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IN THE SUPREME COURT OF THE STATE OF IDAHO

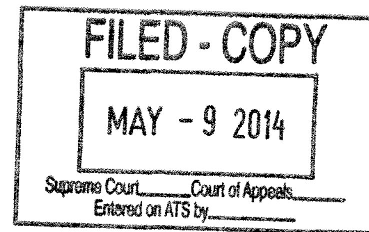
ALAN GOLUB and MARILYN GOLUB, husband and wife,

Supreme Court No. 41501-2013

Plaintiffs/Respondents,

v.

KIRK-SCOTT, LTD., a Texas corporation;
KIRK-HUGHES DEVELOPMENT, LLC,
a Delaware limited liability company;
GERALDINE KIRK-HUGHES and PETER SAMPSON,
husband and wife; KIRK-HUGHES & ASSOCIATES, INC.,
a Nevada corporation,



Defendants/Appellants,

And

KELLY POLATIS, an individual,
and DELANO D. and LENORE J. PETERSON, husband and wife,
INTERNAL REVENUE SERVICE;
TOMLINSON NORTH IDAHO, INC., an Idaho corporation,

Defendants.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County, Honorable Lansing L. Haynes, District Judge, Presiding.

Michael Bissell, Residing at Spokane, Washington, Attorneys for Appellants, Kirk-Hughes Development, LLC; Geraldine Kirk-Hughes, Peter Sampson, and, Kirk-Hughes & Associates, Inc.

Matthew Crotty, Residing at Spokane, Washington, Attorney for Appellant Kirk-Scott, Ltd.

Michael Howard, Residing at Coeur d'Alene, Idaho, Attorneys for Respondents, Golub

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I. INTRODUCTION

Appellees Alan and Marilyn Golub's ("Golub") pleadings expose a fundamental misunderstanding of I.C. § 55-606 which led to an acknowledgement that Golub had actual notice of Kirk-Scott's deed of trust before Golub obtained a judgment lien. Apparently, Golub did not realize that actual notice of Kirk-Scott's deed of trust in September 2010 (a month before the judgment lien was created) would defeat his claim to priority in the subject property. The testimony and arguments presented at Summary Judgment revealed that Golub had actual knowledge of Kirk-Scott's interest on September 17, 2010[1]; thus, it is impossible for Golub's judgment lien to constitute a "good faith" encumbrance under the recording statute as a matter of law. Now, in an attempt to put the proverbial cat back in the bag, Golub is twisting previous affidavit testimony, and abandoning former arguments, which establish Kirk-Scott's priority interest in the property at issue.

A. The Good Faith Requirement in Idaho Code § 55-606 Applies to All Subsequent Encumbrances, Including Judgment Liens.

As succinctly stated by this Court, "the primary purpose of the recording statute is to give notice to others that an interest is claimed in real property, and thus give protection against bona fide third parties who may be dealing in the same property." *Large v. Cafferty Realty*, 123 Idaho 676, 679-680, 851 P.2d 972 (1993) (citation omitted). Put simply, recording statutes exist to provide notice of interests and to protect parties that acquire interests without knowledge of other unrecorded interests. *See id.* Here, the statute *does not* provide protection to Golub's judgment

[1] A judgment does not become a "judgment lien" until it is validly recorded pursuant to I.C. § 10-1110. Here, the judgment did not become a "judgment lien" until October 28, 2010.

lien because he in fact had actual knowledge of Kirk-Scott's deed of trust at the time the judgment lien was created. *See id;* I.C. § 55-606. Given the plain meaning and purpose of the statute, it is unreasonable to interpret I.C. § 55-606 to treat "judgment liens" as a separate and special class of interests that automatically acquire priority over all other interests, despite actual or constructive notice of other legitimate interests held by third-parties. Golub's interpretation gives judgment liens a super-priority.

This is the first time Golub has asserted that the recording statute allows a judgment lien to cut off another party's interests, even when the judgment creditor has actual knowledge of prior interests. Golub's novel interpretation is surprising in light of his prior motion which acknowledges that good faith must be met under I.C. § 55-606. (R, Vol. 1, p. 83-90.) It is telling that Golub now argues notice is irrelevant when he failed to make this argument previously and filed over six pages of argument to convince the District court that he met the good faith requirement under the statute. *See id.*

The legislative history cited by Golub does not provide any indication that the legislature intended to carve out a special class of judgment liens to place judgment creditors' interests ahead of other types of known encumbrances. Indeed, until 1989 judgment liens received no protection under I.C. § 55-606. *See Johnson v. Caspe*r, 75 Idaho 256, 270 P.2d 1012 (1954) (holding that a judgment lien is not considered an "instrument" under the recording statute); (R, Vol. 1, p. 584.) In 1989, the legislature clarified the recording statute because it was concerned that the Idaho "Supreme Court ha[d] recently allowed a judgment to be eliminated if the property [was] sold before a collection [could] be made." (R, Vol. 1, p. 350.) It appears as though the

legislature was responding to several cases in Idaho which held that a "judgment lien" did not qualify as an "instrument" under the former version of I.C. § 55-606. *See Siegel Mobile Home Group v. Bowen*, 114 Idaho 531, 533, 757 P.2d 1250 (Ct. App. 1988) (explaining that a judgment lien "is not an "instrument" under I.C. § 55-606") (citing *Johnson v. Casper*, 75 Idaho 256, 270 P.2d 1012 (1954)). The only change the legislature made to the statute was to include the words "or valid judgment lien" so as to indicate that judgment liens were not subordinate to subsequent conveyances. (*See* R, Vol. 1, p. 347.)

Golub incorrectly asserts that "neither the text of I.C. § 55-606 nor the courts interpreting it require that any finding of good faith or additional consideration, beyond the underlying obligation giving rise to the judgment is necessary for the holder of a valid judgment lien to avail himself to the protections of I.C. §55-606." The Idaho Supreme Court previously ruled that "[w]hen a subsequent *encumbrancer* or purchaser has actual knowledge of a prior interest, it makes no difference whether the prior interest was properly acknowledged and recorded." *Farm Bureau Fin. Co. v. Carney*, 100 Idaho 745, 747, 605 P.2d 509 (1980) (emphasis added). There is not a single case that exempts judgment liens from the good faith requirement, nor does Golub cite to a single case that supports this absurd interpretation. The plain meaning of the statute expressly provides that prior conveyances are *conclusive* against *all* others unless a later encumbrancer acquires the interest through consideration[2] and without notice of prior interests. I.C. § 55-606. "One who purchases *or encumbers* property with notice of conflicting claims . . .

[2] Golub argues that the recording statue does not require consideration to be given for the acquisition of judgment liens. A judgment constitutes legal value, and in this instance the lien stems from Golub's realtor fees that were purportedly unpaid. In other words, Golub did in fact provide consideration for the lien that was acquired.

does not take in 'good faith' and will not prevail over a prior purchaser." *Langroise v. Becker*, 96 Idaho 218, 526 P.2d 178 (1974) (emphasis added). If Golub had prior notice, he does not have priority over Kirk-Scott's deed of trust as a matter of law.

B. Golub had Actual Knowledge of Kirk-Scott's Interest prior to Obtaining a Judgment Lien.

Golub asserts that he had no actual knowledge of Kirk-Scott's deed of trust "prior to" obtaining the judgment lien. This is not true. Golub's own testimony and the arguments made at summary judgment establish that he had actual knowledge of Kirk-Scott's deed of trust before the judgment lien came into existence, and at a minimum, the affidavits in support of the Kirk-Hughes defendants establish a question of fact as to Mr. Golub's knowledge.

1. Golub previously argued that he obtained knowledge of Kirk-Scott's interest on September 17, 2010—a month before the judgment lien was created.

At summary judgment, Golub testified that he did not have knowledge of Kirk-Scott's deed of trust "*prior to*" September 17, 2010. Golub's response brief makes much ado about the interpretation of this statement, and argues that notice "prior to" does not mean that Golub actually had notice on September 17, 2010. However, Golub's brief at summary judgment expressly interprets Golub's affidavit testimony to mean just that: "Golub had no actual notice of any interest claimed by Kirk-Scott in either property *until* the Deed of Trust was recorded on September 17, 2010." (R, Vol. 1, p. 90, L. 1-2) (emphasis added.) While the affidavit testimony alone might give rise to a question of fact as to what Golub meant, Golub's brief clarifies the testimony and constitutes an admission of notice on September 17, 2010. *See id.* This is fatal to Golub's claim of priority. Golub should not be allowed to twist former testimony and mince

words, especially when Golub's own summary judgment brief interpreted the affidavit testimony to mean that Golub had notice as of September 17, 2010. (R, Vol. 1, p. 90, L. 1-2.)

2. <u>The affidavits filed by Geraldine Kirk-Hughes and Darlene Moore establish genuine issues of material fact.</u>

Notwithstanding the conclusive evidence of prior notice provided by Golub's own testimony and argument, the affidavits of Darlene Moore and Geraldine Kirk-Hughes present genuine issues of fact. Golub asserts that the affidavits merely provide evidence of an intent or desire to convey an interest to Kirk-Scott. This is not true. Geraldine Kirk-Hughes testified that she informed Golub that Ms. Moore was preparing a deed of trust on behalf of Kirk-Scott. (R, Vol. 1, p. 583-584.) Ms. Moore testified that she informed Golub it would be futile to pursue a lawsuit because Balinda Antoine had a prior interest in the only asset Golub could collect against.[3] (R, Vol. 1, p. 308.) Golub asserts that the use of the word "mortgage" rather than deed of trust was insufficient to give Golub notice of Kirk-Scott's interest. Geraldine Kirk-Hughes had previously informed Golub that Kirk-Scott would be given a deed of trust, and a lay persons use of "mortgage" rather than "deed of trust" does not destroy Golub's notice. This technical argument places form over substance and it should be disregarded. Golub's experience, his constant involvement in the development project, and the testimony provided by Darlene Moore and Geraldine Kirk-Hughes present issues of fact as to when Golub obtained notice of Kirk-Scott's interest. While there is no question that Golub had actual notice on September 17, 2010,

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[3] Any argument that Golub was informed that "Balinda" was granted an interest as opposed to "Kirk-Scott" is without merit. Golub previously testified that he equates Balinda with Kirk-Scott, when he referred to Kirk-Scott as "she" during his 2013 deposition. (Dep. of A. Golub, in the Augmentation Record pursuant to the Third Motion to Augment, filed May 5, 2014, P. 91:10-92:2.)

there is also a genuine issue of fact as to whether Golub had actual knowledge long before that date.

C. Constructive Notice Is Not at Issue.

Golub had actual notice and there is no need to analyze the validity of the recordation for purposes of constructive notice. However, Kirk-Hughes does not concede that that the acknowledgement of the deed of trust was defective. Kirk-Scott briefed the acknowledgement issue at length, and that briefing establishes that the acknowledgement was proper. (R, Vol. 1, p. 234-237.) However, whether acknowledgement and recording were sufficient to impart constructive notice are immaterial and needlessly complicate the simple issue before the Court.

D. Sanctions Are Not Warranted.

While sanction awards are committed to the discretion of trial courts, discretion must not be abused, and the amount of attorney fees incurred should serve as a guide to the amount of sanctions awarded. *See Campbell v. Kildew*, 141 Idaho 640, 651, 115 P.3d 731 (2005). It is undisputed that Golub did not incur any attorney fees responding to the Kirk Hughes defendants, and the District Court directed Golub to apportion incurred costs between the Kirk-Hughes and Kirk-Scott defendants. (R, Vol. 1, p. 556.) The District Court abused its discretion in awarding $2,400.00 in sanctions against the Kirk-Hughes defendants since it is undisputed that they did not cause Golub to incur *any* legal fees. (Affid. of M. Howard, in the Augmentation Record pursuant to the Second Motion to Augment, filed March 5, 2014, ¶ 19.) Accordingly, the award against Kirk-Hughes should be reversed.

II. CONCLUSION

Based on the foregoing, summary judgment in favor of Golub should be reversed, the award of sanctions should be reversed, and the District Court should be directed to enter an order stating that the Kirk-Scott deed of trust has priority over Golub's judgment lien.

DATED this 7th day May, 2014.

CAMPBELL & BISSELL, PLLC

By:

MICHAEL S. BISSELL
Attorneys for Defendants/Appellants
Kirk-Hughes Development, LLC, Geraldine
Kirk-Hughes, Peter Sampson, and Kirk-Hughes
& Associates, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of May, 2014, I caused to be served a true and correct copy of the foregoing document to the following:

☒	HAND DELIVERY	Michael T. Howard
☐	U.S. MAIL	Winston & Cashatt, P.S.
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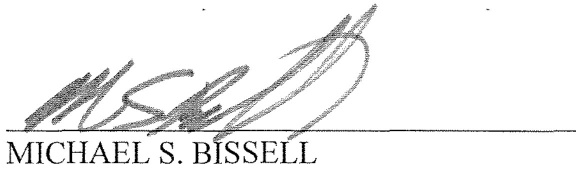

MICHAEL S. BISSELL