3-31-2008

# Spencer v. Jameson Appellant's Reply Brief Dckt. 34517

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**LARRY SPENCER,**

**Appellant,**

**vs.**

**DEE JAMESON, an Individual, DAVIDSON TRUST CO., CUSTODIAN FOR IRA/SEP ACCOUNT NO. 68-0811-30, and JAMES A. RAEON, SUCCESSOR TRUSTEE,**

**Respondents.**

**KOOTENAI DC DOCKET NO. 06-3304**

**SUPREME COURT DOCKET NO. 34517**



# APPELLANT'S REPLY BRIEF

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

HONORABLE LANSING L. HAYNES
District Court Judge

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## JAMESON

### A. Failure to State a Claim Upon Which Relief Can Be Granted

Jameson argues in his Brief that Spencer has failed to state a claim upon which relief can be granted (Jameson Brief P. 14). Jameson asserted said affirmative defense in his Answer (R. P. 49). However, Jameson did not assert said affirmative defense in his Motion for Summary Judgment (AR. P. 17-27), and the District Court did not grant the Motion for Summary Judgment based on said affirmative defense (R. P. 72-81).

In ***Sanchez v. Arave, 120 Idaho 321, 815 P.2d 1061 (1991)***, this Court held:

> The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal. E.g., ***Kinsela v. State, Dep't of Finance, 117 Idaho 632, 634, 790 P.2d 1388, 1390 (1990)***. Recently we applied the rule to dismiss the appeal in a case where the state asked us to rule on an issue that was not raised in the trial court. ***State v. Martin, 119 Idaho 577, 808 P.2d 1322 (1991)***.
>
> The rationale for this rule was first stated by the Supreme Court of the Territory of Idaho in 1867:
>
> > It is for the protection of inferior courts. It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance. ***Smith v. Sterling, 1 Idaho 128, 131 (1867)***.

Having failed to argue the affirmative defense of failure to state a claim upon which relief can be granted before the District Court, below, it is respectfully requested that this Court decline to entertain Jameson's argument at this juncture.

**B. Subordination**

Should the Court consider the affirmative defense of Failure to State a Claim Upon Which Relief can be granted, Jameson's Motion for Summary Judgment should still be denied.

Jameson argues that, if a surplus from the Trustee's sale exists, Spencer is not entitled to the surplus because of the terms and conditions of the Subordination Agreement dated November 14, 2002 (AR. P. 138).

The answer to the question of whether Spencer is entitled to the surplus does not end the inquiry. As set forth in Spencer's Amended Complaint for Declaratory Judgment and Damages, Spencer sought alternative relief. Not only did Spencer seek an award of the surplus, but Spencer sought an order from the District Court declaring the Trustee's sale invalid and rescheduling the same.

In granting Jameson's Motion for Summary Judgment, the District Court agreed with Spencer that there were irregularities in the manner in which the sale occurred. However, the District Court then stated that ". . .the Plaintiff has not shown that this irregularity in bidding has caused an unfair situation of Plaintiff or in fact caused him any harm at all." (R. P. 78). Spencer argued before the District Court that Idaho Code

§ 45-1507(3) provides that excess sale proceeds shall be distributed to subordinate lien holders on the property sold. Spencer argued that he is, and was, obligated, to pay the note relative to the subordinated lien, and Spencer, therefore, had a direct interest in the sale of DOT No. 1 and DOT No. 2 being conducted in a manner consistent with the statutory requirements, free of "irregularities" and for market value.

The District Court's finding that the foreclosure sale of DOT No. 1 and DOT No. 2 was conducted irregularly, but then concluding said irregularities caused Spencer no harm, ignores the fact that the surplus from the Defendant's bid should have been paid to Thompson, which would have reduced the Plaintiff's liability to Thompson.

As a result, Spencer has asserted a claim upon which relief can be granted.

**C. Equity**

Jameson has also asserted in his Brief that it would be inequitable for the Court to adopt Spencer's argument (Jameson Brief P. 14). The concept of equity is quite broad and encompasses various theories. Jameson has failed to identify the equitable theory under which his argument is made, and Jameson has failed to cite any legal authority for this argument.

In ***Huff v. Singleton 143 Idaho 498, 148 P.3d 1244 (2006)***, this Court stated:

> When issues presented on appeal are not supported by propositions of law, citation to legal authority, or argument they will not be considered by this Court. ***Langley v. State, 126 Idaho 781, 784, 890 P.2d 732, 735 (1995)***.

Jameson argues that the manner in which the express contracts, DOT No. 1 and DOT No. 2, were entered into were proper. Yet, Jameson argues that if Spencer's argument is correct, Jameson will suffer an inequity. An inequity, if it exists, which occurred entirely as the result of Jameson's (or Davidson Trust's) own actions in deciding upon the order in which the foreclosure sales were conducted.

In ***Bakker v. Thunder Spring-Wareham LLC 141 Idaho 185, 108 P.3d 332 (2005)***, this Court stated:

> However, equitable remedies may be available even where an express contract exists, if the contract is unlawful, unconscionable or violates public policy. ***U.S. Bank Nat. Ass'n v. Kuenzli, 134 Idaho 222, 227, 999 P.2d 877, 882 (2000)***. It has not been asserted that the term at issue is unlawful and we have already concluded the term does not violate public policy.
>
> This Court recently addressed the doctrine of unconscionability in ***Lovey v. Regence BlueShield of Idaho, 139 Idaho 37, 72 P.3d 877 (2003)***:
>
> > Courts do not possess the roving power to rewrite contracts in order to make them more equitable. ***Smith v. Idaho State Univ. Federal Credit Union, 114 Idaho 680, 760 P.2d 19 (1988)***. Equity may intervene to change the terms of a contract if the unconscionable conduct is serious enough to justify the court's interference. Id. "While a court of equity will not relieve a party from a bargain merely because of hardship, yet he [or she] may claim the interposition of the court if an unconscionable advantage has been taken of his [or her] necessity or weakness." ***114 Idaho at 684, 760 P.2d at 23 (quoting 28 AM. JUR. 2D Equity § 24 (1966))***. It is not sufficient, however, that the contractual provisions appear unwise or their enforcement may seem harsh. ***Walker v. American Cyanamid Co., 130 Idaho 824, 948 P.2d 1123 (1997)***.

> For a contract or contractual provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable. ***Id.*** Procedural unconscionability relates to the bargaining process leading to the agreement while substantive unconscionability focuses upon the terms of the agreement itself. ***Id.***

Jameson has failed to demonstrate to the District Court, and this Court, how DOT No. 1 and DOT No. 2 are unlawful, unconscionable or violate public policy. It is respectfully requested that the Court decline to consider Jameson's equitable argument.

**2.**

**DAVIDSON TRUST**

Davidson Trust argues in its Brief that "The $5,000.00 is Not Missing" (Brief of Davidson Trust P. 9). Davidson Trust cites Paragraph V of DOT No. 2 in support of it's argument. Paragraph 5 of DOT No. 2 is entitled: "To Protect the security of this Deed of Trust, Grantor agrees:" (R. P. 16) Paragraph A has six subsections. Subsection 1 generally requires the Grantor to keep the property in good condition and repair. Subsection 2 generally requires the Grantor to maintain fire insurance. Subsection 3 generally requires the Grantor to appear and defend any actions purporting to affect the real property. Subsection 4 generally requires the Grantor to pay taxes, encumbrances and liens on the real property. Subsection 5 requires the Grantor to immediately pay all sums set forth in Subsections 1-4 which are expended by the Beneficiary or Trustee.

Subsection 6 generally provides that if the Grantor fails to make payment or do any act set forth in Paragraph A, that the Beneficiary or Trustee may do the same to protect the security.

Initially, it should again be pointed out that DOT No. 2 contains absolutely no language stating a mobile home is part of the security for the loan. Furthermore, as previously stated, the mobile home was personal property, not real property, and was therefore not subject to sale via a non-judicial foreclosure.

There is no disagreement between the Parties that the $5,000.00 was never provided to Spencer. Davidson Trust's argument is that the $5,000.00 was spent on "improvements" (Brief of Davidson Trust P. 10) to the mobile home. The expenditures for the "improvements" were made after DOT No. 2 was foreclosed (Affidavit of Ed Jameson AR. P. 145-146).

Clearly, the $5,000.00 was not spent by the beneficiary or the trustee of DEED OF TRUST No. 2 to protect the real property as contemplated by DOT No. 2. The mobile home was not real property. Clearly, the $5,000.00 was expended after the foreclosure of DOT No. 2, and therefore, could not have been to protect the real property because the title to the real property, and the possession of the real property, was with the beneficiary. The $5,000.00 was spent by the beneficiary to improve the value of the real property. Spencer should not be required to pay the beneficiary for improving the real property after the foreclosure had occurred.

Davidson Trust essentially concludes its argument on this issue by stating DOT No. 2 provides Spencer be liable to pay Davidson Trust and Jameson for the improvements made to the mobile home after the date of the foreclosure, and in the alternative, it is equitable that Spencer be liable to pay Davidson Trust and Jameson for the improvements made to the mobile home after the date of the foreclosure. As set forth above, DOT No. 2 does not contemplate that Spencer is liable for improvements made to personal property after the date of the foreclosure upon which personal property stood. In addition, Davidson Trust has failed to cite any legal authority in support of its equitable argument, and for the reasons and the legal authority cited herein relative to Jameson's arguments that are without legal authority, it is respectfully requested that the Court decline to address Davidson Trust's equitable arguments.

**3.**

**CONCLUSION**

There are genuine issues of material fact in dispute in the above-entitled matter. In the alternative, the facts demonstrate the foreclosure of DOT No. 1 and DOT No. 2 were conducted improperly, and Spencer is entitled to the relief sought in his Complaint herein. In either event, the District Court's granting of Jameson's Motion for Summary Judgment was in error, and it is therefore respectfully requested that this Court reverse the decision of the District Court and remand the matter for further proceedings.

DATED this 26th day of March, 2008.

IAN D. SMITH
Attorney for Spencer

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26th day of March, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

| | |
|---|---|
| Michael R. Chapman<br>Chapman Law Office, PLLC<br>2020 Lakewood Drive, Suite 221<br>Coeur d'Alene, ID 83814<br>Attorney for Dee Jameson | [ ] Hand-Delivered<br>[**X**] Regular U.S. Mail<br>[ ] Certified U.S. Mail<br>[ ] Overnight Mail<br>[ ] Facsimile: 208-667-7625 |
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