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For the reasons set out in this Reply Brief, this Honorable Court should reverse the decision of the trial court that Knight Properties, Inc. (KPI) and Chad Knight's defense of equitable estoppel was unavailable to the Bank's instant action on certain promissory notes and personal guarantees and render summary judgment in favor of KPI and Mr. Knight. In the alternative, this Court should reverse the trial court's decision and remand for a factual determination on each of the elements of election of remedies and equitable estoppel.

ARGUMENT

I. The Bank's Election Of Foreclosure Is Inconsistent With Its Later Decision To Pursue An Action On The Notes And Guarantees.

The Bank claims its election of foreclosure is not inconsistent with its later decision to pursue an action on the notes and guarantees. At no time was the Bank permitted to foreclose on the property, collect the amount due on the notes and also proceed against KPI and Mr. Knight for that same amount due. It is axiomatic that a party cannot recover twice for the same loss. *See Gillis v. Sonnier*, 187 So. 2d 311, 314 (Miss. 1966) (citing 25A C.J.S. Damages §181). The Bank chose foreclosure. Whether some lesser amount in a deficiency judgment could have been pursued against KPI and/or Mr. Knight is not the issue before this Court.

II. The Bank's Action Is Barred By Its Own Election To Pursue Foreclosure Which Was Relied Upon By KPI And Mr. Knight To Their Detriment.

The Bank takes the position in its Brief essentially that it can do whatever it likes and change its mind at anytime. The Bank claims that it has not elected a remedy unless that remedy is successful. *See* Brief of Appellee at p.12. While successful conclusion of one cause of action will prevent a party from seeking an additional remedy based on an inconsistent theory, this is not the only way the doctrine of election of remedies is invoked. *See O'Briant v. Hull*, 208 So. 2d 784, 786 (Miss. 1968). That election also becomes conclusive when the electing party's

opponent has materially changed position in reliance on the election. 25 Am.Jur.2d Election of Remedies § 4.

In the instant case and as discussed more fully in Appellants' Brief, The Bank chose to institute foreclosure proceedings. The Bank informed Mr. Knight and KPI of its decision to institute foreclosure declaring that the property would be sold on November 26, 2007. Mr. Knight acted in reliance on the Bank's decision to foreclose on the property and abandoned the appeal on behalf of North Place Seven challenging the condition placed on development of the property by the City of Madison. After all, it would have been futile to pursue an appeal for property for which the Bank was taking ownership. The abandonment of the appeal has left the value of the property seriously impaired due to the condition imposed by the City. Mr. Knight and KPI have suffered the detrimental devaluation of their property, based on the Bank's decision and communication of that decision to Mr. Knight and KPI that it was instituting foreclosure proceedings. The Bank made its election and should not now be allowed to disavow that election to the detriment of KPI and Mr. Knight.

The Bank relies on *Beyer v. Easterling* for the proposition that one is not barred by the doctrine of election of remedies if the first remedy he chooses is unfounded. 738 So. 2d 221, 226 (Miss. 1999). In *Beyer*, a mentally unsound person gave mistaken or false testimony, due to his mental instability, that he did not sign a certain agreement, though his own expert could not exclude the possibility that it was his signature. *Id.* at 223. When advised by a federal magistrate that his chances of success on this position were slim, he took a reduced settlement and pursued his attorney for malpractice in negotiation of the agreement. *Id.* This Court in *Beyer* found that his mistaken or false testimony in one action did not prevent contrary testimony in a second action. *Id.* at 227.

The Bank's reliance on *Beyer* is misplaced. The Bank is not mentally unsound. The instant case does not involve mistaken or even false testimony. The Bank's pursuance of foreclosure of the property was not barred by the applicable law. The Bank's initial position to foreclose on the property was not unfounded. The Bank made its election; KPI and Mr. Knight acted in reliance on that election to their detriment; and now the Bank's current action should be barred.

III. The Bank's Argument For The First Time On Appeal That North Place Seven Should Have Appealed The City's Imposed Condition Sooner Is Not Properly Before The Court.

The Bank asserts for the first time in its Brief that North Place Seven should have appealed the condition imposed by the City of Madison earlier. *See* Brief of the Appellee at p. 14-15. It is a long standing principle that issues not raised in the trial court cannot be raised on appeal. *Hudson v. Palmer*, 977 So. 2d 369, 379 (Miss. Ct. App. 2007). Therefore the Bank's argument is not properly before this Court and will not be addressed.

IV. The Bank's Arguments Regarding The Defense Of Impairment Of Collateral Are Inapplicable To The Case At Hand.

In none of the cases cited by the Bank regarding waiver of the defense of impairment of collateral did the creditor elect a remedy and then change its position after detrimental reliance by the debtor. *See Haney v. Deposit Guaranty National Bank*, 362 So. 2d 1250 (Miss. 1978) (bank failed to perfect its security interest thereby surrendering the collateral); *Price v. First National Bank of the South*, 477 So. 2d 1340 (Miss. 1985) (collateral sold by bank in reasonably commercial way and applied to debt and court found no impairment of collateral); *Great American Federal Savings & Loan Assoc. v. American Fidelity Co.*, 734 F. Supp. 747 (S.D. Miss. 1989) (bank's failure to ensure it was listed as a loss payee on the debtor's insurance policy was not an impairment of collateral).

These cases are inapplicable. The Bank argues that Appellants waived the defense of impairment of collateral. The Bank's argument is irrelevant. Appellants are not seeking to avoid a deficiency action, as the Bank has not brought one. Rather, the Bank's election has undisputedly devalued property owned by Appellants. That devaluation is a detriment caused by the Bank's election. Appellants have not waived their defenses of election of remedies or of equitable estoppel.

The Bank further argues that this Court should take notice of prospective Miss. Code Ann. § 75-3-605(f). The Bank cites no authority for the proposition that this Court enforce a statute that has not even taken effect as of the date of this appeal and was not in effect during any of the actions comprising this litigation. This Court should ignore any arguments that rely on prospective legislation.

Conclusion

Here, the Bank elected the remedy of foreclosure. The Bank's election became conclusive, barring a later change, when the elements of estoppel applied. KPI and Mr. Knight materially changed their position in reliance on the Bank's election, which precluded the Bank from resorting to other remedies. While the application of the law may appear harsh, the law exists to hold the Bank to the position it assumed, because to do otherwise would result in harsh and inequitable consequences to KPI and Mr. Knight, who had the right to in good faith rely on the Bank's action, and who in fact did so rely to their detriment.

This Court should review the facts and the law *de novo*, deny the Bank's motion for summary judgment, and grant the Appellants' cross motion for summary judgment. In the alternative, the Court should remand the case for more complete development of the facts and a trial of this matter.

This the 1st day of June, 2010.

Respectfully submitted,
Knight Properties, Inc. and Chad Knight

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CERTIFICATE OF SERVICE

I, Melissa Selman Martin, attorney for the appellants, Knight Properties, Inc. and Chad Knight, certify that I have this day served a copy of this Brief of the Appellant by United States mail with postage prepaid on the following persons at these addresses:

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This the 1st day of June, 2010.

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