2014 WL 6985561 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

NORTH AMERICAN SAVINGS BANK, F.S.B., Plaintiff-Appellee,

v.

Douglas O. VOLKLAND, et al., Defendants-Appellants.

No. 112, 097.
November 19, 2014.

Appeal from the District Court of Johnson County, Kansas
Honorable Thomas M. Sutherland, Judge
District Court Case No. 12 CV 9467
Oral Argument: 15 Minutes

Brief of Appellants

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*1 Nature of the Case

Following a bench trial in a mortgage foreclosure action, the district court found that the two borrower defendants had defaulted under two promissory notes and granted judgment to the lender plaintiff allowing a foreclosure to proceed upon two mortgages. The defendants contended that there had been no event of default under the loan documents, and that the amended petition for foreclosure did not allege any non-monetary defaults. The district court found that the death of a guarantor constituted an event of default under the promissory notes. The borrowers appeal the judgment of foreclosure and a post-judgment modification to the judgment.

*2 Statement of Issues

Issue I: The defendants did not default under either promissory note because their payments under the loans were current and because the death of the borrowers' guarantor did not constitute an event of default.

Issue II: The trial court erred by failing to invoke equitable principles to relieve the defendants from acceleration of the loan balances because the borrowers had a good payment history, the plaintiff lender was significantly overcollateralized and because the death of the guarantor was a natural event beyond the borrowers' control.

Issue III: The trial court erroneously awarded plaintiff attorney fees because plaintiff did not segregate the attorney fees incurred in connection with the collection of the promissory note from attorney fees incurred by plaintiff in an unsuccessful lawsuit against the quarantor's trust.

Issue IV: The trial court erroneously modified the judgment after the instant appeal had been docketed by awarding the plaintiff additional pre-judgment interest.

***3 Statement of Facts**

In 2004 and 2006, defendants Douglas O. Volkland and Janet Swinson, husband and wife, signed two promissory notes secured by two mortgages on certain parcels of real estate situated in Johnson County, Kansas. (R. IV, Exhibits 1, 5, 7, 11). For each of the loans, Keith Volkland signed a guaranty. (R. IV, Exhibits 21, 22). The primary loan documents at issue in the case consist of two promissory notes, two mortgages and two guaranties. (R. IV, Exhibits 1, 5, 7, 11). In the district court below, the 2004 Promissory Note is sometimes referred to as "the Note" and the 2006 Promissory Note is sometimes referred to as "Note 2." (R. II, 130-132). Both loans were originated by plaintiff North American Savings Bank, F.S.B. ("NASB"), which held and serviced the loans as lender at all relevant times. (R. II, 130, 133).

Keith Volkland, the guarantor of both loans, died May 4,2012. (R. V, Exhibit 40). On or about October 22, 2012, NASB declared a default under the two promissory notes (but not under the terms of the two mortgages), based upon (a) the death of the guarantor, Keith Volkland; and (b) untimely payment. (R. IV, Exhibit 14). On such date, NASB made demand for payment of $803,033.26 to be paid within one week. (R. IV, Exhibit 14). This mortgage foreclosure action followed. (R. I, 7).

Paragraph 16 of the Plaintiff's Amended Petition for Mortgage Foreclosure alleged that Defendants "have failed, neglected and refused to make the **payments due** under the Note and Note 2 and the Mortgage and Mortgage 2." ***4** (emphasis added). (R. I, 325). The Amended Petition alleges no default other than a default in payments due. (R. I, 320-329). NASB's Amended Petition does not expressly allege a default based upon the death of Keith Volkland or upon the death of a guarantor. (R. I, 320-329).

The larger of the two mortgage loans was the 2004 loan. (R. IV, Exhibit 1). The 2004 loan was for a principal amount of $590,000. (R. IV, Exhibit 1). The stated maturity date of the $590,000 Note is April 1, 2034. (R.IV, Exhibit 1 at ¶ 3(ii)). This loan had a fixed term of thirty years without a stated balloon. (R. IV, Exhibit 1). The monthly payment amount stated under the Note was $3,766.06, based upon a thirty-year amortization. (R. IV, Exhibit 1). The Note provided for equal monthly payments until the year 2034. (R. IV, Exhibit 1).

The second loan was taken out in 2006. (R. IV, Exhibit 7). It was for a smaller principal amount of $155,000. (R. IV, Exhibit 7). The smaller note was originally to mature in February 2007. (R. IV, Exhibit 7). On three occasion, the maturity was extended a total of 51/2 years until October 2012. (R. IV, Exhibits 8, 9, and 10).

The Note and Note 2 state that they are to be governed and construed according to the law of Missouri. (R. IV, Exhibits 1 and 7). The two Guaranties also state that they are to be governed and construed according to the law of Missouri. (R. IV, Exhibits 21 and 22 at ¶ 15).

Both mortgage loans were guaranteed by Keith Volkland. (R. IV, Exhibits 21 and 22). The Guaranties were executed by Keith Volkland in an individual capacity, and not as a trustee or as a representative of a trust. (R. IV, Exhibits 21 ***5** and 22). Keith Volkland was retired. (R. III, 107-108). Keith Volkland was the father of defendant Douglas Volkland. (R. IlI, 107). Keith Volkland died on May 4, 2012 at the age of 88. (R. II, 135; R. V, Exhibit 40).

At the time of the guaranty of the $590,000 loan in March 2004, Keith Volkland was 80 years old. (R. V, Exhibit 40) (Date of Birth: XX/XX/1923). NASB obtained the promise of an 80-year old man to guaranty the payment and performance of a 30-year note. (R. IV, Exhibit 1, ¶ 3(ii); Exhibit 21¶2; R. V, Exhibit 40). At the time of the last modification of the smaller note (R. IV, Exhibit 10) (March 31, 2010), the guarantor, Keith Volkland, was 86 years old. (R. V, Exhibit 40). There is no evidence that NASB had a concern about the health or longevity of Keith Volkland at any time during the life of the loan. There is no evidence that NASB expected Keith Volkland to remain living at any given time during the term of the 30-year loan.

Both promissory notes contain virtually identical "event of default" provisions, listing eight "Events of Default" identified as (a) through (h). (R. IV, Exhibits 1 and 7). In pertinent part, the "Event of Default" paragraph in the notes state:

Each of the following events or occurrences shall constitute an "Event of Default" hereunder: (a) if default is made in the payment of any installment hereunder, or of any monetary amount payable hereunder, under the terms of any Loan Document, or under the terms of any other obligation of Maker to Lender, when the same is due; (b) if default is made in the performance of any other promise ***6** or obligation described herein, in any Loan Document, or in any other document evidencing or securing any indebtedness of any Maker to Lender; (c) ***if any person liable hereon... shall die..."*** (emphasis added). (R. IV, Exhibits 1 and 7).

NASB prepares its loan documents internally, but from time to time NASB uses outside legal counsel to review them and to provide templates. (R. III, 85:12 - 86:1). Specifically, the promissory notes at issue in this case were prepared internally by NASB. (R. III, 86:22-23). The Volklands were not involved in the preparation of the loan documents. (R. III, 104:5-23). The Volklands were not given an opportunity to review the loan documents prior to closing. (R. III, 104:1219). The Volklands were not represented by counsel at the time of the $590,000 loan. (R. III, 105:8-10).

There is no evidence as to the parties' intent as to the "event of default" provisions in the notes and mortgages. At trial, NASB's chief lending officer, Michael Braman offered a non-attorney opinion as to his interpretation of whether the death of Mr. Volklan's father would be an event of default. (R. III, 67:25 -68:5). Mr. Braman was not employed by NASB in 2004 and 2006 at the time of the loans, not having joined NASB until 2007. (R. III, 66:1-8).

There is nothing within the four corners of either Note expressly stating that Keith Volkland is "liable hereon." (R. IV, Exhibits 1 and 7). There is nothing within the four corners of either Note expressly stating that a guarantor is deemed to be "liable hereon." (R. IV, Exhibits 1 and 7). Keith Volkland did not sign either of the Promissory Notes. (R. IV, Exhibits 1 and 7). Keith Volkland is not identified as a ***7** Maker in either Note. (R. IV, Exhibits 1 and 7). The only evidence that Keith Volkland had any liability to NASB are the Guaranties themselves, which are not the Notes and are separate documents. (R. IV, Exhibits 21 and 22).

NASB learned of the death of Keith Volkland within ten days after his death. (R. IV, Exhibit 41; R. V, Exhibit 40). NASB's loan account status report dated September 18, 2012 expressly notes the death of Keith Volkland. (R. V, Exhibit 105). Neither Keith Volkland nor the estate of Keith Volkland are named as a defendant in this matter. (R. I, 320-329). NASB never took judicial action to hold Keith Volkland or the estate of Keith Volkland liable on the Notes. (R. I, 313-318; R. II, 171-191). NASB never took judicial action to hold Keith Volkland or the estate of Keith Volkland liable on the Guaranties. (R. I, 313-318; R. II, 171-191).

After the date that NASB learned of the death of the guarantor (May 14, 2012), on three occasions NASB accepted payments from defendants representing five monthly installments (May, June, July, August and September 2012) on the larger Note. (R. IV, Exhibit 12, last page). After the date that NASB learned of the death of the guarantor (May 14, 2012), on three occasions NASB accepted payments from defendants representing five monthly installments (May, June, July, August and September 2012) on the smaller Note. (R. IV, Exhibit 13, last page). For five months after obtaining knowledge of the death of the guarantor, NASB accepted payments from the Volklands on both loans without objection or reservation. (R. IV, Exhibits 12 and 13).

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NASB's status report dated September 18, 2012 was prepared after the date that NASB learned of the death of the guarantor. (R. V, Exhibit 105; R. IV, ***8** Exhibit 41). The report specifically notes the death of the guarantor. (R. V, Exhibit 105). The status report does not expressly mention, reference or identify any event of default or that the loans are considered to be in default status. (R. V, Exhibit 105).

On September 18, 2012, Michael Braman sent an email to Douglas Volkland referencing the need to cure a default. (R. IV, Exhibit 23). This email was not sent to defendant Janet Swinson. (R. IV, Exhibit 23). There is no evidence that Janet Swinson received any knowledge or notice that the death of Keith Volkland was considered to be an event of default until October 22, 2012. (R. IV, Exhibit 14).

As of September 2012, NASB considered the Volklands to have a good payment history for the loans and also determined that the $800,000 (approx.) combined loan balance was adequately secured by $1,000,000 (approx.) value of the real estate collateral. (R. V, Exhibit 105). The Defendants made several payments on the loans between May 2012 and the end of September 2012, and the lender accepted those payments with knowledge that the guarantor had died. (R. IV, Exhibits 12, 13, 41).

Payment of the two mortgage loans were current as of September 30, 2012. (R. IV, Exhibits 12, 13; R. V, Exhibit 105). However, in September 2012, the lender NASB demanded a $400,000 paydown on the 30-year loan even though there had been a good payment history and even though the loan was overcollaterized. (R. III, 111:9 - 113:17). The paydown demand was ***9** contrary to the 30-year payment schedule established for the loan. (R. IV, Exhibit 1).

The acceleration clause of the Note does not permit the lender to declare a partial acceleration of the loan balance. (R. IV, Exhibit 1). Rather the acceleration clause of the Note provides:

Lender may, at its option and in its sole discretion, declare the **entire balance** of the Note, all accrued interest, costs, expenses, charges, disbursements and fees payable by Maker hereunder or under any other Loan Documents and any other indebtedness evidenced hereby to be immediately due and payable, and upon such declaration **all sums outstanding and unpaid** under this Note and all other Loan Documents shall become and be in default, matured and immediately due and payable.... (emphasis added).

(R. IV, Exhibit 1 at p. 4).

NASB claims that the decision to require a paydown / payoff on the two loans was made at the end of August 2012. (R. III, 67:15-22). About ten days after deciding to require a payoff on both Notes, on September 10, 2012 NASB accepted a full monthly installment payment of $4,203 from the borrowers on the larger loan and a full monthly installment payment of $1,560.73 on the smaller loan. (R. IV, Exhibit 122 (last page) and Exhibit 13 (last page). In September 2012, the borrowers were current under both loans and they were not considered delinquent on their payments. (R. IV, Exhibits 12 and 13; R. III, 63:8-19; R. V, Exhibit 105).

With respect to discussions in September 2012 between Michael Braman on behalf of NASB and Douglas Volkland, Mr. Volkland testified as follows:

Q. All right. And in your discussions with Mr. Braman, what were you told that the bank's position was in regard to the two notes that you and your wife had ***10** at the bank?

A. We were told that they were going to require a $400,000 paydown on the 590; and we were told that they weren't going to renew 155.

Q. All right. And were you aware that the 155 was due October 1st of 2012?

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A. Of course. Yes I was.

Q. All right. And what if anything were you told about your opportunity to pay them something less than what they were demanding, and that was the additional $400000 adown on the lare note?

A On that first occasion we had no other opportunity.

Q. Was there ever a discussion that they wouldn't take anything less than what they were demanding?

A. Yes, there was.

Q. All right. Did you have any belief as to whether or not if you tendered just the 155 - or, really, whatever the balance was if it was only 133. But if you tendered that, it would be accepted?

A. No. Mike made it clear that we would be held in default if we didn't pay down the 590 down $400,000.

(R. III, 111:9-113:17).

Although Braman, testifying as NASB's chief lending officer, is not sure how blunt he was, he does not dispute that in September 2012 in substance he told Douglas Volkland that if the borrowers did not pay $400,000 on both loans by the end of 2012, that there would be a foreclosure. (R. III, 92:1-7). When asked about these conversations during cross-examination, Braman did not deny that the $400,000 payment was a demand on behalf of NASB to the borrowers. (R. III, 92: 11-93:8).

On Wednesday, October 3, 2012 at 7:21 p.m. in the evening, Braman sent an email demanding to speak with Douglas Volkland "immediately" about the "payoff and modification" demands. (R. IV, Exhibit. 23). Braman left the country ***11** on Friday, October 5, 2012 and was gone for several weeks. (R. Ill, 93:18-19). Braman was out of the country at the time of the default letters of October 22, 2012. (R. III, 93:9-19; R. IV, Exhibit 14).

Braman's testimony concerning his discussions in September 2012 with Mr. Volkland differs from Mr. Volkland's verbatim testimony set forth above only with respect to the amount of the cash paydown demanded. (R. Ill, 88:10-92:7; 111:9 -113:17). Braman testified the amount of cash demanded was $60,000 plus the payoff on the smaller note (approximately $140,000 which was about to mature) while Volkland testified the amount of cash demanded was a principal reduction of $400,000 on the larger note **plus** full payoff of the smaller Note, a combined total of approximately $550,000. (R. III, 91:20-92:7; 111:13-15).

Braman testified that the number of loans he serviced, the trip out of the country, and the length of time between September 2012 and the trial in November 2013 affected his recollection of his discussions with Douglas Volkland concerning the demand for a payment of $400,000. (R. III, 57:7-12). Braman did not retain notes of his conversations with Douglas Volkland in September 2012. (R. III, 90:19 -91:9). Braman testified that his practice of keeping notes and records regarding demands and discussions with borrowers regarding payment and foreclosure for an $800,000 commercial real estate loan is like going to a car dealership to buy a car. (R. III, 91:6-19). Braman does not keep the "different iterations of the back and forth" between borrower and lender. (R. III, 91:18-19).

NASB's status report dated September 18, 2012 concerning this loan reflects a requirement that the borrowers pay $400,000 to NASB by the end of ***12** 2012, notwithstanding the stated 30-year payment term of the larger Note, the scheduled monthly payments therein, and the fact that the Note was current and not delinquent. (R. V, Exhibit 105). The defendants did not make the payment on the larger Note for October 2012 because NASB had demanded a $400,000 principal reduction on the larger Note contrary to the terms of the Note. (R. III, 112:2-22).

Braman advised Douglas Volkland that the reason for the $400,000 principal paydown demand on the larger note was undercollateralization. (R. III, 112:23 - 113:1). Other than a discussion of the undercollateralization and the death of the guarantor, Braman did not identify any other events of default during his discussions with Douglas Volkland. (R. III, 118:16-20).

There is no evidence that NASB was undercollateralized with respect to these loans. There is no written evidence which contradicts the content of the two status reports. (R. III, 72:25 - 73-22). At no time in 2012 was NASB undercollateralized. (R. V, Exhibit 105). Braman gave Volkland an inaccurate and unsupported justification for the $400,000 paydown demand. (R. V, Exhibit 105; R. III, 112:23-113:1).

On September 18, 2012 and March 31, 2012, NASB prepared separate reports to determine whether the two loans should continue to be carried on NASB's books on an accrual basis and whether the loans were considered to be impaired. (R. III, 61:8-13; R. V, Exhibit 105). NASB considers a loan impaired when it is likely that NASB will be unable to collect all amounts due according to ***13** the contractual terms. (R. V, Exhibit 105). NASB concluded that the loans were not impaired. (R. V, Exhibit 105) (“Is this loan impaired?” “No”); R. III, 60:5-8).

Douglas Volkland was the sole heir and beneficiary of Keith Volkland. (R. II, 135). Both of the status reports stated that full payment of principal and interest was expected. (R. V, Exhibit 105) (p. 2: “Is payment in full of principal and interest expected?” “Yes”). Both of the reports indicate that the loan is not a “troubled debt” meaning that there were no reasons related to the debtor's financial difficulties that would require NASB to grant concessions that it would not otherwise consider. (R. V, Exhibit 105) (p. 1: “Is this loan a TDR?” “No”).

Braman testified that the general assessment in the reports was not wrong. (R. III, 72:6-8). While Braman testified that he was “very concerned about their [Volklands'] ability to make payments,” Braman never testified that the prospect of payment was actually “impaired” as such term is used in Event of Default (h) under the Note. (R. IV, Exhibit 1; R. III, 37:9-11). There is no written evidence from NASB's loan files indicating a payment concern regarding these two loans. NASB produced no other status reports or internal documents describing any concern that the prospect of full payment was impaired. There is no written evidence that NASB deemed itself insecure as to the loans.

In six months (from March 2012 to September 2012), the combined principal loan balance had decreased $13,500 from $805,000 (approx.) to $791,500 (approx.). (R. V, Exhibit 105). From March 2012 to September 2012, the loan-to-value ratio remained at 80%, meaning that NASB maintained an equity cushion of about 20% or $200,000 throughout the entire first three quarters of 2012. (R. V, ***14** Exhibit 105). As of September 18, 2012, the status reports suggested one million dollars in collateral compared to a loan balance of $786,000. (R. V, Exhibit 105). Neither of the status reports recommends that NASB declare a default or commence a foreclosure. (R. V, Exhibit 105).

There is no evidence as to a change in the borrowers' financial condition, nor a change in the condition of the collateral, nor a change in the value of the collateral, between September 18, 2012 (the date of the status report) and October 22, 2012 (the date of the default letters). In the five-month period after becoming aware of the death of the guarantor (May 14, 2012) (R. IV, Exhibit 41) until declaring a default (October 22, 2012) (R. IV, Exhibit 14), NASB did not obtain any appraisals of the any of the three parcels of property securing the loan. (R. III, 82:10-24).

In the entire history of the loans, NASB is not aware of any appraisal ever being conducted of the 70-acre Moonlight Road property which served as collateral for the loan. (R. III, 82:10-24; 84:3:18). However, at the time of the default letters, NASB's files contained some records from 2004 of someone's estimated value of the 70-acre Moonlight Road property at between $5,250,000 and $7,000,000 based upon comparable sales information. (R. V, Exhibit 108). On March 31, 2012, NASB's opinion of the loan was that the loan was being adequately protected by the value of the collateral. (R. III, 70:12-21). At trial, there was no opinion testimony from a real estate appraiser as to the value of the collateral. Mr. Braman, NASB's only corporate witness, is not an appraiser and gave no opinion as to the market value of the property as of October 2012.

***15** As of March 31, 2012, NASB regarded the loan account as "paid as agreed" and noted the Volklands had a good payment history over the prior eight years since the beginning of the loan. (R. V, Exhibit 105). NASB did not declare a default as to any late payment. (R. III, 63:5-7). NASB never took an adversarial stance with the borrowers regarding late payments. (R. III, 62:1-7). As long as the borrowers are making payments, even late payments are considered paid as agreed. (R. III, 71:10-14).

Between May 10, 2004 (R. IV, Exhibit 3) and October 2012 (R. IV, Exhibit 43), the Volklands had reduced the principal debt on the larger note by $283,000, from $940,000 to $657,000. (R. IV, Exhibit 43). This equates to a 30% reduction in principal. ($940,000 x .30 = $282,000). Between January 9, 2006 (R. IV, Exhibit 7) and October 2012, the borrowers had reduced the principal balance on the smaller note by $21,395, from $166,000 down to $133,605. (R. IV, Exhibit 43).

The default letters dated October 22, 2012 were sent more than five months after NASB became aware of the death of the guarantor. (R. IV, Exhibits 14 and 41). NASB believed the default letters accurately stated the position of NASB as of that date. (R. III, 93:20-94:1). The default letters do not cite any problem with a tax lien, any problem with the failure of the borrowers to provide updated financial information, any problem with late payments, any problem with the maintenance or condition of the collateral, any problem with the failure to open a probate estate, nor any problem with the escrow balance. (R. IV, Exhibit 14).

The default letters do not expressly identify, claim or refer to an "event of default" under either mortgage. (R. IV, Exhibit 14). The default letters do not ***16** declare a default under either mortgage. (R. IV, Exhibit 14). The default letters do not expressly identify or refer to any provision of either mortgage. (R. IV, Exhibit 14). There is no evidence of an affirmative, overt act taken by NASB to exercise its option to accelerate the loan balance based Upon an express event of default set forth in either mortgage. The default letters do not expressly claim or refer to subsection (b) of the "Event of Default" paragraphs in the Notes. (R. IV, Exhibits 1, 7, and 14).

NASB's Amended Petition for Mortgage Foreclosure does not allege a default based upon tax liens, the escrow balance, the condition or remodeling of the collateral, false statements, the lack of a probate estate, late payments or a problem with not providing updated financial information to the lender. (R. I, 320-329). While cited in the Pretrial Order (R. II, 80-81), there is no evidence of an event of default based upon (a) false statements made to NASB by the borrower's; (b) failure to maintain the residence at 9714 Belinder or a failure to complete the remodeling of such property; or (C) a failure to maintain escrowed funds.

During the period of September 2012 through October 5, 2012 (when Braman left the country for a month), there were at least two e-mails sent by Braman (October 3, 2012 and September 18, 2012) (R. IV, Exhibits 23 and 41) as well as verbal discussions and face-to-face meetings between them. In all of these encounters and communications between lender and borrower, NASB did not once advise the Volklands that there was any problem with (a) a tax lien; (b) the need for updated financial information; (c) recent late payments; (d) the condition or maintenance of 9714 Belinder; or (e) the escrow balance. (R. III, 118:16-20; ***17** 56:12-23; 63:5-7; 71:10-14; 111:3 - 113:22). Braman did not advise the borrowers that NASB considered these things as being grounds for a default. (R. III, 115:7 - 117:25; 118:16-20).

Braman had no specific knowledge as to whether the Volklands ever received a request to provide updated financial information. (R. III, 95:3 - 96:15). NASB was unble to produce a written request for such information addressed to the Volklands. (R. III, 95:10-15). Neither of the status reports from 2012 mention any problem with tax liens, escrow balance, or condition or maintenance of the collateral. (R. V, Exhibit 105). There is no evidence as to the amount of the tax lien. (R. Ill, 35:21 - 36:3). There is no evidence when the tax lien arose, although counsel suggested that it was sometime "along the way" and prior to May 2012. (R. III, 34:20-22).

9714 Belinder has been the borrowers' primary residence at all times during the loan. (R. III, 105:11-21) (R. V, Exhibit 105 ("the SF [single family] home is the borrowers' personal residence"). Douglas Volkland and Janet Swinson have never abandoned 9714 Belinder as their primary residence. (R. III, 106:6-8).

In its Memorandum Decision and Journal Entry of Judgment, the district court awarded $28,704.87 to NASB for attorney fees and expenses. (R. II, 180; R. IV. Exhibit 43). The amount of attorney fees and expenses incurred by NASB in connection with the mortgage foreclosure case (12CV09467) is not discernable from Exhibit 42 because NASB has not segregated fees and expenses for the two separate actions. (R. IV, Exhibit 42). NASB did not prevail in the other district court action, 12 CV 8619). (R. II, 190-191).

***18** Following its judgment entered May 23, 2014 (R. II, 171), and after the appeal in this matter had been docketed, the district court modified the amount of the judgment on the two notes to award additional pre-judgment interest to NASB from December 1, 2013 to May 23, 2014, a total of 174 days of additional pre-judgment interest, at a combined total of $204.89, resulting in a grand total of $35,650.86 in additional interest from December 1, 2013 until May 23, 2014. (R. VI, 55-56). Although no such pre-judgment interest was expressly itemized in the Memorandum Decision, by its Journal Entry dated October 8, 2014, the district court stated: "[I]n the Court's Memorandum Decision, this Court clearly contemplated the assessment of... interest from November 30, 2013, forward." (R. VI, 55).

***19 Arguments and Authorities**

Issue I: The Defendants did not default under either promissory note because their payments under the loans were current and because the death of the borrowers' guarantor did not constitute an event of default.

Standard of Review and Preservation of the Issue

"A substantial competent evidence standard of review is used in cases with stipulated facts when the record includes conflicting testimony or when the case involves oral testimony that is conflicting." *State v. Brown,* 272 Kan. 843, 845, 35 P.3d 910 (2001). Substantial competent evidence is that which is both relevant and substantial and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. *See also Bldg. Constr. Enters., Inc. v. Pub. Bldg. Comm'n of Johnson Cnty.,* 296 P.3d 1139 (Kan. App., 2013). In other words, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *Venters v. Sellers,* 293 Kan. 87, 93, 261 P.3d 538 (2011).

This Court will review a trial court's "findings of fact to determine if the findings are supported by substantial competent evidence and are sufficient to support the [trial] court's conclusions of law." *Hodges v. Johnson,* 288 Kan. 56, 65, 199 P.3d 1251 (2009).

Where the question turns on the interpretation of written documents, appellate review is unlimited. *Shamberg, Johnson & Bergman, Chtd. v. Oliver,* 289 Kan. 891, 900, 220 P.3d 333 (2009). *See also Bank of Am. v. Narula,* 46 Kan.App.2d 142, 261 P.3d 898 (Kan. App., 2011). This Court does have de novo review over the district court's conclusions of law. *See American Special Risk* ***20** *Management Corp. v. Cahow,* 286 Kan. 1134 1141, 192 P.3d 614 (2008). To the extent that this case also requires the interpretation of a contract, the legal effect of a written instrument is a question of law. The Court may construe the contract and its legal effect regardless of the construction made by the district court. *Osterhaus v. Toth,* 291 Kan. 759, 768, 249 P.3d 888 (2011).

Defendants have preserved their right to contest the foreclosure and the existence of a default. (R. II, 1 - 6; 83 - 84; R. III, 9-13; R. VI, 1 - 34). *Analysis*

The contract documents at issue in this case have "choice of law" provisions. The Promissory Notes and Guaranties state that they are to be governed and construed by Missouri law, while the Mortgages state that they are to be governed and construed in accordance with Kansas law. With respect to the issues of contract enforcement and construction identified below, the application of Missouri law to the guaranties and notes in the present case is not offensive to the public policy in Kansas. *Cf. Brenner v. Oppenheimer & Co.,* 273 Kan. 525, 44 P.3d 364 (Kan. 2002) (parties are permitted to choose the law applicable to

their agreement, and Kansas courts will generally effectuate the law chosen by the parties unless there are strong public policy concerns). Since there is little difference between Missouri and Kansas law on these issues, there is no actual conflict of law. However, where appropriate the Court should consider Missouri law in addition to Kansas law regarding these contract issues.

Whether NASB is entitled to relief in this matter, e.g. a foreclosure, depends upon whether NASB has met its burden of proof to establish a default. ***Cf. Student* *21 *Loan Marketing Ass'n v. Hollis,*** 121 P.3d 462 (Kan. 2005) (in an action upon promissory note, the burden of proof is on the plaintiff to show the defendant's breach).

In this case, the Court's review of the circumstances of an event of default are limited to those defaults set forth in NASB's First Amended Petition. The First Amended Petition (filed September 4, 2013) alleges only a payment default. **See** First Amended Petition ¶ 16 (Appendix 6). Accordingly, the trial court was permitted only to consider whether there was a ***payment default*** by the borrowers, Douglas Volkland and Janet Swinson. Since there was no payment default, there was no substantial competent evidence to support the judgment of foreclosure.

A pretrial order may amend the pleadings if necessary or desirable. K.S.A. § 60-216(c)(2)(c). NASB attempted to describe several new events of default in the Pretrial Order. However, in the Pretrial Order, Defendants objected to all of the new theories advanced by NASB as to the existence of one or more events of default. When a court takes action as reflected in a pretrial conference order, the order controls the subsequent course of the action. K.S.A. § 60-216(d). However, when the court takes no action as to the objections preserved in the pretrial order, the order is not controlling.

Presenting a new theory of recovery one week before trial for the first time in a pretrial order does not automatically amend the pleadings if there is an unresolved objection. The method used by NASB to unilaterally amend the pleadings without judicial action does not comport with the requirements of K.S.A. § 60-215. An amendment of the pleadings requires a motion, leave of court, and ***22** a showing that justice requires the amendment. K.S.A. § 60-216 does not eliminate these requirements in cases where the opposing party has preserved an objection.

The Pretrial Order dated November 18, 2013 (one week prior to trial) confirms that no motion to amend the pleading was even requested on behalf of NASB. See Pretrial Order at p. 11 ("no pending motions") (Appendix 21). The new theories of recovery advanced by NASB in the Pretrial Order are not controlling. With one notable exception, the district court rejected NASB's attempt to add new theories one week prior to trial, which was obviously well after the close of discovery. The Court properly concluded that it was not bound to consider all of the events of default claimed by NASB in the Pretrial Order. Memorandum Decision at p. 16 (Appendix 52).

The trial court correctly found that the death of Keith Volkland was not pleaded as a ground for default. Notwithstanding this conclusion, however, the district court based its entire ruling as to the existence of a default upon the death of Keith Volkland. In other words, in entering judgment that would allow a foreclosure, the trial court erroneously based its entire ruling in that regard upon the death of Keith Volkland. The ruling should not be allowed to stand. As a matter of law, the district court should have found that there was no default under the terms of either of the promissory notes and no default under the terms of either mortgage because there was no monetary or payment default at the time of the purported acceleration of the loan balances. The trial court committed error in basing its ruling upon an unpleaded event of default.

***23** The Notes and Mortgages all contained "optional acceleration" clauses, meaning that the lender could not accelerate the loan balances until the lender exercised its option to affirmatively take action to declare a default and accelerate the maturity of the loan. *Cf. Foundation Property Investment v. CTP, LLC,* 186 P.3d 766, 286 Kan. 597 (Kan. 2008) (discussing optional acceleration clauses). Before any such action was taken, NASB had already breached the agreement.

NASB's ultimatum to the Volklands for a principal reduction of $400,000 by the end of 2012 constitutes a material breach of the terms of the Note, which was to be repaid over a thirty-year term in equal monthly payments until 2034. NASB materially

breached the terms of the Note by its improper demand for a principal reduction. Such demand occurred prior to NASB's exercise of its option to declare a default by way of its letter dated October 22, 2012.

Missouri has adopted the "first to breach" rule, which holds that a party to a contract cannot claim its benefit where it is the first to materially violate its terms. *R.J.S. Sec. Inc. vs. Command Sec. Serv. Inc.,* 101 S.W.3d 1, 18 (Mo. App. 2003); *Classic Kitchens and Interiors v. Johnson,* 110 S.W.3d 412, 417 (Mo. App. 2003). Kansas also follows the first to breach rule with respect to loan agreements. *Bank of America v. Narula,* 46 Kan.App.2d 142,261 P.3d 898 (Kan. App. 2011) (Syl. ¶ 3 "the first to breach rule precludes a party who has first materially breached a contract from attempting to enforce that contract until the breach is cured and entitles the nonbreaching party to suspend or terminate performance under that contract as long as the breach remains uncured).

24** The demand for a $400,000 principal reduction was a material breach of the terms of the Note and therefore the borrowers were excused from making a payment in October 2012 on the larger Note. Similarly since NASB would not have accepted less than the $400,000, a payment on the smaller note was excused. Further attempts to satisfy the smaller note would have been futile. A party to a contract is not required to make a futile gesture of tendering an amount which he knows will be rejected. ***In re Wurtz Estate, 520 P.2d 1308 (Kan. 1974); *CIT Group/Equipment Financing, Inc. v. Integrated Financial Services, Inc.,* 910 S.W.2d 722 (Mo. App. 1995) (the law will not require the performance of a futile act). A wrongful refusal to accept payment on a debt waives formal tender of the money and the entity refusing is not entitled to interest on the note thereafter. *Bremeyer v. School Ass'n of Swedish,* 86 Kan. 644 (1912). NASB was precluded from declaring a default or accelerating the loan balances until it rescinded its improper ultimatum. NASB did not withdraw this ultimatum.

Even if this Court upholds the district court's decision to consider whether the death of the guarantor triggered an event of default, the foreclosure relief awarded to NASB still cannot be sustained. An event of default under the Note predicated upon a death requires the death of a person "**liable hereon.**" (emphasis added). The trial court erroneously construed the "event of default" provisions to find that the death of Keith Volkland triggered a default. Keith Volkland was never liable upon the Note itself. Keith Volkland was liable to NASB only because he executed Guaranties in which he agreed to guarantee the payment and performance of the Note.

***25** Under the law of both Missouri and Kansas, a guaranty is an independent and collateral undertaking. In *Mercantile Bank, N.A. v. Loy,* 77 S.W.3d 93 (Mo. App. 2002), the Missouri Court of Appeals stated:
We observe, however, that the Eastern District in ***Jamieson-Chippewa Inv. Co.,*** recently reiterated the proposition that a guaranty was a "collateral agreement" consisting of "an independent contract" imposing "responsibilities different from those imposed in the agreement to which it is collateral." *Id.* at 87; ***see also Ulreich v. Kreutz,*** 876 S.W.2d 726, 728 (Mo. App.1994) and Standard Meat Co. v. Taco Kid of Springfield, Inc., 554 S.W.2d 592, 595 (Mo. App. 1977). These latter three cases point out that while a guaranty may be construed together with a contemporaneously executed agreement dealing with the same subject matter, "this does not mean that those agreements constitute a single contract," rather "the liability of the guarantor remains primarily dependent on the guaranty agreement itself." ***Jamieson-Chippewa,*** 996 S.W.2d at 87; Taco Kid, 554 S.W.2d at 595; ***see Ulreich,*** 876 S.W.2d at 728. Unlike the facts in Commerce Bank, which involved financing of a stock swap in which the trustee in bankruptcy complained involved "fictitious consideration," to the bank, 645 S.W.2d at 19, here there is nothing to suggest that the transaction was anything other than a run-of-the mill financing mechanism by which individual guarantors gave added security for a corporate debt and where the guarantors' liability arose from the guaranty agreement itself, in which event should be "strictly construed according to the terms of the guaranty agreement." ***Royal Banks,*** 819 S.W.2d at 362.

In ***Savannah Place, Ltd. v. Heidelberg,*** 122 S.W.3d 74 (Mo. App. 2003), the Missouri Court of Appeals stated:

> We observe that [a] guarantor agrees to become secondarily liable for the obligation of a debtor in the event the debtor does not perform the primary obligation. A guaranty is... a species of contract. The rules of construction applicable to a guaranty are the same as applied to other contracts. A guaranty is a collateral

> agreement for another's undertaking, and is an independent contract which imposes responsibilities different from those imposed in the agreement to which it is collateral. (citations omitted)

***26** Kansas law is in accord. In *Kauk v. First Nat. Bank of Hoxie,* 613 P.2d 670, 5 Kan.App.2d 83 (Kan. App., 1980), the Kansas Court of Appeals stated:

> A guaranty is a contract between two or more persons, founded upon consideration, by which one person promises to answer to another for the debt, default or miscarriage of a third person, and, in a legal sense, has relation to some other contract or obligation with reference to which it is a collateral undertaking. The contract of a guarantor is his own separate contract. It is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and is not an engagement jointly with the principal to do the thing. A guarantor, not being a joint contractor with the principal, is not bound like a surety to do what the principal had contracted to do, but answers only for the default of the principal. ***The original contract of his principal is not his contract.*** (citations omitted) (emphasis added).

The conclusion that Keith Volkland is not directly liable on the Notes is bolstered by reference to the statute of frauds. Guarantor liability is dependent upon satisfaction of the statute of frauds in both Missouri and Kansas. ***Walton v. Piqua State Bank,*** 204 Kan, 741, 466 P.2d 316 (1970); ***Owens v. Goldhammer,*** 77 S.W.3d 76 (Mo. App. 2002). In order for the Note itself create guarantor liability, the Note would have to contain the signature of Keith Volkland. It, of course, does not. As the Note is ***"not his contract,"*** Keith Volkland is not "liable hereon."

NASB presented no evidence of the intended meaning of the subject "event of default" provisions. If NASB wanted to have the ability to accelerate a promissory note with a 30-year term upon the death of a guarantor (who was already 80 years old of the time of the closing), it could have clearly expressed that intention. NASB did not do so. Accordingly, the death of Keith Volkland is not an event of default under either of the promissory notes.

***27** Assuming that there is some ambiguity as to the meaning of the phrase "liable hereon," any such ambiguity would have to be construed against the drafter, which is NASB. Ambiguity exists if the contract contains provisions or language of doubtful or conflicting meaning. *Liggatt v. Employers Mut Casualty,* 273 Kan. 915, 921, 46 P.3d 1120 (2002). If the meaning is ambiguous, the contract must be construed against the drafter of the instrument and liberally towards the other party. *Coble v. Scherer,* 3 Kan.App.2d 572, 598 P.2d 561 (Kan. App. 1979); *Metropolitan Life Ins. Co. v. Strnad,* 255 Kan. 657, 662, 874 P.2d 1362 (1994). Any ambiguity must be construed against the drafter of the contract at issue. *See C & W Spreaders, L.L.C. v. Wosoba,* 324 S.W.3d 462 (Mo. App. 2010).

Resort to the terms of the mortgages is of no aid to NASB in its attempt to foreclose on the basis of the death of Keith Volkland. Mortgage 2 (the smaller loan) contains no event of default based upon anyone's death. In order for a default under the Mortgage to also be a default under the Notes, there would have to be a default "made in the performance of any other promise or obligation described herein, in any Loan Document, or in any other document evidencing or securing any indebtedness of Maker to Lender." (emphasis added). Only a default in "performance" under the Mortgage would also constitute a default under the Notes. A death is not a default of performance.

Since Douglas Volkland was the sole heir and beneficiary of Keith Volkland, the death of Keith Volkland, who was 87 years old and long since retired, did not materially impair the prospect of full payment. Under these circumstances, the ***28** death of Keith Volkland does not constitute an event of default under any of the loan documents, specifically including the mortgage.

Moreover, the default letters from NASB do not declare a default under either mortgage nor do they signify any other overt, affirmative action to accelerate the obligations of the mortgages. The default letters do not refer to, nor rely upon, any events of default under the mortgages. In order to effectuate acceleration and render the entire debt due on the basis of a default

under the mortgage, the mortgagee must perform some affirmative, overt act evidencing an intention to take advantage of the acceleration provisions. ***Lowry v. Northwestern Sav. & Loan Ass'n,*** 542 S.W.2d 546 (Mo. App. 1976). "An acceleration clause is not self-enforcing. It creates only an option in the holder of the note to treat the entire debt as due. To invoke the acceleration clause, the holder of the note must perform, some affirmative, overt act evidencing his intention to take advantage of the accelerating provision." ***Executive Hills Home Builders, Inc. v. Whitley,*** 770 S.W.2d 507 (Mo. App. 1989) (citations omitted). It is well settled that the lender must clearly and unequivocally express an intention to exercise the option to accelerate and then affirmatively act toward enforcing that intention in order to properly exercise the option. ***FGB Realty Advisors, Inc. v. Keller,*** 923 P.2d 520, 22 Kan.App.2d 853 (Kan. App. 1996). Accordingly; NASB cannot rely upon the default provisions of the mortgages to establish a proper acceleration of the loan prior to foreclosure. No default was declared under the mortgages, and no mortgage balance was expressly accelerated.

***29** Even if this Court were to consider other events of default as unilaterally inserted into the Pretrial Order by NASB without being accompanied by a motion to amend the pleadings and without a showing that such an amendment would be in the interest of justice, NASB simply did not meet its burden to show any other circumstances claimed to constitute grounds for a material default under any of the loan documents. Memorandum Decision at p. 16, fn 7; Appendix 52). Although cited in the Pretrial Order, NASB presented no testimony or exhibits to establish a default based upon (a) purported false statements provided to NASB by the borrowers; (b) a purported failure to complete the remodeling at 9714 Belinder or otherwise maintain the property; and (c) a purported failure to maintain a sufficient escrow balance. There is no evidence of the amount of the tax lien, nor the date upon which a tax lien was asserted. Accordingly, NASB does not establish that a tax lien would constitute material default under any of the loan documents.

There was no credible evidence that NASB made a specific request for updated financial information from the borrowers. NASB received a large volume of financial information from the borrowers over the life of the loan, and there was no testimony that the information was insufficient. NASB made no verbal follow-up to any computer form letter it claims it sent to the borrowers. It is noted that neither of the status reports from 2012 have been adversely impacted by the purported lack of updated financial information. The September 18, 2012 status report states that while NASB is "working to obtain verification." It is clear that the author of the report as able to complete the report without verified financial information. Mr. Braman, testifying as NASB's chief lending officer, ***30** admitted that late payments were not the problem. The district court did correctly find that NASB did not sustain its burden of proof to demonstrate a proper acceleration of the loan on the basis of late payments, financial statements or a tax lien of an undetermined amount Memorandum Decision at p. 16, fn 7; Appendix 52).

Since there were no events of default, the loans were improperly accelerated. NASB made a series of improper demands for payment. The $400,000 paydown demand was improper and in breach of the 30-year term of the loan, which did not permit partial acceleration. The default letter also improperly made a demand for payment. Due to the absence of default and the improper loan demands of NASB, the foreclosure should not be allowed to stand. The judgment of foreclosure should be reversed because there is no substantial competent evidence to establish the existence of an event of default and because the trial court erroneously construed the default provisions of the loan documents.

***31 Issue II: The trial court erred in failing to invoke equitable principles to relieve the defendants from acceleration of the loan balances because the borrowers had a good payment history, the plaintiff lender was significantly overcollateralized and because the death of the guarantor was a natural event beyond the borrowers' control.**

Standard of Review and Preservation of the Issue

First Nat'l Bank of Omaha v. Centennial Park, LLC, 48 Kan.App.2d 714, 303 P.3d 705 (Kan. App., 2013) sets out the applicable standard of review for Issue II:

Under Kansas law, "the application of an equitable doctrine rests within the sound discretion of the trial court. [Citation omitted.]" *National City Mortgage Co. v. Ross,* 34 Kan.App.2d 282, 287, 117 P.3d 880, rev. denied 280 Kan. 984 (2005). A judicial action constitutes an **abuse** of discretion if the action: (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error

of law; or (3) is based on an error of fact. *State v. Ward,* 292 Kan. 541, 550, 256 P.3d 801 (2011), cert. denied --- U.S. ---, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012) (criminal); *Critchfield Physical Therapy v. The Taranto Group, Inc.,* 293 Kan. 285, 292, 263 P.3d 767 (2011) (civil). Moreover, an **abuse** of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. *O'Brien v. Leegin Creative Leather Products, Inc.,* 294 Kan. 318, 331, 277 P.3d 1062 (2012) (civil); *State v. Woodward,* 288 Kan. 297, 299, 202 P.3d 15 (2009). The party ***32** asserting that the trial court **abused** its discretion bears the burden of showing this **abuse** of discretion. *State v. Wells,* 289 Kan. 1219 1226, 221 P.3d 561 (2009).

Defendants raised this issue below, and fully preserved their right to seek equitable relief from the harsh effects of a loan default based upon a natural occurrence such as the death of an **elderly** guarantor. (R. VI, 27- 28).

Analysis

Throughout the life of the loan and specifically throughout the first three quarters of 2012, the Volklands had substantially complied with their obligations under the loan documents. Where there has been substantial compliance, no material breach can exist. Further, borrowers demonstrated good faith performance and a good payment history. They have made a total reduction in principal of over $300,000 on the two loans over an eight-year period. The borrowers had been performing the essential purpose of the loan agreement by making their payments, providing financial statements, and successfully obtaining renewals of the smaller loan. NASB perceived no impairment of payment and expected full payment as of September 18, 2012, notwithstanding a few minor problems with recent late payments.

In *First Nat'l Bank of Omaha v. Centennial Park LLC,* 48 Kan. App.2d 714, 303 P.3d 705 (Kan. App. 2013), the Kansas Court of Appeals recently noted:

Generally, courts may invoke equitable principles to relieve a mortgagor from acceleration of the maturity of a debt secured by a mortgage or deed of trust. 59 C.J.S., Mortgages § 681. Even so, courts should use their power to refuse to accelerate the maturity of a debt on equitable grounds sparingly and should refuse to foreclose a mortgage only under certain clearly defined circumstances. ***33** 59 C.J.S., Mortgages § 681. When making this determination, courts generally have considered the following factors: (1) the conduct of the parties; (2) the amount paid in reduction of the debt; and (3) the improvements made on the property by the mortgagor. 59 C.J.S., Mortgages § 681. Courts also may use equity to provide relief to the mortgagor against acceleration there the default results from accident, mistake, or where strict enforcement of acceleration would impose an inconceivable hardship on the mortgagor and give the mortgagee an unconscionable advantage. 59 C.J.S. Mortgages § 681; see also Greenberg v. Service Business Forms Industries, 882 F.2d 1538, 1542 (10th Cir. 1989) ("a court in equity can relieve a debtor from the hardship of acceleration based on accident, mistake, fraud, or inequitable conduct of the creditor").

Under the principles of contract law, the doctrine of substantial performance provides that a party's performance may be considered complete if the essential purpose of the contract is accomplished and that party has made a good-faith attempt to comply with the terms of the agreement even though he or she fails to meet the precise terms of the agreement. Dexter v. Brake, 46 Kan. App. 2d 1020 1033, 269 P.3d 846 (2012).

Under the circumstances described above and in view of the guidance of ***Centennial Park,*** the trial court **abused** its discretion in not providing equitable relief to spare the defendants from the harsh and unfair effects of the acceleration of the loans based upon purely technical grounds described in the loan documents, such as the death of an 87-year old retired guarantor whose sole heir and beneficiary would remain liable on the loan. Accordingly, the judgment of foreclosure should be reversed. The trial court **abused** its discretion in not according equitable relief to the Volklands.

***34 Issue III: The trial court erroneously awarded NASB attorney fees because plaintiff did not segregate the attorney fees incurred in connection with the collection of the promissory note from attorney fees incurred by plaintiff in an unsuccessful lawsuit against the guarantor's trust.**

Standard of Review and Preservation of the Issue

In ***Davis v. Miller,*** 269 Kan. 732, 7 P.3d 1223 (Kan., 2000), the Kansas Supreme Court provided the following standard of review regarding an award of attorney fees: "A district court's determination of the reasonableness of claimed attorney fees is reviewed on appeal under an **abuse** of discretion standard of review. Judicial discretion is **abused** when judicial action is arbitrary, fanciful, or unreasonable." (citations omitted).

The issue of the district court's authority to award attorney fees is a question of law over which appellate review is unlimited. ***Idbeis v. Wichita Surgical Specialists,*** 285 Kan. 485, 490, 173 P.3d 642 (2007). Where the trial court has authority to grant attorney fees, its decision is reviewed under the **abuse** of discretion standard. ***Tyler v. Employers Mut. Cas. Co.,*** 274 Kan. 227, 242, 49 P.3d 511 (2002). While the authority to award attorney fees is a question of law, the amount of such an award is within the sound discretion of the district court and will not be disturbed on appeal absent a showing that the district court **abused** that discretion. ***Johnson v. Westhoff Sand Co.,*** 281 Kan. 930, 940, 135 P.3d 1127 (2006).

In *Thoroughbred Associates v. Kan. City Royalty Co.,* 45 Kan.App.2d 312, 248 P.3d 758 (Kan. App., 2011), the appellate court noted "The trial court's determination of a fee award is intended to be a comparatively streamlined ***35** process that should not result in extended satellite litigation. To accomplish that goal, counsel for the party seeking fees are expected to furnish the court with detailed billing records and other materials from which the information necessary to a reasoned fee determination may be readily extracted." (citations omitted).

Defendants preserved their right to challenge attorney fees. (R. VI, 29).

Analysis

In its Memorandum Decision and Journal Entry of Judgment, the district court awarded $28,704.87 to NASB for attorney fees and expenses. (R. II, 180; R. IV, Exhibit 43). NASB simultaneously pursued two separate lawsuits. One lawsuit was to obtain recovery against a trust based upon some sort of unjust enrichment or constructive trust. The matters were tried together. NASB did not prevail in the trust litigation lawsuit, District Court Case No. 12 CV 8619,

The amount of attorney fees and expenses incurred by NASB in connection with the mortgage foreclosure case (12CV09467) is not discernable from Exhibit 42 because NASB has not segregated fees and expenses for the two separate actions. (R. IV, Exhibit 42). The trial court **abused** its discretion in awarding $28,704.87 in attorney fees. The award is arbitrary and fanciful. Plaintiff presented no evidence from which a "reasoned fee determination may be readily extracted."

When a party both prevails on a claim allowing attorney fees and loses on other claims, "a court should award fees based only on the time spent on the successful claim permitting them." *DeSpiegelaere v. Killion,* 24 Kan.App.2d 542, Syl. ¶ 1, 947 P.2d 1039 (1997). When that happens, the party seeking fees must ***36** provide the court with an adequate basis to "segregate the work" for which fees may be allowed from the rest of the time billed to the client. 24 Kan.App.2d at 542, Syl. ¶1, 947 P.2d 1039. If a party seeking the recovery of attorney fees fails to segregate the fees, it will not be entitled to a recovery. ***Werdmann v. Mel Hambelton Ford, Inc.,*** 32 Kan.App.2d 118, 133, 79 P.3d 1081 (2003).

The judgment awarding attorney fees to NASB should be reversed or reduced by the $28,704.87 amount allocated to attorney fees. It was an **abuse** of discretion for the trial court to have awarded any attorney fees on the basis of the evidence presented by NASB.

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***37 Issue IV: The trial court erroneously modified the judgment after the instant appeal had been docketed by awarding the plaintiff additional pre-judgment interest, thereby eliminating the surplus proceeds from the foreclosure sales and creating a deficiency.**

Standard of Review and Preservation of Issue

This issue presents a question of appellate jurisdiction, over which this Court has unlimited review. ***State v. Ellmaker,*** 289 Kan. 1132 1147, 221 P.3d 1105 (2009), cert. denied---U.S.---, 130 S.Ct. 3410, 177 L.Ed.2d 326 (2010).

Defendants have preserved their right to object to modifications of the judgment while this matter is on appeal. (R. II, 210-211).

Analysis

Defendants timely filed a notice of appeal on June 23, 2014, and they timely docketed the appeal on July 14, 2014. As of July 14, 2014, the District Court no longer had jurisdiction to correct any clerical mistakes or mistakes arising from oversight or omission without leave from the appellate court. K.S.A. § 60-260(a). Such leave has not been sought nor granted. Moreover, there was no timely post-judgment motion to correct or modify the judgment.

A trial court does not have jurisdiction to modify a judgment after it has been appealed and the appeal docketed at the appellate level. ***In the Matter of Robinson's Estate,*** 232 Kan, 752, 659 P.2d 172 (1983). It is a welksettled general rule in Kansas that a district court loses jurisdiction over the case once an appeal is docketed. ***See Sanders v. City of Kansas City,*** 18 Kan.App.2d 688, 692, 858 P.2d 833 (1993) ('We conclude that the filing of a motion to docket an appeal out of time with the appellate courts deprives the district court of jurisdiction ***38** to consider a pending motion to dismiss."); ***State v. Russell,*** 36 Kan.App.2d 396, 138 P.3d 1289 (2006) (district court loses jurisdiction over a case when the appeal is docketed); ***City of Kansas City, Kansas v. Lopp,*** 269 Kan. 159, 4 P.3d 592 (2000) ("Court rules and case law make it clear that once the appeal is docketed in the appellate courts, the district court loses jurisdiction."); ***State v. McDaniel,*** 255 Kan. 756, 761, 877 P.2d 961 (1994) (district court would lose jurisdiction over motion to withdraw guilty plea once appeal has been docketed); ***Darnall v. Lowe,*** 615 P.2d 786, 5 Kan.App.2d 240 (Kan. App. 1980).

A trial court must proceed with caution before taking judicial action that would interfere with an appeal that has already been docketed. ***See e.g. In re Estate of Robinson,*** 232 Kan. 752, 659 P.2d 172 (1983) (noting that a trial court does not have jurisdiction to modify a judgment after an appeal has been docketed). In ***Robinson,*** the Supreme Court was justifiably concerned with the difficulties occasioned by the trial court's decision to exercise jurisdiction while an appeal was pending. ***Id.*** at 755.

In the present case, on October 8, 2014, the district court modified the amount of the judgment to add $35,650.86 in additional pre-judgment interest from December 1, 2013 until May 23, 2014. (R. VI, 55-56). The district court exceeded its jurisdiction. The Journal Entry dated October 8, 2014 should be quashed and held for naught.

***39 Conclusion**

The judgment of foreclosure should be reversed. It was error for the trial court to have considered an unpleaded event of default. The district court committed further error in misconstruing the pertinent provisions of the loan documents to find that the death of Keith Volkland triggered an event of default. Keith Volkland was not liable on the note, and thus his death had no impact upon the terms of the note. The trial court **abused** its discretion in not relieving the Volklands from the harsh effects of a technical matter based upon the natural occurrence of the death of an **elderly** person inasmuch as the borrowers had established a good payment history and the lender was oversecured by the value of the collateral for the loan. The trial court committed error in awarding *28,704 in attorney fees and an additional *35,650 in prejudgment interest after the appeal had been docketed.

Appendix not available.

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