11-2-2011

Grazer v. Jones Respondent's Brief Dckt. 38852

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALLEN F. GRAZER, an individual,

Plaintiff-Appellant,

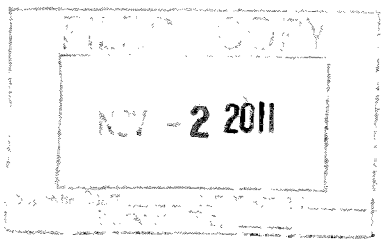
vs.

GORDON A. JONES, an individual; GORDON A. JONES, Personal Representative of THE ESTATE OF LINDA G. JONES, deceased; J&J LIVESTOCK, LLC, a Utah Limited Liability Company; and John Does 1-10,

Defendants-Respondents.

Supreme Court Docket No. 38852-2011

Franklin County District Court No. 2005-183



RESPONDENTS' BRIEF

Appeal from the District Court of the Sixth Judicial District for Franklin County Honorable David C. Nye, District Judge, Presiding

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

The Respondents obtained over 200 acres of real property in Franklin County Idaho in 2002. Respondent Gordon Jones operated a construction company doing business in both Idaho and Utah. In 2004, Respondent Gordon Jones commenced a lawsuit in Utah to collect from Appellant monies owed for the construction of a home.

In the subsequent Utah state court proceedings, a judgment was entered against Respondent Gordon Jones individually and in favor of Appellant. Prior to the entering of the judgment in Utah, the Respondents transferred away the above described real property to Respondent J&J Livestock, LLC.

Appellant filed the Utah state court judgment in the Idaho District Court of Franklin County as a foreign judgment pursuant to I.C. § 10-1110. This foreign judgment was also recorded in Franklin County to create a lien on the real property pursuant to I.C. § 10-1110. Thereafter, Appellant filed a lawsuit against the Respondents to undo the transfer of the real property alleging that the transfer was fraudulent.

The case was delayed for many reasons. During this time Respondent Linda Jones passed away, requiring her estate to become a party in these proceedings. Additionally, in 2010, District Judge David C. Nye dismissed Respondent Jason Jones from the litigation. More than five years after the foreign judgment was filed by the Appellant, and the Appellant filed its fraudulent conveyance case, the matter was scheduled for trial by Judge Nye. Judge Nye and the parties all agreed that none of the facts were in dispute and that the matter could be resolved by

jointly filed motions for summary judgment rather than by holding an evidentiary trial. The parties submitted their initial briefs, responses and replies, all of which Judge Nye took under advisement.

On April 1, 2011, Judge Nye issued his Decision on Motions for Summary Judgment concluding that Appellant's judgment and judgment lien had lapsed because the Appellant had failed to renew his judgment or judgment lien within 5 years as required by I.C. § 10-1111. Judge Nye also concluded that Appellant had failed to seek any writs within the time provided by Idaho law as required by I.C. §§ 11-101 and 105. As a result, Judge Nye entered his Decision on Motion for Summary Judgment and granted judgment in favor of Respondents and against the Appellant. The Appellant now appeals.

II. STATEMENT OF THE FACTS

On November 8, 2002, Respondents Gordon & Linda Jones received real property in Franklin County, Idaho by warranty deed consisting of an excess of 200 acres (hereafter the "Franklin Property"). The warranty deed was recorded on November 12, 2002, as Franklin County Recorder's Instrument No. 219428.[1]

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[1] R. at 331-32, paragraph 17.

Respondent Gordon Jones initiated litigation in Utah to collect from the Appellant monies Respondent Gordon Jones believed were due and owing for building Appellant a home. This case was designated as Utah state court, Davis County Case No. 020700570.[2]

Appellant countersued and on December 15, 2004, the Judge in the Utah case scheduled a trial in the matter for April 26-29, 2005.[3]

On December 22, 2004, Respondents transferred the Franklin Property by quitclaim deed to Respondent J&J Livestock, LLC. Said quitclaim deed was recorded on December 27, 2004, as Franklin County Recorder's Instrument No. 228503.[4] Respondent J&J Livestock, LLC was formed by Respondents in the state of Utah on December 28, 2004.[5] On March 7, 2005, Respondents also transferred water shares that are appurtenant to the Franklin Property to Respondents Linda Jones and Jason Jones.[6]

The Utah, Davis County case went to trial. Utah District Court Judge Michael G. Allphin dismissed the claims brought by Respondent Gordon Jones and on April 29, 2005, declared his intention to award judgment in favor of Appellant and against Respondent Gordon Jones.[7]

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[2] R. at 332, paragraphs 18-19.
[3] R. at 332-33, paragraph 21.
[4] R. at 345-46.
[5] R. at 333, paragraph 23.
[6] R. at 333, paragraph 24.
[7] R. at 333, paragraph 26.

On May 11, 2005, Appellant filed his complaint in this action commencing the present case in an effort to undo what he claimed were fraudulent transfers involving the Franklin County property.[8]

A document, purporting to be a judgment was entered by Judge Allphin in the Utah, Davis County case on July 7, 2005, against Respondent Gordon Jones individually in the amount of $1,886,727.87.[9]

On July 15, 2005, the Respondents transferred the Franklin Property by quitclaim deed from Respondent J&J Livestock LLC back to the Respondents Gordon & Linda Jones individually. Said quitclaim deed was recorded on July 29, 2005, as Franklin County Recorder's Instrument No. 230638.[10]

On August 1, 2005, pursuant to I.C. § 10-1110, Appellant chose to file a Notice of Filing Foreign Judgment, and the Affidavit of Margaret H. Olson re: Foreign Judgment in the present litigation.[11] By doing do, Appellant filed in Franklin County Idaho, as a foreign judgment, the Utah, Davis County judgment described above.

On September 23, 2005, Appellant also chose to record its Notice of Filing Foreign Judgment as Franklin County Recorder's Instrument No. 231394. [12] Appellant also recorded the document issued by Judge Allphin in the Utah state court proceedings purporting to be a

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[8] R. at 1-10.
[9] R. at 347-51.
[10] R. at 561.
[11] R. at 334, paragraph 31; R. at 369-74.
[12] R. at 369-70.

Judgment in the sum of $1,886,727.87. Said document was recorded as Franklin County Recorder's Instrument No. 231395.[13]

By reason of having recorded the documents described above, Appellant affirmatively declared that he had obtained a judgment "lien" against the Respondents' Franklin Property on September 23, 2005.[14] Appellant maintained this position in his Settlement Agreement with the Chapter 7 Bankruptcy Trustee described below.[15]

On April 18, 2006, Respondent Gordon Jones individually filed a Chapter 7 bankruptcy in Utah. On January 31, 2007, the Chapter 7 Bankruptcy Trustee and Appellant entered in a Settlement Agreement concerning among other things Appellant's litigation in Idaho against Respondent Gordon Jones for the alleged fraudulent transfers.[16]

The Settlement Agreement states in pertinent part:

> The Trustee stipulates and agrees that [Appellant] has a valid, enforceable security interest in the [therein described] property of [Respondent Gordon Jones'] bankruptcy [including the Franklin Property]. . . . Upon the Effective Date of the Agreement, . . . any and all property of the [Respondent Gordon Jones'] bankruptcy estate of any kind whatsoever, known or unknown, tangible and intangible, including, but not limited to real property . . . personal property . . . causes of action . . . [including] the Idaho Fraudulent Transfer Action . . . shall be deemed abandoned and no longer property of the [Respondent Gordon Jones'] bankruptcy estate and [Appellant] shall be deemed to have relief from the stay to pursue any and all state court remedies against the [Respondent Gordon Jones] and such property.[17]

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[13] R. at 371-74.
[14] R. at 334, paragraph 31.
[15] R. at 400, paragraph H.
[16] R. at 335, paragraphs 35-37; R. at 381-414.
[17] R. at 404, paragraph 4.

The Settlement Agreement further states that Appellant is entitled to fully pursue all his rights and claims against the aforesaid property, which rights and claims are not altered, amended or affected in any way by this Agreement or by the filing of the Respondent Gordon Jones' bankruptcy case. Further, the Settlement Agreement states that it is binding on Respondent Gordon Jones.[18]

The Settlement Agreement was approved by the Bankruptcy Court in an Order dated April 19, 2007.[19]

On January 20, 2009, Bankruptcy Judge Judith A. Boulden issued an Order granting a discharge of all of Respondent Gordon Jones' unsecured debt. This Order of Discharge "prohibits any attempt to collect from [Respondent Gordon Jones] a debt that has been discharged. . . . However, a creditor may have the right to enforce a *valid* lien such as a mortgage or security interest, against the debtor's property after bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case.[20]

The judgment lien that Appellant affirmatively declared that he had obtained against the Franklin Property on September 23, 2005, was not avoided in the bankruptcy case. Additionally, the filing of the Notice of Foreign Judgment in Idaho by Appellant was not avoided in the bankruptcy case.[21]

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[18] R. at 335-36, paragraphs 38-40; R. at
[19] R. at 414-25.
[20] R. at 336, paragraphs 41-44; R. at 414-25.
[21] R. at 336, paragraph 45.

On February 23, 2011, District Judge David C. Nye took the case under advisement, upon the receipt of the summary judgment briefs, responses and replies from Appellant and Respondents.[22] At no time during the pendency of these proceedings did Appellant ever take any action or file any motion of any sort with this Court or any court in Idaho to renew his Foreign Judgment or to renew his judgment lien in any way as required by I.C. § 10-1111.[23]

Further, Appellant never filed any motion of any sort with this Court or any court in Idaho to seek execution on the Foreign Judgment or the judgment lien he declared to have obtained as required by I.C. §§ 11-101 and 105.[24]

More than five (5) years passed since Appellant filed his Foreign Judgment in Franklin County Idaho. Additionally, more than five (5) years passes since Appellant recorded the document issued by Judge Allphin in the Utah state court proceedings purporting to create his judgment lien in the sum of $1,886,727.87. Said documents were recorded as Franklin County Recorder's Instrument No. 231394 and 231395 respectively on September 23, 2005.[25]

All of the causes of action in Appellant's Second Amended Complaint are dependent upon the existence and validity of the Foreign Judgment and judge lien Appellant declared to have obtained.[26]

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[22] R. at 653-655.
[23] Record before the Court is devoid of any such motions or requests.
[24] Record before the Court is devoid of any such motions or requests.
[25] R. at 334, paragraph 31; R. at 348-351.
[26] R. at 329-44.

ISSUES PRESENTED ON APPEAL

It appears that the following issues have been identified and/or argued by the Appellant in his Appellants' Brief:

1. Whether the district court properly granted Respondent's motion for summary judgment upon deciding that Appellant's foreign judgment and judgment lien had lapsed?
2. Whether the district court properly denied the Appellant's motion for summary judgment upon deciding that Appellant had failed to seek a timely writ of execution?
3. Whether the district court properly dismissed Respondent Jason Jones as a party from these proceedings?

In addition, Respondents identify the following issue on appeal: Whether Respondents are entitled to attorney fees and costs on appeal?

ATTORNEY FEES ON APPEAL

Respondents are entitled to an award of attorney fees and costs on appeal pursuant to I.C. § 12-121, I.R.C.P. 54(e)(1), and I.A.R. 11.2. The Appellant's pursuit of this appeal must be deemed unreasonable, frivolous, without merit, not well grounded, not warranted by existing law, and not made in good faith.

The evidence relied upon by the district court below was undisputed, uncontroverted and derived primarily from the Appellant's own pleadings, namely the Appellant's Second Amended

Complaint and the exhibits attached thereto. The Appellant failed to present any evidence sufficient to create any genuine issues of material fact. The Appellant ignored the clear law regarding judgments and judgment liens in Idaho and the proper methods in which said judgments and judgment lines are renewed. Rather, Appellant simply seeks to have this Court ignore the applicable law and allow him to still proceed on his lapsed judgment and lapsed judgment lien.

For these reasons and upon these grounds, Respondents respectfully requests attorney fees and costs on appeal pursuant to I.C. § 12-121, I.R.C.P. 54(e)(1), and I.A.R. 11.2.

STANDARD OF REVIEW AND ARGUMENT

I. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary Judgment is appropriate when ". . . the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law." *State v. Rubbermaid*, 129 Idaho 353 (1996) citing to *McCoy v. Lions*, 120 Idaho 765, 769 (1991).

Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to make a showing of the existence of a genuine issue of material fact on the elements challenged by the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994). It is well settled in Idaho that in order to create a genuine issue of material fact, the party opposing the motion must present more than just a conclusory assertions that an issue of material fact exists. *Van Velson Corp. v. Westwood Mall*

Assoc., 126 Idaho 401, 406, 884 P.2d 414, 419, (1994). "Rather, the [opposing party] must respond to the summary judgment motion with specific facts showing that there is a genuine issue for trial." *Tuttle v. Sudenga Indus., Inc.*, 125 Idaho 145, 150, 868 P.2d 473, 478 (1994).

The non-moving party has the obligation of establishing the existence of each element essential to any claims they have made in which they bear the burden of proof at trial. This obligation has been imposed by the United States Supreme Court in applying Rule 56(c) of the Federal Rules of Civil Procedure in the case of *Cellotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Idaho Supreme Court has adopted *Cellotex* in the application of Idaho Rules of Civil Procedure 56(c). *See*, *Badell v. Beeks*, 115 Idaho 101,102 (1998). In *Cellotex*, Justice Renquist wrote for the majority and explained:

> The plain language of Rule 56(c) mandates the entry of Summary Judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to a Judgment as a matter of law . . . 477 U.S. at 322-323.

As a result of *Cellotex*, the Appellant in this case cannot raise merit-less claims to defeat Summary Judgment. Rather the Appellant must introduce or point to facts in the record that support each element of each claim asserted in Appellant's Second Amended Complaint.

The facts of the present case are admitted to by the Appellant in his Second Amended Complaint. By application of Idaho law, namely I.C. § 10-1111, the Appellant's foreign judgment and judgment lien lapsed and can no longer be pursued by Appellant. Additionally,

even if the foreign judgment and judgment lien were still somehow valid, Appellant has entirely failed to timely execute on the foreign judgment he declared to have obtained pursuant to I.C. §§ 11-101 and 105. For these reasons, all of Appellant's claims in his Second Amended Complaint fail, there are no remaining valid causes of action for Appellant to pursue, and the dismissal Appellant's Second Amended Complaint and this litigation by the district court was proper.

II. APPELLANT'S FOREIGN JUDGMENT AND JUDGMENT LIEN LAPSED

Both the foreign judgment and the judgment lien Appellant declared that he obtained, lapsed by operation of Idaho law. Once it has been correctly filed a foreign judgment becomes enforceable as an Idaho judgment as of the date of filing pursuant to I.C. § 10-1302. *G&R Petroleum, Inc., v. Clements*, 127 Idaho 119, 120, 898 P.2d 50, 51 (1995). Upon recording, such a judgment becomes a lien upon real property. *Westmark Federal Credit Union v. Smith*, 116 Idaho 474, 476, 776 P.2d 1193, 1195 (1989).

A judgment lien is purely a creature of statute and does not exist in the body of our common law. *Messenger v. Burns*, 86 Idaho 26, 29, 383 P.2d 913, 914 (1963). A judgment lien is created in Idaho by recording a judgment with the county recorder. I.C. § 10-1110. "The lien resulting from recording of a judgment other than for support of a child continues five (5) years from the date of the judgment." I.C. § 10-1110. At any time prior to the expiration of the lien created by I.C. § 10-1110, the court which entered the judgment, may *upon motion*, renew such judgment. I.C. § 10-1111 (Italics added). The renewed judgment may be recorded in the same

manner as the original judgment, and the lien established thereby shall continue for five (5) years. *Id.*

Idaho courts "view I.C. § 10-1111 to be in the nature of a statute of limitations; it sets the time limit for a judgment creditor to take action to renew the judgment and its judgment lien." *Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct. App. 1998). If no motion is filed by the judgment creditor within the time prescribed then both the judgment and the judgment lien lapse or expire. *G&R Petroleum*, 127 Idaho at 121, 898 P.2d at 52. Even if a motion is properly filed and the judgment is renewed there is a clear statutory mandate that, in order for a renewed judgment lien to be acquired and perfected, the renewed judgment itself must be recorded. I.C. § 10-1111. A lien simply does not exist if the judgment, or renewed judgment, has not been recorded. *Amato v. The United States of America, et al*, 94 F. Supp.2d 1077, 1081 (D. Idaho). This reasoning is supported by longstanding Idaho case law which holds, "that a judgment lien lapses under the statute creating it, at the expiration of five years from the date it is docketed." *Id.*, (*citing*, *Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma*, 62 Idaho 340, 343, 111 P.2d 1093, 1096 (1941)).

The facts in the present case are not in dispute and were correctly considered by the district court. Appellant pleaded these facts in his Second Amended Complaint and the Exhibits

attached thereto and he is bound by his own admissions and declarations concerning these facts.[27]

The undisputed facts before this Court are that on August 1, 2005, Appellant filed a Notice of Filing Foreign Judgment in the present litigation and recorded it on September 23, 2005 as Franklin County Recorder's Instrument No. 231394.[28] On this same date Appellant also recorded the document issued by Judge Allphin in the Utah state court proceedings purporting to be a Judgment in the sum of $1,886,727.87 as Franklin County Recorder's Instrument No. 231395.[29] By reason of having recorded the documents attached to his Second Amended Complaint as Exhibit "E", Appellant affirmatively declares that he obtained a judgment lien against the Franklin Property on September 23, 2005.[30]

Appellant failed to file a motion with this Court, within five years of August 1, 2005 to renew the Foreign Judgment he claims to have obtained.[31] Therefore, on August 1, 2010, this judgment lapsed by operation of Idaho law and no longer exists.[32] Appellant also failed to renew his recorded judgment within five years of September 23, 2005. As a result, on September 23,

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[27] R. at 329-428. Appellant's Second Amended Complaint with all attached Exhibits.
[28] R. at 334, paragraph 31; R. at 369-74.
[29] R. at 334, paragraph 31; R. at 348-51.
[30] R. at 334, paragraph 31; R. at 400, paragraph H.
[31] R. at 562-65; State Court Docket is devoid of any "motion" filed at any time by Appellant to renew the Foreign Judgment he declared to have obtained.
[32] I.C. § 10-1111.

2010, Appellant's judgment lien also lapsed and is no longer a valid lien on the Respondents' property by operation of Idaho law.[33]

As Appellant has admitted in its Second Amended Complaint, due to the Order of Discharge entered in Defendant Gordon Jones's bankruptcy proceedings, Appellant is only entitled to pursue *valid and enforceable security interests* which would not have been discharged by the bankruptcy.[34] Because Appellant no longer holds a *valid* judgment lien in Idaho the bankruptcy Order of Discharge by its own terms prevents Appellant from obtaining or seeking a new one now.[35]

In summary, based upon the record created by Appellant's Second Amended Complaint, and all the documents attached thereto, any valid foreign judgment and judgment lien that Appellant may have enjoyed in Idaho have now lapsed. For these reasons, this Court should uphold the decision of the district court in granting summary judgment in favor of Respondents.

In an effort to persuade this Court that the district court's decision was somehow in error, Appellant raises several new arguments in his Appellant's Brief that the Respondents will address. First, Appellant's appear to claim that the district court's reliance on I.C. § 10-1111 was "misplaced" because the 5-year deadline was somehow "tolled." However, Appellant provides no statutory or case law authority supporting this conclusory statement that the 5-year period can

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[33] I.C. § 10-1111.
[34] R. at 335-36, paragraphs 35-45.
[35] R. at 336, paragraph 43-44; R. at 427-28.

be tolled. There is no authority that applies "tolling" to I.C. §§ 10-1110 or 10-1111. Thus no tolling can or did occur in the present case and the Court should disregard this argument.

Appellant attempted to raise different tolling arguments concerning I.C. § 10-1110 in his summary judgment brief based on I.C. § 5-234 and/or the bankruptcy filed by Respondent Gordon Jones.[36] Respondents provided the applicable Idaho and bankruptcy law showing that no tolling occurred.[37] In his Decision on Motions for Summary Judgment, Judge Nye correctly analyzed the applicable law and found that the five year deadline of I.C. § 10-1110 was not tolled.[38]

Next, the Appellant appears to claim that the Respondents' affirmative defenses assert "inconsistent positions" that somehow estop the Respondents from relying upon the argument that the judgment and lien both lapsed. However, I.R.C.P. 8(e)(2).provides:

> "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. . . ."

Based upon this authority, the affirmative defenses raised by the Respondent were proper. Additionally, the district court properly analyzed the issue of whether the Appellant's judgment and lien lapsed pursuant to I.C. §§ 10-1110 and 10-1111. For these reasons, this Court should disregard this argument as well.

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[36] R. at 702-04.
[37] R. at 666-71.
[38] R. 772-74.

The Appellant next seems to argue that it was the fault of the Respondents and "their counsel" that he did not seek to renew his judgment and lien in time. The Appellant then claims that the Respondents sought several continuances, filed motions, etc, during this litigation. According to the Appellant, the Respondents "should not be allowed to benefit from their own efforts to delay this matter" even though "Defendants' counsel's conduct in this case is not particularly reprehensible." This argument lacks merit. Appellant could have at any time during this litigation simply filed a motion to renew his judgment. Once the judgment was renewed he could then have recorded the renewed judgment. Respondents did nothing, and in fact, could do nothing to stop Appellant from renewing his judgment and lien *at any time* before they lapsed. This argument has no support from the record and should be disregarded by this Court.

The next argument Appellant makes is that even if the lien lapsed, the judgment did not and Appellant should still now be able to pursue his judgment through its court action, which was filed before the judgment lapsed. Appellant raised this argument previously in its summary judgment motion to Judge Nye.[39] This argument is nonsensical for two reasons. First, both the renewal of the judgment and the lien are controlled by I.C. § 10-1111. If the judgment lapsed the lien had to have lapsed as well. The lien cannot continue or survive without the judgment. Second, the Appellant has already admitted through its pleadings that because of the bankruptcy it can only pursue a "valid lien."[40] So even if the Appellant were correct and only the lien

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[39] R. at 698-701.
[40] R. at 336, paragraphs 41-44.

lapsed, it still cannot pursue the judgment alone now due to the bankruptcy court's Discharge Order.[41] Thus the claim that Appellant makes under I.C. § 5-215 can only be applicable where no intervening bankruptcy occurred. However, since an intervening bankruptcy exists in this case, and Appellant holds no *valid* lien, Appellant can no longer seek to recover under the Utah state court judgment in any way, including bringing or maintaining an "action on the judgment." Thus this Court should disregard this argument since the record evidences both the lapse of the lien and the intervening bankruptcy.

The next argument Appellant makes is similar. Appellant claims that a judgment creditor holding a foreign judgment can choose between filing a formal action on that judgment or simply filing the judgment under the Uniform Foreign Judgment Act as an independent judgment. This legal position is not disputed by Respondents. However, Respondents do dispute the claim made by the Appellant that it chose to file a formal action on the judgment. Respondents also dispute Appellant's claim that its Second Amended Complaint contains a claim on the Utah state court judgment. The facts of this case do not allow Appellant to rely upon this legal position. The record clearly shows that Appellant chose to file under the Uniform Foreign Judgment Act.[42] The record also evidences that Appellant's Second Amended Complaint never asserts a claim on the Utah state court judgment. Rather, it states on its face, and in its allegations and causes of

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[41] R. at 336, paragraphs 43-44; R. at 427-28.
[42] R. at 334, paragraph 31; R. at 369-74.

action that it was "an action under the Uniform Fraudulent Transfer Act."[43] There is no allegation, claim or cause of action for a judgment on the Utah state court judgment. The Appellant simply wanted to undo a transfer of real property so that its foreign judgment and lien could be pursued. Further, as argued above, even if the Appellant did make such a claim, once the lien lapsed, the intervening bankruptcy would stop Appellant from pursuing the action. Additionally, applicable Idaho law limits a party in their choice of action on a Foreign Judgment. The party can either file a foreign judgment *or* they can file an action on a judgment, but they cannot do both at the same time.[44] For these reasons, this argument is not supported by the record or applicable law and should be disregarded by this Court.

III. FAILURE TO PROCEED WITH EXECUTION

In addition to failing to renew his Foreign Judgment and judgment lien Appellant also failed to proceed with a timely execution. Execution upon a judgment in Idaho is controlled by statute. Except for child support, the party in whose favor judgment is given may, at any time *within five (5) years after the entry thereof*, have a writ of execution issued for its enforcement. I.C. § 11-101 (Italics added). Under this statute a judgment creditor may delay taking out execution against his debtor, as long as this statute permits him to claim the issuance of execution. *Stewart v. Slater*, 61 Idaho 628, 629, 105 P.2d 729 (1940). In all cases, *other than*

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[43] R. at 329-44.
[44] R. at 761- 63, Respondent's Reply arguments section C. containing the applicable case law.

for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five (5) years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings. I.C. § 11-105 (Italics added).

In the present case, the record reflects that Appellant took no action to execute upon any such judgment within five (5) years after said judgment was entered. As established by the record above, the Foreign Judgment Appellant relies upon was filed in Franklin County, Idaho on August 1, 2005. In addition to allowing his Foreign Judgment and judgment lien to lapse Appellant made no effort to file a motion or to obtain an Order from the Court allowing execution on the judgment within five (5) years of August 1, 2005. Appellant only sought such a writ in its Motion for Summary Judgment and Issuance of Writ of Execution on February 11, 2011, *after* he learned from Respondents' Motion for Summary Judgment that he had already missed the five (5) year deadline to obtain a writ of execution. Under applicable Idaho law, it is too late for Appellant to obtain any writ of execution.

Appellant appears to argue that since Respondent did not "attack [] the validity of the Utah judgment," that he can still somehow seek execution on the Utah judgment. Appellant even seeks to have this Court "mandate the issuance of a Writ of Execution by the court below." In doing so, Appellant completely ignores the applicable law set forth above. Additionally, Appellant ignores the application of the law causing his Foreign Judgment and judgment lien to lapse. It appears that Appellant is arguing that a writ of execution should be issued not on any current or existing Idaho judgment but on a judgment that may or may not still be valid in the state of Utah. The Appellant provides this Court with no authority for the relief it seeks because

there is no authority for such relief. For this reason, this Court should disregard Appellant's argument that a writ of execution should be mandated by this Court.

Appellant also appears to argue that a writ of execution should be issued because he is not seeking "the recovery of money."[45] This is an astounding argument for Appellant to make given that the Utah judgment is a money judgment Appellant declared to have obtained in the sum of $1,886,727.87.[46]

In summary, by his own admissions, and the record before the Court Appellant has failed to proceed with or obtain any valid execution on the judgment he claims to have. More than five years passed and Appellant's Foreign Judgment and judgment lien lapsed. The applicable law now prevents Appellant from obtaining nay writ of execution. For these reasons, this Court should disregard Appellant's argument that a writ of execution should be mandated by this Court.

IV. THE DISTRICT COURT'S DISMISSAL OF JASON JONES WAS PROPER

The dismissal of Respondent Jason Jones by Judge Nye was proper and, even if it was not, this issue is moot by reason of the lapse of the Foreign Judgment and judgment lien. The Idaho court of Appeals has held that the relevant period of time on which the courts will focus on

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[45] I.C. § 11-105 provides that "In all cases other than the recovery for money, the judgment may be enforced or carried into execution after the lapse of five (5) years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental proceedings."

[46] R. at 333-34, paragraphs 26, 31 and 32;

in determining whether there was proper service is the six months following the filling of the complaint. *Hansen v. Herrera*, 137 Idaho 787, 790, 53 P.3d 838, 841 (Ct. App. 2002).

In the present case Judge Nye analyzed I.R.C.P. 4(a)(2) and found that Respondent Jason Jones was not served within six months of the filing of Appellant's First Amended Complaint, where Respondent Jason Jones was first named as a party in this litigation.[47] Judge Nye also found that there was no good cause shown by Appellant as to why he failed to serve Respondent Jason Jones in a timely fashion.[48] As a result, Judge Nye dismissed Respondent Jason Jones from this litigation.[49]

The district court's analysis and decision are supported by applicable law. Additionally, even if the district court had been in error, the Appellant's Foreign Judgment and judgment lien have lapsed. Because of this there are no valid causes of action remaining in the Appellant's Second Amended Complaint that can be raised against any of the Respondents, including Respondent Jason Jones. For this reason, this Court should disregard Appellant's argument that the dismissal of Respondent Jason Jones from this litigation was improper.

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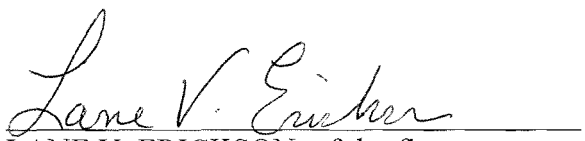
[47] R. at 485.
[48] R. at 485-87.
[49] R. at 480-88.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the district court's Decision on Motions for Summary Judgment and Decision on Motion to Dismiss in favor of the Respondents be affirmed in their entirety and that Respondents be granted their attorney fees and costs on appeal.

DATED this 31st day of October, 2011.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED

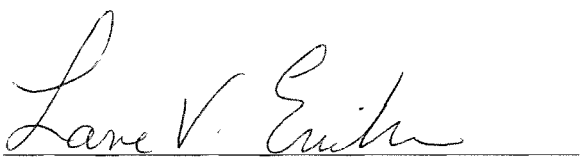


LANE V. ERICKSON, of the firm
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of October, 2011, I served two true and correct copies of the above and foregoing document to the following person(s) as follows:

Lincoln W. Hobbs (ID Bar # 7325)	[X]	U. S. Mail Postage Prepaid
Margaret H. Olson (ID Bar # 4680)	[ ]	Hand Delivery
HOBBS & OLSON, P.C.	[ ]	Overnight Mail
466 East 500 South, Suite 300	[ ]	Facsimile Transmission
Salt Lake City, Utah, 84111		
Attorneys for Plaintiff		



LANE V. ERICKSON