

4-15-2009

# Black Diamond Alliance, LLC v. Kimball Clerk's Record v. 1 Dckt. 35189

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IN THE Volume 1 of 1  
**LAW CLERK SUPREME COURT**  
OF THE  
STATE OF IDAHO

BLACK DIAMOND ALLIANCE, LLC.,  
Plaintiff *and*  
Respondent,  
vs.

SHERRY KIMBALL,  
Defendant *and*  
Appellant.

Appealed from the District Court of the Seventh *Judicial*  
District of the State of Idaho, in and for Bonneville *County*  
Hon. Gregory S. Anderson, *District Judge*

David A. Johnson P.O. Box 50578 Idaho Falls, ID 83405  
*Attorney for Appellant*

Kipp L. Manwaring 381 Shoup Avenue, Suite 210 Idaho Falls, ID 83402  
*Attorney for Respondent*

Filed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.  
Clerk  
By \_\_\_\_\_ Supreme Court of Appeals Deputy

FILED - COPY  
APR 15 2009

35189

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

BLACK DIAMOND ALLIANCE. LLC.,

Plaintiff/Respondent,

vs.

SHERRY KIMBALL,

Defendant/Appellant,

\*\*\*\*\*

**CLERK'S RECORD ON APPEAL**

\*\*\*\*\*

Appeal from the District Court of the  
Seventh Judicial District of the State of Idaho,  
in and for the County of Bonneville

HONORABLE Gregory S. Anderson, District Judge.

\*\*\*\*\*

David A. Johnson, Esq.  
WRIGHT, WRIGHT & JOHNSON  
P.O. Box 50578  
Idaho Falls, ID 83405-0578

Kipp L. Manwaring, Esq.  
Attorney at Law  
P.O. Box 50271  
Idaho Falls, ID 83405-0271

*Attorney for Appellant*

*Attorney for Respondent*

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ROA Report

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Case: CV-2007-0003806 Current Judge: Gregory S. Anderson

Black Diamond, LLC vs. Sherry Kimball, etal.

Black Diamond, LLC vs. Sherry Kimball, John Does I-x

Date	Code	User		Judge
7/6/2007	SMIS	DOOLITTL	Summons Issued (2)	Gregory S. Anderson
	NCOC	DOOLITTL	New Case Filed-Other Claims	Gregory S. Anderson
	NOAP	DOOLITTL	Plaintiff: Black Diamond, LLC Notice Of Appearance Kipp L. Manwaring	Gregory S. Anderson
		DOOLITTL	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Manwaring, Kipp L. (attorney for Black Diamond, LLC) Receipt number: 0028913 Dated: 7/6/2007 Amount: \$88.00 (Check) For: Black Diamond, LLC (plaintiff)	Gregory S. Anderson
7/25/2007	MOTN	PHILLIPS	Motion for Order Authorizing Service By Publication	Gregory S. Anderson
	AFFD	PHILLIPS	Affidavit of Counsel	Gregory S. Anderson
8/3/2007	RTOS	DOOLITTL	Return Of Service ***NOT FOUND*** Kherry Kimball	Gregory S. Anderson
8/17/2007	COMP	DOOLITTL	Amended Verified Complaint Filed	Gregory S. Anderson
8/29/2007	MOTN	LMESSICK	Motion for Order Authorizing Service By Publication	Gregory S. Anderson
	AFFD	LMESSICK	Affidavit of Counsel	Gregory S. Anderson
9/12/2007	ORDR	LMESSICK	Order Authorizing Service by Publication	Gregory S. Anderson
10/18/2007	APPL	WILLIAMS	Application for Default Judgment	Gregory S. Anderson
	AFFD	WILLIAMS	Affidavit of Counsel	Gregory S. Anderson
	PPUB	WILLIAMS	Proof Of Publication - 9/18, 9/25, 10/2, 10/9/07	Gregory S. Anderson
10/26/2007		DOOLITTL	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Kimball, Sherry (defendant) Receipt number: 0046446 Dated: 10/29/2007 Amount: \$58.00 (Check) For: Kimball, Sherry (defendant)	Gregory S. Anderson
	NOAP	DOOLITTL	Defendant: Kimball, Sherry Notice Of Appearance David A. Johnson	Gregory S. Anderson
11/5/2007	NOTC	PHILLIPS	3-Day Notice of Intent	Gregory S. Anderson
11/7/2007		DOOLITTL	Filing: I1B - Civil Answer Or Appear. More Than \$1000 With Prior Appearance Paid by: Johnson, David A. (attorney for Kimball, Sherry) Receipt number: 0048070 Dated: 11/8/2007 Amount: \$14.00 (Check) For: Kimball, Sherry (defendant)	Gregory S. Anderson
		DOOLITTL	Filing: J8B - Special Motions Counterclaim With Prior Appearance Paid by: Johnson, David A. (attorney for Kimball, Sherry) Receipt number: 0048070 Dated: 11/8/2007 Amount: \$14.00 (Check) For: Kimball, Sherry (defendant)	Gregory S. Anderson
	ANSW	DOOLITTL	Answer and Counterclaim	Gregory S. Anderson
11/20/2007	NOTC	LMESSICK	Notice of Service	Gregory S. Anderson
		LMESSICK	Reply to Counterclaim	Gregory S. Anderson
11/27/2007	NOTC	WILLIAMS	Notice of Compliance	Gregory S. Anderson



Black Diamond, LLC vs. Sherry Kimball, John Does I-x

Date	Code	User		Judge
12/3/2007	MOTN	WILLIAMS	Motion for Interim Payments	Gregory S. Anderson
12/5/2007	HRSC	LMESSICK	Hearing Scheduled (Motion 01/02/2008 10:30 AM) Motion for Interem Payment	Gregory S. Anderson
12/13/2007	NOTC	PHILLIPS	Notice of Compliance	Gregory S. Anderson
12/14/2007	NOTH	PHILLIPS	Notice Of Hearing 1/2/08 @ 10:30 a.m.	Gregory S. Anderson
12/28/2007	MOTN	TAWILLIAMS	Motion To Continue Hearing	Gregory S. Anderson
12/31/2007	MOTN	TAWILLIAMS	Motion To Shorten Time	Gregory S. Anderson
1/8/2008	HRVC	LMESSICK	Hearing result for Motion held on 01/02/2008 10:30 AM: Hearing Vacated Motion for Interem Payment	Gregory S. Anderson
1/15/2008	HRSC	LMESSICK	Hearing Scheduled (Motion 02/13/2008 09:15 AM) Motion for Interim Payment	Gregory S. Anderson
1/17/2008	NOTC	LMESSICK	Notice of Hearing Motion for Interim Payments	Gregory S. Anderson
1/18/2008	MOTN	DOOLITTL	Motion for Summary Judgment	Gregory S. Anderson
	MEMO	DOOLITTL	Memorandum in Support of Motion for Summary Judgment	Gregory S. Anderson
	AFFD	DOOLITTL	Affidavit of Counsel in Support of Motion for Summary Judgment	Gregory S. Anderson
	AFFD	DOOLITTL	Affidavit of First American Title	Gregory S. Anderson
	AFFD	DOOLITTL	Affidavit of remont Investment & Loan	Gregory S. Anderson
	AFFD	DOOLITTL	Affidavit of Bradon K. Howell	Gregory S. Anderson
1/30/2008	HRSC	LMESSICK	Hearing Scheduled (Motion 03/06/2008 08:15 AM) Motion for Summary Judgment	Gregory S. Anderson
1/31/2008	NOTH	DOOLITTL	Notice Of Hearing 3-6-08 @ 9:15 a.m.	Gregory S. Anderson
2/13/2008	HRHD	LMESSICK	Hearing result for Motion held on 02/13/2008 09:15 AM: Hearing Held Motion for Interim Payment	Gregory S. Anderson
2/14/2008	NTOS	DOOLITTL	Notice Of Service (Defendant's Interrogatories and Requests for Production of Documents)	Gregory S. Anderson
2/15/2008	MOTN	DOOLITTL	Motion to Amend Caption	Gregory S. Anderson
	AFFD	DOOLITTL	Affidavit of Sherry Kimball	Gregory S. Anderson
	AFFD	DOOLITTL	Affidavit of David A. Johnson	Gregory S. Anderson
	RESP	DOOLITTL	Response to Motion and Memorandum for Summary Judgment	Gregory S. Anderson
	MOTN	DOOLITTL	Motion to Continue Hearing	Gregory S. Anderson
2/19/2008	HRSC	LMESSICK	Hearing Scheduled (Pretrial Conference 04/30/2008 09:00 AM)	Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Trial 05/06/2008 10:00 AM)	Gregory S. Anderson
	MINE	LMESSICK	Minute Entry	Gregory S. Anderson
	ORPT	LMESSICK	Order Setting Pretrial Conference/trial	Gregory S. Anderson
2/20/2008	MEMO	QUINTANA	Memorandum of Points and Authorities on Equitable Power of Court to Require Interim Payments	Gregory S. Anderson

Date: 6/16/2008

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ROA Report

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Case: CV-2007-0003806 Current Judge: Gregory S. Anderson

Black Diamond, LLC vs. Sherry Kimball, etal.

Black Diamond, LLC vs. Sherry Kimball, John Does 1-x

Date	Code	User		Judge
2/21/2008	AFFD	DOOLITTL	Affidavit of Counsel	Gregory S. Anderson
2/29/2008	MOTN	DOOLITTL	Motion to Strike	Gregory S. Anderson
	BRIF	DOOLITTL	Reply Brief Filed	Gregory S. Anderson
	NTOS	DOOLITTL	Notice Of Service (Defendant's Black Diamond's LLC Response to Plaintiff's Interrogatories and Requests for production of Documents)	Gregory S. Anderson
3/5/2008	AFFD	ROBBINS	Affidavit of David A Johnson (2)	Gregory S. Anderson
3/6/2008	DCHH	LMESSICK	Hearing result for Motion held on 03/06/2008 08:15 AM: District Court Hearing Held Court Reporter: Karen Konvalinka Number of Transcript Pages for this hearing estimated: 100 pages	Gregory S. Anderson
	MINE	LMESSICK	Minute Entry	Gregory S. Anderson
3/12/2008	MOTN	WILLIAMS	Motion for Reconsideration	Gregory S. Anderson
3/13/2008		LMESSICK	Summary Judgment	Gregory S. Anderson
		LMESSICK	Writ of Ejection and Writ of Restitution	Gregory S. Anderson
3/18/2008	MOTN	ANDERSEN	Motion for Inspection of Premises	Gregory S. Anderson
	AFFD	ANDERSEN	Affidavit of Counsel in Support of Motion for Inspection of Premises and Application for Temporary Restraining Order	Gregory S. Anderson
	RESP	ANDERSEN	Response in Opposition to Motion for Reconsideration	Gregory S. Anderson
	MOTN	ANDERSEN	Motion for Order Quashing and Releasing Notice of Lis Pendens	Gregory S. Anderson
	APPL	ANDERSEN	Application for Temporary Restraining Order (no proposed order included)	Gregory S. Anderson
3/20/2008	HRSC	LMESSICK	Hearing Scheduled (Motion 04/10/2008 08:00 AM) Motion to Quash and Release Lis Pendens Motion for Inspection of Premises Application for TRO	Gregory S. Anderson
3/24/2008	NOTC	LMESSICK	Notice of Withdrawal of Motion to Allow Inspection of Premises	Gregory S. Anderson
	MOTN	LMESSICK	Motion for Costs and Fees	Gregory S. Anderson
	MEMO	LMESSICK	Memorandum of Costs	Gregory S. Anderson
3/27/2008	NOTH	DOOLITTL	Notice Of Hearing 4-17-08 @ 8:15 a.m.	Gregory S. Anderson
3/28/2008	NOTH	DOOLITTL	Notice Of Hearing 4-17-08 @ 8:15 a.m.	Gregory S. Anderson
4/1/2008	AFFD	LMESSICK	Affidavit of Lost Writ	Gregory S. Anderson
4/2/2008		TAWILLIAMS	Filing: T - Civil Appeals To The Supreme Court (\$86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Kimball, Sherry (defendant) Receipt number: 0013572 Dated: 4/3/2008 Amount: \$15.00 (Check) For: Kimball, Sherry (defendant)	Gregory S. Anderson
	NOTC	TAWILLIAMS	Notice of Appeal	Gregory S. Anderson

Date: 6/16/2008

Seventh Judicial District Court - Bonneville County

User: SHULTS

Time: 03:27 PM

ROA Report

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Case: CV-2007-0003806 Current Judge: Gregory S. Anderson  
Black Diamond, LLC vs. Sherry Kimball, etal.

Black Diamond, LLC vs. Sherry Kimball, John Does 1-x

Date	Code	User		Judge
4/2/2008		TAWILLIAMS	Objection To Attorney Fees and Costs	Gregory S. Anderson
4/4/2008	WRIT	LMESSICK	Writ Issued - Writ of Ejectment and Writ of Restitution (Bonneville County)	Gregory S. Anderson
	WRIT	LMESSICK	Writ Issued - Amended Writ of Ejectment and Writ of Restitution (Bonneville County)	Gregory S. Anderson
	NOTH	DOOLITTL	Notice Of Hearing 4-17-08 @ 8:15 a.m.	Gregory S. Anderson
	MOTN	DOOLITTL	Motion to Enforce Judgment and Alternative Motion for Bond Pending Appeal	Gregory S. Anderson
	MISC	SHULTS	Notice of Appeal	Gregory S. Anderson
	BNDC	SHULTS	Bond Posted - Cash (Receipt 13806 Dated 4/4/2008 for 100.00)	Gregory S. Anderson
4/17/2008	DCHH	LMESSICK	Hearing result for Motion held on 04/17/2008 08:15 AM: District Court Hearing Held Court Reporter: Karen Konvalinka Number of Transcript Pages for this hearing estimated: 50 pages	Gregory S. Anderson
	STATUS	LMESSICK	Case Status Changed: closed pending clerk action	Gregory S. Anderson
	HRVC	LMESSICK	Hearing result for Trial held on 05/06/2008 10:00 AM: Hearing Vacated	Gregory S. Anderson
	HRVC	LMESSICK	Hearing result for Pretrial Conference held on 04/30/2008 09:00 AM: Hearing Vacated	Gregory S. Anderson
4/18/2008		SHULTS	S.C. Notice sent to Mr. Johnson. Amended Appeal to be filed within 14 days (April 30) Serving Reporter.	Gregory S. Anderson
4/24/2008		MCGARY	Amended Notice of Appeal	Gregory S. Anderson
5/1/2008	WRRT	WILLIAMS	Writ Returned	Gregory S. Anderson
5/15/2008		SHULTS	S.C. Acknowledgment of Appeal & Receipt for \$86.00	Gregory S. Anderson
		SHULTS	DOCKET # 35189	Gregory S. Anderson
		SHULTS	S.C. DUE DATE 7-3-08	Gregory S. Anderson
	MEMO	LMESSICK	Memorandum Decision Re: Motion to strike; Motion for Reconsideration; Motion for Order Quashing and Releasing Notice of Lis Pendens; and Motion for Costs and Fees	Gregory S. Anderson
	ORDR	LMESSICK	Order Re: Motion to strike; Motion for Reconsideration; Motion for Order Quashing and Releasing Notice of Lis Pendens; and Motion for Costs and Fees	Gregory S. Anderson
6/4/2008	MOTN	DOOLITTL	Motion to Reconsider	Gregory S. Anderson

CHARLES C. JUST, ESQ. – ISB 1779  
KIPP L. MANWARING, ESQ. – ISB 3817  
JUST LAW OFFICE  
381 Shoup Avenue  
P.O. Box 50271  
Idaho Falls, Idaho 83405  
Telephone: (208) 523-9106  
Facsimile: (208) 523-9146

2007.07 -6 AM 10:53  
BONNEVILLE COUNTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07- 3806
Plaintiff,	)	
vs.	)	COMPLAINT
	)	
SHERRY KIMBALL, an Individual,	)	Fee Category: A.1.
and JOHN DOES I-X,	)	Fee: \$88.00
	)	
Defendants.	)	
	)	

Plaintiff, for a cause of action against Defendant, complains and alleges as follows.

1. Black Diamond, LLC (Black) is a corporation licensed to do business in the State of Idaho and previously held a promissory note secured by a deed of trust on the subject real property described below.
2. Sherry Kimball (Kimball) at all times relevant here were residents of Bonneville County, Idaho, and previously held title and interest to the subject real property described below.
3. Black foreclosed Kimball's title and interest in the subject real property through nonjudicial foreclosure of its deed of trust, culminating in issuance of a Trustee's Deed to Black on June 12, 2007 and recorded as Instrument No. 1266637 in the Recorder's Office for Bonneville County, Idaho. A copy of the Trustee's Deed is attached as Exhibit A and is incorporated here by reference.
4. Black now holds paramount title to the subject real property free of Kimball's interest, title, claim or right.
5. The subject real property is known by its common address of 2345 North Woodruff, Idaho Falls, Idaho and is more particularly described as follows:

Lot 3, Block 2, New Sweden Estates, Division No. 1, to the city of Idaho Falls, Bonneville County, Idaho, according to the plat recorded March 30, 1978 as Instrument No. 573699.

6. More than ten days have elapsed since conveyance and recording of the Trustee's Deed.

7. In accordance with Idaho Code § 45-1506(11), Black is entitled to possession of the real property obtained through the foreclosure process.

8. Kimball has continued to occupy the subject real property in derogation of Black's title and right to possession.

9. Kimball has no title, interest, or right to possession of the subject real property and by law is a tenant at sufferance.

10. Black has not agreed to any tenancy with Kimball and considers Kimball's continued occupancy a trespass.

11. Black is entitled to a writ of ejectment removing Kimball, and any and all persons claiming possession or occupancy under them, together with all personal property from the subject real property.

12. Black is entitled to a writ of restitution granting it full possession and occupancy of the subject real property.

13. Black has retained the services of Just Law Office to prosecute this action and in accordance with the terms of the deed of trust and promissory note executed by Kimball, Black is entitled to an award of its court costs and reasonable attorney fees. In accordance with Idaho Code §§ 12-120(3) and 12-121, and applicable rules of the Idaho Rules of Civil Procedure, Black is entitled to an award of its court costs and reasonable attorney fees. In the event this action is uncontested, a reasonable attorney fee is \$450.00. In the event this action is contested, a reasonable attorney fee will be in such further and greater amount as the court may determine.

WHEREFORE, Plaintiff requests relief as follows:

1. Judgment granting a Writ of Ejectment and directing the Sheriff of Bonneville County to use such force as reasonably necessary to physically remove Defendant, and any person claiming possession or occupancy under her, together with all personal property from the subject real property.

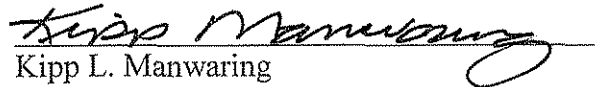
2. Judgment granting a Writ of Restitution and directing the Sheriff of Bonneville County to place Plaintiff in full possession and occupancy of the subject real property.

3. An Order decreeing that any personal property left on the subject property by Defendant, or any persons claiming an occupancy right derivatively through Defendant, is deemed to be abandoned and valueless, and authorizing Plaintiff to take possession of such property or discard or destroy it as Plaintiff shall see fit.

4. Judgment awarding Plaintiff its court costs and reasonable attorney fees.

5. For such further and other relief as the court deems just and equitable.

Dated this 5<sup>th</sup> day of July 2007.

  
Kipp L. Manwaring  
Attorney for Plaintiff

### TRUSTEE'S DEED

JUST LAW, INC., herein called Successor Trustee under the Deed of Trust hereinafter particularly described, does hereby bargain, sell and convey, without warranty to Black Diamond LLC, whose business address is 2345 N. Woodruff, Idaho Falls, ID 83404, all of the real property situated in the County of Bonneville, State of Idaho, described as follows to-wit:

**Lot 3, Block 2, New Sweden Estates, Division No. 1, to the city of Idaho Falls, Bonneville County, Idaho, according to the plat recorded March 30, 1978 as Instrument No. 573699.**

This conveyance is made pursuant to the powers conferred upon the Successor Trustee by the Deed of Trust between Sherry Kimball, an unmarried person, as Grantors, Just Law, Inc., as Successor Trustee, and Mortgage Electronic Registration Systems, Inc. as the Beneficiary, under the Deed of Trust recorded January 22, 2004 as Instrument No. 1141336, in the records of Bonneville County, Idaho. The Beneficial interest of said Deed of Trust was subsequently assigned to Fremont Investment & Loan, recorded January 22, 2007 as Instrument No. 1250938; and after the fulfillment of the conditions specified in said Deed of Trust authorizing the conveyance as follows:

(a) Default occurred in the obligations for which such Deed of Trust was given as security and the Beneficiary made demand upon the Successor Trustee to sell said property pursuant to the terms of said Deed of Trust. The Notice of Default was recorded as Instrument No. 1250940, records of said County, Idaho, the nature of such default being set forth in said Notice of Default. Such default still existed at the time of sale.

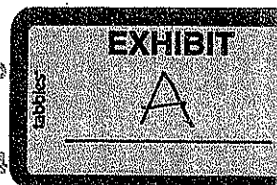
(b) After recordation of said Notice of Default, Successor Trustee gave notice of the time and place of the sale of said property by registered or certified mail, by personal service upon the occupants of said real property, or by posting in a conspicuous place on said premises and by publishing in a newspaper of general circulation in the county in which the property is situated as more fully appears in affidavits recorded at least 20 days prior to the date of sale as Instrument Nos. 1255324, 1255325, and 1255326, records of said County, Idaho.

(c) The provisions, recitals and contents of the Notice of Default referred to in paragraph (a) and of the Affidavits referred to in paragraph (b) shall be and they are hereby incorporated herein and made an integral part hereof for all purposes as though set forth herein at length.

(d) All requirements of law regarding the mailing, personal service, posting, publication and recording of the Notice of Default and Notice of Sale and of all other notices have been complied with.

(e) Not less than 120 days elapsed between the giving of notice of sale by certified mail and the sale of said property.

(f) Successor Trustee, at the time and place of sale fixed by said notices, at public auction, in one parcel, struck off to Black Diamond LLC, being the highest bidder, the property



herein described for the sum of \$112,500.00, subject however to all prior liens and encumbrances. No person or corporation offered to take any part of said property less than the whole thereof for the amount of principal, interest, advances, and costs.

In WITNESS WHEREOF, the Successor Trustee, Just Law, Inc., has caused his name to be hereunto subscribed this 12 day of June, 2007.

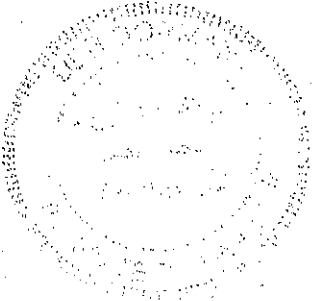
Just Law, Inc.

*[Handwritten signature]*  
\_\_\_\_\_

STATE OF IDAHO            )  
  ) ss.  
County of Bonneville    )

On this 12th day of June, 2007, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared Charles C. Just, known to me to be the President of the corporation that executed this instrument or the person who executed the instrument on behalf of said corporation, whose name is subscribed to the within instrument and acknowledged to me that such corporation executed the same as such Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 12th day of June, 2007.



*[Handwritten signature]*  
Notary Public for Idaho  
Residing at Idaho Falls  
Commission expires: 4-17-2012

INSTRUMENT NO.	<u>1266637</u>
DATE	<u>6-14-07</u>
INST. CODE	<u>210</u>
IMAGED PGS	<u>2</u>
FEE	<u>6-</u>
STATE OF IDAHO	) ss.
COUNTY OF BONNEVILLE	)
I hereby certify that the within instrument was recorded.	
Ronald Longmore, County Registrar	
By	<i>[Signature]</i>
Deputy	
Request of	<u>FATCO</u>



CHARLES C. JUST, ESQ. - ISB 1779  
KIPP L. MANWARING, ESQ. - ISB 3817  
JUST LAW OFFICE  
381 Shoup Avenue  
P.O. Box 50271  
Idaho Falls, Idaho 83405  
Telephone: (208) 523-9106  
Facsimile: (208) 523-9146

7:07 AM 17 PM 12:17

RETURNED  
 Fee Not Paid  
 Wrong Filing Fee  
 No Return of Service  
 WRIT Not Returned  
 Other  
AUG 14 P3:48

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	AMENDED VERIFIED
and JOHN DOES I-X,	)	COMPLAINT
	)	
Defendants.	)	
	)	

Plaintiff, for a cause of action against Defendant, complains and alleges as follows.

1. Black Diamond, LLC (Black) is a corporation licensed to do business in the State of Idaho and was granted a deed of trust on the subject real property described below.
2. Sherry Kimball (Kimball) at all times relevant here were residents of Bonneville County, Idaho, and previously held title and interest to the subject real property described below.
3. Black foreclosed Kimball's title and interest in the subject real property through nonjudicial foreclosure of its deed of trust, culminating in issuance of a Trustee's Deed to Black on June 12, 2007 and recorded as Instrument No. 1266637 in the Recorder's Office for Bonneville County, Idaho. A copy of the Trustee's Deed is attached as Exhibit A and is incorporated here by reference.
4. Black now holds paramount title to the subject real property free of Kimball's interest, title, claim or right.
5. The subject real property is known by its common address of 2746 W. 17<sup>th</sup> S., Idaho Falls, Idaho and is more particularly described as follows:

Lot 3, Block 2, New Sweden Estates, Division No. 1, to the city of Idaho Falls, Bonneville County, Idaho, according to the plat recorded March 30, 1978 as Instrument No. 573699.

6. More than ten days have elapsed since conveyance and recording of the Trustee's Deed.

7. In accordance with Idaho Code § 45-1506(11), Black is entitled to possession of the real property obtained through the foreclosure process.

8. Kimball has continued to occupy the subject real property in derogation of Black's title and right to possession.

9. Kimball has no title, interest, or right to possession of the subject real property and by law is a tenant at sufferance.

10. Black has not agreed to any tenancy with Kimball and considers Kimball's continued occupancy a trespass.

11. Black is entitled to a writ of ejectment removing Kimball, and any and all persons claiming possession or occupancy under them, together with all personal property from the subject real property.

12. Black is entitled to a writ of restitution granting it full possession and occupancy of the subject real property.

13. Black has retained the services of Just Law Office to prosecute this action and in accordance with the terms of the deed of trust and promissory note executed by Kimball, Black is entitled to an award of its court costs and reasonable attorney fees. In accordance with Idaho Code §§ 12-120(3) and 12-121, and applicable rules of the Idaho Rules of Civil Procedure, Black is entitled to an award of its court costs and reasonable attorney fees. In the event this action is uncontested, a reasonable attorney fee is \$450.00. In the event this action is uncontested, a reasonable attorney fee will be in such further and greater amount as the court may determine.

WHEREFORE, Plaintiff requests relief as follows:

1. Judgment granting a Writ of Ejectment and directing the Sheriff of Bonneville County to use such force as reasonably necessary to physically remove Defendant, and any person claiming possession or occupancy under her, together with all personal property from the subject real property.

2. Judgment granting a Writ of Restitution and directing the Sheriff of Bonneville County to place Plaintiff in full possession and occupancy of the subject real property.

3. An Order decreeing that any personal property left on the subject property by Defendant, or any persons claiming an occupancy right derivatively through Defendant, is deemed to be abandoned and valueless, and authorizing Plaintiff to take possession of such property or discard or destroy it as Plaintiff shall see fit.

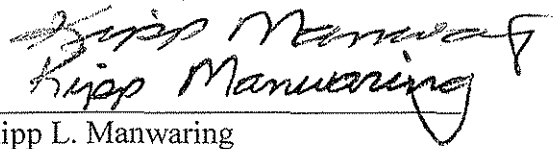
4. Judgment awarding Plaintiff its court costs and reasonable attorney fees.

5. For such further and other relief as the court deems just and equitable.

Dated this 14th day of August 2007.



Trent Tyler, Representative  
Black Diamond, LLC

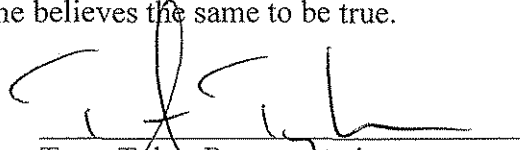


Kipp L. Manwaring  
Attorney for the Plaintiffs

VERIFICATION

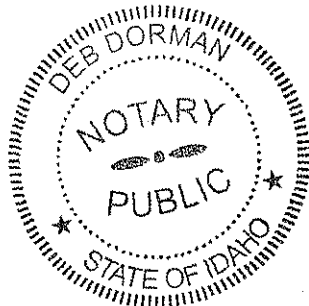
STATE OF IDAHO )  
 )  
 ) ss.  
County of Bonneville )


Trent Tyler, Representative for the Plaintiff, Black Diamond, LLC, being first duly sworn, depose and say: he is the Representative for Black Diamond, LLC and they are the Plaintiffs in the above action; he has read the foregoing Complaint and knows the contents thereof, and as to the matters and things alleged, he believes the same to be true.

  
\_\_\_\_\_  
Trent Tyler, Representative  
Black Diamond, LLC  
Plaintiff

SUBSCRIBED AND SWORN to before me this 14th day of August 2007.

[SEAL]



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Idaho Falls  
My Commission Expires: 04.17.12

## TRUSTEE'S DEED

JUST LAW, INC., herein called Successor Trustee under the Deed of Trust hereinafter particularly described, does hereby bargain, sell and convey, without warranty to Black Diamond LLC, whose business address is 2345 N. Woodruff, Idaho Falls, ID 83404, all of the real property situated in the County of Bonneville, State of Idaho, described as follows to-wit:

**Lot 3, Block 2, New Sweden Estates, Division No. 1, to the city of Idaho Falls, Bonneville County, Idaho, according to the plat recorded March 30, 1978 as Instrument No. 573699.**

This conveyance is made pursuant to the powers conferred upon the Successor Trustee by the Deed of Trust between Sherry Kimball, an unmarried person, as Grantors, Just Law, Inc., as Successor Trustee, and Mortgage Electronic Registration Systems, Inc. as the Beneficiary, under the Deed of Trust recorded January 22, 2004 as Instrument No. 1141336, in the records of Bonneville County, Idaho. The Beneficial interest of said Deed of Trust was subsequently assigned to Fremont Investment & Loan, recorded January 22, 2007 as Instrument No. 1250938; and after the fulfillment of the conditions specified in said Deed of Trust authorizing the conveyance as follows:

(a) Default occurred in the obligations for which such Deed of Trust was given as security and the Beneficiary made demand upon the Successor Trustee to sell said property pursuant to the terms of said Deed of Trust. The Notice of Default was recorded as Instrument No. 1250940, records of said County, Idaho, the nature of such default being set forth in said Notice of Default. Such default still existed at the time of sale.

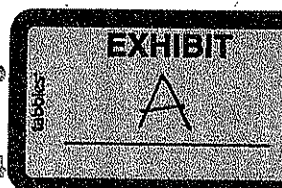
(b) After recordation of said Notice of Default, Successor Trustee gave notice of the time and place of the sale of said property by registered or certified mail, by personal service upon the occupants of said real property, or by posting in a conspicuous place on said premises and by publishing in a newspaper of general circulation in the county in which the property is situated as more fully appears in affidavits recorded at least 20 days prior to the date of sale as Instrument Nos. 1255324, 1255325, and 1255326, records of said County, Idaho.

(c) The provisions, recitals and contents of the Notice of Default referred to in paragraph (a) and of the Affidavits referred to in paragraph (b) shall be and they are hereby incorporated herein and made an integral part hereof for all purposes as though set forth herein at length.

(d) All requirements of law regarding the mailing, personal service, posting, publication and recording of the Notice of Default and Notice of Sale and of all other notices have been complied with.

(e) Not less than 120 days elapsed between the giving of notice of sale by certified mail and the sale of said property.

(f) Successor Trustee, at the time and place of sale fixed by said notices, at public auction, in one parcel, struck off to Black Diamond LLC, being the highest bidder, the property



herein described for the sum of \$112,500.00, subject however to all prior liens and encumbrances. No person or corporation offered to take any part of said property less than the whole thereof for the amount of principal, interest, advances, and costs.

In WITNESS WHEREOF, the Successor Trustee, Just Law, Inc., has caused his name to be hereunto subscribed this 12 day of June, 2007.

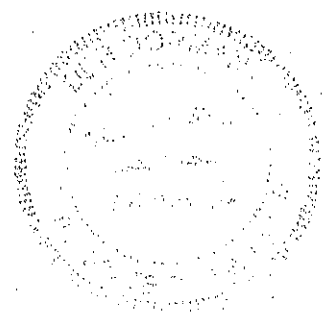
Just Law, Inc.

*[Handwritten signature]*

STATE OF IDAHO )  
 ) ss.  
County of Bonneville )

On this 12th day of June, 2007, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared Charles C. Just, known to me to be the President of the corporation that executed this instrument or the person who executed the instrument on behalf of said corporation, whose name is subscribed to the within instrument and acknowledged to me that such corporation executed the same as such Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 12th day of June, 2007.



*[Handwritten signature]*  
Notary Public for Idaho  
Residing at Idaho Falls  
Commission expires: 4-17-2012

INSTRUMENT NO. 1266637  
DATE 6-14-07  
INST. CODE 210  
IMAGED PGS 2  
FEE 6-  
STATE OF IDAHO ) ss.  
COUNTY OF BONNEVILLE )  
I hereby certify that the within instrument was recorded.  
Ronald Longmore, County Recorder  
By *[Signature]*  
Deputy  
Request of FATCO

2013 NOV -7 PM 4:28

David A. Johnson, Esq.  
Wright, Wright & Johnson PLLC  
477 Shoup Avenue, Suite 109  
P.O. Box 52251  
Idaho Falls, ID 83405-2251  
Telephone (208) 535-1000  
Facsimile (208) 523-4400  
Idaho State Bar No. 3319

Attorney for Defendant

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

**BLACK DIAMOND, LLC,**  
Plaintiff,  
  
**vs.**  
  
**SHERRY KIMBALL,**  
Defendant.

Case No: CV-07-3806

**ANSWER AND COUNTERCLAIM**

Fee Category: I.1.b.; J.8.b.  
Fee: \$14.00; \$14.00

Sherry Kimball (Kimball), by and through her attorney David A. Johnson, hereby answers Plaintiff Black Diamond, LLC's (Black) Amended Verified Complaint as follows:

1. Each and every allegation not specifically admitted herein is denied.
2. Denies paragraph 1.
3. As to paragraph 2, Kimball admits that she was and is a resident of Bonneville County, Idaho, and that she holds title and interest to the subject real property. The remainder of paragraph 2 is denied.

4. As to paragraph 3, Kimball admits that Exhibit A was recorded on the records of Bonneville County, Idaho. The remainder of paragraph 3 is denied, including a specific denial that Black foreclosed Kimball's title and interest.
5. Denies paragraph 4.
6. Admits paragraph 5.
7. Admits paragraph 6. Kimball does not admit the validity of the Trustee's Deed.
8. Denies paragraph 7.
9. As to paragraph 8, Kimball admits that she continued to occupy the subject real property. The remainder of paragraph 8 is denied.
10. Denies paragraph 9.
11. Admits paragraph 10 as to Black's statement of position, but denies the truthfulness of Black's position.
12. Denies paragraph 11.
13. Denies paragraph 12.
14. As to paragraph 13, Kimball admits that Black has retained the services of Just Law Office, but denies that she should pay for such services.

#### **FIRST AFFIRMATIVE DEFENSE**

At the time of the foreclosure sale, Kimball was not in default.



## **SECOND AFFIRMATIVE DEFENSE**

The foreclosure sale was not conducted in conformance with Idaho Law. Black is not entitled to possession or any writ for the removal of Kimball from the subject real property.

## **THIRD AFFIRMATIVE DEFENSE**

Kimball and Fremont Investment & Loan (Fremont) entered into an accord with the lender wherein the foreclosure sale was to be cancelled. The arrangement could also be construed as a novation, modification of the contract, etc., wherein Kimball would not be in default of the terms of the contract between Fremont and Kimball.

## **FOURTH AFFIRMATIVE DEFENSE**

Black lacks standing or is not the real party in interest.

## **FIFTH AFFIRMATIVE DEFENSE**

By their conduct, Black assumed the risk.

## **SIXTH AFFIRMATIVE DEFENSE**

Black would be unjustly enriched were it to receive the subject real property without paying for the full consideration for the subject real property.

## **SEVENTH AFFIRMATIVE DEFENSE**

By their conduct, individually and in conjunction with other entities/individuals, Black waived any claims it presently raises.

## **NINTH AFFIRMATIVE DEFENSE**

Black would be unjustly enriched were it to receive the subject real property without paying the full consideration for the subject real property.

## TENTH AFFIRMATIVE DEFENSE

Black did not purchase the subject real property in good faith..

## COUNTERCLAIM

Kimball for a cause of action against Black, states and alleges as follows:

1. Kimball is a resident of Bonneville County, Idaho.
2. Kimball is the owner of real property located in Bonneville County, Idaho, located at 2746 W. 17<sup>th</sup> South, Idaho Falls, Idaho, (hereinafter referred to as "the Subject Property") whose legal description is:  
  
Lot 3, Block 2, New Sweden Estates, Division No. 1, to the city of Idaho Falls, Bonneville County, Idaho according to the plat recorded March 30, 1978
3. Kimball purchased the Subject Property with borrowed funds, secured by the Subject Property.
4. Fremont acquired the interest from the previous creditor for the Deed of Trust and Deed of Trust Note on or about January 22, 2007
5. Just Law Office, acting on behalf of Fremont, processed a Notice of Trustee's Sale, on or about January 22, 2007, setting the date of sale for May 29, 2007.
6. Thereafter, Kimball contacted Fremont because of incorrect accounting on the part of Fremont or its predecessor in interest, wherein certain payments were credited to Kimball's account.

7. On May 29, 2007, arrangements were made between Fremont and Kimball, wherein in exchange for a payment of \$3,000.00 and a promise to pay the balance on or before June 18, 2007, Fremont would:
  - a. Cancel the Trustee's sale.
  - b. Notify the Trustee to make sure the sale was cancelled.
  - c. Take no further action until at least June 18, 2007.
8. As agreed, Kimball paid Fremont \$3,000.00 on May 29, 2007, and Fremont accepted the payment.
9. The Trustee's sale scheduled for May 29, 2007 was cancelled.
10. Without any notice to Kimball, the Subject Property was sold to Black by the Trustee, either by sale or otherwise, sometime on or before June 14, 2007. Kimball was not aware of any date or time for any sale other than the May 29, 2007 sale, which was vacated.
11. On June 14, 2007, a Trustee's Deed was issued by Just Law Office, acting as Trustee to Black .
12. On June 20, 2007, Fremont returned to Kimball a check for \$3,000.00, a true and correct copy of which is attached hereto as Exhibit A.

### **FIRST CAUSE OF ACTION**

#### **Quiet Title**

13. Kimball incorporates by reference paragraphs 1-12 as stated above.
14. At the time of the Trustee's sale and issuance of the Trustee's Deed to Black, Kimball was not in default of the Deed of Trust and Deed of Trust Note (Note).

15. At the time of the Trustee's sale and issuance of the Trustee's Deed to Black, Kimball and Fremont had entered into an accord, novation, and/or other modification of the contract and no sale should have been conducted nor should the Trustee's Deed have been issued.
16. The Trustees sale was not conducted in conformance with Idaho law, including not following the requirements of Title 45, Chapter 15 of the Idaho Code and pursuant to the due process requirements as contained in the U.S. Constitution and the Constitution of the State of Idaho.
17. Kimball is entitled to be have the Trustee's Deed (Instrument number 1266637) declared invalid, null, and void.
18. Kimball is entitled to be declared the rightful owner of the Subject Property, subject to the Note.

### **SECOND CAUSE OF ACTION**

#### **Unjust Enrichment**

19. Kimball incorporates by reference paragraphs 1-18 as stated above.
20. *Black would be unjustly enriched, should they retain the Subject Property without further compensation to Kimball.*
21. Under the totality of the circumstances, it would be inequitable for Black to retain the benefit of the Subject Property without reasonable compensation or payment to Kimball.

### **REQUEST FOR ATTORNEY FEES**

Attorneys fees of are requested, pursuant to Idaho Code §§ 12-120 and 121.

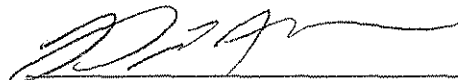
**DEMAND FOR JURY TRIAL**

Kimball demands a trial by jury on all matters of law and fact.

WHEREFORE, Kimball prays for judgment as follows:

- 1. Black's Complaint be dismissed and it take nothing thereby.
- 2. The Court decree that Black has no interest in the Subject Property.
- 3. For an award of attorney fees and costs.
- 4. For any other and further relief the Court deems just and equitable.

DATED: November 7, 2007.

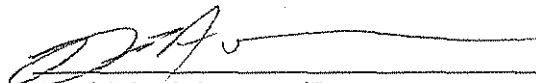
  
 \_\_\_\_\_  
 WRIGHT, WRIGHT & JOHNSON, PLLC  
 David A. Johnson, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on November 7, 2007, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Name and Address  
 Kipp L. Manwaring  
 381 Shoup Avenue  
 P.O. Box 50271  
 Idaho Falls, Idaho 83405

Method of Service  
 Mail

  
 \_\_\_\_\_  
 David A. Johnson, Esq.

--	--	--	--

CHECK AMOUNT \$3,000.00

THE ORIGINAL DOCUMENT HAS A WHITE REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO VIEW. DO NOT CASH IF NOT PRESENT.

**FREMONT**  
INVESTMENT & LOAN

WELLS FARGO BANK

11 24  
121018

NO. 0037117912

P.O. BOX 19030  
San Bernardino, CA 92423-9030

CHECK DATE  
06/20/07

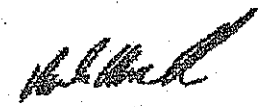
Member  
FDIC

\*\*\*\*\*3,000 DOLLARS AND 00 CENTS

AMOUNT \$ \$3,000.00

VOID AFTER 180 DAYS

OF: SHERRY KIMBALL  
2746 WEST 17TH SOUTH  
IDAHO FALLS ID 83402



AUTHORIZED SIGNATURE  
SECOND SIGNATURE REQUIRED FOR AMOUNTS \$100,000 & ABOVE

⑈0037117912⑈ ⑆21000248⑆ 4159 311810⑈

**EXHIBIT A**

Security Features Included

CHARLES C. JUST, ESQ. – ISB 1779  
KIPP L. MANWARING, ESQ. – ISB 3817  
JUST LAW OFFICE  
381 Shoup Avenue  
P.O. Box 50271  
Idaho Falls, Idaho 83405  
Telephone: (208) 523-9106  
Facsimile: (208) 523-9146

2007 NOV 20 PM 1:05  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

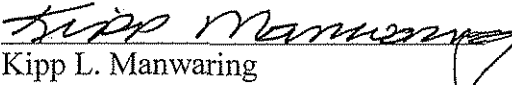
Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	NOTICE OF SERVICE
and JOHN DOES I-X,	)	
	)	
Defendants.	)	

I HEREBY CERTIFY that on the 14th day of November 2007, I served **PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUEST FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS** to the following in manner and method described:

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**

  
Kipp L. Manwaring  
Attorney for Plaintiff

CHARLES C. JUST, ESQ. – ISB 1779  
 KIPP L. MANWARING, ESQ. – ISB 3817  
 JUST LAW OFFICE  
 381 Shoup Avenue  
 P.O. Box 50271  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 523-9106  
 Facsimile: (208) 523-9146

2007 NOV 20 PM 1:05  
 DISTRICT COURT  
 7TH JUDICIAL DISTRICT  
 BONNEVILLE COUNTY ID

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	REPLY TO COUNTERCLAIM
and JOHN DOES I-X,	)	
	)	
Defendants.	)	
	)	

Black Diamond, LLC, replies to Sherry Kimball’s counterclaim as follows.

1. All allegations not specifically admitted are deemed denied.
2. Paragraph 1 is admitted.
3. Paragraphs 2, 11, 16, 17, 18, 20, and 21 are denied.
4. Black Diamond, LLC, is without sufficient knowledge and information to admit or deny the allegations of paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, and 15, and therefore the allegations in said paragraphs are denied.
5. Paragraphs 13 and 19 are precatory statements and require no response.

**Affirmative Defenses**

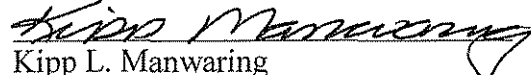
1. Waiver.
2. Estoppel and quasi-estoppel.
3. Failure to join Fremont Investment & Loan as an indispensable party.
4. Breach of contract by Kimball.
5. Failure of accord.
6. Kimball is a trespasser and has no right to possession.



7. Kimball's claims should have been brought against Fremont Investment & Loan and are solely claims for damages where she has no title rights to possession.

8. Black is a bona fide purchaser for value.

Dated this 14th day of November 2007.

  
Kipp L. Manwaring  
Attorney for Plaintiff

CERTIFICATE OF MAILING


I HEREBY CERTIFY that on the 13th day of November 2007, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

REPLY TO COUNTERCLAIM

PARTIES SERVED:

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**

  
Alicia Lambert  
Legal Assistant

CHARLES C. JUST, ESQ. – ISB 1779  
KIPP L. MANWARING, ESQ. – ISB 3817  
JUST LAW OFFICE  
381 Shoup Avenue  
P.O. Box 50271  
Idaho Falls, Idaho 83405  
Telephone: (208) 523-9106  
Facsimile: (208) 523-9146

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

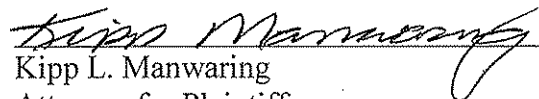
BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	MOTION FOR SUMMARY
and JOHN DOES I-X,	)	JUDGMENT
	)	
Defendants.	)	
	)	

In accordance with I.R.C.P. 56, Plaintiff, Black Diamond, LLC, moves the court for its order granting summary judgment on all issues raised in the complaint and counterclaim. Defendant, Sherry Kimball, contests the pending ejectment, asserting various defenses regarding the nonjudicial foreclosure. Kimball also filed a counterclaim alleging the trustee's sale was invalid and claiming unjust enrichment.

This motion is based upon the pleadings of record and the Affidavit of Counsel, Affidavit of Bradon K. Howell, Affidavit of First American Title Company, and Affidavit of Fremont Investment & Loan filed in support.

Oral argument is requested.

Dated this 16th day of January 2008.

  
Kipp L. Manwaring  
Attorney for Plaintiff

CERTIFICATE OF MAILING

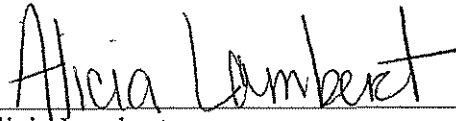
I HEREBY CERTIFY that on the 16th day of January 2008, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

MOTION FOR SUMMARY JUDGMENT

PARTIES SERVED:

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**



---

Alicia Lambert  
Legal Assistant

CHARLES C. JUST, ESQ. – ISB 1779  
 KIPP L. MANWARING, ESQ. – ISB 3817  
 JUST LAW OFFICE  
 381 Shoup Avenue  
 P.O. Box 50271  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 523-9106  
 Facsimile: (208) 523-9146

2009.11.18 AM 10:46

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF BONNEVILLE

BLACK DIAMOND, LLC,	)	Case No. CV-07-3806
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SHERRY KIMBALL, et al.	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR SUMMARY
	)	JUDGMENT
Defendants.	)	
	)	

**Sherry Kimball defaulted by failing to pay her promissory note. Fremont initiated nonjudicial foreclosure of the deed of trust. Kimball attempted but failed to reach a forbearance agreement with Fremont prior to the trustee's sale. To facilitate Kimball's attempt at forbearance, the trustee postponed the sale in accordance with statute. At the date and time of the postponed trustee's sale, Black Diamond purchased the real property and later was given a trustee's deed. Black Diamond was a bona fide purchaser for value and is entitled as owner to possession to the real property.**

The issues are: Was the trustee's sale invalid where Kimball unilaterally delivered \$3,000 to Fremont without a written forbearance agreement?; Was the rescheduled trustee's sale invalid for lack of notice? Does Kimball's second cause of action state a claim for relief?; and, Is Black Diamond entitled to possession of the real property?

## FACTS

Pertinent facts are drawn from the affidavit of Bradon K. Howell, the affidavit of First American Title Company, the affidavit of Fremont Investment & Loan, the affidavit of counsel, and pleadings of record.

Sherry Kimball in consideration of a loan from Fremont Investment & Loan, executed a promissory note in favor of Fremont in the amount of \$104,800. The promissory note was secured by a deed of trust on the subject real property.

Kimball defaulted on the note by failing to make all required payments. Kimball's default has never been cured. In accordance with paragraphs 9 and 19 of the deed of trust, Fremont declared Kimball's loan accelerated and sought foreclosure.

Notice of default was properly recorded in Bonneville County, Idaho. Notice of the trustee's sale scheduled for May 29, 2007 was delivered to Kimball by certified mail but the letter was returned unclaimed. Notice of the trustee's sale was further given to Kimball by publication in the Post Register and by posting upon the front door of the residence situated on the subject real property. Kimball admits in her pleadings that she had notice of the trustee's sale scheduled for May 29, 2007.

On May 29, 2007 Fremont directed the trustee to postpone the sale pending a possible forbearance and reinstatement of Kimball's loan. In accordance with statutory requirements, the trustee publicly announced at the time of the sale on May 29, 2007 that the sale was postponed until June 12, 2007 at 11:00 a.m.

No forbearance or reinstatement was ever reached between Fremont and Kimball. In order to qualify for forbearance and reinstatement, Kimball had to meet all requirements set forth in paragraph 19 of the deed of trust. Kimball did not meet those requirements. Moreover, no written forbearance agreement was prepared and executed by Fremont and Kimball.

On June 12, 2007 the rescheduled trustee's sale was held. Black Diamond entered the highest bid. On June 14, 2007 a trustee's deed was issued and recorded conveying fee simple title to the subject real property to Black Diamond.

Black Diamond brought this action to eject Kimball from the real property. Kimball has counterclaimed alleging the trustee's sale was invalid due to a claimed forbearance agreement

and or lack of notice of the rescheduled sale. Kimball further alleges unjust enrichment would result if Black Diamond was given possession of its real property purchased at the trustee's sale.

## STANDARD

"Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c)." *Zollinger v. Carrol*, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002).

When reviewing a motion for summary judgment the trial court applies the following standard:

Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in the light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. The burden of proving the absence of material facts is upon the moving party. The adverse party, however, "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." In other words, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.

*Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 266 (2000) (citations omitted). Moreover, the court should "liberally construe the record in favor of the party opposing the motion for summary judgment, drawing all reasonable inferences and conclusions supported by the record in favor of that party." *Walker v. Hollinger*, 132 Idaho 172, 175, 968 P.2d 661, 664 (1998).

## ARGUMENT

### *Forbearance Agreement*

Under the first cause of action in her counterclaim, Kimball seeks quiet title to the subject property alleging first that the trustee's sale on June 12, 2007 was invalid because on that date Kimball's account with Fremont was purportedly not in default. It is essential to note that Kimball has not raised a claim against Fremont; rather, she has only posed a challenge to the validity of the trustee's sale while claiming a right to title and possession.

Rule 12(b)(6), I.R.C.P., permits dismissal of a claim where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975). When considering the application of Rule 12(b)(6), all reasonable inferences are drawn from the evidence in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). Where a claim does not reach the merits of an opposing claim, judgment should be granted on the opposing claim. *Goodman v. Lothrop*, \_\_\_ Idaho \_\_\_, \_\_\_ P.3d \_\_\_ (Idaho Sup. Ct. 2007, Opinion No. , January 4, 2007).

Forbearance of a contract right or modifications to a contract requires that the parties have a common and distinct understanding or mutual meeting of the minds, which may be express or implied. *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 237, 31 P.3d 921, 925 (2001). Although formation of a contract is generally a question of fact for the trier of fact to resolve,” in a dispute over contract formation it is incumbent upon the proponent to prove a distinct and common understanding between the parties.” *Inland Title Co. v. Comstock*, 116 Idaho 701, 702, 779 P.2d 15, 16 (1989). In addition, when dealing with interests affecting real property or contracts requiring performance exceeding one-year, the agreement must be reduced to writing in accordance with the statute of frauds. I.C. § 9-503; *see also Hoffman v. SV Co., Inc.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981).

Fremont denies any agreement of forbearance and reinstatement was reached with Kimball. Kimball’s evidence amounts to an allegation of telephone conversations together with her unilateral delivery of \$3,000 to Fremont. Kimball’s evidence fails to show a prima facie case for formation of a forbearance agreement. Moreover, Kimball’s evidence proves the terms of forbearance and reinstatement required under the deed of trust were not satisfied. Furthermore, Kimball has no writing proving the existence of a forbearance agreement or reinstatement agreement.

Accordingly, Kimball’s claim under her first cause of action in her counterclaim alleging the trustee’s sale on June 12, 2007 was invalid due to her account having been reinstated cannot be sustained and must be dismissed.

Black Diamond is entitled to summary judgment dismissing that portion of Kimball’s first cause of action.

### *Notice of Trustee's Sale*

The second prong of Kimball's first cause of action is an allegation that she did not have notice of the rescheduled trustee's sale set for June 12, 2007. There is no dispute of fact that Kimball had notice of the trustee's sale scheduled for May 29, 2007.

Idaho's statutory scheme for nonjudicial foreclosures addresses the notice issue raised by Kimball. The issue raises a question of law.

Under Idaho Code § 45-1506(8), upon direction of the beneficiary of a deed of trust, the trustee may postpone the trustee's sale for a period not exceeding 30 days. Notice of the postponed sale is given at the time and on the date for the original trustee's sale. In fact, consecutive postponements of the trustee's sale are permissible. Other than the public announcement made at the time and date of the initial trustee's sale, no other notice is required.

On May 29, 2007 at 11:00 a.m. at the office of First American Title Company at 2004 Jennie Lee Drive, Idaho Falls, Idaho the trustee postponed the scheduled sale by publicly announcing at the time and place originally fixed for the sale the postponement to June 12, 2007 at 11:00 a.m. Through that announcement, the trustee complied with the notice requirements for postponing a sale. In short, there is not a procedural due process issue in this action.

As a matter of law, Black Diamond is entitled to summary judgment on that portion of Kimball's first cause of action asserting lack of notice.

### *Unjust Enrichment*

In her second cause of action, Kimball alleges Black Diamond would be unjustly enriched if it were allowed possession of the real property it purchased for value at the trustee's sale. Kimball's cause of action fails to state a claim for relief.

"In order to establish the *prima facie* case for unjust enrichment, the plaintiff must show that there was: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999) (citing *Curtis v. Becker*, 130 Idaho 378, 382, 941 P.2d 350, 354 (Ct.App.1997)).



The doctrine of quantum meruit permits recovery, on the basis of an implied promise to pay, of the reasonable value of the services rendered or the materials provided. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 767, 979 P.2d 627, 640 (1999) (citing *Peavey v. Pellandini*, 97 Idaho 655, 551 P.2d 610 (1976)).

Unjust enrichment is an equitable claim and will not be considered when an adequate legal remedy is available. *Iron Eagle Development, L.L.C. v. Quality Design Systems, Inc.*, 138 Idaho 487, 492, 65 P.3d 509, 514 (2003). Because quantum meruit is a species of implied contract, such recovery will not normally lie where there is an express contract governing the relationship of the parties. *Cf. Wolford v. Tankersley*, 107 Idaho 1062, 695 P.2d 1201 (1984).

Obviously, Kimball cannot present a prima facie case for unjust enrichment. She did not confer a benefit upon Black Diamond; instead, Black Diamond purchased the real property for value at a public trustee's sale. Black Diamond did not retain a valuable benefit bestowed by Kimball. Kimball's default led to foreclosure of the deed of trust. By its very nature, foreclosure extinguishes Kimball's interests in and title to the subject real property. A purchaser for value at a trustee's sale does not receive a benefit given by the defaulted and foreclosed debtor. Nor are there any facts suggesting an implied or express contract existed between Black Diamond and Kimball. If Kimball believes she was damaged because of wrongful foreclosure, her *legal* remedy is to bring an action against Fremont; the *equitable* remedy of unjust enrichment has no application here.

Black Diamond is entitled to summary judgment dismissing Kimball's second cause of action.

### ***Black Diamond's Right to Possession***

Based upon the evidence before the court, Kimball defaulted in the payment of her promissory note. Upon default, Fremont followed Idaho's statutory scheme for nonjudicial foreclosure. Black Diamond's bid at the trustee's sale was the highest bid. The trustee recorded its trustee's deed conveying title to the real property to Black Diamond.

Idaho Code § 45-1508 states:

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, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. (Emphasis added).*

A bona fide purchaser is one who takes real property by paying valuable consideration and in good faith. I.C. §§ 55-606, 55-812. "The theory behind the rule is to protect innocent purchasers and to allow them to obtain and convey unsullied interests." *Sun Valley Land and Minerals, Inc. v. Burt*, 123 Idaho 862, 853 P.2d 607 (Ct. App. 1993).

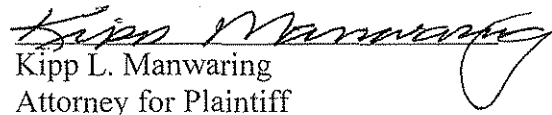
Black Diamond paid \$112,500 at the foreclosure sale. Black Diamond was a good faith purchaser at the foreclosure sale. Black Diamond's knowledge that Kimball was the owner of the foreclosed property did not prevent Black Diamond from being a bona fide purchaser. *Jahnke v. Mesa Equipment, Inc.*, 128 Idaho 562, 916 P.2d 1287 (Ct. App. 1996).

Black Diamond is the titled owner of the subject real property. Black Diamond is entitled to possession of its real property. For several months Kimball has lived on the real property rent free, without any cost, all to the disadvantage of Black Diamond.

#### **CONCLUSION**

Accordingly, Black Diamond is entitled to summary judgment granting judgment of ejectment of Kimball and her personal property and restoring Black Diamond to possession of the real property.

Dated this 16th day of January, 2008.

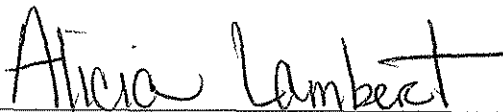
  
Kipp L. Manwaring  
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16th day of January, 2008, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED: MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

PARTIES SERVED: David A. Johnson  
WRIGHT, WRIGHT, & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251



\_\_\_\_\_  
Alicia Lambert  
Legal Assistant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

BLACK DIAMOND, LLC,	)	
	)	
Plaintiff,	)	Case No. CV-2007-3806
vs.	)	
	)	MINUTE ENTRY
SHERRY KIMBALL, an individual,	)	
and JOHN DOES I-X,	)	
	)	
Defendants.	)	
<hr/>		

February 13, 2008, at 9:15 A.M., plaintiff's motion for interim payments came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Kipp Manwaring appeared on behalf of the plaintiff. Mr. David Johnson appeared on behalf of the defendant.

Mr. Manwaring presented argument in support of plaintiff's motion for interim payment. Mr. Johnson argued in opposition to plaintiff's motion. Mr. Manwaring presented additional argument supporting plaintiff's motion.

The Court took the matter under advisement. The Court will allow counsel to submit supplemental briefs no later than Wednesday, February 2, 2008.

The Court scheduled a court trial for 10:00 a.m., May 6, 2008. A pre-trial conference was scheduled for 9:00 a.m., April 30, 2008.

Court was thus adjourned.

*Gregory S. Anderson*

---

GREGORY S. ANDERSON

District Judge

c: Kipp Manwaring  
David Johnson

2008 FEB 19 AM 9:48  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

BLACK DIAMOND, LLC, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 SHERR KIMBALL, an individual, )  
 and JOHN DOES I-X, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. CV-2007-3806

ORDER SETTING TRIAL AND  
PRETRIAL CONFERENCE

Pursuant to Rule 16 of the Idaho Rules of Civil Procedure, the following pre-trial schedule shall govern all proceedings in this case:

**I. IT IS HEREBY ORDERED<sup>1</sup>:**

1. A pre-trial conference shall be held at 9:00 A.M., on April 30, 2008.
2. Court trial shall commence at 10:00 A.M., on May 6, 2008.
3. No later than ninety (90) days before the date set for trial, counsel shall disclose the names, addresses, and telephone numbers of expert witnesses that may be called to testify at trial.
4. All discovery shall be completed seventy (70) days prior to trial.<sup>2</sup>
5. All Motions for Summary Judgment must be filed sixty (60) days prior to trial in conformance with Rule 56(a), I.R.C.P.
6. All Motions for Summary Judgment must be heard at least twenty-eight (28) days prior to trial.

<sup>1</sup>The disclosure cut-off date, discovery completion date and motion dates are for the benefit of the Court in managing this case. They will be enforced at the Court's discretion. The disclosure date should not be relied on by the parties for discovery purposes. The disclosure, discovery and motion dates will not be modified by the Court without a hearing and assurance from the parties that the modification will not necessitate continuance of the trial.

<sup>2</sup> Discovery requests must be served so that timely responses will be due prior to the discovery cutoff date.

**II. IT IS FURTHER ORDERED** that each attorney shall, no later than fourteen (14) days before trial:

1. Submit a list of names to the court of persons who may be called to testify.
2. Submit a descriptive list of all exhibits proposed to be offered into evidence to the court indicating which exhibits counsel have agreed will be received in evidence without objection and those to which objections will be made, including the basis upon which each objection will be made.
3. Submit a brief to the court citing legal authorities upon which the party relies as to each issue of law to be litigated.
4. If this is a jury trial, counsel shall submit proposed jury instructions to all parties to the action and the court. All requested instructions submitted to the court shall be in duplicate form as set out in Idaho Rule of Civil Procedure 51(a)(1).
5. Submit that counsel have in good faith tried to settle this action.
6. State whether liability is disputed.

**III. IT IS FURTHER ORDERED** that each attorney shall no later than seven (7) days before trial:

1. Submit any objections to the jury instructions requested by an opponent specifying the instruction and the grounds for the objection.
2. Deposit with the clerk of the court all exhibits to be introduced, except those for impeachment. The clerk shall mark plaintiff's exhibits in numerical sequence as requested by plaintiff and shall mark all defendant's exhibits in alphabetical sequence as requested by defendant.
3. A duplicate set of all exhibits to be introduced, except those for impeachment, shall be placed in binders, indexed, and deposited with the clerk of the court.

**IV. IT IS FURTHER ORDERED** that:

1. Any exhibits or witnesses discovered after the last required disclosure shall immediately be disclosed to the court and opposing counsel by filing and service stating the date upon which the same was discovered.
2. No exhibits shall be admitted into evidence at trial other than those disclosed,

listed and submitted to the clerk of the court in accordance with this order, except when offered for impeachment purposes or unless they were discovered after the last required disclosure.

3. This order shall control the course of this action unless modified for good cause shown to prevent manifest injustice.
4. The court may impose appropriate sanctions for violation of this order.

DATED this 15<sup>th</sup> day of February, 2008.

*Gregory S. Anderson*  
GREGORY S. ANDERSON  
District Judge



CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of February, 2008, I did send a true and correct copy of the aforementioned Order upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Kipp Manwaring  
MANWARING LAW OFFICE  
381 Shoup Avenue, Ste. 210  
Idaho Falls, ID 83402

David Johnson  
WRIGHT WRIGHT & JOHNSON  
Courthouse Box  
Idaho Falls, Idaho

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

  
Deputy Clerk

CHARLES C. JUST, ESQ. – ISB 1779  
 KIPP L. MANWARING, ESQ. – ISB 3817  
 JUST LAW OFFICE  
 381 Shoup Avenue  
 P.O. Box 50271  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 523-9106  
 Facsimile: (208) 523-9146

2008 FEB 15 PM 2:47

DISTRICT COURT  
 MAGISTRATE DIVISION  
 BONNEVILLE COUNTY  
 IDAHO

Attorneys for Plaintiff

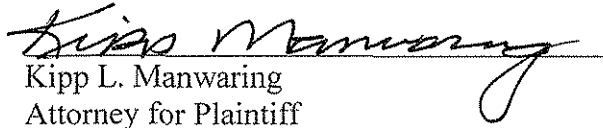
**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	MOTION TO AMEND
and JOHN DOES I-X,	)	CAPTION
	)	
Defendants.	)	
	)	

As discussed in open court on February 13, 2008 the parties agreed to change the caption in this action to reflect the change to Plaintiff's full name from Black Diamond, LLC, to Black Diamond Alliance, LLC, an Idaho limited liability company.

No hearing is required based upon the discussion and agreement in court. A proposed order is attached.

Dated this 13th day of February 2008.

  
 Kipp L. Manwaring  
 Attorney for Plaintiff

CERTIFICATE OF MAILING

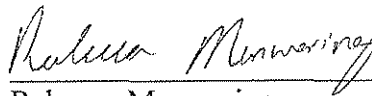
I HEREBY CERTIFY that on the 13th day of February 2008, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

MOTION TO AMEND CAPTION

PARTIES SERVED:

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**



---

Rebecca Manwaring  
Legal Assistant

2008 FEB 15 PM 4:30  
DISTRICT COURT  
MAGISTRATE DIVISION  
BONNEVILLE COUNTY

David A. Johnson, Esq.  
Wright, Wright & Johnson PLLC  
477 Shoup Avenue, Suite 109  
P.O. Box 52251  
Idaho Falls, ID 83405-2251  
Telephone (208) 535-1000  
Facsimile (208) 523-4400  
Idaho State Bar No. 3319

Attorney for Defendant

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

**BLACK DIAMOND, LLC,**

Plaintiff,

vs.

**SHERRY KIMBALL, et al.**

Defendant.

Case No: CV-07-3806

**RESPONSE TO MOTION AND  
MEMORANDUM FOR SUMMARY  
JUDGMENT**

David A. Johnson, attorney for Defendant Sherry Kimball (Kimball), hereby responds to Plaintiff Black Diamond, LLC's (Black Diamond) Motion for Summary Judgment as follows:

**FACTS NOT IN DISPUTE**

Kimball does not dispute that in 2004, she entered into a Deed of Trust and Deed of Trust Note with Fremont Investment & Loan (Fremont) for \$104,800.00, (note: Exhibit B to Affidavit of Fremont lacks attached a legal description) related to her property which is located at 2746 West 17<sup>th</sup> South, Idaho Falls, Idaho. Kimball does not

dispute that in approximately October 2006, she was unable to regularly make monthly payments, which entitled Fremont to pursue non-judicial foreclosure. She also does not dispute that proper procedures were followed to conduct a foreclosure sale on May 29, 2007. Finally, there is no dispute that the May 29, 2007, Trustee's Sale was not conducted because of arrangements made between Kimball and Fremont.

### FACTS IN DISPUTE

Kimball disputes the following allegations:

1. Black Diamond, LLC, is a legal entity.
2. Black Diamond was a bonafide purchaser for value.
3. The amount Kimball was in arrears.
4. The terms of the agreement for not conducting the May 29, 2007, Trustee's Sale.

### DISCUSSION

1. **Black Diamond, LLC, is not a legal entity existing in Idaho.**

Kimball's attorney has reviewed the Idaho Secretary of State's records and is unable to locate "Black Diamond, LLC." There are approximately 43 entities listed on the Secretary of State's website with black diamond in its name, including Black Diamond Corporation, Black Diamond Group, LLC, Black Diamond Alliance, LLC, Black Diamond Management, LLC, etc. Black Diamond Alliance, LLC, has a registered agent and manager listed for Idaho Falls, who is believed to be the brother of Bradon Howell, the "foreclosure specialist" who signed an affidavit in support of the present Motion for Summary Judgment. However, because Black Diamond, LLC, does not exist, the present lawsuit is without proper party.

Kimball, based upon the discussion at the last hearing, is of the understanding that Plaintiff will be amending the Complaint to a legally recognized entity.

**2. The Trustee was required to, but failed to, provide adequate notice of any postponed or rescheduled Trustee's sale.**

Although there is a dispute as to whether or not the sale was cancelled, postponed, or subject to forbearance, as discussed below, there is no dispute that the Trustee handling the foreclosure failed to provide any notice to Kimball as to the date, time, and place of the rescheduled sale. No affidavit was filed on the Records of Bonneville County, of which the Court is requested to take judicial notice of. Apparently, Black Diamond is attempting to rely upon Idaho Code § 45-1506(8) as authority that, when a sale is postponed, no further notice is required other than to simply announce the subsequent date and hour. This provision does not replace the other requirements of Idaho Code Title 45, Chapter 15. This provision does not exclude the other requirements of any notice of sale, particularly notice given to the debtor. Idaho Code § 45-506 specifically requires that notice of sale be given by registered or certified mail at the last known address of various persons or entities, including the debtor. Idaho Code § 45-1506(7) requires that an affidavit of mailing the notice of sale and an affidavit of posting and publication of notice of sale be recorded on the mortgage records of the county of the property described. The Idaho Supreme Court has directly addressed this issue, stating that: "*[u]nlike sales postponed under 45-1506 or 45-1506A, which require recorded affidavits certifying compliance with the notice requirement*", a sale postponed under Idaho Code §45-1506B is simply rescheduled at the original sale and no further notice of any kind is necessary. *Federal*

*Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429, 434 n.3 (2006) (emphasis added). This provision requires compliance with the notice and affidavit provisions for even a postponed sale. This certainly makes sense, particularly in light of due process requirements which should be in place before the deprivation of property.

Idaho Code § 45-1508 states:

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, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. 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. (Emphasis added)

Reading all of these Code sections together, any declaration of dates of postponement at the original sale is obviously intended to give notice to those persons present, and is not intended to allow a quick sale, particularly, in light of § 45-1508, where it discusses the failure to give notice by mailing personal service, etc., and in accordance with § 45-1506, to persons who have had actual notice. If Kimball had been at the May 29, 2007 sale and there was in fact a postponement declared to a specified future date and time, then Kimball would have actual notice and arguably, for this issue only, the formal notice requirement would not be detrimental to the finality of

the sale. (See *Federal Home*, 137 P.3d 429 (2006) and *Roberts V. Pocatello School District No. 25*, 134 Idaho 890, 8893, 11 P.3d 1108 (2000)).

“Section 45-1508 does not eliminate notice to properly foreclose a trust deed, but it does recognize “actual notice” as a substitute for notice otherwise required by statute. Actual notice leads to finality of the sale, the concern of section 45-1508, because no rights have been violated in the process. . . . Absent a showing of actual notice, however, the trustee’s affidavit must reflect compliance with statutory notice requirements to entitle the sale to finality, albeit those entitled to such notice may not have actually received it. *Federal Home Loan Mortgage Corp v. Appel, supra.*”<sup>1</sup>

The evidence is uncontradicted that, although Kimball was aware of the first scheduled Notice, she was not present when the alleged postponement was announced. Because of her contacts with the Trustee and Fremont, and based upon confirmation that the sale had been cancelled, she had no reason to attend the sale. Because there was no attempt whatsoever to provide notice of the rescheduled sale, the statutory procedures were not followed, and the sale is voidable.

A general rule of statutory construction is that “a statute should be interpreted so as to give effect to all of its provisions, and that we do not presume that the legislature performed an idle act by enacting a meaningless provision.” *Roberts v. Brd. of Tr. Pocatello School District No. 25*, 134 Idaho 890, 893, 11 P.3d 1108, 1111 (2000).

Further, the Idaho Supreme Court has stated:

We must attempt to construe this provision consistent with the primary rules of statutory instruction-that all sections of the applicable statutes should be considered and construed together to determine the intent of the legislature, *Janss Corp. v. Board of Equalization of Blaine County*, 93

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<sup>1</sup> *Hebdon v. Fisher*, Teton County, Idaho, Case CV-03-0006. Memorandum Decision by Judge Brent Moss, December 16, 2006. This Memorandum Decision involved similar procedures by the same Trustee herein. Kimball understands that a district court opinion does not provide case precedence and the quotation is provided to properly recognize the author.



Idaho 928, 478 P.2d 878 (1970); and that it is incumbent upon a court to give the statute an interpretation that will not in effect nullify it. Filer Mutual Telephone Co. v. Idaho State Tax Commission, 76 Idaho 256, 281 P.2d 478 (1955).

As cited in Magnuson v. Idaho State Tax Commission, 97 Idaho 917, 920, 556 P.2d 1197, 1200 (Idaho 1976).

A straight forward reading of the language of Idaho Code §45-1508, clearly shows that “actual knowledge” is only a substitution for the methodology of service, not to excuse the process by which property is foreclosed. The foreclosure process is intended to provide a reasonable means of non-judicial foreclosure, which provides *adequate remedy for the creditor (including one who has been delayed by a debtor filing for bankruptcy)*, while still providing reasonable due process to protect the interests of the debtor and junior lien holders. Failure to provide notice deprives the debtor reasonable opportunities to protect their interest and to mitigate their loss. The intent of a public sale is to allow all interested persons to bid, obtain the highest price for the property, and any surplus being paid to the junior interest holders or debtor.

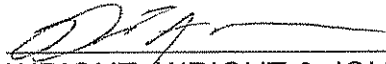
**3. Black Diamond is not a bonafide purchaser for value.**

Black’s Law Dictionary states that a bona fide purchaser for value is “[o]ne who purchases legal title to real property without actual or constructive notice of any infirmities, claims, or equities against the title.” BLACK’S LAW DICTIONARY 1001 (7<sup>th</sup> abr. ed. 2000).

If a purchaser is on inquiry notice of a potential defect of statutory notice requirements, they can not qualify as a bona fide purchaser. *Federal Home*, 137 P.2d at 434. In *Federal Home*, referencing *Shearer v. Allied Live Oak Bank*, 758 S.W.2d 940 (Texas Ct. App. 1988), reasonable or inquiry notice can originate from circumstances

related to the sale. In the present case, if Black Diamond would be on notice as to the defects. In addition, there is likely to be a business and/or familial relationship between the Trustee's agent and Black Diamond. Any inside information could be detrimental to Black Diamond's alleged status as a bona fide purchaser. As indicated above, discovery is pending related to this issue.

DATED: February 15, 2008.

  
\_\_\_\_\_  
WRIGHT, WRIGHT & JOHNSON, PLLC  
David A. Johnson, Esq.

### CERTIFICATE OF SERVICE

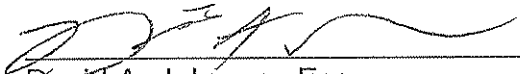
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on February 15, 2008, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method.

Person/Attorney Served:

Kipp L. Manwaring  
Just Law Office  
P.O. Box 50271  
Idaho Falls, ID 83405-0271

Method of Service:

Courthouse Box

  
\_\_\_\_\_  
David A. Johnson, Esq.

CHARLES C. JUST, ESQ. – ISB 1779  
 KIPP L. MANWARING, ESQ. – ISB 3817  
 JUST LAW OFFICE  
 381 Shoup Avenue  
 P.O. Box 50271  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 523-9106  
 Facsimile: (208) 523-9146

DISTRICT 7TH JUDICIAL COURT  
 BONNEVILLE COUNTY, IDAHO

8 FEB 29 P1:56

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	MOTION TO STRIKE
and JOHN DOES I-X,	)	
	)	
Defendants.	)	
	)	

In accordance with I.R.E. 802, Plaintiff moves the court to strike the following portions of the Affidavit of David Johnson and the Affidavit of Sherry Kimball.

Paragraphs 4 and 5 of the Affidavit of David Johnson contain inadmissible hearsay based upon a telephone conversation between Mr. Johnson and Sandy Winn. Mr. Johnson cannot testify as to another person's recollection or statement.

Paragraphs 7 and 9 of Sherry Kimball's affidavit contain inadmissible hearsay based upon an alleged telephone conversation between Kimball and representatives of Fremont Investment & Loan. Additionally, paragraph 7 contains inadmissible hearsay based upon an alleged telephone conversation between Kimball and Bradon Howell. Kimball cannot testify as to what another person or persons stated. Such alleged statements are not statements against interest or statements by a party opponent where neither Fremont nor the trustee is a party to this action.

Paragraph 13 of Sherry Kimball's contains an admission that the allegations are not within Kimball's personal knowledge. All the allegations are therefore based upon

conjecture and supposition and are not admissible evidence.

Oral argument is requested.

  
Kipp L. Manwaring  
Attorney for the Plaintiffs

CERTIFICATE OF MAILING

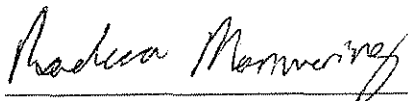
I HEREBY CERTIFY that on the 26<sup>th</sup> day of February 2008, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

NOTICE OF HEARING

PARTIES SERVED:

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**

  
Rebecca Manwaring  
Legal Assistant

CHARLES C. JUST, ESQ. – ISB 1779  
KIPP L. MANWARING, ESQ. – ISB 3817  
JUST LAW OFFICE  
381 Shoup Avenue  
P.O. Box 50271  
Idaho Falls, Idaho 83405  
Telephone: (208) 523-9106  
Facsimile: (208) 523-9146

DISTRICT 7TH JUDICIAL COURT  
BONNEVILLE, COUNTY, IDAHO

8 FEB 29 P1:57

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	REPLY BRIEF
and JOHN DOES I-X,	)	
	)	
Defendants.	)	
	)	

Black Diamond replies to Defendant's response to the motion for summary judgment as follows.

Legal Entity

Black Diamond Alliance, LLC, is a legal entity registered in the state of Idaho. There is no genuine issue of fact to the contrary.

Notice of Postponed Sale

Kimball argues the trustee was required to give her notice of the postponed trustee's sale.

Kimball's reliance on I.C. §§ 45-1506A, 1506B, and 1508 is misplaced.

It is essential to note that Kimball admits she received actual notice of the trustee's sale scheduled for May 29, 2007. Accordingly, the trustee complied with the requirements of I.C. §§ 45-1506 and 1508.

In the trustee's sale here, the postponement was at the instance of Kimball and Fremont and not due to the stay of any bankruptcy proceeding. Therefore, Sections 1506A and 1506B are inapposite.

Compliance with statutory notice requirements suffice to grant finality to the trustee's sale. *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429 (2006). As noted in *Appel*, "So, if no bankruptcy is ever filed and no stay intervenes, postponement proceeds according to § 45-1506(8)...." *Id.* at 433.

Unlike the defendant in *Appel*, Kimball did not file a bankruptcy causing a stay of the nonjudicial foreclosure. On the facts before the court, postponement of the trustee's sale scheduled for May 29, 2007 was done in accordance with I.C. § 45-1506(8), which states:

The trustee may postpone the sale of the property upon request of the beneficiary by publicly announcing at the time and place originally fixed for the sale, the postponement to a stated subsequent date and hour. No sale may be postponed to a date more than thirty (30) days subsequent to the date from which the sale is postponed. A postponed sale may itself be postponed in the same manner and within the same time limitations as provided in this subsection.

In accordance with that statute, to reschedule the May 29, 2007 sale the trustee simply announces the new date and time of the postponed sale on May 29, 2007. *See Id.* at 433. The affidavit of First American Title proves full compliance with I.C. § 45-1506(8).

Accordingly, Kimball's argument that the trustee was obligated to provide some additional notice of the postponed sale fails. Black Diamond Alliance is entitled to summary judgment as a matter of law.

#### Bona Fide Purchaser

Kimball posits two arguments supporting her claim that Black Diamond Alliance was not a bona fide purchaser for value. First, she contends there was a defect of statutory notice and Black Diamond Alliance was on inquiry notice of the defect. Second, she maintains there was some relationship between the trustee and Black Diamond Alliance implying collusion relating to the trustee's sale. Both arguments fail on facts and law.

As discussed above, there was not defect in the notice of trustee's sale. Kimball admits she received actual notice of the trustee's sale scheduled for May 29, 2007. She admits that sale was postponed due to her effort to seek forbearance from Fremont. The trustee followed statutory requirements for giving notice of the postponed sale. No additional notice was required. Kimball slept on her rights and now cannot be heard to challenge her lack of notice of the postponed sale scheduled for June 12, 2007.

Furthermore, there are no facts showing or supporting an inference that Black Diamond Alliance should have been on inquiry notice regarding some defect in the notice requirements for the trustee's sale.


Mere conjecture is the source of Kimball's argument that Black Diamond Alliance and the trustee were in collusion. Kimball has the affirmative duty to set forth admissible evidence to support her theory. She has not and can not.

Where Black Diamond Alliance was the highest bidder at a public foreclosure auction with numerous other potential buyers present, the court can find Black Diamond Alliance was a bona fide purchaser for value. As a matter of law, Black Diamond Alliance is entitled to summary judgment.

Conclusion

Sherry Kimball had actual notice of the trustee's sale scheduled for May 29, 2007. In accordance with statutory requirements, the trustee postponed that trustee's sale to June 12, 2007. Black Diamond Alliance was a bona fide purchaser for value. Black Diamond Alliance is the owner of the subject property and is entitled to summary judgment ejecting Kimball and granting Black Diamond Alliance possession.

Dated this 27<sup>th</sup> day of February 2008.

  
Kipp L. Manwaring  
Attorney for Plaintiff

CERTIFICATE OF MAILING

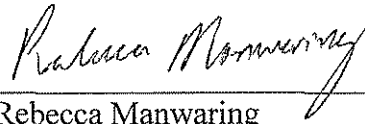
I HEREBY CERTIFY that on the 27<sup>th</sup> day of February 2008, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

REPLY BRIEF

PARTIES SERVED:

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**



---

Rebecca Manwaring  
Legal Assistant



2008 MAR -5 PM 2:55  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	ORDER AMENDING
and JOHN DOES I-X,	)	CAPTION
	)	
Defendants.	)	

Based upon the stipulation and agreement of the parties placed on record in open court on February 13, 2008 the court finds good cause for amending the caption and identity of the Plaintiff in this action. Therefore;

IT IS HEREBY ORDERED that the caption and identify of Plaintiff in this action shall be changed from Black Diamond, LLC, to Black Diamond Alliance, LLC, an Idaho limited liability company. All future pleadings shall reflect Plaintiff's full name, Black Diamond Alliance, LLC, and all prior pleadings shall be deemed amended to include Plaintiff's full name.

Dated this <sup>13<sup>th</sup></sup> day of February 2008.

Gregory S. Anderson  
Gregory S. Anderson  
District Judge

RECEIVED  
FEB 15 2008  
By \_\_\_\_\_

NOTICE OF ENTRY

I HEREBY CERTIFY that a conformed copy of the foregoing ORDER AMENDING CAPTION was this ~~5<sup>th</sup>~~ day of ~~February~~, 2008, mailed to the following parties:

*March*

Kipp L. Manwaring  
MANWARING LAW OFFICE, P.A.  
Attorney At Law  
381 Shoup Avenue, Suite 210  
Idaho Falls, Idaho 83402

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251

*Justin Mendel*  
Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

BLACK DIAMOND, LLC,	)	
	)	
Plaintiff,	)	Case No. CV-2007-3806
vs.	)	
	)	MINUTE ENTRY
SHERRY KIMBALL, an individual,	)	
and JOHN DOES I-X,	)	
	)	
Defendants.	)	
<hr style="border: 0.5px solid black;"/>		

March 6, 2008, at 9:15 A.M., plaintiff's motion for summary judgment came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Kipp Manwaring appeared on behalf of the plaintiff. Mr. David Johnson appeared on behalf of the defendant.

Mr. Johnson presented argument supporting defendant's motion to continue.

Mr. Manwaring responded.

Mr. Manwaring presented argument supporting plaintiff's motion for summary judgment relating to notice requirements.

Mr. Johnson presented argument opposing plaintiff's motion.

Mr. Manwaring presented additional argument supporting plaintiff's motion for summary judgment.

The Court granted plaintiff's motion for summary judgment. The Court instructed Mr. Manwaring to prepare the appropriate judgment for the Court's signature.

Court was thus adjourned.

*Gregory S. Anderson*

---

GREGORY S. ANDERSON

District Judge

c: Kipp Manwaring  
David Johnson

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

2008 MAR 13 PM 1:16  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

BLACK DIAMOND, LLC, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 SHERRY KIMBALL, an Individual, )  
 and JOHN DOES I-X, )  
 )  
 Defendants. )

Case No. CV-07-3806

SUMMARY JUDGMENT

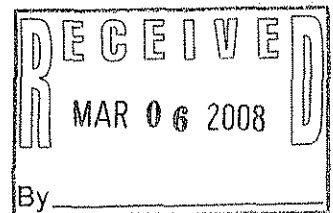
On March 6, 2008 this action came before the court for hearing Plaintiff's motion for summary judgment. At the hearing, counsel for Defendant stipulated that the issue of notice of the postponed sale would be dispositive of the action. After considering the pleadings and arguments of counsel, the court determines Plaintiff is entitled to summary judgment granting it possession of the real property. Therefore;

**IT IS ORDERED, ADJUDGED AND DECREED** that Plaintiff have judgment against Defendant granting Plaintiff possession of the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:**

1. A Writ of Ejectment issue directing the Sheriff of Bonneville County to use such force as reasonably necessary to physically remove Defendant, and any person claiming possession or occupancy under her, together with all personal property from the subject real property.
2. A Writ of Restitution issue directing the Sheriff of Bonneville County to place Plaintiff in full possession and occupancy of the subject real property.
3. ~~Any personal property left on the subject property by Defendant, or any persons claiming an occupancy right derivatively through Defendant, shall deemed to be abandoned and valueless, and Plaintiff is authorized to take possession of such property, or discard, or destroy it as Plaintiff shall see fit.~~

**DATED** this 12<sup>th</sup> day of March 2008.



Gregory S. Anderson  
Gregory Anderson  
District Judge

NOTICE OF ENTRY

I HEREBY CERTIFY that I am a Clerk in the above entitled Court and that I mailed a true copy of the foregoing documents on the 1<sup>st</sup> day of March 2008, to the following of record and/or parties:

DOCUMENT SERVED:

SUMMARY JUDGMENT

PARTIES SERVED:

CHARLES C. JUST, ESQ.  
KIPP L. MANWARING, ESQ.  
JUST LAW OFFICE  
381 Shoup Avenue  
P.O. Box 50271  
Idaho Falls, Idaho 83405  
**MAILED**

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**

RONALD LONGMORE  
CLERK OF THE DISTRICT COURT

[Signature]  
DEPUTY CLERK

CHARLES C. JUST, ESQ. - ISB 1779  
 KIPP L. MANWARING, ESQ. - ISB 3817  
 JUST LAW OFFICE  
 381 Shoup Avenue  
 P.O. Box 50271  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 523-9106  
 Facsimile: (208) 523-9146

2008 MAR 13 PM 1:15  
 DISTRICT COURT  
 7TH JUDICIAL DISTRICT  
 BONNEVILLE COUNTY ID

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF BONNEVILLE**

BLACK DIAMOND, LLC,	)	
	)	Case No. CV-07-3806
Plaintiff,	)	
vs.	)	
	)	
SHERRY KIMBALL, an Individual,	)	WRIT OF EJECTMENT AND
and JOHN DOES I-X,	)	WRIT OF RESTITUTION
	)	
Defendants.	)	

STATE OF IDAHO )  
 : ss  
 County of Bonneville )

**TO THE SHERIFF OF BONNEVILLE COUNTY, IDAHO:**

Plaintiff, Black Diamond Alliance, LLC, was granted judgment against Defendant, Sherry Kimball, for possession of that certain real property located at 2345 North Woodruff, Idaho Falls, Idaho and more particularly described as follows:

Lot 3, Block 2, New Sweden Estates, Division No. 1, to the city of Idaho Falls, Bonneville County, Idaho, according to the plat recorded March 30, 1978 as Instrument No. 573699.

Which judgment dated March 12, 2008, directed that Plaintiff, Black Diamond Alliance, LLC, have restitution of the premises and be restored to immediate possession. Therefore;

**YOU ARE HEREBY COMMANDED** to cause Defendant, Sherry Kimball, and all her goods and chattels to be forthwith removed from the premises at 2345 North Woodruff, Idaho

RECEIVED  
 MAR 06 2008  
 By \_\_\_\_\_

Falls, Bonneville County, Idaho, and Plaintiff is to have restitution and possession of the premises.

In the event the goods and chattels are not promptly removed, you are authorized and empowered to cause the same to be removed to a safe place for storage.

~~YOU ARE FURTHER COMMANDED to levy on the goods and chattels of Defendant, Sherry Kimball, with all accruing costs of execution and make legal service and due return of this writ.~~

DATED this 12<sup>th</sup> day of March, 2008.

*Gregory D. Anderson*  
\_\_\_\_\_  
GREGORY ANDERSON,  
DISTRICT JUDGE



BONNEVILLE COUNTY  
IDAHO

8 MAR 12 P4:26

David A. Johnson, Esq.  
Wright, Wright & Johnson, PLLC  
477 Shoup Avenue, Suite 109  
P.O. Box 52251  
Idaho Falls, ID 83405-2251  
Telephone (208) 535-1000  
Facsimile (208) 523-4400  
Idaho State Bar No. 3319

Attorney for Defendant

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

**BLACK DIAMOND ALLIANCE, LLC,**

Plaintiff,

vs.

**SHERRY KIMBALL,**

Defendant.

Case No: CV-07-3806

**MOTION FOR RECONSIDERATION**

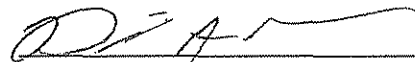
David A. Johnson, attorney for Defendant Sherry Kimball (Kimball), hereby moves the Court to alter, amend, or reconsider the Court's granting summary judgment to Plaintiff. This Motion is brought pursuant to Idaho Rules of Civil Procedure 11(a)(1)(2)(b). The reasons for this Motion are:

1. The Court presumed the sale was postponed and the sale was conducted, pursuant to Idaho Code §45-1506(8). The Court specifically held that Kimball could have been at the Trustee's sale and as a result could have become aware of the new date.

2. The agreement made with Fremont Investment & Loan and the representations made to Kimball were that the sale was cancelled, not postponed. See Affidavit of Sherry Kimball previously filed. There was no reason for Kimball to attend a cancelled sale.
3. The summary judgment was based upon an incorrect assumption of fact, as identified above, and all facts need to be construed in Kimball's favor, as the non-moving party.

No hearing is specifically requested. Kimball will contact the Court clerk and schedule a hearing, in the event the Court determines a hearing will be beneficial.

DATED: March 11, 2008.

  
\_\_\_\_\_  
WRIGHT, WRIGHT & JOHNSON, PLLC  
David A. Johnson, Esq.

### **CERTIFICATE OF SERVICE**

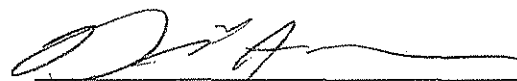
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on March 11, 2008, I served a true and correct copy of the foregoing document, on the person or persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered by the following method:

Attorneys served:

Kipp L. Manwaring  
Just Law Office  
P.O. Box 50271  
Idaho Falls, ID 83405-0271

Method of Service:

Mail

  
\_\_\_\_\_  
David A. Johnson, Esq.

CHARLES C. JUST, ESQ. – ISB 1779  
 KIPP L. MANWARING, ESQ. – ISB 3817  
 JUST LAW OFFICE  
 381 Shoup Avenue  
 P.O. Box 50271  
 Idaho Falls, Idaho 83405  
 Telephone: (208) 523-9106  
 Facsimile: (208) 523-9146

08 MAR 18 AM 10:00

DISTRICT COURT  
 CLERK OF DISTRICT COURT  
 BONNEVILLE COUNTY  
 IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
 STATE OF IDAHO, COUNTY OF BONNEVILLE

BLACK DIAMOND, LLC,	)	Case No. CV-07-3806
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SHERRY KIMBALL, et al.	)	RESPONSE IN OPPOSITION
	)	TO MOTION FOR
	)	RECONSIDERATION
Defendants.	)	
	)	


Plaintiff hereby responds in opposition to Defendant's motion for reconsideration. Defendant postulates that an issue of material fact prevented the court from entering summary judgment.

At the hearing on Plaintiff's motion for summary judgment, counsel for Defendant stipulated that the determination of notice was dispositive. Accordingly, argument was presented on that issue. The court ruled that in accordance with the pertinent statute, notice was sufficient and granted Plaintiff summary judgment. There was no factual issue to determine; sufficiency of notice was a question of law.

Moreover, Defendant's current assertion that she did not have any reason to attend the initial trustee's sale does not change the analysis. The fact remains that in accordance with statute at the initial sale the trustee gave notice of the postponed sale. That act constitutes sufficient notice regardless of Defendant's subjective mental state.

Defendant's motion for reconsideration must be denied.

Dated this 14th day of March 2008.

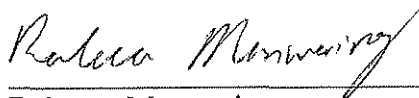
  
Kipp L. Manwaring  
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14th day of March 2008, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:                    RESONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION

PARTIES SERVED:                    David A. Johnson  
    WRIGHT, WRIGHT, & JOHNSON  
    477 Shoup Avenue, Suite 109  
    PO Box 52251  
    Idaho Falls, Idaho 83405-2251  
    **MAILED**



---

Rebecca Manwaring  
Legal Assistant

8 APR -2 P4:40

David A. Johnson, Esq.  
Wright, Wright & Johnson, PLLC  
477 Shoup Avenue, Suite 109  
P.O. Box 52251  
Idaho Falls, ID 83405-2251  
Telephone (208) 535-1000  
Facsimile (208) 523-4400  
Idaho State Bar No. 3319

Attorney for Defendant/Appellant

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

**BLACK DIAMOND ALLIANCE, LLC.**

Plaintiff/Respondent

vs.

**SHERRY KIMBALL**

Defendant/Appellant

Case No. CV-07-3806

**NOTICE OF APPEAL**

Fee Category: T

Fees: \$86.00; \$15.00

NOTICE IS HEREBY GIVEN that:

1. Appellant Sherry Kimball (Kimball) appeals against Respondent Black Diamond Alliance, LLC, a.k.a. Black Diamond, LLC (Black Diamond), to the Idaho Supreme Court from the following decision made by the Honorable Gregory Anderson, District Judge:
  - a. Summary Judgment entered on or about March 13, 2008.

2. Kimball has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Idaho Appellate Rules 11(a)(1) and/or 11(a)(7).
3. The issues to be presented on appeal include:
  - a. The District Court erred in granting summary judgment to Black Diamond. More particularly, the District Court erred in holding that notice of the delayed non-judicial trustee's sale was not required to be provided to Kimball.
4. There has been no order sealing any portion of the record.
5. A transcript is requested of the March 6, 2008, hearing.
6. Appellant requests the following documents be included in the Clerk's Record, in addition to those automatically included under Idaho Appellate Rule 28.

Date	Document
07/06/2007	Civil Complaint
08/17/2007	Amended Verified Complaint
11/7/2007	Answer and Counterclaim
11/20/2007	Reply to Counterclaim
01/18/2008	Motion for Summary Judgment
01/18/2008	Memorandum in Support of Motion for Summary Judgment
01/18/2008	Affidavit of Counsel in Support of Motion for Summary Judgment
01/18/2008	Affidavit of First American Title
01/18/2008	Affidavit of Fremont Investment & Loan
01/18/2008	Affidavit of Bradon K. Howell

02/15/2008	Motion to Amend Caption
02/15/2008	Affidavit of Sherry Kimball
02/15/2008	Affidavit of David A. Johnson
02/15/2008	Response to Motion and Memorandum for Summary Judgment
02/21/2008	Affidavit of Counsel
02/29/2008	Motion to Strike
02/29/2008	Reply Brief Filed
03/05/2008	Affidavit of David A Johnson (2)
03/13/2008	Writ of Ejection and Writ of Restitution
03/13/2008	Summary Judgment
03/12/2008	Motion for Reconsideration
03/18/2008	Response in Opposition to Motion for Reconsideration

7. The names and identification of the parties to this action and their respective attorneys are:

<u>Name</u>	<u>Party Status</u>	<u>Attorney</u>
Black Diamond Alliance, LLC	Plaintiff/Respondent	Kipp L. Manwaring
Sherry Kimball	Defendant/Appellant	David A. Johnson

8. This appeal is taken from both matters of law and fact.

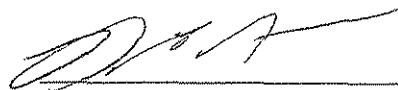
9. I certify that:

- a. A copy of this Notice of Appeal has been served on the reporter.
- b. The Clerk of the District Court has been or will be paid the estimated fee for preparation of the reporter's transcript.



- c. The estimated fee for preparation of the Clerk's Record has been or will be paid.
- d. The appellate filing fee has been paid.
- e. All parties have been served with a copy of this Notice, in accordance with Idaho Appellate Rule 20.

DATED: April 2, 2008.



\_\_\_\_\_  
WRIGHT, WRIGHT & JOHNSON, PLLC  
David A. Johnson, Esq.

### CERTIFICATE OF SERVICE

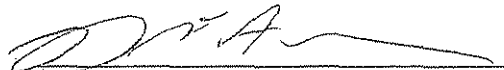
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on April 2, 2008, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

Name and Address

Kipp L. Manwaring  
Just Law Office  
P.O. Box 50271  
Idaho Falls, ID 83405-0271

Method of Service

Facsimile 523-9146



\_\_\_\_\_  
David A. Johnson, Esq.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

2008 MAR 13 PM 1:14  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

BLACK DIAMOND, LLC, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 SHERRY KIMBALL, an Individual, )  
 and JOHN DOES I-X, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

Case No. CV-07-3806

SUMMARY JUDGMENT

On March 6, 2008 this action came before the court for hearing Plaintiff's motion for summary judgment. At the hearing, counsel for Defendant stipulated that the issue of notice of the postponed sale would be dispositive of the action. After considering the pleadings and arguments of counsel, the court determines Plaintiff is entitled to summary judgment granting it possession of the real property. Therefore;

**IT IS ORDERED, ADJUDGED AND DECREED** that Plaintiff have judgment against Defendant granting Plaintiff possession of the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:**

1. A Writ of Ejectment issue directing the Sheriff of Bonneville County to use such force as reasonably necessary to physically remove Defendant, and any person claiming possession or occupancy under her, together with all personal property from the subject real property.
2. A Writ of Restitution issue directing the Sheriff of Bonneville County to place Plaintiff in full possession and occupancy of the subject real property.
3. ~~Any personal property left on the subject property by Defendant, or any persons claiming an occupancy right derivatively through Defendant, shall deemed to be abandoned and valueless, and Plaintiff is authorized to take possession of such property, or discard, or destroy it as Plaintiff shall see fit.~~

**DATED** this 12<sup>th</sup> day of March 2008.

**RECEIVED**  
MAR 06 2008  
By \_\_\_\_\_

*Gregory B. Anderson*

Gregory Anderson  
District Judge

NOTICE OF ENTRY

I HEREBY CERTIFY that I am a Clerk in the above entitled Court and that I mailed a true copy of the foregoing documents on the 12<sup>th</sup> day of March 2008, to the following of record and/or parties:

DOCUMENT SERVED:

SUMMARY JUDGMENT

PARTIES SERVED:

CHARLES C. JUST, ESQ.  
KIPP L. MANWARING, ESQ.  
JUST LAW OFFICE  
381 Shoup Avenue  
P.O. Box 50271  
Idaho Falls, Idaho 83405  
**MAILED**

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
477 Shoup Avenue, Suite 109  
PO Box 52251  
Idaho Falls, Idaho 83405-2251  
**MAILED**

RONALD LONGMORE  
CLERK OF THE DISTRICT COURT

*Ronald Longmore*  
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

BLACK DIAMOND, LLC,	)	
	)	
Plaintiff,	)	Case No. CV-2007-3806
vs.	)	
	)	MINUTE ENTRY
SHERRY KIMBALL, an individual,	)	
and JOHN DOES I-X,	)	
	)	
Defendants.	)	
_____	)	

April 17, 2008, at 8:15 A.M., defendant's motion for reconsideration, plaintiff's motion to quash and release lis pendens, and plaintiff's motion to enforce judgment and alternative motion for bond pending appeal came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Kipp Manwaring appeared on behalf of the plaintiff. Mr. David Johnson appeared on behalf of the defendant.

Mr. Johnson noted no opposition to the writ of ejectment and noted the defendant did not have sufficient funds to post bond and therefore is in the process of vacating the premises.

The Court granted plaintiff's motion to enforce judgment.

Mr. Johnson presented argument supporting defendant's motion to reconsider.

Mr. Manwaring argued in opposition to defendant's motion.

Mr. Johnson presented additional argument supporting defendant's motion.

Mr. Manwaring presented argument supporting plaintiff's motion for release lis pendens.

Mr. Johnson argued in opposition to plaintiff's motion.

The Court took the matter under advisement.

Counsel requested plaintiff's motion for attorney fees be considered submitted and that a decision be issued.

Court was thus adjourned.

*Gregory S. Anderson*  
\_\_\_\_\_  
GREGORY S. ANDERSON  
District Judge

c: Kipp Manwaring  
David Johnson

BONNEVILLE COUNTY  
IDAHO

8 APR 24 04:39

David A. Johnson, Esq.  
Wright, Wright & Johnson, PLLC  
477 Shoup Avenue, Suite 109  
P.O. Box 52251  
Idaho Falls, ID 83405-2251  
Telephone (208) 535-1000  
Facsimile (208) 523-4400  
Idaho State Bar No. 3319

Attorney for Defendant/Appellant

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

**BLACK DIAMOND ALLIANCE, LLC.**

Plaintiff/Respondent

vs.

**SHERRY KIMBALL**

Defendant/Appellant

Case No. CV-07-3806

**AMENDED NOTICE OF APPEAL**

Fee Category: T  
Fees: \$86.00; \$15.00

NOTICE IS HEREBY GIVEN that:

1. Appellant Sherry Kimball (Kimball) appeals against Respondent Black Diamond Alliance, LLC, a.k.a. Black Diamond, LLC (Black Diamond), to the Idaho Supreme Court from the following decision made by the Honorable Gregory Anderson, District Judge:
  - a. Summary Judgment entered on or about March 13, 2008.

2. Kimball has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Idaho Appellate Rules 11(a)(1) and/or 11(a)(7).
3. The issues to be presented on appeal include:
  - a. The District Court erred in granting summary judgment to Black Diamond. More particularly, the District Court erred in holding that notice of the delayed non-judicial trustee's sale was not required to be provided to Kimball.
4. There has been no order sealing any portion of the record.
5. A transcript is requested of the March 6, 2008, hearing.
6. Appellant requests the following documents be included in the Clerk's Record, in addition to those automatically included under Idaho Appellate Rule 28.

Date	Document
07/06/2007	Civil Complaint
08/17/2007	Amended Verified Complaint
11/7/2007	Answer and Counterclaim
11/20/2007	Reply to Counterclaim
01/18/2008	Motion for Summary Judgment
01/18/2008	Memorandum in Support of Motion for Summary Judgment
01/18/2008	Affidavit of Counsel in Support of Motion for Summary Judgment
01/18/2008	Affidavit of First American Title
01/18/2008	Affidavit of Fremont Investment & Loan
01/18/2008	Affidavit of Bradon K. Howell

02/15/2008	Motion to Amend Caption
02/15/2008	Affidavit of Sherry Kimball
02/15/2008	Affidavit of David A. Johnson
02/15/2008	Response to Motion and Memorandum for Summary Judgment
02/21/2008	Affidavit of Counsel
02/29/2008	Motion to Strike
02/29/2008	Reply Brief Filed
03/05/2008	Affidavit of David A Johnson (2)
03/13/2008	Writ of Ejection and Writ of Restitution
03/13/2008	Summary Judgment
03/12/2008	Motion for Reconsideration
03/18/2008	Response in Opposition to Motion for Reconsideration

7. The names and identification of the parties to this action and their respective attorneys are:

<u>Name</u>	<u>Party Status</u>	<u>Attorney</u>
Black Diamond Alliance, LLC	Plaintiff/Respondent	Kipp L. Manwaring
Sherry Kimball	Defendant/Appellant	David A. Johnson

8. This appeal is taken from both matters of law and fact.

9. I certify that:

- a. A copy of this Notice of Appeal has been served on the reporter.
- b. The Clerk of the District Court has been or will be paid the estimated fee for preparation of the reporter's transcript.



- c. The estimated fee for preparation of the Clerk's Record has been or will be paid.
- d. The appellate filing fee has been paid.
- e. All parties have been served with a copy of this Notice, in accordance with Idaho Appellate Rule 20.

DATED: April 22, 2008

  
 \_\_\_\_\_  
 WRIGHT, WRIGHT & JOHNSON, PLLC  
 David A. Johnson, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on April 22<sup>nd</sup>, 2008, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

<u>Name and Address</u>	<u>Method of Service</u>
Kipp L. Manwaring Just Law Office P.O. Box 50271 Idaho Falls, ID 83405-0271	Facsimile 523-9146
Karen Konvalinka, Court Reporter Bonneville County Courthouse 605 N. Capital Avenue Idaho Falls, ID 83402	Courthouse

  
 \_\_\_\_\_  
 David A. Johnson, Esq.

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

2006 MAR 31 11:31 AM  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID  
Case No. CV-07-3806

BLACK DIAMOND ALLIANCE, LLC, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 SHERRY KIMBALL, an individual, and )  
 JOHN DOES I-X, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

**MEMORANDUM DECISION RE:  
MOTION TO STRIKE; MOTION FOR  
RECONSIDERATION; MOTION FOR  
ORDER QUASHING AND RELEASING  
NOTICE OF LIS PENDENS; AND  
MOTION FOR COSTS AND FEES**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Black Diamond Alliance, LLC, (Black Diamond), is an Idaho limited liability company.

Sherry Kimball is a resident of Bonneville County, Idaho.

Kimball executed a promissory note payable to Fremont Investment & Loan (Fremont) on January 12, 2004, in the amount of \$104,800.00.

On January 15, 2004, Kimball executed a deed of trust on her residential property (Property) with Mortgage Electronic Registration Systems, Inc., (MERS) as beneficiary and nominee of Fremont. The deed of trust was recorded in the recorder's office of Bonneville County on January 22, 2004, as Instrument No. 1141336.

Beginning September 1, 2006, Kimball failed to make her monthly payments on the note.

On October 23, 2006, Fremont sent a Notice of Intent to Foreclose to Kimball informing her the loan was in default, and that Fremont intended to foreclose the deed of trust on her Property if she did not cure the default within thirty days.

Kimball failed to cure the default, and foreclosure was initiated in January 2007.

MERS assigned its beneficial interest under the deed of trust to Fremont by written assignment recorded January 22, 2007, as Instrument No. 1250938, in the Bonneville County recorder's office.

Just Law, Inc., was appointed trustee of the deed of trust on January 22, 2007.

The parties agree Kimball received proper notice that a trustee's sale was scheduled at 11:00 a.m. on May 29, 2007 (First Trustee's Sale), at First American Title Company (First American) in Idaho Falls.

On May 29, 2007, Kimball allegedly telephoned Fremont and arranged to make a partial payment of \$3,000 on the past due balance in exchange for cancellation of the trustee's sale of the Property. Kimball agreed to pay the remainder of the past due amount by June 18, 2007.

At the First Trustee's Sale, Just Law, Inc., publicly announced the sale was postponed until June 12, 2007, at 11:00 a.m. (Second Trustee's Sale) and would be held at First American's office in Idaho Falls.

At 11:00 a.m. on June 12, 2007, Just Law, Inc., commenced the Second Trustee's Sale. Black Diamond presented the highest bid for the Property in the amount of \$112,500. The Property was sold to Black Diamond. First American issued a policy of title insurance dated June 14, 2007, showing Black Diamond is the vested owner of the Property.

Kimball did not attend either the First or the Second Trustee's Sale.

Black Diamond commenced this action by filing a Complaint on July 6, 2007.

Black Diamond filed an Amended Verified Complaint on August 17, 2007, requesting

this Court grant it: (1) a writ of ejectment to be used to remove Kimball from the Property; (2) a writ of restitution; and (3) attorney fees and costs.

Kimball filed an Answer and Counterclaim on November 7, 2007, asking this Court to: (1) dismiss Black Diamond's complaint; (2) decree Black Diamond has no interest in the Property; and (3) award her attorney fees and costs.

Black Diamond filed a Motion for Summary Judgment on January 18, 2008.

Kimball filed a Response to Motion and Memorandum for Summary Judgment (Response) on February 15, 2008. Kimball and her attorney, David Johnson, both filed affidavits in support of her Response.

Black Diamond filed a motion to strike parts of the affidavits on February 29, 2008.

On March 6, 2008, Black Diamond's motion for summary judgment came on for hearing before this Court. This Court granted Black Diamond's motion for summary judgment and instructed Black Diamond to prepare the appropriate judgment for the Court's signature.

Kimball filed a Motion for Reconsideration on March 12, 2008.

On March 13, 2008, this Court entered a written judgment for Black Diamond against Kimball and awarded Black Diamond possession of the Property.

The Court issued a Writ of Ejectment on March 13, 2008.

Kimball recorded a Lis Pendens relating to the Property on March 17, 2008.

Black Diamond filed a Motion for Order Quashing and Releasing Notice of Lis Pendens on March 18, 2008.

Black Diamond filed a Motion for Costs and Fees on March 24, 2008.

Kimball filed an Objection to Attorney Fees and Costs on April 2, 2008.

Kimball filed a Notice of Appeal on April 2, 2008.

## II. STANDARD OF ADJUDICATION

### A. Motion to Strike

The Idaho Supreme Court has stated:

The admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial.

*West v. Sonke*, 132 Idaho 133, 138, 968 P.2d 228, 233 (1998). “Trial courts have broad discretion over the admission of evidence . . . .” *Kirk v. Ford Motor Co.*, 141 Idaho 697, 700, 116 P.3d 27, 30 (2005) (citing I.R.C.P. 37(a)(2) (2004); *Karlson v. Harris*, 140 Idaho 561, 564, 97 P.3d 428, 431 (2004)).

### B. Motion for Summary Judgment

A motion for summary judgment “shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). See *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105 (2002); *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2002). The burden is, at all times, on the moving party to demonstrate the absence of a genuine issue of material fact. *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001).

The United States Supreme Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), stated:

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its

MEMORANDUM DECISION RE: MOTION TO STRIKE; MOTION FOR RECONSIDERATION; MOTION FOR ORDER QUASHING AND RELEASING NOTICE OF LIS PENDENS; AND MOTION FOR COSTS AND FEES - 4

motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim. On the contrary, Rule 56(c), which refers to “the affidavits, *if any*” (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide the claimants and defendants, respectively, may move for summary judgment “*with or without supporting affidavits*” (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

*Id.* at 323, 106 S.Ct. at 2553.

When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. American Cleaning Services, Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). Liberal construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *Farnsworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Madrid v. Roth*, 134 Idaho 802, 10 P.3d 751 (Ct. App. 2000).

The Idaho appellate courts have followed the United States Supreme Court’s decision in *Celotex*, which stated:

Summary judgment procedure is properly regarded not as a disfavored

procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to secure the just, speedy and inexpensive determination of every action.” . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

*Id.* at 327, 106 S.Ct. at 2555 (citations omitted); *see Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 53 P.3d 330 (2002); *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002).

A party against whom a summary judgment is sought cannot merely rest on his pleadings but, when faced with affidavits or depositions supporting the motion, must come forward by way of affidavit, deposition, admissions or other documentation to establish the existence of material issues of fact, which preclude the issuance of summary judgment. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001); *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000). The non-moving party’s case, however, must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 798, 41 P.3d 220, 226 (2001).

The moving party is entitled to judgment when the non-moving party fails to make a sufficient showing as to the essential elements to which that party will bear the burden of proof at trial. *Primary Health Network, Inc. v. State, Dept. of Admin.*, 137 Idaho 663, 52 P.3d 307 (2002). Facts in dispute cease to be “material” facts when the plaintiff fails to establish a prima facie case. *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018 (1998). In such a situation, there can be no genuine issue of

material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.*

### **C. Motion to Reconsider**

“The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court.” *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001); *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 329, 48 P.3d 651, 658 (2002).

### **D. Attorney Fees**

An award of attorney fees must be supported by statutory or other authority. *See Webb v. Webb*, 143 Idaho 521, 526, 148 P.3d 1267, 1272 (2006). The amount of attorney fees and costs awarded is generally discretionary. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).

## **III. DISCUSSION**

### **A. Motion to Strike**

#### **1. ¶ 4, David Johnson Affidavit**

Black Diamond asks this Court to strike paragraph 4 of Johnson's affidavit on the ground it is inadmissible hearsay.

Rule 801 of the Idaho Rules of Evidence states: “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

Paragraph 4 states: “Ms. Winn told me that, with the sale of the business, some documents were scanned, but the majority were purged. Ms. Winn indicated she



attempted to locate the documents when Plaintiff contacted her earlier, but was unsuccessful in her attempt.” Johnson Aff. at 2.

Paragraph 4 of Johnson’s affidavit is inadmissible hearsay and should be stricken.

**2. ¶ 5, David Johnson Affidavit**

Black Diamond asks this Court to strike paragraph 5 of Johnson’s affidavit on the ground it is inadmissible hearsay.

Paragraph 5 states: “Ms. Winn also indicated that she does not have any significant recollection of the foreclosures sale(s), which were the subject of this case. She indicated that documents were sent to the Trustee (Just Law Office.)” Johnson Aff. at 2.

Paragraph 5 of Johnson’s affidavit is inadmissible hearsay and should be stricken.

**3. ¶ 7, Kimball Affidavit**

Black Diamond moved to strike paragraph 7 of Kimball’s affidavit on the ground Kimball’s conversations with Fremont personnel and Bradon Howell, a foreclosure specialist with Just Law, Inc., are inadmissible hearsay.

29 AM. JUR. 2D *Evidence* § 665 (2008) explains:

There is a category of nonhearsay designated as verbal acts or verbal conduct in which the utterance of the words is, in itself, an operative fact which gives rise to legal consequences. Verbal acts may be considered nonhearsay when they comprise the operative events at issue . . . .

. . . .

[O]ut of court statements may be offered to show that an agreement or contract was formed by the making of the statements, because the making of the statements gives rise to legal consequences, and the mere fact of utterance is relevant to the issue of whether or not there was an express agreement.

The Idaho Court of Appeals has similarly held:

[W]hile the hearsay rule generally prohibits a witness from relating the statements of other persons for the purposes of proving the truth of the other person's assertions, it does not prohibit a witness from testifying what his understanding was of an agreement with those other persons, even if the agreement was based upon such conversations.

*Furness v. Park*, 98 Idaho 617, 622, 570 P.2d 854, 859 (1977).

Paragraph 7 states:

On May 29, 2007, I telephoned Fremont and spoke with Myra and Kesa. An agreement was reached, wherein I would make a \$3,000.00 partial payment and pay the balance of the payments past due on June 18, 2007. Myra and Kesa told me the sale would be cancelled. I then telephoned the Trustee's office, Just Law, Inc., to ensure the Trustee was aware of the cancellation of sale. I was referred to and spoke with Bradon Howell at the Trustee's office. Then, I went to Western Union and wired \$3,000.00 to Fremont. After I wired the money, I called the Trustee's office to confirm the sale was cancelled.

Kimball Aff. at 3.

Kimball offers paragraph 7 as proof of her understanding regarding an agreement reached between her and Fremont. Consequently, statements of others included in paragraph 7 are not hearsay. Black Diamond's motion to strike paragraph 7 should be denied.

#### **4. ¶ 9, Kimball Affidavit**

Black Diamond moved to strike paragraph 9 of Kimball's affidavit on the ground Kimball's conversations with Fremont personnel are inadmissible hearsay.

Paragraph 9 states:

After my conversations with Myra and Kesa, I believed I had until June 18, 2007, to pay the balance past due of the loan I was attempting to obtain financing, which I believe I could have obtained.

Kimball Aff. at 3.

Paragraph 9 of Kimball's Affidavit is offered as her understanding of an agreement between her and Fremont, and is not hearsay. Black Diamond's motion to strike paragraph 9 should be denied.

**5. ¶ 13, Kimball Affidavit**

Black Diamond moved to strike paragraph 13 of Kimball's affidavit on the ground it is not within Kimball's personal knowledge.

I.R.C.P. 56(e) provides, in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

I.R.E. 602 provides, in part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Paragraph 13 states:

I believe there may be a substantial connection between the Trustee and Black Diamond, LLC. The Court has an Affidavit of Bradon Howell, wherein he identifies himself as a foreclosure specialist for the Trustee. As noted by a document from Black Diamond, Jayce Howell is listed as the manager. I have seen various trade publications, a copy of one is attached as Exhibit C, which shows that High Desert Realtors listed Bradon Howell as an agent, together with Jayce Howell and several other individuals with the surname of Howell. Although I recognize I do not have personal knowledge, the similarity in name and association leads me to believe there is a significant business and familial relationship. I believe that because of the lack of notice to me, and the circumstances that would provide constructive knowledge, that Black Diamond may have been able to purchase my home and real property under less than published conditions. Because of my lack of knowledge, I believe the summary judgment should not been determined by the Court until I have an adequate opportunity to conduct discovery to determine the relationship and communications between the Trustee, Black Diamond, etc.

Kimball Aff. at 4.

The second sentence of paragraph 13 contains facts already in evidence. The fourth sentence is based on Kimball's personal knowledge. The remainder of paragraph 13 is not based on Kimball's personal knowledge and should be stricken.

## **B. Motion for Reconsideration**

### **1. Cancellation of First Trustee's Sale**

Black Diamond moved for summary judgment "on all issues raised in the complaint and counterclaim." M. for Summ. J. at 1.

In her Response to Black Diamond's motion for summary judgment Kimball explained:

The evidence is uncontradicted that, although Kimball was aware of the first scheduled Notice, she was not present when the alleged postponement was announced. Because of her contacts with the Trustee and Fremont, and based upon confirmation that the sale had been cancelled, she had no reason to attend the sale. Because there was no attempt whatsoever to provide notice of the rescheduled sale, the statutory procedures were not followed, and the sale is voidable.

Response at 5.

This Court granted summary judgment to Black Diamond.

Kimball correctly argues this Court, in granting summary judgment in favor of Black Diamond, considered only whether notice given at the First Trustee's Sale of the Second Trustee's Sale was adequate notice of a postponement and did not consider the question of whether the First Trustee's Sale was cancelled rather than postponed. She explains: "The agreement made with Fremont Investment & Loan and the representations made to Kimball were that the sale was cancelled, not postponed. See Affidavit of

Sherry Kimball previously filed. There was no reason for Kimball to attend a cancelled sale.” M. for Reconsideration at 2.

Kimball appears to allege she reached an agreement with Fremont and/or Just Law, Inc., that the First Trustee’s Sale would be cancelled. Cancel is defined as: “1 . . . d: to call off usually without expectation of conducting or performing at a later time.” MERRIAM-WEBSTER ONLINE. Postpone is defined as: “1: to put off to a later time : DEFER.” *Id.* Kimball’s argument is based on the assumption that if a sale is cancelled, any subsequent sale must be re-noticed under the *original notice requirements of* subsections (2) through (7) of Idaho Code § 45-1506.

Kimball’s argument that a cancelled sale reinstates the original notice requirements of Idaho Code § 45-1506 may be meritorious. Therefore, there is a material question of fact whether Fremont agreed to cancel the First Trustee’s Sale resulting in a requirement that the sale be re-noticed under Idaho Code § 45-1506.

## **2. Bona Fide Purchaser**

Idaho Code § 45-1508 states:

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, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. 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.

If Black Diamond purchased the property in good faith and for value, Just Law Inc.'s failure to give notice of the Second Trustee's Sale, after an alleged cancellation of the First Trustee's Sale, may not invalidate the sale. The evidence indicates Black Diamond paid \$112,500 for the Property. The question remains whether Black Diamond was a purchaser in good faith.

### **3. Continuance of summary judgment hearing**

Simultaneously with filing her Response, Kimball filed a Motion to Continue the summary judgment hearing in order to conduct further discovery on the bona fide purchaser issue.

I.R.C.P. 56(f) states:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Paragraph 13 of Kimball's Affidavit indicates Kimball could not present facts to justify her opposition to Black Diamond's motion for summary judgment without conducting discovery regarding the relationship between Just Law, Inc., as trustee, and Black Diamond.

Because material questions of fact remain regarding Fremont's alleged cancellation of the First Trustee's Sale and whether Black Diamond was a bona fide purchaser, Kimball's motion for reconsideration should be granted. This Court's order granting Black Diamond summary judgment should be vacated. And, Kimball should be accorded the opportunity to conduct discovery regarding the bona fide purchaser issue.

### C. Lis Pendens

Black Diamond asks this Court to quash Kimball's notice of lis pendens filed on March 17, 2008. Black Diamond argues:

There is not statutory or case law providing use of lis pendens post judgment. Defendant recorded the notice of lis pendens without legal authority. Defendant's lis pendens constitutes an unlawful cloud on Plaintiff's title and must be removed.

Where no legal basis exists for filing a notice of lis pendens post judgment, Plaintiff requests the court in accordance with I.R.C.P. 11 impose appropriate sanctions, including an award of all attorney fees Plaintiff has incurred and will incur in removing the notice of lis pendens.

M. for Order Quashing and Releasing Notice of Lis Pendens at 1-2.

First, because this Court has decided to vacate its order granting summary judgment to Black Diamond, the lis pendens will no longer be "post judgment."

Second, Idaho Code § 5-505 states:

In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, *or at any time afterward*, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. (Emphasis added.)

In *Suitts v. First Sec. Bank of Idaho, N.A.*, 100 Idaho 555, 559, 602 P.2d 53, 57 (1979), the Idaho Supreme Court held that the proper course of action for the defendants to protect their interest in property during the pendency of an appeal was to file a lis pendens. Kimball's filing of a lis pendens was proper, and Black Diamond's motion to quash and release the lis pendens should be denied.

#### **D. Writ of Ejectment and Motion for Bond Pending Appeal**

The March 13, 2008, Writ of Ejectment was based on this Court's order granting summary judgment to Black Diamond. Because the grant of summary judgment in favor of Black Diamond is being vacated, the Writ of Ejectment should also be vacated.

#### **E. Attorney Fees and Costs**

##### **1. Attorney Fees**

Black Diamond requests attorneys fees pursuant to Idaho Code §§ 12-120(3) and 12-121.

Kimball objects to the award of attorney fees.

Idaho Code § 12-120(3) states:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the *prevailing party* shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

(Emphasis added.)

Idaho Code § 12-121 states:

In any civil action, the judge may award reasonable attorney's fees to the *prevailing party* or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

(Emphasis added.)

Black Diamond is not the prevailing party. Therefore, Black Diamond's motion for attorney fees should be denied.



## 2. Costs

Black Diamond argues it is entitled to costs under I.R.C.P. 54(d)(1).

Kimball objects to the award of costs.

Rule 54(d), I.R.C.P., states that a prevailing party is allowed costs.

Black Diamond is not the prevailing party. Its motion for costs should, therefore, be denied.

## IV. CONCLUSION

Black Diamond's motion to strike paragraphs 4 and 5 of Johnson's Affidavit should be granted.

Black Diamond's motion to strike paragraphs 7 and 9 and the second and fourth sentences of paragraph 13 of Kimball's Affidavit should be denied.

Black Diamond's motion to strike the remainder of paragraph 13 of Kimball's Affidavit should be granted.

Kimball's motion for reconsideration should be granted.

This Court's March 13, 2008, order granting Black Diamond summary judgment and possession of the Property should be vacated.

This Court's March 13, 2008, Writ of Ejectment should be vacated.

The parties should be given time to conduct further discovery on the bona fide purchaser issue.

Black Diamond's motion to quash and release the lis pendens should be denied.

Black Diamond's motion for attorney fees and costs should be denied.

DATED this 15<sup>th</sup> day of May 2008.

Gregory S. Anderson  
GREGORY S. ANDERSON  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of May 2008, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Kipp L. Manwaring  
JUST LAW OFFICE  
P.O. Box 50271  
Idaho Falls, ID 83405

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
P.O. Box 52251  
Idaho Falls, ID 83405

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By   
Deputy Clerk

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE  
 OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

APR 15 PM 3:31  
 DISTRICT COURT  
 7TH JUDICIAL DISTRICT  
 BONNEVILLE COUNTY ID

BLACK DIAMOND ALLIANCE, LLC, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 SHERRY KIMBALL, an individual, and )  
 JOHN DOES I-X, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. CV-07-3806

**ORDER DECISION RE: MOTION TO STRIKE; MOTION FOR RECONSIDERATION; MOTION FOR ORDER QUASHING AND RELEASING NOTICE OF LIS PENDENS; AND MOTION FOR COSTS AND FEES**

This cause having come before this Court pursuant to Black Diamond's February 29, 2008, motion to strike; Kimball's March 12, 2008, Motion for Reconsideration; Black Diamond's March 18, 2008, Motion for Order Quashing and Releasing Notice of Lis Pendens; and Black Diamond's March 24, 2008, Motion for Costs and Fees; this Court being fully advised in the premises; and good cause appearing;

NOW, THEREFORE:

Black Diamond's motion to strike paragraphs 4 and 5 of Johnson's Affidavit is granted.

Black Diamond's motion to strike paragraphs 7 and 9 and the second and fourth sentences of paragraph 13 of Kimball's Affidavit is denied.

Black Diamond's motion to strike the remainder of paragraph 13 of Kimball's Affidavit is granted.

Kimball's motion for reconsideration is granted.

ORDER RE: MOTION TO STRIKE; MOTION FOR RECONSIDERATION; MOTION FOR ORDER QUASHING AND RELEASING NOTICE OF LIS PENDENS; AND MOTION FOR COSTS AND FEES - 1

This Court's March 13, 2008, order granting Black Diamond summary judgment and possession of the Property is vacated.

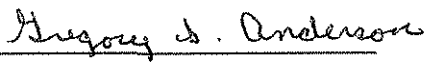
This Court's March 13, 2008, Writ of Ejectment is vacated.

The parties are given time to conduct further discovery on the bona fide purchaser issue.

Black Diamond's motion to quash and release the lis pendens is denied.

Black Diamond's motion for attorney fees and costs is denied.

DATED this 15<sup>th</sup> day of May 2008.

  
\_\_\_\_\_  
GREGORY S. ANDERSON  
District Judge


CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of May 2008, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Kipp L. Manwaring  
JUST LAW OFFICE  
P.O. Box 50271  
Idaho Falls, ID 83405

David A. Johnson  
WRIGHT, WRIGHT & JOHNSON  
P.O. Box 52251  
Idaho Falls, ID 83405

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

BY   
Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

BLACK DIAMOND ALLIANCE, LLC., )  
 )  
 Plaintiff/Respondent, )  
 )  
 vs. )  
 )  
 SHERRY KIMBALL, )  
 )  
 Defendant/Appellant. )  
 \_\_\_\_\_ )  
 STATE OF IDAHO )  
 )  
 County of Bonneville )

**CLERK'S CERTIFICATION  
OF EXHIBITS**

Case No. CV-2007-3806  
 Docket No. 35189

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination: please see attached sheets.

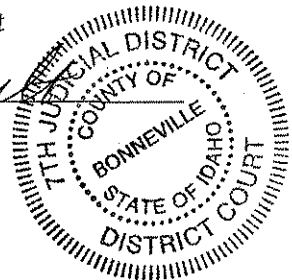
- Affidavit of Counsel in Support of Motion for Summary Judgment, filed 1-18-08
- Affidavit of First American Title, filed 1-18-08
- Affidavit of Fremont Investment & Loan, filed 1-18-08
- Affidavit of Bradon K. Howell, filed 1-18-08
- Affidavit of Sherry Kimball, filed 2-18-08
- Affidavit of David A. Johnson, filed 2-15-08
- Affidavit of Counsel, filed 2-21-08
- Affidavit of David A. Johnson (Second), filed 3-5-08

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court  
 this 16 day of June, 2008.

RONALD LONGMORE  
 Clerk of the District Court

By *Sherry Kimball*  
 Deputy Clerk



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

BLACK DIAMOND ALLIANCE, LLC., )  
 )  
 Plaintiff/Respondent, )  
 )  
 vs. )  
 )  
 SHERRY KIMBALL, )  
 )  
 Defendant/Appellant. )  
 \_\_\_\_\_ )

**CERTIFICATE OF SERVICE**

Case No. CV-2007-3806

Docket No. 35189

I HEREBY CERTIFY that on the \_\_\_ day of June, 2008, I served a copy of the Reporter's Transcript and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

David A. Johnson, Esq.  
 WRIGHT, WRIGHT & JOHNSON  
 P.O. Box 50578  
 Idaho Falls, ID 83405-0578

Kipp L. Manwaring, Esq.  
 Attorney at Law  
 P.O. Box 50271  
 Idaho Falls, ID 83405-0271

*Attorney for Appellant*

*Attorney for Respondent*

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE  
 Clerk of the District Court

By: *Jerry Shultz*  
 Deputy Clerk