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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BLACK DIAMOND ALLIANCE, LLC,)
)
 Plaintiff/Respondent,)
)
 v.)
)
 SHERRY KIMBALL,)
)
 Defendant/Appellant.)
 _____)

Supreme Court Case No. 35189
District Court Case No. CV-2007-3806

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.

Honorable, Gregory S. Anderson, District Judge, presiding.

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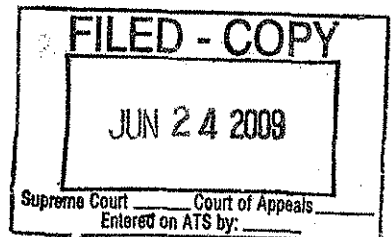


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STATEMENT OF THE CASE

This action arises from a complaint for ejectment following nonjudicial foreclosure of a deed of trust. Summary judgment was entered ruling the purchaser at the trustee's sale was entitled to possession of the subject real property and ejecting the occupant. This appeal followed.

Statement of the Facts

Respondent, Black Diamond Alliance desires to restate the salient facts.

On January 19, 2004 Sherry Kimball executed a promissory note payable to Fremont Investment & Loan in the amount of \$104,800. (*Clerk's Record*, Vol. I, p. 83). That note was secured by a deed of trust executed by Kimball as grantor with Mortgage Electronic Registration Systems, Inc., (MERS), as beneficiary and nominee of Fremont; that deed of trust was recorded January 22, 2004 as Instrument No. 1141336 in the Recorder's Office for Bonneville County, Idaho. (*Clerk's Record*, Vol. I, p. 83).

Beginning September 1, 2006 Kimball failed to make monthly payments on the note. (*Clerk's Record*, Vol. I, p. 83). On October 23, 2006 Fremont sent a Notice of Intent to Foreclose to Kimball explaining Kimball's default and notifying her that Fremont intended to foreclose the deed of trust if Kimball did not cure her default within 30 days. (*Clerk's Record*, Vol. I, p. 83).

When Kimball failed to cure her default, Fremont initiated nonjudicial foreclosure of the deed of trust. (*Clerk's Record*, Vol. I, p. 84). MERS assigned its beneficial interest in the deed of trust to Fremont by written assignment recorded January 22, 2007 as Instrument No. 1250938 in the Recorder's Office for Bonneville County, Idaho. (*Clerk's Record*, Vol. I, p. 84). On the

same date, Just Law, Inc., was appointed as trustee of the deed of trust. (*Clerk's Record*, Vol. I, p. 84).

Kimball received proper notice of the trustee's sale scheduled for 11:00 a.m., May 29, 2007 at First American Title Company in Idaho Falls, Idaho. (*Clerk's Record*, Vol. I, p. 84). On May 29, 2007 Kimball allegedly had a conversation by telephone with representatives of Fremont seeking to obtain some forbearance. (*Clerk's Record*, Vol. I, p. 84). Fremont agreed to postpone the trustee's sale for May 29, 2007 to allow Kimball time to perform in accordance with the discussed forbearance, including an obligation to pay all past due amounts. (*Clerk's Record*, Vol. I, p. 84).

Concomitant with its discussion with Kimball, Fremont directed the trustee to postpone the sale scheduled for May 29. (*Clerk's Record*, Vol. I, p. 84). The trustee notified its crier, First American, to postpone the May 29 sale. (*Clerk's Record*, Vol. I, p. 84). Accordingly, First American publicly announced at 11:00 a.m. on May 29, 2007 that the sale had been postponed and rescheduled for 11:00 a.m., June 12, 2007. (*Clerk's Record*, Vol. I, p. 84).

Prior to the scheduled sale on May 19, 2007 Black Diamond Alliance, LLC, had read in the Post Register the legal notice regarding the foreclosure. (*Supplemental Clerk's Record*, Vol. I, pp. 97-99). Black Diamond performed a drive by inspection of the property and made a determination that it could have a value of \$145,000. (*Supplemental Clerk's Record*, Vol. I, p. 98). Based upon its determination of potential value, Black Diamond decided to attend the foreclosure sale and enter a bid. (*Supplemental Clerk's Record*, Vol. I, pp. 97-99).

On June 12, 2007 First American cried the foreclosure of Kimball's property subject to the deed of trust. (*Clerk's Record*, Vol. I, p. 84). Several bidders were present at the sale and, following Fremont's credit bid, entered bids on the property. (*Supplemental Clerk's Record*,

Vol. I, pp. 33-48 and 104-107). Ultimately, Black Diamond was the highest bidder at the sale on its final bid of \$112,500. (*Clerk's Record*, Vol. I, p. 84; *Supplemental Clerk's Record*, Vol. I, p. 108).

Kimball did not attend the May 29 or the June 12 sales. (*Clerk's Record*, Vol. I, p. 84).

At the time of the sale on June 12, Black Diamond had no knowledge of any discussions between Fremont and Kimball. (*Supplemental Clerk's Record*, Vol. I, pp. 111). Nor did Black Diamond have knowledge of any defects in the foreclosure process. (*Supplemental Clerk's Record*, Vol. I, pp. 111).

On June 13, the day after the June 12 sale, Black Diamond went to the property and left its business flier with a note on the door for the occupant explaining the purchase of the property at foreclosure. (*Supplemental Clerk's Record*, Vol. I, pp. 109). After June 13, and likely after the recording of the Trustee's Deed, Black Diamond had discussions with Kimball to see if she was voluntarily vacating the property. (*Supplemental Clerk's Record*, Vol. I, pp. 109).

A Trustee's Deed was executed and recorded June 14, 2007 as Instrument No. 1266637 in the Recorder's Office for Bonneville County, Idaho conveying title to Black Diamond. (*Clerk's Record*, Vol. I, pp. 15, 84). First American issued to Black Diamond a policy of title insurance dated June 14, 2007. (*Clerk's Record*, Vol. I, p. 84).

Course of the Proceedings

Black Diamond filed a Complaint on July 6, 2007 and an Amended Verified Complaint on August 17, 2007 seeking ejectment of Kimball. (*Clerk's Record*, Vol. I, pp. 5-15). Personal service on Kimball could not be accomplished and the court issued an order authorizing service by publication. (*Clerk's Record*, Vol. I, p. 1). On October 18, 2007 proof of publication was filed together with an application for default. (*Clerk's Record*, Vol. I, p. 1).

Kimball filed a notice of appearance on October 26, 2007 and after 3-day notice of intent to take default was filed, Kimball filed an answer on November 7, 2007. (*Clerk's Record*, Vol. I, p. 1).

Black Diamond filed its first motion for summary judgment on January 18, 2008. (*Clerk's Record*, Vol. I, pp. 27-36, 85). Kimball filed a response. (*Clerk's Record*, Vol. I, p. 85).

At the March 6, 2008 hearing, counsel for Kimball made the following representation and stipulation in open court: "The first issue is that no notice was required to be given on a postponed sale. I think we can argue that one today." (*Transcript March 6, 2008 hearing*, p. 5, ll. 13-16). "As I indicated on the issue of the notice, frankly, it doesn't matter. It [sic] 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." (*Transcript March 6, 2008 hearing*, p. 8, ll. 20-25, p. 9, l. 1).

Clarifying counsel's position, the district court and counsel had the following colloquy: "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 continuation given verbally at the first sale is sufficient, does that resolve the case? MR. JOHNSON: Yes. THE COURT: So can we hear that issue today? MR. MANWARING: Yes. MR. JOHNSON: Right." (*Transcript March 6, 2008 hearing*, p. 10, ll. 20-25, p. 11, ll. 1-3).

After considering the arguments of counsel at the March 6, 2008 hearing on Black Diamond's motion, the court granted summary judgment to Black Diamond. (*Clerk's Record*, Vol. I, pp. 62, 85); (*Transcript March 6, 2008 hearing*, pp. 17-20).

On March 12, 2008 Kimball filed a motion for reconsideration of the summary judgment. (*Clerk's Record*, Vol. I, pp. 85). The district court entered on May 15, 2008 its order granting Kimball's motion for reconsideration. (*Clerk's Record*, Vol. I, pp. 101-103).

Black Diamond filed on June 4, 2008 its motion to reconsider. (*Supplemental Clerk's Record*, Vol. I, pp. 11-12). Black Diamond filed on August 25, 2008 its second motion for partial summary judgment. (*Supplemental Clerk's Record*, Vol. I, pp. 30-32). Kimball responded in opposition to both motions. (*Supplemental Clerk's Record*, Vol. I, pp. 78-80).

On October 24, 2008 the district court entered its order granting Black Diamond's motion to reconsider and motion for partial summary judgment. (*Supplemental Clerk's Record*, Vol. I, p. 167). Subsequently, Black Diamond moved for summary judgment on Kimball's remaining claim of unjust enrichment and on January 15, 2009 the district court entered its order granting that motion. (*Supplemental Clerk's Record*, Vol. I, p. 180). Judgment was entered January 24, 2009. (*Supplemental Clerk's Record*, Vol. I, p. 182).

Kimball timely filed her third amended notice of appeal. (*Supplemental Clerk's Record*, Vol. I, p. 199).

Black Diamond has not filed a cross-appeal.

At no time before the district court did Kimball file a complaint or assert a claim against Fremont Investment.

ISSUES PRESENTED ON APPEAL

Black Diamond restates the issues on appeal as follows.

1. Did the district court correctly determine as a matter of law that the trustee followed statutory requirements in conducting the nonjudicial foreclosure?
2. Did the district court correctly conclude as a matter of law that Black Diamond was a good faith purchaser for value?
3. Is Black Diamond entitled to an award of costs and reasonable attorney fees on appeal?

ARGUMENT

STANDARD OF REVIEW

The Supreme Court reviews a district court's decision on summary judgment using the same standard as that properly employed by the trial court when originally ruling on the motion. Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Zollinger v. Carrol, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002)(citations omitted).

A. The District Court correctly determined as a matter of law that the trustee followed statutory requirements in conducting the nonjudicial foreclosure.

Kimball contends Idaho's statutory framework for nonjudicial foreclosure of a deed of trust requires the trustee to give the debtor actual notice of a postponed trustee's sale. Construing the applicable statute, the district court determined actual notice of the postponed sale was not required.

Kimball's sole allegation of defect in the foreclosure process is the lack of actual notice to her of the date and time of the postponed trustee's sale rescheduled for June 12.

The interpretation of a statute is a question of law over which the appellate court exercises free review. *State v. Thompson*, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004). When construing a statute, the focus of the Court is to determine and give effect to the intent of the Legislature. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). Judicial interpretation of a statute begins with an examination of the statute's literal words. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Where the language of a statute is plain and unambiguous, the Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). The language of the statute must be given its plain, obvious and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. Unless the result is palpably absurd, the Court assumes the Legislature meant what is clearly stated in the statute. *Rhode*, 133 Idaho at 462, 988 P.2d at 688.

Idaho Code § 45-1506(8), provides:

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

The Idaho Supreme Court in *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429 (2006) considered application of the notice provisions contained in the above statute. Noting the interplay between §§ 1506(8), 1506A, and 1506B, the court observed as follows.

If the foreclosure has proceeded in compliance with all requirements of subsections (2) through and including (6), of section 45-1506, Idaho Code, prior to the intervention of the stay, then at the time appointed for the original sale, the trustee shall announce the date and time of the rescheduled sale to be conducted at the place originally scheduled and no further or additional notice of any kind shall be required. So, if no bankruptcy is ever filed and no stay intervenes, postponement proceeds according to § 45-1506(8).

Appel, 143 Idaho at 46, 147 P.3d at 433.

Section 45-1506(8) is plain in its language and obvious in its meaning. When a sale is postponed, the trustee shall announce at the time appointed for the original sale the date and time of the rescheduled sale and “*no further or additional notice of any kind shall be required.*” I.C. 45-1506B(3)(emphasis added).

On May 29, 2009 at 11:00 a.m. – the date and time of the originally scheduled sale – the trustee’s crier announced postponement of the sale and gave the date and time of the rescheduled sale – June 12, 2009 at 11:00 a.m. Private investors interested in purchasing at the foreclosure sale gained their own personal knowledge of the date and time of the rescheduled sale and appeared on June 12 to bid at that sale.

In accordance with the requirements of Idaho Code, the trustee complied with all necessary notice in announcing the rescheduled sale. Kimball was not entitled to some further or additional notice of any kind.

Moreover, at the time of the summary judgment hearing on March 6, 2008, Kimball’s counsel stipulated and represented Kimball’s position as follows. “The first issue is that no notice was required to be given on a postponed sale. I think we can argue that one today.” (*Transcript March 6, 2008 hearing*, p. 5, ll. 13-16). “As I indicated on the issue of the notice, frankly, it doesn’t matter. It [sic] 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.”
(*Transcript March 6, 2008 hearing*, p. 8, ll. 20-25, p. 9, l. 1).

Clarifying counsel’s position, the district court and counsel had the following colloquy:
“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 continuation given verbally at the first sale is sufficient, does that resolve the case? MR. JOHNSON: Yes. THE COURT: So can we hear that issue today? MR. MANWARING: Yes. MR JOHNSON: Right.” (*Transcript March 6, 2008 hearing*, p. 10, ll. 20-25, p. 11, ll. 1-3).

“A stipulation between counsel entered upon the minutes of the court is generally deemed binding upon the parties.” *Savage Lateral Ditch Water Users Association v. Sand Hollow Ditch Co., Ltd*, 125 Idaho 237, 245, 869 P.2d 554, 562 (1993), *citing*, I.C. § 3-202(1); *Singleton v. Pichon*, 102 Idaho 588, 589, 635 P.2d 254, 255 (1981).

Counsel for Kimball directly stated that the district court’s interpretation of notice requirements under I.C. § 45-1506(8) controlled the outcome of the case. Consequently, counsel’s stipulation on the record in open court is binding and disposition of the action rested upon the district court’s construction of the applicable statute.

Kimball raises on appeal new arguments of law regarding due process requirements of the 14th Amendment to the U.S. Constitution and under the Idaho Constitution. Noteworthy in the transcript of the hearing on March 6, 2008 is the absence of any additional argument concerning constitutional due process requirements. Likewise, the transcript of the hearing on October 2, 2008 discloses Kimball made no arguments based upon a denial of due process under federal or state constitutions.

Failure to properly raise such an issue before the district court constitutes a waiver of the right to raise the issue on appeal. *Roell v. Boise City*, 134 Idaho 214, 216, 999 P.2d 251, 253 (2000).

The district court correctly determined that I.C. § 1506(8) and 1506B(3) did not require the trustee to give Kimball any further or additional notice of the postponed sale rescheduled for June 12, 2007.

B. The District Court correctly concluded as a matter of law that Black Diamond was a good faith purchaser.

Kimball's sole argument under this issue is that Black Diamond was aware of alleged defects in the foreclosure process prior to recording of the trustee's deed, thus preventing Black Diamond from being a bona fide purchaser for value. The only alleged defect Kimball has raised was the absence of actual notice to her of the postponed sale rescheduled for June 12, 2007. There is no dispute that at the time of the rescheduled sale on June 12, Black Diamond had no knowledge of any alleged defects in the foreclosure process.

As the district court observed, there was no dispute that proper notice of default was recorded and notice of the May 29, 2007 trustee's sale was served on Kimball by certified mail, recording, and posting. (*Clerk's Record*, Vol. I, p. 84).

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

The critical point for determining a purchaser's status of good faith is the time of the

purchase and not the recording of title.

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....

Further, one *who purchases property* with sufficient knowledge to put [them], or a reasonably prudent person, on inquiry is not a *bona fide* purchaser.

Imig v. McDonald, 77 Idaho 314, 318, 291 P.2d 852, 855 (1955) (citations omitted).

The undisputed facts noted in the district court's memorandum decision established that as of the date and time of the rescheduled sale on June 12, 2009 Black Diamond had no notice or knowledge of any alleged defects in the foreclosure process. (*Supplemental Clerk's Record*, Vol. II, p. 109-112, 161-163). Accordingly, Black Diamond in good faith purchased the property at the foreclosure sale.

Concerning the requirement of giving value, Kimball only tangentially mentions some disparity in value in Appellant's Brief (page 2 – asserting excess equity of \$136,000 without any factual support; and page 4 – suggesting a birthday gift sale to Black Diamond). The district court determined Black Diamond paid value for the property at the foreclosure sale.

Unquestionably, Black Diamond paid \$112,500 for the property at foreclosure. The principal amount of Kimball's note in January 2004 was \$104,800. Black Diamond's bid exceeded that amount by almost \$8,000. It is beyond cavil that Black Diamond gave valuable consideration for the property.

Accordingly, the district court correctly concluded Black Diamond was a good faith purchaser for value at the foreclosure sale.

C. Black Diamond is entitled to an award of costs and reasonable attorney fees on appeal.

In accordance with I.A.R. 41 and 35(b)(5) and Idaho Code § 12-120, Black Diamond requests on appeal an award of its costs and reasonable attorney fees.

In its amended verified complaint, Black Diamond requested attorney fees and costs in accordance with I.C. § 12-120. (*Clerk's Record*, Vol. I, p. 11). Section 12-120(3) allows an award of attorney fees and costs in any commercial transaction.

A commercial transaction is any transaction “except transactions for personal or household purposes.” *Blimka v. My Web Wholesaler, L.L.C.*, 143 Idaho 723, 729, 152 P.2d 594, 600 (2007). A challenge to the validity of a trustee’s sale has been considered a commercial transaction. *Taylor v. Just*, 138 Idaho 137, 59 P.3d 308 (2002)

Based upon the nature of the underlying commercial transaction, Black Diamond is entitled on appeal to an award of its costs and reasonable attorney fees.

Additionally, in accordance with I.C. § 12-121, Black Diamond is entitled on appeal to an award of its costs and reasonable attorney fees. Under Section 12-121, attorney fees are awarded to the prevailing party only if “the Court determines that the action was brought or pursued frivolously, unreasonably or without foundation.” *Baker v. Sullivan*, 132 Idaho 746, 751, 979 P.2d 619, 624 (1999).

Explained in further detail, the Idaho Supreme Court has said that “[a]ttorney fees are awardable if an appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence.” *Anderson v. Larsen*, 136 Idaho 402, 408, 34 P.3d 1085, 1019 (2001). An award of attorney fees under section 12-121 is also appropriate where the law is well-settled and the appellant has made no substantial showing trial court misapplied law. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 377, 973 P.2d 142, 148 (1999).

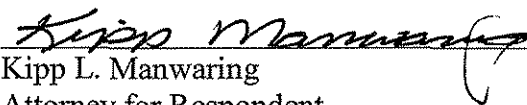
Kimball's appeal is without foundation. Kimball's arguments are on legal issues, which were well-settled and Kimball has not made a substantial showing that the district court misapplied the law. The issues raised presented no new questions of law.

Black Diamond is entitled on appeal to an award of its costs and reasonable attorney fees.

CONCLUSION

The district court's summary judgment granting Black Diamond possession of and ejecting Kimball from the subject property should be affirmed.

Dated this 22 day of June 2009.


Kipp L. Manwaring
Attorney for Respondent

CERTIFICATE OF MAILING

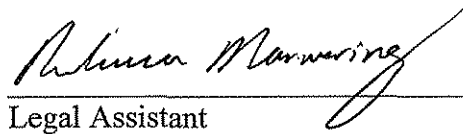
I HEREBY CERTIFY that on the 22 day of June 2009, a true and correct copy of the foregoing document was served upon the person or persons named below in the manner indicated.

DOCUMENT SERVED:

RESPONDENT'S BRIEF

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ELECTRONICALLY DELIVERED



Legal Assistant