5-27-2014

Deutsche Bank Nat. Trust Co. v. Breinholt Respondent's Brief Dckt. 40748

IN THE SUPREME COURT FOR THE STATE OF IDAHO

NO. 40748

DEUTSCH BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR THE RESIDENTIAL ASSET SECURITIZATION TRUST 2005-A15, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-A15 UNDER THE POOLING AND SERVICING AGREEMENT DATED DECEMBER 1, 2005

Plaintiff/Respondent,

v.

RICHARD WILLIAM BREINHOLT AND SUSAN LYN BREINHOLT, HUSBAND AND WIFE, AND/OR ALL UNKNOWN OCCUPANTS,

Defendants/Appellants.

RESPONDENT'S BRIEF

On Review of the Opinion
Of the 4th Judicial District Court of Idaho
Ada County, Case No. CV-OC-2011-10414

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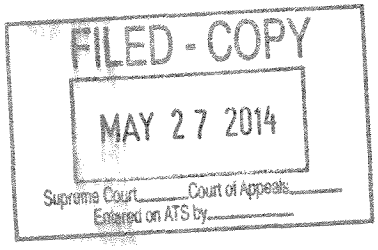

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

On August 30, 2005, the Breinholts entered into a Mortgage Loan Agreement ("Note"). The Note was secured by a Deed of Trust on the real property located at 1976 East Star Lane, Meridian, Idaho 83642. See CR 12. The Breinholts defaulted on their Note and Deed of Trust and the Deed of Trust was subsequently foreclosed upon via non-judicial foreclosure. Id. The trustee's sale was held on May 21, 2009. Id. Deutsche Bank National Trust Company, as Trustee for the Residential Asset Securitization Trust 2005-A15, Mortgage Pass-Through Certificates, Series 2005-O under the Pooling and Servicing Agreement Dated December 1, 2005 (hereinafter "Plaintiff/Deutsche Bank") purchased the subject property at the trustee's sale. Id.

On or about June 17, 2009, the Breinholts, through counsel, filed a Complaint in this Court under case number CV-OC-2009-11351 to contest the validity of the non-judicial foreclosure of the subject property. CR 68. The Breinholts' Complaint set forth allegations of impropriety in the foreclosure, fraud, theft, forgery, and civil conspiracy. CR 73-77. The Breinholts also requested declaratory relief and equitable estoppel. Id.

On or about September 13, 2010, the Breinholts filed a Stipulation to Dismiss the Complaint with Prejudice. CR 81. The Order of Dismissal with Prejudice was entered by the Honorable Ronald J. Wilper on October 6, 2010. CR 84.

On September 10, 2010, the Breinholts filed another, similar lawsuit in the United States District Court, District of Idaho under Case No. 1:10-cv-00466-EJL. Here, the Breinholts also contested the rights of the various defendants to foreclose and raised allegations of fraud and

conspiracy. CR 88.

The pertinent defendants were subsequently dismissed from the Federal Complaint on the grounds that the claims alleged in the District Court action were barred by *res judicata*, as they were already disposed of in the state court action. CR 140. On February 18, 2011, the Honorable Edward J. Lodge entered a Memorandum Order stating that "[I]t is undisputed that [the Breinholts'] claims against OneWest in this lawsuit are the same or similar claims that were raised and dismissed with prejudice in the Ada County case...", CR 139, and that "[T]here is risk of prejudice to the Defendants if the doctrine of res judicata is not fairly applied by the courts and [the Breinholts] have had the opportunity for a disposition on the merits when it filed the state court case regarding this property", CR 141.

The trustee's deed on the subject property was subsequently recorded on April 11, 2011 in the Ada County Recorder's Office. CR 12. Deutsche Bank then initiated eviction proceedings. A Notice to Quit was served on the Breinholts on May 3, 2011. CR 10-11. As the Breinholts failed to vacate the subject property within three (3) days as directed in the Notice to Quit, Deutsche Bank filed its Summons and Complaint for Eviction on May 27, 2011. CR 6.

The Breinholts filed their Answer in this case on June 3, 2011, making the same allegations as were made in the previous state court and federal court actions. Deutsche Bank moved for summary judgment and the magistrate granted Deutsche Bank's motion on December 1, 2011. CR 230. The Breinholts timely appealed the magistrate's Order on summary judgment, CR 234, and successfully moved to stay enforcement of the judgment during the appeal. See CR 438-39.

Sitting in review of the Magistrate's decision, the Fourth Judicial District Court affirmed the Judgment on February 15, 2013. CR 814. The Court held that *res judicata* did bar the Breinholts' attempt to relitigate claims in the unlawful detainer action that were brought or could have been brought in the 2009 action. CR 812-13. The Court reasoned that the doctrine protected Deutsche Bank, a non-party to the 2009 action because it was in privity with the parties in that action. Finally, the Court found no error in the Magistrate's ruling that Deutsche Bank was entitled to possession of the subject property. CR 813-14.

The District Court had considerable difficulty ascertaining the issues addressed in the Breinholts' brief before it, and found their brief violated the Idaho Appellate Rules. CR 809. The district court admonished the Breinholts that it would not do their work for them, and would not presume error on appeal. CR 809. Nevertheless, the court did consider the issue of whether the magistrate erred in granting Deutsche Bank's Motion for Summary Judgment. CR 809

The Breinholts subsequently appealed to this Court on February 21, 2013. CR 816. The Breinholts delayed the filing of their Informal Brief on Appeal for nearly 8 months, and finally lodged the document on April 14, 2014. This Court granted the Breinholts' Motion to file an Informal Brief on Appeal, and considered their brief filed on April 29, 2014.

ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether the District Court erred in affirming the magistrate's grant of summary judgment in favor of Deutsche Bank.

B. Whether the Breinholts' new arguments that could have been brought before the magistrate should be ignored for the purposes of this secondary appeal.

ARGUMENT

A. Standard of Review

On appeal from an order of the district court reviewing a magistrate's decision, this Court examines the record independently, but with due regard for, the district court's intermediate appellate opinion. *Fix v. Fix*, 125 Idaho 372, 375, 870 P.2d 1331, 1334 (Ct. App. 1993); *McNelis v. McNelis*, 119 Idaho 349, 351, 806 P.2d 442, 444 (1991); *Campbell v. Campbell*, 120 Idaho 394, 398, 816 P.2d 350, 354 (Ct. App. 1991). Where the magistrate court's findings of fact are supported by substantial and competent evidence, even if the evidence is conflicting, the magistrate's decision will not be disturbed on appeal. *Stonecipher v. Stonecipher*, 131 Idaho 731, 734, 963 P.2d 1168, 1171 (1998). This Court exercises free review over the magistrate's application of law to the facts as found. Campbell, supra.

"Where a district court sits as an appellate court for the purpose of reviewing a magistrate's judgment, the district court is required to determine whether there is substantial evidence to support the magistrate's findings of fact. If those findings are so supported, and if the conclusions of law demonstrate proper application of legal principles to the facts found, then the district court will affirm the magistrate's judgment. The judgment also will be upheld on further appeal." *Hentges v. Hentges*, 115 Idaho 192, 194 (Ct. App. 1988) (citing *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Ct. App. 1983). *See also* I.R.C.P 83(u)(1). As the Court is reviewing the magistrate's decision, it should undertake the same inquiry as the district court.

B. This Court should Refuse to Consider New Issues Raised on Appeal by the Breinholts.

The Breinholts improperly raise new issues on appeal of the district court's opinion. "To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, [sic] an issue cannot be raised for the first time on appeal." *Garner v. Bartschi*, 139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003). "It is well settled that when a second appeal is taken, the appellants may not raise issues in the higher court different from those presented in the intermediate court." *Centers v. Yehezkely*, 109 Idaho 216, 217, 706 P.2d 105, 106 (Ct. App. 1985). Because the district court found the Breinholts' brief violated the appellate rules, it declined to "issue spot" the brief and search for the issues on appeal. CR 809. Thus, the universe of issues before this Court are identical to those before the district court, who in turn limited its inquiry to the issues analyzed and adjudicated in the context of Deutsche Bank's Motion for Summary Judgment. The Breinholts did not file a response or opposition to the Motion for Summary Judgment, but did treat the Breinholts' Verified Petition for In Rem Action to Validate Plaintiff's Interest and Standing to File and Motion to Dismiss for Lack of Jurisdiction[1] as an opposition to the Motion for Summary Judgment for the purposes of the hearing. TR 2–3. In the broadest sense, the issues before this Court are those raised in the Memorandum in Support of Deutsche Bank's Motion and the Breinholts' Verified Petition. The only issue raised in the voluminous Verified Petition is the issue of Deustche Bank's standing to bring the unlawful detainer action.

[1] This document is lodged at CR 180.

Now, the Breinholts raise three issues on their secondary appeal, insofar as these issues are stated in their "Introduction to Issues on Appeal": (1) that the district court erred in striking their brief on appeal of the magistrate's decision, (2) Deutsche Bank lacks standing to prosecute the eviction, (3) and that the magistrate erred in considering the Affidavit of Jennifer Tait in Support of Plaintiff's Motion for Summary Judgment. Issues (2) and (3), could have and should have been raised in opposition to the motion for summary judgment, but were not. Thus, those issues are new on appeal and should be disregarded by this Court. Moreover, neither have merit, as will be explained below.

The Breinholts also attempt to assert a due process challenge to the unlawful detainer statute. This is another new issue on appeal that should be disregarded as it was not raised below. The Breinholts could have raised this constitutional challenge in opposition to Deutsche Bank's Motion for Summary Judgment, but did not.

C. The District Court did not Err in Declining to "Issue Spot" Either of the Breinholts' Briefs before it.

It is well settled under Idaho law that "pro se litigants are not accorded any special consideration simply because they choose to represent themselves." *Woods v. Sanders*, 150 Idaho 53, 57, 244 P.3d 197, 201 (2010). "Pro se litigants are held to the same standards and rules as those represented by an attorney." *Twin Falls Cnty. v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003). Therefore, the Breinholts should not be excused from "adhering to the rules regarding proper preservation of issues for appeal and proper presentation of arguments in the brief." *Woods*, 150 Idaho at 57. The Breinholts' brief on their initial appeal does not

conform to IAR 35. Their brief did not contain basic requirements like a table of contents or a table of authorities, and importantly did not set forth any issues on appeal as required in IAR 35(4). The district court was not compelled by statute or rule to cull through the brief or the record in order to discern what the issues were on appeal. *See Jensen v. Doherty*, 101 Idaho 910, 911, 623 P.2d 1287 (1981).

The Breinholts' citation to U.S. Supreme Court cases does not aid them. First, the statement in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 65 (1972) that pro se plaintiffs are held to lower standards of adherence to civil rules of pleading is dicta, and not central to the holding. *Cf. Id.* at 520-521. Moreover, the Supreme Court considered only the question of whether a federal prisoner's complaint could survive a motion to dismiss for failure to state a claim under FRCP 12(b)(6). *Cf. Id.* The Supreme Court held that the complaint was sufficiently pleaded to survive a motion to dismiss despite restraints on courts' ability to inquire into the operations of state prisons. *Id.* The case does not stand for the extremely broad proposition that all pro se litigants are entitled to submit evidence to support their claims or defenses, as the Breinholts would have this Court hold.

Moreover, the latitude provided pro se plaintiffs is only available in federal court. The court in *Platsky v. C.I.A.*, 953 F.2d 26, 28 (2nd Cir. 1991) confirmed that the Supreme Court had directed the **district courts** to "construe pro se complaints liberally and to apply a more flexible standard in determining the sufficiency of a pro se complaint than they would in reviewing a pleading submitted by counsel." The term "district courts" in the opinion refers to the United States District Courts. The Breinholts present no authority for the proposition that the more

flexible standard should also apply in the courts of this state, especially in light of Idaho's specific admonition to the contrary in *Woods* and *Coates*, *supra*.

Finally, both *Haines* and *Platsky* address the standards pro se plaintiffs are held to, not litigants in general. The danger, at least in the minds of federal judges, of dismissing pro se complaints for deficient pleading without leave to amend, is that the courts cannot be sure that it is "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Haines*, 404 U.S. at 521 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). There is no such danger here. The thrust of this case is the application of *res judicata* and the Breinholts' attempt to have a second first bite at the apple. The Breinholts were represented by counsel, stipulated to a dismissal with prejudice, and then evidently not happy with that state of affairs, sued anew. As explained below, their proffered defenses to this unlawful detainer action are properly barred as *res judicata*.

D. Substantial Evidence Supports the Magistrate's Findings that the Breinholts' Claims and Defenses are barred by the *Doctrine of Res Judicata*.

In the related state court and federal court actions, the Breinholts asserted claims that are identical to the claims and defenses raised in their Answer to Deutsche Bank's Complaint and again raised here on appeal. The courts have dismissed all of the claims contained in the prior actions with prejudice. The Breinholts again improperly attempt to bring those same futile claims. The doctrine of res judicata prevents the re-litigation of a claim or cause of action. *Kootenai Elec. Coop., Inc. v. Lamar Corp.*, 148 Idaho 116, 120 (Idaho 2009). Whether res

judicata bars re-litigation is a question of law over which this Court exercises sound discretion. *Or. Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 148 Idaho 47, 50-51, 218 P.3d 391 (2009).

Under Idaho law, "a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." *Lohman v. Flynn,* 139 Idaho 312, 319, 78 P.3d 379, 386 (2003). Res judicata "bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or **which might have been made**." *Id.* at 320. (emphasis added). As such, any new allegations or claims of recovery could have and should have been raised by plaintiffs in their initial state court action. *Independence Lead Mines, Inc. v. Hecla Mining Co.*, No. CV06–495–C–EJL, 2007 WL 2769621 at *7–8 (D. Idaho Sept. 24, 2007).

The three requirements of res judicata include "party identity or in privity with a party," "identity of issues," and a "final judgment." *Farmers Nat'l. Bank v. Shirey,* 126 Idaho 63, 68, 878 P.2d 762, 767 (1994). To be in privity, "a person not a party to the former action must 'derive[ ] his interest from one who was a party to it.'" *Ticor Title Co. v. Stanion*, 144 Idaho 119, 125-27, 157 P.3d 613, 618-20 (2007). (quoting *Kite v. Eckley*, 48 Idaho 454, 459, 282 P. 868, 869 (1929)). While it is true that Deutsche Bank was not a party to the prior actions, it was in privity with Pioneer Lender Trustee Service, from whom it received the Trustee's Deed Upon Sale.

Accordingly, the three requirements were satisfied for res judicata in the two earlier proceedings since the actions involve the same parties, the same issues arising from the same set

of facts, and two orders of dismissal with prejudice from the court. The Breinholts filed a state court action under case number CV-OC-2009-11351 to contest the validity of the non-judicial foreclosure of the subject property and alleging fraud, theft, forgery among other claims; this case was dismissed **with prejudice.** Next, the Breinholts filed a federal court action in the United States District Court, District of Idaho under case number 1:10-cv-00466-EJL once again challenging the validity of the foreclosure and now also raising allegations of violations of TILA and RESPA; this case was dismissed **with prejudice**. The Breinholts seek to assert the same claims for the third time. The magistrate's decision to grant summary judgment to Deutsche Bank on the basis of res judicata was therefore supported by substantial evidence.

Finally, the Breinholts argue that the magistrate, and perhaps the district court erred in accepting an affidavit of the undersigned counsel as evidence on summary judgment. It is difficult to ascertain the precise objection the Breinholts are raising, but on review of the document in question, the Affidavit of Jennifer Tait in Support of Plaintiff's Motion for Summary Judgment (CR 63–164, inclusive of exhibits), the only conclusion to draw is that the magistrate did not err. First, the Breinholts assert that the affidavit contains a statement that the "Idaho Supreme Court has dismissed the case." Informal Br. on App. at 49. There is no such statement in the Affidavit. Cf. CR 63–65. Second, the Breinholts assert that Ms. Tait "omits the fact that Appellants filed in the US [sic] District Court the case CASE NO. 10-466-CV-MHW in May of 2009, of which she was a party to." Informal Br. on App. at 49. This is inaccurate. Ms. Tait provides the Breinholts' complaint in U.S. District Court case number 1:10-cv-00466-EJL filed on September 10, 2010. See CR 64 ¶ 4. The Breinholts filed no case in the U.S. District

Court in May of 2009, and under no scenario would the U.S. District court designate a case filed in 2009 with the number 10 to start the case number. Third, the Breinholts assert that "Tait cannot testify regarding the secured document (the RAST 2005 A-15)." Informal Br. on App. at 49. It would seem that the Breinholts are referencing some document related to the securitized trust over which Deutsche Bank serves as trustee. However, Ms. Tait does not testify to any matters with respect to the trust, nor does she offer any trust documents into evidence. Cf. CR 63–65. Fourth, while it is true that the Breinholts improperly filed a Lis Pendens with the the district court and recorded the same with the Ada County recorder's office, Ms. Tait's Affidavit makes no mention of this document. Cf. CR 63–65.

E. As a Matter of Law, the Breinholts may not Raise Claims that Call for Judgment outside the Scope of a Inquiry into Right of Possession in an Unlawful Detainer action.

The Idaho courts on four separate occasions have held that in an unlawful detainer, the sole question involved is right of possession, and no other issues may be injected. *Carter v. Zollinger*, 146 Idaho 842, 845 (2009) (citing to *Richardson v. King*, 51 Idaho 762, 766-67, 10 P.2d 323, 324-25 (1932)). Additionally, the court has stated:

> Being thus limited in its scope and purpose, a judgment rendered in such an action (unlawful detainer) can have no broader application than the proceeding itself, and, the latter being confined solely to the one issue of possession, judgments rendered therein cannot be extended to include other matters.

Richardson, 51 Idaho at 767.

Therefore, the affirmative defenses and counterclaims raised by the Breinholts in their

Answer concerning the foreclosure of subject property and their loan transaction in general have no place in an unlawful detainer action. Such defenses and counterclaims are without legal significance in an action for eviction. The only issue that was properly before the magistrate was one of possession. As evidenced by the trustee's deed, Deutsche Bank is the present rightful owner of the subject property. The Breinholts did not deny that they were and continue to be unlawfully holding over the premises and depriving Deutsche Bank of its property. Additionally, the Breinholts do not raise any procedural defects in the eviction action. Substantial evidence supports Deutsche Bank's right to possession of the property and the magistrate's decision to that effect should be upheld.

The Breinholts' Brief is incomprehensible at time, but they seem to argue that the limitation on issues within an unlawful detainer action violates due process because they cannot produce evidence or be heard on the question of Deutsche Bank's ownership of the property. While it is true that the magistrate cannot exceed the limited scope of the unlawful detainer action, and consequently cannot invalidate the foreclosure or give the Breinholts any of the other miscellaneous relief they sought, a proper challenge to ownership is a challenge to the landlord/tenant relationship. *See Richardson,* 51 Idaho at 766–67. "The purchaser at the trustee's sale shall be entitled to possession of the property on the tenth day following the sale, and any persons remaining in possession thereafter under any interest except one prior to the deed of trust shall be deemed to be tenants at sufferance." IC 45-1506; *see also Caldwell v. Thiessen*, 60 Idaho 515, 519, 92 P.2d 1047 (1939) (holding Mortgagors holding over after a foreclosure are in a landlord/tenant relationship with the purchaser as a matter of law). However,

as stated above, any of the claims and defenses the Breinholts levied against the propriety of the underlying foreclosure, and thus to Deutsche Bank's ownership, were barred by the doctrine of *res judicata*. The Breinholts certainly would have had an opportunity to challenge that relationship had they not already gotten their day in court. A due process claim does not arise out of such failure.

F. Substantial Evidence Supports the Magistrate's finding that the Breinholts' Claims are Precluded as Deutsche Bank was a Good Faith Purchaser at the Trustee's Sale of the Subject Property.

As a good faith purchaser for value, Deutsche Bank is entitled to possession of the Subject Property. A purchaser in good faith in the context of non-judicial foreclosure is one who takes title without knowledge of defects in compliance with I.C. 45-1506. *See e.g. Taylor v. Just*, 138 Idaho 137, 142, 59 P.3d 308 (2002) (I.C. § 45-1508 good faith purchaser status applies when sales are challenged because of a failure to comply with the provisions of I.C. § 45-1506.). *See also Fed. Home Loan Mortg. Corp. v. Appel*, 143 Idaho 42, 47, 137 P.3d 429 (2006). "A sale made by a trustee under [I.C. § 45-1502 et seq.] shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any other person claiming by, through or under such persons. . . " I.C. § 45-1508. Additionally, "any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof." I.C. § 45-1508.

There is no dispute that Deutsche Bank purchased the subject Property at the Trustee's Sale and a Trustee's Deed was given to Deutsche Bank as evidence of its right to the property. CR 12. Further, Deutsche Bank is a purchaser in good faith who is entitled to the protection of section 45-1508. Section 45-1508 provides as follows:

> "A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code . . . The failure to give notice to any of such persons by mailing, personal service, posting or publication in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof."

The sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding the notice of the sale. *Spencer v. Jameson,* 147 Idaho 497, 504, 211 P.3d 106 (2009). This interpretation coincides with the legislative intent and interest in preserving the finality of title to real property. *Id.* The present case undisputedly does not even involve any allegations of deficient or improper notice. Therefore, the sale of subject Property was final once the trustee accepted Deutsche Bank's bid and executed the Trustee's Deed.

In addition to section 45-1508, the trustee's sale is also final pursuant to section 45-1510, Idaho Code which states, in pertinent part:

> "When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the affidavits required under section 45-1506, subsection (7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits.

> However, the recitals and affidavits are conclusive in favor of a purchaser in good faith for value or any successor in interest thereof . . ."

Thus, section 45-1510 provides that when the trustee's deed is recorded properly, the recitals in the deed and the affidavits required in section 45-1506(7) are conclusive in favor of a purchaser in good faith for value. *Appel*, 143 Idaho at 46–47. There is no dispute that the Breinholts had actual knowledge of the sale, nor are there any allegations of any other defects in compliance with I.C. § 45-1506. As there are no facts in the record to support either the existence of a violation of I.C. § 45-1506 or Deutsche Bank's knowledge of any potential violations, Deutsche Bank is a good faith purchaser under the statute. Thus, any potential claims of wrongful foreclosure by the Breinholts are precluded by statutory authority on point. Substantial evidence supports Deutsche Bank's status as a good faith purchaser at trustee's sale and the magistrate's decision to that effect should be upheld.

Finally, the question of "standing" raised by the Breinholts in their Informal Brief on Appeal resolves in Deutsche Bank's favor. Deutsche Bank was a good faith purchaser at sale, and thus it is the real party in interest who may bring the present action for possession. Cf. IRCP 17(a). The Breinholts rightly cite to *Caughey v. George Jensen & Sons*, 74 Idaho 132, 134–35, 258 P.2d 357 (1953) for the proposition that the owner of legal title is usually considered the real party in interest. Deutsche Bank possesses a Trustee's Deed to the property in question, and the continued unlawful holding over of the Breinholts continues to cause it injury. See CR 7.

G. Deutsche Bank is entitled to Possession of the Property according to its Status as the Purchaser at Trustee's Sale.

"The purchaser at the trustee's sale shall be entitled to possession of the property on the tenth day following the sale. . ." I.C. § 45-1506(11). Any person remaining in the property is deemed a tenant at sufferance. I.C. § 45-1506 (11). A purchaser at trustee's sale is entitled to bring an action for ejectment of a tenant at sufferance to recover possession of the property after the tenth day following the sale. An action for "[e]jectment requires proof of (1) ownership, (2) possession by the defendants, and (3) refusal of the defendants to surrender possession." *Ada County Highway District v. Total Success Investments, LLC*, 145 Idaho 360, 369, 179 P.3d 323, 332 (2008). Deutsche Bank is entitled to an order of ejectment as it is the owner of the Subject Property, and the Breinholts or other unknown occupants remain in possession of the subject Property and refuses to surrender possession of the same.

As discussed above, Deutsche Bank is the owner of the subject Property as it purchased the Property at Trustee's Sale and holds the Trustee's Deed to the Subject Property. There is no evidence in the record that controverts the Breinholts' refusal to surrender the Property over to Deutsche Bank. As Deutsche Bank properly established its ownership of the property as well as the Breinholts' unlawful and hostile possession of the property, substantial evidence supports the magistrate's decision to grant a writ of ejectment.

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H. This Court should Reject the Breinholts' Due Process Challenge because they had Ample Opportunity for a Hearing, but Never Properly Opposed the Motion for Summary Judgment, and because there was no Pre-Judgment Deprivation of any Property Right.

The Breinholts incorrectly assert that they had no meaningful opportunity to be heard in the context of this unlawful detainer action. Deutsche Bank brought a Motion for Summary Judgment, which was noted for hearing before the magistrate. The Breinholts did not oppose the motion, instead filing a bevy of confusing and irrelevant motions and petitions. See TP 2 at ll. 12-21. Despite the impropriety of their response, the magistrate considered the Breinholts' Verified Petition for In Rem Action as the opposition to Deutsche Bank's Motion and proceeded to have a hearing on the merits. The magistrate explained at length that in the Breinholt's case, the "bank didn't press to have their hearing quickly . . . they took your answer and responded to it and filed this motion when really the process would have allowed them to do something much quicker." TP 21 at ll. 8-13. The magistrate continued: "[i]n your case you had the opportunity to challenge that sale and not only did you . . . take that opportunity, you kind of took the offensive and filed the case yourself directly with the help of an attorney." TP 21 at ll. 19-23. There was no denial of any opportunity to be heard, and the application of doctrine of *res judicata* is not a denial of due process.

In addition, there was no pre-judgment deprivation of a property right suffered by the Breinholts. Many of the cases they cite to involve pre-judgment writs of attachment; all are distinguishable. The instant case went to judgment on Deutsche Bank's Motion, and only then did a Writ of Ejectment issue from the court. There was no "irrebutable presumption" applied.

Rather, the Breinholts were properly denied, under the doctrine of *res judicata* the ability to bring the same case twice.

CONCLUSION

The district court did not err in affirming the magistrate's order. Substantial evidence supports the magistrate's determination on summary judgment as (1) defendants' claims in this action are barred by the doctrine of res judicata and thus should be considered by this court; (2) defendants' claims are precluded as Deutsche Bank was a good faith purchaser at the Trustee's Sale; (3) Deutsche Bank is entitled to possession of the subject property under I.C. § 45-1506(11). Deutsche Bank respectfully requests that this Court affirm the district court and uphold the magistrate's Order on Summary Judgment and issuance of a Writ of Ejectment.

Dated this 22nd day of May, 2014.

Jennifer Tait, ISB# 8243
Robinson Tait, P.S.
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Tracie Bitney, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a paralegal to Jennifer Tait, attorney for Respondent, Deutsche Bank, and am competent to be a witness herein.

On May 23rd, 2014, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing RESPONDENT'S BRIEF to the following:

Susan and Richard Breinholt
1976 Star Lane
Meridian, ID 83646

DATED this 23rd day of May, 2014.

Tracie Bitney
Litigation Paralegal
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