3-12-2013

Golub v. Kirk-Scott, LTD Appellant's Brief Dckt. 41505

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALAN GOLUB and MARILYN GOLUB, Supreme Court No. 41505-2013

husband and wife,

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.

APPELLANT BRIEF - KIRK SCOTT, LTD.

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

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

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

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

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I. STATEMENT OF THE CASE

A. Nature of Case

This case is about whether Appellant Kirk-Scott, Ltd. ("Kirk-Scott") or Appellees Alan and Marilyn Golub ("Golub") have priority to real property located in Coeur D'Alene, Idaho.

B. Course of Proceedings

On January 25, 2013[1], Golub commenced a declaratory judgment action in the Kootenai County, Idaho, District Court. The 2013 Action, Case No. CV-13-866, sought determination as to whether Golubs' March 11, 2009, Default Judgment had priority over Kirk Scott's November 18, 2004, Deed of Trust. On March 14, 2013, Kirk-Scott answered Golubs' complaint. On April 30, 2013, Kirk-Scott moved to dismiss the 2013 Action. On May 9, 2013, Golubs moved for summary judgment adjudication of the 2013 Action.

On May 20, 2013, the 2013 Action was consolidated with Kootenai County District Court Cause Number CV07-8038.[2] On June 24, 2013, Kirk-Scott moved to vacate the March 11, 2009, Default Judgment. On July 9, 2013, the Court heard oral argument on Kirk-Scott's Motion to Dismiss, Kirk-Scott's Motion to Vacate, and Golubs' Motion for Summary Judgment. At the July 9, 2013, hearing the Court allowed, over Kirk-Scott's objection, Golubs' late-filed evidence to be admitted. On July 25, 2013, Kirk-Scott moved to compel Golub to disclose the amount of monies Golub received in partially settling the 2007 Action.

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[1] The 2013 lawsuit is titled the "2013 Action".
[2] The 2007 lawsuit is titled the "2007 Action".

On August 9, 2013, the Trial Court issued an order that (a) denied Kirk-Scott's Motion to Dismiss, (b) denied Kirk-Scott's Motion to Vacate, (c) granted Golubs' Motion for Summary Judgment, and (d) rendered Kirk-Scott's Motion to Compel moot. On August 19, 2013, the Trial Court issued its final judgment. On August 21, 2013, Kirk-Scott moved to alter/amend the Court's August 9, 2013, Order and August 19, 2013, Judgment. On September 27, 2013, the Trial Court denied Kirk-Scott's Motion to Amend/Alter. On September 30, 2013, Kirk-Scott filed its Notice of Appeal. On November 21, 2013, the Trial Court, *sua sponte*, sanctioned Kirk-Scott for its Motion to Amend/Alter and, on December 3, 2013, issued its Order re Sanctions in which the Trial Court ordered Kirk-Scott to pay Golub $2,400.00 in attorneys' fees. Kirk-Scott amended its Notice of Appeal on December 4, 2013, in order to address the Trial Court's November 21, 2013, and December 4, 2013 sanctions orders.

C. Statement of Facts.

1. The 2007 and 2013 Actions originate from a federal lawsuit titled *Tomlinson Black North Idaho v. Geraldine Kirk-Hughes, et. al,* 2:06-cv-00118-RHW (D. Idaho) *available at* http://www.gpo.gov/fdsys/pkg/USCOURTS-idd-2_06-cv-00118/pdf/USCOURTS-idd-2_06-cv-00118-1.pdf (*last visited* January 27, 2014)(hereinafter the "Federal Action"). The Federal Action involved a real estate commission dispute between Tomlinson Black North Idaho, Inc., Geraldine Kirk-Hughes, Kirk-Hughes Development, LLC, and Kelly Politas. *Id.* at 3.[3] Briefly stated, in mid-2004 Ms. Kirk-Hughes instructed Tomlinson Black to write an offer to purchase

[3] Neither Kirk-Scott, Ltd. or Balinda Antoine, Kirk-Scott's president, were parties (or witnesses) to the Federal Action.

real property then-owned by Lenore and Delano Peterson (the Peterson property[4]). *Id.* at 3. Alan Golub, an employee of Pacific Real Estate & Investment, served as the listing agent for the Peterson property. *Id.* at 3. Ultimately, the purchase price for the Peterson property was $5,482,000 with a real estate commission equal to 50% of any sale amount over $4.4 million. *Id.* at 5.

2. On September 25, 2007, Mr. Golub was deposed as part of the Federal Action; and, at the deposition, testified about a 2004 meeting he attended at the Coeur d'Alene Resort with Balinda Antoine, Kirk-Scott, Ltd's president:

> Q. And if you already testified to this, I apologize. But who was present?
>
> A. Tony Jansen, who was an architect at that time with ALSC from Spokane, John Lasher from First American Title, Ron Hazard and Mike Harris with the Stonehill Group, who were developers of a large project. Dean was present. I was present. Ms. Kirk-Hughes was present. Darlene Moore was present. Ms. Kirk-Hughes husband, Peter was present. Ms. Kirk-Hughes sister. I believe her name is Belinda was present. There was also a conference call to architect Algie Pulley. Also present was the engineer, Bart North from North Engineering. And I believe also present was Sherry Howell, who formerly worked for the county. She was present.
>
> ...
>
> Q. So please tell me what was the purpose of this presentation again?

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[4] The Peterson property abuts real property referred to as the Sloan and Atkinson property. *Id.* at 3. The Federal Action found that "Kirk-Hughes bought the Atkinson property after Golub assigned his interest in purchasing the property to Kirk-Hughes" and that Kirk-Hughes purchased the Sloan property. *Id.* at 3. Kirk-Scott's Deed of Trust secures the Atkinson and Sloan parcels, not the Peterson property. (R, Vol. 1, p. 39-42)

A. It was my understanding Geraldine wished to have her sister, who lived in Texas, come up to see Idaho to see the property and to elicit her interest in investing in this project.

Q. And so the purpose of the presentation was to --

A. To --

Q. Sell her sister --

A. Sell her sister on this project. (R, Vol. 1, p. 137, L. 24-25; p. 138, L. 1-25, p. 139, L. 1-7, p. 249, L. ¶2)

3. Ms. Antoine traveled to Coeur d'Alene, Idaho in 2004 in order to attend a presentation that Mr. Golub made regarding the subject property's development.[5] *Id.* p. 249, L. ¶3. That presentation took place at a seminar room located in the Coeur d'Alene Resort. *Id.* at p. 249 - 250, L. ¶¶4-5, 6, 8. At the meeting Mr. Golub and Ms. Antoine had an extensive conversation in which Ms. Antoine asked Mr. Golub whether the subject property was encumbered by other liens. *Id.* Ms. Antoine then informed Mr. Golub that any loan regarding the subject property's development would be secured with a deed of trust. *Id.* Mr. Golub assured Ms. Antoine that title to the property was clear. *Id.*

4. At the September 25, 2007, deposition Mr. Golub testified that the day after the above-referenced presentation he drove Ms. Antoine to the subject property:

Q. Did you have conversations with any of the parties in that group that day about purchasing the Peterson property?

[5] The phrase "subject property" means the Atkinson, Sloan, and Peterson properties in Kootenai County, Idaho. At the trial court level the parties periodically referred to the "subject property" as the Atkinson, Sloan, and Peterson properties. (R, Vol. 1, p. 73-74)

A. I was basically showing them around the property. It was to -- my attention actually was directed primarily at her sister, Belinda. I was personally showing her the different attributes of the property, the views, and took her, thinking that she was the key person that that meeting was set up for. So I spent my time showing the property to her sister.

Q. What led you to believe she was the key person that you needed to show this property to that day?

A. It was the fact that the meeting was arranged for her. When we were on the -- when Ms. Kirk-Hughes had the phone conversation with her sister she mentioned -- this is at the first meeting on May 8th -- she mentioned that her sister lived in Texas and had two major businesses in the medical field, that one was equipment, medical equipment for oxygen, beds, this type of thing, medical equipment. And also she had another company where she staffed private nursing, nurses for resident care. And she described her sister as a very successful business woman in Texas.

Q. You already had both the Sloan property and the Peterson property under contract with Geraldine Kirk-Hughes and Darlene Moore so why did you care?

A. Because it was my impression that Ms. Kirk-Hughes did not individually have the financial capability to close on the contract. And in her conversations she talked about investors that she was looking to interest in the property. (R, Vol, p. 141, L. 24:25, p. 142, L. 1-25, p. 143, L., 1-17, p. 250, L. ¶6)

5. At the September 25, 2007, deposition Mr. Golub testified, in relation to the "real estate commission"[6] regarding the Peterson property: (a) "the total commission to all real estate agents would have been" $941,000; and, (b) the $941,000 "commission" would be split with: (i) Darlene Moore receiving $109,640.00 (of the $941,000 commission); (ii) Tomlinson Black

[6] *See supra* at §I(C)(1) for a general description of the "listing agreement" that gave rise to the "real estate commission." The "listing agreement" is available at R, Vol. I, p. 173-174.

receiving $191,870.00 (of the $941,000 commission); (iii) Pacific Real Estate receiving $154,872.50 (of the $941,000 commission); and, (iv) Mr. Golub receiving $464,617.50 (of the $941,000 commission). (R, Vol. 1, p. 262, L. 2-17, p. 284, L. 14-20, p. 175, p. 185, L. 14-23, p. 186, L. 1-3). At the September 25, 2007, deposition Mr. Golub testified that he (Golub) would pay Darlene Moore a two percent commission based of the sale of the Peterson property. (R, Vol. 1, p. 158, L. 13-19)

6. At the September 25, 2007, deposition Mr. Golub testified to repeatedly querying First American Title Employee Melody Jones during 2004 - 2005 timeframe to ascertain who had title to the Sloan, Atkinson, and Peterson properties. (R, Vol. 1, p. 146, L. 22-25; p. 147, L. 1-2; p. 148, L. 18-23; p. 149, L. 7-13; p. 150, L. 18-25; p. 151, L. 1-17; p. 152, L. 22-24; p. 153, L.12-18; p. 156, L. 17-25; p. 157, L. 1-4) Ms. Jones agrees. (R, Vol. 1, p. 319 - 320)

7. Mr. Peterson filed a complaint against Mr. Golub with the Idaho Real Estate Commission. (R, Vol. 1, p. 288, L. 19-25, p. 289, L. 1-5) The Idaho Real Estate Commission found Mr. Golub liable for failing to timely communicate with Mr. Peterson and fined Mr. Golub. (R, Vol. 1, p. 289, L. 18-25, p. 290, L. 1-25, p. 291, L. 1-23)

8. There is no evidence in the record that Pacific Real Estate assigned its $154,872.50 share of the $941,000 to Golub. (Tr. Vol. 1, p. 32, L. 21-25, p. 33, L. 1-2)

9. In 2006 Alan Golub contacted Darlene Moore and asked if Ms. Moore would be interested in suing Ms. Kirk-Hughes in order to recover the above-referenced real estate commissions. (R, Vol. 1, p. 307, L. ¶17) Ms. Moore told Mr. Golub that such a lawsuit lacked

merit because "Balinda Antoine had a mortgage on the [subject property] and there would be no asset to collect against." *Id.*

10. What Ms. Moore told Mr. Golub did not come as a surprise as Mr. Golub testified:

> Q. You knew in 2004 that Kirk-Scott had clear title to the property?
>
> A. The property, yes.
>
> Q. Okay. And what do you mean by "the property?"
>
> A. The properties would have been, I believe, the Mayvis Sloan and/or Atkinson property. (R, Vol. 1, p. 296, L. 6-18)

11. Not only was Mr. Golub well informed about Kirk-Scott's secured interest in "the property," but he received a play-by-play narrative of the steps being taken to draft Kirk-Scott's Deed of Trust regarding the subject property. To wit: in mid-2004 Ms. Antoine told Mr. Golub that the subject property would be secured by a deed of trust; in July 2004 Ms. Antoine told Mr. Golub that the subject property needed to be titled in Kirk-Scott's name because Kirk-Scott was financing the subject property's purchase; in September 2004 Ms. Kirk-Hughes told Mr. Golub that she was giving Ms. Antoine a deed of trust in the subject property; in November 2004 Ms. Kirk-Hughes told Mr. Golub that the Deed of Trust was being prepared; in November 2004 Darlene Moore told Mr. Golub that she (Moore), personally, was preparing the Kirk-Scott Deed of Trust. (Tr. Vol. 1, p. 61, L. 20-25, p. 62, L. 1-25, p. 63, L. 1-22; R, Vol. 1, p. 305, L. ¶11, p. 306, L. ¶15, p. 312, L. ¶10, p. 313, L. ¶12)

12. Mr. Golub, a real estate agent, knows how to do a title search, knows where to find records regarding real property ownership, and, when presented with Kirk-Scott's Deed of Trust, testified that there was nothing in that document that confused him. (Tr. Vol. 1, p. 64, L. 9-18; R, Vol. 1, p. 274, L. 1-18, p. 276, L. 6-20, p. 295, L. 10-25, p. 300, L. 15-23)

13. From 2006 - 2007 Mr. Golub attended county commissioner hearings regarding the subject property's development. (Tr. Vol. 1, p. 64, L. 19-25; R, Vol. 1, p. 315, L. ¶¶18, 22)

14. And, it bears repeating, Ms. Moore told Mr. Golub in 2006 that the subject property was secured by Kirk-Scott's Deed of Trust. (R, Vol. 1, p. 307, L. ¶17)

15. On October 30, 2007, Alan Golub sued Geraldine Kirk-Hughes, Peter Sampson, Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Kelly Polatis, Delano Peterson, and Lenore Peterson.[7] (R, Vol. 1, p. 162 - 169) Neither Kirk-Scott or Ms. Antoine were parties to the 2007 Action. *See id.* And even though Mr. Golub testified under oath at the September 25, 2007, deposition (which predated the October 30, 2007, Complaint's filing by 35 days) that his share of the $941,000 commission was, at best, $464,617.50, he nonetheless sued for the entire $941,000 amount. *See infra.*

16. The 2007 Action asked for, *inter alia,* (a) "Judgment in favor of Plaintiffs for all claims against Defendants in an amount to be proven at trial, but more than the jurisdictional amount of $10,000.00" and (b) "pre-judgment interest." (R, Vol. 1, p. 169) A single sentence in

[7] This lawsuit, which was filed in the Kootenai County, District Court, under Cause Number CV 07-8038, is the above-referenced 2007 Action.

the complaint alleged that defendant "Peterson did not pay Golub the $941,000 under the Listing Agreement..." *Id.* p. 166.

17. On June 11, 2008, Mr. Golub filed the "Affidavit of Alan Golub in Support of Motion for Default Judgment Against Kelly Polatis." *Id.* at p. 170.

18. Exhibit 1 to Mr. Golub's June 11, 2008, Affidavit is the above-referenced "listing agreement" to which Mr. Golub testified he is entitled to $941,000.00. *Id.* at p. 171. The two page hand written "listing agreement" does not contain the number $941,000.00 or state that Mr. Golub is (or was) entitled to that amount of money. *Id.* at p. 173 - 174. Those omissions were for good reason, for Mr. Golub testified that he was not entitled to $941,000. *See supa.* at ¶7.

19. On February 26, 2009, attorney Michael Howard (who defended Mr. Golub's deposition in the Federal Action, represented Mr. Golub in the 2007 Action, and represents Mr. Golub in the 2013 Action) moved, under I.R.C.P. 55(b)(1) for a Motion for Default Judgment. *Id.* at p. 190 - 192. The memorandum in support of the default motion was supported by a February 18, 2009, Affidavit of Michael Howard, and the June 10[8] [sic], 2008, Affidavit that Alan J. Golub filed against Kelly Polatis - - - just one of the seven defendants in the 2007 Action. *Id.* at p. 170-174, p. 190-192. The February 26, 2009, motion for default against Kirk-Hughes Development, LLC (and others) was not supported by "an affidavit of the amount due showing the method of computation, together with any original instrument evidencing the claim" against defendant Kirk-Hughes Development, LLC (or any other defendant besides

[8] The reference to the June 10, 2008, Golub Affidavit was a typographical error. The docket contains no evidence of a June 10, 2008 Golub Affidavit but does contain evidence of a June 11, 2008 Golub Affidavit. (R, Vol 1. pg. 211-224)

Polatis) as required by IRCP 55(b)(1) - - - it was supported by an Affidavit of amount due against Kelly Polatis and Kelly Polatis only. *Id.*

20. On March 11, 2009, the Trial Court signed Mr. Golub's Judgment but did not execute a IRCP 54(b) certificate. (R, Vol. 1, p. 36-37). The March 11, 2009, Judgment listed: "principal judgment amount" as $941,000, "pre-judgment interest: 12% to run from March 11, 2005 through the date of this Judgment," and "post judgment interest." *Id.* By way of contrast, Mr. Golub's October 30, 2007, Complaint (a) did not ask for $941,000 from any defendant, (b) did not seek 12% interest from any defendant, or (c) did not seek any prejudgment interest from any defendant. (R, Vol. 1, p. 162-169)

21. On or about July 8, 2009, Mr. Golub settled his claims with defendants Delano and Lenore Peterson. (R, Vol. 1, p. 201, L. 5-6)

22. On or about July 23, 2009, Mr. Golub moved to have the Court issue a Rule 54(b) certificate against all defendants but Kirk-Hughes Development, LLC. *Id.* at p. 204. In seeking the Rule 54(b) certification Mr. Golub admitted that there were "technically still parties" to the case but claimed that "immediate entry of judgment will allow Golub the opportunity to begin execution upon the assets of the Defendants." *Id.* at p. 205 L. 15.

23. On August 25, 2009, Mr. Golub recorded the March 11, 2009, Judgment but not the signed Rule 54(b) certificate. *Id.* at p. 36.

24. On July 15, 2010, defendants Delano and Lenore Peterson filed a "Full Satisfaction of Mediated Settlement Agreement." *Id.* at p. 207-208. The amount of the settlement agreement is not known but both Mr. Golub and Mrs. Golub signed the document. *Id.*

Although the settlement amount is not known, it is likely significant for the Petersons had the financial wherewithal to pay the entire $941,000 judgment as Mr. Golub admits that the basis for the October 2007 action is "based upon the sales price of $5,482,000 for the [sale of] the Peterson property." *Id.* at p. 185.

25. On September 17, 2010, Kirk-Scott, Ltd.'s agent recorded the Deed of Trust. *Id.* at p. 35. Golub concedes that Kirk-Scott's Deed of Trust is valid. (Tr. Vol. 1, p. 48, L. 12-15)

26. On October 28, 2010, Mr. Golub re-recorded the March 11, 2009, Judgment but that Judgment did not contain a Rule 54 certificate. *Id.* at p. 35. Additionally, the re-recorded Judgment did *not* take into account the amount Mr. and Mrs. Golub received from the Peterson defendants as a result of the July 2010 settlement - - - it sought the same $941,000 amount as before. *See id.*

27. On February 22, 2013, Golub served Kirk-Scott with the 2013 Action. (R, Vol. 1, p. 356) On that day Balinda Antoine and Kirk-Scott, Ltd., who were not parties to the 2007 Action, first learned of the March 11, 2009, Default Judgment (R, Vol. 1, p. 466, L. ¶5)

28. Kirk-Scott, who never had opportunity to defend its interests in the 2007 Action, answered and immediately commenced discovery. Discovery revealed (a) that Mr. Golub testified, under oath in September 2007, that he did not have a claim to over half of the $941,000, (b) that Mr. Golub recovered some of the $941,000 from the Peterson defendants via a July 2010 settlement, (c) that Mr. Golub re-recorded the default judgment in October 2010 but did not deduct the monies he recovered from the Petersons when he re-recorded the judgment, and (d) that Mr. Golub thought it perfectly fair that he be allowed to recover twice on the default

judgment (once from the Petersons as part of the July 2010 settlement and once from the Kirk-Hughes defendants), and that (e) some of the $941,000 Golub obtained as part of the default judgment is what Tomlinson Black recovered as part of the Federal Action. (R, Vol. 1, p. 284, L. 15-25, p. 285, L. 1-25, p. 286, L. 1-9, p. 287, L. 8-23, p. 293, L. 7-25, p. 294, L. 1-25, p. 295, L. 1-2)

29. On May 3, 2013, Mr. Golub executed (and then filed) an affidavit in support of his motion for summary judgment in the 2013 Action. (R, Vol. 1. p. 95, L. ¶4) Mr. Golub's 2013 affidavit contradicted Mr. Golub's 2007 deposition testimony: Mr. Golub testified in his May 3, 2013 affidavit that he "never had any dealings with Kirk-Scott or Antoine" yet extensively testified to the opposite on September 25, 2007. (*Compare* R, Vol. 1, p. 95, L. ¶4 *with* p. 131, L. 16-18; p. 132, L.1; p. 133, L.18-25; p. 134, L. 1-6; P. 135, L. 23-25; p. 136, L. 1-21; p. 137, L. 21-25; p. 138; p. 140, L.1-8; p. 141-143; p. 144, L. 25; p. 145, L.1-24) Mr. Golub's May 3, 2013, affidavit also stated that Mr. Golub "was not aware that Kirk-Scott had executed a Deed of Trust to Kirk-Hughes Development" before Kirk-Scott recorded Kirk-Scott's Deed of Trust on September 17, 2010. *Id.* at p. 95, L. ¶14. Mr. Golub's statement is misleading: it was *Kirk Hughes Development, LLC* - not Kirk-Scott - who *executed* the Deed of Trust. *Id.* p. 39-40.

30. On June 24, 2013, Kirk-Scott moved to vacate the March 11, 2009, Default Judgment under I.R.C.P. 60(b)(4),(5), and (6) and, at the July 9, 2013, oral argument on the motion, emphasized the facts in support of those theories of relief, including the fact that the Default Judgment was a "prospective judgment" insofar as the Court would have to monitor disbursement of the $941,00 to Darlene Moore, Tomlinson Black, and others. (Tr. Vol. 1, p. 9,

L. 18-23; p. 13-16; p.18, L. 1-5; p. 30-31) At the July 9, 2013, oral argument Golub maintained that he, personally, was "out $941,000 because real estate fees weren't paid" (Tr. Vol 1. p. 24, L. 22-25) but conceded that "at some time later Pacific Real Estate [could be] obligated to give...Darlene Moore" part of the $941,000 commission. *Id.* at p. 25, L. 14-25, p. 26, L. 1.

31. At oral argument Golub conceded that Kirk-Scott needed to establish a "good faith" defense to Golubs' IC 55-606 by proving that Golub was on notice of Kirk-Scott's secured interest in the property. (Tr. Vol. 1, p. 50, L. 21-25; p. 51, L. 1-9; p. 54, L. 13-25; p. 56, L. 1-25; p. 57- 58) At oral argument the Trial Court, over the defendants' objection, allowed Mr. Golub to submit evidence - a declaration of Ms. Kirk-Hughes from a bankruptcy proceeding - in support of its opposition to Kirk-Scott's Motion to Vacate. (Tr. Vol. 1, p. 18; p. 79, L. 6-25; p. 80; L. 1-25; R, Vol. 1, p. 394 - 399)

32. On August 9, 2013, the Court denied Kirk-Scott's motions to vacate and dismiss and granted Golubs' motion for summary judgment. (R, Vol. 1, p. 414-420) On August 19, 2013, the Court issued its final judgment in the case. *Id.* at p. 435 - 439. On September 13, 2013, the Court denied Kirk-Hughes' motion to stay execution of Golubs' judgment. *Id.* at p. 485-486. And or about September 25, 2013, Mr. Golub acquired the property secured by Kirk-Scott's Deed of Trust via a credit bid. (R. Vol. 1, p. 524)

33. On August 21, 2013, Kirk-Scott moved to alter/amend the Court's August 9th and 19th orders. (R, Vol. 1, p. 440-458) Kirk-Scott's motion sought (a) address the Court's July 9, 2013, evidentiary ruling because the ruling did not allow Kirk-Scott to have a fair trial, (b) reflect

that record did not support the August 19, 2013's Judgment's award of $941,000 to Golubs, and (c) address Golubs' admitted double recovery. *Id.* at p. 445, 446.

34. On September 5, 2013, Kirk-Scott partially withdrew its Motion to Amend/Alter. *Id.* at p. 506. At the Motion to Amend/Alter oral argument Kirk-Scott reiterated that the evidence in the record did not support the August 19th Judgment (of which the $941,000.00 was part), that the August 9th Order's denial of Kirk-Scott's Motion to Compel allowed Golub double recovery, and that the Court's allowance of Golubs' late-filed evidence at the July 9, 2013, hearing constituted an "irregularity in the proceeding" that prejudiced Kirk-Scott. (Tr. Vol. 1, p. 95-99)

35. On October 2, 2013, the trial court denied Kirk-Scott's Motion to Amend/Alter and, on November 21, 2013, *sua sponte* sanctioned the appellants. *Id.* at p. 548-556. The trial court denied Kirk-Scott's Rule 59 Motion to Amend/Alter because no trial had taken place in the case which, in the trial court's opinion, rendered Rule 59 inapplicable. (Tr. Vol. 1, p. 106-107)

II. ISSUES PRESENTED ON APPEAL

A. Did the trial court err in denying Kirk-Scott's motion to vacate by requiring Kirk-Scott to establish "when" it became aware of the March 11, 2009, default judgment?

B. Did the trial court err in denying Kirk-Scott's motion to vacate under I.R.C.P. 60(b)(4) even though Kirk-Scott's motion to vacate was timely and Golubs' March 11, 2009, default judgment awarded relief greater than what was prayed for in the 2007 Action's Complaint?

C. Did the trial abuse discretion in denying Kirk-Scott's IRCP 60(b)(5) & (6) motions to vacate given that (i) the trial court did not address those motions in its order denying Kirk-Scott, Ltd.'s motion to vacate, (ii) the default judgment was a prospective judgment, and (iii) the default judgment did not comport with IRCP 55(b)(1) because the affidavit in support of the default judgment named only one defendant?

D. Did the trial court err in granting Golubs' Motion for Summary Judgment by failing to address whether Golubs met the "good faith" element required under IC 55-606?

E. Did the trial court err in granting Golubs' motion for summary judgment even though: (a) Golubs' default judgment was invalid because it was not supported by valuable consideration; and, (b) Golubs' default judgment was invalid because it lacked a Rule 54(b) certificate.

F. Did the trial court err in granting Golubs' motion for summary judgment by finding that Kirk-Scott, Ltd.'s deed of trust was not properly acknowledged?

G. Did the trial court err in denying Kirk-Scott, Ltd.'s motion to dismiss by finding that Golub had standing to object to Kirk-Scott's recording of its Deed of Trust during a bankruptcy stay?

H. Did the trial court err in allowing Golub a double recovery?

I. Did the trial court abuse its discretion in sanctioning Kirk-Scott?

III. ATTORNEY FEES ON APPEAL

Appellant requests an award of its attorneys' fees and costs pursuant to Idaho Code § 12-120(3), and IC §12-121. IC § 12-120(3) allows for recovery of attorneys' fees in cases relating to

commercial transactions. The 2007 Action, to which the 2013 Action was consolidated into on Golubs' motion, is a commercial transaction involving a real estate listing agreement. *See supra* at §I(C)(1). The 2013 Action is "fundamentally related" to the listing agreement at issue in the 2007 Action insofar as (a) the listing agreement served as the basis for Golubs' 2007 Action (b) Golub obtained a Default Judgment in the 2007 Action, and (c) Golubs' 2013 Action seeks to acquire real property secured by Kirk-Scott's Deed of Trust to recover on the commercial transaction at issue in the 2007 Action. *See Reynolds v. Trout Jones Gledhill Fuhrman, P.A.,* 154 Idaho 21, 27 (2013).

IV. ARGUMENT

A. Standard of Review.

A trial court's denial of a motion to vacate a default judgment is reviewed for abuse of discretion. *Shelton v. Diamond Int'l Corp.,* 108 Idaho 935, 938 (1985). However, a trial court's discretion in acting on a motion for relief from a judgment "may be greatly narrowed where certain procedural safeguards were not strictly complied with in obtaining the judgment." *Deutz–Allis Credit Corp. v. Smith,* 117 Idaho 118, 120 (Ct.App.1990). In analyzing whether the trial court abused its discretion the trial court will:

> review...the trial court's application of law to the facts found [and] consider whether appropriate criteria were applied and whether the result is one that logically follows. Thus, if (a) the trial court makes findings of fact which are not clearly erroneous, (b) the court applies to those facts the proper criteria under Rule 60(b)(1) (tempered by the policyfavoring relief in doubtful cases), and (c) the trial court's decision follows logically from application of such criteria to the facts found, then the court will be deemed to have acted within its sound discretion. Its decision will not be overturned on appeal. *Id.*

The "policy favoring relief in doubtful cases" is implicated here: Mr. Golub admits that he is not entitled to over half of the $941,000.00 but obtained a Default Judgment on that amount. Kirk-Scott, who never had opportunity to contest the 2007 Action (and was then sanctioned for raising, on reconsideration, Golubs' admission that he was not entitled to the full $941,000) is now stuck with the Default Judgment. Such facts are precisely why "judgments by default are not favored [and] a trial court should grant relief in doubtful cases in order to decide the case on the merits." *Meyers v. Hansen,* 148 Idaho 283, 287 (2009); *Jonsson v. Oxborrow,* 141 Idaho 635, 638 (2005). As such, *Deutz* applies in reviewing the trial court's ruling given the procedural safeguard that were violated in entering Golubs' Default Judgment.

A trial court's decision on a motion for summary judgment is reviewed, on appeal, under the same standard the trial court used in ruling upon a motion for summary judgment. *Brewer v. Washington RSA No. 8 Ltd. P'ship,* 145 Idaho 735, 738 (2008). To that end summary judgment is appropriate "if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Badell v. Beeks,* 115 Idaho 101, 102 (1988) (*citing* I.R.C.P. 56(c)). "In making this determination, all allegations of fact in the record, and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion." *City of Kellogg v. Mission Mountain Interests Ltd.,* 135 Idaho 239, 243 (2000).

For the reasons stated below, the trial court erred in denying Kirk-Scott's Motion to Vacate and granting Golubs' Motion for Summary Judgment.

B. Kirk-Scott's motion to vacate under I.R.C.P. 60(b)(4) was timely and proper.

The trial court's August 9, 2013, opinion states that Kirk-Scott "provided no evidence to the Court as to when it became aware of the judgment in question" and cited *McGrew v. McGrew*, 139 Idaho 551, 563 (2003) in support. (R, Vol. 1, p. 414, 416) The trial court erred legally and factually.

First, *McGrew,* a divorce action, is distinguishable: it involved Party A suing Party B, Party A obtaining a default judgment against Party B, and Party B moving to under Rule 60, to vacate the default judgment. *McGrew* found that Party B's motion to vacate the default judgment was untimely because it was filed on April 1, 1999 but that Party B did not move to vacate the default judgment until February 13, 2001 - twenty-one months later. *McGrew* at 559. Had Kirk-Scott been a party to the 2007 Action where the default judgment was obtained, *McGrew* would arguably apply. But Kirk-Scott was not a party to the 2007 Action. And since Kirk-Scott was not a party to the 2007 Action the issue of whether it became aware of the default judgment *before* plaintiffs sued (and served) Kirk-Scott (in 2013) to enforce the default judgment is irrelevant. This case involves A (Golub) suing B (Kirk Hughes), A obtaining a default judgment against B, and, years later, A (Golub) suing C (Kirk-Scott) in an attempt to foreclose upon the default judgment it obtained against B (Kirk-Hughes).

Second, even if Kirk-Scott knew (it didn't *see infra*) that Golub obtained a default judgment against Kirk-Hughes development in 2009, Kirk-Scott lacked standing to attack the Default Judgment under Rule 60 as "one must either be a party or a party's legal representative in order to have standing to bring any Rule 60(b) motion." *In re La Sierra Fin. Servs., Inc.,* 290

B.R. 718, 727 (B.A.P. 9th Cir. 2002); *Kem Mfg. Corp. v. Wilder,* 817 F.2d 1517, 1520 (11th Cir.1987); *First State Bank of Eldorado v. Rowe*, 142 Idaho 608, 612 (2006). This Court also holds:

> A stranger to the record, who was not a party to the action in which the judgment was rendered or in privity with a party is not prohibited from impeaching the validity of the judgment in a collateral proceeding; but in order to do so he must show that he has rights, claims, or interests which would be prejudiced or injuriously affected by the enforcement of the judgment, and which accrued prior to its rendition. *Johnson v. Hartford Ins. Grp.,* 99 Idaho 134, 136 (1978)(emphasis added).

Before getting served with the 2013 Action Kirk-Scott had no "right, claim, or interest" affected by the Default Judgment. It was not until Golub sued Kirk-Scott in the 2013 Action that Kirk-Scott's interest (here its Deed of Trust secured interest in the subject property) became prejudiced. *See Johnson,* 99 Idaho at 136. Before 2013 Kirk-Scott did not know what Golub intended to do with the Default Judgment. Thus, the trial court's August 9, 2013 Order is in error as it required that Kirk-Scott (a) guess at what Golub intended to do with the Default Judgment and then (b) take legal action against Golub, without standing, based off of that guess.

Third, the trial court erred factually. The Second Affidavit of Ms. Antoine makes clear that Kirk-Scott (or Antoine personally) did not know of the Default Judgment until February 2013. (SOF[9] ¶27) Within three (3) months and 11 days of answering Golubs' 2013 Complaint, Kirk-Scott, moved to dismiss Golubs' case, propounded discovery on Golub, analyzed that discovery, deposed Mr. Golub, researched, analyzed, and evaluated the CV07-8038 (2007 Action) case (to which Kirk-Scott was not a party), responded to Golubs' motion for summary

[9]"SOF" stands for "Statement of Facts" and references the fact section of this brief.

judgment, and moved to vacate Golubs' March 11, 2009, default judgment. (SOF ¶28) Kirk-Scott's motion to vacate was brought within the "reasonable time" set out under I.R.C.P. 60(b).

Fourth, the trial court erred in finding that the Default Judgment was not voidable under I.R.C.P. 60(b)(4) because "a fair and complete reading of the 2007 Complaint reveals that Plaintiffs were claiming they were wrongfully and unlawfully deprived of $941,000 in commission plus interest from the sale of certain real property." (R, Vol. 1, p. 416) The trial court's reasoning does not comport with the law.

A judgment by default may not differ in kind from or exceed in amount "that prayed for in the plaintiff's demand for judgment." *Hayes v. Towles*, 95 Idaho 208, 211 (1973); I.R.C.P. 54(c). A court does not have jurisdiction to enter a default judgment that "differs in kind from or exceeds in amount that demanded in the prayer of the complaint." *Cobb v. Cobb*, 71 Idaho 388, 390 (1951); *Meyer v. Meyer*, 135 Idaho 460, 463 (Ct. App. 2001): *Angel v. Mellen*, 48 Idaho 750, 285 P. 461, 461 (1930). The policy underlying this rule is:

> The theory of this provision is that once the defending party receives the original pleading he should be able to decide on the basis of the relief requested whether he wants to expend the time, effort, and money necessary to defend the action. It would be fundamentally unfair to have the complaint lead defendant to believe that only a certain type and dimension of relief was being sought and then, should he attempt to limit the scope and size of the potential judgment against him by not appearing or otherwise defaulting, allow the court to give a different type of relief or a larger damage award. 10 Wright & Miller, Federal Practice and Procedure s 2663 (1973). In short, the default judgment provisions of Rule 54(c) embody "the essentials of due process and of fair play." *Sylvan Beach, Inc. v. Koch*, 140 F.2d 852, 862 (8th Cir. 1944). *Johnson v. Hartford Ins. Grp.*, 99 Idaho 134, 138 (1978)(emphasis added).

The Default Judgment awarded more than prayed for in the 2007 Complaint for three reasons. First, Mr. Golub's 2007 Complaint did not pray for $941,000 to be awarded against Kirk-Hughes Development, LLC, or any other defendant. (SOF ¶16) The ***only*** reference to the $941,000 in the 2007 Complaint is: "Peterson did not pay Golub the $941,000 commission under the Listing Agreement..." (R, Vol. 1, p. 166, L. 14) The unspecific nature of Golubs' $941,000 "claim" is further illustrated in paragraph 4.4 of the 2007 Complaint where Mr. Golub states that "Petersons breached their contractual obligations when they failed to pay Golub a commission [as opposed to the $941,000 commission] after selling the Peterson property to Polatis." *Id.* at p. 166, L. 24. A precise reading of the 2007 Complaint did not put Kirk-Hughes on notice that Golub sought $941,000 from it. Second, the 2007 Complaint did not pray for post judgment interest yet the Default Judgment awards post judgment interest. *Compare.* p. 169 *with* p. 35-36. Third, while the 2007 Complaint prayed for pre-judgment interest, it did not specifically pray for a 12% interest rate and the 12% interest rate in the default judgment is 7% more than the 5% "legal rate of interest on money due on the judgment of any competent court." IC § 28-22-104.

The trial court erred in vacating the default judgment under I.R.C.P. 60(b)(4) because the trial court lacked jurisdiction to award relief in excess of what Golub prayed.

C. Kirk-Scott's motion to vacate under I.R.C.P. 60(b)(5) and (6) was proper.

Kirk-Scott moved to vacate the Default Judgment under the auspices of I.R.C.P. 60(b)(5) and 60(b)(6). (R, Vol. 1, p. 111; Tr. Vol. 1, p. 13-18) The trial court did not address Kirk-Scott's Rule 60(b)(5) and 60(b)(6) motions in its August 9, 2013, Order and abused discretion by not

exercising discretion (at all) in the Rule 60(b)(5)&(6) motions. *See Zaleha v. Rosholt, Robertson & Tucker, Chtd.,* 131 Idaho 254, 257 (1998) ("In reviewing an exercise of discretion, this Court must consider... whether the trial court correctly perceived the issue as one of discretion.")

Nonetheless, the Default Judgment should be vacated under I.R.C.P. 60(b)(5) because it is a prospective judgment. In vacating a default judgment under Rule 60(b)(5), Kirk-Scott must show "(1) that the judgment is prospective in nature; and (2) that it is no longer equitable to enforce the judgment as written." *Meyers v. Hansen*, 148 Idaho 283, 289 (2009). "Any component of the order is a 'prospective judgment' if susceptible to the legal or equitable rights of the parties as they evolve due to changes in law or circumstance." *Hansen*, 148 Idaho at 290. By way of comparison, a non-prospective judgment "adjudicat[es] all the rights as between the parties as of the date of the judgment." *Curl v. Curl,* 115 Idaho 997, 1002 (1989).

The Default Judgment is a prospective judgment because Mr. Golub admits that (at least) $476,382.50 of the $941,000 does not even belong to him. (SOF ¶5) In fact, $191,870.00 of the $941,000 is what Tomlinson Black was awarded as part of the *Tomlinson Black North Idaho v. Geraldine Kirk-Hughes, et. al,* CV06-118-N-RHW (D. Idaho 2008) case. (SOF ¶28) It is no longer equitable to enforce the Default Judgment because Golub has used the Default Judgment's $941,000.00 amount to acquire the subject property that was secured by Kirk-Scott's Deed of Trust even though at least half of the $941,000.00 does not belong to Golub and the trial court will have to evaluate changing circumstances to ensure that Tomlinson, Moore, and Pacific Real Estate are paid what Golub admits they are owed on the $941,000 commission. (SOF ¶¶5,8)

The trial court also erred in not vacating the Default Judgment under I.R.C.P. 60(b)(6).

Idaho Rule of Civil Procedure 55 provides, in part:

> *Default Judgment by the Court or Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the court or the clerk thereof, upon request of the plaintiff, and upon the filing of an affidavit of the amount due showing the method of computation, together with any original instrument evidencing the claim unless otherwise permitted by the court, shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person, and has been personally served, other than by publication or personal service outside of this state. I.R.C.P. 55(b)(1).

Rule 55(b)(1)'s purpose is to inform defendants of the judgment against them so defendants can either satisfy the judgment, and avoid post-judgment interest, or resist the judgment. *See Meyers v. Hansen*, 148 Idaho 283, 292 (2009). To that end, the affidavit in support of a default judgment must contain (a) a "plaintiff's claim against a defendant...for a sum certain or for a sum which can by computation be made certain" (b) the method by which the amount due was computed, and (c) "the instrument evidencing the claim." I.R.C.P. 55(b)(1). Absent evidence of (a), (b), and/or (c), a default judgment can be vacated. I.R.C.P. 60(b)(6).

Alan Golub's June 11, 2008, affidavit in support of the Default Judgment fails under (a), (b), and (c). As to point (a), Golubs'affidavit in support of the Default Judgment was based on the June 11, 2008, affidavit of Alan Golub that was against one defendant, Kelly Polatis. (R, Vol. 1, p. 170-174) The Default Judgment, however, seeks relief against Geraldine Kirk-Hughes, Peter Sampson, Kirk-Hughes Development, LLC, and Kirk-Hughes & Associates, LLC - - - individuals and entities for which no supporting default affidavit was ever submitted. (R, Vol. 1, p. 35) Courts vacate default judgments under similar circumstances. *See Lowe's of Raleigh, Inc. v. Worlds*, 166 S.E.2d 517, 518 - 519 (N.C. Ct. App. 1969)(vacating default judgment because

motion for default only addressed one of the two defendants and holding "facts alleged against only one defendant cannot support default judgment against a second"). As to point (b), Mr. Golub's affidavit against Kelly Polatis does not set out the means by which the $941,000 was computed - it says "I was entitled to a realtor fee of $941,000 from the sale to Ms. Kirk-Hughes" - - - a misleading statement (at best) given Alan Golub's testimony that he was not entitled to half of that amount. (R, Vol. 1, p. 170-174; SOF ¶5) As to point (c), Mr. Golub's affidavit does not contain an "instrument evidencing a claim," it contains a hand-written document that does not even contain the $941,000 figure or a document from Pacific Real Estate (Golubs' then-employer) that allowed Golub any of the $941,000. Accordingly, the Default Judgment should be vacated.

D. The trial court erred in not considering I.C. 55-606's "good faith" element.

The trial court held that Golubs' Default Judgment had priority over Kirk-Scott's Deed of Trust. (R, Vol. 1, p. 418-419) In reaching that conclusion the trial court did not even consider whether Golub was a "good faith" encumbrancer - - - an essential element of Golubs' claim that was briefed and argued extensively. (R, Vol. 1, p. 227-231; Tr. Vol. 1, p. 60-65) IC 55-606 provides, in full:

> 55-606. Conclusiveness of conveyance -- Bona fide purchasers. Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument or valid judgment lien that is first duly recorded. (emphasis added)

As to the "good faith" analysis, Idaho courts hold that a subsequent encumbrancer's (Golub) actual knowledge of a prior interest in real property renders the first lien (here Kirk-Scott's Deed of Trust) prior to the subsequent encumbrancer's lien (the Default Judgment) even though the first lien was not properly recorded. *Farm Bureau Fin. Co. v. Carney,* 100 Idaho 745, 747 (1980). To that end, Idaho courts hold "that one cannot be a good faith purchaser or encumbrancer when a reasonable investigation of the property would have revealed the existence of the conflicting claim in question." *Langroise v. Becker,* 96 Idaho 218, 221 (1974). "Good faith" means that a party purchases the property without knowing or having notice of any adverse claims to the property. *Sun Valley Hot Springs Ranch, Inc. v. Kelsey,* 131 Idaho 657, 661 (1998); *Froman v. Madden*, 13 Idaho 138, 88 P. 894, 895 (1907). *Froman* held:

> Of course, if the defendant [Kirk Scott] should be able to show that the plaintiff [Golub] had actual knowledge of the sale and conveyance to her prior to his receiving a deed and parting with the purchase price, she would be entitled to recover in this action, or, if she could show that he had knowledge of such facts and circumstances as would have led to the discovery of her purchase and conveyance by a reasonably prudent man, she would be entitled to recover, but, in order to recover, she must show that he was not a purchaser in good faith within the meaning of the statute. *Id.* (emphasis added).

The trial court erred in granting summary judgment in favor of Golubs because material issues of fact exist as to the "facts and circumstances" Golub was aware of regarding Kirk-Scott's secured interest in the subject property and whether those "facts and circumstances" would have

led to discovery of Kirk-Scott's interest in the property "by a reasonably prudent man."[10] First, by the end of 2004, Mr. Golub knew that (i) Ms. Antoine would secure the subject property with a Deed of Trust, (ii) Ms. Kirk-Hughes directed the Deed of Trust be written, and (iii) that Ms. Moore was drafting the Deed of Trust. (SOF ¶¶11-14) Second, Golub knew in 2006 that the subject property was encumbered - - - Ms. Moore told him so. (SOF ¶14) Third, Golub's May 3, 2013, affidavit testimony, which contradicts his September 25, 2007, deposition testimony, calls Mr. Golub's credibility into question. (SOF ¶29) Fourth, it is beyond dispute that Mr. Golub is a sophisticated real estate professional well aware of the importance of ensuring that title to real property he markets is free and clear of other encumbrances. (SOF ¶12) In fact, Mr. Golub made repeated inquiries as to the title to the Peterson, Atkinson, and Sloan properties throughout 2004 and 2005. (SOF ¶6) Fifth, Mr. Golub admits that as early as March 11, 2009, it was his expectation that his agent (Michael Howard, his attorney) would identify assets belonging to the judgment debtors and collect upon those assets. (R, Vol. 1, p. 297, L. 2-25, p. 298, L. 1-25, p. 299, L. 1-6, p. 301, L. 14-25) Yet, Golubs' lawyer did not allow Mr. Golub to disclose when he (the lawyer) learned of the existence of the Kirk-Scott Deed of Trust and when he (the lawyer) told Mr. Golub of the deed of trust's existence. *Id.*

Simply stated, Mr. Golub (i) knew that Kirk-Scott would secure the subject property with a deed of trust, (ii) knew that Kirk-Scott did secure the subject property with a deed of trust, and (iii) had the knowledge and wherewithal to conduct a title-search of the subject property before encumbering it with his Default Judgment. Further, it is unclear whether and when Golubs'

[10] The issue of reasonableness is a fact question. *Langroise v. Becker,* 96 Idaho 218, 221 (1974).

agent knew about the Deed of Trust's existence. The trial court erred in ignoring those material facts and, implicitly, accepting (as undisputed fact) Mr. Golub's self-serving affidavit that Golub had no idea the subject property was secured by Kirk-Scott's Deed of Trust. (SOF¶¶10, 29)

A jury should decide whether Golub satisfied the "good faith" element of IC 55-606.

E. The trial court erred in granting Golubs' motion for summary judgment because: (a) the Default Judgment was not supported by valuable consideration; and, (b) the Default Judgment lacked a Rule 54(b) certificate.

(1) The Default Judgment was not supported by valuable consideration.

The device upon which the encumbrancer acquires title must be supported by valuable consideration. I.C. 55-606. The word "valuable" means "[w]orth a good price; having financial or market value." Black's Law Dictionary, at 1256 (7th Ed. 2000). The "word consideration" means "[s]omething of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee." *Id.* at 245. Courts defining the phrase "valuable consideration" in the context of instruments conferring title to real property mirror Black's Law Dictionary's definition. *Life Ins. Co. v. Rose Chapel Mortuary, Inc.*, 95 Idaho 599, 603 (1973)(stating "valuable consideration" means a "detriment to the promisee or a benefit to the promisor."); *Gardiner v. Gardiner*, 36 Idaho 664, 214 P. 219, 220 (1923)(love and affection not valuable consideration); *Hiddleson v. Cahoon*, 37 Idaho 142, 214 P. 1042, 1043 (1923).

Mountain Home Lumber Co., Ltd. v. Swartout, 30 Idaho 559, 166 P. 271 (1917) is illustrative and analogous to this case. *Swartout* involved Mr. Swartout obtaining title to real property, from Mr. Garrett, and recording the deed. *Id.* at 273. Thereafter another entity, Mountain Home Lumber Company, obtained a judgment against Mr. Garrett. *Id.* Mountain

Home Lumber Company then executed on its judgment and obtained title to the subject real property. *Id.* The *Swartout* court (without addressing whether Mr. Swartout's deed was properly recorded) held that Mr. Swartout's deed was prior to Mountain Home's judgment because Mountain Home's judgment "was not valuable consideration; for it amounted to nothing more than a cancellation of pre-existing indebtedness" and reasoned that Mountain Home was "[a] purchaser who part[ed] with a consideration [that was] neither valuable or irrevocable [and was] not a bona fide purchaser." *Id. Swartout* found that the deed was not irrevocable because the lumber company's judgment against Garrett could be revived, subject to Mr. Swartout's equities. *Id. Swartout* is in line with other Idaho cases. *Rexburg Lumber Co. v. Purrington,* 62 Idaho 461, 113 P.2d 511, 513-514 (1941)("his judgment is merely credited on the purchase price...is not a bona fide purchaser because he has parted with nothing, merely a paper exchange and no valuable consideration has passed. Thus respondent was not a bona fide purchaser...and not protected against secret liens.")(citations omitted); *American Credit Co. v. Stuyvesant Ins. Co.*, 173 S.E.2d 523, 526 (N.C. Ct. App. 1970)(affirming vacation of default judgment "because the motion for judgment, sounding in contract, failed to allege 'valuable consideration.'").

Swartout applies here. First, Mr. Golub's Default Judgment is the device Golub used to cancel Kirk Hughes Development's pre-existing indebtedness as Mr. Golub admits to credit-bidding the Default Judgment at the September 2013 sheriff sale of the subject property. (SOF ¶32) Second, the Default Judgment is not irrevocable as Golub can execute against the Kirk-Hughes defendants' assets. Third, the Default Judgment is not "valid consideration" against Kirk-Scott. There is no "promisor" - "promisee" relationship between Kirk-Scott and Golub.

Kirk-Scott neither gave (or received) value, forbearance, or other consideration regarding the Default Judgment. Accordingly, Golubs' default judgment against Kirk-Scott fails for lack of valuable consideration.[11]

(2) The Default Judgment lacked a Rule 54(b) certificate.

A "valid judgment lien" is as "an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document that on its face states the relief granted or denied." *T.J.T., Inc. v. Mori*, 148 Idaho 825, 826 (2010). A final judgment must be final as to all parties and all claims and contain a signed I.R.C.P. 54(b) certificate. *Bishop v. Capital Fin. Servs.*, 109 Idaho 866, 867, (1985). Golub admits that he "could not record the judgment and begin his collection efforts" because the court did not sign the Rule 54(b) certificate. (R, Vol. 1, p. 76, L. 20) The Default Judgmet that Mr. Golub recorded in August 2009 and, again, in October 2010 *still* does not have a signed Rule 54(b) certificate attached. (R, Vol. 1, p. 37) Accordingly, the Default Judgment is not a "valid judgment lien" as contemplated under IC 55-606 and the trial court erred in granting Golubs' motion for summary judgment as a matter of law.

F. The trial court erred in granting Golubs' motion for summary judgment because Kirk-Scott, Ltd.'s Deed of Trust was recorded by the Kootenai County Recorder's office, clearly understood by Golub, and properly acknowledged under Nevada law, the jurisdiction where the Deed of Trust was executed.

[11] Finding Golubs' Default Judgment ineffective against Kirk-Scott does not deprive Golub of a means to satisfy it as Golub can (and has) conduct supplemental proceedings against the Kirk-Hughes defendants.

The trial court found that Kirk-Scott's Deed of Trust was not properly acknowledged. (R, Vol. 1, p. 419) The trial court's ruling ignored Idaho law and the fact that Golub, himself, read the Deed but was not confused by any of it.

This Court holds that, "[t]he policy of the law is not to defeat a grantor's intent" given the purpose of Idaho's recording statute. *Mollendorf v. Derry*, 95 Idaho 1, 3 (1972). To wit:

> The primary purpose of the recording statutes 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. Here the earnest money agreement was signed by all parties, but not acknowledged by the sellers, the Mathesons. In this condition, with an acknowledged cover sheet, the county recorders of two counties accepted and recorded the document. **If entitled to recordation, it was constructive notice as to its contents; if not, the contrary is the case**. I.C. s 55-811. In either event, the extent of the interest claimed was clear for all to see, the earnest money agreement itself being part of the recordation. To record, whether a deed, a mortgage, or a contract, is to give notice, and we are unable to see that attaching a "Notice" cover sheet, to that which under the statutes is notice, either adds or subtracts. *Matheson,* 98 Idaho at 761 (1977)(emphasis added).

Under *Mollendorf* deeds lacking both an acknowledgement and containing deficiencies in the legal description have not been voided. *Mollendorf*, 95 Idaho, at 4; *Farm Bureau Fin. Co., Inc. v. Carney,* 100 Idaho 745, 750 (1980); *Pacific Coast Joint Stock Land Bank v. Security Prods. Co.,* 56 Idaho 436 (1936); *In re Big River Grain, Inc.*, 718 F.2d 968, 971 (9th Cir. 1983).

Thus, even if the Kirk-Scott Deed of Trust did not comply with Idaho law its supposed deficiencies do not render it void. Again, it was recorded and recording, alone, is constructive notice. *Matheson v. Harris,* 98 Idaho 758, 761 (1977)("If entitled to recordation, it was constructive notice as to its contents..."). Further, Mr. Golub testified at deposition that nothing

in Kirk-Scott's Deed of Trust confused him. (SOF ¶12) Lastly, Idaho Code 55-805 states that deeds acknowledged under the laws of foreign jurisdictions comply with Idaho's recording statutes. The Kirk-Scott Deed of Trust, which was executed in Nevada, complies with Nevada law. *See* Nev. Rev. Stat. Ann. § 240.1655.

G. The trial court erred in finding that Golub had standing to contest Kirk-Scott's recording of the Deed of Trust during a bankruptcy proceeding.

The trial court found that Kirk-Scott improperly recorded the Deed of Trust during Ms. Kirk-Hughes' bankruptcy. (R, Vol. 1, p. 417-418) The trial court cited *In re Schwartz*, 954 F.2d 569, 574 (9th Cir. 1992) in support of its decision. *Id.* at p. 418. The trial court erred. Before addressing whether Kirk-Scott improperly recorded the Deed of Trust during bankruptcy, the trial court needed to address Golubs' standing to attack Kirk-Scott's Deed of Trust recording.

Courts consistently hold that a non-debtor/non-trustee (like Golub) lacks standing to enforce a violation of a bankruptcy stay, here the 2010 recording of Kirk-Scott's Deed of Trust. *In re Brooks*, 79 B.R. 479, 481 (Bankr. 9th Cir.1987) *aff'd,* 871 F.2d 89 (9th Cir.1989)(holding that bank's post-petition re-recording of deed of trust cannot be avoided since "the debtor or the trustee chose not to invoke the protections of 11 U.S.C. § 362, no other party [could] attack any acts in violation of the automatic stay"); *In re Stivers*, 31 B.R. 735 (Bankr.N.D.Cal.1983); *In re Fuel Oil Supply and Terminaling, Inc.*, 30 B.R. 360, 362 (Bankr.N.D.Tex.1983).

The trial court cited *In re Schwartz* for the proposition that a deed of trust recorded during a bankruptcy stay is void as a matter of law. (R, Vol. 1, p. 417-418) But in order for *Schwartz* to apply Golub needed establish standing to complain of Kirk-Scott's 2010 violation of the

bankruptcy stay. Golubs lacked standing as *Schwartz* cites *In re Brooks* and, in citing *Brooks, Schwartz* holds:

> Finally, the government argues in the alternative that its violation of the automatic stay falls within the narrow exception for technical violations of the automatic stay carved out by *In re Brooks,* 79 B.R. 479 (Bankr. 9th Cir.1987), *aff'd,* 871 F.2d 89 (9th Cir.1989). *See also In re Wingo,* 89 B.R. 54, 57 (Bankr. 9th Cir.1988). In *Brooks,* the BAP held that a minor technical violation of the stay-the rerecording of a deed to correct a property description mistake-was voidable rather than void. However, on appeal we did not address the void/voidable issue and instead decided the case on the issue of standing, 871 F.2d at 90, and we expressed no opinion on the validity of the exception recognized by the BAP in *Brooks.* Because the BAP's *Brooks* reasoning is not dispositive in this case, we again refrain from addressing the validity of the *Brooks* exception. *In re Schwartz,* 954 F.2d, at 574 (emphasis added).

Since *Schwartz* did not overrule, question, or dispose of *Brooks,* then *Brooks'* standing requirement controls. And since Golub did not have standing under *Brooks* the trial court cannot utilize *Schwartz* to render the Kirk-Scott Deed of Trust void given Golubs' lack of standing.

H. The trial court erred in allowing Golub a double recovery.

Golub sued Lenore and Delano Peterson, Geraldine Kirk-Hughes, Peter Sampson, Kelly Polatis, Kirk-Hughes Development, LLC, and Kirk-Hughes Associates for $941,000 as part of the 2007 Action. (SOF ¶15) On March 11, 2009, Golub obtained the Default Judgment for $941,000 against all of the above-referenced defendants but the Petersons. *Id.* at ¶20. On July 15, 2010, Golubs settled with the Petersons for a unknown amount. *Id.* at ¶21. Yet on October 28, 2010, Golubs recorded the Default Judgment for the full $941,000 deducting nothing for the Peterson settlement. *Id.* at ¶26. Mr. Golub admits that he is recovering twice; but, contrary to the well established law of our Country, believes that there's nothing wrong with getting paid twice for the same injury. (SOF ¶28(d)) Kirk-Scott moved to compel Golub to reveal the amount

Golub revealed from Peterson but the trial court's August 9, 2013, Order mooted Kirk-Scott's motion. (R, Vol. 1, p. 419) The trial court's ruling was in err as it, in effect, allowed Golub double recovery.

The Idaho Supreme Court hold that "there can only be one award of damages for a single injury" and "the trial court may reduce the judgment to a single recovery, if it believes the jury awarded a party twice for the same injury." *Gunter v. Murphy's Lounge, LLC,* 141 Idaho 16, 31 (2005). The U.S. Supreme Court is in accord. *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 297 (2002) ("[I]t goes without saying that the courts can and should preclude double recovery by an individual."). Allowing double recovery works an injustice. *Nizan v. Wells Fargo Bank Minnesota Nat. Ass'n*, 274 Va. 481, 491 (2007)("The defense of double recovery is thus rooted in common law and equitable principles..."). Indeed, there can be only one recovery of damages for one wrong or injury. *Meade v. Slonaker*, 183 W. Va. 66, 69 (1990)("Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories."); *S. California Fed. Sav. & Loan Ass'n. v. United States*, 422 F.3d 1319, 1332-33 (Fed. Cir. 2005)("The purpose of damages for breach of contract is generally to put the wronged party in as good a position as he would have been had the contract been fully performed. In light of this general purpose, a wronged party is typically not allowed to recover twice for the same harm, here a breach of contract.").

Here it is undisputed that Peterson paid Golub some of the $941,000 Golub claims Kirk-Scott, among others, still owe. The trial court allowed Golubs' double recovery by failing to allow Kirk-Scott's motion to determine the amount of the recovery and seek reduction.

I. The trial court abused its discretion in awarding sanctions against Kirk-Scott.

The reviewing court analyzes at trial court's I.R.C.P. 11 sanctions order under the abuse of discretion standard. *Campbell v. Kildew,* 141 Idaho 640, 649-50 (2005). Additionally, this Court holds "Rule 11(a)(1) is 'a court management tool' which should be exercised narrowly."[12] *Landvik by Landvik v. Herbert*, 130 Idaho 54, 61 (Ct. App. 1997)(*citing Conley v. Looney,* 117 Idaho 627, 631 (Ct. App. 1990); *State of Alaska ex rel. Sweat v. Hansen,* 116 Idaho 927, 929 (Ct.App.1989)).

The trial court ignored Rule 11's narrow range and sanctioned Kirk-Scott for filing its Motion to Amend/Alter the trial court's August 9th Order and August 19th Judgment. (R, Vol. 1, p. 549-556) The trial court sanctioned Kirk-Scott upon finding that (a) Kirk-Scott's "assertion that a summary judgment motion...is equivalent to a directed verdict/trial was not warranted by existing law or a good faith argument for the extension of existing law" (b) Kirk-Scott improperly brought the motion under Rule 59 to avoid IRCP 11(a)(2)(B)'s bar against reconsideration of Rule 60 motions. *Id.* at p. 553, 554, and 555. The trial court abused its discretion for two reasons.

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[12] *Riggins v. Smith*, 126 Idaho 1017, 1021 (1995) illustrates the narrow range of Rule 11. *Smith* held that "Smith's awareness of Koehn's perjury during depositions without correcting her or informing the opposing counsel of the misrepresentation, may be unethical conduct by Smith, but such trial activities do not support Rule 11 sanctions."

First, Kirk-Scott's assertion that a summary judgment motion is equivalent to a directed verdict is well warranted by both existing law and a good faith argument for the extension thereof. The Washington State Supreme Court and federal courts equate summary judgment motions to trial. *Dreiling v. Jain*, 151 Wn. 2d 900, 910, 93 P.3d 861, 867 (2004)("Summary judgment effectively adjudicates the substantive rights of the parties, just like a full trial."). *See generally In re United Air Lines, Inc.*, 453 F.3d 463, 468 (7th Cir. 2006)(*citing Betaco, Inc. v. Cessna Aircraft Co.*, 32 F.3d 1126, 1131-32 (7th Cir.1994))("[A]nd it is also true that, under certain, rare circumstances, cross summary judgment motions can be converted into a bench-trial-like situation.") Those authorities support the *McFeely v. United States*, 700 F. Supp. 414, 417 (S.D. Ind. 1988)("summary judgment motion is like a trial motion for a directed verdict and that 'genuine' allows some quantitative determination of the sufficiency of the evidence.") case Kirk-Scott cited in its reconsideration motion. Further, this Court has reversed trial courts for denying Rule 59 motions in cases where the plaintiff voluntarily dismissed the case before a trial even occurred. *Straub v. Smith,* 145 Idaho 65, 70-71 (2007).

Additionally, this Court recognizes that Rule 59(a) is a proper device to alter or amend a judgment following summary judgment. *Johnston v. Pascoe*, 100 Idaho 414, 419 n.4 (1979)("Although the motion was denominated as one for "New Trial" no trial was had, the case being resolved under summary judgment proceedings. However, it could properly be considered as a motion in amendment of judgment, mentioned in I.R.C.P. 59(a).").

Second, Kirk-Scott brought its Motion to Amend/Alter to (i) have the August 9, 2013, Order amended to address Alan Golub's credibility as that issue went squarely to the IC 55-606 issue of "good faith", (ii) address Golubs' double recovery, (iii) point out there was insufficient evidence to justify the trial court's affirmation of Golub's $941,000 Default Judgment, and, (iv) address the trial court's July 9, 2013, evidentiary ruling regarding the late-admission of Golubs' Affidavit. (R, Vol. 1, p. 460, L. ¶¶2,3,4,6, p. 507-518; Tr, Vol. 1, p. 95-99; SOF ¶33) After Kirk-Scott filed its motion, but before reply briefing and oral argument, Golub informed Kirk-Scott that the Motion to Amend/Alter addressed Rule 60 issues. (R, Vol. 1, p. 491-492). Kirk-Scott partly withdrew its motion and limited the issues it addressed at oral argument. (SOF ¶34; R, Vol. 1, p. 502-506; Tr, Vol. 1, p. 95-99)

Kirk-Scott's motion to Amend/Alter should be considered in the context of Rule 59's purpose and its text. Rule 59 exists to avoid or limit issues on appeal. *First Sec. Bank v. Neibaur,* 98 Idaho 598, 603 (1977)("Rule 59 was designed to allow the trial court either on its own initiative or on motion by the parties to correct errors both of fact and law that had occurred in its proceedings. It thereby provided a mechanism to circumvent appeal.") A trial does not need to occur in order for Rule 59(a) to trigger. This Court's decisions and Rule 59's text support such a conclusion. *See Johnston,* 100 Idaho at 419 n.4; I.R.C.P. 59(a) - "New Trial - Amendment of Judgment - Grounds."

By its terms Rule 59 applies not only to "trials" but "amendment of judgment[s]". Rule 59(a)(1)(6)&(7) allows altering/amendment of a verdict "*or other decision*" based on irregularities in the proceedings, evidence insufficient to sustain the judgment, and errors of law.

Kirk-Scott moved to alter/amend a "other decision", here the Court's August 9, 2013, Order, August 19, 2013, Judgment, and the trial court's July 9, 2013, admission of Golubs' late filed evidence, because (i) no evidence existed supporting Golubs' $941,000 August 19, 2013, Judgment under Rule 59(a)(6) (R, Vol. 1, p. 435, p. 452-453), (ii) the trial court's allowance of Golubs' late-filed July 9, 2013, affidavit was an irregularity in the proceeding that harmed Kirk-Scott by depriving it of an opportunity to respond to the evidence under Rule 59(a)(1), (R, Vol. 1, p. 460-462), (iii) the trial court's August 9, 2013, mooting of Kirk-Scott's motion to compel resulted in Golub recovering twice under Rule 59(a)(1)(6)&(7) (R, Vol. 1, p. 452-453), and (iv) address the "good faith" element of IC 55-606 under Rule 59(a)(7). (R, Vol. 1, p. 457)

Kirk-Scott's motion to amend/alter properly tried to limit the issues on appeal. Instead the trial court sanctioned Kirk-Scott, a result that, if anything, will have a chilling effect on other litigants who attempt to, post-summary judgment, get the trial court to limit the issues on appeal.

Lastly, the trial court's *sua sponte* sanction against Kirk-Scott calls the trial court's impartiality into question. The evidence shows that: (a) Golub sued for $941,000 even though he admitted, days before filing suit, that he was entitled to, at best, half of that amount; (b) Golub failed to reduce the $941,000 Default Judgment by what Peterson paid; and, (c) Alan Golub's misrepresentation that he had "no dealings" with Ms. Antoine when he testified to the exact opposite. Yet the trial court did not address those issues, at all, and instead sanctioned Kirk-Scott, a non-party to the Federal and 2007 Actions who did not have opportunity to defend against Golubs' claims, for bringing them to the forefront.

The trial court's sanctions order should be vacated.

V. CONCLUSION

Kirk-Scott's Motion to Vacate should be granted. The trial court's sanctions order against Kirk-Scott should be vacated. Golubs' Motion for Summary Judgment should be denied.

Dated: March 5TH, 2014

CROTTY & SON LAW FIRM, PLLC

By: _____
Matthew Z. Crotty
Attorney for Kirk-Scott, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of March 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Michael T. Howard Winston & Cashett 250 Northwest Blvd., Ste. 206 Coeur d' Alene, ID 83814 *Attorneys for Appellees*	☒ ☒ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX)
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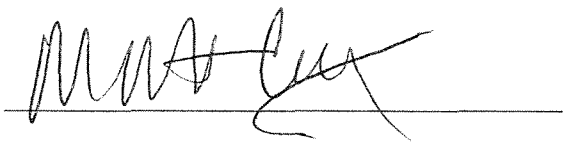

MATTHEW Z. CROTTY