

5-6-2009

Black Diamond Alliance, LLC v. Kimball Clerk's Record v. 3 Dckt. 35189

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Vol. 3 of 5

Supplemental Record

IN THE

volume 2 of 2

SUPREME COURT

LAW CLERK

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, Esq.

P.O. Box 52251 Idaho Falls, ID 83405-2251

Attorney for Appellant

Kip Manwaring

P.O. Box 50271 Idaho Falls, ID 83405-0271

Attorney for Respondent

Filed this _____ day of _____, 20____

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MAY - 6 2009

Clerk

By Supreme Court Court of Appeals Deputy

35189COPY

BONNEVILLE COUNTY
IDAHO

2008 OCT -7 PM 4:33

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, 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.

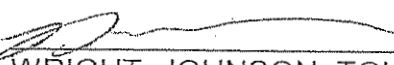
SHERRY KIMBALL, et al.
Defendant.

Case No: CV-07-3806

PUBLICATION OF THE
DEPOSITION OF BRADON K.
HOWELL

David A. Johnson, attorney for Defendant Sherry Kimball, pursuant to Idaho
Rules of Civil Procedure 32, for purposes of Summary Judgment/Motion for
Reconsideration, hereby requests the Court to publish the attached Deposition of
Bradon K. Howell taken September 24, 2008.

DATED: October 7, 2008


WRIGHT, JOHNSON, TOLSON &
WAYMENT, 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 October 7, 2008, I served a true and correct copy of the foregoing document (without the deposition transcript), on the person(s) listed below 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:

Facsimile 523-9146



David A. Johnson, Esq.

Transcript of the Testimony of:
Bradon Howell

Date: September 24, 2008

Volume: I

Case: BLACK DIAMOND v. KIMBALL, ET AL.

Printed On: October 2, 2008

T&T Reporting
Phone: 208/529-5491
Fax: 208/529-5496
Email: tntreport@ida.net
Internet: www.tandtreport.com

DEPOSITION OF BRADON K. HOWELL,

BE IT REMEMBERED that the deposition of BRADON K. HOWELL, was taken by the attorney for the Defendant, at the offices of Wright, Johnson, Tolson & Wayment, located at 477 Shoup Avenue, Idaho Falls Idaho, before Karla Steed, Court Reporter and Notary Public, in and for the State of Idaho, on Wednesday, the 24th day of September, 2008 commencing at the hour of 9:00 a.m., in the above-entitled matter.

A P P E A R A N C E S

For the Plaintiff:

JUST LAW OFFICE
BY: KIPP L. MANWARING
381 Shoup Avenue, Suite 210
Post Office Box 50271
Idaho Falls, Idaho 83402
(208) 782-2300
e-mail kipp@manwaringlaw.com

For the Defendant:

WRIGHT, JOHNSON, TOLSON & WAYMENT
BY: DAVID A. JOHNSON
477 Shoup Avenue, Suite 109
Post Office 52251
Idaho Falls, Idaho 83405-0578
e-mail dj@ida.net

Also Present: Trent Tyler
Jayce Howell
Dustin Howell

I N D E X
E X A M I N A T I O N

WITNESS

BRADON K. HOWELL

EXAMINATION BY

PAGE

MR. JOHNSON 4

E X H I B I T S

NUMBER

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1 (The deposition of Bradon K. Howell proceeded at 9:00
2 a.m. as follows:)

3 BRADON K. HOWELL

4 produced as a witness at the instance of the
5 Defendant, having been first duly sworn, was
6 examined and testified as follows:

7 EXAMINATION

8 BY MR. JOHNSON:

9 Q Bradon, would you state your full name
10 for the record.

11 A Bradon Kerry Howell.

12 Q And as far as your address, for
13 purposes of reading that, would that be in care of
14 Just Law Office?

15 A Yes.

16 Q Have you ever had your deposition taken
17 before?

18 A No, sir.

19 Q And I am sure Kipp has probably told
20 you some of the rules of deposition. Let me just go
21 over a couple of those to make this go easier. I
22 try to ask questions that look articulable when the
23 transcript is prepared.

24 Because of that I generally try to speak
25 a little slower and methodical in order to accomplish

1 that. Because of that, sometimes you may anticipate
2 a question before the question is completed. But
3 just make sure that you wait until the end of the
4 question to answer so we don't talk over each other?

5 Okay?

6 A Sure.

7 Q Okay?

8 A Uh-huh.

9 Q The next one is to make sure that your
10 answers are clear and definitive. Particularly
11 avoid things like Uh-huh or Huh-hu or yeah -- those
12 in particular causes fits for the deposition
13 transcript later on.

14 A Okay.

15 Q If there are other issues that come up
16 as we take this deposition, I will raise them at
17 this time -- or at that time.

18 Finally, if you need to correct
19 something or you have an epiphany-type experience and
20 you want to clarify it, you may want to make a mental
21 note at the end of that question and answer, and we
22 can come back at some point and clarify because I
23 want to make sure that we're clear.

24 Okay?

25 A Okay.

1 Q What is your current employment.

2 A Foreclosure specialist/office manager.

3 Q Whom are you employed with?

4 A Just Law Office.

5 Q How long have you been with Just Law
6 Office?

7 A Nine to ten years.

8 Q Okay. And have you had other
9 occupations or pursuits at any time during that nine
10 to ten years?

11 A Yes.

12 Q And what were they?

13 A Realtor.

14 Q Okay. And was there a particular
15 brokerage that you were affiliated with?

16 A High Desert Realtors.

17 Q And did you ever have any family
18 members that were associated with High Desert
19 Realtors?

20 A Yes.

21 Q And who was that?

22 A I have a father and two brothers
23 affiliated.

24 Q And your father is who?

25 A Kerry Howell.

1 Q And the brothers that were affiliated
2 with that business?

3 A Dustin Howell. Jayce, J.A.Y.C.E.
4 Howell.

5 Q And you probably know where I am headed
6 with the next question. Where is Jayce Howell
7 currently, as far as the physical location?

8 A I am not sure.

9 Q Okay. Do you know if he is -- well, I
10 mean do you know where he resides?

11 A As far as business or --

12 Q Residential.

13 A Yes.

14 Q Okay. I assume you have contact from
15 time to time with him?

16 A Yes.

17 Q Do you know what business he is
18 affiliated with?

19 A No.

20 Q Do you know whether he has any business
21 known as Black Diamond Alliance?

22 A Yes.

23 Q And what is your knowledge about that
24 business?

25 A Good standing.

1 Q Well, I was going to say: Is that a
2 review of the Secretary of State records or your
3 personal view?

4 (Trent Tyler, Jayce Howell and Dustin Howell
5 entered the deposition room.)

6 MR. JOHNSON: Welcome, gentlemen.

7 BY MR. JOHNSON:

8 Q Have you ever had any involvement with
9 Black Diamond Alliance?

10 A I don't understand the question.

11 Q What is the nature of your contact then
12 with Black Diamond Alliance?

13 A None.

14 Q You have never had any business
15 association?

16 A No.

17 Q Okay. Now in conjunction with your
18 title as foreclosure specialist, what type of duties
19 and responsibilities do you have?

20 A Set up, conduct trustee sales
21 throughout the state of Idaho.

22 Q Okay. Tell me about the process in
23 general terms.

24 A File, receive first legal action, set a
25 sale. Conduct the sale -- all per lender's

1 instructions.

2 Q Okay. Now the term "crier", does that
3 mean anything to you?

4 A That would usually be a title company
5 in our case who conducts the trustee sale on our
6 behalf in the county where the property is located.

7 Q Do you typically attend a trustee --

8 A No. Sorry.

9 Q Rule number one, first one --

10 A Sorry.

11 Q No, you are fine. Do you usually
12 attend the trustee sale?

13 A No.

14 Q Is there a particular person that is
15 employed by the trustee that attends the sale?

16 A No.

17 Q And what was -- what is the reason that
18 you work with title companies?

19 A They provide title work. Title
20 insurance. It's convenient for our office as we do
21 them throughout the state of Idaho.

22 Q Okay. And as far as information, how
23 is it conveyed from a customer on whom you are
24 providing a trustee sale? How does that come to you
25 in general terms?

1 A I am not sure I understand the
2 question.

3 Q Well, I mean do you get a particular
4 company that provides you business or is it various
5 sources?

6 A We do have established clients, yes.

7 Q Okay. Now maybe we can turn our
8 attention to Sherry Kimball's foreclosure sale. Are
9 you familiar with that particular matter?

10 A Yes.

11 Q When was the first time you became
12 involved with that particular transaction?

13 A January 8th, 2007.

14 Q Okay. And how was it that you became
15 involved in this particular situation?

16 A A foreclosure referral from Fremont
17 Investment and Loan was sent to us.

18 Q How did that information come to you?

19 A You know I think it was via an
20 over-night express.

21 Q Okay. I have noticed that in some of
22 the documents there is a VIP portal.

23 A Yes.

24 Q What is that?

25

1 A It's an on-line based correspondence
2 for the vendor and servicer.

3 Q Okay. Method of communication?

4 A Correct.

5 Q Okay. The vendor being the note
6 holder?

7 A The vendor -- we would be the vendor.

8 Q Okay. And what would be the person who
9 had the note, what would be their title?

10 A I guess servicer.

11 Q Okay. Make sure that we have got --

12 A I would say we're the trustee and they
13 are the client.

14 Q Okay. I am not going to ask you
15 questions about each step of the foreclosure process
16 because I am not too sure how much it really has
17 bearing. I have seen the documents.

18 I want to go to approximately the end
19 part of May of 2007. And you were aware that there
20 was a trustee sale that I believe was scheduled for
21 the 30th -- or what was the original date of the
22 trustee sale? I can't remember if it was the 29th or
23 the 30th.

24 A The original sale date was set for May
25 29, 2007 at 11:00 o'clock a.m. at First American

1 Title Company on Jennie Lee in Idaho Falls.

2 Q Did that sale take place?

3 A No.

4 Q Why not?

5 A Postponed per lender's instructions.

6 Q How did those instructions come to you?

7 A Verbally on the phone.

8 Q Okay. Tell me about the conversation.

9 Who did you speak with?

10 A Sarah at Fremont.

11 Q Now do you keep any notes or journals
12 on these particular type of matters?

13 A Phone calls?

14 Q The question was: Journals or notes.

15 A Yes.

16 Q And what is the nature of the notes
17 that you keep?

18 A Just written in my file basically. I
19 mean, there is some on-line things that I can print
20 out. But in this particular case I believe it was a
21 last minute thing that they decided to do, so they
22 had called.

23 Q Okay. And so when they called, this
24 Sarah, what did Sarah tell you?

25 A Postpone the sale -- I believe it was

1 two weeks -- for possible forbearance.

2 Q Now are there any notes related to this
3 telephone call?

4 A Just what I have in my file, yeah. But
5 it's my notes.

6 Q And what are your notes? If I could
7 look at those.

8 A Per Sarah at Fremont. Postponed
9 6-12-07. It's right here.

10 Q As far as the 6-12-07, is that the date
11 that you created?

12 A Yes.

13 Q Okay. I want to just walk through to
14 make sure I understand. She said to postpone it two
15 weeks.

16 A I believe that was the timeframe they
17 were giving her. Yes. And you can't conduct a
18 trustee sale on a Saturday -- so I believe that is
19 why the 12th was the initial date -- -- or on the
20 weekend. So it had to be during the week. So that
21 is how that fell into place.

22 Q All right. Now during that same time
23 period, did you have any contact with Sherry
24 Kimball?

25 A No.

1 Q She reports that she called and talked
2 to someone which she believes she thinks was you to
3 make sure that the sale was cancelled --

4 A Okay.

5 Q -- for that day.

6 A I don't recall.

7 Q Do you have a recollection?

8 A No.

9 Q Do you ever recall having any contact
10 with Sherry Kimball?

11 A Yes.

12 Q And when would that have been?

13 A I think it was post-foreclosure sale.

14 Q Would there be a specific date that you
15 could --

16 A After the 12th of June.

17 Q Okay. Would it be on June 12th, June

18 --

19 A No. I don't recall.

20 Q All right. You are really running over
21 me. Okay.

22 A Got yeah. No problem.

23 Q Okay. Do you have any notes that would
24 indicate the contact that you had with Sherry
25 Kimball?

1 A No.

2 Q All right. Let's talk about that
3 conversation.

4 A Okay.

5 Q Tell me what you recall about how it
6 was made? Was it an in-person conversation? A
7 telephone conversation?

8 A She had called and said that someone
9 had put something on her door and she wanted to know
10 what was going on. I said -- I basically gave her
11 the run down that we had postponed the sale
12 previously and it went up for auction.

13 I was told, I think from her -- she had
14 told me that she had until X day -- I don't recall
15 the day -- to come up with X amount of funds, and I
16 believe it was 3,000, and then they would accept them
17 and cancel the sale; "them" being Fremont.

18 And per Fremont, they received some of
19 the funds but not all of them. And therefore
20 proceeded with the sale. Sent me a new bid. And it
21 was conducted on the 12th of June.

22 MR. JOHNSON: I know you are probably
23 confused and rather than going back, let me
24 indicate to you and perhaps show you some of your
25 records.

1 In fact let's just have this one
2 marked.

3 (Exhibit 1 marked)

4 BY MR. JOHNSON:

5 Q Mr. Howell -- well, let's see. I guess
6 it is marked as number one. Do you recognize this
7 document?

8 A Uh-huh.

9 Q What is this document?

10 A Looks like bidding instructions.

11 Q Okay. Is this something that you
12 received from the servicer?

13 A Yes.

14 Q I want you to look down at the bottom
15 where it has a suspense balance of \$3,000.

16 A Yes.

17 Q The date of it being June 6?

18 A Yes.

19 Q Let me represent to you that I don't
20 think that there is a factual dispute that Sherry
21 Kimball gave \$3,000 dollars --

22 A Okay.

23 Q -- to Fremont --

24 A Okay.

25 Q -- on May 29 in order to get the

1 postponement or the cancellation.

2 A Okay.

3 Q All right?

4 A Okay.

5 Q So I just want to make sure, if we can
6 avoid a confusion, that we can do so in your
7 answers.

8 A Okay. Sure.

9 Q All right. Now I want to go back to
10 that conversation that you had with Sherry Kimball.
11 Now apparently she called, is that correct --

12 A Yes.

13 Q -- on the telephone and talked to you.
14 And she referred to having a document on her door or
15 a note on her door?

16 A Yes.

17 Q Okay. Now let's take it from that
18 point. What did she indicate to you?

19 A She wanted to know what was going on.
20 And basically I told her what I had previously
21 stated about the postponement, and that the sale had
22 gone to auction. A third had partied showed up.

23 Q Okay. Now as far as what she told you,
24 apparently she indicated to you that she thought she
25 had more time.

1 A Yes.

2 Q And that she had to come up with a
3 certain amount of money on a future date, is that
4 correct.

5 A That's correct.

6 Q Now is there anything else in that
7 conversation that you can remember?

8 A No.

9 Q Okay. Could you tell me when that
10 conversation took in relation to where you are at in
11 processing this sale?

12 A I contacted my client.

13 Q Fremont?

14 A Yes.

15 Q Okay. Tell me about that conversation.

16 A I told them what had happened with a
17 third party. And from what I recall they said that
18 she did not come up with the total amount of funds
19 by the date that they had indicated, therefore, they
20 proceeded with the trustee sale.

21 Q Okay. At that time when so Sherry
22 Kimball contacted you, had you dispursed the funds
23 to Fremont?

24 A No.

25 Q Had you delivered a trustee's deed to

1 anyone?

2 A No.

3 Q So apparently it was in close proximity
4 to the time of the sale itself?

5 A Very close.

6 Q Now as far as the situation on May 29,
7 2008 -- it was scheduled at 11:00 o'clock. Now who
8 was the crier?

9 A I was not there. I am not sure.

10 Q Okay. Who did you hire to act as the
11 crier in this matter?

12 A It would be First American.

13 Q Did you have any contact with First
14 American in regards to the cancellation of the sale?

15 A Which date?

16 Q On May 29th, 2007.

17 A I did. It was a postponement of the
18 sale from 5-29-07 to 6-12-07.

19 Q Okay. And who did you talk to?

20 A I sent an e-mail to both Lois Olson and
21 Sandy Winn.

22 Q Okay. Is that the e-mail that says
23 it's postponed until June 12th?

24 A Yes.

25 Q Okay. Did you have any other

1 contact -- well, just to make sure we're clear. The
2 first time you recall having any contact with Sherry
3 Kimball was after June -- excuse me -- on or after
4 June 12, 2007.

5 A That is what I recall after the sale,
6 yes.

7 Q Okay. But never before?

8 A I don't believe I spoke to her before
9 prior to that, no.

10 Q Okay. Did you send out any documents
11 to Sherry Kimball advising her of the new date?

12 A No.

13 Q Are you aware of any documents in your
14 file that somebody else in the trustee's office who
15 sent out any other notice?

16 A No.

17 Q Are you aware of any other contact
18 anyone may have made with Sherry Kimball to advise
19 her of the new date?

20 A No.

21 Q Is there any public place in which the
22 notice of trustee sale is put or published?

23 A Yes.

24 Q What place is that?

25 A County records, Post Register and on

1 the property.

2 Q All right. And I assume all of those
3 were done for the May 29, 2007 sale?

4 A That's correct.

5 Q Was there anything placed on the county
6 records related to the June 12th, 2007 sale?

7 A No.

8 Q Was there anything put in the newspaper
9 related to the June 12, 2007 sale?

10 A No.

11 Q Was there anything put on the property
12 related to the June 12, 2007 sale?

13 A No.

14 Q Are you aware of anything you did or
15 anyone else did in order to provide any type of
16 notice as to when the new sale would take place?

17 A No.

18 Q Now I have seen an affidavit from
19 Sandy -- I can't remember her last name off the top
20 of my head -- from First American indicating that
21 she announced the new date at the time of the
22 original sale which is the May 29th, 2007 sale.

23 Do you know whether or not there was any
24 document sent from you -- from First American to you
25 to indicate that was in fact done?

1 A I don't believe so.

2 Q Is is there any notes or any type of
3 log or journal that First American Title sent to
4 you.

5 A No.

6 Q Typically, what documents does First
7 American send to you if a sale has been postponed or
8 cancelled?

9 A Typically the e-mail kind of covers all
10 those bases. They keep it on their calendar and I
11 keep it on my calendar; and we're on the same page.

12 Q But most of it, the communications are
13 via e-mail?

14 A That's correct.

15 Q Now as far as the sale that is actually
16 conducted itself -- particularly this sale on
17 June 12, 2007 -- did you attend that sale?

18 A No.

19 Q Do you know who attended the sale?

20 A Not entirely, no.

21 Q Do you receive any documents or any
22 types of communication from your crier, and
23 particularly the crier in this particular instance,
24 as far as how the sale went, who attended and what
25 the bids were?

1 A Yes. I do have the results of the
2 sale. And quite honestly I think she even gave me
3 an attendance sheet which I usually do not keep. I
4 don't know if they have that on their records. But
5 I do have the results of the sale with the third
6 party information.

7 Q Is that on the trustee "cry" sale?

8 A That's correct.

9 Q And it has basically on the second page
10 who the successful bidder was?

11 A That's correct.

12 Q And the sales price?

13 A That's correct.

14 Q Is there any other documents -- you
15 talked about an attendance sheet. Do you have an
16 attendance sheet?

17 A No, sir.

18 Q Was there an attendance sheet?

19 A I believe so.

20 Q Where is this attendance sheet?

21 A I did not keep it.

22 Q Is there any other documents besides
23 that that has been thrown away?

24 A Not that I am aware of, no.

25 Q And what was the reason for throwing

1 away the attendance sheet?

2 A It's usually not needed. I mean, it's
3 more paper in my file. I really did not think it
4 was relevant.

5 Q How voluminous is this attendance
6 sheet? Is it a single sheet?

7 A Yes.

8 Q And I guess my question is: Why were
9 you concerned about not keeping a single sheet of
10 paper?

11 A No reason.

12 Q And you indicate that is the only sheet
13 that was thrown away.

14 A No, there is a cover letter also.

15 Q Okay. After Sherry Kimball's contact
16 with you, what other actions, if any, were you
17 involved in in relation to this trustee sale?

18 A I contacted my client on the matter
19 and then proceeded to prepare the trustee's deed.

20 Q During any of this time period, did you
21 have any contact with Black Diamond Alliance?

22 A Not that I am aware of, no.

23 Q Did you have any contact with Jayce
24 Howell related to the foreclosure sale?

25 A Not that I am aware of, no.

1 Q Or Trent Tyler?

2 A No, sir. No, sir.

3 Q And apparently you prepared a trustee's
4 deed, or someone in Just Office did?

5 A That's correct.

6 Q And what did you do with that trustee's
7 deed.

8 A It was sent for recording.

9 (technical difficulty)

10 BY MR. JOHNSON:

11 Q Mr. Howell, I believe the question I
12 was asking you, you talked about you sent it for
13 recording. The question was: Were you sending that
14 directly to the recorder or to another entity?

15 A The title company, which conducted the
16 trustee sale.

17 Q And they are the ones that record the
18 deed?

19 A That's correct.

20 Q Okay. And where does the deed go back
21 after it's recorded?

22 A To our office.

23 Q Okay. And what do you do with that?

24 A Prep our final letter, make copies.

25 Send the policy and the trustee's deed out to the

1 successful bidder and or client, whichever.

2 Q And could you tell me the date in which
3 the trustee's deed was sent to Black Diamond?

4 A To Black Diamond?

5 Q Yes.

6 A June 15.

7 Q Okay. Do you know the date of
8 recording?

9 A June 14th.

10 Q And if I understand correctly the
11 conversation that you had with Sherry Kimball took
12 place either before the recording or the delivery of
13 the trustee's deed to Black Diamond?

14 A That's correct.

15 Q Okay. Now I want to go back to -- when
16 Sherry Kimball contacted you you contacted Fremont?

17 A Correct.

18 Q And was there any discussion about
19 having another trustee sale conducted?

20 A Possibly, yes, there was. I kind of
21 told them their options or what they could do.

22 Q Okay. Go into detail if you would.
23 And I know you can't remember everything. But you
24 are more fortunate than some people. Sometimes we
25 have them go back five or six years to have them

1 recall a specific conversation.

2 A From what I understand or remember I
3 told them they could accept the funds and cancel the
4 foreclosure sale, or they could hold the funds in
5 suspense I believe and not apply them, therefore,
6 our default is valid and they could proceed with the
7 sale.

8 And or they could just send the funds
9 back to the borrower and tell her it's not enough to
10 reinstate the loan.

11 Q Send what funds?

12 A The \$3,000.

13 Q Okay. You are not talking about the
14 \$112,500?

15 A No, sir. Sherry Kimball's money.

16 Q Okay. And what did they choose to do?

17 A Proceed with the sale and send the
18 funds back.

19 Q Now as far as an accounting of the
20 funds, how does the trustee do so? I mean when you
21 have -- first of all, it was -- as I understand this
22 property sold for \$112,500.

23 A That's correct.

24 Q How were those funds applied?

25 A It looks like \$109,669.80 went to

1 Fremont Investment and Loan.

2 Q Go ahead. We'll go with the flow.

3 A And then our funds -- our fees and
4 costs were paid in full.

5 Q And is there a document that shows what
6 your fees and costs were?

7 A No, because we did not have to do a
8 final bill. We just pulled our funds out of there.

9 Q Okay. Well, I guess the question is:
10 How did you determine how much you were owed?

11 A The fees and costs are on the file from
12 the foreclosure.

13 Q Okay. And would it be easier if we
14 just took a photocopy of that?

15 A Probably.

16 MR. JOHNSON: Okay. May I?

17 (Exhibit 2 marked)

18 BY MR. JOHNSON:

19 Q Mr. Howell, you have been handed what
20 has been marked for deposition purposes as Exhibit
21 2.

22 Is that a correct copy of stickers on
23 the front of your file.

24 A Yes.

25 Q All right. And this is what reflects

1 your costs, is that correct?

2 A Fees and costs. That's correct.

3 Q Okay. The only one that I have a
4 question on -- it says "other" \$150?

5 A Yes.

6 Q What does that relate to?

7 A Usually that is like a referral fee
8 that our client will charge us, and we indicate that
9 we get paid back for that -- reimbursed. We also do
10 a doc prep fee included in that.

11 Q Okay. I want to go back to Exhibit 1.
12 If I understand correctly, is this a document that
13 you prepared or somebody else prepared?

14 A I prepared that, yes.

15 Q And was that prepared on June 6, 2007?
16 So this is basically prepared before the sale, is
17 that correct?

18 A Yes.

19 Q And there is some cursive writing on
20 the right side of the paper.

21 A Numerical writing, yes, that's correct.

22 Q True. I guess you did not write in
23 cursive actually. All right. So numbers?

24 A Right.

25 Q I can see where the 109,668.80 comes

1 from, but I don't understand the 762.80.

2 What is that?

3 A That is the process of me working up my
4 bid. Basically I total all the fees and costs.
5 Usually there is 500 applied by the client so I less
6 the 500, then less the title insurance; so that the
7 title insurance and premium are matched.

8 Then once I add those two numbers, then
9 I add in the title premium which gives you that total
10 bid amount.

11 Q 641 is the title premium?

12 A I believe so, yes.

13 MR. MANWARING: If you look at Exhibit 2 on
14 title commitment line.

15 THE WITNESS: Yes.

16 BY MR. JOHNSON:

17 Q Okay. I am a little bit confused about
18 the 762 as well. You told me what it's not. Tell
19 now what it is.

20 A That is our understanding, fees and
21 costs less the title insurance.

22 Q So the \$109,668.80 is that -- those
23 items that are related to Fremont Investment?

24 A Yes. Fremont Investment numbers.
25 That's correct. It's reflected as a total

1 beneficiaries' debt.

2 Q As far as that May 29, 2007 sale when
3 it was cancelled or postponed, do you typically
4 provide any types of public notices?

5 A No.

6 Q Do you provide any other notice than
7 what the crier pay indicate at the sale.

8 A Could you repeat that.

9 Q Sure. Are you aware of any other
10 notices that may be provided other than what the
11 crier may say at the time of the original sale?

12 A No.

13 Q Is there any obstacles that you see
14 where you could not -- where you could have sent out
15 notice to the debtor?

16 MR. MANWARING: Objection. Form of the
17 question. You may answer if you can.

18 THE WITNESS: Could you repeat the question.

19 MR. JOHNSON: Sure. Probably won't be the
20 same question.

21 BY MR. JOHNSON:

22 Q Is there any reason why you don't send
23 out notice to a debtor when a sale is cancelled or
24 postponed?

25 MR. MANWARING: Objection. Form of the

1 question.

2 MR. JOHNSON: You can answer.

3 MR. MANWARING: You can still answer.

4 THE WITNESS: Can I say no -- what if I don't
5 answer?

6 MR. MANWARING: If you don't know, you don't
7 know.

8 MR. JOHNSON: Okay. I will ask another
9 question the same way.

10 BY MR. JOHNSON:

11 Q Why didn't you let Sherry know when the
12 new sale was?

13 MR. MANWARING: Objection. Form of the
14 question. You can still answer if you can.

15 A (cont'd) As far as I know we don't
16 have to. It's not law. And we still don't.

17 Q All right.

18 MR. JOHNSON: That is all the questions I
19 have.

20 MR. MANWARING: No questions.

21
22 (Deposition concluded at 9:45 a.m.)

23

24

25

VERIFICATION

STATE OF _____)
)
 COUNTY OF _____)

I, BRADON HOWELL say that I am the witness referred to in the foregoing deposition, taken the 24th day of September, 2008, consisting of pages numbered 1 to 32, that I have read the said deposition and know the contents thereof; that the same are true to my knowledge, or with corrections, if any as noted.

Page	Line	Should Read	Reason
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

 BRADON HOWELL

Subscribed and sworn to before me this _____ day
 of _____, 200_, at _____.

(Seal)

 Notary Public for Idaho
 My Commission Expires _____

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF BONNEVILLE)

I, Karla Steed, RPR, RMR, CSR, and
Notary Public in and for the State of Idaho, do
hereby certify:

That prior to being examined BRADON
HOWELL, the witness named in the foregoing
deposition, was by me duly sworn to testify to
the truth, the whole truth, and nothing but the
truth;

That said deposition was taken down by
me in shorthand at the time and place therein
named and thereafter reduced to typewriting under
my direction, and that the foregoing transcript
contains a full, true and vebatim record of said
deposition.

I further certify that I have no
interest in the event of the action.

WITNESS my hand and seal this
_____ day of _____, 2008.

Karla Steed
Idaho CSR No. 755
Notary Public in and for
the State of Idaho

My Commission Expires: 8-21-12

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

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

**MEMORANDUM DECISION RE:
MOTION TO RECONSIDER AND
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

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 residence (Property) with Mortgage Electronic Registration Systems, Inc., (MERS) as beneficiary and nominee of Fremont.

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 also 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.

Kimball alleges that she telephoned Fremont on May 29, 2007, and arranged to make a partial payment of \$3,000 on the past due balance in exchange for Fremont canceling the First Trustee's Sale. 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., held 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. The trustee's deed was delivered to Black Diamond on June 15, 2007.

Kimball alleges she did not attend either the First or the Second Trustee's Sale because she had been informed that the First Trustee's Sale had been canceled.

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. 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.

Kimball filed a Motion for Reconsideration on March 12, 2008. Kimball argued the Court should have considered not only the statutory notice requirements for a postponed sale, but whether the First Trustee's Sale was to have been cancelled, rather than postponed. On May 15, 2008, this Court entered an order granting Kimball's motion for reconsideration and vacating its March 13, 2008, judgment in favor of Black Diamond.

Black Diamond filed a Motion for Reconsideration on August 13, 2008, arguing that at the March 6, 2008, hearing on Black Diamond's motion for summary judgment, Kimball waived her argument that the First Trustee's Sale was to have been cancelled, rather than postponed. Kimball filed Defendant's Response to Plaintiff's Motion for Reconsideration on August 21, 2008.

On August 25, 2008, Black Diamond filed a Motion and Memorandum for Partial Summary Judgment on the issue of whether Black Diamond was a bona fide purchaser

for value at a nonjudicial foreclosure sale. Kimball filed a Response to Plaintiff's Motion and Memorandum for Partial Summary Judgment on September 17, 2008.

II. STANDARD OF ADJUDICATION

A. 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).

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 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.*

III. DISCUSSION

A. Motion for Reconsideration

Black Diamond argues this Court should not have granted Kimball's March 12, 2008, motion for reconsideration because at the March 6, 2008, hearing on Black Diamond's motion for reconsideration, Kimball stipulated that if Black Diamond was not required to give her notice of the postponed sale under Idaho Code § 45-1506, the case would be resolved in favor of Black Diamond.

Kimball responds that her language at the March 6, 2008, hearing was taken out of context and she never intended to abandon her argument that the First Trustee's Sale was to have been cancelled, not postponed.

The Idaho Supreme Court has held that "A stipulation between counsel entered upon the minutes of the court is generally deemed binding upon the parties." *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 245, 869 P.2d 554, 562 (1993) (citing Idaho Code §3-202).

In *Sato v. Schossberger*, 117 Idaho 771, 792 P.2d 336 (1990), during oral argument, the plaintiff's attorney represented to the Idaho Supreme Court that if the case were remanded, the plaintiff would only pursue one of her claims. The Idaho Supreme Court held that such a representation was binding on the plaintiff. *Id.* at 776, 792 P.2d at 341.

At the March 6, 2008, hearing on Black Diamond's motion for summary judgment, the Court engaged in the following dialogue with Kimball's attorney:

MR. JOHNSON: Your Honor, if I may, there is a matter, a preliminary matter, before we get started.

THE COURT: Okay.

MR. JOHNSON: And that is in conjunction – we did file a motion to continue this particular hearing pursuant to Rule 56. When we had a hearing last month the Court may indicate that I indicated that there's two issues that I believe that they've raised. The first issue is that no notice was required to be given *on a postponed sale*. I think we can argue that one today.

...

As I indicated on the issue of notice, frankly, it doesn't matter. If they don't have to give any notice *of a postponement sale* to the debtor, the case is going to be done, and I'm not going to play games of, you know, making them go for the formal amendment and that. So the Court can decide on that issue.

...

THE COURT: Let me go back and clarify something you said – I think you said in passing. Let me do it in the way of a question: *If I find that the notice of a continuation given verbally at the first sale is sufficient, does that resolve the case?*

MR. JOHNSON: Yes.

Transcript of March 6, 2008, Hrg. on M. for Summ. J. at 5, 8, 10-11 (emphasis added).

At the March 6, 2008, hearing, Kimball's counsel stated that the first issue before the Court was what type of notice was required by statute for a postponed (not canceled) trustee's sale. At no point during the hearing did Mr. Johnson argue that Kimball understood the First Trustee's Sale was to have been cancelled, rather than postponed. Mr. Johnson represented that if the Court held the notice given at the First Trustee's Sale of the Second Trustee's Sale was sufficient, that would resolve the case. Mr. Johnson's representation is binding on his client.

Black Diamond's motion for reconsideration should be granted.

B. Motion for Partial Summary Judgment – Bona Fide Purchaser

Although it is unnecessary based on this Court's decision to grant Black Diamond's motion for reconsideration, this Court will also address Black Diamonds'

argument it is entitled to partial summary judgment based on its status as a bona fide purchaser.

Black Diamond argues it is entitled to summary judgment because it is a bona fide purchaser of the Property.

Kimball responds that there is a material question of fact whether Black Diamond is a bona fide purchaser.

Idaho Code § 45-1508 provides:

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).

1. Good Faith

In the context of mortgages, the Idaho Supreme Court has defined “good faith” as meaning: “a party purchased the property without knowing of any adverse claims to the property.” *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 661, 962 P.2d 1041, 1045 (1998). A purchaser’s status as a purchaser in good faith depends on whether the purchaser had notice of any adverse claims at or before the time of the purchase. *See Haugh v. Smelick*, 126 Idaho 481, 483, 887 P.2d 26, 28 (Ct. App. 1993) (*quoting Imig v. McDonald*, 77 Idaho 314, 318, 291 P.2d 852, 855 (1955) (“One who relies for protection

upon the doctrine of being a *bona fide* purchaser must show that at the time of the purchase [they] paid a valuable consideration and upon the belief and the validity of the vendor's claim of title without notice, actual or constructive, of any outstanding adverse rights of another. . . ."); 55 AM. JUR. 2D *Mortgages* § 308 n.17 (citing *First Alabama Bank, N.A. v. Brooker*, 418 So.2d 851 (Ala. 1982) ("For a bank to avail itself of the status of a bona fide purchaser or mortgagee for value, it has to establish clearly . . . that it had no notice, and knew no fact sufficient to put it on inquiry, as to another party's equity, either at the time of purchase or at or before the time it paid purchase money or otherwise parted with such value.")).

Trent Tyler, part-owner of Black Diamond, was deposed on September 24, 2008. During his deposition, the following dialogue occurred between Tyler and his attorney:

By Mr. Manwaring.

Q When Black Diamond found out about this property, did it find out through publication?

A Yes.

Q Did Black Diamond get any information about this sale of the Kimball property from a Bradon Howell?

A No.

Q At the time of the sale on June 12 did Black Diamond have any knowledge or information about negotiations between Fremont and Sherry Kimball?

A I am sorry. Would you repeat that.

Q Yes. At the time of the sale on June 12 did Black Diamond have any knowledge or information about any negotiations between Fremont and Sherry Kimball?

A No.

Q At the time of the sale on June 12th did Black Diamond have any knowledge or information that the sale itself had any defects as it relates to notice to Sherry Kimball?

A No.

Tyler Depo. at 25.

Tyler's testimony supports Black Diamond's argument that it purchased the Property in good faith.

Kimball argues that under *Taylor v. Just*, 138 Idaho 137, 59 P.3d 308 (2002), Black Diamond cannot be a bona fide purchaser because it had notice of Kimball's adverse claim prior to its receipt of the trustee's deed on June 15, 2007. This argument is inconsistent with the foregoing authority.

Furthermore, in *Taylor*, the grantors defaulted on a promissory note secured by a deed of trust. Two days before the scheduled non-judicial foreclosure sale, the grantors and beneficiary reached a forbearance agreement. The trustee was notified via email of the forbearance agreement and instructed to stop the foreclosure proceedings. Because of a problem with the trustee's internet provider, he did not receive the email notice until the day after the foreclosure sale was held. The foreclosure sale was held on its originally scheduled date and the property was sold and paid for in full by the highest bidder. Upon learning of the forbearance agreement, the trustee informed the purchaser, Taylor, that he would be unable to deliver the trustee's deed. Taylor brought an action seeking a judgment declaring him the owner of the property. Taylor argued that he was entitled to a deed to the property because he was a good faith purchaser under Idaho Code § 45-1508. The trial court held that the forbearance agreement did not cure the default and that the sale was valid. On appeal, the Idaho Supreme Court reversed the trial court,

holding that the forbearance agreement cured the default and required a new default by the grantors before the deed of trust could be foreclosed. The Court held:

Taylor is not a good faith purchaser for value because he did not acquire title to the real property. The trustee refused to execute and deliver a deed. *The doctrine of good faith purchaser for value is available to protect title obtained, not to acquire title.* As this Court explained in *Ewald v. Hufton*, 31 Idaho 373, 380, 173 P. 247, 247-48 (1918):

The doctrine of bona fide purchaser is peculiarly available for purposes of defense. (See the discussion in 2 Pomeroy, Equity Jurisdiction, § 735, et seq.) This defense can be maintained only in favor of a title, though it may be defective, which a bona fide purchaser has, and it is not available for the purpose of creating a title. This view is well expressed by Mr. Justice Bean in the case of *Allen v. Ayer*, 26 Or. 589, 39 Pac. 1 [(1895)], as follows:

“Where the title to land passes, though obtained by fraud, and the deed is therefore voidable, one who purchases from the grantee in good faith, and without notice, will be protected, because he had a title which he could and did convey, but when the deed was never in fact delivered, the grantee can convey no title for the protection of which the plea of a bona fide purchaser can be invoked.”

Thus, Taylor is not entitled to obtain a deed to the real property based upon his contention that he is a good faith purchaser for value.

Id. at 142, 59 P.3d at 313 (emphasis added). *Taylor* is distinguishable from the present case. In *Taylor*, the purchaser never obtained title to the property. In this case, Black Diamond obtained title to the Property on June 15, 2007, when the trustee’s deed was delivered to it. Black Diamond is seeking to protect its title, not acquire title.

As previously noted, Black Diamond did not have notice of any adverse claims at the time it purchased the Property. Black Diamond purchased the Property in good faith.

2. For Value

Black Diamond paid \$112,500 for the Property. Black Diamond purchased the Property for value.

3. Conclusion

Because Black Diamond purchased the Property in good faith for value, the Second Trustee's Sale is valid and final.

IV. CONCLUSION

Black Diamond's motion for reconsideration should be granted.

Black Diamond's motion for partial summary judgment should be granted.

DATED this 21st day of October 2008.

Gregory S. Anderson
GREGORY S. ANDERSON
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October 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

2008 OCT 24 AM 10:00
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 RE: MOTION TO
RECONSIDER AND MOTION FOR
PARTIAL SUMMARY JUDGMENT**

This cause having come before this Court pursuant to Black Diamond's August 13, 2008, Motion for Reconsideration and August 25, 2008, Motion for Partial Summary Judgment; this Court being fully advised in the premises; and good cause appearing;

NOW, THEREFORE:

Black Diamond's motion for reconsideration is granted.

Black Diamond's motion for partial summary judgment is granted.

DATED this 21st day of October 2008.

Gregory S. Anderson
GREGORY S. ANDERSON
District Judge

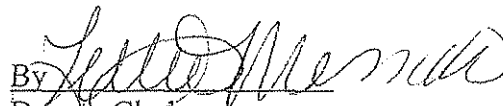
CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October 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
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P.O. Box 52251
Idaho Falls, ID 83405

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

2008 DEC -1 PM 4:31
DISTRICT COURT
HACIENDA DIVISION
FOURTH COUNTY

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, 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

**SECOND AMENDED NOTICE OF
APPEAL**

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.
 - b. Order Re: Motion to Reconsider and Motion for Partial Summary Judgment

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:
 - i. Holding that notice of the delayed non-judicial trustee's sale was not required to be provided to Kimball.
 - ii. Holding that a Stipulation was entered which excluded the issue that the trustee's sale had been cancelled.
 - iii. Holding that Black Diamond was a bona fide purchaser of the real property at the trustee's sale.
4. There has been no order sealing any portion of the record.
5. A transcript is requested of the March 6, 2008 and October 2, 2008 hearings.
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
04/02/2008	Notice of Appeal
04/04/2008	Writ Issued - Writ of Ejectment and Writ of Restitution (Bonneville County)
04/04/2008	Writ Issued - Amended Writ of Ejectment and Writ of Restitution (Bonneville County)
04/04/2008	Motion to Enforce Judgment and Alternative Motion for Bond Pending Appeal
04/04/2008	Notice of Appeal
04/24/2008	Amended Notice of Appeal

05/15/2008	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
05/15/2008	Order Re: Motion to strike; Motion for Reconsideration; Motion for Order Quashing and Releasing Notice of Lis Pendens; and Motion for Costs and Fees
06/04/2008	Motion to Reconsider
07/14/2008	S.C. Order Granting Motion to Suspend appeal (Stipulated)
08/13/2008	Memorandum in Support of Motion for Reconsideration
08/13/2008	Affidavit of Counsel in Support of Motion for Reconsideration and 2nd Motion for Summary Judgment
08/15/2008	Hearing Scheduled (Motion 09/04/2008 08:15 AM) Motion to Reconsider
08/21/2008	Defendant's Response to Plaintiff's Motion for Reconsideration
08/25/2008	Affidavit of Chad Murdock
08/25/2008	Affidavit of Jeremy Bingham
08/25/2008	Affidavit of Dick Fowler
08/25/2008	Motion and Memorandum for Partial Summary Judgment
09/05/2008	Affidavit of Jerry Glowacki
09/05/2008	Affidavit of Mary Glowacki
09/17/2008	Response to P's Motion and Memorandum for Partial Summary Judgment
09/17/2008	Affidavit of David A. Johnson (Second)
09/30/2008	Reply to Response in Opposition to Motion for Summary Judgment
09/30/2008	Affidavit of Counsel in Support of Reply to Response in Opposition to Motion for Summary Judgment
10/01/2008	Supplemental Affidavit of Sherry Kimball
10/01/2008	Supplement to Response to P's Motion and Memorandum for Partial Summary Judgment

10/03/2008	Minute Entry
10/07/2008	Publication of the Deposition of Trent D. Tyler including the deposition of Trent D. Tyler taken on September 24, 2008
10/07/2008	Publication of the Deposition of Bradon K. Howell including the deposition of Bradon Howell taken on September 24, 2008
10/24/2008	Memorandum Decision Re: Motion to Reconsider and Motion for Partial Summary Judgment
10/24/2008	Order Re: Motion to Reconsider and Motion for Partial Summary Judgment

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

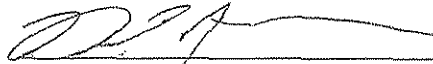
8. This appeal is taken from both matters of law and fact.

9. I certify that:

- a. A copy of this Second Amended 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: November 25, 2008



WRIGHT, JOHNSON, TOLSON &
WAYMENT, 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 25, 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

Karen Konvalinka, Court Reporter
Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402

Method of Service

Facsimile 523-9146

Courthouse Box



David A. Johnson, Esq.

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.,	)	SECOND AMENDED
	)	CLERK'S CERTIFICATE
Plaintiff/Respondent,	)	OF APPEAL
)	
vs.	)	Case No. CV-2007-3806
)	
SHERRY KIMBALL,	)	Docket No.
)	
Defendant/Appellant.)	

Appeal from: Seventh Judicial District, Bonneville County

Honorable Gregory S. Anderson, District Judge, presiding.

Case number from Court: CV-2007-3806

Order or Judgment appealed from: Summary Judgment, entered March 13, 2008

Attorney for Appellant: David A. Johnson, Esq.

Attorney for Respondent: Kipp L Manwaring

Appealed by: Defendant

Appealed against: Plaintiff

Notice of Appeal Filed: December 1, 2008

Appellate Fee Paid: Yes

Was District Court Reporter's Transcript requested? Yes

If so, name of reporter: Karen Konvalinka

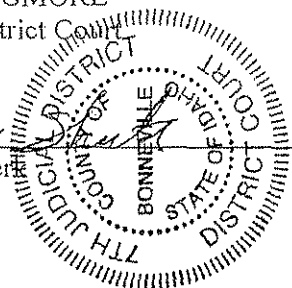
Dated: December 4, 2008

RONALD LONGMORE

Clerk of the District Court

By:

Deputy Clerk



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

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

Case No. CV-07-3806

PARTIAL
SUMMARY JUDGMENT

By Order entered October 24, 2008, Plaintiff's motion for summary judgment was granted. Therefore;

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

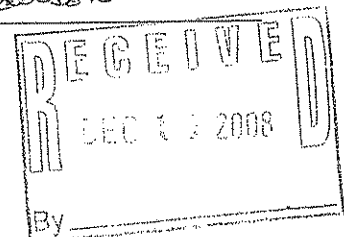
1. A Writ of Ejectment issue directing the Sheriff of Bonneville County to eject, with such force as reasonably necessary, Defendant, Sherry Kimball, and any person claiming possession or occupancy under her, together with all personal property from the subject real property.

2. A Writ of Restitution issue directing the Sheriff of Bonneville County to immediately place Plaintiff in full possession and occupancy of the subject real property.

3. In the event Defendant, Sherry Kimball, fails to remove her personal property, the Sheriff shall cause the same to be removed by a bonded moving company and held in storage in accordance with the bonded moving company's policy on storage.

DATED this 31st day of December 2008.

Gregory S. Anderson
Gregory Anderson
District Judge



NOTICE OF ENTRY

I HEREBY CERTIFY that I am a Clerk in the above Court and that I mailed a true copy of the foregoing documents on the 12th day of ~~December~~ *January* 2008, to the following counsel of record and/or parties:

DOCUMENT SERVED:

PARTIAL 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


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.)	
<hr/>		

January 15, 2009, at 9:15 A.M., plaintiff's amended motion for attorney fees and costs and plaintiff's motion for bond on 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. Manwaring presented argument supporting the amended motion for attorney fees and costs.

Mr. Johnson argued in opposition to plaintiff's motion for attorney fees and costs.

Mr. Manwaring presented additional argument supporting plaintiff's motion.

Mr. Manwaring presented argument supporting the motion for bond on appeal.

Mr. Johnson argued in opposition to the motion.

Mr. Manwaring presented additional argument supporting the motion.

The Court and counsel discussed staying the appeal pending a final decision in District Court.

Court was thus adjourned.

Gregory S. Anderson

GREGORY S. ANDERSON

District Judge

c: Kipp Manwaring
David Johnson

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

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 RE: MOTION FOR
SUMMARY JUDGMENT**

WHEREAS, Plaintiff filed a Motion for Summary Judgment on January 18, 2008,
asking this Court to grant it summary judgment on Defendant's cause of action for unjust
enrichment; and

WHEREAS, Defendant did not object to Plaintiff's motion for summary
judgment, as it pertained to her claim for unjust enrichment;

NOW, THEREFORE, Plaintiff's Motion for Summary Judgment pertaining to
Defendant's claim for unjust enrichment, is granted.

DATED this 15th day of January 2009.

Gregory S. Anderson
GREGORY S. ANDERSON
District Judge


CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2009, 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
STATE OF IDAHO, COUNTY OF BONNEVILLE

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

DISTRICT COURT
7TH JUDICIAL DISTRICT
BONNEVILLE COUNTY ID

Case No. CV-07-3806

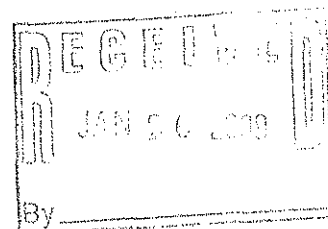
JUDGMENT

By Order entered January 15, 2009, Plaintiff's motion for summary judgment on Defendant's cause of action for unjust enrichment was granted. Therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment against Defendant, Sherry Kimball, on Kimball's claim for unjust enrichment.

Dated this 29th day of January 2009.

Gregory S. Anderson
Gregory S. 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 20th day of January 2009, to the following of record and/or parties:

DOCUMENT SERVED:

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


DEPUTY CLERK

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, an individual, and
JOHN DOES I-X,

Defendants.

Case No. CV-07-3806

**MEMORANDUM DECISION RE:
AMENDED MOTION FOR COSTS
AND FEES AND MOTION FOR BOND
ON APPEAL**

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.

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.

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 telephoned Fremont and allegedly arranged to make a partial payment of \$3,000 on the past due balance in exchange for postponement 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 as 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 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.

Kimball filed a Motion for Reconsideration on March 12, 2008. On May 15, 2008, this Court entered an Order granting Kimball's motion for reconsideration and vacating the Court's earlier grant of summary judgment to Black Diamond.

Black Diamond filed a Motion for Reconsideration on June 4, 2008, and a Memorandum in Support of Motion for Reconsideration on August 13, 2008. On August 25, 2008, Black Diamond filed a Motion and Memorandum for Partial Summary Judgment.

On October 24, 2008, this Court entered an Order granting Black Diamond's motion for reconsideration and motion for partial summary judgment.

Black Diamond filed an Amended Motion for Costs and Fees, an Amended Memorandum of Costs, and a Motion for Bond on Appeal on December 10, 2008.

Kimball filed an Objection to Amended Motion for Attorney Fees and Costs (Objection) on December 19, 2008.

II. STANDARD OF ADJUDICATION

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. 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 on three bases:

1. There is no statutory or contractual basis for awarding attorney fees and costs.
2. Plaintiff's request for attorney fees and costs is untimely.
3. The totality of the charges are unreasonable.

Objection at 1-2.

1. Idaho Code § 12-120(3)

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.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

(Emphasis added.)

During the hearing on Black Diamond's motion for attorney fees, Black Diamond relied on *Taylor v. Just*, 138 Idaho 137, 59 P.3d 308 (2002), for the proposition the transaction between the parties was a commercial transaction.

In *Taylor*, the plaintiff was the purchaser of real property at a trustee's sale. The defendant was the trustee. The Idaho Supreme Court held the transaction between the parties was a commercial transaction under Idaho Code § 12-120(3). The relationship between the parties in *Taylor* is different than that between the parties in this case. The facts and relationship of the parties in *PHH Mortgage Services Corp. v. Perreira*, ___ Idaho ___, ___ P.3d ___, 2009 WL 213058 (2009), are more analogous to those in this case. In *Perreira*, the Idaho Supreme Court explained:

In *Taylor v. Just*, both parties agreed that the action was to recover on a commercial transaction because the plaintiff had bid at the foreclosure sale in order to obtain the property for resale. This case was brought by PHH to eject the Perreiras and Anestos from their residence, and the Perreiras counterclaim sought to contest the foreclosure sale of their residence. *This was not an action to recover in a commercial transaction. See Bajrektarevic v. Lighthouse Home Loans, Inc.*, 143 Idaho 890, 893, 155 P.3d 691, 694 (2007) (action involving the refinancing of plaintiff's home was not a commercial transaction). Therefore, PHH cannot recover attorney fees on appeal pursuant to that statute, even if they were the prevailing party on appeal.

Id. (emphasis added). Like *Perreira*, the parties in this case are the purchaser at the trustee's sale and the former home owner.

This case does not involve a commercial transaction and Black Diamond may not recover attorney fees under Idaho Code § 12-120(3).

2. Idaho Code § 12-121

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.)

I.R.C.P 54(e)(1) states:

In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, *attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation*; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

(Emphasis added).

When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. . . . Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. . . .

McGrew v. McGrew, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003).

Black Diamond is the prevailing party in this case.

Black Diamond brought this litigation seeking to eject Kimball following its purchase of the Property at the Second Trustee's Sale. In her Answer, Kimball argued that she "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.” Answer at 3.

On January 18, 2008, Black Diamond filed its first Motion for Summary Judgment, arguing: (1) the First Trustee’s Sale was postponed, not cancelled, and that Kimball had received proper notice as required by Idaho Code § 45-1506; (2) it was entitled to summary judgment on Kimball’s cause of action for unjust enrichment; (3) it was a bona fide purchaser.

In her Response to Motion and Memorandum for Summary Judgment, filed February 15, 2008, Kimball: (1) again asserted the First Trustee’s Sale was cancelled, not postponed; (2) waived her cause of action for unjust enrichment by not responding to Black Diamond’s motion for summary judgment on it; (3) noted that discovery was still pending on the issue of Black Diamond’s status as a bona fide purchaser; and (4) argued Black Diamond may not be a bona fide purchaser because there was likely a “business and/or familial relationship between the Trustee’s agent and Black Diamond.” Response to Mot. and Mem. for Summ. J. at 7.

At the March 6, 2008, hearing on Black Diamond’s motion for summary judgment, Kimball argued notice of the Second Trustee’s Sale was insufficient, even if the First Trustee’s Sale had been postponed, not canceled. The parties stipulated that if this Court held, as a matter of law, that a trustee could provide sufficient notice of a postponed trustee’s sale merely by “publicly announcing at the time and place originally fixed for the sale, the postponement to a stated subsequent date and hour,” the case would be resolved in favor of Black Diamond. I.C. § 45-1506(8). Kimball thereby waived her argument that the First Trustee’s Sale was canceled, rather than postponed. The plain

language of Idaho Code § 45-1506(8) indicates notice of a postponed trustee's sale may be made by announcement at the originally scheduled sale. Kimball's argument that this notice was insufficient may have been unreasonable or without foundation based on the plain language of Idaho Code § 45-1506. However, until this point in time, the other bases for Kimball's defense were not frivolous, unreasonable or without foundation. See *McGrew, supra*; *Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc.*, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1991) ("Where . . . there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued. The total defense of a party's proceedings must be unreasonable or frivolous.").

Following this Court's grant of summary judgment to Black Diamond at the March 6, 2008, hearing, Kimball filed a motion for reconsideration, attempting to resurrect her original defense that the First Trustee's Sale was cancelled, not postponed. Kimball's attempt to resurrect her initial defense was not frivolous, unreasonable or without foundation.

In response to Black Diamond's August 25, 2008, Motion and Memorandum for Partial Summary Judgment, Kimball continued to assert Black Diamond was not a bona fide purchaser. Kimball argued, among other things, that *Taylor* stood for the proposition that Black Diamond could not be a bona fide purchaser because it had notice of her adverse claim prior to its receipt of the trustee's deed on June 15, 2007. Although this Court disagreed with Kimball's interpretation of *Taylor*,¹ it cannot say that Kimball's argument was frivolous, unreasonable or without foundation.

¹ See Memorandum Decision Re: Motion to Reconsider and Motion for Partial Summary Judgment at 11-12 (October 24, 2008).

Kimball's defense in this action has not been frivolous, unreasonable or without foundation. Consequently, Black Diamond's motion for attorney fees under Idaho Code § 12-121 should be denied.

B. Costs

Black Diamond's Amended Memorandum of Costs indicates it incurred \$440.30 in costs as a matter of right and \$31.00 in discretionary costs.

1. Costs as a Matter of Right

Rule 54(d)(1)(A) states:

Parties Entitled to Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

Filing fees, writ fees, publication/service of process fees, and deposition costs are costs awarded as a matter of right under Rule 54(d)(1)(C)(1), (2), (9) and (10). Black Diamond incurred \$440.30 in costs for filing fees, writ fees, publication/service of process fees, and deposition costs. Black Diamond should be awarded \$440.30 in costs as a matter of right.

2. Discretionary Costs

Defendants also request \$31.00 for costs relating to the preparation of a hearing transcript.

Rule 54(d)(1)(D) states:

Discretionary Costs. Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed *upon a showing that said costs were necessary and exceptional costs* reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item

of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

(Emphasis added).

Expenses are not exceptional if they are commonly incurred in cases of a similar nature. *Fish v. Smith*, 131 Idaho 492, 494, 960 P.2d 175, 177 (1998). The preparation of hearing transcripts cannot be said to be uncommon or exceptional. Black Diamond's request for discretionary costs in the amount of \$31.00 should be denied.

C. Motion for Bond on Appeal

Black Diamond argues this Court should require Kimball to:

[P]ost a cash bond in the amount of \$112,400 to protect Black Diamond from damages of lost rental income and lost economic advantage from sale of the property during the appeal process.

Black Diamond is entitled to possession and control of the subject property. However, Kimball has filed a notice of *lis pendens* on the subject real property preventing Black Diamond from selling the property. If Kimball cannot post the cash bond, the notice of *lis pendens* should be removed.

Mot. for Bond on Appeal at 1. Black Diamond argues this Court has authority to require a bond or remove the *lis pendens* under Rule 13(b)(10), I.A.R.

Rule 13(b)(10) provides:

Stay Upon Appeal - Powers of District Court - Civil Actions. In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal;

...

10) Make any order regarding the use, preservation or possession of any property which is the subject of the action on appeal.

1. Bond

Rule 13(b)(10) states that the district court has the authority to make “any order regarding the use, preservation or possession” of property. Rule 13(b)(10) appears to apply to measures intended to protect the physical condition of the property. Black Diamond seeks a bond to protect itself from loss of income during the pendency of the appeal, not to protect the property’s physical condition. Requiring Kimball to post a bond would not affect Black Diamond’s ability to use, preserve or possess the property in this case. Black Diamond has not cited, nor is this Court aware of, any legal authority that would allow this Court to order Kimball to post a bond on appeal.

2. Lis Pendens

In its May 15, 2008, 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, this Court held that Kimball’s filing of a *lis pendens* was proper. Black Diamond has not provided this Court with any legal authority that would allow this Court to remove Kimball’s *lis pendens*.

Black Diamond’s motion for bond on appeal should be denied.

IV. CONCLUSION

Black Diamond’s request for attorney fees should be denied.

Black Diamond should be awarded \$440.30 in costs as a matter of right.

Black Diamond’s request for discretionary costs in the amount of \$31.00 should be denied.

Black Diamond's motion for bond on appeal should be denied.

DATED this 9th day of February 2009.

Gregory S. Anderson
GREGORY S. ANDERSON
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February 2009, 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

BLACK DIAMOND ALLIANCE, LLC,)

Plaintiff,)

-vs.-)

SHERRY KIMBALL, an individual, and)
JOHN DOES I-X,)

Defendants.)

Case No. CV-07-3806

**ORDER RE: AMENDED MOTION FOR
COSTS AND FEES AND MOTION FOR
BOND ON APPEAL**

This cause having come before this Court pursuant to Black Diamond's
December 10, 2008, Amended Motion for Costs and Motion for Bond on Appeal; this
Court being fully advised in the premises; and good cause appearing;

NOW, THEREFORE:

Black Diamond's request for attorney fees is denied.

Black Diamond is awarded \$440.30 in costs as a matter of right.

Black Diamond's request for discretionary costs in the amount of \$31.00 is
denied.

Black Diamond's motion for bond on appeal is denied.

DATED this 9th day of February 2009.

Gregory S. Anderson
GREGORY S. ANDERSON
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February 2009, 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

DISTRICT COURT
BONNEVILLE

9 JAN 23 24:00

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, 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

**THIRD AMENDED NOTICE OF
APPEAL**

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.
 - b. Order Re: Motion to Reconsider and Motion for Partial Summary Judgment

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:
 - i. Holding that notice of the delayed non-judicial trustee's sale was not required to be provided to Kimball.
 - ii. Holding that a Stipulation was entered which excluded the issue that the trustee's sale had been cancelled.
 - iii. Holding that Black Diamond was a bona fide purchaser of the real property at the trustee's sale.
4. There has been no order sealing any portion of the record.
5. A transcript is requested of the March 6, 2008 and October 2, 2008 hearings.
6. Appellant requests that in addition to those automatically included under Idaho Appellate Rule 28, that the following documents be included in the Clerk's Record

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
04/02/2008	Notice of Appeal
04/04/2008	Writ Issued - Writ of Ejectment and Writ of Restitution (Bonneville County)
04/04/2008	Writ Issued - Amended Writ of Ejectment and Writ of Restitution (Bonneville County)
04/04/2008	Motion to Enforce Judgment and Alternative Motion for Bond Pending Appeal
04/04/2008	Notice of Appeal
04/24/2008	Amended Notice of Appeal

05/15/2008	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
05/15/2008	Order Re: Motion to strike; Motion for Reconsideration; Motion for Order Quashing and Releasing Notice of Lis Pendens; and Motion for Costs and Fees
06/04/2008	Motion to Reconsider
07/14/2008	S.C. Order Granting Motion to Suspend appeal (Stipulated)
08/13/2008	Memorandum in Support of Motion for Reconsideration
08/13/2008	Affidavit of Counsel in Support of Motion for Reconsideration and 2nd Motion for Summary Judgment
08/15/2008	Hearing Scheduled (Motion 09/04/2008 08:15 AM) Motion to Reconsider
08/21/2008	Defendant's Response to Plaintiff's Motion for Reconsideration
08/25/2008	Affidavit of Chad Murdock
08/25/2008	Affidavit of Jeremy Bingham
08/25/2008	Affidavit of Dick Fowler
08/25/2008	Motion and Memorandum for Partial Summary Judgment
09/05/2008	Affidavit of Jerry Glowacki
09/05/2008	Affidavit of Mary Glowacki
09/17/2008	Response to P's Motion and Memorandum for Partial Summary Judgment
09/17/2008	Affidavit of David A. Johnson (Second)
09/30/2008	Reply to Response in Opposition to Motion for Summary Judgment
09/30/2008	Affidavit of Counsel in Support of Reply to Response in Opposition to Motion for Summary Judgment
10/01/2008	Supplemental Affidavit of Sherry Kimball
10/01/2008	Supplement to Response to P's Motion and Memorandum for Partial Summary Judgment

10/03/2008	Minute Entry
10/07/2008	Publication of the Deposition of Trent D. Tyler including the deposition of Trent D. Tyler taken on September 24, 2008
10/07/2008	Publication of the Deposition of Bradon K. Howell including the deposition of Bradon Howell taken on September 24, 2008
10/24/2008	Memorandum Decision Re: Motion to Reconsider and Motion for Partial Summary Judgment
10/24/2008	Order Re: Motion to Reconsider and Motion for Partial Summary Judgment
1/15/2009	Minute Entry
1/15/2009	Order Re: Motion for Summary Judgment.

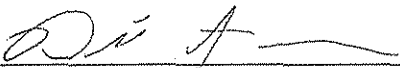
7. The names and identification of the parties to this action and their respective attorneys are:

<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 copy of this Third Amended Notice of Appeal has been served on the reporter.
 - The Clerk of the District Court has been or will be paid the estimated fee for preparation of the reporter's transcript.
 - 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: January 23, 2009



WRIGHT, JOHNSON, TOLSON &
WAYMENT, 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 January 23, 2009, 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

Karen Konvalinka, Court Reporter
Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402

Method of Service

Facsimile 523-9146

Courthouse Box



David A. Johnson, Esq.

In the Supreme Court of the State of Idaho

BLACK DIAMOND ALLIANCE, LLC,)	
)	
Plaintiff-Respondent,	)	ORDER TO REINSTATE APPELLATE
	)	PROCEEDINGS
v.)	
	)	Supreme Court Docket No. 35189-2008
SHERRY KIMBALL,	)	Bonneville County District Court No.
	)	2007-3806
Defendant-Appellant.)	

A STIPULATION FOR STAY was filed by counsel for the parties on January 16, 2009, requesting that this Court stay the proceedings in the above entitled appeal pursuant to I.A.R. 13, based upon the time needed for the district court to determine all issues, including Defendant-Appellant's Claim for unjust enrichment, has been adjudicated. Further, this issue has been fully submitted to the district court, but has not been expressly ruled upon. Thereafter, a NOTICE OF WITHDRAWAL (TREATED AS A MOTION TO LIFT THE STAY) was filed by counsel for Appellants on January 26, 2009, advising opposing counsel and this Court of the withdrawal of the Stipulation for Stay previously filed with this Court on January 16, 2009, for the reason the district court has now issued the Order resolving the final issue of the case. Therefore, good cause appearing,

IT HEREBY IS ORDERED that proceedings in the above entitled appeal shall be REINSTATED and proceed accordingly.

IT FURTHER IS ORDERED that the due date for filing the Clerk's Record and Reporter's Transcript shall be reset and the Clerk's Record and Reporter's Transcript shall be filed with this Court on or before April 6, 2009.

DATED this 27th day of February 2009.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter Karen Konvalinka

205

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

HONORABLE GREGORY S. ANDERSON
District Judge

605 N. Capital Avenue
Idaho Falls, Idaho
(208) 529-1350 Ext. 1299

March 10, 2009

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


RE: BLACK DIAMOND, LLC v SHERRY KIMBALL, etal.
Bonneville County Case No. CV -2009-3806
Supreme Court Docket No. 35189

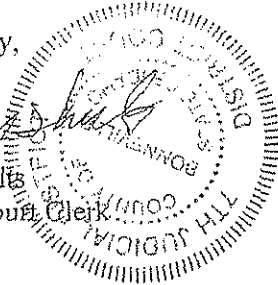
Counsel:

Enclosed please find a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the above-entitled appeal.

Referring to Rule 29, you have 28 days from the date of service to file objections to the record. We shall, therefore, deem the record as settled on the 7th day of April, 2009, and mail the same to the Supreme Court, unless an objection is filed. Thank you.

Yours truly,


Jenny Shultz
Deputy Court Clerk



/s/f
Enclosure
c: Supreme Court

2009 MAR 12 PM 4:24

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, 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, et al.,

Defendants.

Case No: CV-07-3806

**OBJECTION TO MOTION FOR
COSTS ON EXECUTION OF
JUDGMENT AND MEMORANDUM
OF COSTS ON EXECUTION OF
JUDGMENT**

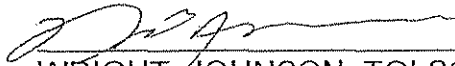
Defendant Sherry Kimball (Kimball) by and through her attorney, David A. Johnson, hereby objects to the costs sought in Plaintiff Black Diamond Alliances' Motion for Costs on Execution of Judgment and Memorandum of Costs on Execution of Judgment. The reasons for this Motion are:

1. Plaintiff, contrary to the Court's order, took "self-help remedies" in changing the locks on the property which is the subject of this litigation. Kimball had the right

to obtain her property. Because of Plaintiff's unavailability and Kimball's right to the property, Kimball did take minimal actions to access her property.

2. The Memorandum of Costs is unjustified. The cost of \$300.00 for the broken window is not subject to the present cause of action and is unreasonable.
3. Due to Plaintiff's conduct, Kimball was unable to acquire the remainder of her property. She should not be charged with the mover's costs.

DATED: March 12, 2009


WRIGHT, JOHNSON, TOLSON &
WAYMENT, 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 12, 2009, 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:

Facsimile 523-9146


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

09 MAR -9 PM 3:55

DISTRICT COURT
DISTRICT 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,

Plaintiff,

vs.

SHERRY KIMBALL, an Individual,
and JOHN DOES I-X,

Defendants.

Case No. CV-07-3806

AFFIDAVIT OF COUNSEL
IN SUPPORT OF MOTION FOR
COSTS ON EXECUTION OF
JUDGMENT

STATE OF IDAHO)

ss.

County of Bonneville)

Kipp Manwaring, being first duly sworn under oath, deposes and states as follows:

1. I am a licensed attorney in the state of Idaho and represent Plaintiff in the above action.
2. Attached as Exhibit A and incorporated here by reference is a true and correct copy of the Idaho Falls Police Department Incident Report under OCA 2009-00843.
3. As shown by the report, Sherry Kimball admitted she broke a window at the subject property owned by Plaintiff and entered and removed all of her boxes prior to the scheduled date when the sheriff had given notice of forced removal with the writ of execution.
4. Plaintiff had provided Kimball with contact information to allow Kimball to lawfully gain access to the property in order to remove her goods.
5. I had arranged with the Bonneville County Sheriff's Office, at its request, to have a moving company available to remove and store Kimball's personal property.

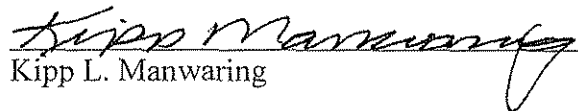
6. Due to Kimball's self-help, the Sheriff's Office and the moving company arrived at the subject property and it was discovered Kimball had removed her items.

7. The Sheriff's Office and the moving company charged for their time in appearing.

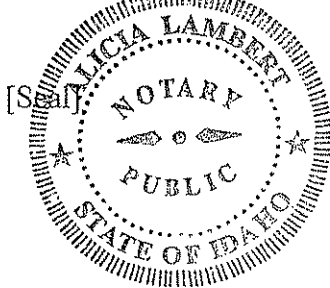
8. Attached as Exhibit B and incorporated here by reference is a true and correct copy of the moving company's invoice sent to this office and filed in accordance with the regular record keeping practices of this office and used in the ordinary course of business.

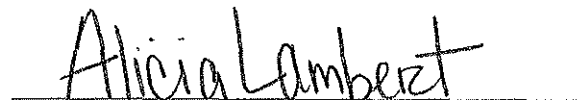
9. Attached as Exhibit C and incorporated here by reference is a true and correct copy of the Bonneville County Sheriff's Office return and fee.

Dated this 5th day of March 2009.


Kipp L. Manwaring

SUBSCRIBED AND SWORN to before me this 5th day of March 2009.




Notary Public For Idaho
Residing At: Shelley
My Commission Expires: 05.24.11

CERTIFICATE OF MAILING


I HEREBY CERTIFY that on the 5th day of March 2009, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

AFFIDAVIT OF COUNSEL

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

ed at: 2/25/2009 11:49

214



Incident / Investigation Report

Falls Police

OCA: 2009-00843

Status Codes L = Lost S = Stolen R = Recovered D = Damaged Z = Seized B = Burned C = Counterfeit / Forged F = Found U = Unknown

Status	Quantity	Type Measure	Suspected Drug Type

Offender(s) Suspected of Using <input type="checkbox"/> Drugs <input checked="" type="checkbox"/> N/A <input type="checkbox"/> Alcohol <input type="checkbox"/> Computer	Offender 1 OFI Age: 50 Race: W Sex: F	Offender 2 Age: Race: Sex:	Offender 3 Age: Race: Sex:	Primary Offender Resident Status <input checked="" type="checkbox"/> Resident <input type="checkbox"/> Non-Resident <input type="checkbox"/> Unknown
	Offender 4 Age: Race: Sex:	Offender 5 Age: Race: Sex:	Offender 6 Age: Race: Sex:	

Name (L, F M) Kimball, Sherry Lynn Home Address 2692 Hallon, Idaho Falls, ID 83402 Home Phone (208) 881-8015

Occupation Business Address Business Phone

DOB / Age	Race	Sex	Hgt	Wgt	Build	Hair Color	Eye Color
50	W	F	5'06	185		Brown	Hazel
					Hair Style	Hair Length	Glasses

Scars, Marks, Tattoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics)

Hat	Shirt/Blouse	Coat/Suit	Socks
Jacket	Tie/Scarf	Pants/Dress/Skirt	Shoes

Was Suspect Armed?	Type of Weapon	Direction of Travel	Mode of Travel
--------------------	----------------	---------------------	----------------

VYR	Make	Model	Style/Doors	Color	Lic/Lis ID	Vin
-----	------	-------	-------------	-------	------------	-----

Suspect Hate / Bias Motivated: ☐ Yes ☒ No Type:

Name (Last, First, Middle) D.O.B. Age Race Sex

Home Address Home Phone Employer Phone

Officer Flores 01-31-09

On 01-31-09 around 1710 hrs I was dispatched to 2746 W 17th S in reference to a burglary. I arrived and spoke with Dustin Howell.

Dustin stated that today John Cummings called him and told him that a Sherry Kimball was at the above address taking her items out of the residence. Dustin stated that Sherry does not have the right to be on that property. He stated that she has not lived at the property since July 2008. Dustin stated that Black Diamond Alliance now owns the property and he is the property manager for Black Diamond Alliance LLC.

Dustin continued to state that Sherry broke a back basement window to get in the residence and get her belongings. I took pictures of the broken window with my digital camera. Dustin stated that Black Diamond and Sherry have been in litigation for several months. He stated that Sherry could have called him to let her into the residence.

John then showed me where Sherri was now living. I went to her current address at 2692 Hallon.

Incident / Investigation Report

Idaho Falls Police

OCA: 2009-00843

Officer's Narrative (continued)

I went to that residence and spoke with Sherry. She stated that she was at her old residence and she did break the window to get inside. She stated that she is still on the deed along with Black Diamond Alliance. Sherry then showed me the order to vacate notice from the Bonneville County Sheriff's Office that was taped to the front door of the residence at 2746 W 17th S. It was stamped on 01-29-09. It stated that she had 48 hrs to remove her belongings from the residence. I asked her why she broke the window. She stated that she did not have a key. I asked her why she did not call Black Diamond Alliance. She stated that they were closed on Saturdays.

I spoke with Sgt Hansen and later Galbreath about the situation. I called Sherry and advised her that I was going charge her with malicious injury to property. I advised her that she had a right to be there to get her property, but she did not have to break a window to get in. I advised her that she should have made contact with Black Diamond to get her belongings. I met her at her office at 106 W 17th. I cited Sherry with malicious injury to property. I gave her a court date of 02-12-09. I gave her a later date because she could possibly have back surgery next week.

No further action taken.

SF

Incident / Investigation Report

Idaho Falls Police

OCA: 2009-00843

Officer's Supplement

Officer 601504910

Date / Time Reported SA Jan 31, 2009 17:10

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

--

INVOICE

bit to: NICHOLAS MOVING SYSTEMS
 1385 FOOTE DRIVE
 IDAHO FALLS, ID 83402



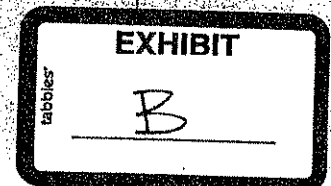
3333 Highway 30 West
 Pocatello, ID 83201
 (208) 233-2802
 (208) 233-5159 Fax

1385 Foote Drive
 Idaho Falls, ID 83402
 (208) 523-2670
 (208) 523-9902 Fax

Just Law INC
 381 Shoup Ave
 Suite 210
 Idaho Falls, ID 83402

Invoice# 201711
 Invoice Date 2/09/09
 PO Number
 Customer # 40091

TUCK DIAMOND EVICTION		From	To	Salesman	
ie Code	Descriptions	Amount/Quantity or Weight	%	Rate	Credits & Charges
102	EVICTON AT 2746 W 17th S 2 MEN & VAN 4 HOUR MINI	4.00		100.00 HR	400.00
					400.00



215

TOTAL →

Confirmation of shipping instructions, services, rate quotation, shipping document bill and evidence of insurance.
Document issued at:

I.C.C. M.C.
67234

NICHOLAS MOVING SYSTEMS
3333 HWY. 30 W.
POCATELLO, ID 83201
(208) 233-2802

1385 FOOTE DRIVE
IDAHO FALLS, ID 83402
(208) 523-2670

Date Serv. Req'd. 2-4-09 A.M.
P.M.
Pack Date A.M.
P.M.
Delivery Date Req'd. A.M.
P.M.
ORDER By:
TAKEN

SHIPPER IS REQUESTED TO READ THIS DOCUMENT BEFORE SIGNING AND ASK FOR AN EXPLANATION OF ANYTHING NOT CLEAR OR INCONSISTENT WITH ANY PREVIOUS REPRESENTATION. THIS WILL CONFIRM INSTRUCTIONS AND AUTHORIZE YOU TO MOVE, SHIP, PACK, STORE, AND/OR PERFORM THE SERVICES HEREON.

FROM: <u>2446 W</u>	FLOOR: _____	TO: _____	FLOOR: _____
<u>17504th</u>	APT. NO. _____		APT. NO. _____
PHONE: _____		PHONE: _____	

SPECIAL INSTRUCTIONS

Notifying and Billing Address

Shipper is requested to Supply an Address and Contact Method. (If no address or phone is available, write "None")

STORAGE ORDERED

☒ In Transit ☐ Regular

A charge will be made for handling in and out of storage and for wrapping, moth treating and accessorial services.

NOTICE OF CHANGE OF ADDRESS OF DEPOSITOR MUST BE GIVEN TO COMPANY IN WRITING. GOODS MAY BE STORED IN ANY DEPOSITORY IN:

Name of _____

Also subject to order of _____

Spec. Stge. Instructions _____

Description of Property:

ITEMS	CONTAINERS			PACKING			UNPACKING		
	QUANTITY	RATE	AMOUNT	QUANTITY	RATE	AMOUNT	QUANTITY	RATE	AMOUNT
BARREL, DISH-PACK DRUM, ETC.									
CARTONS: LESS THAN 3 CUBIC FEET									
3 CUBIC FEET									
4 1/2 CUBIC FEET									
6 CUBIC FEET									
6 1/2 CUBIC FEET									
WARDROBE CARTON, NOT LESS THAN 10 CU. FT.									
MATTRESS CARTON, CRIB									
MATTRESS CARTON (NOT EXCEEDING 39" x 75")									
MATTRESS CARTON (NOT EXCEEDING 54" x 75")									
MATTRESS CARTON (EXCEEDING 54" x 75")									
MATTRESS CARTON (39" x 80")									
MATTRESS COVER (PLASTIC OR PAPER)									
CORRUGATED CONTAINERS:									
CRATES:									
GROSS MEASUREMENT OF CRATE OR CONTAINER:									

WEIGHT OF SHIPMENT (Weight tickets attached)

Gross Weight _____ Lbs. Weighmaster _____
Tare Weight _____ Lbs. Weighmaster _____
Actual weight of shipment _____ Lbs.

TOTAL CONTAINER CHARGES

TOTAL PACKING CHARGE

TOTAL UNPACKING CHARGES

PACKING	hours	@	
UNPACKING	hours	@	
TOTAL \$			
Sales Tax			

INSURANCE/FULL VALUE PROTECTION

The shipper declares the actual cash value of this shipment to be \$ _____

☐ Transit Rate \$ _____ per \$100.00 Premium \$ _____
☐ Storage Rate \$ _____ per \$100.00 Premium \$ _____ per mo.

Authorized Signature X

CUSTOMER'S DECLARED VALUE AND LIMIT OF COMPANY'S LIABILITY.
Since rates are based on the declared value of the property, and the customer (Shipper) is required to declare in writing the released value of the property, the agreed or declared value of the property is hereby specifically stated to be not exceeding _____ cents per pound per article for transportation purposes.

OR _____ cents per pound per article for regular storage purposes.

Release shipment at higher valuation for entire shipment at \$ _____ per lb.

Signature _____

The customer (shipper) hereby declares valuations in excess of the above limits on the following articles: _____

ALL CHARGES PAYABLE IN CASH, CERTIFIED CHECK OR MONEY ORDER BEFORE PROPERTY IS RELIQUISHED BY CARRIER.

I have read this contract, understand and agree to the limit of liability as set forth above, to the provisions on both sides and received a copy.

Sign Here X

Delivery Receipt X

Goods received in good condition except as noted hereon.

Customer

REMIT TO:

BONNEVILLE COUNTY SHERIFF'S OFFICE
605 N CAPITAL
IDAHO FALLS, ID 83402

02/04/2009
PAGE 1 OF 1
CV250B

BILLING STATEMENT

PERSONAL INFORMATION

7421-Kim-Kimball

JUST LAW INC
381 SHOUP AVE STE 211
IDAHO FALLS, ID 83201

Home Phone:

Work Phone: (208) 523-9106

PAPER INFORMATION

Paper ID: 200900739 Paper Type: WRT WRIT
Case No: CV073806 Court Name: 7TH DIST BONNEVILLE
Case Title: BLACK DIAMOND VS KIMBALL, SHERRY Review Date: 02/05/2009
Attorney: JUST LAW INC
Plaintiff: BLACK DIAMOND LLC
Defendant: KIMBALL, SHERRY

SERVICE INFORMATION

	Date	Time	Officer
Received:	01/29/2009	03:37 PM	GIBBONS, LUCINDA (LUCI) ANN
Served:	01/29/2009	07:38 PM	CHRISTENSEN, KEITH
Returned:	02/04/2009	11:23 AM	MUNNS, CHARLENE
Served To:	POSTED FROM DOOR		
Served At:	2746 W. 17TH S. IDAHO FALLS ID 83404		

PAPER CHARGES

Date	Type	Type Description	Amount
01/29/2009	01	SERVICE	20.00
01/29/2009	02	RETURN - PAPER	20.00
TOTAL			40.00

PAYMENTS & DISBURSEMENTS

Date	Payor	Type	Check No.	Amount
------	-------	------	-----------	--------

BALANCE INFORMATION

Total Charges: 40.00 Total Payments: 0.00 Total Uncollectable: 0.00

REMAINING BALANCE: \$ 40.00

***** PLEASE PAY THIS AMOUNT IN FULL UPON RECEIPT *****

MAKE CHECKS PAYABLE TO: BONNEVILLE COUNTY SHERIFF'S OFFICE

EXHIBIT

tabbles

C

217

PAID
02-19-09

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

09 MAR -9 PM 3:54

DISTRICT COURT
CLERK'S OFFICE
BONNEVILLE COUNTY
IDAHO

Attorneys for Plaintiff

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

BLACK DIAMOND ALLIANCE, LLC,)
an Idaho limited company,)

Case No. CV-07-3806

Plaintiff,)

vs.)

SHERRY KIMBALL, an Individual,)
and JOHN DOES I-X,)

MEMORANDUM OF COSTS
ON EXECUTION OF JUDGMENT

Defendants.)

In compliance with I.R.C.P. 54(d)(1) and (d)(5), Plaintiff submits the following Memorandum of Costs in support of an award of costs on execution of judgment in this action.

Costs as a Matter of Right:

1. Nicholas Moving Company:	\$ 400.00
2. Bonneville County Sheriff:	\$ 40.00
3. Broken window cost:	\$ 300.00
SUBTOTAL	<u>\$ 740.00</u>

TOTAL

\$ 740.00

To the best of my knowledge and belief the above items are correct and all costs claimed are in compliance with I.R.C.P. 54.

Dated this 5th day of March 2009.


Kipp L. Manwaring
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 5th day of March 2009, 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 OF COSTS ON EXECUTION
OF 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

09 MAR -9 PM 3:54

DISTRICT COURT
CLERK'S OFFICE
BONNEVILLE COUNTY
IDAHO

Attorneys for Plaintiff

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

BLACK DIAMOND ALLIANCE, LLC,)
an Idaho limited company,)

Case No. CV-07-3806

Plaintiff,)

vs.)

SHERRY KIMBALL, an Individual,)
and JOHN DOES I-X,)

MOTION FOR COSTS ON
EXECUTION OF JUDGMENT

Defendants.)

In accordance with I.R.C.P. 54(d)(1)(F), Plaintiff moves the court for its order adding to the judgment in this action the costs incurred upon service of the writ of execution.

This motion is based upon the pleadings of record, the Affidavit of Counsel in Support of Motion for Costs on Execution of Judgment, and the Memorandum of Costs filed simultaneously with this motion.

Defendant took self-help action resulting in trespass and damage to Plaintiff's property and causing Plaintiff to unnecessarily incur costs for a bonded moving company. Due to Defendant's action, she should be required to pay the costs incurred.

Oral argument is requested.

Dated this 5th day of March 2009.

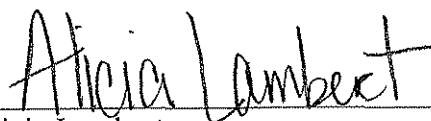

Kipp L. Manwaring
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 5th day of March 2009, 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 COSTS ON EXECUTION
OF 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

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/>		

March 19, 2009, at 10:00 A.M., plaintiff's motion costs on execution of 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. Manwaring presented argument supporting the motion for costs.

Mr. Johnson opposed the motion.

Mr. Manwaring presented additional argument supporting the motion.

The Court awarded costs for the moving company in the amount of \$400.00 and for the Sheriff's fees in the amount of \$40.00. The Court instructed Mr. Manwaring to prepare the appropriate order for the Court's signature.

Court was thus adjourned.

Gregory S. Anderson

GREGORY S. ANDERSON

District Judge

c: Kipp Manwaring
David Johnson

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 COURT OF THE SEVENTH JUDICIAL DISTRICT
COUNTY OF BONNEVILLE

9 MAR 19 10:03

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,	)	OBJECTION TO CLERK'S RECORD
and JOHN DOES I-X,)	
)	
Defendants.)	

Plaintiff, Black Diamond Alliance, LLC, objects to the Clerk's Record on appeal for the following reasons.

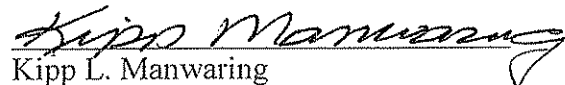
The Clerk's Record does not contain all necessary pleadings, decisions, and judgments for purposes of the appeal. Specifically, the Clerk's Record should contain the following additional documents.

1. Affidavit of Bradon Howell dated January 16, 2008.
2. Plaintiff's Motion to Reconsider dated June 3, 2008.
3. Affidavit of Jerry Glowacki dated August 29, 2008.
4. Affidavit of Mary Glowacki dated September 2, 2008.
5. Affidavit of Chad Murdock dated August 13, 2008.
6. Affidavit of Jeremy Bingham dated August 12, 2008.
7. Affidavit of Dick Fowler dated August 15, 2008.
8. Affidavit of Counsel in Support of Reply to Response in Opposition to Motion for Summary Judgment together with exhibits, dated September 30, 2008.
9. Plaintiff's Motion and Memorandum for Partial Summary Judgment dated August 21, 2008.
10. Plaintiff's Memorandum in Support of Motion for Reconsideration dated August 11, 2008.

11. Plaintiff's Reply to Response in Opposition to Motion for Summary Judgment dated September 20, 2008.
12. Minute Entry for hearing on October 2, 2008.
13. Memorandum Decision Re: Motion to Reconsider and Motion for Partial Summary Judgment, filed October 24, 2008.
14. Order Re: Motion to Reconsider and Motion for Partial Summary Judgment, filed October 24, 2008.
15. Order Re: Motion for Summary Judgment, filed January 15, 2009.
16. Judgment filed January 29, 2008.
17. Partial Summary Judgment filed December 2008.
18. Deposition of Braden Howell.
19. Deposition of Trent Tyler.

Inclusion of the above pleadings and records is essential for purposes of providing an appropriate record on appeal.

Dated this 13th day of March 2009.


Kipp L. Manwaring
Attorney for Plaintiff

CERTIFICATE OF MAILING

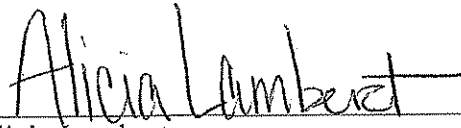
I HEREBY CERTIFY that on the 13th day of March 2009, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

OBJECTION TO CLERK'S RECORD

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

DISTRICT COURT
BONNEVILLE COUNTY

9 MAR 23 P4:22

David A. Johnson, Esq.
Wright, Johnson, Tolson & Wayment, 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

**OBJECTION TO CLERK'S
RECORD/ REQUEST FOR
ADDITIONAL DOCUMENTS**

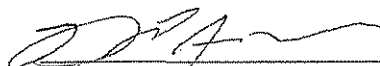
Pursuant to IAR 28 and 29, Defendant, Sherry Kimball (Kimball) objects to the Clerk's Record on Appeal for failing to include those documents identified in Kimball's Third Amended Notice of Appeal. Namely, the following documents should have been included, but were not:

Date	Document
04/04/2008	Writ Issued - Writ of Ejectment and Writ of Restitution (Bonneville County)
06/04/2008	Motion to Reconsider
07/14/2008	S.C. Order Granting Motion to Suspend appeal (Stipulated)

08/13/2008	Memorandum in Support of Motion for Reconsideration
08/13/2008	Affidavit of Counsel in Support of Motion for Reconsideration and 2nd Motion for Summary Judgment
08/15/2008	Hearing Scheduled (Motion 09/04/2008 08:15 AM) Motion to Reconsider
08/21/2008	Defendant's Response to Plaintiff's Motion for Reconsideration
08/25/2008	Affidavit of Chad Murdock
08/25/2008	Affidavit of Jeremy Bingham
08/25/2008	Affidavit of Dick Fowler
08/25/2008	Motion and Memorandum for Partial Summary Judgment
09/05/2008	Affidavit of Jerry Glowacki
09/05/2008	Affidavit of Mary Glowacki
09/17/2008	Response to P's Motion and Memorandum for Partial Summary Judgment
09/17/2008	Affidavit of David A. Johnson (Second)
09/30/2008	Reply to Response in Opposition to Motion for Summary Judgment
09/30/2008	Affidavit of Counsel in Support of Reply to Response in Opposition to Motion for Summary Judgment
10/01/2008	Supplemental Affidavit of Sherry Kimball
10/01/2008	Supplement to Response to P's Motion and Memorandum for Partial Summary Judgment
10/03/2008	Minute Entry
10/07/2008	Publication of the Deposition of Trent D. Tyler including the deposition of Trent D. Tyler taken on September 24, 2008
10/07/2008	Publication of the Deposition of Bradon K. Howell including the deposition of Bradon Howell taken on September 24, 2008
10/24/2008	Memorandum Decision Re: Motion to Reconsider and Motion for Partial Summary Judgment

10/24/2008	Order Re: Motion to Reconsider and Motion for Partial Summary Judgment
1/15/2009	Minute Entry
1/15/2009	Order Re: Motion for Summary Judgment.

DATED: March 23, 2009



WRIGHT, JOHNSON, TOLSON &
WAYMENT, PLLC
David A. Johnson, Esq.

CERTIFICATE OF SERVICE

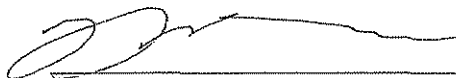
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on March 23, 2009, I served a true and correct copy of the foregoing document, on the person(s) listed below by causing the same to be delivered by the following method:

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.

2009 APR -3 PM 3:47
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,

Plaintiff,

vs.

SHERRY KIMBALL, an Individual,
and JOHN DOES I-X,

Defendants.

Case No. CV-07-3806

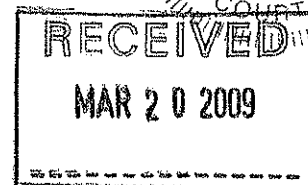
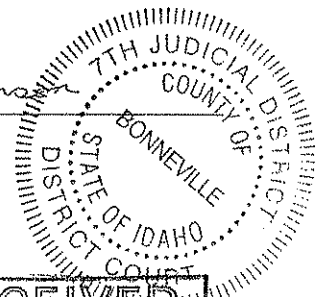
ORDER AND JUDGMENT OF
COSTS ON EXECUTION

On March 19, 2009 this action came before the court for hearing Plaintiff's motion for costs on execution of judgment. After considering the arguments of counsel and the matters of record, the court finds the moving company expenses and sheriff's costs incurred by Plaintiff were necessary, reasonable, and exceptional in accordance with I.R.C.P. 54(d)(1)(D) and (F); however, the repair cost for a broken window are not allowable costs. Therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's motion for costs in granted in part and Plaintiff shall have judgment against Defendant, Sherry Kimball, in the amount of \$440.00.

Dated this 23 day of ^{April} ~~March~~ 2009.

Gregory S. Anderson
Gregory S. 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 30 day of ~~August~~ April 2009 to the following of record and/or parties:

DOCUMENT SERVED:

ORDER AND JUDGMENT ON
COSTS OF EXECUTION

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

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.)
_____)

**CERTIFICATE OF SERVICE
FOR SUPPLEMENTAL RECORD
ON APPEAL**

Case No. CV-2007-3806

Docket No. 35189

I HEREBY CERTIFY that on the _____ day of May, 2009, 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: _____
Deputy Clerk