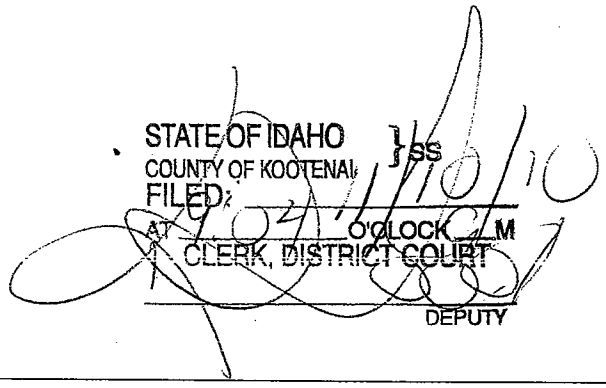

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

MOUNTAIN WEST BANK, an Idaho state banking corporation, Plaintiff, v. TERRY COREY, an individual, and VERNA COREY, an individual, Defendants.	**CASE NO. CV – 10 – 4805** MEMORANDUM OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
TERRY COREY and VERNA COREY, Counterclaimants, v. MOUNTAIN WEST BANK, Counterdefendants.	
TERRY COREY and VERNA COREY, Third Party Plaintiffs, v. NORTHWEST DEVELOPERS GROUP, INC., and MIKE RAI, Third Party Defendants.	

Plaintiff extended a line of credit to the Defendants' company, and the Defendants' company executed promissory notes secured by deeds of trust. The Defendants also executed commercial guarantees. The Plaintiff seeks collection of the amount due and owing. The Defendants counterclaim that the Plaintiff changed the terms of the commercial guarantees. Plaintiff/Counterdefendant moves for summary judgment against the Defendants/Counterclaimants on all claims.

Jonathan D. Hallin, Lukins & Annis, P.S., attorney for Plaintiff/Counterdefendant.

Stephen B. McCrea, Attorney at Law, attorney for Defendants/Counterclaimants.

I. FACTS AND PROCEDURE

The facts in this case are largely undisputed. On June 7, 2005, the Defendants each executed and delivered to the Plaintiff two commercial guaranties ("Commercial Guaranties"), guaranteeing all existing and future obligations of the Defendants' company Blackwolf Homes & Development, Inc., ("Blackwolf"). (Exhibits 4 and 5, Affidavit of Erik Campbell, ¶ 13.) On March 11, 2008, the Plaintiff extended Blackwolf three lines of credit: two lines of credit for $150,000 and one line of credit for $75,000. (Exs. 1, 2, and 3, Aff. Campbell, ¶¶ 4, 7, and 10.) Blackwolf then executed and delivered to the Plaintiff three promissory notes ("Promissory Notes"), one in the amount of $75,000 and two in the amount of $150,000. (Id.) Each Promissory Note states that each note is secured by "the following collateral described in the security instrument listed herein: a Deed of Trust dated March 11, 2008, to a trustee in favor of Lender on real property located in Kootenai County, State of Idaho." (Id.) According to the Defendants, the Plaintiffs have ten deeds of trust to ten lots of real property. (Exhibit, Affidavit of Terry Corey, October 19, 2010.) The deeds of trust are not part of the record.

Blackwolf failed to make any payments on the debt. The Plaintiff filed its complaint ("Complaint") on June 4, 2010, seeking payment of the principle amount of $375,000 from the Defendants as per the Commercial Guaranties. Plaintiff also seeks to recover $8,317.27 in fees and pre-judgment interest accruing at a per diem rate of $51.36985 commencing April 9, 2010. (Aff. Campbell, ¶¶ 6, 9, 12.)

The Defendants answered on July 14, 2010, ("Answer") asserting that they were acting as agents of third party defendants Northwest Developers Group, Inc. and Mike Rai ("Third Party Defendants") when they signed the Commercial Guaranties. The Defendants also assert that the Third Party Defendants requested modifications to the Promissory Notes that relieve the Defendants of liability. The Defendants also counterclaim against the Plaintiff that the Third Party Defendants had requested modification of the terms of the Promissory Notes and therefore the Commercial Guarantees are no longer enforceable by the Plaintiff against the Defendants.[1]

The Plaintiffs replied to the Defendants' counterclaims on July 19, 2010 ("Reply to Counterclaim"). The Plaintiff moved for summary judgment ("Motion for Summary Judgment") on its claims and the Defendants' counterclaims on September 2, 2010, and supported its motion with the Affidavit of Erik Campbell. After moving for summary judgment, in October 2010, the Plaintiff completed non-judicial foreclosure on the ten deeds of trust securing the Promissory Notes and ultimately purchased the ten lots for $150,380.00. (Exhibit, Affidavit of Terry Corey, October 19, 2010.) This Court heard argument from the Plaintiff and the Defendants on October 27, 2010.

[1] The Defendants also included a third party complaint against the Third Party Defendants, asserting that the Third Party Defendants agreed to personally guarantee the loans for and on behalf of the Third Party Defendants, and that the Third Party Defendants promised the Defendants that the Defendants would not incur any liability, and that the Third Party Defendants have breached this agreement. However, this claim is not the subject of the instant motion and will not be addressed.

II. STANDARDS FOR SUMMARY JUDGMENT

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the "pleadings, depositions, and admissions on file, together with any affidavits." Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987). In order to make that determination, the court must look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ." (I.R.C.P. 56.) Supporting and opposing affidavits must set forth such facts as would be admissible in evidence. (I.R.C.P. 56.) Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

The facts in the record are to be liberally construed in favor of the party opposing the motion. The opposing party cannot rest upon mere allegations or denials, but the party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue of material fact. (I.R.C.P. 56(e)); Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 918 P.2d 583 (1996); G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991); Edwards v. Conchemco, Inc., 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986).

III. DISCUSSION

A. The Plaintiff is Entitled to Summary Judgment as a Matter of Law

The Plaintiff argues that it is entitled to judgment as a matter of law because the Defendants personally guaranteed the existing and future debts and obligations of Blackwolf in the Commercial Guaranties, and Blackwolf failed to pay the debt owed to the Plaintiff. There is no dispute that the Plaintiff loaned Blackwolf money in the amount of $375,000, and that neither Blackwolf nor the Defendants have paid the Plaintiff according to the terms of the Promissory Notes or the Commercial Guaranties. There is also no dispute that fees totaling $8,317.27 and interest at a per diem rate of $51.36985 have accrued. There is no dispute that the Plaintiff has completed non-judicial foreclosure of the deeds of trust securing the Promissory Notes, or that the Plaintiff paid $150,380.00 for the ten lots in the foreclosure sale. (Ex., Aff. Corey, Oct. 19, 2010.) The Plaintiff, however, asserts that the principle amount of the debt owed by Blackwolf ($375,000) has been reduced by the market value of the lots the Plaintiff purchased in the non-judicial foreclosure sale (the $150,380.00 paid by the Plaintiff for the lots), and that a deficiency of $224,620.00 remains. (Ex., Aff. Corey, Oct. 19, 2010.)

The Defendants, however, dispute that there is any deficiency, and instead argue that there is a genuine issue of material fact that the debt "has been satisfied, in part, due to the Plaintiff having foreclosed on collateral," but now the Plaintiff is seeking "double recovery" by trying to collect from the Defendants as guarantors. The Defendants support their assertion with the Affidavit of Terry Corey filed October 19, 2010, which includes as an exhibit a letter showing the Plaintiff purchased the ten lots for $150,380.00. The Defendants also present an affidavit from an appraiser who

concluded that the estimated market value is $400,000 for all ten lots as of October 5, 2010. The Defendants' argument, then, is that because the Plaintiff obtained the ten lots as a result of the foreclosure sale, and an appraiser has valued the lots at $400,000, the Plaintiff has received the full principle amount owed by Blackwolf.

The Plaintiff responds that, while the Defendants do not rely on Idaho's anti-deficiency statute (I.C. § 45-1512) the Defendants as guarantors of Blackwolf's debt are attempting to assert protections similar the protections of Idaho's anti-deficiency statute to avoid paying the remaining principle debt, fees, and interest as required by the Commercial Guarantees. Idaho's anti-deficiency statute provides:

> At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale . . . .

In First Security Bank v. Gaige, 98 Idaho 172, 765 P.2d 683 (1983) the Idaho Supreme Court held that guarantors cannot take advantage of the anti-deficiency statutes because by the statute's plain language the statute only applies to the borrow-grantor who gave the security interest covered by the deed of trust. Id. at 174-175, 765 P.2d at 685-686. The Defendants are not the borrower-grantor, but instead, the Defendants guaranteed Blackwolf's debt, and are therefore not entitled to the protection of Idaho's anti-deficiency statute.

The Defendant provides no authority in support of its argument and this Court is not persuaded that a deficiency does not exist or that the Commercial Guarantees do

not make the Defendants liable for that deficiency. The Defendants entire argument is premised on the fact that the Plaintiff was the ultimate purchaser of the ten lots in a foreclosure sale in which third parties could have also obtained ownership of some, if not all, of the lots. The fact that the Plaintiff, in the end, obtained the ten lots at the market value of $150,380.00 and then applied that value to the Defendants' debt does not change the fact that there is a deficiency of $224,520.00 on the principle debt, in addition to fees and interest. Additionally, the Defendants' argument ignores that the Plaintiff paid an additional $150,380.00 for the ten properties, and therefore it could not be said that the Plaintiff has recovered twice. Instead, it could be said that the Plaintiff paid twice by making the initial $375,000 in loans to Blackwolf, and then paying an additional $150,380.00 for the collateral secured by the deeds of trust. As a result, there is no genuine issue of material fact that a deficiency exists.

The Idaho Supreme Court also held in Gaige that, even if Idaho's anti-deficiency statute applied to guarantors, the guaranty Gaige signed contained a waiver of all defenses. Id. at 175, 765 P.2d at 686. The Plaintiff in this case makes a similar argument that the Commercial Guaranties signed by the Defendants contained waivers of any and all defenses that may otherwise be available, including the defenses raised in the Defendants' Answer. However, because the party opposing summary judgment cannot rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue of material fact (I.R.C.P. 56(e)), and because the Defendants in this case have not provided any evidence or argument in support of any other defense, there is no genuine issue of material fact. As a result, the Plaintiff is entitled to judgment as a matter of law.

B. The Plaintiff is Entitled to Summary Judgment on the Defendants' Counterclaims Pursuant to Idaho Rule of Civil Procedure 56(e)

The Plaintiff also argues that it is entitled to summary judgment on the Defendants' counterclaim because the Defendants did not provide any evidence in support of their counterclaims. Idaho Rule of Civil Procedure 56(e), provides that

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, **shall be** entered against the party.

The Defendants have presented no evidence in support of their counterclaims in response to the Plaintiff's motion for summary judgment. For this reason, the Plaintiff is entitled to judgment as a matter of law.

III. CONCLUSION

Based on the foregoing, it is hereby ORDERED that the Plaintiff's Motion for Summary Judgment be and the same is hereby GRANTED, and the Defendants' counterclaims against the Plaintiff are DISMISSED.

DATED this 10th day of November, 2010

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 10 day of November, 2010, to the following:

Jonathon D. Hallin
Lukins & Annis, P.S.
601 E. Front Ave, Suite 502
Coeur d'Alene, Idaho 83814
Fax: (208) 666-4111

Stephen B. McCrea
Attorney at Law
PO Box 1501
608 Northwest Blvd, Suite 101
Coeur d'Alene, Idaho 83814
Fax: (208) 666-2594

DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk