

6-12-2009

# Black Diamond Alliance, LLC v. Kimball Appellant's Brief Dckt. 35189

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

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

DOCKET NO. 35189-2008

District Court Case No. CV- 07-3806

**APPELLANT'S BRIEF**

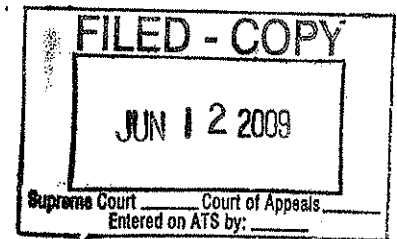
Appeal from the District Court of the Seventh Judicial District for

Bonneville County

Honorable Gregory S. Anderson, District Judge

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## STATEMENT OF THE CASE

### A. Nature of the Case.

This is a case filed by Black Diamond Alliance LLC (Black Diamond) for the ejectment of Sherry Kimball (Kimball) from her home following a disputed Trustee's sale.

### B. Procedural History.

A Complaint was filed on July 6, 2007, on behalf of "Black Diamond, LLC" requesting the Court to eject Kimball from her home located at 2746 W. 17<sup>th</sup> S, Idaho Falls, Idaho (hereinafter referred to as "the property."). R. p. 5. An Amended Complaint was filed on August 17, 2009. Black Diamond claimed, as the successful bidder at a Trustee's sale, that they were entitled to possession and control of the property. R. p. 10.

On November 7, 2007, Kimball filed her Answer and Counterclaim. Among the defenses raised by Kimball was that the Trustee's sale was not conducted in conformity with Idaho law and that Black Diamond was not the real party in interest. R. p. 16. Black Diamond filed their Reply to the Counterclaim on November 20, 2007. R. p. 25.

On January 18, 2008, Black Diamond moved for Summary Judgment with supporting Affidavits. R. p. 27. Kimball, on February 15, 2008, filed her opposition to Summary Judgment and filed Affidavits in opposition to the same. R pp. 45 and 104. Black Diamond thereafter filed its Reply brief and a hearing was held on March 6, 2008. R. p. 54.

On March 6, 2008, the hearing on Black Diamond's Motion for Summary Judgment was held. The District Court ruled from the bench and granted summary judgment to Black Diamond. Tr. p. 20 LL. 15-17 March 6, 2008. On March 12, 2008, a Motion for Reconsideration was filed by Kimball. R. p. 66. To preserve her rights to appeal, Kimball filed a

Notice of Appeal on April 2, 2008. R. p. 71. On May 15, 2008, the Court heard the Motion for Reconsideration, granted the same and vacated the Summary Judgment previously entered. R. p. 101.

On June 4, 2008, Black Diamond filed its Motion for Reconsideration. Supp. R. p. 11. Based upon the stipulation of the parties, the Supreme Court suspended the appeal on July 9, 2008. Supp. R. p. 13. On August 25, 2008, Black Diamond moved again for partial summary judgment. Supp. R. p. 30. After hearing, the District Court re-entered summary judgment in favor of Black Diamond. Supp. R. p. 167. The final issue was resolved by summary judgment in favor of Black Diamond on January 15, 2009, after which this appeal was pursued. Supp. R. p. 180.

**C. Statement of Facts.**

Kimball purchased a home and real property located at 2746 West, 17th South, Idaho Falls, Idaho on August 30, 1988. Subsequently, she later refinanced her property through Wells Fargo Bank, who assigned the promissory note and deed of trust to Fremont Investment & Loan (hereinafter referred to as "Fremont."). In the latter part of 2007, Kimball fell behind in her payments under the Deed of Trust Note, and Fremont commenced a non-judicial foreclosure proceeding. Kimball was properly notified of the Trustee's Sale scheduled for May 29, 2008. Affidavit of Sherry Kimball ¶ 4 filed 2-18-2008. (treated by the District Court Clerk for the Record as an Exhibit R. p. 104.)

Kimball had in excess of \$136,000.00 equity in the house and contacted Fremont to discuss and work out a solution so she could keep her property. In addition, Kimball disputed the amount owed and faxed copies of checks that were not credited to her account. On the day of the

sale, Kimball again telephoned Fremont in a last ditch effort to avoid the sale. Kimball was successful in obtaining an agreement where in exchange for \$3,000.00 Kimball would have until June 18, 2008 to pay the balance on the note. Fremont also told Kimball that the Trustee's sale would be cancelled.

After sending the \$3,000.00 to Fremont, who deposited the funds, Kimball telephoned Just Law Office, who was the Trustee, to ensure that they were aware of the cancellation of sale. Kimball was referred to and spoke with Bradon Howell at the Trustee's office, who confirmed that the sale was cancelled. Bradon Howell did not inform Kimball of a new sale date and time. Kimball Aff. ¶¶ 6-8. Bradon Howell did email First American Title Company (First American) and indicated that the sale would be rescheduled for June 12, 2008. R. p. 138 LL. 20-24. Black Diamond's Affidavits indicate that First American, at the time of the originally scheduled sale, indicated that the Trustee's sale would be held on June 12, 2008, pursuant to the instructions of the Trustee, through Bradon Howell. (Affidavit of First American Title filed 1-18-2008, of Record as exhibit, R. p. 104.) Kimball was not in attendance since it was her understanding that the sale had been cancelled. She was completely unaware of the matters that took place at that time. Kimball Aff. ¶¶ 7-8, R. 76. No notices were sent to Kimball; no attempts to telephone Kimball were made; there were no postings on the property, nor any other steps taken to provide notice to Kimball of the new Trustee's sale, date and time. Kimball Aff. ¶ 10., Supp. R. p. 138 L. 10 - p. 139 L. 17.

On June 12, 2008, the Trustee's sale was conducted. Trent Tyler (hereinafter referred to as "Tyler."), an agent for Black Diamond, attended the sale, learning of the sale via a telephone call from Dustin Howell, an employee of Black Diamond, to First American. Supp. R. p.102 L. 18 -



p. 103 L. 24. Others in attendance were familiar with Tyler and discussed Tyler's recent birthday. The other potential buyers made a few token bids and then allowed Mr. Tyler to take the bid, wishing Tyler a "happy birthday." R. p. 107 LL. 11-22.

Tyler and Jayce Howell are the managing members of Black Diamond, a company whose business is to purchase and sell distressed properties. Jayce Howell is a brother to Bradon Howell of the Trustee's office. After the sale, Tyler and Dustin Howell, yet another brother to Bradon and Jayce Howell, went on that same day or the next day, placed a pamphlet and a Post-It® note from Black Diamond on the door of Kimball's home indicating they had purchased the house and real property, and requested Kimball to contact them. R. p. 108 L. 18 - p. L. 23. When Kimball returned home on June 13, 2008 and saw the pamphlet and note, she immediately contacted both Dustin Howell at the number on the pamphlet and Bradon Howell at the Trustee's office. She informed both of them that the sale should not have taken place because of the additional time promised. Supp. R. pp. 76-77.

Bradon Howell then contacted Fremont to discuss options, including redoing the sale. Fremont and the Trustee decided to record and deliver the Trustee's Deed<sup>1</sup> to Black Diamond. R. p. 144 L. 15 - p 145 L 18. Thereafter, Fremont sent Kimball a check for \$3,000.00 sometime after June 20, 2008. R. p. 23. Thereafter Kimball continued to assert ownership and refused to move from the property and the present action was commenced.

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<sup>1</sup> After the commencement of the proceedings herein, an Amended Trustee's Deed was prepared to supposedly correct the purchaser/party to the action from "Black Diamond LLC" to "Black Diamond Alliance LLC." There is no LLC with the name "Black Diamond LLC" in Idaho. R. p. 43.

## ISSUES PRESENTED ON APPEAL

1. Did the District Court err, in both fact and law, in granting summary judgment to Black Diamond?
  - A. Does a sale that has been postponed under Title 45, Chapter 15 require service or notice, other than being orally declared at the time of the original Trustee's sale, to be given to an owner who has appeared or activity attempted to protect her property?
  - B. Can Black Diamond be considered a good faith purchaser?

## STANDARD ON APPEAL.

The appellate court has free review of the decisions of the District Court. The Idaho Supreme Court has stated:

In an appeal from an order granting summary judgment, the standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. Upon review, the Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. Summary judgment is appropriate 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 a judgment as a matter of law. If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied.

*Lochsa Falls, L.L.C. v. State* 2009 WL 918620 at \*2 (Idaho)

## ARGUMENT

### The District Court erred in granting Summary Judgment to Black Diamond.

#### A. The District Court erred in concluding sufficient notice was given to Kimball of the subsequent sale.

The District Judge erred, in both fact and law, in finding that the foreclosure sale herein was conducted according to the requirements of Title 45, Chapter 15 of the Idaho Code and the requirements of law. It is undisputed that no efforts were made to personally serve, notify or otherwise bring to the attention of Kimball the date and time of the June 12, 2008, Trustee's sale. Nor were there any efforts to post the property or display any notice in any public place. R. pp. 136-137.

The District Court's summary judgment was based upon the position that Idaho Code §45-1507(8) requires only the oral declaration of the new date and time of the trustee's sale. This interpretation is incorrect under the statutory scheme of Title 45, chapter 15 which requires notification, at least under Idaho Code §45-1506(7). Otherwise, due process requirements under the Fourteenth Amendment to the United States Constitution and Article I, Section 13 of the Idaho State Constitution would be violated. Kimball is not challenging the constitutionality of Idaho Code §45-1508 as a whole, but only as to the facts and circumstances of this case.

To satisfy due process requirements, the notice provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Under both the Idaho and United States Constitutions the right to procedural due process is guaranteed, requiring that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. *Rudd v. Rudd*, 105 Idaho 112,

666 P.2d 639 (1983).” *Frontier Federal Sav. and Loan Ass'n v. Douglass* 123 Idaho 808, 824, 853 P.2d 553, 569 (Idaho, 1993)- Dissenting Opinion. The core of due process is notice and opportunity in a meaningful time and manner. *Ada County Highway Dist. v. Total Success Investments, LLC* 145 Idaho 360, 179 P.3d 323 (2008). See also, *Herrera v. Estay* 146 Idaho 674, 201 P.3d 647 (2009). The level of notice to be given, however, depends on the interest at issue because "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Strong distinctions lie in the law between those who are actively involved, like Kimball, versus those that “lie doggo.”<sup>2</sup> *Taylor v. Slick*, 178 F.3d 698, 703 (C.A.3 (Pa.),1999)

The actions of the Trustee deprived Kimball of all reasonable notice and opportunity and was in violation of an expressed agreement between Kimball and the beneficiary, for whom the Trustee was acting on behalf. Requiring only a verbal announcement on May 29, 2008 in light of Kimball’s active attempt to prevent the loss of her property, clearly violates the due process requirements discussed herein. In addition, the same creates conflict within the non-judicial foreclosure statutes. For example, the subsequent sale could not be construed as final. Idaho Code §45-1508 states:

Finality of Sale- 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**

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<sup>2</sup> Definition: British Slang. “To keep out of sight; hide: Lie doggo until the excitement blows over.” <http://dictionary.reference.com/browse/lie+doggo?qsrc=2446>

**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)

Pursuant to Idaho Code §45-1508, a trustee's sale only becomes final as to persons who have been: (a) adequately notified, (b) had actual knowledge, or (c) if the purchaser acquired the property in good faith. Kimball submits that the purpose of announcement at the time scheduled for the original sale is not necessarily to provide notice to the owner or other known persons, but to reach those who respond to public notifications, without requiring the delay and expense of republication. *Ostrow v. Higgins*, 722 P.2d 936 (Alaska 1986). The identity and address of the owner of the property, particularly residential property in which the owner personally resides for 19 years, is well known and service or some reasonable effort to at least attempt service or give notice would be proper. Thus, Kimball submits that to withstand constitutional muster, and to comply with Idaho law, the requirements of Idaho Code §45-1506(7) which requires mailing and posting, followed by an affidavit of mailing the notice of sale and an affidavit of posting should have been provided, *a fortiori* in this case because of Kimball's efforts to protect her equity.

In this case, there would be no reason for Kimball to attend a cancelled sale (or one that she understood was cancelled). A letter, a posting on the door if no one was home, or even perhaps a telephone call to the property owner would be substantially better than an email between the trustee and a title company to arrange a new notice which the property owner would not be privy to. In *Dusenbery v. United States*, 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002), the sending of a certified letter was sufficient even if not received. See also *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708 (2006.). (After a mailed notice was returned unclaimed, a state was required by the Due Process Clause of the Fourteenth Amendment to take additional reasonable

steps to notify the owner before the sale could proceed.) In this case, Kimball owned and occupied the subject property as her home for 19 years prior to the foreclosure. Her address and whereabouts were well known and notice could have easily been made in several ways, including those listed above.

The Trustee provided no other reason or justification for not providing notice to Kimball. When pressed, the agent for the Trustee stated that “[a]s far as we know we don’t have to. It’s not law. And we still don’t.” Supp. R. p. 150.

Idaho Code §45-1506(7) requires an affidavit of mailing notice of sale and an affidavit of posting. The Idaho Supreme Court has stated, perhaps by dicta, that sales postponed under §§ 45-1506 or 45-1506A require recorded affidavits certifying compliance with the notice requirements. *Federal Home Loan Mortg. Corp. v. Appel* 143 Idaho 42, 47 n.3, 137 P.3d 429, 434 n.3 (2006).

Kimball submits that parallelisms could also be drawn to similar situations in Idaho Law. For example, pursuant to IRCP 55(b)(2) when a person has appeared in a lawsuit, no default can take place prior to written notice being given three days in advance. There are also several statutes in Idaho where persons can request notice to protect their interests and concerns in various proceedings. See e.g., Idaho Code §§ 7-1304, 15-3-505, 15-5-406.

Providing of notice of a postponed sale is not difficult to do. The simple mailing of a letter and posting on the property do not require significant effort or expense or cause any significant delay.

Kimball was active in her contacts with Fremont and the Trustee, attempting to work out an arrangement and disputing the amount of claimed balance. Eventually, in exchange for a

significant sum of money, Fremont deposited the funds and reported to Kimball that the sale was cancelled which was confirmed by the Trustee when Kimball went even further by her telephone call to the Trustee. She then knew or believed that no sale would take place until after June 18, 2008 if she did not satisfy the obligation. When Kimball was notified that Black Diamond had purchased the property during the undisclosed sale, she immediately brought the notice deficiency to the Trustee's and Black Diamond's attention before the issuance of a Trustee's deed.

However, rather than correcting the deficiency in a reasonable manner, i.e. scheduling another sale with notice to Kimball, the Trustee prepared, recorded and delivered the Trustee's Deed to "Black Diamond, LLC" at a time when Black Diamond knew of the notice problems.

In foreclosures, particularly in fact situations like this case, very substantial property rights are affected and this Court needs to consider the extent of the interest in determining the level of notice required. The application of the facts to the requirements of due process dictate that the Trustee's sale cannot stand.

Based upon the requirements of due process, and considering the overall view of Idaho non-judicial foreclosure laws, notice to the owner of the property, particularly one who has made efforts to actively participate in the foreclosure proceedings, is required. Because the Trustee failed to follow even minimal requirements, summary judgment in favor of Black Diamond should not have occurred.

**B. Black Diamond was not a good faith purchaser.**

Black Diamond was aware of the defects in the foreclosure process before the Trustee's Deed was recorded or delivered to Black Diamond, and therefore, cannot be a good faith purchaser. Somewhat ironic is the fact that Black Diamond takes the position that even though

Kimball received no notice of the sale, she is not entitled to any relief. Yet, Black Diamond also takes the position that even though they had notice of the procedural defects and claims of Kimball, they believe they should be considered a good faith purchaser.

Black's Law Dictionary states that a bona fide purchaser for value is "[o]ne who purchases legal title to real property without actual or constructive notice of any infirmities, claims, or equities against the title." Black's Law Dictionary at 1001 (7th abr. ed. 2000).

If a purchaser is on inquiry notice based if the circumstances indicate that potential defects of notice requirements exist, they cannot qualify as a bona fide purchaser. *See Federal Home Loan Mortg. Corp. v. Appel* 143 Idaho 42, 47, 137 P.3d 429, 434 ( 2006). In the present case, the following time line is significant:

- **May 29, 2008**: Sherry reaches an agreement with Fremont to cancel the sale. She sends \$3,000.00 to Fremont and confirms the cancellation with the Trustee. Kimball Aff. ¶¶ 6-7.
- **June 12, 2008**: Trustee's sale takes place without Kimball's knowledge. Kimball Aff. ¶ 10.
- **June 13, 2008**: Black Diamond placed a pamphlet and note on Kimball's door indicating they bought her house at the Trustee's sale. Supp. R. 109. Kimball called Just Law Office (Trustee) and informed them of the lack of notice of the Trustee's sale. Supp. R. 132-133. Kimball also calls Black Diamond and notified them of the lack of notice of the Trustee's sale. Supp. R. 76-77.
- **June 14, 2008**: Just Law Office called Fremont and gave the various options, including the option to conduct another Trustee's sale. Fremont instructs Trustee



to process the Trustee's Deed to Black Diamond . Supp. R. 136, 145. Just Law Office records Trustee's Deed.

- **June 15, 2008:** Trustee's Deed sent to Black Diamond by Trustee. Supp. R. 144.
- **June 20, 2008:** Fremont prepares and sends to Kimball. R. p. 23.

Black Diamond knew of the problems with the notice of sale prior to either the creation, recording or receipt of the Trustee's Deed. Such knowledge prevents Black Diamond from becoming a bona fide/good faith purchaser for value. "[S]tatus as a bona fide purchaser or a purchaser in good faith, at least in the context of a non-judicial foreclosure sale, is generally not available where a purchaser is on inquiry notice of a potential defect of statutory notice provisions." *Federal Home Loan Mortg. Corp. v. Appel* 143 Idaho 42, 47, 137 P.3d 429, 434 (2006). In *Federal Home*, the Court specifically referenced the sale postponement in Idaho Code §45-1506 and referenced the requirements.

Black Diamond was aware of the lack of notice to Kimball and thus the defect in notice prior to the conveyance of the Trustee's Deed. Therefore, it cannot legitimately claim to be a good faith purchaser. In a case involving the same Trustee herein (and who is also representing Black Diamond herein), the Idaho Supreme Court has held that good faith purchaser status is only available "... 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." *Taylor v. Just* 138 Idaho 137, 142, 59 P.3d 308, 313 (2002). The law is clear that the time for determining good faith is at the time of conveyance of the property. The property herein was not conveyed until after the defect was known to Black Diamond and the Trustee.

## CONCLUSION

For the reasons stated above, the Court is requested to reverse the decision of the District Court and direct the vacating of the summary judgment herein.

DATED: June 10, 2009

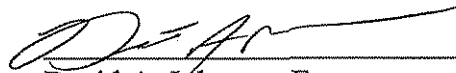
  
David A. Johnson, Esq.

## CERTIFICATE OF SERVICE

I hereby certify that two (2) true and accurate copies of the foregoing was served by placing the copies in the U.S. Mail postage prepaid on June 10, 2009, addressed to the following:

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

Hand Delivery

  
David A. Johnson, Esq.