

RABO AGRIFINANCE, INC. V. TERRA XXI, LTD.

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**RABO AGRIFINANCE, INC.,
Successor in Interest to Farm
Credit Bank of Texas,
Plaintiff-Appellee,**

v.

**TERRA XXI, LTD., a Texas Limited
Partnership, Composed of VEIGEL CATTLE
COMPANY, as General Partner;
ROBERT WAYNE VEIGEL a/k/a BOB W. VEIGEL;
ELLA MARIE WILLIAMS VOGEL, a/k/a
ELLA MARIE VEIGEL;
VEIGEL CATTLE COMPANY, a Texas corporation;
VEIGEL FARM PARTNERS, a Texas general partnership
d/b/a Veigel Partners;
BOB VEIGEL, INC., a Texas corporation;
STEVE VEIGEL, INC., a Texas corporation;
VEIGEL-KIRK, INC., a Texas corporation;
VICKI VEIGEL, INC., a Texas corporation;
VEIGEL FARMS, INC., a Texas corporation;
TERRA PARTNERS, a Texas general partnership;
BURNETT & VEIGEL, INC., a Texas corporation,
as general partner of Terra Partnership, a Texas
general partnership; and ALL UNKNOWN
CLAIMANTS OF INTEREST IN THE PREMISES
ADVERSE TO THE PLAINTIFF,
Defendants-Appellants,**

No. 34,757

COURT OF APPEALS OF NEW MEXICO

November 18, 2015

APPEAL FROM THE DISTRICT COURT OF QUAY COUNTY, Drew D. Tatum, District
Judge

COUNSEL

Rowley Law Firm, P.C., Richard F. Rowley II, Clovis, NM, for Appellant

Keleher & McLeod, P.A., Jeffrey A. Dahl, Julia L. Maccini, Albuquerque, NM, for Appellants

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, J. MILES HANISEE, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Appellants Terra XXI, Ltd., et al. (Defendants) appeal from the district court's ruling that denies Defendants relief based on their Rule 1-060(B) NMRA argument for application of the primary fund doctrine. [RP Vol.14/3328, 3347] Our notice proposed to affirm, and Defendants filed a memorandum in opposition, as well as a motion to stay the proceedings in this Court. Defendants' motion to stay is denied. We further remain unpersuaded by Defendants' arguments, and thus affirm.

{2} As set forth in our notice, in a previous appeal in this Court, Defendants also raised a primary fund doctrine argument, but in that appeal this Court declined to review the primary fund argument on the basis that Defendants had not preserved such argument in their underlying Rule 1-060(B) motion filed in district court. See *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 2014-NMCA-106, ¶¶ 5, 13, 15, 17, 336 P.3d 972 (declining to review the primary fund doctrine argument for lack of preservation in the underlying Rule 1-060(B) motion). [RP Vol.14/3198, 3199] Subsequent to that appeal and now the subject of the present appeal, Defendants filed a second Rule 1-060(B) motion in the district court, this time raising an argument pursuant to the primary fund doctrine, which the district court again denied. [RP Vol.14/3201, 3235, 3305, 3328, 3347]

{3} In our notice, we did not address the merits of Defendants' primary fund argument. Instead, we considered that Defendants did not raise a primary fund doctrine argument in their first Rule 1-060(B) motion, as addressed in the previous appeal, and declined to review the merits on the basis that we could perceive no justifiable reason for Defendants' failure to do so. See *Rios v. Danuser Mach. Co.*, 1990-NMCA-031, ¶ 25, 110 N.M. 87, 792 P.2d 419 (recognizing our disfavor of multiple Rule 1-060(B) motions, and providing that a subsequent Rule 1-060(B) motion for relief based on different grounds than the first motion may be considered "if there was a justifiable reason for not raising those grounds in the first motion"); see also *Gedeon v. Gedeon*,

1981-NMSC-065, ¶ 17, 96 N.M. 315, 630 P.2d 267 (stating “[i]t is well established that a motion for relief from a judgment or order under Rule [1-60(B)] is not intended to extend the time for taking an appeal and cannot be used as a substitute for appeal”).

{4} In response to our notice, Defendants point out that unlike in the previous appeal, this time they raised their primary fund argument in their second Rule 1-060(B) motion filed in district court. [MIO 3] We acknowledge this, but again emphasize that Defendants have nonetheless not provided a justifiable reason for not raising the primary fund argument in their first Rule 1-060(B) motion. While Defendants advocate that “application of the primary fund doctrine is necessary and appropriate” [MIO 3] and required by equity on the asserted basis that the proceeds from the sale of the Texas property satisfied the judgment against them, this argument relates to the merits of application of the primary fund doctrine [MIO 4], but does not provide a justifiable reason for failing to raise the argument in their first Rule 1-060(B) motion.

{5} For the reasons set forth herein and in our notice, we affirm the district court’s order denying Defendants’ motion for relief.

{6} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge