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Roesch v. Klemann Appellant's Brief Dckt. 39836

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IN THE SUPREME COURT OF THE
STATE OF IDAHO

KARL L. ROESCH, as to an undivided)
77.5% interest, and RIVER TERRACE)
ESTATES, INC., as to an undivided)
22.5% interest,)
Plaintiffs-Appellants,)
v.)
DANIEL L. KLEMANN, an unmarried)
man; CORNERSTONE FINANCIAL, INC.;)
and SHEA REALTORS, PLLC,)
Defendants.)

DOCKET NO. 39836-2012

Kootenai County Case
No. CV-2011-3947

APPELLANTS' BRIEF

APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District of
the State of Idaho, in and for the County of Kootenai

THE HONORABLE JOHN T. MITCHELL, DISTRICT JUDGE, PRESIDING

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a judicial foreclosure case. KARL L. ROESCH and RIVER TERRACE ESTATES, INC. (herein "Secured Parties") commenced this action to foreclose upon a Promissory Note secured by a Real Estate Mortgage granted by the Defendant DANIEL L. KLEMANN upon real property in Kootenai County, Idaho. The Plaintiffs obtained a foreclosure decree entitled Judgment And Decree Of Sale entered August 30, 2011. The Honorable John T. Mitchell, District Judge, presiding, entered an Amended Judgment and Decree Of Foreclosure, on March 20, 2012, from which the Secured Parties appeal.

II. COURSE OF THE PROCEEDINGS

On or about May 16, 2011, KARL L. ROESCH and RIVER TERRACE ESTATES, INC. (herein "Secured Parties") commenced this judicial foreclosure action to foreclose upon a Promissory Note secured by a Real Estate Mortgage granted by the Defendant DANIEL L. KLEMANN upon real property in Kootenai County, Idaho. The action named as defendants DANIEL L. KLEMANN, the maker of the Promissory Note and mortgagor of the Real Estate Mortgage, and the holders of junior or inferior mortgages upon the real property, CORNERSTONE FINANCIAL, INC. and SHEA REALTORS, PLLC.

The Complaint filed May 16, 2011 set forth the unpaid principal balance of the indebtedness, the interest paid to date, and the note rate of interest accruing. R. Pgs. 1-8, Complaint paragraph 11. The Complaint then set forth the relief requested for judicial foreclosure: An adjudication of the unpaid principal balance, the principal balance date, the interest rate accruing

through the judicial foreclosure sale, the costs and attorney fees of foreclosure, priority adjudication, the sale of the property, and a deficiency judgment if the debt is not satisfied.

R. Pgs. 1-8, Complaint paragraphs 15, 19-24.

Following service of process the Defendant SHEA REALTORS, PLLC stipulated to a priority adjudication, the Defendant CORNERSTONE FINANCIAL, INC. stipulated to a priority adjudication, and the Defendant KLEMANN was defaulted. On August 30, 2011, the Judgment And Decree Of Sale was entered, which provided for a determination of the amounts due and accruing, the priority date and priority adjudication, for the judicial sale of the property pledged as security, and for proceedings to adjudicate a deficiency money judgment, if any. R. Pgs 11-15. A Writ of Execution For Sale Of Real Property was issued on September 13, 2011 by the District Court which was consistent with the pleadings in the Complaint and the provisions of the Judgment And Decree Of Sale. R. Pgs 16-18.

After encountering difficulties with the Kootenai County Sheriff in executing pursuant to the decree and the writ, the Secured Parties filed a Petition For Writ Of Mandamus To Compel Sheriff on December 14, 2011. R. Pgs 19-29. On January 31, 2012, the Secured Parties and the Kootenai County Sheriff and the Kootenai County Civil Deputy Prosecuting Attorney were able to resolve the issue of executing pursuant to the decree and the writ (based upon similar proceedings to compel before a different District Court Judge for Kootenai County) and the Secured Parties withdrew the petition to compel.

The District Court on January 31, 2011, rather than accept

the withdrawal of the petition, proceeded as to the "correct" rate of interest accruing between the adjudication to sell the property and the actual sale of the property. Transcript Pgs. 1-22. The District Court then entered on March 14, 2011 what it entitled Memorandum Decision And Order Denying Plaintiffs' Motion For A Writ Of Mandamus. R. Pgs. 35-60 (the petition had been withdrawn). The District Court then entered the Amended Judgment And Decree Of Sale on March 20, 2012. R. Pgs 61-65.

The Secured Parties timely filed a Notice of Appeal as to the Amended Judgment And Decree Of Sale. R. Pgs. 66-69. This appeal follows.

III. CONCISE STATEMENT OF FACTS

On August 30, 2011, the District Court entered a Judgment And Decree of Sale which determined the amount due and owing on a promissory note secured by real property as of a date certain plus interest still accruing on the note rate through the date of foreclosure sale. The interest accruing was at the note rate of 15%. The Judgment And Decree of Sale further ordered that the foreclosure sale proceeds be applied to the note indebtedness.

A Writ of Execution For Sale Of Real Property was issued September 13, 2011 which conformed to the decree.

On March 20, 2012, the District Court entered an Amended Judgment And Decree Of Sale which amended the interest accruing between the date certain through the date of foreclosure sale. The note rate accrued on the unpaid principal balance. The interest rate used was the "statutory judgment" rate of 5.250% pursuant to Idaho Code § 28-22-104(2) and was applied to the

total amount due (principal, interest, and attorney fees and costs).

ISSUES ON APPEAL

The Appellant's statement of the issue on appeal is: Did the District Court err in setting of the rate of interest in a foreclosure action accruing between the order of sale and the actual sheriff's sale date to be held?

Alternatively the issue on appeal can be stated as: Does the note rate of interest accruing on a debt secured by real property continue through the date of the judicial sheriff's foreclosure sale of the property and the application of the proceeds of the sale to the debt?

ARGUMENT ON APPEAL

I. THE NOTE RATE OF INTEREST CONTINUES TO ACCRUE THROUGH THE DATE OF THE JUDICIAL FORECLOSURE SALE

The issue on appeal in this case is the District Court's reduction of the rate of interest from the "note" rate to the "statutory judgment" rate from the entry of the order for sale until the actual foreclosure sale by the sheriff and the application of the proceeds of sale to the debt. The foreclosure process upon real property securing a debt, whether judicially or by power of sale, is well established. Generally, the secured party must first seek to recover by the sale of the security. The amount recovered at the sale or the fair market value, whichever is greater, is applied to the debt. The debt includes the principal and note rate of interest through the date of sale. Redemption periods apply to the foreclosed property. Redemption periods for non-judicial sales are prior to the sale held. Redemption periods for judicial sales are after the sale held. If the amount recovered from the foreclosure sale of the property does not satisfy the debt, a deficiency can be recovered as a personal money judgment.

In the instant action, the Secured Parties held a note secured by a mortgage. Regarding the foreclosure of mortgage, Idaho Code § 6-101(1) provides in relevant part (emphasis added) as follows:

There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to

the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; (and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt), and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued.

The District Court failed to recognize that in a foreclosure, the Court adjudicates ("by its judgment") the indebtedness and orders a sale of the security from which to apply the sale proceeds to the indebtedness ("the amount due the plaintiff"). The indebtedness accrues interest pursuant to the debt instrument through sale. That is the "amount due the plaintiff" pursuant to Idaho Code § 6-101(1). The Court's order to sell does not convert the indebtedness to a final money judgment upon which the statutory judgment interest rate accrues.

Following the foreclosure sale, if a deficiency exists, the Court then holds supplemental proceedings by which to adjudicate the deficiency money judgment. It is not until the deficiency is adjudicated and entered that the statutory "judgment interest" rate would apply. Idaho Code § 6-108 provides regarding deficiency judgments on a mortgage (emphasis added), as follows:

No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

A foreclosure action on a mortgage involves not suing on a debt, but rather first collecting on the security. In the first appeal of Fed. Land Bank of Spokane v. Parsons, 116 Idaho 545,

549-50, (Ct. App. 1989), the Court recognized the nature of a mortgage and foreclosure process, and stated as follows:

First, the law in Idaho authorizes a single form of action to collect a debt secured by a mortgage. I.C. § 6-101. To collect on the debt, the mortgage must be foreclosed. The creditor may not simply sue on the debt and collect by execution on the judgment. *Quintana v. Anthony*, 109 Idaho 977, 979-80, 712 P.2d 678, 680-81 (Ct.App.1985). The bank correctly sought repayment of its \$32,000 loan by the mortgage foreclosure.

Second, Idaho law provides that "a mortgage is a lien upon everything that would pass by a grant or conveyance of the property." I.C. § 45-906. The bank produced evidence that its mortgage was properly recorded. Additionally, when the bank filed the complaint in foreclosure, it also filed a *Lis Pendens* under I.C. § 6-504, which gave notice to any subsequent purchaser that the foreclosure action was pending. See *Suitts v. First Security Bank of Idaho, N.A.*, 100 Idaho 555, 559, 602 P.2d 53, 57 (1979). The record does not indicate that any party with a properly recorded interest prior to the mortgage has contested this foreclosure.

In the second appeal of Fed. Land Bank of Spokane v. Parsons, 118 Idaho 324, 326-27, (Ct. App. 1990), the Court again recited the difference in the action and held that:

Appellants cite *Messenger v. Burns*, 86 Idaho 26, 382 P.2d 913 (1963), as authority that no lien existed upon the property subject to execution because the judgment was not recorded. However, we do not believe that *Messenger* is on point. It did not involve a foreclosure action and therefore has no application to the instant case.

As noted, this case arises from a mortgage foreclosure action. A mortgage is a lien upon everything that would pass by grant or conveyance of the property. I.C. § 45-906. Pursuant to I.C. § 6-101, et seq., a mortgagee must first seek payment of a mortgage debt from the mortgaged property. Only if there is a deficiency, will the mortgagee be allowed to pursue the other assets of the mortgage debtor. If a deficiency judgment is obtained in due course by the mortgagee pursuant to I.C. § 6-108, that deficiency judgment would be subject to the recording provisions of I.C. § 10-1110. In this way, the Idaho law protects property not subject to the mortgage unless the value of the mortgaged property is exhausted. Since the lien against the property existed by virtue of the recording of the mortgage, we hold that recording the "Judgment and Decree of Foreclosure and Order of Sale" with the county recorder was not required in

order to proceed with the sheriff's sale, or issuance of the sheriff's certificate of sale and ultimately the sheriff's deed on foreclosure.

The process of retaining jurisdiction to determine the fair market value for the purposes of a deficiency per I.C. § 6-108 was set forth in First Nat. Bank of N. Idaho, N.A. v. Burgess, 118 Idaho 627, 631, (Ct. App. 1990), as follows:

The statute "requires determination of the fair market value of the mortgage property before a deficiency judgment can be awarded," *Eastern Idaho Production Credit Assoc. v. Placerton, Inc.*, 100 Idaho 863, 870, 606 P.2d 967, 974 (1980), and has been construed to require that the valuation should be that as it existed at the time of the entry of the original decree. *Id.*, at 871, n. 4, 606 P.2d at 975, n. 4. However, nothing in the statute forbids the procedure utilized in this case by the district court. By retaining jurisdiction, the court reserved the right to take evidence on valuation at a later date and, if necessary, to amend the decree of foreclosure to include a determination of value, established as of the date of the original decree. Nothing about this procedure would appear to violate Burgess's right under the statute. Accordingly, we reject his contention that the district court erred in retaining jurisdiction to make a subsequent determination of value.

The adjudication of indebtedness and the order of sale are not the final judgment in the matter. The District Court retains jurisdiction to determine value and deficiency.

In regards to the foreclosure of a deed of trust, Idaho Code § 45-1503 provides in relevant part (emphasis added) as follows:

Where any transfer in trust of any estate in real property is hereafter made to secure the performance of such an obligation, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which such transfer is security, and a deed of trust executed in conformity with this act may be foreclosed by advertisement and sale in the manner hereinafter provided, or, at the option of beneficiary, by foreclosure as provided by law for the foreclosure of mortgages on real property.

In the event a Deed of Trust is judicially foreclosed upon, it is done so as a mortgage, with the application of Title 6, Chapter 1 of the Idaho Code.

Similarly, for a deed of trust foreclosed non-judicially, Idaho Code § 45-1512, regarding a money judgment by an action seeking a balance after a trustee' sale, provides (emphasis added) as follows:

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. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.

In Thompson v. Kirsch, 106 Idaho 177 (Ct App. 1984), the Court ruled that in a judicial foreclosure proceeding on a deed of trust, the trial court uses the judicial mortgage foreclosure proceedings (I.C. § 6-101 and 6-108) in the determination of the deficiency judgment. That includes the application of the manner of determining the total amount of the indebtedness and the application of the sales proceeds or fair market value, to determine the deficiency due on the indebtedness, which becomes a personal money judgment. The case and analysis spoke in terms of applying the rate of interest on money due to payments made by a junior lienholder on a senior lien. The Court in Thompson ruled that:

The decree of foreclosure provides the cut off date for fixing the amount of the mortgage indebtedness. "The decree directing a sale of the premises should find the exact

amount due on the mortgage and not leave this to be calculated by the office." FN2 L. JONES, LAW OF MORTGAGES OF REAL PROPERTY § 2042 at 493 (8th ed. 1928)

FN2. This, of course, does not preclude the decree from setting forth a per diem amount of interest which will accrue from the date of the decree to the date of sale. Also, it does not preclude adding costs of the foreclosure sale in computing the amount of any deficiency judgment.

Thompson, 106 Idaho at 182-3. Nothing in that provision provides that the rate of interest between the decree directing a sale and the sale date is at the statutory judgment rate. At the time of Thompson, the statutory rate on money due but unpaid and the statutory judgment rate were both 8%. The Thompson case dealt with several issues, including the applicable rate of interest to accrue on the payments advanced on a senior lien (which was the 8% "statutory" rate on money due). Having the same rate can cause confusion, but the District Court misunderstood the ruling. As the Thompson Court state, the interest "continues" to accrue until the deficiency judgment is entered, then the unpaid principal and the unpaid interest, etc. are all totaled for a person money judgment, which that total then accrues interest at the statutory judgment rate of interest.

The Court that same year in Camp v. Jiminez, 107 Idaho 878, 886 (Ct. App. 1984) further highlighted and identified the distinction between money due prior to the adjudication of a final money judgment and the rate of interest on money due (but prior to adjudication), citing as follows:

See also Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct.App.1984) (applying nonjudgment legal rate to obligations owed but not yet adjudicated, and judgment rate to such obligations after adjudication).

In a foreclosure, the note rate (when set forth) or the "nonjudgment" legal rate (when there is no rate by the note) is applied through the foreclosure process. The "judgment" rate applies after adjudication of the deficiency (and at least through the date of the foreclosure sale).

As set forth in Perkins v. Bundy, 42 Idaho 560, 561 (1926), "[a] decree of foreclosure of a mortgage is in no sense a personal judgment, and no personal judgment can be entered until after the foreclosure sale." This is because an adjudication of the amount due on an instrument of indebtedness for foreclosure is not a "judgment" upon which "judgment interest" then accrues. The adjudication of the amount due is necessary to hold the foreclosure sale. The deficiency, if any, is the personal judgment (upon which the statutory judgment interest rate then accrues).

In Isaak v. Idaho First Nat. Bank, 119 Idaho 907, 910 (1991), the Court held that "[t]he correct date for determining the value of the [property sold at foreclosure sale] would have been the date when the trial court in a foreclosure case determined whether a deficiency judgment should be entered pursuant to I.C. § 6-108." The Court went on to describe the method for determining the deficiency, which includes interest before the sale date at the rate in the instrument of indebtedness.

When the Court has considered the deficiency judgment proceedings pursuant to the deed of trust non-judicial process, (rather than the mortgage foreclosure statutes), the same result is found. In Wilhelm v. Johnston, 136 Idaho 145, 151

(2001) (citing Farber v. Howell, 111 Idaho 132, 135 (1986)) the Court of Appeals explained the deficiency process and how the deficiency is calculated on a non-judicial foreclosure. The first step is to continue the interest on the debt at the note rate through the date of foreclosure sale. Then the sales proceeds or fair market value (whichever is greater) is applied. See also First National Bank of North Idaho v. Burgess, 118 Idaho 627 (1990) cited above and American Mutual Building & Loan v. Kesler, 64 Idaho 799 (1943) for general descriptions of the foreclosure process, including the deficiency and interest calculations.

The District Court failed to recognize the applicable interest rate in a foreclosure action. Interest at the note rate continues to accrue on the unpaid principal balance through the foreclosure sale date. The District Court held that principal, interest, and attorney fees were totaled and that statutory judgment rate of interest applied to that total through the foreclosure sale date. The application of the statutory judgment rate arises in a foreclosure action only after the foreclosure sale and supplemental proceedings. In a foreclosure, a final personal money judgment (upon which the statutory judgment rate of interest would then accrue) is not entered until, if at all, deficiency proceedings are held after the foreclosure sale and application of the sale proceeds (or the fair market value, whichever is greater) to the debt. Those post sale proceedings and the calculation of any remaining unpaid debt continues at the note rate of interest. Not until the deficiency personal money judgment is entered does the statutory rate of interest then accrue. The final "judgment" is not the decree of sale, but

rather is the personal judgment based on deficiency, if needed.

Idaho Code § 28-22-104(2) which provides for the post-judgment statutory rate of interest on a personal money judgment is inapplicable to the foreclosure proceeding before the judicial foreclosure sale is held. Foreclosure sales are not the same thing as a real property execution sale seeking to recover on a lien which arises from a money judgment (whether based upon contract, tort, foreclosure deficiency judgment, or otherwise).

The District Court relies upon several cases and the District Court's prior decision in an unrelated group of foreclosure proceedings involving a separate common debtor. The prior decision by the District Court in the unrelated cases was not subjected to review upon appeal, based upon a bankruptcy discharge preventing a deficiency and a debt that greatly exceed value.

The District Court primarily relies upon Bouten Const. Co. v. H.F. Magnuson Co., 133 Idaho 756 (1999) for its decision as to interest. That case dealt with a breach of construction contract (not a judicial foreclosure of a note secured by a mortgage). The language relied upon by the District Court dealt with prejudgment, interjudgment, and postjudgment interest for damages awarded as increased construction costs. The crux of the ruling was that the judgment rate of interest in effect at the entry of the judgment remains unchanged until the judgment is paid. The rate does not fluctuate each year with the changes to rate. The Bouten case has nothing to do with the issue in the instant matter. The Bouten case does not involve any rate of interest applicable in a mortgage foreclosure whatsoever. The District Court's analysis is flawed.

II. THE SHERIFF IS REQUIRED TO HOLD THE FORECLOSURE SALE

The duties and responsibility of the Sheriff's Department in proceeding on a foreclosure sale of real property is not discretionary. By the decree and the writ, the Sheriff's Department is ordered and required to "conduct a Sheriff's Foreclosure Sale for the sums due to the Plaintiff." The Plaintiff has a clear legal right to have the act performed; specifically the conduct of the sale with an application of the proceeds to the amount due on the indebtedness. In addition, the Sheriff's Department has a clear duty to act, and the action is ministerial in nature. There is no exercise of discretion necessary for the Sheriff's Department.

As set forth in Blumauer-Frank Drug Co. v. Branstetter, 4 Idaho 557 (1895), there is no discretion for the Sheriff's Department:

We must not lose sight of the fact that process faire upon its face must be executed by the sheriff, upon its being placed in his hands. We hold the affidavit and notice to be process. No objection is made by the respondent from the form of the process. Therefore, the sheriff must execute it. The sheriff cannot be called upon, when he receives and execution, to sit in judgment upon the validity of the judgment. Neither can he, in this case, be called upon to sit in judgment on the validity of the mortgage. This is for the court, and not for the sheriff.

In addition, the Sheriff's Department is liable for the failure to act. See generally Price v. Pace, 50 Idaho 353 (1931); Works v. Byrom, 22 Idaho 794 (1912).

CONCLUSION

The Secured Parties are entitled to a decree of sale which adjudicates the amount due on the mortgage and provides for interest at the note rate through the date of sale (as well as attorney fees and costs of foreclosure and the sheriff's costs of sale). If the proceeds of sale do not satisfy the indebtedness, the District Court through supplemental proceedings shall then determine the fair market value and apply the greater of the fair market value or the proceeds of sale to the indebtedness to adjudicate the deficiency judgment. The deficiency judgment shall accrue interest at the statutory judgment rate. The Amended Judgment And Decree Of Sale entered by the District Court should be stricken, and the matter proceed to sale on the Judgment And Decree Of Sale previously entered in this matter.

RESPECTFULLY SUBMITTED this 20th day of July, 2012.


JOHN A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2012, two (2) true and correct copies of the foregoing, were served by deposit in the U.S. Mail, postage prepaid, and were addressed to:

NONE

