3-19-2014

Federal Home Loan Mortgage Corporation v. Butcher Respondent's Brief Dckt. 41188

IN THE SUPREME COURT OF THE STATE OF IDAHO

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiff-Respondent,

vs.

MARGARET A. BUTCHER,

Defendants-Appellants,

and

DENNIS D. BUTCHER JOHN DOES 1-10, whose true identity is unknown, as Occupants of the Premises located at 10512 W. Achillea Street, Star, Idaho 83669,

Defendants.

RESPONDENT FEDERAL HOME LOAN MORTGAGE CORPORATION'S OPENING BRIEF

Case Number 41188-2013

Appeal from the District Court of the Fourth Judicial District, Ada County.
Appeal from the Honorable Christopher M. Bieter, Magistrate Judge, Judge Kathryn A. Sticklen, District Judge.

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STATEMENT OF ISSUES ON APPEAL

Appellant has listed numerous issues on appeal; however, Respondent rephrases the issues on appeal as following:

1.) Whether Appellant has waived the right to appeal the magistrate court's grant of summary judgment in favor of Respondent where she failed to comply with the Idaho Appellate Rules on appeal to the district court.

2.) Whether Appellant has waived all of her issues presented on appeal by failing to have raised those issues below and/or by failing to support each issue as required by the Idaho Appellate Rules.

3.) Whether there was substantial and competent evidence to support the magistrate court's findings of fact and whether its conclusions of law follow from those findings.

STATEMENT OF THE CASE

Nature of Case

This is a post-foreclosure eviction action that has been ongoing since 2011 in which Federal Home Loan Mortgage Corporation ("Freddie Mac") seeks restitution of the premises commonly known as 10512 W. Achillea Street, Star, Idaho 83669 (hereinafter referred to as "The Property") pursuant to a Trustee's Deed. The trial court/magistrate court granted summary judgment in favor of Freddie Mac on November 25, 2011 and Appellant appealed to the district court. The district court affirmed the trial court on May 23, 2013 and Appellant is again appealing. As of the date of this appeal, possession of The Property has been returned to Freddie Mac in accordance with magistrate court's November 25, 2011 and following a number of unsuccessful attempts to stay ejectment from the Property during the pendency of the appeal to this Court.

Course of Proceedings and Disposition Below

On July 12, 2011, Freddie Mac filed a post-foreclosure eviction complaint for ejectment and restitution of property. (Clerk's Record on Appeal ("R. _") at 6-11.) The matter was assigned to the Honorable Christopher M. Bieter, Magistrate Judge. (*Id.*) Named as defendants were Margaret A. Butcher, Dennis D. Butcher, and John Does 1-10 whose true identify is unknown, as occupants of The Property. (*Id.*).

Appellant, Margaret A. Butcher (aka Margaret McCluskey) was the only party to appear, filing a Notice of Appearance on August 1, 2011. (R. 18.) On August 16, 2011, Appellant filed a 37 page Answer setting forth no counterclaims and asserting what she characterized as 107 different affirmative defenses. (R.21-57.) Appellant's Answer admitted that she was occupying The Property and that she executed a promissory note and granted a deed of trust, as security for that note, on The Property. (R. 23-25.) Appellant generally denied all of the other salient allegations set forth in the Complaint. (*Id.*)

Based upon Appellant's concessions, on September 28, 2011, Freddie Mac filed its motion for summary judgment. (R. 70.) That motion was supported by an affidavit of counsel which provided the court with true and correct copies of the documents evidencing compliance with Idaho's non-judicial foreclosure statutes including Affidavit of Mailing, Affidavit of Service and Posting, and Affidavit of Publication as recorded in the mortgage records of Ada County, as Instrument Nos. 110075667, 110075668, and 110075669. It also provided the court with a true and correct copy of the bankruptcy docket of Appellant, Idaho Bankruptcy Case No.

10-02840 and a true and correct copy of a motion for stay relief filed by the beneficiary on Appellant's Deed of Trust, Wells Fargo, which was not objected to and ultimately granted by the bankruptcy court on October 18, 2010. (R. 72-113.)

Freddie Mac's motion for summary judgment was then set for hearing on November 1, 2011. (R. 126-127.) Appellant did not file any response to the motion but instead appeared at the November 1, 2011 hearing in person at which time upon stipulation of the parties, the hearing was re-set for November 22, 2011. (R. 128-131.) A notice of continued hearing was then filed, resetting Freddie Mac's motion for summary judgment to be heard on November 22, 2011 and specifically providing that any response was to be filed on or before November 15, 2011. (R. 130-131.)

On November 15, 2011, Freddie Mac received a packet of materials in excess of 81 pages including what appeared to be various exhibits and which appeared to contain an amended answer, without leave of the court, and attaching a pleading titled "Response to Motion for Summary Judgment," which was merely a compilation of answers to facts set forth in the Complaint and in the motion for summary judgment, discussion of affirmative defenses and discussion of a counterclaim, which also was not appropriately filed with the court. (R.135-136.) Treating the materials as a response to the pending motion for summary judgment, Freddie Mac then filed its reply memorandum in support of summary judgment on November 21, 2011. (R. 135-140.) Filed contemporaneously therewith Freddie Mac also submitted the Affidavit of Jeff Stenman which contained a true and correct copy of the Notice of Rescheduled Trustee's Sale dated March 31, 2011, with copies of the return mail envelopes and return receipts endorsed by

the responding parties, as well as a true and correct copy of the affidavit of publication of the notice of rescheduled sale. (R. 141-160.)[1]

Thereafter, at the November 22, 2011 hearing on Freddie Mac's motion for summary judgment, Appellant informed the court that the clerk's office would not accept her packet of documents for filing. (R. 163; *See also* R. 164-554.) Freddie Mac, having received the packet of material previously did not oppose the court's acceptance and review of the materials which were then filed by the Clerk. (R. 163-554.) The court then heard oral argument from both sides and advised Appellant that it would read all of the filed materials. (Tr., p. 14:5-7.)

The matter having been fully briefed by both sides and oral argument having been completed, on November 25, 2011, the magistrate court issued its written ruling granting Freddie Mac's motion for summary judgment requiring Appellant to surrender The Property. (R.554-558.) Thereafter, on December 5, 2011, Appellant filed what was titled as a "Motion Re: Reply Memorandum," which was in excess of 60 pages. (R. 559-623.) Appellant did not seek reconsideration of the magistrate court's order granting summary judgment or leave to file the additional brief opposing the summary judgment motion, and thus, the court did not take any

[1] Appellant's Opening Brief takes issue with the magistrate court's acceptance of Freddie Mac's November 21, 2011 Reply Memorandum in Support of Motion for Summary Judgment, contending that she was somehow prejudiced by the late filings and/or the court erred by issuing its written decision on the matter before Appellant submitted her December 5, 2011 filing. (*See* Appellant's Brief, pg. 2 and 15.) In so arguing, Appellant overlooks the Idaho Rules of Civil Procedure which do not provide her with the right to file anything other than a response to motion for summary judgment, which Freddie Mac received on or about November 15, 2011 and which the court accepted at the hearing on November 22, 2011 and indicated it would review prior to issuing its written decision dated November 25, 2011. (*See* I.R.C.P. 56(c)(which provides for the filing of a moving brief, answering brief, and reply brief.) Furthermore, after the court issued its November 25, 2011 ruling, Appellant did not ask it to reconsider its ruling in light of her December 5, 2011 filings, nor did she seek to strike or to otherwise exclude Freddie Mac's reply memorandum and supporting affidavit of Jeff Stenman. Thus, as will be discussed in greater detail below, she has now waived such arguments on appeal. *Michalk v. Michalk,* 148 Idaho 224, 230, 220 P.3d 580, 586 (2009).

action with respect to the December 5, 2011 filing. (R. 2.) Appellant also did not seek to strike or exclude Freddie Mac's reply memorandum in support of summary judgment or the supporting affidavit of Jeff Stenman. (R. 2.)

Instead, on December 9, 2011, Appellant filed a 22 page Notice of Appeal to the district court. (R. 624-645.) The appeal was assigned to the Honorable Judge Kathryn A. Sticklen on December 9, 2011, and an Order Governing Procedure on Appeal was issued on December 14, 2011. (R. 646-650.) Thereafter, Appellant filed a number of various inappropriate motions including a 45 page Motion: Declaratory Relief and Quiet Title (R. 682-726.) and a 47 page Motion: Compulsory Counterclaim in Recoupment (R. 727-773.) On February 29, 2012, the district court issued a temporary stay pending the appeal and ordered Appellant to make $500.00 monthly payments to the Clerk of the Court. (R. 775-777.)

On March 22, 2012, Appellant filed her opening brief, which was in excess of 150 pages including attached exhibits. (R.778-947.) Appellant's opening brief failed to comply with virtually all of the Idaho Appellate Rule 35 requirements, including a lack of table of contents, table of authorities, statement of the case, issues presented on appeal, and supporting argument section. (R. 987-999.) Thereafter, on April 24, 2012, Freddie Mac filed its Appeal Brief. (R. 948-959.) Oral argument was originally scheduled for July 19, 2012 but was ultimately postponed until November 15, 2012, during which time, Appellant, previously proceeding *pro se,* appeared through her counsel of record Wesley Hoyt on September 11, 2012. (R. 965-967 and 976-978.) Oral argument was held, following which the district court took the matter under advisement and ultimately issued its written ruling that Appellant had failed to comply with the

Idaho Appellate Rules and notwithstanding that failure, affirming the magistrate court's decision granting summary judgment in favor of Freddie Mac on May 23, 2013. (R. 984-995.)

On July 2, 2013 and July 25, 2013, Appellant filed her Notice of Appeal and Amended Notice of Appeal respectively. (R. 996-1006.) Since that time, the stay preventing Freddie Mac from taking possession of the property has expired and both the district court as well as this Court have declined multiple requests by Appellant to continue that stay. (*See* Order Denying Verified Ex-Parte Application for Temporary Stay, entered on December 19, 2013 and Order Denying Application for Full Stay, entered on December 27, 2013.) Freddie Mac has possession of the Property.

Statement of Facts

On or about December 15, 2005, Appellant and her former husband borrowed $147,000 for the purchase of The Property and in doing so executed a note and deed of trust which deed was recorded in the Ada County land records as Instrument No. 105191493. (R. 951.) Ultimately, the payment obligations due under the Note and Deed of Trust went into default and a Notice of Default was recorded in the Ada County land records as Instrument No. 110050723. (R. 10.)

A Trustee's sale of The Property was originally scheduled for October 15, 2010. (R. 556.) Notice of sale was sent to Appellant by certified mail on June 16, 2010. (*Id.*) On June 17, 2010, notice of the October 15, 2010 sale was personally served on Appellant through delivery to an adult then residing at The Property. (*Id.*) Notice of the same October 15, 2010 Trustee's sale was published in the Idaho Business Review on June 28, July 5, July 12, and July 19, 2010. (*Id.*)

Appellant filed bankruptcy on September 3, 2010 which stayed the Trustee's sale; however, on October 18, 2010, relief from the automatic stay was granted by the bankruptcy court. (*Id.*)

After the bankruptcy stay was lifted, the Trustee's sale of the property was rescheduled for May 16, 2011. (*Id.*) Notice of the rescheduled sale, was again sent by certified mail to Appellant on April 1, 2011, and published in the Idaho Business Review on April 15, 22, and 29, 2011. (*Id.*) The Trustee's sale was held and a Trustee's Deed was issued in favor of Freddie Mac and recorded in the Ada County land records as Instrument No. 111041753. (*Id.*; R. 952.) The Trustee's Deed provides that Freddie Mac bought the property at the May 16, 2011 sale with a credit bid of $123,000.00.[2] (*Id.*)

Notwithstanding the Trustee's sale of the property, Appellant failed to vacate The Property and she continued to occupy the Property up until her last attempt to stay execution of a Writ of Ejectment was denied by this Court on December 27, 2013. (R. Order Denying Application for Full Stay, entered on December 27, 2013.)

ARGUMENT

Throughout these entire proceedings, Appellant has done nothing more than inundate the court and the record with voluminous filings and conclusory allegations making no attempt to support her allegations leaving both the court and counsel to have to search the record for her

[2] Appellant devotes almost her entire appeal to whether Freddie Mac was entitled to submit a credit bid. As is discussed in greater detail below, the record reveals that this is the first time she is raising this issue and as such, she has waived the ability to do so because she did not present the issue before the magistrate court such that an appropriate record could be developed, evidence submitted, and her concerns addressed by Respondent and ruled upon by the magistrate court. In fact, the district court confirmed the same failure to appropriately raise this argument in its ruling upholding the magistrate court. Without having raised this issue before the magistrate court and having presented it with evidence or authority, it cannot be said that the magistrate court's ruling, based upon the record before it was in error.

claimed error. Ultimately, it is not the Court's or Respondent's burden to search the record for potential support for Appellant's allegations.

As is discussed in greater detail below, the present appeal should be denied both on procedural grounds as well as on the merits. First, Appellant has waived all of the issues she now seeks to raise before this Court because she failed to raise the issues before the magistrate court and the district court on appeal. Appellant has also failed to comply with Idaho Appellate Rule 35(a)(6) with respect to at least half of her identified issues on appeal, by completely failing to provide this Court with any argument, analysis, authority, or citations to case law and/or the record to support such issues. Lastly, Appellant fails to specifically challenge any of the magistrate court's findings of fact or conclusions of law and this Court should refrain from searching the record for error where Appellant fails to meet her burden of showing error.

I. STANDARD OF REVIEW

In her opening brief, Appellant asserts that she is appealing to this Court "for *de novo* review" and attempts to argue purported issues of material fact that she claims to have presented both before the magistrate court and the district court on appeal. (*See* Appellant's Brief, pg. 3, ¶ 3; *see also* pg. 6, Issues Presented on Appeal.) In so arguing, Appellant disregards recent case law from this Court specifically noting that the standard of review on appeal from a district court sitting in its capacity as an appellate court is not *de novo*, but is instead as follows:

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm

> the district court's decision as a matter of procedure. *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (quoting *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)). Thus, this Court does not review the decision of the magistrate court. *Id.* "Rather, we are 'procedurally bound to affirm or reverse the decisions of the district court.'" *Id.* (quoting *State v. Korn*, 148 Idaho 413, 415 n. 1, 224 P.3d 480, 482 n. 1 (2009)). Prior to Losser, when this Court reviewed a district court acting in its appellate capacity the standard of review was: "when reviewing a decision of the district court acting in its appellate capacity, this Court will review the record and the magistrate court's decision independently of, but with due regard for, the district court's decision." *Losser*, 145 Idaho at 672, 183 P.3d at 760. After Losser, this Court does not directly review a magistrate court's decision. *Id.* Rather, it is bound to affirm or reverse the district court's decision. *See Bailey*, 153 Idaho at 529, 284 P.3d at 973; *Korn*, 148 Idaho at 415 n. 1, 224 P.3d at 482 n. 1. *Pelayo v. Pelayo*, 154 Idaho 855, 858–59, 303 P.3d 214, 217–18 (2013).

Turner v. Turner, ____ Idaho ____, 317 P.3d 716, 719-720 (2013). In conducting such a "deferential review, the evidence must be liberally construed in favor of the judgment entered." *Id.*

II. APPELLANT HAS WAIVED THE RIGHT TO ALLEGE ASSIGNMENTS OF ERROR WITH RESPECT TO THE MAGISTRATE COURT'S RULINGS BY FAILING TO ABIDE BY THE IDAHO APPELLATE RULES ON HER APPEAL TO THE DISTRICT COURT.

Appellant should be deemed to have waived the right to allege assignments of error with respect to the magistrate court's grant of summary judgment because she failed to abide by the Idaho Appellate Rules on her initial appeal to the district court. Thus, Appellant has failed to preserve any of the issues which she now seeks to raise on appeal to this Court, by having failed to present them to the district court for its review. Essentially, Appellant's present appeal is nothing more than a "do over" attempt whereby she is attempting to gain a "second bite" at the

appellate apple, which is not allowed for under Idaho law.[3]

This Court has previously stated as follows:

> pro se litigants are held to the same standards and rules as those litigants represented by an attorney. *See, e.g. Rizzo v. State Farm Ins. Co.*, No. 39611, 2013 WL 2232287 at *10 (May 22, 2013). Thus, this Court has refused to consider an appellant's claims "because he has failed to support them with either relevant argument and authority or coherent thought." *Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010). "Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975). A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm,* 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). This Court will not search the record on appeal for error. *Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Clark v. Cry Baby Foods, LLC, et. al., 152 Idaho 182, 307 P.3d 1208, 1212 (2013); *citing to Bach v. Bagley*, 148 Idaho 784, 790–91, 229 P.3d 1146, 1152–53 (2010). Additionally,

> it is well established law that a litigant may not remain silent as to a claimed error and later raise objections for the first time on appeal. *Baramore,* 145 Idaho at 343, 179 P.3d at 306. Additionally, substantive issues will not be considered for the first time on appeal. *Id.* Accordingly, this Court will not consider any issue on appeal that [Appellant] failed to properly preserve during trial.

Michalk v. Michalk, 148 Idaho 224, 230, 220 P.3d 580, 587 (2009).

[3] Stated differently, Appellant should not be allowed to now raise issues before this Court, which she failed to properly raise and support on intermediate appeal to the District Court. If she were allowed to do so, the District Court's role as an intermediate appellate court and any credence given to its rulings as well as the requirements of the Idaho Appellate Rules would be rendered superfluous.

In denying Appellant's initial appeal from the magistrate court, the district court specifically found that Appellant had wholly failed to abide by the Idaho Appellate Rules. Specifically, the district court noted as follows:

> In this appeal, Ms. Butcher, while appearing pro se, has filed a fifty page brief, with attachments. I.R.C.P. 83(v)(Appellate briefs) provides that "briefs shall be in the form and arrangement...provided by the rules for appeals to the Supreme Court unless otherwise ordered by the district court....."
>
> ...
>
> While Ms. Butcher is proceeding pro se, "[p]ro se litigants are not accorded any special consideration simply because they choose to represent themselves, and 'are not excused from adhering to procedural rules.' Rather, 'pro se litigants are held to the same standards and rules as those represented by an attorney.' Therefore, Sanders is not excused from adhering to the rules regarding proper preservation of issues for appeal and proper presentation of arguments in the brief, and this Court analyzes the issues by the same standards applied to an attorney." *Woods v. Sanders,* 150 Idaho 53, 57, 244 P.3d 197, 201 (2010).
>
> "In addition, it must be noted that the appellant has here failed to comply with a number of provisions of the Idaho Appellate Rules governing presentation of appeals to this court. For example, the appellant's brief fail to set forth either the facts involved in this case or the proceedings had below. The brief also fails to denominate any issues on appeal... Absent compliance with the appellate rules, the court will not review the record for error. Error is never presumed on appeal; the burden of showing it is upon the party alleging it." *Jensen v. Doherty,* 101 Idaho 810, 911, 623 P.2d 1287, 1288 (1981).
>
> Ms. Butcher's brief fails to comply with virtually all of the requirements of I.A.R. 35 concerning a brief on appeal. Her brief has no table of contents, no table of cases and authorities, no statement of the case and, most importantly, no issues presented on appeal section, and no argument section. Instead, Ms. Butcher has presented the court with a fifty page document that is interspersed with numerous issues, citations (some relevant, some not), and other information on every page. It would be very difficult for the Court to attempt to review such a lengthy document and engage in issue spotting and the Court does not believe that it has an obligation to do so. That is the purpose behind I.A.R. 35.

> The Court specifically finds that Ms. Butcher's brief violates the dictates of the Idaho Appellate Rules and will not perform Ms. Butcher's work for her in this appeal...

(R. 987-999.)

As correctly noted by the district court, the requirements applicable to an appeal and the standards applicable to *pro se* litigants are no different than the standards applicable to attorneys. Appellant's failure to comply with the Idaho Appellate Rules including her failure to identify issues on appeal and to direct the district court's attention to error in the underlying magistrate court's decision were fatal to her appeal before the district court,[4] and no different than if she had remained silent. *Woods v. Sanders,* 150 Idaho 53, 58, 244 P.3d 197, 201 (2010)(noting that the Court will not consider any issue on appeal which was not raised below). Appellant ultimately left the district court in the position of having to search the record for error which is not its job and which is never presumed on appeal. *Idaho Power Co., v. Cogeneration, Inc.,* 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000). Rather, it was Appellant's burden of showing error, a burden she wholly failed to meet. *Id.*

Based upon the foregoing, this Court should decline to review the issues presented on appeal because they were not properly identified, raised, and supported before the district court sitting its appellate capacity below and Appellant should not be allowed to cure her previous deficiencies by simply filing another appeal. To so allow would render the role of the district court and the Idaho Rules of Appellate Procedure superfluous and create a proposition that a

[4] "Issues that are not argued and supported as required by the Appellate Rules are deemed to have been waived." *Bettwieser v. New York Irrigation Dist.,* 154 Idaho 317, 326, 297 P.3d 1134, 1143 (2013); *citing to Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005)).

litigant need not comply with the Idaho Appellate Rules on appeal before the district court because its decision can be simply appealed to this Court and any errors corrected without any repercussions.

III. APPELLANT HAS WAIVED ALL OF HER ISSUES ON APPEAL BY FAILING TO HAVE RAISED THEM BEFORE THE TRIAL COURT AND BY FAILING TO ARGUE OR SUPPORT THEM AS REQUIRED BY THE IDAHO APPELLATE RULES.

Even if Appellant is not deemed to have waived her right to appeal due to her failure to comply with the Idaho Appellate Rules on appeal to the district court, there are separate grounds for this Court to find waiver. Specifically, Appellant identifies six separate issues on appeal, the first three of which are entirely new arguments not appropriately raised below and the other three of which lack any argument or authority in compliance Idaho Appellate Rule 35(a)(6). As is discussed in greater detail below, all of these issues are deemed to have been waived and should not be consider as part of the present appeal.

A. Appellant's first and second issues on appeal are deemed to have been waived because she failed to raise them before the magistrate court.

Appellant's first and second issues on appeal seek to challenge Freddie Mac's right to enter a credit bid in the underlying Trustee's sale. These issues were not raised before the magistrate court and thus cannot be raised for the first time on appeal.

Idaho law clearly provides that a litigant may not remain silent as to a claimed error and later raise objections for the first time on appeal. *Michalk v. Michalk,* 148 Idaho 224, 230, 220 P.3d 580, 587 (2009); *citing to Mackowiak v. Harris,* 146 Idaho 864, 866, 204 P.3d 504, 506 (2009). Thus, the Court will not consider issues raised for the first time on appeal. *Id.,* 148 Idaho

at 232, 204 P.3d at 588. "Additionally, substantive issues will not be considered for the first time on appeal." *Id.; citing to Barmore v. Perrone,* 145 Idaho 340, 343, 179 P.3d 303, 306 (2008). Accordingly, the Idaho Supreme Court will not consider any issue on appeal that was not properly preserved during trial. *Michalk,* 148 Idaho at 230, 220 P.3d at 586.

In the case at hand, Appellant in a wholly conclusory fashion alleges that she "presented evidence to the Magistrate showing that Respondent was not entitled to purchase the property by credit bid because Freddie Mac was not the owner of [appellant's] Promissory Note as of the date of the foreclosure sale and that there was no Assignment of Deed of trust in favor of Freddie Mac recorded in the mortgage records of Ada County." (Appellant's Brief, pg. 9, ¶ 1.) Similarly, she contends that she raised "the issue of ownership of the Note in the Magistrate Court..." (*Id.,* pg. 10.) Noticeably lacking from Appellant's conclusory assertions, is any citation to the record demonstrating that she in fact raised these issues before the magistrate court, such that they can now be raised on appeal. This is ultimately because the record reveals that she made no such argument before the magistrate court and is thus barred from raising the issue now.

In fact, the district court in upholding the magistrate court's ruling was troubled by Appellant's same attempt to raise new issues on appeal before it. The court transcript from the hearing before the district court specifically shows that both Appellant and her counsel were specifically asked to point the court to the record showing where Freddie Mac's right to enter a credit bid was ever argued or put at issue before the magistrate court and they were unable to do so. (Tr., p 36:20-45:8.) Following oral argument, the district court then issued a written ruling

confirming the same and noting that "[Appellant] did not assert before the magistrate that [Freddie Mac] could not make a credit bid; she argued that the credit bid was not proper and that it was too low." (R. 993-994.) A review of the magistrate court's Order Granting Motion for Summary Judgment confirms the same and evidences that the only issue before it was whether a credit bid was a valid means to purchase property at a Trustee's sale under Idaho law, which pursuant to *Federal Home Loan Mortg. Corp. v. Appel,* 143 Idaho 42 (2006), the Magistrate Court found it was. (R. 557.)

Ultimately, it is not the job of this Court or Respondent to search the record for error or for support for Appellant's contentions.[5] That is ultimately her burden and a burden which she has not and cannot meet. Similarly, issues cannot be raised for the first time on appeal, which is exactly what Appellant is attempting to do here. Based upon the foregoing, the Court should decline to review these issues on appeal.

B. Appellant's third issue on appeal is deemed to have been waived because she failed to raise the issue in the proceedings below.

Appellant's third issue on appeal, which alleges that she was denied a full and fair opportunity to litigate her claims and defenses to Freddie Mac's motion for summary judgment is similarly waived because she failed to ever raise this issues in the proceedings below.

As noted above, a litigant may not remain silent as to a claimed error and later raise objections for the first time on appeal. *Michalk v. Michalk,* 148 Idaho 224, 230, 220 P.3d 580, 587 (2009); *citing to Mackowiak v. Harris,* 146 Idaho 864, 866, 204 P.3d 504, 506 (2009). "A

[5] As noted by the Honorable Judge Sticklen, a party cannot "come into court and say a lot of stuff and file a few pounds of pleadings and expect to – expect the court to sort it out." (Tr., p.44:13-16.)

party's failure to object to an action by the trial court precludes a party from challenging that action on appeal." *Id.*, 148 Idaho at 231, 220 P.3d 587. "For an issue to be appealable to this Court, there must have been an adverse ruling by the lower court. *Id.,* 148 Idaho at 234, 220 P.3d at 590; *citing to McPheters v. Maile,* 138 Idaho 391, 397, 64 P.3d 317, 323 (2003).

In the case at hand, Appellant, for the first time argues that her due process rights were violated by the magistrate court. Appellant contends that the magistrate court's issuance of a written ruling granting summary judgment before Appellant filed another 60+ page "Motion Re: Reply Memorandum," on December 5, 2011 was in error and that she was cut off in oral argument and thus deprived her day in court. (Appellant's Brief, pg. 15, ¶ 1.) Consistent with her lack of citation to the record to support her other issues on appeal, Appellant makes her assertions here with absolutely no citations to the record including any evidence from the record that she ever raised her purported legal issues in the proceedings below either through appropriate motion with the magistrate court or on appeal to the district court. This is ultimately because she did neither and is attempting to raise this argument for the first time on appeal.

Specifically, the record shows that Appellant was given ample time to submit briefing in opposition to Respondent's motion for summary judgment, with the motion and memorandum having been filed on September 28, 2011 and a hearing not held till November 1, 2011, during which time Appellant submitted no opposition. (R. 128-131.) Rather, Appellant showed up at the November 1, 2011 hearing requesting additional time, which counsel for Freddie Mac stipulated to, moving the hearing date to November 22, 2011. (R. 128-131.) On the day of the November 22, 2011 hearing, the Court then accepted hundreds of documents that Appellant

compiled and submitted in opposition to Freddie Mac's motion. (R. 163-554.) The Court informed Appellant that it would review her materials, which its written Order granting summary Judgment confirms that it did. (R. 555.) Specifically, the magistrate court noted that "the Court has indeed considered all of the documents in the attachment submitted by Ms. Bucher and asks the clerk of the court to treat it as part of the record. The motion is now fully presented to the Court for decision." (*Id.*)

The record shows that Appellant did not object to the magistrate court's order as being premature nor did she ever seek leave to file her December 5, 2011 brief, which was not otherwise allowed for under I.R.C.P. 56(c).[6] (R. 2-3.) The record shows that Appellant did not seek to strike Freddie Mac's reply which she now contends that she did not receive until after the summary judgment hearing nor did she ask that the magistrate court not consider the filing or request additional time to respond to the filing. (*Id.*) Similarly, the record shows that Appellant did not seek reconsideration of the magistrate court's order in light of the additional briefing she submitted. (R. 2-3.) Ultimately, the record is devoid of any such requests because Appellant made none. Instead, on December 9, 2011, four days after the filing of her December 5, 2011 memorandum, Appellant elected to file a 22 page Notice of Appeal to the district court. (R. 624-645.) The record before the district court is similarly void of any evidence that Appellant ever raised her "due process" argument or concerns before the District Court. In fact, Appellant

[6] I.R.C.P. 56(c) allows for the filing of a moving brief, an answering brief and a reply brief. "It is within the court's discretion whether to consider supplemental briefing, beyond those allowed in the Court Rules." *Willnerd v. Sybase, Inc.*, 2011 WL 652539 (D. Idaho 2011).

failed to raise any alleged issues of having been denied the full and fair opportunity to litigate her claims.

Additionally, contrary to Appellant's characterization that she was cut off during her oral argument the transcript from that hearing clearly shows that the magistrate court gave Appellant ample time to make her arguments and attempted to try to get Appellant to narrow her comments to only those issues presented in the case. (*See* Tr., p. 10:13-16:24.) Ultimately, the magistrate court asked Appellant on a number of occasions whether she had additional arguments giving her ample opportunity to present those arguments before concluding the hearing. (*Id.*, p. 13:5, 14:9, 15:18, 16:5.) Similarly, Appellant points to nothing in the record which indicates she ever raised this issue before the district court and in fact, nothing in the transcript from the appeal hearing before the district court, shows that it was. (Tr., p. 17:3-26:25, 35:15-43:18.)

Again, the present appeal is not the proper place for Appellant to raise new arguments for the first time. Idaho law is clear that by failing to raise this issue below, she is now barred from doing so now. As such, the Court should decline to review Appellant's third issue on appeal.

C. Appellant's fourth, fifth, and sixth issues on appeal are also deemed to have been waived because they are not properly argued or supported as required by I.A.R. 35(a)(6).

Appellant's fourth, fifth, and sixth issues on appeal should also be deemed to have been waived because they are not properly argued or supported as required by the Idaho Appellate Rules.

I.A.R. 35(a)(6) provides that "the argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the

authorities, statutes and parts of the transcript relied upon." This Court has held that "issues that are not argued and supported as required by the Appellate Rules are deemed to have been waived. *Bettwieser v. New York Irrigation Dist.,* 154 Idaho 317, 326, 297 P.3d 1134, 1143 (2013); *citing to Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005)). Similarly, issues on appeal that are not supported by propositions of law or authority are **deemed waived** and **will not be considered**. *Michalk v. Michalk,* 148 Idaho 224, 230, 220 P.3d 580, 587 (2009)(emphasis added); *citing to Wheeler v. Idaho Dept. of Health Welfare,* 147 Idaho 257, 266, 207 P.3d 988, 997 (2009). The reasoning behind such a rule "lies in the fact that it is the appellant who has asserted error on the part of the [trial court]. Absent compliance with the rules, this Court will not search the record for error. Error is never presumed on appeal and the burden of showing it is on the party asserting it." *Idaho Power Co., v. Cogeneration, Inc.,* 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000). Thus "regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by an cogent argument or authority, it cannot be considered by this Court. *Liponis v. Bach,* 149 Idaho 372, 374, 237 P.3d 696, 698 (2010); *citing to Inama v. Boise Coutny ex rel. Bd. Of Comm'rs,* 138 Idaho 324, 330, 63 P.3d 450, 456 (2003).

With the foregoing in mind, Appellant has failed to comply with I.A.R. 35(a)(6) with respect to her fourth, fifth, and sixth issues on appeal. Beyond merely repeating the issues in the section heading and then providing a conclusory summary of her argument, Appellant's opening brief provides no justification for reaching her stated conclusion, no citations to any authority, controlling or otherwise, and no citations to the record or transcript relied upon including

citations establishing that she ever raised the identified issues before either the magistrate court or the district court on appeal such that they can be validly raised now. *See Michalk v. Michalk*, 148 Idaho 224, 232, 220 P.3d 580, 588 (2009); *citing to Mackowiak v. Harris*, 146 Idaho 864, 866, 204 P.3d 504, 506 (2009).

Ultimately, neither Respondent nor the Court has any indication of the basis of Appellant's arguments. Appellant provides no authority or citations to the record to even begin to determine what her argument may be or what it may be based upon and as such, Respondent has no meaningful opportunity to respond. For the above reasons, the Court should decline to review Appellant's fourth, fifth, and sixth issues presented on appeal which are barred by her failure to comply with Idaho Appellate Rule 35(a)(6).

IV. THE DISTRICT COURT'S DECISION MUST BE AFFIRMED AS A MATTER OF PROCEDURE BECAUSE THERE WAS SUBSTANTIAL AND COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE MAGISTRATE COURT'S FINDINGS OF FACT AND ITS CONCLUSIONS OF LAW FOLLOW FROM THOSE FINDINGS.

Even if this Court declines to find that Appellant has waived the issues she is now attempting to raise on appeal, Appellant appears to only challenge the magistrate court's ruling and district court's approval of that ruling on one ground, which was whether Freddie Mac could submit a credit bid at the sale.[7] As noted above, Appellant failed to preserve this issue for appeal by failing to raise it before the magistrate court such that it had the opportunity to review and

[7] Contrary to Appellant's assertion that the Magistrate Court was somehow required to look at Note Ownership in determining the effect of a Trustee's Deed, this Court in *Trotter v. Bank of New York Mellon,* ruled that there is no requirement to prove standing in non-judicial foreclosures such as the one that occurred in this case and Appellant's argument is nothing more than an after-the-fact attempt to create such requirement, where none otherwise exists. *Trotter v. Bank of New York Mellon,* 225 P.3d 857 (2012).

rule upon it. Had she properly raised this issue before the magistrate court, the issue could have been addressed and evidence submitted and this Court would have a record before it from which to make a fully informed ruling. Additionally, the standard of review is not *de novo,* but this Court is instead confined to the magistrate court's findings of fact, based upon the record before it, and the conclusions of law drawn therefrom. Where Appellant raised no issues before the magistrate court with respect to whether Freddie Mac could appropriately submit a credit bid, the magistrate court made no findings of fact and drew no conclusions of law from which Appellant can now appeal.

In the proceedings below, the magistrate court was faced with a very narrow issue as to whether Freddie Mac, pursuant to a validly recorded Trustee's Deed was entitled to possession of The Property. The magistrate court acknowledged as much in the first line of its written Order Granting Motion for Summary Judgment (R. 554.) The magistrate court was not faced with any affirmative requests for relief from the Appellant on any of the grounds she now asserts in her opening brief,[8] including but not limited to a request that the foreclosure sale be set aside because Appellant does not believe she was in default, that Appellant believes she was entitled to a modification of her loan, that Appellant challenged the ownership of her note, or that her loan should have been or was modified by Wells Fargo, an entity she never made a party to the present suit. (*See* Appellant's Brief, pg. 15-17.) In fact, Appellant's opening brief is completely

[8] It is Appellant's burden to support her arguments with citations to the record and not the burden of the Respondent or this Court to have to search the record for what she may be using as support or to demonstrate a lack thereof. In the case at hand, beyond conclusory assertions of having raised questions below or having created issues of material fact, Appellant provides absolutely no citations to the record including the portions of any of her underlying briefing or argument in the lower court proceedings to support such assertions.

devoid of any reference to the record in this case to support her conclusory assertions. This is ultimately because they record contains none as all of the foregoing arguments are being raised for the first time in this appeal.

In reaching its decision on the narrow issue before it, the magistrate court made appropriate findings of fact based upon the undisputed record before it which included a copy of the Trustee's Deed the effect of which, pursuant to I.C. § 45-1508, terminated all of Appellant's interest[9] in The Property and entitled Respondent to immediate possession ten days after the sale. (R. 10-11; R. 557 and 991.) The magistrate court also had before it copies of the various notices given with respect to the trustee's sale. (R. 72-82, 141-162; R. 557 and 992.) These documents were undisputed, notwithstanding Appellant's copious amounts of briefing and argument, none of which contradicted or set forth any evidence for the magistrate court to rely upon in order to refute the statutory presumptions afforded to a Trustee's Deed under I.C. § 45-1501(1). (R. 994 (noting that "The trustee's deed is prima facie evidence of the validity of the sale, which has not been rebutted by admissible evidence.").)

The magistrate court's conclusions of law then appropriately followed from its findings and the undisputed record. Specifically, Idaho law provides that the effect of the undisputed trustee's sale of The Property was to "foreclose and terminate all interest in the property covered

[9] As noted by the Honorable Judge B. Lynn Winmill in *Laurie Hobson v. Wells Fargo Bank, N.A., et. al.*, 2012 WL 505917 (D.Idaho 2012), there is nothing in the Idaho Trust Deeds act that prohibits the assignment of a successful credit bid on a property or that requires that such assignment be recorded. Furthermore, even if such assignment of a credit bid created some irregularity, the statute provides that "the sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding the notice of the sale (which are admittedly not present in this case)." *Spencer v. Jameson*, 211 P.3d 106, 113 (Idaho 2009). Therefore, [plaintiff] no longer had any interest in the property after the bid was accepted and has no standing to object to the assignment." *Id.*

by the trust deed of all persons to whom notice is given under section 45-1506." I.C. § 45-1508. A "purchaser at a trustee's sale is entitled to possession of the property on the tenth day following the sale..." I.C. 45-1506(11). "When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the affidavits required under section 45-1506, subsection (7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits..." I.C. § 45-1510(1). Furthermore, nothing in the Idaho Trust Deeds Act prohibits the assignment of a successful credit bid after a foreclosure sale. *Laurie Hobson v. Wells Fargo Bank, N.A., et. al.,* 2012 WL 505917 (D.Idaho 2012).

Contrary to Appellant's assertions in the underlying proceedings of the Idaho Trust Deeds Act having been repealed, the magistrate court and district court correctly found that the Idaho Trust Deeds Act has not been repealed. (R. 557 and 992-993; *citing to Spencer v. Jameson,* 147 Idaho 497, 501, 211 P.3d 106, 110 (2009).) Both courts also correctly found that HAMP was irrelevant to the proceedings because no private cause of action exists under HAMP and even if it did, the district court, on appeal, correctly noted that Appellant's own evidence showed that she was reviewed and denied because she did not comply with the program's directives. (*See* R. 990-991, fn. 5 and 6.)

The magistrate court did not have before it any evidence or argument contesting Freddie Mac's ability to submit a credit bid because Appellant did not challenge or raise questions as to who could submit a credit bid but instead she merely challenged whether a credit bid was allowed at all. (R. 993-994.) The district court correctly noted this omission and both it and the

magistrate court, faced only with Appellant's challenge as to whether a credit bid was a proper means of purchasing a property at a trustee's sale, found that it was pursuant to *FHLMC v. Appel,* 143 Idaho 42, 44, 137 P.3d 429, 431 (2006). Because of the narrow challenge raised by Appellant in the proceedings below, her attempt to now broaden her arguments to now include who has standing to submit a credit bid should not be considered by this court, first, because there is no record to support such argument/issue and second, consideration of such arguments prejudices the rights of Freddie Mac, which has had no opportunity to introduce evidence or argument to counter such arguments.

Ultimately, Appellant has pointed to nothing in the record that was before the magistrate court that demonstrates its findings of fact and conclusions of law drawn from those facts were inappropriate. Because the Court must conduct a deferential review where error is never presumed and "the evidence must be liberally construed in favor of the judgment," this Court should affirm the district court's decision as a matter of procedure.

CONCLUSION

For the reasons stated above, the May 23, 2013 decision of the district court affirming the grant of summary judgment to Freddie Mac, should be affirmed in all respects.

Dated: March 19th, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the Respondents' Opening Brief and this certificate of service was served upon the following designated parties, by first class mail, at the address listed below:

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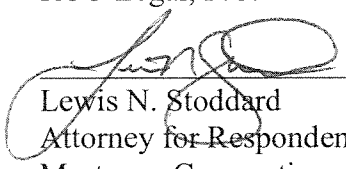

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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