

2016

Dos Lagos, LLC; Mellon Valley, Roland Neil Family Limited Partnership; Roland N. Walker; And Sally Walker, Petitioners, vs. 2010-1 Radc/Cadc Venture, LLC, Respondent.

Utah Supreme Court

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IN THE UTAH SUPREME COURT

DOS LAGOS, LLC; MELLON VALLEY,
LLC; ROLAND NEIL FAMILY LIMITED
PARTNERSHIP; ROLAND N. WALKER;
AND SALLY WALKER,

Petitioners,

vs.

2010-1 RADC/CADC VENTURE, LLC,

Respondent.

BRIEF OF PETITIONERS

Supreme Court Case No. 20160436-SC
Court of Appeals Case No. 20140675-CA
District Court Case No. 110700200

Appeal from the Utah Court of Appeals

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LIST OF PARTIES

Petitioners/Appellants (Court of Appeals)/Defendants (District Court)

Dos Lagos, LLC

Mellon Valley, LLC

Roland Neil Family Limited Partnership

Roland N. Walker

Sally Walker

Respondent/Appellee (Court of Appeals)/Plaintiff (the District Court)

2010-1 RADC/CADC Venture, LLC

Original Plaintiff Before the District Court

Utah First Federal Credit Union

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STATEMENT OF JURISDICTION

This Court's jurisdiction rests upon Utah Code Annotated Section 78A-3-102(3)(a).

ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred in concluding Respondent 2010-1 RADC CADC Venture's claims against Petitioner could be deemed to relate back to the filing of a complaint by another party under the provisions of Rule 15(c) of the Utah Rules of Civil Procedure.

Standard of Appellate Review: *De novo*. This Court considers appeals from a district court's summary judgment decision "under a *de novo* standard of review, granting no deference to the district court's analysis." *L.C. Canyon Partners, L.L.C. v. Salt Lake Cty.*, 2011 UT 63, ¶ 8, 266 P.3d 797. This *de novo* standard has also been called "correctness" by this Court and applies "regardless of the nature of the underlying law governing the parties' rights." *Bahr v. Imus*, 2011 UT 19, ¶¶ 15-16, 250 P.3d 56. *See also Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App 354, ¶ 31, 101 P.3d 371 (holding that "a correctness standard applies to a trial court's rule 15(c) analysis").

Presented in Petition for Writ of Certiorari at pages 7-10.

2. Whether the court of appeals erred in affirming the district court's award of 100% of the amount due on the note to Respondent 2010-1 RADC CADC Venture after determining Petitioner's argument was inadequately briefed.

Standard of Appellate Review: *De novo*. This Court considers appeals from a district court's summary judgment decision "under a *de novo* standard of review, granting

no deference to the district court's analysis." *L.C. Canyon Partners, L.L.C. v. Salt Lake Cty.*, 2011 UT 63, ¶ 8, 266 P.3d 797. This *de novo* standard has also been called "correctness" by this Court and applies "regardless of the nature of the underlying law governing the parties' rights." *Bahr v. Imus*, 2011 UT 19, ¶¶ 15-16, 250 P.3d 56.

Presented in Petition for Writ of Certiorari at pages 10-13.

DETERMINITIVE PROVISION

Utah Code Annotated § 57-1-32. Sale of trust property by trustee -- Action to recover balance due upon obligation for which trust deed was given as security -- Collection of costs and attorney's fees.

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

STATEMENT OF THE CASE

This case was originally brought as a deficiency action by a plaintiff with a 52% interest in the loan. Though the other plaintiff did not bring a deficiency action within the three-month statute of limitations and owned only a 48% interest in the loan, the district court granted that party summary judgment and awarded it a judgment for 100% of the total amount due under the note. The court of appeals affirmed. The petitioners seek review by this Court.

Procedural History

On January 14, 2011, subsequent to a foreclosure sale that occurred on December 3, 2010, Utah First Federal Credit Union (“Utah First”) commenced an action for deficiency against Dos Lagos, LLC; Mellon Valley, LLC; Roland Neil Family Limited Partnership; Roland N. Walker; and Sally Walker (collectively “Dos Lagos”). (R. 1-28.) Utah First alleged that the total amount due on the loan was \$1,819,774.97. Ten months later, on November 15, 2011, Utah First filed an Amended Complaint, adding 2010-1 RADC/CADC Venture, LLC (“RADC”) as a plaintiff, asserting that Utah First had an undivided 52% interest in the loan and RADC had a 48% undivided interest in the loan, and leaving the total amount due on the loan as \$1,819,774.97. (R. 303-334.) Ten months after that, on September 7, 2012, Utah First and RADC filed a Second Amended Complaint, modifying the total amount due under the promissory note at the time of the foreclosure sale from \$1,819,774.97 to \$3,426,701.91. (R. 635-642.)

In 2012, Utah First and RADC filed motions for summary judgment. Dos Lagos filed a cross-motion for summary judgment. The district court denied Utah First’s motion¹, denied Dos Lagos’s motion, and granted RADC’s motion for summary judgment in its *Ruling on Dispositive Motions* dated April 25, 2013.² (R. 826-838.) The district court subsequently entered two additional orders. The first, dated July 25, 2013,

¹ The court denied Utah First’s motion for summary judgment due to unresolved questions of fact relating to whether its participation in the loan was legal and whether any of the Dos Lagos parties were members of the credit union. Utah First subsequently sought and received leave to voluntarily dismiss its claims without prejudice, rendering RADC’s judgments final. (R. 1097-1101.)

² This ruling is attached hereto as Addendum B.

awarded RADC a judgment against Dos Lagos and Mellon Valley in the total amount due under the loan, minus the fair market value of the property foreclosed on by Utah First.³ (R. 936-939.) The second, dated August 16, 2013, awarded RADC a judgment against the guarantors of the loan, the Roland Neil Family Limited Partnership, Roland N. Walker, and Sally Walker.⁴ (R. 991-993.)

In an opinion dated April 28, 2016, the court of appeals affirmed the district court's rulings, orders, and judgments. *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2016 UT App 89, 372 P.3d 683.⁵

Statement of Facts

The facts in this case are generally not in dispute. The following facts are condensed principally from the district court's *Ruling on Dispositive Motions* (R. 826-838), with additional record citations as appropriate:

1. Dos Lagos, LLC and Mellon Valley, LLC entered into a Business Loan Agreement with America West Bank in March 2007. (R. 768-775.)
2. On December 6, 2007, America West Bank entered into a loan Participation Agreement with Utah First wherein America West Bank retained an undivided 48% interest in the loan and Utah First obtained an undivided 52% interest in the loan. (R. 555-559, 786-790.)
3. On December 5, 2008, Dos Lagos, LLC and Mellon Valley, LLC executed a Change in Terms Agreement, which restated, modified and extended their Promissory

³ This judgment is attached hereto as Addendum C.

⁴ This judgment is attached hereto as Addendum D.

⁵ This opinion is attached hereto as Addendum A.

Note with America West Bank dated March 29, 2007, with a principal amount of \$2,500,000.00. (R. 561-563.)

4. The Promissory Note was secured by real property owned by Mellon Valley, LLC located in Hurricane, Washington County, Utah. (R. 565-572.)

5. On May 1, 2009, the FDIC closed America West Bank and seized its interest in the Promissory Note. (R. 546-554.)

6. In 2010, the FDIC auctioned, sold, assigned, and transferred America West Bank's interest in the Promissory Note to 2010-1 RADC/CADC Venture, LLC. (R. 792-795.)

7. On December 6, 2010, the property securing the Promissory Note was sold at trustee's sale for \$1,060,000.00 to the highest bidder, 2010-1 RADC/CADC Venture, LLC. (R. 546-554, 590-591.)

8. The value of the property securing the Promissory Note was \$1,510,000.00 at the time of the December 6, 2010 trustee's sale. (R. 620-625.)

9. On December 6, 2010, the outstanding payoff balance on the loan was \$3,426,701.91. (R. 546-554.)

10. The Roland Neil Family Limited Partnership, Roland N. Walker, and Sally Walker personally guaranteed the loan. (R. 776-784.)

SUMMARY OF THE ARGUMENT

The court of appeals failed to correctly apply Utah law to its analysis of the statute of limitations issues in this case and improperly affirmed the judgment of 100% of the amount due under the loan to RADC, which owns only a 48% interest in the loan.

RADC did not file an action within the three-month statute of limitations, and its claim against Dos Lagos is accordingly barred. The court of appeals erred in holding that the Rule 15(c) relation back doctrine extended to allow the addition of RADC's tardy claim. The relation back doctrine found in the actual language of Rule 15(c) does not apply to the addition of parties. But the court of appeals held that the exception, which allows relation back for new parties with an identity of interest to the old parties, applied to RADC's new claim on two grounds: notice and identity of interest.

The court of appeals incorrectly found that notice of Utah First's claim was sufficient to give Dos Lagos notice of RADC's claim. Utah First brought suit for deficiency against Dos Lagos and claimed only its 52% share of the amount due under the note. Nothing about that claim gave notice to Dos Lagos that RADC intended to bring an action to collect on its independent 48% interest.

The court of appeals also incorrectly found that Utah First and RADC had an identity of interest sufficient to trigger the exception. Utah law clearly holds that privity of contract is not sufficient to establish an identity of interest. In this case, Utah First and RADC's only link is their contractual loan participation agreement. The two entities obtained their interests in the loan separately, have separate business operations, and had legally different results before the trial court. Further, Utah precedent and policy dictate that procedural rules cannot override clear statutory requirements like the three-month deadline found in the deficiency statute.

RADC, under both statute and contract, is entitled to collect only its 48% interest in the loan. The court of appeals incorrectly held that Dos Lagos failed to adequately

brief this issue. Dos Lagos addressed the issue substantially in both its opening and reply briefs to the court. Though it has not found case law directly on point, Dos Lagos pointed the court of appeals to both statutory and contract law in support of its argument that RADC should not have been awarded a judgment for the full amount due under the loan.

The judgment awarded to RADC is precisely the kind of windfall the deficiency statute is designed to prevent. RADC's judgment is subject to the yet-to-be-determined rights and interests of Utah First, but those rights and interests may not be legally recognizable, leaving RADC with a windfall. Further, RADC obtained the property securing the loan with a credit bid. Subtracting the value of that property from its proportional share of the loan leaves it with a fraction of the judgment actually due to it.

The contracts at issue also preclude RADC from a judgment in the full amount due. Under the Business Loan Agreement, Dos Lagos agreed that participants in the loan would be an "absolute owner[]" of its interest and could independently "enforce its interests." In addition, the participation agreement limits RADC to \$1,200,000.

The opinion of the court of appeals contains two reversible errors, and its decision is entitled to no deference. This Court should therefore reverse the court of appeals and hold that (1) RADC's claim is not entitled to relation back under Rule 15(c) and is thus time barred by the statute of limitations and (2) RADC's claim, if any remains, is limited to its 48% interest.

ARGUMENT

The court of appeals failed to correctly apply Utah law to its analysis of the statute of limitations issues in this case and improperly affirmed a judgment for 100% of the

total amount due under a loan to a party that owns only a 48% interest in that loan.

Specifically, the court of appeals erred in (1) concluding that RADC's claims were deemed to relate back to the filing of Utah First's complaint under Rule 15(c) of the Utah Rules of Civil Procedure⁶ and (2) holding that Dos Lagos's briefing was inadequate and thus affirming the district court's award of 100% of the amount due on the loan to RADC, which has only a 48% interest in the loan.

I. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THAT RADC'S CLAIM FOR DEFICIENCY WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The court of appeals incorrectly affirmed the district court's ruling that RADC's claim against Dos Lagos was not barred by the statute of limitations, despite the undisputed fact that RADC did not file a complaint within the three months required by statute. The court of appeals erred, specifically, when it held that the purposes of Rule 15(c) were met and that RADC and Utah First have an identity of interest sufficient to trigger the exception to Rule 15(c) of the Utah Rules of Civil Procedure allowing relation back to parties with an identity of interest.

RADC did not file a deficiency action against Dos Lagos within the required three months. The statute of limitations for an action for deficiency after the foreclosure of property securing a note is within three months after the sale of the property. Utah Code Ann. § 57-1-32. This statute is a creditor's only avenue to recover any deficiency. *See,*

⁶ If this Court ultimately finds that RADC's complaint did not relate back to the original complaint filed by Utah First or that RADC was not entitled to a judgment for the full amount due under the note, the judgment against the guarantors, Roland Neil Family Limited Partnership, Roland N. Walker, and Sally Walker, should be dismissed or modified accordingly.

e.g., *Machock v. Fink*, 2006 UT 30, ¶ 22, 137 P.3d 779. In this case, the property was sold on December 3, 2010, making the deadline to file a deficiency action March 3, 2011. While Utah First filed a complaint related to its 52% interest in the loan within the deadline in January 2011, RADC did not file an independent action or appear on any complaint against Dos Lagos until November 15, 2011, over eight months past the deadline, and did not add in its 48% share of the loan deficiency until September 2012.

RADC's deficiency action is not saved by the relation back doctrine found in Rule 15(c) of the Utah Rules of Civil Procedure. Rule 15(c) allows an amended complaint to "relate back" to the date of the original complaint "[w]hensoever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Utah R. Civ. P. 15(c) (emphasis added). But, by its own terms, Rule 15(c) applies only to "claims" and "defenses" not to parties. Indeed, Utah courts have confirmed that "[g]enerally Rule 15(c) . . . will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings—whether plaintiff or defendant." *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976).

Nor does the exception to Rule 15(c) apply to save RADC's deficiency action. "The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial." *Id.* The relation back doctrine "invokes a constructive timing fiction with respect to certain amended pleadings" and "has been interpreted to extend not just to the parties to the original pleading but also to those who share an

‘identity of interest’ with them.” *VCS, Inc. v. Utah Community Bank*, 2012 UT 89, ¶ 25, 293 P.3d 290. In this case, Utah First’s lawsuit did not constitute notice to Dos Lagos that RADC would seek a deficiency judgment, nor do Utah First and RADC have an identity of interest sufficient to trigger the exception to Rule 15(c).

First, the court of appeals erroneously held that the exception requires simply that a party have notice of litigation concerning a particular occurrence. *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2016 UT App 89, ¶ 12, 372 P.3d 683 (citing *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 n.3 (1984)). The court of appeals noted that the amended complaint “did not assert new claims” and “did nothing more than add RADC, a successor coholder of the very note Utah First had sued upon, as a plaintiff.” *Id.* Based on this, the court held that upon receipt of the first complaint, Dos Lagos “received sufficient notice to satisfy the rational of rule 15(c).”⁷ *Id.*

Dos Lagos, for obvious reasons, asserts that being on notice that one creditor intends to sue is substantially different from being on notice that an additional creditor intends to sue. As this Court has recognized, one of the purposes of the three-month time period is to allow the debtor to “plan accordingly.” *Standard Fed. Sav. And Loan Ass’n v. Kirkbride*, 821 P.2d 1136, 1138 (Utah 1991). Creditors receive a quick remedy of foreclosure but then have to quickly give notice to the debtor of an intention to seek a deficiency, which prevents the debtor from being left in financial limbo. *Id.* Dos Lagos’s

⁷ In support of this holding, the court cited only two federal cases considering “the comparable federal rule.” The Utah exception, in apparent contrast with the federal rule, does not extend to amendments that add new parties “who have no identity of interest with existing parties.” *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995) (citations omitted).

loan agreements were all with America West Bank, succeeded in interest by RADC. And yet, RADC did not file a deficiency action. Dos Lagos did receive notice that Utah First, asserting only its 52% interest in loan via the participation agreement, sought a deficiency judgment, and Dos Lagos planned accordingly. But Dos Lagos was certainly not on notice that RADC sought a deficiency judgment. And the addition of RADC to the action also meant that, in addition to Utah First's claim for its 52% of the loan proceeds, RADC's claim for its 48% of the loan proceeds was added. Thus, the court of appeals got it wrong on both counts, i.e., a claim was in fact added and notice of Utah First's claim was not notice to Dos Lagos of RADC's claim. The insufficiency of the notice of an action from RADC is particularly apparent where, as here, the two creditors do not have the identity of interest contemplated by the exception.

Second, the court of appeals erroneously held that RADC and Utah First had an identity of interest. An identity of interest in this context is defined as follows:

[t]he parties are so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other. Such an identity exists, for example, between past and present forms of the same enterprise.

Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 217 (Utah 1984) (citations omitted). However, "privity of contract alone is an insufficient identity of interest for relation back under rule 15(c)." *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995).

Despite clear Utah law on the subject, the court of appeals held that "[t]here is perhaps no closer identity of interest than that shared by two parties who are joint holders

of the same note.” *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2016 UT App 89, ¶ 13, 372 P.3d 683. In so holding, the court of appeals ignored the progeny of cases decided by this Court on this very issue, all of which hold that mere privity of contract – the only thing binding Utah First and RADC in this case – is not a sufficient identity of interest to trigger the exception. *See, e.g., Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984); *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995); *VCS, Inc. v. Utah Community Bank*, 2012 UT 89, ¶ 27, 293 P.3d 290.

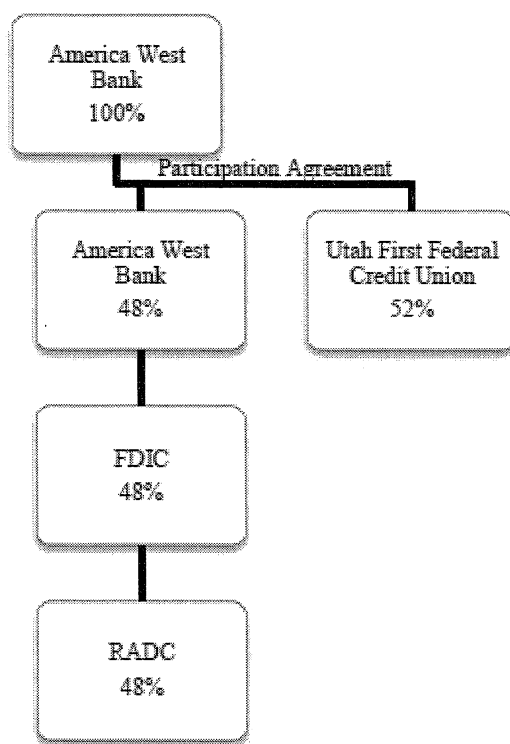
In *Perry*, a general contractor sued a subcontractor, Perry, for breach of contract related to some defective doors. *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214 (Utah 1984). Almost three years later, after the statute of limitations had expired, Perry attempted to have its third-party complaint against the door supplier relate back to the filing of the original action. *Id.* at 217. This Court rejected that approach and held that where there was “no evidence showing any identity of interest between the [parties] other than privity of contract,” the identity of interest was insufficient for the purpose of Rule 15(c). *Id.*

Likewise, in *Russell*, the plaintiff sued The Associated Press and The Salt Lake Tribune for alleged defamatory remarks contained in an article originally published by the Ogden Standard Examiner. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995). The plaintiff later sought to use Rule 15(c) to have her tardy claim against Standard relate back to the date of her original complaint. *Id.* at 265. Though the news organizations all published the article and had contracts among themselves, this Court declined to allow the relation back, holding that “privity of contract alone is an insufficient identity of

interest for relation back under rule 15(c).” *Id.*

In *VCS, Inc. v. Utah Community Bank*, this Court more recently considered the question of the exception to the relation back doctrine permitting the relation back of an amended complaint adding a party where the party has an identity of interest. 2012 UT 89, 293 P.3d 290. VCS, a contractor, filed suit against the developer for lack of payment. VCS later argued that its tardy complaint against the financing bank should relate back to its original complaint against the developer. Again, this Court rejected the argument and held that VSC “fails to establish . . . that [the two defendants] share an ‘identity of interest’ and thus the relation back doctrine cannot excuse its failure to join [the second defendant] within the timeframe required by statute.” *Id.* The court further emphasized that “[o]ur precedent accordingly forecloses VCS’s assertion that [the two defendants] shared an identity of interest based on their contractual relationship. *Id.*

Like the parties in *Perry, Russell*, and *VCS*, the only tie between RADDC and Utah First, in this case, is their contractual relationship as defined in the participation agreement, i.e., their privity of contract. Under Utah law, that privity of contract is not an identity of interest sufficient to trigger the relation back doctrine in Rule 15(c). Nor do RADDC and Utah First have any other markers of an identity of interest. They are not so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other. In fact, Utah First and RADDC are separate and distinct entities with separate and distinct interests and have no related business operations. They obtained their interests in the note at issue in two different ways, as shown in the chart below.



This lack of an identity of interest becomes even clearer when considering the posture of each entity on summary judgment. The district court denied Utah First's motion for summary judgment, while granting RADC's motion for summary judgment. (R. 826-838.) If these two entities had an identity of interests, they would have been in the same or similar position on the motions for summary judgment. And yet, they were not. The facts related to the positions of Utah First and RADC even in relation to the same note were different and concluded with different legal results. The district court appropriately treated the two entities and their claims as separate, and the court of appeals should have determined that they did not have an identity of interest sufficient to trigger the exception to the relation back doctrine in Rule 15(c). Its failure to do so resulted in prejudice to Dos Lagos.

Finally, Utah law and public policy dictate that procedural rules should not override clear statutory requirements. In *Donjuan v. McDermott*, this Court considered the application of the Rule 15 relation back doctrine in the context of the strict statutory scheme for adoptions. 2011 UT 72, 266 P.3d 839. This Court held that Rule 15 did not operate to save the father's claim because he failed to comply with the statutory requirements: "[o]ur general rules of procedure cannot obviate such explicit statutory requirements." *Id.* at ¶ 16. Similarly, the relation back doctrine in Rule 15 cannot operate here to relieve RADC of its strict and explicit statutory requirement to file a deficiency action within the three month statute of limitation, particularly where RADC and Utah First lack an identity of interest.⁸

This Court should reverse the court of appeals and hold that RADC and Utah First lacked an identity of interest sufficient to trigger the exception to Rule 15(c) and that RADC's complaint was untimely and barred by the statute of limitations.

II. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THAT RADC WAS ENTITLED TO A JUDGMENT OF 100% OF THE AMOUNT DUE.

Even if this Court determines that RADC's claims were timely, the court of appeals erroneously held that RADC was entitled to a judgment that included 100% of the amount due on the loan, despite RADC's 48% interest in the loan and acquisition of the property securing the loan. Rather than determine this question on its merits, the court

⁸ The court of appeals also noted that "as a policy matter, cases such as this one should be decided in a single action." *2010-1 RADC/CADC Venture, LLC*, 2016 UT App 89 at ¶ 14 (citations omitted). Dos Lagos does not dispute that policy but does dispute that such a policy can or should relieve one or more of the parties from the applicable statute of limitations requirements.

of appeals decided not to reach the issue:

Appellants complain that the district court's order, making the judgment subject to any subsequently determined interest of Utah First, "cited no law." But after registering this complaint, Appellants direct this court to no statute, case, or other authority that supports their contention that the district court got this wrong. Appellants' failure to carry their burden of persuasion on appeal is a sufficient ground for us to reject this argument. *See Hi-Country Estates Homeowners Ass'n v. Jesse Rodney Dansie Living Trust*, 2015 UT App 281, ¶ 8, 359 P.3d 655.

2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC, 2016 UT App 89, ¶ 21, 372 P.3d 683.

This Court has declared that "[f]ailure to provide *any* analysis *or* legal authority constitutes inadequate briefing." *Coleman ex rel. Schefski v. Stevens*, 2000 UT 98, ¶ 7, 17 P.3d 1122 (citations omitted) (emphasis added).

Dos Lagos's briefing on this issue was not inadequate. In its opening brief to the court of appeals, Dos Lagos dedicated over two full pages to this argument and provided both analysis and legal authority to support its argument.⁹ Though, admittedly, Dos Lagos could not (and still has not) found legal authority directly on point, it argued in its opening brief that allowing RADC to collect 100% of a note, of which it owns only 48%, is precisely the kind of windfall the deficiency statute is trying to prevent.¹⁰

RADC purchased America West Bank's interest in 48% of the loan at issue. After granting summary judgment to RADC and denying summary judgment to Utah First, the district court awarded RADC a judgment for 100% of the amount due under the note,

⁹ The relevant excerpt of Petitioner's opening brief to the court of appeals is attached hereto as Addendum E.

¹⁰ RADC's brief to the court of appeals addressed this issue in just under two pages and only cited the Loan Agreement between America West Bank and Dos Lagos, the Commercial Guaranties, and the district court's ruling.

“subject to any subsequently determined interest of Utah First Federal Credit Union.” (R. 836 n.7.) The problem with this approach is that such a judgment gives RADC immediate leave to collect on that judgment, which it has done. And yet, if, at some point in the future, Utah First is determined to not have any legally cognizable interest in the loan, RADC will be left with a windfall.

Further, RADC acquired the foreclosed property, which was worth \$1,510,000.00. With a total amount due under the note of \$3,426,701.91, RADC’s 48% share of that is \$1,644,816.92. Subtracting the value of the foreclosed property from RADC’s share, RADC is left with just \$134,816.92 owed to it. And yet, the district court awarded it a judgment of almost \$3 million. Allowing RADC to retain a judgment for the full amount is not only unjust, inequitable, and subject to the legal issues discussed herein but is also a slippery slope and dangerous precedent to set for other participating creditors.

The court of appeals noted that “it would be unjust to allow debtors to avoid responsibility for a substantial portion of their obligations simply because one of two creditors on a single debt takes the laboring oar in collecting the debt.” *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2016 UT App 89, ¶ 22, 372 P.3d 683. That statement is inapplicable here. RADC did not take “the laboring oar” in collecting the debt, and Utah First and RADC are not “joint owners.” They have distinct interests in the note, and Utah First brought the only timely action under the note. RADC was then improperly allowed to join the action. RADC was successful in its claims, and Utah First was not. It is not equitable then, to bestow a windfall on RADC when it received the foreclosed property and its claims extend only to 48% of the amount due on the loan.

In its reply brief to the court of appeals, Dos Lagos dedicated over three pages to this very issue, this time focusing its argument on Utah contract law and the contracts among the parties: the Loan Agreement, the Commercial Guaranties, and the Participation Agreement.¹¹

RADC is entitled only to its 48% interest in the loan. In the Business Loan Agreement, executed by America West Bank and Dos Lagos, Dos Lagos agreed to the following provision on loan participation:

Consent to Loan Participation. Borrower agrees and consents to Lender's sale or transfer, whether now or later, of one or more participation interests in the Loan to one or more purchasers, whether related or unrelated to Lender. Lender may provide, without any limitation whatsoever, to any one or more purchasers, or potential purchases, any information or knowledge Lender may have about Borrower or about any other matter relating to the Loan, and Borrower hereby waives any rights to privacy Borrower may have with respect to such matters. Borrower also agrees that the purchasers of any such participation interests will be considered as the absolute owners of such interest in the Loan and will have all the rights granted under the participation agreement or agreements governing the sale of such participation interests. Borrower further waives all rights of offset or counterclaim that it may have now or later against Lender or against any purchaser of such a participation interest and unconditionally agrees that either Lender or such purchaser may enforce Borrower's obligation under the Loan irrespective of the failure or insolvency of any holder of any interest in the Loan. Borrower further agrees that the purchaser of any such participation interests may enforce its interests irrespective of any personal claims or defenses that Borrower may have against Lender.

(R. 771 (emphasis added).) Everything in this provision indicates that a participation agreement cleaves the interests of the participants. A participant is the "absolute owner[]" of its interest and may independently "enforce its interests." And, of course, as the drafter of this agreement, any ambiguities are construed against America West Bank and its

¹¹ The relevant excerpt of Petitioner's opening brief to the court of appeals is attached hereto as Addendum E.

successor, RADC. *See, e.g., Express Recovery Servs., Inc. v. Rice*, 2005 UT App 495, ¶ 3, 125 P.3d 108.

RADC could sell and assign its 48% interest in the loan, as it bought it. It could not, however, sell or assign Utah First's 52% interest. RADC's property rights extend only to its share of the note, according to both contract law and property law. Further, the participation agreement limits American West Bank's (and therefore RADC's) participation to "\$1,200,000.00." (R. 556.) The district court's judgment grants RADC the right to collect far more than \$1,200,000.

Dos Lagos adequately briefed this issue before the court of appeals. Though Dos Lagos (as well as RADC, the district court, and the court of appeals) has not found legal authority on this issue, both the statute and the contract governing the parties indicates that the judgment should have been limited to RADC's 48% interest.

This court should therefore reverse the holding of the court of appeals and hold that Dos Lagos's briefing on this issue was adequate and that RADC is entitled to only its pro rata share of the loan.

CONCLUSION

Therefore, Petitioners respectfully request that this Court reverse the court of appeals, set aside RADC's judgments, and award Petitioners their attorneys' fees and costs pursuant to both statute and the contracts at issue in this case.

RESPECTFULLY SUBMITTED this 21st day of September 2016.

DURHAM JONES & PINEGAR

/s/ Douglas B. Thayer
Douglas B. Thayer
Andy V. Wright
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of September 2016, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were served via U.S. Mail, postage prepaid, to the following:

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CERTIFICATE OF COMPLIANCE

Petitioners, through counsel and pursuant to Rule 24 of the Utah Rules of Appellate Procedure, hereby certify that the Brief of Petitioners complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure.

Specifically, the Brief of Petitioners contains 5,586 words (according to the word count feature in Microsoft Word), exclusive of the cover page, list of parties, table of contents, table of authorities, certificate of service, this certificate of compliance, and the addenda.

DATED this 21st day of September 2016.

DURHAM JONES & PINEGAR

/s/ Douglas B. Thayer

Douglas B. Thayer

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Attorneys for Petitioners

ADDENDA

Addendum A – Opinion of the Utah Court of Appeals in 2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC, 2016 UT App 89 (April 28, 2016)

Addendum B – Ruling on Dispositive Motions (April 25, 2013)

Addendum C – Order and Judgment (July 25, 2013)

Addendum D – Order and Judgment Against Defendants Roland Neil Family Limited Partnership, Roland N. Walker, and Sally Walker (August 16, 2013)

Addendum E – Excerpt of Brief of Appellants, Case No. 20140675-CA (November 19, 2014)

Addendum F – Excerpt of Reply Brief of Appellants, Case No. 20140675-CA (April 6, 2015)

Addendum A

Addendum A

2016 UT App 89

APR 28 2016

THE UTAH COURT OF APPEALS

2010-1 RADC/CADC VENTURE, LLC,
Appellee,

v.

DOS LAGOS, LLC; MELLON VALLEY, LLC; ROLAND NEIL FAMILY
LIMITED PARTNERSHIP; ROLAND N. WALKER; AND SALLY WALKER,
Appellants.

Opinion

No. 20140675-CA

Filed April 28, 2016

Second District Court, Farmington Department
The Honorable John R. Morris
No. 110700200

Clifford V. Dunn, Michael C. Dunn, Evan A.
Schmutz, and Jordan K. Cameron, Attorneys
for Appellants

Richard C. Terry and Jeremiah R. Taylor, Attorneys
for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which JUDGES
MICHELE M. CHRISTIANSEN and KATE A. TOOMEY concurred.¹

ORME, Judge:

¶1 This appeal comes to us from the district court's grant of summary judgment in favor of 2010-1 RADC/CADC Venture,

1. Judge James Z. Davis heard the arguments in this case but did not have the opportunity to vote on this Opinion prior to his death. *See State v. Goins*, 2016 UT App 57, n.1. Judge Kate A. Toomey substituted for Judge Davis and, having reviewed the briefs and listened to the oral arguments, participated fully in the court's resolution of this appeal.

LLC (RADC). Appellants challenge the summary judgment on a number of grounds. We affirm.

BACKGROUND

¶2 The pertinent facts of this case are undisputed. In 2007, Appellants Dos Lagos, LLC, and Mellon Valley, LLC, (Borrowers) received a \$2.5 million loan from America West Bank. The loan was personally guaranteed by Appellants Roland N. Walker, Sally Walker, and the Roland Neil Family Limited Partnership (the Guarantors). Later that year, America West entered into a loan participation agreement with Utah First Federal Credit Union, whereby Utah First obtained a fifty-two percent interest in the loan and America West retained a forty-eight percent interest.

¶3 One year later, on December 5, 2008, Borrowers executed a Change in Terms Agreement, which, among other things, extended their promissory note (the Note) with America West. The Note was secured by real property owned by Mellon Valley (the Property).

¶4 The FDIC ultimately closed America West and seized America West's interest in the Note, which it thereafter sold to RADC at auction. Borrowers defaulted on the Note and received multiple letters notifying them of the default and requesting payment. In December 2010, RADC purchased the Property—which was valued at \$1,510,000—at a trustee's sale for \$1,060,000. At the time of the sale, the total amount owing on the Note was \$3,426,701.91, leaving a deficiency of \$1,916,701.91 between the amount owed and the value of the Property. Utah First, whose interest in the Note had not been affected by America West's demise and the transfer of its interest, filed an action seeking a deficiency judgment the next month.

¶5 In its original Complaint, Utah First was the only named plaintiff and it erroneously indicated that the total amount owed

on the Note was just \$1,819,774.97.² Dos Lagos filed a motion to dismiss, in part because RADC was not included as a party. The parties stipulated to allow amendment, and the First Amended Complaint added RADC as a plaintiff. It did not, however, correct the amount owed. Utah First and RADC sought leave to amend again and filed the Second Amended Complaint in September 2012, alleging the amount due as the full \$3,426,701.91.

¶6 RADC and Utah First filed motions for summary judgment, seeking a deficiency of \$1,916,701.91. Borrowers subsequently filed a motion to dismiss and a motion for summary judgment. The district court denied Utah First's motion for summary judgment, determining that there were issues of fact surrounding the validity of the loan participation agreement that had been executed by Utah First and America West. But it granted RADC's motion for summary judgment against Borrowers, awarding RADC a deficiency judgment, calculated as the difference between the full amount due under the Note and the value of the property at the time of its sale to RADC, *see* Utah Code Ann. § 57-1-32 (LexisNexis 2010), subject to any subsequently determined interest of Utah First. The district court denied Borrowers' motion to dismiss and motion for summary judgment.

¶7 Shortly thereafter, RADC moved for summary judgment against the Guarantors on the ground that judgment had been awarded against Borrowers on the obligation guaranteed by the Guarantors. The district court granted the motion, and

2. RADC suggests that this amount represented Utah First's fifty-two percent interest in the total amount owed on the Note. But by our math, fifty-two percent of \$3,426,701.91 is \$1,781,884.99.

Borrowers and the Guarantors (collectively, Appellants) now appeal.³

ISSUES AND STANDARD OF REVIEW

¶8 Appellants first argue that RADC's claim did not relate back to the original Complaint and was therefore barred by the statute of limitations. They next contend that the district court erred by awarding RADC the full amount due under the Note rather than just its pro rata share. Finally, Appellants claim that it was error for the district court to grant summary judgment against the Guarantors. All of the issues raised involve the district court's interpretation and application of the law in granting summary judgment. "[W]e review the [district] court's legal conclusions for correctness, affording those legal conclusions no deference." *Ault v. Holden*, 2002 UT 33, ¶ 15, 44 P.3d 781.

ANALYSIS

I. RADC's Claim Was Not Time-Barred.

¶9 The resolution of Appellant's primary argument on appeal depends on the operation of the applicable statute of limitations. Section 57-1-32 of the Utah Code requires that "an action . . . to recover the balance due upon [an] obligation for which [a] trust deed was given as security" must be commenced "within three months after any sale of property under a trust deed." See Utah Code Ann. § 57-1-32 (LexisNexis 2010). Appellants argue that because RADC did not commence an action against Borrowers within three months of the trustee's

3. Utah First moved to voluntarily dismiss its claims without prejudice, which the district court allowed over Borrowers' objection. Utah First is therefore not a party to this appeal.

sale, its claim was barred before it joined the action via the First Amended Complaint.⁴

¶10 There is no dispute that RADC was not identified as a plaintiff in any complaint filed against Borrowers within three months of the trustee's sale. There is also no dispute that Utah First's original Complaint was filed within that three-month window. What we must determine, then, is whether the original Complaint operates to satisfy the three-month requirement for RADC as well as for Utah First.

¶11 Appellants contend that the First Amended Complaint impermissibly added a party to the proceeding in violation of the applicable statute of limitations. Rule 15(c) of the Utah Rules of Civil Procedure allows an amended complaint to "relate[] back to the date of the original pleading" if "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Utah R. Civ. P. 15(c). Relying on the Utah Supreme Court's opinion in *Doxey-Layton Co. v. Clark*, 548 P.2d 902 (Utah 1976), Appellants argue that this rule generally does "not apply to an amendment which substitutes or adds new parties . . . whether plaintiff or defendant." *See id.* at 906.

4. Appellants also take issue with the district court's alternate conclusion that "even if the claims of RADC do not relate back to the original filing of the complaint, because the purposes of Utah Code Ann. § 57-1-32 have been satisfied, RADC's failure to comply with the statute did not constitute an absolute bar to the suit." Because we conclude that RADC's claim *does* relate back to the filing of the original Complaint, we need not consider the propriety of this alternate ruling. *See generally Weber v. Snyderville West*, 800 P.2d 316, 320 (Utah Ct. App. 1990) ("We may affirm the trial court on any proper ground.").

¶12 Of course, there are exceptions to this general rule. The principal exception is articulated in *Sulzen v. Williams*, 1999 UT App 76, 977 P.2d 497, where this court stated:

[W]hile generally Rule 15(c) . . . will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings, [the Utah Supreme Court has] made an exception to the general rule. The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial.

Id. ¶ 14 (alterations and omission in original) (citation and internal quotation marks omitted). “The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.” *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 n.3 (1984) (considering the comparable federal rule). “The same general standard of notice applies regardless of whether a litigant seeks to add defendants, plaintiffs, or claims.” *McClelland v. Deluxe Fin. Servs., Inc.*, 431 F. App’x 718, 723–24 (10th Cir. 2011) (considering the comparable federal rule). Here, the First Amended Complaint did nothing more than add RADC, a successor coholder of the very note Utah First had sued upon, as a plaintiff. It did not assert new claims. It therefore follows that when Utah First filed the original Complaint, seeking the deficiency between the amount owed on the Note and the value of the Property purchased by RADC at the trustee’s sale, Borrowers received sufficient notice to satisfy the rationale of rule 15(c).

¶13 The sufficiency of the notice to Borrowers is further demonstrated by the identity of interest between Utah First and RADC. The cases cited by Appellants in relation to this point are unhelpful, as they address a framework that is inapplicable to

the facts of this case. For instance, Appellants suggest that because “RADC and Utah First are two separate and distinct entities,” there can be no relation back. We acknowledge that it is often necessary to look at the connection between the business operations of the original and added parties, *see Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995), but that factor alone is insufficient to resolve an identity-of-interest question. We cannot ignore the fact that although there is no direct business or ongoing contractual relationship between Utah First and RADC, this case centers around *one* debt, *one* promissory note, and *one* trustee’s sale. In very simple terms, there is but one “conduct, transaction, or occurrence” on which all claims are based. *See* Utah R. Civ. P. 15(c). There is perhaps no closer identity of interest than that shared by two parties who are joint holders of the same note. *See generally Penrose v. Ross*, 2003 UT App 157, ¶ 16, 71 P.3d 631 (“[A]n identity of interest requires parties to have the ‘same’ interest.”).

¶14 We also point out that as a policy matter, cases such as this one should be decided in a single action. *Cf.* Utah Code Ann. § 78B-6-901(1) (LexisNexis 2012) (“There is only one action for the recovery of any debt, or the enforcement of any right, secured solely by mortgage upon real estate and that action shall be in accordance with the provisions of this chapter.”). So long as the rights of the parties are protected and the rules of law are followed—which they were here by the notice given to Borrowers via the initial Complaint and by the identity of interest between RADC and Utah First—our judicial system values judicial economy. *See Okelberry v. West Daniels Land Ass’n*, 2005 UT App 327, ¶ 11, 120 P.3d 34. By allowing the amendments to the original Complaint, the district court furthered this objective.

II. It Was Not Error for the District Court to Award RADC the Full Deficiency Amount.

¶15 Appellants next challenge two aspects of the district court’s order concerning the amount of the judgment. First, they

argue that the district court should not have awarded judgment in the amount sought by the Second Amended Complaint—the full deficiency amount—but should instead have limited any judgment to a sum calculated with reference to the amount claimed to be due in the original Complaint. Second, Appellants argue that it was error to award the entire deficiency judgment amount to RADC, even though the district court expressly made that judgment subject to any later-determined interest of Utah First. We conclude that the district court did not err in either regard.

A. Plaintiffs Were Entitled to Recover the Full Deficiency Amount.

¶16 The original Complaint claimed that the total amount still due on the Note was \$1,819,774.97. The First Amended Complaint, which added RADC as a plaintiff, left that amount unchanged. Finally, in the Second Amended Complaint, the amount due on the Note was updated to correct the full amount actually due on the Note and to state the amount still due following the sale of the land securing the Note—\$1,916,701.91. When Plaintiffs moved for summary judgment, they sought a deficiency judgment in this amount.

¶17 Appellants point to the language of section 57-1-32 to argue that Plaintiffs were limited to pursuing the amount indicated in the original Complaint. Specifically, the statute mandates that “the complaint shall set forth the entire amount of the indebtedness.” Utah Code Ann. § 57-1-32 (LexisNexis 2010). The question before us, as Appellants state it, is whether, based on that language, RADC “should have been estopped from arguing that the amount owing was more than what was originally plead[ed].”

¶18 A successful claim of estoppel would require, among other things, a showing that Appellants took reasonable action—or reasonably refrained from action—based on the misstatement of the amount of indebtedness included in the original

Complaint. See *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶ 41, 258 P.3d 539. According to Appellants, without citation to any portion of the record, “[Borrowers] did not engage in a trial and negotiation strategy that they would or could have employed had the total amount due under the note been originally asserted as the same amount as ultimately claimed.” This is not the sort of inaction that is contemplated by the doctrine of estoppel.

¶19 But even if Appellants might have acted differently in the months following the filing of the original Complaint had it included the amount actually due, the Second Amended Complaint was filed in September 2012. The district court did not grant RADC’s motion for summary judgment until April 2013. Thus, even ignoring the fact that Borrowers likely always knew—and surely should have known—the full amount owed under the Note, they had seven months between the filing of the Second Amended Complaint and the district court’s order during which they could have “engage[d] in a [different] trial and negotiation strategy” when confronted with the increased amount, if so inclined. Because they did not do so then, there is no reason to assume they would have done so earlier. It was therefore not error for the district court to enter judgment based on the amount alleged in the Second Amended Complaint once that amount was proven.

B. It Was Not Error for RADC to Receive Judgment Based on the Full Amount Due on the Note.

¶20 RADC had only a forty-eight percent interest in the Note, but the district court awarded the entire deficiency amount to RADC, albeit subject to any subsequently determined interest of Utah First. We acknowledge that, at first glance, it might appear that Appellants make a compelling argument. After all, it seems somewhat intuitive that as a forty-eight percent owner of the Note, RADC should have received judgment for only forty-eight percent of the amount still owing on the Note.

¶21 Appellants complain that the district court's order, making the judgment subject to any subsequently determined interest of Utah First, "cited no law." But after registering this complaint, Appellants direct this court to no statute, case, or other authority that supports their contention that the district court got this wrong. Appellants' failure to carry their burden of persuasion on appeal is a sufficient ground for us to reject this argument. See *Hi-Country Estates Homeowners Ass'n v. Jesse Rodney Dansie Living Trust*, 2015 UT App 218, ¶ 8, 359 P.3d 655.

¶22 We do briefly note, however, that it would be unjust to allow debtors to avoid responsibility for a substantial portion of their obligations simply because one of two creditors on a single debt takes the laboring oar in collecting the debt.⁵ See, e.g., *Irons v. American Nat'l Bank*, 172 S.E. 629, 641 (Ga. 1933) ("Any one of the holders may foreclose, giving the notice required by law to all holders concerned."); *Zalesk v. Wolanski*, 281 Ill. App. 54, 55 (1935) (determining that "the plaintiff, as one of the note holders, under the terms of the trust deed, had the right to declare the whole amount of the indebtedness due and unpaid"). The district court determined that Borrowers owed \$1,916,701.91 under the Note. How that amount is divided between RADC and Utah First is no business of Borrowers, provided that they are the only two holders of the Note and the judgment represents the total amount properly due under the Note. There is no dispute that the amount awarded by summary judgment is the total amount owed, and the qualifying language of the judgment recognizes the possible interest of Utah First and

5. Of course, the creditor who obtains a judgment would then have to account to the other creditor for its interest in the note or other instrument. Cf. *Joseph Nelson Supply Co. v. Leary*, 164 P. 1047, 1049 (Utah 1917) ("[A] person who claims the contract price, in whole or in part, which is due to the contractor . . . , takes the assignment subject to the claims for labor performed and material furnished to the contractor, which was by him used in the performance of his contract[.]").

protects Appellants from having to pay the debt twice—once to RADC and once to Utah First.

III. Summary Judgment Against the Guarantors Will Not Be Disturbed.

¶23 Finally, Appellants contend that the district court erred by granting summary judgment against the Guarantors. Appellants' straightforward argument is that judgment was improperly granted against Borrowers on the underlying obligation and so the judgment against the Guarantors is likewise invalid. Appellants recognize that their arguments on behalf of the Guarantors rise or fall with their arguments on behalf of Borrowers, arguing that "if the judgment that forms the basis of the judgment against the guarantors is overturned, then the judgment against guarantors must also be overturned." Because we have declined to disturb the judgment against Borrowers, we have no occasion to disturb the judgment against the Guarantors.

CONCLUSION

¶24 We reject Appellants' arguments on appeal. RADC was properly added as a plaintiff to the case in the First Amended Complaint because that amendment relates back to the original Complaint. The district court did not err by awarding judgment for the entire deficiency amount or by awarding that full amount to RADC, subject, of course, to its obligation to account to Utah First for its share of any proceeds recovered. Finally, Appellants have not demonstrated any reason why the judgment against the Guarantors should be disturbed.

¶25 Affirmed.

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of April, 2016, a true and correct copy of the attached DECISION was sent by standard or electronic mail to be delivered to:

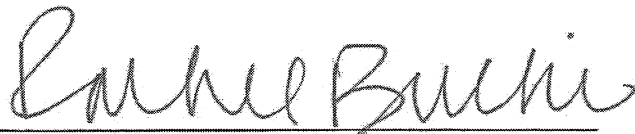
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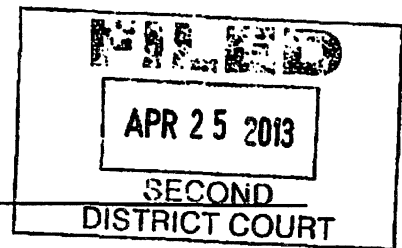
A handwritten signature in cursive script, reading "Rachel Buckle", written in black ink. The signature is fluid and stylized, with a horizontal line underneath it.

Judicial Secretary

TRIAL COURT: SECOND DISTRICT, FARMINGTON, 110700200
APPEALS CASE NO.: 20140675-CA

Addendum B

Addendum B



IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
FARMINGTON DEPARTMENT, STATE OF UTAH

UTAH FIRST FEDERAL CREDIT
UNION, and 2010-1 RAD/CADC
VENTURE, LLC, as successors in interest
to AMERICA WEST BANK,

Plaintiffs,

vs.

DOS LAGOS, LLC, MELLON VALLEY,
LLC, ROLAND NEIL FAMILY
LIMITED PARTNERSHIP, ROLAND
N. WALKER, and SALLY WALKER,

Defendants.

RULING ON DISPOSITIVE MOTIONS

Case No. 110700200

Judge John R. Morris

This matter is before the Court on (1) Plaintiffs' Amended Motion for Summary Judgment, (2) Defendants' Motion to Dismiss the Claims of Plaintiff 2010-1 RAD/CADC Venture, LLC, and (3) Defendants' Motion for Summary Judgment or in the Alternative Rule 56(f) Motion for Continuance. The Court has reviewed the moving and responding papers, along with their supporting materials, and its case file. The Court also held a hearing on the matters on February 25, 2013. Having considered all of the arguments, being fully advised in the premises, and for the reasons set forth below, the Court rules as follows:

ANALYSIS

Summary Judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist[.]" so as to determine if judgment may be rendered as a matter of law. *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995).

Ruling on Dispositive Motions
Case No. 110700200

Here, Plaintiffs seeks summary judgment on their claims for deficiency judgment and unjust enrichment.¹ In support of their motion, Plaintiffs assert the following material facts,² which Defendants have not disputed:

- 1) Dos Lagos, LLC and Mellon Valley, LLC entered into a Business Loan Agreement with America West Bank in 2007.
- 2) On December 6, 2007, America West Bank entered into a loan Participation Agreement with Utah First Federal Credit Union, wherein America West Bank retained an undivided 48% interest in the loan and Utah First Federal Credit Union obtained an undivided 52% interest in the loan.
- 3) On December 5, 2008, Dos Lagos, LLC and Mellon Valley, LLC executed a Change in Terms Agreement, which restated, modified and extended their Promissory Note with America West Bank dated March 29, 2007, with a principal amount of \$2,500,000.00.
- 4) The Promissory Note was secured by real property owned by Mellon Valley, LLC located in Hurricane, Washington County, Utah.
- 5) The Revolving Credit Deed of Trust on the real property securing the Promissory Note named America West Bank as beneficiary and trustee.
- 6) On May 1, 2009, the FDIC closed America West Bank and seized its interest in the Promissory Note.
- 7) Between May and December 2009, the FDIC sent Defendants multiple letters notifying them that their loan with America West Bank was in default, and requesting payment.
- 8) On November 23, 2009, a Notice of Default under the Revolving Credit Deed of Trust was recorded at the Washington County Recorder's Office.

¹ While Plaintiffs' Second Amended Complaint includes claims for Breach of Real Property Note and Breach of Guarantees, these claims seek to recover a deficiency following a trustee's sale of real property that secured a promissory note. Accordingly, the Court shall construe Plaintiffs' claims for Breach of Real Property Note and Breach of Guarantees as actions for deficiency judgment under Utah Code Ann. § 57-1-32.

² To support their statement of undisputed material facts, Plaintiffs submitted the Amended Affidavit of Paul Toller, the Senior Vice President of Utah First Federal Credit Union, which attached copies of relevant documentation.

Ruling on Dispositive Motions
Case No. 110700200

- 9) The Notice of Default identified Marlon L. Bates as the successor trustee and indicated that the trustee elected to sell the trust property to satisfy the delinquent obligations.
- 10) In 2010, the FDIC auctioned and sold America West Bank's interest in the loan to Plaintiff 2010-1 RADC/CADC Venture, LLC.
- 11) The FDIC subsequently assigned and transferred the Revolving Credit Deed of Trust to 2010-1 RADC/CADC Venture, LLC effective August 26, 2010, and recorded the assignment at the Washington County Recorder's Office on October 26, 2010.
- 12) On September 21, 2010, Dos Lagos, LLC and Mellon Valley, LLC were informed via letter that their loan had been transferred from America West Bank and that Cohen Financial was its new servicer, acting as an agent for 2010-1 RADC/CADC Venture, LLC.
- 13) On October 27, 2010, a Notice of Trustee's Sale was sent to Mellon Valley, LLC via certified mail, but was returned undeliverable.
- 14) The Notice of Trustee's Sale was also posted at the property securing the Promissory Note and published in a newspaper of general circulation in Washington County, Utah.
- 15) On December 3, 2010, a Substitution of Trustee was recorded at the Washington County Recorder's Office naming Marlon L. Bates as the successor trustee under the Revolving Credit Deed of Trust.
- 16) On December 6, 2010, the property securing the Promissory Note was sold at trustee's sale for \$1,060,000.00 to the highest bidder, 2010-1 RADC/CADC Venture, LLC.
- 17) The value of the property securing the Promissory Note was \$1,510,000.00 at the time of the December 6, 2010 trustee's sale.
- 18) On December 6, 2010, the outstanding payoff balance on the Revolving Credit Deed of Trust was \$3,426,701.91.
- 19) On January 14, 2011, Utah First Federal Credit Union commenced this action.
- 20) On April 29, 2011, a Special Warranty Deed conveying the property securing the Promissory Note to 2010-1 RADC/CADC Venture, LLC was executed.

Ruling on Dispositive Motions
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Plaintiffs maintain that these undisputed material facts entitle them to judgment against Defendants for the deficiency on the entire amount of indebtedness, \$1,916,701.91, as a matter of law.³

Defendants have opposed Plaintiffs' amended motion for summary judgment and filed a cross-motion for summary judgment arguing that they were not party to any contract with Utah First Federal Credit Union. Defendants further argue that Utah First Federal Credit Union has no right to enforce the Promissory Note, as its Participation Agreement with America West Bank violates state and federal credit union laws and is void for public policy since no Defendants were members of Utah First Federal Credit Union. As to 2010-1 RADC/CADC Venture, LLC, Defendants argue that the three-month statute of limitations for deficiency actions bars its claims.⁴ Alternatively, Defendants argue that Plaintiffs should be estopped from recovering the entire amount of deficiency, as it was not pled in their original complaint, and that additional time for discovery is necessary regarding the charter of Utah First Federal Credit Union, its membership guidelines, its participation in loans with non-members, and its agreement with America West Bank.

I. The undisputed material facts establish each of the requirements for rendering a deficiency judgment against Dos Lagos, LLC and Mellon Valley, LLC pursuant to Utah Code Ann. § 57-1-32.

The Utah Code provides that "[a]t any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of

³ While Plaintiffs' Second Amended Complaint includes claims against Roland Neil Family Limited Partnership, Roland N. Walker, and Sally Walker for guaranteeing any indebtedness of Dos Lagos, LLC and Mellon Valley, LLC to America West Bank, Plaintiffs' Amended Motion for Summary Judgment does not include any statements of material fact relating to the existence of a guarantee. Accordingly, the Court construes Plaintiffs' motion as pertaining only to their claims against Dos Lagos, LLC and Mellon Valley, LLC.

⁴ The statute of limitations argument Defendants raise in their opposition to Plaintiffs' Amended Motion for Summary Judgment is also the sole argument raised in Defendants' Motion to Dismiss the Claims of Plaintiff 2010-1 RADC/CADC Venture, LLC.

the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale." Utah Code Ann. § 57-1-32. "Before rendering judgment, the court shall find the fair market value of the property at the date of sale." *Id.* "The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale." *Id.*

The undisputed material facts in this matter establish that the entire amount of the indebtedness on the Revolving Credit Deed of Trust at the date of the trustee's sale was \$3,426,701.91, that the property sold at the trustee's sale for \$1,060,000.00, and that the fair market value of the property at the time of the trustee's sale was \$1,510,000.00. From these undisputed material facts the Court concludes as a matter of law that Plaintiffs have complied with the requirements of the Utah deficiency statute and are entitled to judgment in the amount of the deficiency, \$1,916,701.91, absent application of one of the defenses or arguments raised by Defendants.

II. That Defendants were not party to the Participation Agreement is immaterial to Plaintiffs' claims; however, genuine issues of material fact preclude summary judgment on Utah First Federal Credit Union's claims.

The first defenses raised by Defendants are that Utah First Federal Credit Union cannot seek remedy for Defendants' breach of the Revolving Credit Deed of Trust, as Defendants were not party to its Participation Agreement with America West Bank. Defendants also argue that the Participation Agreement violates state and federal credit union laws and is void for public policy, as no Defendants were members of Utah First Federal Credit Union prior to the entry of the Participation Agreement. The Court finds that Defendants' arguments are without merit. By the plain language of the Business Loan Agreement that Dos Lagos, LLC and Mellon Valley, LLC entered with America West Bank, Dos Lagos, LLC and Mellon Valley, LLC agreed that America West Bank could sell or transfer partici-

Ruling on Dispositive Motions
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pation interests in the loan to third parties, such as Utah First Federal Credit Union, without notice or obligation to notify the borrowers. *See* Business Loan Agreement, pg. 4, ¶ Miscellaneous Provisions, Consent to Loan Participation. Accordingly, the Court finds that it is immaterial to Plaintiffs' claims whether Defendants were party to Utah First Federal Credit Union's Participation Agreement with America West Bank.

Additionally, Defendants argument that the Participation Agreement is void does not preclude summary judgment on 2010-1 RADC/CADC Venture, LLC's claim for deficiency judgment. Indeed, Defendants concede that 2010-1 RADC/CADC Venture, LLC may seek remedy against Defendants for the entire amount of deficiency, subject to its compliance with the requirements of Utah Code Ann. § 57-1-32. As to Utah First Federal Credit Union's claims, however, Defendants correctly note that both state and federal laws permit a credit union to participate in loans only if the loan is made to the credit union's own members or the member of another participating credit union. *See* Utah Code Ann. §§ 7-9-20(7)(b)(ii)(A) & (8)(c)(ii)(A); *see also* 12 C.F.R. § 701.22(d)(2). The Court finds that genuine issues of material fact exist with regard to whether Roland N. Walker was a member of Utah First Federal Credit Union prior to its entry into the Participation Agreement with America West Bank. The Court is also unwilling on summary judgment to determine whether public policy renders the Participation Agreement void if no Defendants were, in fact, members of Utah First Federal Credit Union prior to its entry of the Participation Agreement.⁵ Accordingly, the Court concludes that the existence of genuine issues of material fact preclude summary judgment in favor of Utah First Federal Credit Union on its claim for deficiency judgment.

⁵ Plaintiffs' argument that a private cause of action does not exist when a participation agreement violates state and federal credit union laws is irrelevant in this case, as Defendants are not attempting to assert a private cause of action. Rather, Defendants are asserting an affirmative defense to Utah First Federal Credit Union's ability to seek remedy for breach of the Defendants' obligations under the Revolving Credit Deed of Trust by virtue of the Participation Agreement.

The Court also concludes that genuine issues of material fact preclude summary judgment on Utah First Federal Credit Union's unjust enrichment claim. It is unclear from the undisputed material facts whether Utah First Federal Credit Union actually conferred a benefit on Defendants by virtue of its Participation Agreement, or merely conferred a benefit on American West Bank. *See Rawlings v. Rawlings*, 2010 UT 52, ¶29, 240 P.3d 754 ("A claim for unjust enrichment in Utah requires proof of three elements: (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.") (Internal quotations omitted). Further, even if Utah First Federal Credit Union did confer a benefit on Defendants, the Court declines to determine on summary judgment whether it would be inequitable for Defendants to retain the benefit without remunerating Utah First Federal Credit Union given the Court's concern with the effect of public policy on the enforceability of the Participation Agreement. *See Id.* The Court, therefore, DENIES Plaintiffs' Amended Motion for Summary Judgment insofar as it pertains to the claims of Utah First Federal Credit Union.⁶

III. 2010-1 RADC/CADC Venture, LLC's deficiency judgment claims are not barred by the three-month statute of limitations for deficiency actions under Utah Code Ann. § 57-1-32.

The next defense raised by Defendant is that 2010-1 RADC/CADC Venture, LLC's deficiency judgment claims are barred by the three-month statute of limitations of Utah Code Ann. § 57-1-32. The Court finds that this argument is without merit. Utah First Feder-

⁶ The Court finds that Defendant's request for a Rule 56(f) continuance is rendered moot by the Court's denial of Plaintiffs' Amended Motion for Summary Judgment as it pertains to Utah First Federal Credit Union, as the request pertained only to discovery directed at Utah First Federal Credit Union and not 2010-1 RADC/CADC Venture, LLC. Moreover, more than two years have passed since this matter was initiated and the Court has previously permitted several extensions of time for discovery to be completed. Defendants have failed to assert a sufficient basis for an additional extension of time for discovery and given the undisputed material facts, the Court finds that additional discovery is unnecessary for a determination of 2010-1 RADC/CADC Venture, LLC's claim for deficiency judgment.

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al Credit Union initiated this action on January 14, 2011, well within three months of the property's December 6, 2011 trustee's sale. Defendants subsequently filed their Answer to Plaintiff's Complaint and a Motion to Dismiss Pursuant to Rule 17(a) arguing that 2010-1 RADC/CADC Venture, LLC is the real party in interest to the action. Thereafter, Utah First Federal Credit Union filed a Motion for Leave to Amend Complaint on August 15, 2011, seeking to add 2010-1 RADC/CADC Venture, LLC to the action as a party plaintiff. The parties then filed a Stipulation to Allow Plaintiff's Amended Complaint and Withdraw Pending Motions on September 7, 2011, and Plaintiffs filed their Amended Complaint on November 15, 2011. While Defendants' Answer to Plaintiffs' First Amended Complaint raises an affirmative defense based upon the applicable statute of limitations, the Court finds that Defendants' prior stipulation to the inclusion of 2010-1 RADC/CADC Venture, LLC as a party plaintiff constitutes a waiver of Defendant's statute of limitations defense. *See Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 942 (Utah 1993) ("A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it."). The Court finds that Defendants were clearly aware of 2010-1 RADC/CADC Venture, LLC's interest in the action by virtue of their Rule 17(a) motion to dismiss, but nevertheless, agreed to the filing of Plaintiffs' Amended Complaint rather than challenging the amendment as being futile as a result of a running of the statute of limitations.

Regardless of Defendants' waiver, however, Rule 15(c) of the Utah Rules of Civil Procedure provides that "[w]henver the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleadings." Utah R. Civ. P. 15(c). "This rule allows a plaintiff to cure defects in his or her original complaint despite the intervening running of a statute of limitations." *Russell v. Standard Corp.*, 898 P.2d 263, 265 (Utah 1995). Rule 17(a) of the Utah Rules of Civil Procedure additionally provides:

Ruling on Dispositive Motions
Case No. 110700200

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Utah R. Civ. P. 17(a).

In applying these rules to this case, the Court finds that Plaintiffs' Amended Complaint relates back to the date of Utah First Federal Credit Union's original complaint. The amendments included within Plaintiffs' Amended Complaint arose out of the same transaction set forth in the original complaint and an identity of interest exists between Utah First Federal Credit Union and 2010-1 RADC/CADC Venture, LLC. *Cf. Russell*, 898 P.2d at 265 (upholding the general rule that relation back under Rule 15(c) does not apply to amendments that add new parties who have no identity of interest with existing parties). While Defendants correctly assert that that privity of contract is generally an insufficient identity to interest for the purposes of relation back under Rule 15(c), *see Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984), the identity of interest between Plaintiffs goes beyond mere privity of contract. Plaintiffs assert shared, undivided interests in the deficiency on the Revolving Credit Deed of Trust. Based upon this identity of interest, the Court finds that Utah First Federal Credit Union's original complaint sufficiently placed Defendants on timely notice that a deficiency judgment was sought by the creditors of the Revolving Credit Deed of Trust. The Court, therefore, concludes that Plaintiffs' Amended Complaint relates back to the filing of Utah First Federal Credit Union's original complaint and 2010-1 RADC/CADC Venture, LLC's deficiency judgment claims are not barred by the three-month statute of limitations of Utah Code Ann. § 57-1-32.

This conclusion is also supported by the primary purposes of Utah's deficiency judgment statute. "The primary purposes of section 57-1-32 are (1) to prevent the creditor from purchasing the property for below market value at the trustee's sale and then suing the debtor or guarantor for a large deficiency, and (2) to provide a debtor or guarantor with

Ruling on Dispositive Motions
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prompt notice that the creditor intends to pursue a deficiency so as to allow the debtor or guarantor to plan its finances.” *Machock v. Fink*, 2006 UT 30, ¶26, 137 P.3d 779. The Utah Supreme Court has further “recognized that section 57-1-32’s requirement that a creditor file a deficiency action within three months is a ‘procedural hurdle,’ not an absolute bar to suit.” *Id.* at ¶25. Accordingly, “as long as the primary purposes of the statute are satisfied, an action will not be barred for failure to initially meet certain procedural requirements of section 57-1-32.” *Id.* at ¶26. Here, both purposes of Utah’s deficiency judgment statute are satisfied, as the deficiency judgment Plaintiffs’ seek is based upon the fair market value of the property sold at the December 6, 2010 trustee’s sale, and as the debtor and guarantor Defendants were timely placed on notice that a deficiency judgment was sought by the creditors of the Revolving Credit Deed of Trust. Accordingly, the Court DENIES Defendant’s Motion to Dismiss the Claims of Plaintiff 2010-1 RAD/CADC Venture, LLC.

IV. Defendants’ estoppel argument is without merit and 2010-1 RAD/CADC is entitled to judgment in the amount of the deficiency on the entire amount of indebtedness, subject to any subsequently determined interest of Utah First Federal Credit Union.

Finally, Defendants argue that Plaintiffs should be estopped from recovering a deficiency on the entire amount of indebtedness under the Revolving Credit Deed of Trust, as this amount was not pled in Utah First Federal Credit Union’s original complaint. Defendants’ argument, however, ignores that the Court twice permitted the filing of amended complaints in this matter. The Court permitted the filing of Plaintiffs’ First Amended Complaint on November 15, 2011, which added 2010-1 RAD/CADC Venture, LLC as a party plaintiff to the litigation, following the filing of a stipulation to the amendment. The Court then granted leave for the filing of Plaintiffs’ Second Amended Complaint on September 6, 2012, following Defendants’ failure to file an opposition to Plaintiffs’ Motion for Leave to Amend. Plaintiffs’ Second Amended Complaint asserts the entire amount of indebtedness under the Revolving Credit Deed of Trust that Plaintiffs now seek on summary judgment. Under these circumstances, the Court finds no basis to estop Plaintiffs from seeking the recovery of a de-

iciency on the entire amount of indebtedness under the Revolving Credit Deed of Trust. Moreover, Defendants have cited no legal authority to support their argument other than Utah's deficiency statute, which states that "the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed." Utah Code Ann. § 57-1-32. Plaintiffs' Second Amended Complaint satisfies this requirement and the primary purposes of the Utah's deficiency statute were satisfied by the filing of Utah First Federal Credit Union's original complaint. *See Machock*, 2006 UT 30, ¶¶25-26. Moreover, by rule Plaintiffs' Second Amended Complaint relates back to the date of the original pleading. *See* Utah R. Civ. P. 15(c) & 17(a). The Court, therefore, finds that Defendants' estoppel argument is without merit. Accordingly, the Court concludes that the undisputed material facts demonstrate that 2010-1 RADC/CADC Venture, LLC is entitled to judgment against Dos Lagos, LLC and Mellon Valley, LLC in the amount of \$1,916,701.91, the deficiency on the entire indebtedness under the Revolving Credit Deed of Trust.⁷ The Court, therefore, GRANTS Plaintiffs' Amended Motion for Summary Judgment insofar as it pertains to 2010-1 RADC/CADC Venture, LLC, and DENIES Defendants' Motion for Summary Judgment or in the Alternative Rule 56(f) Motion for Continuance.

CONCLUSION

Based upon the foregoing, the Court:

- 1) GRANTS Plaintiffs' Amended Motion for Summary Judgment insofar as it pertains to 2010-1 RADC/CADC Venture, LLC;
- 2) DENIES Plaintiffs' Amended Motion for Summary Judgment insofar as it pertains to Utah First Federal Credit Union;
- 3) DENIES Defendants' Motion to Dismiss the Claims of Plaintiff 2010-1 RADC/CADC Venture, LLC; and


⁷ 2010-1 RADC/CADC Venture, LLC's judgment against Dos Lagos, LLC and Mellon Valley, LLC for the amount of the deficiency on the entire amount of indebtedness under the Revolving Credit Deed of Trust, LLC is, however, subject to any subsequently determined interest of Utah First Federal Credit Union.

Ruling on Dispositive Motions
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4) DENIES Defendants' Motion for Summary Judgment or in the Alternative Rule 56(f) Motion for Continuance.

The Court directs Plaintiffs to prepare and submit an Order and a Judgment that is consistent with and reflects this Ruling.

Date signed: 4/15/13


DISTRICT COURT JUDGE
JOHN R. MORRIS

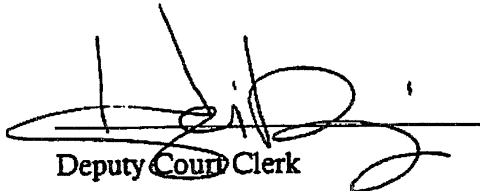
Ruling on Dispositive Motions
Case No. 110700200

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of April, 2013, I sent a true and correct copy of the foregoing **Ruling** to the parties as follows:

Richard C. Terry
Jeremiah R. Taylor
TERRY JESSOP & BITNER
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111-2705

Michael C. Dunn
DUNN LAW FIRM
P.O. Box 2318
110 West Tabernacle
St. George, Utah 84771



Deputy Court Clerk

Addendum C

Addendum C

The Order of Court is stated below:

Dated: July 25, 2013
04:06:03 PM

/s/ John R. Morris
District Court Judge



Richard C. Terry, USB No. 3216
Jeremiah R. Taylor, USB No. 13933
TERRY JESSOP & BITNER
341 South Main Street, Suite 500
Salt Lake City, Utah 84111-2705
Telephone: 801/534-0909
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richard@tjblawyers.com

Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
FARMINGTON DEPARTMENT, STATE OF UTAH

UTAH FIRST FEDERAL CREDIT UNION,
and 2010-1 RAD/CADC Venture, LLC, as
successors in interest to AMERICA WEST
BANK,

Plaintiffs,

v.

DOS LAGOS, LLC, a Utah limited liability
company, MELLON VALLEY, LLC, a Utah
limited liability company, ROLAND NEIL
FAMILY LIMITED PARTNERSHIP;
ROLAND N. WALKER, an individual and
SALLY WALKER, an individual,

Defendants.

ORDER AND JUDGMENT

Civil No. 110700200

Judge John R. Morris

On February 25, 2013, the Court held a hearing on (1) Plaintiffs' Amended Motion for Summary Judgment, (2) Defendants' Motion to Dismiss the Claims of Plaintiff 2010-1 RAD/CADC Venture, LLC, and (3) Defendants' Motion for Summary Judgment or in the Alternative Rule 56(f) Motion for Continuance. After reviewing the moving and responding papers, hearing the arguments, and considering the pleadings, depositions, answers to

interrogatories, admissions, affidavits, and other evidence, if any, in the Court's file, the Court issued a Ruling on Dispositive Motions on April 25, 2013, which ruling is incorporated herein by reference. Consistent with that ruling, the Court hereby ORDERS, ADJUDGES, and DECREES that:

1. Plaintiff 2010-1 RADC/CADC Venture, LLC's ("RADC") Amended Motion for Summary Judgment is GRANTED. There is no genuine issue of material fact to the extent the case pertains to RADC, and RADC is entitled to judgment as a matter of law against Defendants Dos Lagos, LLC and Melon Valley, LLC, jointly and severally, as follows:

\$1,916,701.91	The Principal Deficiency Amount on the entire indebtedness under the Revolving credit Deed of Trust with interest accruing on the principal amount from June 06, 2013, at the default contract rate of 21% per annum until paid in full.
\$1,006,819.88	Accrued Interest from December 6, 2010, to June 6, 2013 at the default contract rate of 21% per annum with interest accruing thereon from June 7, 2013, at the federal post-judgment rate plus 2% until paid in full.
\$943.80	Costs incurred by RADC as of June 6, 2013, with interest accruing thereon from June 7, 2013, at the federal post-judgment rate plus 2% until paid in full.
\$18,958.37	Attorney's Fees incurred by RADC as of June 6, 2013, with interest accruing thereon from June 7, 2013, at the federal post-judgment rate plus 2% until paid in full.
\$2,943,423.96	TOTAL JUDGMENT

This Judgment may be augmented in the amount of reasonable costs and attorney's fees expended in collecting this judgment. Plaintiffs shall serve upon Defendants any request to

augment the judgment, and Defendants shall have 30 days from the date of service to file an objection.

2. Plaintiff Utah First Federal Credit Union's Amended Motion for Summary Judgment is DENIED.

3. Defendants' Motion to Dismiss the Claims of Plaintiff 2010-1 RAD/CADC Venture, LLC is DENIED.

4. Defendants' Motion for Summary Judgment or in the Alternative Rule 56(f) Motion for Continuance are both DENIED.

Approved as to form and content by:

/s/ Michael C. Dunn

Attorney for Defendants

(signed electronically with Mr. Dunn's permission)

*****END OF DOCUMENT*****

CERTIFICATE OF SERVICE

I certify that on July 12, 2013, I caused to be served a true and correct copy of the foregoing ORDER AND JUDGMENT (proposed) to the following by electronic filing, by email, or by mail, postage prepaid.

Michael C. Dunn
Clifford V. Dunn
Dunn Law Firm
PO Box 2318
110 West Tabernacle
St. George, Utah 84771-2318
mdunn@dunnfirm.com

/s/ Richard C. Terry

Addendum D

Addendum D

The Order of Court is stated below:

Dated: August 16, 2013
02:27:01 AM

/s/ John R. Morris
District Court Judge



Richard C. Terry, USB No. 3216
Jeremiah R. Taylor, USB No. 13933
TERRY JESSOP & BITNER
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Salt Lake City, Utah 84111-2705
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Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

FARMINGTON DEPARTMENT, STATE OF UTAH

UTAH FIRST FEDERAL CREDIT UNION,
and 2010-1 RAD/CADC Venture, LLC, as
successors in interest to AMERICA WEST
BANK,

Plaintiffs,

v.

DOS LAGOS, LLC, a Utah limited liability
company, MELLON VALLEY, LLC, a Utah
limited liability company, ROLAND NEIL
FAMILY LIMITED PARTNERSHIP;
ROLAND N. WALKER, an individual and
SALLY WALKER, an individual,

Defendants.

ORDER AND JUDGMENT

Against Defendants Roland Neil Family
Limited Partnership, Roland N. Walker,
and Sally Walker

Civil No. 110700200

Judge John R. Morris

On July 15, 2013, Plaintiff RAD/CADC moved this Court for summary judgment against Defendants Roland Neil Family Limited Partnership, Roland N. Walker, and Sally Walker (the "Guarantors"). The time to oppose RAD/CADC's motion has passed, and Defendants have not filed a responsive memorandum or affidavit in opposition to RAD/CADC's motion. The Court has reviewed the moving papers and considered the pleadings, depositions, answers to interrogatories,

admissions, affidavits, and/or other evidence, if any, in the Court's file. The Court concludes that the foregoing show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff 2010-1 RAD/CADC Venture, LLC's ("RAD") Motion for Summary Judgment against Guarantors is GRANTED. RAD is entitled to judgment as a matter of law against the Guarantors, jointly and severally, as follows:

\$1,916,701.91	The Principal Deficiency Amount on the entire indebtedness under the Revolving credit Deed of Trust with interest accruing on the principal amount from August 9, 2013, at the default contract rate of 21% per annum until paid in full.
\$1,076,293.76	Accrued Interest from December 6, 2010, to August 8, 2013, at the default contract rate of 21% per annum with interest accruing thereon from August 9, 2013, at the federal post-judgment rate plus 2% until paid in full.
\$943.80	Costs incurred by RAD as of August 8, 2013, with interest accruing thereon from August 9, 2013, at the federal post-judgment rate plus 2% until paid in full.
\$21,560.42	Attorney's Fees incurred by RAD as of August 8, 2013, with interest accruing thereon from August 9, 2013, at the federal post-judgment rate plus 2% until paid in full.
\$3,015,499.89	TOTAL JUDGMENT

This Judgment may be augmented in the amount of reasonable costs and attorney's fees expended in collecting this judgment. Plaintiffs shall serve upon Defendants any request to augment the judgment, and Defendants shall have 30 days from the date of service to file an

objection.

*****END OF DOCUMENT*****

CERTIFICATE OF SERVICE

I certify that on August 8, 2013, I caused to be served a true and correct copy of the foregoing ORDER AND JUDGMENT (proposed) to the following by electronic filing.

Michael C. Dunn
Clifford V. Dunn
Dunn Law Firm
PO Box 2318
110 West Tabernacle
St. George, Utah 84771-2318
mdunn@dunnfirm.com

/s/ Richard C. Terry

Addendum E

Addendum E

IN THE COURT OF APPEALS, STATE OF UTAH

2010-1 RADC/CADC Venture, LLC, as
successors in interest to America West
Bank,

Plaintiff and Appellee,

vs.

DOS LAGOS, LLC, a Utah limited liability
company, MELLON VALLEY, LLC, a
Utah limited liability company, ROLAND
NEIL FAMILY LIMITED
PARTNERSHIP; ROLAND N. WALKER,
an individual and SALLY WALKER, an
individual,

Defendants and Appellants.

BRIEF OF APPELLANTS

Case No: 20140675- CA

Appeal from the Second Judicial District Court of Davis County,
Farmington Department, State of Utah
The Honorable John R. Morris

RICHARD C. TERRY (NO. 3216)
JEREMIAH R. TAYLOR (NO. 13933)
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Attorneys for Plaintiff/Appellee
RADC

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Attorneys for Defendants/Appellants

complaint, RADC's filing happened long after the three month statute of limitations expired. Courts have held that the three month deadline set forth in section 57-1-32 can be a mere procedural hurdle, and not an absolute bar to suit only if the purposes of section 57-1-32 are satisfied. Standard Federal Savings & Loan Ass'n v. Kirkbride, 1991 Utah LEXIS 42, 821 P.2d 1136, 1138. Those purposes include preventing windfalls to creditors, and providing the debtor and guarantor notice that the creditor intends to pursue the deficiency. Machock, 2006, UT 30, ¶26. The facts of this case show that RADC's and Utah First's conduct in the district court proceeding did not satisfy the purposes of Utah Code Ann. §57-1-32, and RADC's complaint should have been dismissed, and the district court's failure to do so is reversible error.

The district court ruled in favor of RADC, and found that judgment in favor of RADC was appropriate for the full amount due under the Note, despite RADC only owning 48% of the Note, and despite a finding that the judgment in favor of RADC was subject to a factual determination regarding Utah First's interest in the Note. The district court's summary judgment in favor of RADC based on the full amount of the Note was reversible error.

- a. The district court should not have granted judgment for RADC based on the full amount of the Note, subject to a later determination of Utah First's interest.*

In its ruling, the district court denied Utah First's motion for summary judgment, due to issues of fact, but granted summary judgment in favor of RADC. The district court's ruling for RADC granted RADC a deficiency based on the full amount of the indebtedness under the loan (\$3,426,701.91), despite RADC being a mere 48% interest

holder. (R. p. 835-836) In entering this ruling, the district court added a footnote which stated: “[RADC]’s judgment against Dos Lagos, LLC and Mellon Valley, LLC for the amount of the deficiency on the entire amount of indebtedness under the Revolving Credit Deed of Trust, LLC[sic] is, however, subject to any subsequent determined interest of Utah First Federal Credit Union.” (R. p. 836)(Exhibit A. p. 11). In making this determination, the district court cited no law, and provided no valid reason for awarding RADC the full judgment rather than its proportionate share of the Note.

The amended complaint that added RADC as a plaintiff asserted that RADC only owned 48% of the Note under which deficiency was being sought. (R. p. 304) Allowing RADC to recover more than its proportionate share of the note would subvert public policy and be in direct violation of Utah Code Ann. §57-1-32. The result of the ruling is a windfall to RADC, the very thing the Code is intended to prevent.

As noted previously, Utah Code Ann. §57-1-32 has two primary purposes: 1) to prevent windfalls to creditors who buy properties at below market and pursue large deficiencies; and 2) provide notice to the debtor and guarantor of the creditor’s intent to pursue a deficiency. The district court, in granting RADC’s motion for the full amount of the deficiency, violated the first articulated purpose of the statute. The district court judgment allows RADC to collect more than double what it may be entitled, and expose Defendants to the jeopardy of multiple claims against them. In fact, the district court dismissed Utah First’s claims “without prejudice” leaving the door open for a later claim by Utah First if it deems it appropriate to do so. (R. pp 1097-1101) The total amount of

RADC's judgment, if valid, could have been no more than \$920,016.91, 48% of a deficiency, when based on the full amount of Note. More appropriately, the amount could be no more than \$148,691.52, 48% of a deficiency based upon the amount of the note as alleged in the original complaint of RADC (*See* Section e below).

At the same time it ruled in favor of RADC's motion for summary judgment, the district court ruled that there existed genuine issues of material fact related to Utah First's claims (R. p. 832). The district court's ruling makes it impossible for a judgment in favor of RADC to have been determinable as a matter of law, because the district court's ruling was subject first to a determination of Utah First's interest. RADC's judgment cannot be determined as a matter of law, when its final value relies entirely upon the determination of specific and genuine issues of fact.

Either the judgment in favor of RADC was appropriate, but not in an appropriate amount, or it was not appropriate because there existed genuine issues of material fact and the matter must be remanded for that determination. Either way, the district court erred and this Court should overturn its rulings.

b. Defendants' stipulation to allow an amended complaint did not constitute a waiver of Defendants' right to assert a statute of limitations defense.

The district court's ruling concluded that "[w]hile Defendants' Answer to Plaintiffs' First Amended Complaint raises an affirmative defense based upon the applicable statute of limitations, the Court finds that Defendants' prior stipulation to the inclusion of 2010-1 RADC/CADC Venture, LLC as a party plaintiff constitutes a waiver of Defendants' statute of limitations defense." (R. p. 833) In support of its position, the

Addendum F

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IN THE COURT OF APPEALS, STATE OF UTAH

2010-1 RADC/CADC Venture, LLC, as
successor in interest to America West
Bank,

Plaintiff and Appellee,

vs.

DOS LAGOS, LLC, a Utah limited
liability company, MELLON
VALLEY, LLC, a Utah limited liability
company, ROLAND NEIL FAMILY
LIMITED PARTNERSHIP; ROLAND
N. WALKER, an individual and
SALLY WALKER, an individual,

Defendants and Appellants.

REPLY BRIEF OF APPELLANTS

Case No. 20140675-CA

District Court Case No. 110700200

Appeal from the Second Judicial District Court, Davis County, State of Utah
The Honorable John R. Morris

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ARGUMENT

I. RADC IS NOT ENTITLED TO A FULL DEFICIENCY UNDER THE LOAN AND PARTICIPATION AGREEMENTS.

The district court misconstrued the Loan Agreement, the Commercial Guaranties, and the Participation Agreement when it ruled that RADC was entitled to judgment for the full deficiency under the Note, despite RADC only owning 48% of the Note.

Under Utah contract law,

[w]hen determining whether the plain language is ambiguous, [the court] attempt[s] to harmonize all of the contract's provisions and all of its terms. [T]o harmonize the provisions of a contract, we examine the entire contract and all of its parts in relation to each other and give a reasonable construction of the contract as a whole to determine the parties' intent. Also, [w]hen interpreting the plain language, we look for a reading that harmonizes the provisions and avoids rendering any provision meaningless.

Nolin v. S & S Const., Inc., 2013 UT App 94, ¶ 13, 301 P.3d 1026, 1029 cert. denied sub nom. *Nolin v. S & S Const.*, 312 P.3d 619 (Utah 2013) (citation and internal quotation marks omitted); *see also McNeil Engineering v. Bennett*, 2011 UT App 423, ¶8 (“Under well-accepted rules of contract interpretation, we look to the language of the contract to determine its meaning and the intent of the contracting parties. We also consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none. If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.”) (citations and internal quotation marks omitted). Moreover, “the specification of terms in a contract implies the exclusion of all not expressed.” 17A C.J.S. Contracts § 415.

In relevant part, the plain language of the Loan Agreement provides that the “Borrower agrees and consents to Lender’s sale or transfer, whether now or later, of one or more participation interests in the Loan to one or more purchasers Borrower also agrees that the purchasers of any such participation interests will be considered as the absolute owners of such participation interests. Borrower further . . . unconditionally agrees that either Lender or such purchaser may enforce Borrower’s obligation under the Loan irrespective of the failure or insolvency of any holder of any interest in the Loan.” (R. p. 771 (emphasis added).)

Under the district court’s ruling, RADC is entitled to the full amount of the Note, or the entire indebtedness of the Defendants. However, “Indebtedness” is defined in the Loan Agreement as “the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Borrower is responsible under this Agreement or under any of the Related Documents.” (R. p. 772.) In other words, if the parties negotiated and intended for a participation interest to be entitled to the entire indebtedness under the Loan Agreement, it would have provided that “the purchasers of any such participation interests will be considered as the absolute owners of [the Indebtedness],” or similar language. The parties clearly never intended a participation interest to grant rights of ownership or collections against the entire deficiency. While it is undisputed that RADC has a right to its own participation interest of 48%, the district court overreached when it awarded RADC the entire deficiency.

The provisions of other contracts at issue confirm that the district court erred when it awarded RADC the entire deficiency. The Commercial Guaranties contain language consistent with the Loan Agreement, specifically, that “Guarantor authorizes Lender, either before or after any revocation hereof, without notice or demand and without lessening Guarantor’s liability under this Guaranty, from time to time . . . (G) to sell, transfer, assign or grant participations in all or any part of the indebtedness” (R. pp. 779, 782.) While participation interests are allowed, there is nothing to indicate that a participation interest is transformed into a larger interest that may claim an entire deficiency. Surely, the Commercial Guarantee cannot be read to create a contractual right to multiply the total amount owed by Defendant.

In addition, the Participation Agreement defines the parameters of the participation of Utah First Federal Credit Union in America West Bank’s Loan Agreement with Defendants. Under the Participation Agreement, Utah First Federal Credit Union received a “Participation Equal to: \$1,300,000.00.” (R. p. 786.) Further, Utah First Credit Union’s participation share is explicitly 52%, while America West Bank’s retained share is 48%. (R. p. 787.) There is nothing in the Participation Agreement that entitles America West or RADC, as a successor to America West Bank’s share, to have a judgment for the entire deficiency.

As noted in the Brief of Appellants, and for which RADC provides no counter, *Machock v. Fink* stands for the proposition that Section 57-1-32 may bar suit by a creditor to prevent windfalls to the creditor. 2006 UT 30, ¶ 26, 137 P.3d 779. In this case, awarding RADC an entire deficiency when it is only entitled to a 48% participation

interest is a windfall to RADC.¹ The district court's ruling allows RADC to collect more than double what it may be entitled, and exposes Defendants to an unwarranted additional judgment in the event the district court ultimately grants Utah First a deficiency judgment based on its percentage. (R. pp. 1097-1101, the district court dismissed Utah First's claims without prejudice). Such a result would amount to a windfall to RADC.

II. ISSUES REMAIN REGARDING THE STATUTE OF LIMITATIONS THAT PRECLUDE ENTRY OF JUDGMENT IN FAVOR OF RADC.

A. Until the Trial Court determines Utah First's rights under the Participation Agreement, it cannot determine whether RADC's action relates back to the original complaint filed by Utah First.

The Utah Code dictates that a deficiency action must be brought within three months after any sale of property under a trust deed. *See* Utah Code Ann. § 57-1-32. The parties do not dispute that Utah First initiated an action within three months, rather, the parties dispute whether the addition of RADC as a separate party plaintiff and its assertion of its own separate claim for deficiency, long after the expiration of the three month statute of limitation, relates back to Utah First's original filing under Rule 15(c) or Rule 17(a). Appellees conceded that where an amended complaint adds an additional

¹ RADC arguments regarding the amount it is owed, even under a 48% ownership interest, are unsupported by basic math. The first Complaint filed with the trial court alleged a deficiency amount of \$1,819,774.97. (R. p. 3; *see also* R. pp. 225-226 and 551-552). The Second Amended Complaint alleged a deficiency of \$3,426,701.91. (R. p. 639). RADC attempts to justify the amount it alleged in its Second Amended Complaint by arguing that the Original Complaint mistakenly alleged a total indebtedness of only \$1,819,774.97 which inadvertently took into account only Utah First's 52% interest in the Note. (*see* R. p. 3; *see also* R. pp. 225-226 and 551-552; Brief of Appellee, p. 6, ¶¶ 26-27). However, 52% of \$3,426,701.91 does not equal \$1,819,774.97. In fact, 52% of \$3,426,701.91 is \$1,781,884.99. Similarly, 48% of \$3,426,701.91 does not equal \$1,606,926.94, as RADC argues, but rather, is \$1,644,816.92. (*See* Brief of Appellee at p. 7, ¶ 29).