7-21-2011

Indian Springs L.L.C. v. Andersen Appellant's Brief Dckt. 38369

Terry and Rosanna Andersen, Pro Se
775 Yellowstone, PMB 121, Pocatello, ID 83201
Telephone (208) 233-1020
FAX (208) 233-1020

IN THE IDAHO STATE SUPREME COURT

July 20, 2011

INDIAN SPRINGS LLC, an Idaho Limited Liability Company, Plaintiffs-Counterdefendants-Respondents and THOMAS M. HENESH, an Individual, Counterdefendant-Respondent vs. TERRY ANDERSEN and ROSANNA ANDERSEN, Husband and Wife; EVERETT and MARGIE ELLS, Husband and Wife; and any and all individuals claiming any possessory interest by or through him, Plaintiffs/Counterclaimants - Appellants	**SUPREME COURT NO.** **38369-2010**

APPELLANT'S BRIEF

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT AND NATURE OF THE CASE

This case began as a Complaint for Eviction, filed March 3, 2009, concurrent with an appeal of an action in foreclosure. The foreclosure was on the real property known as Indian Springs Resort, near American Falls, ID. Located on a parcel of land held as "private property" is a 3-bedroom double-wide trailer home purchased personally by the Defendants/Appellants on or about April 24, 1996. Defendants/Appellants have always held the title since that time in some manner. The home has never been taxed as a permanent structure, and the title is issued by the Department of Motor Vehicles. There are certain requirements to make the home permanent that were never met. The foreclosure was based on a legal description that encapsulated the parcel where the home sits. That parcel was always held and taxed separate from the rest of the resort. It is believed to have been included in error by the same attorney who created the confusion of title. There are conflicting claims on the number of acres included. The Defendants/Appellants were in a dilema. The home was not in compliance to be a permanent structure, and could not meet the code to be moved because the Plaintiff/Defendent had cut off the power and water. The court, when so informed, abused its discretion by ruling that the home was a permanent fixture — rather than ordering the requirements be met so that the home could be moved. No allowance was made for financial consideration to the Defendants/Appellants.

The Complaint for Eviction was errantly filed under Idaho Code § 6-310. An Answer and Counterclaim was filed by Defendants/Appellants Terry and Rosanna Andersen, husband and wife, (hereafter, "Andersens") challenging the Eviction on the basis that IC § 6-310 did not apply because there was NO tenant - landlord relationship. Said Counterclaim was in the amount of $1,920,847.00. At a hearing on December 10, 2009, the court further abused its discretion, and showed prejudice by

giving legal counsel from the bench to the Plaintiff's attorney, Mr. Erickson — giving detailed instructions on changing "Eviction" to "Ejectment." The court further abused its discretion by declaring that the trailer home was a permanent structure, in spite of the tax, all other records and the Defendants/Appellants claims that it is a mobile home.

The home on privately held and taxed property, was purchased prior to the purchase of the resort. It was sold and taxed as a separate property for over 30 years. Andersens were able to mortgage the home. They could mortgage the home because they clearly held title, BUT they could not get a new mortgage on the resort because the Title was corrupt from the beginning. The Bankruptcy Court granted possession of the home to the Ells/Andersens when the Trustee moved to abandon the property as burdensome. He could not sell the resort because of the convoluted Title. It would appear that the home would properly be classified as personal property belonging to the Ells/Andersens. However, the lower ruled that the home was a permanent structure, and granted possession to the Plaintiff/Respondent with no consideration to the Defendants/Appellants.

Andersens appeal the rulings of the lower court on the basis of several factors which have been unresolved in the lower. As stated in the Notice of Appeal,

> "Did the court err in dismissing Appellants' claims for unjust enrichment where the Respondent purchased the subject property in 2008 and Appellants' unjust enrichment claim pertained in part to benefits Appllants alleged they conferred on the subject property through 2009?"

THE COURSE OF THE PROCEEDINGS AND ITS DISPOSITION

The Complaint for Eviction under Idaho Code §6-310 was filed on March 3, 2009. Defendants Everett and Margie Ells (hereafter, "Ells") filed a Defendants Answer & Counterclaim, dated March 31, 2009. After listing several items of complaint against the Plaintiff, Mr. and Mrs. Ells asked the court to wait until the Supreme Court of Idaho had made its decision on the appeal (Supreme Court No. 34623) of the foreclosure. The appeal was scheduled for Oral Argument on May 9, 2009.

Concurrently, Andersens filed a Motion to Dismiss, and a Defendants Answer and Counterclaim on March 31, 2009. On April 8, 2009, Andersens filed an Amendment to Defendants Answer and Counterclaim. On April 9, 2009, a hearing was held by Judge Peter D. McDermott. Judge McDermott ordered that the case should be continued until the Supreme Court had made its decision on the appeal. He was of the opinion that: "matters would become more complicated and more difficult to unravel if the trial were to proceed prior to the Supreme Courts decision, particularly if the Defendants prevailed."

On October 8, 2009, a hearing was held with Judge Stephen S. Dunn presiding.

> It is of concern that Judge Dunn was assigned to this case, inasmuch as he was the Mediator in a Bannock County case involving the Plaintiff Henesh vs. the McKinneys over personal property at Indian Springs. Andersens intervened in that case, and made clear that a large part of the personalty in question never belonged to Thornhill-Henesh, but to the Andersens, and was valued at $88,000. Andersens vacated claim on personalty sold with the resort, but not their own. However, that court allowed the other parties to continue their claims over Andersens' property. Mediator / Judge Dunn clarified that the Andersnes could pursue their claims in other actions, then refused to consider those claims in the current case.

At the October 8th hearing, Judge Dunn ordered that Andersens provide authority on the position that the mobile home could not be legally moved because the manufacture preceeded 1978. Additionally, Andersens were to provide evidence confirming the titled ownership of the home, and authority as to whether the home was a fixture on the property. The Plaintiff was ordered to provide authority on the fixture question as well, and to respond to the assertions that the Complaint was defective because it was not authorized. A hearing was set for November 12, 2009.

On October 14, 2009, Andersens and Ells unitedly filed an Amended Motion to Dismiss Complaint for eviction and Notice of Hearing. The amended motion stated that the Complaint for Eviction fails to comply with Idaho Code (I.C.) § 6-318 and that I.C. § 6-310 did not apply because the size of the land was greater than 5 acres. The Amended Motion was accompanied by an Engineer's report and affidavit that the size of the parcel was greater than 5 acres.

On October 19, 2009, Plaintiff filed an Amended Complaint for Eviction under Idaho Code I.C. § 6-310! The Amended Complaint requested the court to order the "immediate removal of the mobile home residences and possession of the property." Additionally, the Plaintiff/Respondent had filed the Amended Complaint **without asking the court's permission.** Subsequently, the Plaintiff/Respondent filed a Motion for Leave to Amend Pleadings, dated November 2, 2009. Whereupon, the Andersens and Ells filed an Objection to Motion for Leave to Amend Pleadings, Motion to Strike Amended Complaint for Eviction, AND: Motion for Enlargement of Time on November 6, 2009. This document was accompanied by a Motion for Order to Shorten Time for the Objection & Motions to be heard at the November 12th hearing date.

At the hearing on November 12, 2009, the Plaintiff's Amended Complaint contained 15 pages of another client's documents within the exhibits which, of course, did not pertain to the case. Judge

Dunn ordered the errant pages to be removed from the Amended Complaint, and also ordered the Andersens to provide documentation as to the title of the home, and documentation as to whether the home is a fixture to the real property. A hearing was scheduled for December 10, 2009 for all matters pending before the court.

On November 20, 2009, Andersens and Ells filed an Amended Motion to Dismiss the Amended Complaint for Eviction. Within that Motion, they once again stressed the inappropriateness of I.C. § 6-310. The Motion was accompanied by an Affidavit of Margie B. Ells wherein she affirmed that the Title is for W. Everett Ells OR Margie B. Ells, OR Andersen, Terry W. or Rosanna. The Affidavit also avows that Taxes have always been SEPERATELY LEVIED on the Mobile Home, and that property taxes were paid in part by Terry and Rosanna Andersen. The Affidavit had exhibits including a copy of the Title, and several Tax receipts showing that taxes on the mobile home were seperately levied at all times. Further, the parcel of land that the home sits on is caught within the outer perimeters shown on the faulty legal description.

At the hearing on December 10th, Judge Dunn gave legal advice to the Plaintiff's Attorney from the bench concerning I.C. § 6-310, and instructed Attorney Erickson to give oral motion to change the complaint to one of Ejectment. He then proceeded to accept the premise that the mobile home was a fixture, and ordered the Andersens to remove their personal belongings from the home and storage building within 120 days. The personalty and other issues of the Counterclaim were ignored, and sidestepped. The Andersens OBJECTED to these proceedings, but to no avail.

The case continued at a hearing on March 11, 2010 for a Motion for a Rule 54(b) Certificate submitted by the Defendants/Appellants. A Certificate under IRCP 54(b) would produce a final judgment, and allow the Defendants to appeal. The Motion was denied, and the order was made for

Andersens to remove the personal property from the home by April 15, 2010, or lose it. On April 8, Andersens moved the court for enlargement of time to remove personal items while Rosanna Andersen was incapacited from an assault and battery inflicted on her by Plaintiff Tom Henesh on May 15, 2009, when the forclosure was still on appeal and Mr. Henesh was in violation of his agreement to stay off the "home property" until the appeal was complete. The judge allowed the extension of time to June 15, 2010.

On May 24, 2010, Andersens filed a Motion for Reconsideration, and a hearing was scheduled for June 10, 2010. The Motion entered new evidence into the court which included a statement by Merritt Thornhill, selling the home to the Andersens **separate from the property.** Other documents were submitted as exhibits to show that there were gross errors in the sale of the real property, and that there was cause to leave the mobile home as is until all issues could be concluded.

At the hearing on June 10, 2010, Andersens represented themselves, and Attorney Norman Reese represented the Ells. The court agreed to reconsider the matter of whether the mobile home was real or personal property. Because of the slow recovery on Rosanna Andersen's wrist and hand, the Andersens asked that the Court give them additional time to remove their personal property. The Court ordered and granted the additional time, and allowed the Defendants to keep their personal property in the mobile home and the related shed until the matter was scheduled for final hearing. At this same hearing, the Defendants asserted that the Plaintiff(s) who was the Assignee assumed **the rights and liabilities** of the Assignor, Merritt D. Thornhill and Indian Springs Natatorium, Inc. Judge Dunn changed the meaning of the Defendants assertion in the Minute Entry and Order — using the wording:

"First, the Defendants assert, in the Amended Counterclaim, that

> Indian Springs LLC, which is the Plaintiff in this case has legal responsibility for actions taken by its predecessors and can be sued for Defendants claims on the personal property issues as the successor in interest to various other parties....."

By changing the wording, Judge Dunn changed the meaning and intent of the Case Law that was quoted to support the premise. The Case Law refers to the Assignee — NOT the Predecessor, and the Assignor — NOT the successor in interest. It will be shown that the Plaintiff / Respondent in this case only purchased the Mortgage and Note in order to acquire his interests. The hearing was ended with an order that the matters were scheduled for November 12, 2010 to be addressed by the court. These matters included orders that the Defendants were to have 30 days to submit authority and briefing on the issue of the liabilities of the Plaintiff. The Plaintiff was given 30 days to respond to that sumission. The Defendants were also given 90 days to submit evidence of the claim for personal property losses / damages. Andersens

On July 8, 2010, Attorney Norman G. Reece, Jr., representing the Defendants, submitted an Answer to Verified Amended Complaint for Eviction and Counterclaim. The document included a long list of personal property and a list of 19 Defenses. Among those defenses listed is a Defense of "Failure to Serve Notice of Default." It should be pointed out that during the foreclosure action, the Plaintiff then used a Notice of Default to substantiate his claim which was authored before he assumed the Mortgage and Note from the Assignor, Merritt D. Thornhill. These Defendants / Appellants / Counterclaimants now raise the question: **How can the court rule that the Plaintiff (Assignee) did not acquire the rights and liabilities of the Assignor when, in fact, he utilized the Notice of Default previously entered by the Assignor to fortify his Complaint for Foreclosure?** The Document also made claims of Unjust Enrichment, based on the valuable

improvements that the Andersens made on the Real Property to which there was never clear Title.

The Plaintiffs, by and through their attorney, Lane V. Erickson, filed a Motion to Dismiss on August 9, 2010, and then on September 29, submitted the Plaintiff's Objection to Defendants' Motion to Amend.

On November 2, 2010, Judge Dunn filed his Memorandum Decision and Order RE: Plaintiff's Motion to Dismiss and Defendants' Motion to Amend. The judge granted the Plaintiff's Motion to Dismiss, in part, and Denied Defendants' Motion to Amend. The Order required the Defendants to remove their peronal property on or before November 30, 2010 under the condition that had been previously set, in that the Attorney for the Plaintiff or some other person was to be on hand to videotape the personal property as it was removed, and that the Plaintiff, Henesh, was NOT to be present for the removal. Because of heavy snows during the end of November, and baracades that the Plaintiff/Respondent put up preventing access, the Defendants filed a Motion for Enlargement of Time and removal of baracades in order to remove their possessions. The judge granted the Motion, and the Plaintiff's counsel was to give written notice as to when the snow and equipment blocking access to the home was removed. Within 7 days of such letter, the Defendants were required to remove their personal property. Plaintiff/Respondent's Attorney issued a letter stating Defendants/Appellants had to remove their household goods in that time, but cut the window of time by several days for his convenience. He further stated "anything not removed in that time frame would be considered abandoned."

On December 9, 2010, the court issued its final judgment, and a Notice of Appeal was filed on the same day.

Further prejudice and abuse of discretion appears on the Minute Entry and Order filed on

December 15, 2010. This Minute Entry and Order reviewed the hearing on December 9, 2010. Previously, the only conditions for removal was that the Plaintiff's counsel was to be on the site when removal of personal items took place. Andersens received a call from their attorney on December 9, 2010 that they should prepare their possessions for removal.

On December 10, the Andersens were at the home boxing up their personal and household belongings in preparation for a pre-arranged move on December 15. They were surprised by a visit from the Sheriff's Deputy, saying that they were reported (by Henesh) as trespassing. The Andersens responded by saying that the court had ordered them to remove their personal property. The Deputy then returned to verify with the Clerk of the Court, and received instructions from the Prosecuting attorney to issue a citation for Trespass. Interestingly, the first time that the Andersens or their Attorney saw the aforementioned Minute Entry and Order was on December 15 AFTER the Trespass charge. The language in the Minute Entry and Order were changed from any previous conditions that had been established by the court. In the Minute Entry, it states for the very first time: "Andersens and Mahoney shall not enter the premises at any time without compliance with this order and are not to be on the premises without Mr. Erickson or his representative present." On December 15, the Andersens were given specific authority to be on the premises to finish packing. Upon arrival at the home, a deputy delivered a Trespass Citation dated December 10th. Mr. Erickson was present, and the Andersens went into the house to pack. They requested their attorney, Norman G. Reece to be present as Erickson insisted on coming into the house to videotape their belongings before removal, which was NOT as understood. Before Mr. Reece arrived, the Bailiff and the Clerk of the Court arrived and gave Andersens a Minute Entry and Order, dated December 15, 2009, apparently signed by Judge Dunn. The Order had been seen by neither Andersens nor their attorney, and apparently

At the October 8th hearing, Judge Dunn ordered that Andersens provide authority on the position that the mobile home could not be legally moved because the manufacture preceeded 1978. Additionally, Andersens were to provide evidence confirming the titled ownership of the home, and authority as to whether the home was a fixture on the property. The Plaintiff was ordered to provide authority on the fixture question as well, and to respond to the assertions that the Complaint was defective because it was not authorized. A hearing was set for November 12, 2009.

On October 14, 2009, Andersens and Ells unitedly filed an Amended Motion to Dismiss Complaint for eviction and Notice of Hearing. The amended motion stated that the Complaint for Eviction fails to comply with Idaho Code (I.C.) § 6-318 and that I.C. § 6-310 did not apply because the size of the land was greater than 5 acres. The Amended Motion was accompanied by an Engineer's report and affidavit that the size of the parcel was greater than 5 acres.

On October 19, 2009, Plaintiff filed an Amended Complaint for Eviction under Idaho Code I.C. § 6-310! The Amended Complaint requested the court to order the "immediate removal of the mobile home residences and possession of the property." Additionally, the Plaintiff/Respondent had filed the Amended Complaint **without asking the court's permission.** Subsequently, the Plaintiff/Respondent filed a Motion for Leave to Amend Pleadings, dated November 2, 2009. Whereupon, the Andersens and Ells filed an Objection to Motion for Leave to Amend Pleadings, Motion to Strike Amended Complaint for Eviction, AND: Motion for Enlargement of Time on November 6, 2009. This document was accompanied by a Motion for Order to Shorten Time for the Objection & Motions to be heard at the November 12th hearing date.

At the hearing on November 12, 2009, the Plaintiff's Amended Complaint contained 15 pages of another client's documents within the exhibits which, of course, did not pertain to the case. Judge

stemmed from a hearing on December 9 on two cases involving Mahoney vs. Henesh. Andersens were NOT present at the hearing nor represented.

Given the short time allowed, even with a moving crew, it was impossible to remove all the possessions. The house had become mouse infested, the garage window was broken, and everything was weathered, dusty, and coated with bird droppings. The storage unit had been rifled, and furniture broken, or rendered unusable. Andersens were only able to fill their car and the largest moving van they could obtain within the allotted time, leaving much behind. When Mr. Reece asked for an extension of time, the judge only gave one extra hour, which was totally inadequate.

The case for Trespass (Power County CR 2010-001704), without basis in law or fact, was eventually dismissed, but only after Andersens demanded a jury trial. Subpoenas had been delivered to the Prosecuting Attorney, Randall Kline, the Plaintiff's Attorney, Lane V. Erickson, the Clerk of the Court, Linda Annen, the Sheriff, Jim Jeffries, and their own Attorney, Norman G. Reece. Subpoenas had also been prepared for Judge Dunn, the Court Bailiff, Deputy Ralphs, Tom Henesh, and Detective Max Sprague. Max Sprague was also deeply involved, aiding and abetting as an employee of the Plaintiff/Respondent. Andersens had unsuccessfully moved to dismiss, and were awaiting a list of the jury pool, when they received a Notice of Dismissal of the case from the prosecuting Attorney, Randall Kline stating it was "in the interest of justice."

STATEMENT OF THE FACTS

April 24, 1996 Terry and Rosanna Andersen purchased a mobile home in connection with the purchase of Indian Springs Swimming & RV Park by AICO Recreational Properties A&B LLC. The mobile home was then titled to The Terry W. Andersen and Rosanna Andersen Living Revocable Trust, Dated February 1, 1991.

July 1, 1996 to June, 2003 The Andersens purchased over $80,000 worth of personalty that was used in the management and operations of Indian Springs Resort, and put in over $650,000 of improvements on the property. With payments on a defective mortgage, property taxes, etc., the total damages were in the amount of $1,920,847.00, not including lost time and opportunity.

September 27, 2005 Merritt D. Thornhill and Indian Springs Natatorium, Inc. assign the Note and Mortgage to Indian Springs LLC / Tom & Penny Henesh.

October, 2005 Complaint and Summons for the Foreclosure by Indian Springs LLC and Tom Henesh.

December 20, 2008 Auction held to sell Indian Springs by Prime Time Auctions for and in behalf of Denice McKinney.

January 18, 2009 McKinneys unable to produce Title to the property, and the reclamation period ends.

March 3, 2009 Complaint for Eviction filed by Indian Springs LLC.

NOTE: Additional evidence pertaining to Standing is being submitted concurrently with this Brief. Included are notarized Documents transferring all interests of the Ells and all interests of the company known as Recreational Properties A&B LLC to the Andersens as individuals. This should clear any charges of no standing that the Plaintiff / Respondent may bring.

ATTORNEY FEES ON APPEAL

Though the Appellant is appealing the case to the Supreme Court Pro se, there exists certain, yet undetermined costs, consulting and attorney fees.

ISSUES PRESENTED ON APPEAL

The issues on appeal are based on Abuse of Discretion in the lower court as follows:

1. Did the court err in dismissing Appellants' claims for unjust enrichment where the Respondent purchased the subject property in 2008 and Appellants' unjust enrichment claim pertained in part to benefits Appllants alleged they conferred on the subject property through 2009?
   A. Does a Sheriff's Deed transfer Title?
   B. Are Assignor's rights and liabilities inherited by the Assignee?
   C. What improvements did the Andersens make on the property?
   D. When did the improvements and repairs alleged by the Andersens take place?
   E. Were the improvements made under the color of Title?
   F. What value do the improvements and repairs have?
   G. What benefits has the Assignee received from the improvements?
2. As mediator in the case of Henesh vs. McKinney, did Judge Dunn receive any information that applies to the Countercomplaint?
3. Did Judge Dunn have a preconceived agenda as it appears in the Transcript of the December 10, 2009 hearing?
4. Was there evidence overlooked in a review of the Notice of Default which has swayed the lower court to not be prejudice?

ARGUMENTS

Sheriff's Deed does not transfer title. Under recognized Title Insurance Codes, a Deed may be recorded, and notarized, but until a Title Insurance Company issues Title Insurance with respect of the property in question, there is no Title transferred. I.C. 41-508 defines Title Insurance.

> "**Title Insurance** is the certification or guarantee of title ownership, or insurance of owners of property or others having an interest therein or liens or encumbrances thereon, against loss by encumbrance, or defective titles, or ivalidity, or adverse claim to title." (I.C. 41-508)

If there is a lien or encumbrance on the property, or if there is a defective title or adverse claim to title, the Title Insurance protects owners of property against such encumbrances on the Title. A Deed, and in this case a Sheriff's Deed, does NOT gurarantee anyone of Title. Title Companies are in existence because of these hidden deficiencies in the transfer of real property. A Title Search is conducted by the Title Company.

> "**Title Search** is a search made through the records maintained in the public record office to determine the state of a title, including all liens, encumbrances, mortgages, future interests, etc., affecting the property, and is the means by which a chain of title is ascertained." (Barron's Law Dictionary, 1996)

Without Title Insurance, there can be no certainty that the Plaintiff/Respondent truly had the ability to foreclose. There is a possibility of several other parties who were not informed of the foreclosure and/or the opportunity to redeem the property.

> In *Northwestern & Pacific Hypo-the-e-bank v. Nord,* the court concurred with *Duff v. Randall,* 116 Cal. 226, 48 P. 66,
>
> > "A redemption when made is not from the mortgage but from the execution sale, and **a deed subsequently given by the sheriff passes no additional title**, but rather evidences that the purchaser's title has not been divested by redemption."

The Assignor's rights and liabilities are inherited by the Assignee. In *Martin v. Pioneer Title co. of Ada County* 1993 WL 381101 Idaho Dist. (Idaho Supreme Court Docket No. 96438) the Idaho Supreme Court cited *Mountain States Financial Resources Corp. v. Agrawal,* 777 F.Supp. 1550 (W.E.Okla.1991) and held that:

> The Court reasoned that the general principle that an assignee stands in the shoes of their assignor, and **acquires all of the assignor's rights and liabilities in the assignment.**

Indian Springs LLC was assigned the Note and Mortgage held by Assignor Merritt D. Thornhill on September 25, 2005. As assignee, by the Supreme Court's Opinion stated above, acquires the liabilities in the assignment. The Counterclaim filed by the Andersens addresses many improvements made to the property. The value of these improvements came to $651,000. The court abused its disgretion when Judge Dunn sidestepped this issue by stating that Assignor Thornhill was not in this case, and that any claims that the Defendants have against him are not passed on to the Assignee. It would appear that Idaho Code supports the opinion of the Supreme Court: For instance,

> "....an account debtor on an account, chattel paper or a payment intangible may discharge its obligation by paying the assignor until, but not after the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor." (I. C. 28-9-406)

Incommercial Transactions, Idaho Code states that:

> "With respect to a regulated consumer credit sale, an assignee of the rights of the seller is subject to all claims and defenses of the debtor against the seller arising from the sale of property or services." (I.C. 28-45-301)

Andersens made significant improvements on the property to correct environmental and public safety issues inherited from the assignor/assignee. In the Counterclaim noted in the foreclosure action, these improvements were notated, and a disclosure of these improvements were made available to the court in that action. Regardless of when they were presented, these claims still are valid claims against the Assignor / Assignee. NOTE: The Assignee has dismantled some of these improvements, possibly with the motive to negate such claims as the Andersens may have. A submission of these exhibits is being filed concurrently with the Supreme Court. The value of the improvements is $651,000, and are a part of the Counterclaim. Some of the deficiencies in the property were listed in the Answer filed March 31, 2009. See Supplementary Exhibits A & B.

Andersens made the improvements to the property during a period from July 2, 1996 to sometime in 2009. Some of the improvements included repair of damages caused directly by the Plaintiff/Respondent. These are noted in the Supplementary Exhibits A & B.

The improvements were made under the assumption that Title had properly passed. In *Bach v. Miller and Harris, et al,* 144 Idaho 142, 158 P.3d 305 — (ALSO Idaho Supreme Court Docket 31658, (2007) Opinion No. 57),

> "Idaho Code § 6-414 provides: Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the owner in possession of the same after the filing of an action as hereinafter provided, until the provisions of this act have been complied with; provided said occupant may elect, after filing of the action, to exercise his right to remove such improvements if it can be done without injury otherwise to such real estate. The Court held "Under IC § 6-414, an improver can recover if he can meet both prongs of a two-part test. *See Fouser v. Paige,* 101 Idaho 294, 297, 612 P.2d 137, 140 (1980) (citing *Smith v. Long,* 76 Idaho 265, 281 P.2d 483 (1955))." "First, the improvements must have been made under color of title, and second, they must have been made in good faith."
> In *White v. Mock* 140 Idaho 882, 104 P.3d 3561the Idaho Supreme Court held that:

"...the Real Property Purchaser was entitled to statutory damages under the Consumer Protection Act IC § 48-608(1) provides that "any person who purchases ..... goods ..... and thereby suffers any ascertainable loss .... as a result ..... of a method, act or practice declared unlawful by this act ..... may bring an action to recover actual damages or one thousand dollars ($1,000), whichever is greater." Having determined that the Defendants (Mocks) had engaged in an act or practice which was misleading, false, or deceptive to Plaintiff (White), in violation of the Idaho Consumer Protection Act, the jury was required to make an award of at least one thousand dollars to White."

"When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowes as a set-off against such damages." (I. C. 6-404)

I.C. 6-417 "COLOR OF TITLE – DEFINITION. For definition in this act, a person having color of title shalle include..... (b) a person who has occupied a tract of real estate if he, or those under whom he claims, have at any time during such occupancy with the knowledge or consent, express or implied, of the real owner made any valuable improvements thereon;"

By Idaho Code, and the case law quoted, Andersens have a perfect right to make their counterclaim for the improvements made on the property, and the court should have granted payment or other valuable consideration to the Andersens.

Assignee Indian Springs LLC and/or its manager of record, Tom Henesh, have benefited by the improvements made by the Andersens. Those benefits include, but are not limited to the continued operation of the recreational facilities of the property. For instance, if the Andersens had not corrected the electrical public safety issues, these improvements would have eventually been required by the Health Department or other people. One incidence is sufficient to explain the hazards that were once on the property. This occurred when a young girl received an electric shock when she attempted to turn on the water faucet at the family's campground. Legal suits

for damages have been diverted by these improvements. Additionally, overloads on the electrical system have been diverted due to the Andersens' improvements to the property. Also, several illegal sewage systems were corrected, providing additional benefits to the Assignee. These environmental hazard corrections are outlined in the exhibits found in the Clerk's Record, pg. 90 and 91.

Judge Stephen F. Dunn acted as Mediator in Henesh vs. McKinney. Andersens intervened in this case because the parties were litigating damages due Henesh over equipment that was part of the personalty present at Indian Springs. There were two lists of equipment concerned: those that had been purchased with the land in the initial purchase in 1996, and the equipment that Andersens subsequently purchased and were using on the property. The second list had items such as a truck and several trailers. There was also an ice cream machine, and an ice maker which were all in good repair. When Mediator Stephen F. Dunn confronted the Andersens, he made it clear that according to the documents, the personalty on the first list had been pledged as collateral against the balance of the mortgage that was payable to the Assignor / Assignee. Andersens were dismissed from the Mediation with the clear understanding that those items on the second list could be brought up for ajudication in other actions. It may be that Judge Dunn could not remember this issure when the Andersens brought up the Counterclaim in the present Eviction Case. Then again, it may be that the Judge had a different agenda than the Mediator.

In the December 10, 2009 hearing it appears that Judge Dunn had an agenda and was prejudiced against the Defendants/Appellants. In the Transcript on page 10, 11, 12, and 13, the Judge gave legal counsel to the Plaintiff's Attorney from the bench. It is the belief of the Andersens that this is not only unethical, but may be illegal. It appeared as though the judge had already done his research, and provided the Plaintiff with case law to pave the way to change by oral motion

(suggested by the judge) the wording from one of Eviction to that of Ejectment. This is highly suspect of partiality on the part of the court. Court judges are supposed to approach the courtroom with impartiality, and that was NOT the case with this hearing. On several occassions, Henesh refused to obey court orders which the court subsequently overlooked. It was clear from the Judge's post-hearing comments, that private case-related conversation had taken place between Plaintiff/Respondent's attorney and the judge excluding other parties in the case.

A Notice of Default had been entered previously by the Assignor Thornhill. This Notice of Default was issued prior to the close of the Bankruptcy, without lifting the stay. It was issued by the Assignor, Merritt D. Thornhill. On page 250 of the Clerk's Record, Fifth Defense, the court was advised that there was no Notice of Default. In the Supplemental Exhibits, the "Notice of Default" claimed by the Plaintiff/Respondent has been supplied for convenience. In the prior foreclosure case, the Notice of Default submitted as evidence was dated July 19, 2001— FOUR YEARS BEFORE THE PLAINTIFF WAS ASSIGNED HIS INTEREST. Why is this significant? Because the Plaintiff is claiming that he is NOT liable for the claims against his Assignor. Yet, in the Complaint for Foreclosure, this Notice of Default is assumed as this Plaintiff's Notice of Default. **If the Plaintiff on one hand can claim a Notice of Default from his Assignor as a right, then how can he refuse to honor the claims of these Defendants as to the charges in the Counterclaim?** ALSO, How can the lower court make a judgment that there is no liability on the part of the Assignee — Plaintiff/Respondent?

CONCLUSION

The lower court has abused its discretion on several matters which are pertinent and critical to the appeal. The lower has:

- Sidestepped the claim by the Andersens (Defendants / Appellants & Counterclaimants) that the Plaintiff / Respondent is liable for the improvements made prior to the Complaint for Eviction.
- Shown his prejudice by refusing the Counterclaim.
- Ignored the Color of Title under which the improvements were made by the Defendants / Appellants.
- May have been previously influenced by the mediation conducted by the judge in another trial wherein the Defendants / Appellants intervened.
- Given legal advice from the bench during the hearing on December 10, 2009.
- Changed conditions for the removal of personalty from the subject property with a Minute Entry and Order which produced a citation for Trespass *after the fact* upon the Defendants / Appellants.

Because of these partialities demonstrated by the lower, several hardships have been levied upon the Defendants (Andersens), including, but not limited to: storage costs; and the loss of time, money and reputation to remove a criminal complaint of Trespass.

Even in cases of Emminent Domain, there is consideration paid for property taken. In this case, the Andersens have not been paid for their home, their personal property, or for the damages sustained. When the McKinneys found they had no clear title to satisfy the auction of the land, they offered $75,000 to the Andersens to quit. It was totally inadequate.

THEREFORE, Defendants/Appellants & Counterclaimants request the court to remand this case back to the District Court with instructions to award the Andersens for their damages claimed in the Countercomplaint.

Respectfully submitted this 20th day of July, 2011

Terry Andersen Pro se

Rosanna Andersen Pro se

CERTIFICATE OF SERVICE

I hereby certify that on July 20th, 2011, I served two (2) true and correct copies via U. S. Mail, postage prepaid, of the foregoing to the following:

Lane V. Erickson (ISB#: 5979)
Racine, Olson, Nye, Budge & Bailey, Chartered
201 Center St.
POB 1391
Poacatello, ID 83204-1391

Terry Andersen