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Black Diamond Alliance, LLC v. Kimball Appellant's Reply 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 REPLY BRIEF

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

Honorable Gregory S. Anderson, District Judge

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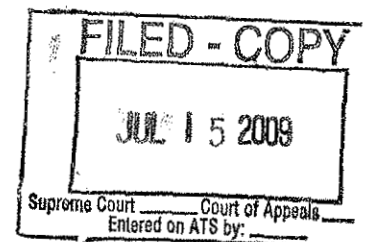


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David A. Johnson, on behalf of the Defendant/Appellant, Sherry Kimball (Kimball) hereby replies to the Respondent's Brief filed by Plaintiff/Respondent, Black Diamond Alliance, LLC (Black Diamond) as follows:

INCORRECT STATEMENT OF FACT

In light of its significance to the outcome of this case, Kimball finds it necessary to correct Black Diamond's assertion that Fremont agreed only to "postpone" the trustee's sale. (Resp't Br. 2). The record cited (R. 84) by Black Diamond does not support this statement. The Affidavit of Sherry Kimball ¶ 4 filed 2-18-2008 (treated by the District Court Clerk for the Record as an Exhibit. R. p. 104.) specifically states that she was told by Fremont that the sale was cancelled. In a summary judgment proceeding, the Court must liberally construe facts in the existing record in favor of the non-moving party, and draw all reasonable inferences from the record in favor of the non-moving party. *Lochsa Falls, L.L.C. v. State* 147 Idaho 232, 207 P.3d 963, (2009). The citation referenced by Black Diamond on the record, a memorandum decision by the District Court stated: "On May 29, 2007 Kimball allegedly telephoned Fremont and arranged to make a partial payment of \$3,000 on the past due balance in exchange for *cancellation* of the trustee's sale on the property. Kimball agreed to pay the remainder of the past due amount by June 18, 2007." (R. p. 84). (emphasis added)

ARGUMENT

- 1. The District Court erred in concluding sufficient notice was given to Kimball of the subsequent sale.**

In its response, Black Diamond attempts to reform the issue and incorrectly states that “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.” (Resp’t Br. 6). This misstates Kimball’s position and argument. As advocated in her Appellant’s Brief, Kimball is not challenging the constitutionality of the statutes related to non-judicial foreclosure. Rather, Kimball is challenging the interpretation of this statute by Black Diamond which was accepted by the trial court in such a manner that is both against the statutory intent and in a manner that would violate constitutional due process requirements.

While advocating that Idaho Code § 45-1506(8) is controlling and to the exclusion of all other requirements, including notice to the debtor, Black Diamond references Idaho Code § 45-1506B(3) for the proposition that no further notice is required. (Resp’t Br. 8). In making this argument, Black Diamond takes a position opposite to what it argued before the trial court, wherein it argued that Idaho Code § 45-1506(B) should not be applied to the facts of this case. (R. pp. 54-55.) This flip-flop in Black Diamond’s legal position should be rejected by this Court. Idaho Code § 45-1506B(3) is relevant only when a bankruptcy stay has been put in place and the stay is lifted prior to the original sales date, the requirements of Idaho Code § 45-1506(2-6) have been met, and if the trustee receives a written request for postponement. Then the postponement could be made by announcement at the original trustee’s sale, date and time. In this case, there was no stay entered nor was there any written request for postponement. By itself, Idaho Code § 45-1506(8) does not support the lack of notice to a debtor.

Black Diamond was repetitive in its assertion that a stipulation was made, that this was a “postponement” not a “cancellation.” (Resp’t Br. 4, 8, 9) The relevant facts that apply to the this

issue and summary judgment are: (1) Kimball was told by Fremont that the sale was cancelled; (2) Kimball paid \$3,000.00 to Fremont to buy time, until June 18, 2007, to come up with the money to pay off the mortgage; (3) the trustee instructed the title company to reset the sale to June 12, 2007 without any notice to Kimball or without her knowing of the new sale date; and (4) Fremont sent Kimball a check for \$3,000.00 after the trustee's sale.

Kimball stands by the proposition that if a declaration made at the time and date of the original sale rescheduling the trustee's sale for the June 12, 2007 was sufficient notice to Kimball under the circumstances of this case, Kimball's ability to challenge is lost. However, for the reasons and authority stated in the Appellant's Brief, which were not responded to by Black Diamond in its brief, the circumstances of this case dictate that notice should have been given to Kimball.

2. Black Diamond falsely states that due process arguments were not raised below.

Black Diamond asserts that Kimball is raising new issues on appeal by referencing the U.S. and Idaho Constitutions related to due process. Black Diamond specifically references the March 6, 2008 transcript and apparently asserts that a verbal argument must be raised to preserve the appeal, but provides no authority for such proposition. (Resp't Br. p. 9). Again, Black Diamond errs in its reasoning. The record herein contains several citations in which the issues of due process and statutory construction are asserted. In particular, this Court is directed to pages 47-50 of the Record which discusses the non-judicial foreclosure statutory scheme. Some of the specific arguments include:

1. "This provision requires compliance with the Notice and Affidavit provisions for even a postponed sale. This certainly makes sense, particularly in light of due

process requirements which would be in place before the deprivation of property.”

(R. p. 48)

2. “Failure to provide notice deprives the debtor reasonable opportunities to protect their interest and to litigate their loss.” (R p. 50)
3. “It is incumbent upon a court to give the statute an interpretation that will not in effect nullify it.” *Magnuson v. Idaho State Tax Commission*, Idaho 17, 556 P.2d 1197, 1176 (1997). (R. p. 50)

In addition Kimball asserted as her second affirmative defense in her Answer that the foreclosure sale was not conducted in accordance to Idaho Law. (R. p. 49). This Court should reject Black Diamond’s argument in this regard.

3. Black Diamond was not a Good Faith Purchaser.

Interestingly, Black Diamond does not address the substantial case law and points raised by Kimball in her Appellant’s Brief. Rather, Black Diamond asserts that a good faith purchaser is determined at the time of being the successful bidder (Resp’t Br. pp.10-11). This is not the law in Idaho. Black Diamond cites *Sun Valley Land and Minerals, Inc. v. Burt* 123 Idaho 862, 853 P.2d 607, (Idaho App.,1993) and the 1955 case of *Imig v. McDonald*, 77 Idaho 314, 291 P.2d. 852, (1955) for the proposition that the “critical time” for determining bona fide purchaser status is at the time of purchase, not the time of recording. (Resp’t Br. p.10)

Black Diamond cited the following portion of the *Sun Valley Land* case as follows: “The theory behind the rule is to protect innocent purchasers and to allow them to obtain and convey unsullied interests.” (Resp’t Br. p.10). In candor to the Court, the next sentence was not, but should have been included: “Generally, a person must take property through a “conveyance” in order to be afforded the protective status of a bona fide purchaser.” The Idaho Supreme Court

goes on to state that a purchaser must record their interest in good faith to be provided protection against other's claims. 123 Idaho at 866, 853 P.2d at 611. This shows that the time of conveyance and recording are relevant to the issue of whether a person qualifies as a bona fide purchaser.

Black Diamond's position is also in conflict with *Taylor v. Just*, 130 Idaho 137, 59 P.3d 308 (2008). Although cited by Kimball and is directly on point, Black Diamond fails to discuss or distinguish the same. This is particularly puzzling in that the *Taylor v. Just* case involved the same law firm who acted as trustee in this case and is also acting as counsel for Black Diamond herein. In *Taylor v. Just*, the Idaho Supreme Court found that "The doctrine of good faith purchaser for value is available to protect title obtained, not to acquire title." *Taylor v. Just*, 130 Idaho 137, 142, 59 P.3d 308, 313 (2008). Black Diamond's silence on this case is a tacit admission on their part that *Taylor v. Just* is on point and controlling.

4. Attorney Fees are not appropriate on Appeal.

First, Kimball is optimistic that she will be the prevailing party and if so, attorney fees cannot be awarded to Black Diamond. If Kimball does not prevail on this appeal attorney fees are still not merited. This was not a commercial transaction nor was this appeal pursued frivolously.

The term "commercial transaction" is defined to mean all transactions except transactions for personal household purposes. I.C. § 12-120(3). As the trial court below declined to do, this court should also find that there is no commercial transaction herein. There was no contractual privity between the parties (i.e, no transaction) nor was the property commercial in nature. *Grover v. Wadsworth*, 147 Idaho 60, 205 P.3d 1196, 1201 (2009).

Idaho Code § 12-121 is not applicable. Even where a losing party brings an appeal in good faith or raises a genuine issue of law, attorney fees are not available under I.C. § 12-121. *Edwards v. Edwards*, 122 Idaho 963, 970, 842 P.2d 299, 306 (Ct.App.1992). *Higley v. Woodard*, 124 Idaho 531, 537, 861 P.2d 101, 107 (Idaho App.,1993). Contrary to Black Diamond's arguments, there are no clear set of laws to control the circumstances of this case. As noted by the Trial Court struggles in reaching a decision: First granting summary judgment, then granting a motion to reconsider and then reentering summary judgment, this is indicative of the difficulties encountered in the law.

CONCLUSION

The safeguards the legislature put in place for non-judicial foreclosure was for reasonable protection of the individual property rights in real estate while recognizing the need to allow creditors to enforce the contract entered. In doing so, the legislature intended to provide due process requirements to allow persons notice and opportunity to preserve these property rights.

This Court should not condone a beneficiary or trustee to be arbitrarily handle the circumstances and procedures of this case. Reasonable notice could and should have been given to Kimball. Further, a trustee should not be able to arbitrarily choose who is a good faith purchaser such as rejecting the successful bidder in *Taylor v. Just, supra* and then to convey title in this case, with both Black Diamond and the trustee having prior knowledge of the defect.

July 14, 2009.



David A. Johnson
Attorney for Appellant

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 July 14, 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

Method of Service

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