5-9-2014

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

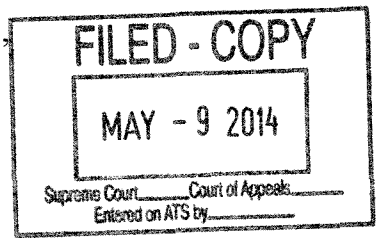
ALAN GOLUB and MARILYN GOLUB, Supreme Court No. 41505-2013

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'S REPLY 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. INTRODUCTION

Alan and Marilyn Golub (Golub) cite *Sherwood & Roberts, Inc. v. Riplinger,* 103 Idaho 535, 650 P.2d 677 (1982) for the proposition that a trial court abuses its discretion when it arbitrarily disregards "relevant facts" on a motion to vacate. (Resp. Br. p. 7) Some of the "relevant facts" before the trial court on Kirk-Scott, Ltd.'s (Kirk-Scott) motion to vacate were: (a) Alan Golub's deposition testimony that Golub was entitled to, at most, $464,617.50 of the $941,000 default judgment at issue in this case; (b) that Golub has recovered twice on the default judgment; and, (c) that Golub's affidavit of amount due, upon which the 2009 default judgment is based, related to only one defendant (Kelly Politas) but the trial court awarded default relief against four other defendants (Peter Sampson, Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., and Geraldine Kirk-Hughes) for which Golub did not file an affidavit of amount due in support of the default against the four other defendants. (R, Vol. 1. p. 170-174) Tellingly, Golub's appeal response brief does not even address point (c).

The trial court ignored points (a), (b), and (c) on Kirk-Scott's motion to vacate. The trial court did not address, at all, Kirk-Scott's Rule 60(b)(5) and 60(b)(6) motions in any of its written or oral decisions. When Kirk-Scott moved the trial court to reconsider points (a), (b) and the trial court's non-consideration of the Rule 60(b)(5) and (b)(6) motions, the trial court *sua sponte* sanctioned Kirk-Scott. The trial court's disregard of those facts, and subsequent sanctioning of Kirk-Scott, are precisely the "unjust and compelling circumstances which justify such relief" under Rule 60 and the trial court should be reversed for not granting Kirk-Scott that relief and

then sanctioning Kirk-Scott when Kirk-Scott raised those points on reconsideration. (Resp. Br. p. 8 *citing Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.* 153 Idaho 440, 449-50, 283 P.3d 757 (2012))

The trial court also erred in granting Golub summary judgment on Golub's declaratory judgment action by: (a) not requiring Golub to establish the "good faith" element of his IC 55-606 claim; and, (b) allowing Golub to foreclose with a judgment not supported by valuable consideration. The trial court's summary judgment ruling should be reversed

II. SUMMARY OF ARGUMENT

Golub's opening response to Kirk-Scott, Ltd.s' (Kirk-Scott) appeal argues the "relevant and undisputed facts" are "Golub is a judgment creditor on a $941,000 judgment." (Resp. Br. p. 3) While the default judgment awarded Golub $941,000, the record before the trial court showed that Golub was entitled to far less. The record contained Alan Golub's 2007 under oath deposition testimony which made clear that Golub was entitled to, at most, $464,617.50 of the $941,000. Kirk-Scott, a stranger to the action in which Golub obtained the $941,000 default judgment, repeatedly informed the trial court of that undisputed fact. The trial court ignored that fact (nowhere is it mentioned in any of the trial court's orders in this case) on Kirk-Scott's motion to vacate and then sanctioned Kirk-Scott when Kirk-Scott re-addressed that point on reconsideration.

While Idaho law allows trial courts discretion to vacate default judgments (and award sanctions), that discretion is not without limitation. The trial court in this case exceeded those limits by allowing Alan Golub to enforce his $941,000 default judgment against Kirk-Scott when

the record established that, *inter alia*, (a) Golub was, at best, personally entitled to $464,617.50 of the $941,000 he obtained via default, (b) Golub recovered twice on the default judgment; (c) the default judgment awarded Golub more than what Golub prayed for in the underlying complaint, and (d) the trial court abused its discretion in not even addressing Kirk-Scott's rule 60(b)(5) and 60(b)(6) motions. Points (a), (b), (c), and (d) taken alone mandate vacation of the default judgment and the trial court abused discretion in not doing so. Points (a), (b), (c), and (d) taken together, underscore the trial court's arbitrary disregard of the facts, Idaho law and Kirk-Scott's rights under the law. The trial court also abused its discretion by (i) requiring Kirk-Scott to establish "when" it became aware of the default judgment and (ii) sanctioning Kirk-Scott after Kirk-Scott sought, based on Golub's own undisputed testimony, to get that judgment reduced following summary judgment. The trial court arbitrarily disregarded the above-referenced facts (and more) and relevant legal principles and should be reversed as to denying Kirk-Scott's motion to vacate and *sua sponte* sanctioning Kirk-Scott.

The trial court's grant of summary judgment in Golub's favor also warrants reversal. Idaho law requires an encumbrancer, i.e. "[o]ne having a legal claim, such as a lien...against property",[1] to establish "good faith" in order to defeat Idaho's "conclusiveness of conveyance" statute, I.C. § 55-606. The trial court erred in granting summary judgment for Golub on Golub's 2013 declaratory judgment action by improperly excusing Golub from establishing the IC 55-606 "good faith" element and ignoring the record evidence of: (a) Golub's knowledge of Kirk-Scott's "clear title" to the subject property; and, (b) the default judgment not being supported by

[1] Black's Law Dictionary, at 432 (7th Ed. 2000).

valuable consideration.

For the reasons stated below the trial court should be reversed and this case should be remanded to a different trial judge for a jury trial.

III. ARGUMENT

A. The trial court abused its discretion in denying Kirk-Scott's Motion to Vacate the default judgment.

"Determining whether to set aside a default judgment requires an appellate court to 'apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt.'" *Kovachy v. DeLeusomme*, 122 Idaho 973, 974, 842 P.2d 309, 310 (Ct. App. 1992). Analyzing whether a trial court abused its discretion requires assessing: (a) whether the trial court made findings of fact that were not clearly erroneous; (b) whether the trial court applied the proper Rule 60 criteria (with an eye toward favoring relief in doubtful cases); and, (c) the trial court's decision logically applied the Rule 60 criteria to the facts. *Allis Credit Corp. v. Smith,* 117 Idaho 118, 120 (Ct.App.1990). *Dorion v. Keane,* 153 Idaho 371, 373, 283 P.3d 118, 120 (Ct. App. 2012). *Keane* is illustrative of Idaho's "policy favoring relief in doubtful cases and resolution on the merits" as it involved the trial court granting default relief for the same defendant not once, but twice, in the *same* case. *Id.* The defendant in *Keane* was a party to the litigation in which both defaults occurred and were then vacated under Rule 60. Yet the trial court ignored *Keane* and denied Kirk-Scott's motion to vacate even though Kirk-Scott was a stranger to the litigation in which Golub obtained the default judgment. *See infra.* §B.

Here the trial court abused its discretion by, *inter alia,* (1) not considering Golub's own testimony which established that Golub was entitled to, at best, $464,617.50 of the $941,000.00 default judgment; (2) not considering the undisputed fact that (i) Golub supported his default motion with an affidavit that sought relief against one (Kelly Polatis) of the seven defendants in the case (Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, Peter Sampson, Lenore Peterson, and Delano Peterson) but (ii) was awarded a default judgment against Kelly Polatis *and* Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, Peter Sampson - - - an event that mandates vacation of the default judgment as IRCP 55 does not allow a party to move for default against one defendant (Politas) but obtain a default judgment against four other defendants against whom no affidavit of amount due was filed; and, (3) ignoring that Golub's 2007 complaint, at best, sought $941,000 against Delano and Lenore Peterson and no one else.

For those reasons and the reasons set out below, the default judgment should be vacated.

B. The trial court abused its discretion by requiring Kirk-Scott (a non-party to the action in which the default judgment was obtained) to establish when it became aware of the default judgment.

The trial court erred in requiring Kirk-Scott to show that its Rule 60 motion was timely. (R. Vol. 1, p. 416) Under the facts of this case Kirk-Scott (a) did not need to make such a showing but (b) made the timeliness showing nonetheless.

Regarding point (a), there is no known Idaho case that addresses whether a non-party to the action in which a default judgment was obtained has, for purposes of attacking the default judgment at a later date, to establish "when" it became aware of the default judgment. Indeed,

none of the cases cited by Golub or the trial court address A [Golub] suing B [Kirk-Hughes], A getting a default judgment against B, and A years later suing C [Kirk-Scott] for the purposes of establishing priority of the default judgment obtained against B in the A vs. B case.

Golub argues that the trial court properly exercised discretion in considering Kirk-Scott's relationship with Kirk-Hughes and cites *Dawson v. Cheyovich Family Trust,* 149 Idaho 375, 380, 234 P.3d 699, 704 (2010), in support. (Resp. Br. p. 13) Golub's argument fails for three reasons, First, *Dawson* supports Kirk-Scott's argument that the trial court abused discretion by not ruling on Kirk-Scott's Rule 60(b)(5) and Rule 60(b)(6) motions. (Kirk-Scott Appeal Br. pg. 25-26) Specifically, *Dawson* held "[t]he district court erred by failing to issue a ruling on Dawson's Rule 60(b)(6) motion." *Id.* at 380, 381. Here the trial court erred in not addressing Kirk-Scott's Rule 60(b)(5) and Rule 60(b)(6) motions. (Kirk-Scott Appeal Br. pg. 25-26) Second, Golub's argument that the trial court properly considered the Kirk-Hughes/Kirk-Scott relationship is equally misplaced. Neither Golub or the trial court identified any authority that mandates a corporation's member (here Kirk-Scott as a member of Kirk-Hughes) to establish when it became aware of the default judgment for the purposes of a motion to vacate. Moreover, neither the trial court or Golub identified any authority requiring a corporation's member to then take legal action in the member's name when the parent company (here Kirk-Hughes Development) receives a default judgment. For it is illogical to require members, shareholders, individual owners to take action in their individual capacity when the corporate entity with whom they have an ownership/membership interest is subject to a judgment. By allowing that illogical result the trial court abused its discretion. Third, Golub's citation to *Johnson v. Pioneer Title Co. of Ada Cnty.*,

104 Idaho 727, 729-30, 662 P.2d 1171, 1173-74 (Ct. App. 1983), is distinguishable. *Johnson* involved A suing B (and serving an employee of B with the summons and complaint), and then B changing its name to C (who continued to employ the same employee who received the summons and complaint) - - - not the case here. The default judgment in *Johnson* was vacated - - - not the case here.

Regarding point (b), Kirk-Scott (a stranger to the action where the default judgment was obtained) established timeliness. Kirk-Scott moved to vacate the default judgment within three (3) months and 11 days of answering Golub's 2013 Complaint while also (a) moving to dismiss Golub's case, (b) propounding discovery on Golub, (c) analyzing that discovery, (d) deposing Golub, (e) analyzing the CV07-8038 (2007 Action) filings (to which Kirk-Scott was not a party), (f) responding to Golub's motion for summary judgment, and (g) moving to vacate Golub's March 11, 2009, default judgment. (Kirk-Scott Br. at p. 15¶28) Further, neither Kirk-Scott or its president, Balinda Antoine, knew of the default judgment before being served with Golub's declaratory judgment action. *Id.* at ¶27. (R, Vol. 1, p. 464-466) Kirk-Scott made its motion to vacate within I.R.C.P. 60(b)'s "reasonable time" standard, informed the trial court of the same, but the trial court disregarded Kirk-Scott's showing and then sanctioned Kirk-Scott after Kirk-Scott supplied, on reconsideration, the affidavit of Balinda Antoine for the purpose of rebutting the trial court's July 9, 2013, ruling that allowed Golub to file evidence in response to Kirk-Scott's Motion to Vacate *the day of the hearing*. (Kirk-Scott Appeal Br. pg. 40) Golub's reliance on *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 71, 995 P.2d 835, 841 (Ct. App. 2000) is easily distinguishable as the party seeking vacation of default in *Viafax* "offered no explanation for its

delay of nearly five months in seeking Rule 60(b) relief". Here Kirk-Scott's aggressive defense of Golub's 2013 Action is ample reason and explanation for it waiting three months to bring its motion. *See supra.* Golub's citation to *Blanc v. Laritz*, 119 Idaho 359, 360, 806 P.2d 452, 453 (Ct. App. 1991) and *McGrew v. McGrew*, 139 Idaho 551, 554, 82 P.3d 833, 836 (2003), are misplaced because both involve defaults taken during divorce proceedings (i.e. A vs. B cases) and do not involve the fact pattern at issue in this case (A vs. B and then A suing C years later and using the default judgment as basis for the lawsuit).

C. The trial court abused discretion by not addressing Kirk-Scott's IRCP 60(b)(5) and Rule 60(b)(6) motions, ignoring Golub's disregard for IRCP 55, and in not vacating the default judgment under Rule 60(b)(4) because the default judgment awarded more than what was prayed for in the complaint.

1. Dawson requires reversal of the trial-court's non-addressing of Kirk-Scott's Rule 60(b)(5) and (b)(6) motions.

Kirk-Scott moved to vacate the default judgment under IRCP 60(b)(4), 60(b)(5), and 60(b)(6). (Kirk-Scott Br. p. 25-26) The trial court did not address Kirk-Scott's Rule 60(b)(5) and Rule 60(b)(6) motions. *Id. Dawson v. Cheyovich Family Trust* mandates reversal when, as is the case here, the trial court does not address a party's Rule 60(b)(5) and Rule 60(b)(6) motions. *Dawson,* 149 Idaho at 380 - 381. Accordingly, the trial court should be reversed for failure to exercise discretion by not ruling, at all, on Kirk-Scott's Rule 60(b)(5) and Rule 60(b)(6) motions.

2. Golub's failure to comply with IRCP 55 requires reversal under Rule 60(b)(6).

In addition to violating *Dawson*, trial court erred in denying Kirk-Scott's motion to vacate because the default judgment was incompliant with IRCP 55(b). By way of a recap, on June 11, 2008, Mr. Golub filed the "Affidavit of Alan Golub in Support of Motion for Default Judgment

Against Kelly Polatis." (R, Vol. 1, at p. 170) Exhibit 1 to Mr. Golub's June 11, 2008, Affidavit is the "listing agreement" to which Mr. Golub claims he is entitled to $941,000.00. *Id.* at p. 171. On February 26, 2009, Golub's counsel 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 Golub's counsel and the June 10[2] [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 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.* IRCP 55(b)(1) makes clear that an affidavit of amount due as it relates to a default must set out the amount due as to each party:

> 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. I.R.C.P. 55(b)(1)(emphasis added).

Here the trial court erred allowed Golub to submit an affidavit for a sum certain against one defendant (Politas) but then erred by entering default against multiple defendants based on

[2] 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)

the Golub June 2008 affidavit that sought amount due against Politas. What Golub did was akin to (a) John Doe suing Microsoft, Amazon, and Google, (b) John Doe moving for default against Microsoft, (c) John Doe filing an affidavit of amount due setting out his monetary damage against Microsoft but (d) John Doe then asking the trial court to enter default judgment against Microsoft *and* Amazon *and* Google and the trial court granting Mr. Doe's request. The trial court allowed this to happen here even though IRCP 55(b)(1) does not allow for such a result. Golub does not address this issue on appeal. (Kirk-Scott Br. at 26-27)

3. The trial court erred in denying Kirk-Scott's Rule 60(b)(4) motion.

The trial court also abused its discretion by denying Kirk-Scott's Rule 60(b)(4) motion. The "default judgment provisions of Rule 54(c) embody "the essentials of due process and of fair play." *Johnson v. Hartford Ins. Grp.,* 99 Idaho 134, 138, 578 P.2d 676, 680 (1978). Rule 54(c) states, in part:

> **(c) Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

The phrase "demand for judgment" means the complaint's prayer for relief. *See id.* at 137. *Johnson,* which Golub cites, involved: (i) the complaint's body seeking defendant's "community property," including defendant's "various policies of insurance;" (ii) the complaint not mentioning the "insurance policies" in its prayer for relief (but mentioning other community property items in the prayer for relief); and, (iii) the plaintiff obtaining "insurance policies" (and the community property prayed for in the prayer for relief) via a default judgment. *Johnson,* 99 Idaho at 137. *Johnson* held that "under the narrow circumstances of this case" the default

judgment complied with Rule 54(c). *Id.* at 139. Such narrow circumstances do not exist in this case.

Golub's 2007 Complaint did not "fairly appraise" Kirk-Hughes of "the type and amount of damages claimed." (Resp. Br. pg. 15) The 2007 Complaint mentioned $941,000 in one sentence and did not pray, in its demand for judgment, that $941,000 to be awarded to any party. (Resp. Br. at 16) That omission makes sense given Golub's September 2007 testimony that he, at most, was entitled to only $464,000 of the $941,000.

Golub's response to Kirk-Scott's double recovery argument also undercuts Golub's "fair reading" argument. Golub argues that IRCP 60(b)(4) is inapplicable because a "fair" reading of the 2007 Complaint informed all defendants that Golub sought $941,000.00 against everyone; but, in response to Kirk-Scott's double recovery argument, argues that "this is [not] a contract case in which the damage for breach is a specified amount which may not be recovered twice." (Resp. Br. pg. 37) What Golub says on page 37 of his appeal response brief is wrong: page 5 of the 2007 Complaint (i) states "**FIRST CAUSE OF ACTION - BREACH OF CONTRACT**",[3] and, (ii) alleges "Peterson breached their contractual obligations when they failed to pay Golub a commission." (R, Vol. 1, p. 166, L. 17-25) Golub cannot properly argue (on pages 15 -16 of his brief) that his 2007 Complaint fairly apprised all defendants that Golub demanded $941,000.00 in judgment against all defendants but then ague (on page 37 of the same brief) that Golub's double recovery is allowed because no discrete contract claim exists that put the defendants on

[3] Golub's 2007 Complaint then goes on to allege "SECOND CAUSE OF ACTION - BREACH OF DUTY OF GOOD FAITH", a contract claim, and "THIRD CAUSE OF ACTION - TORTIOUS INTERFERENCE WITH CONTRACT." (R, Vol. 1, p. 167)

notice of a specific amount prayed for. *Compare* Resp. Br. at 15-16 *with* Resp. Br. at 37. Golub's March 11, 2009 judgment by default differed in kind from and exceed the amount prayed for in the 2007 Complaint's demand for judgment. The trial court erred in finding otherwise and should be reversed.

Golub's reliance on *Schlieff v. Bistline,* 52 Idaho 353, 15 P.2d 726, 729 (1932) does not necessitate a different result. *Schlieff* holds "the court may grant...any relief consistent with the case made by the complaint embraced within the issues." *Id.* Golub cites his discovery responses for the proposition that Kirk-Hughes should have known that Golub was seeking $941,000 against all defendants in the 2007 Action. (Resp. Br. pg. 17) But Golub's discovery responses, like Golub's complaint, imply that Peterson (not the other 2007 Action defendants) was at fault for "the principal amount of the [unspecified] commission." *Id.*

The default judgment should be vacated under Rule 60(b)(4).

D. The trial court erred in absolving Golub from establishing IC 55-606's "good faith" element, issues of fact exist as to whether Golub was a good faith encumbrancer, and issues of fact exist as to whether the default judgment was supported by valuable consideration.

Golub argues that a judgment lien holder does not have to establish IC 55-606's "good faith" element. Golub is wrong and the trial court erred in failing to hold Golub to establishing "good faith." The 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)

An encumbrancer is "one having a legal claim, such as a lien or mortgage." Blacks Law Dictionary, at 432 (7th Ed. 2000). Golub concedes that "the effect of Golub's judgment...creates a lien on the real property of a debtor as a matter of law." (Resp. Br. at pg. 12) Golub is an encumbrancer because he had a lien (i.e. the March 11, 2009 default judgment) and filed suit against Kirk-Scott, and others, in 2013 to foreclose upon that lien. Encumbrancers may "in good faith and for valuable consideration acquire[] title or lien by an instrument *or* valid judgment lien." IC 55-606. This Court holds "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, 526 P.2d 178, 181 (1974)(emphasis added). Golub is an encumbrancer who must establish the "good faith" element. And such a conclusion is consistent with Idaho law which states that default judgments are disfavored; for it would be illogical for the Idaho legislature to require encumbrancers with liens that are not default judgments to establish "good faith" but not require encumbrancers with default judgments (which are disfavored) to abide by the same "good faith" standard.

Numerous material issues of fact exist as to whether Golub was a "good faith" encumbrancer and the trial court erred in granting summary judgment on Golub's behalf. Those issues of fact include, but are not limited to, Darlene Moore informing Golub in 2006 of the Kirk-Scott Deed of Trust and Golub's own testimony that Golub knew that Kirk-Scott had "clear title" to the Atkinson and Sloan property as of 2004. (Kirk-Scott Br. pg. 11-12) Golub's self

serving affidavit (R. Vol. 1, p. 96) is not enough to survive (much less affirmatively obtain) summary judgment. *See Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 859 (9th Cir. 2009). (Kirk-Scott Br. at 28-30) Further, in granting summary judgment for Golub the trial court ignored the rule that "[a]ll disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007). Although confronted with evidence of Golub's contradictory and self-serving testimony, the trial court construed the disputed facts in favor of Golub and then sanctioned Kirk-Scott when Kirk-Scott readdressed Golub's lack of credibility on reconsideration. Additionally, the fact that the Kootenai County Recorder's office recorded Kirk-Scott's Deed of Trust[4] and Golub was not confused by the instrument militate against the trial court's grant of summary judgment.

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[4] Golub cites the 1968 case of *Credit Bureau of Preston v. Sleight*, 92 Idaho 210, 215, 440 P.2d 143, 148 (1968) for the proposition that a recorded instrument does not impart constructive notice when (i) there was no personal appearance before a notary (ii) it is admitted by the party seeking to uphold the validity of the acknowledgment that it was not taken personally before a notary, or (iii) where it is shown that the notary has a beneficial or financial interest. (Resp. Br. at 34) Here the Kirk-Scott Deed of Trust was signed by Kirk-Hughes Development, LLC on November 18, 2004, before Sherry Patterson, a Notary Public in the State of Nevada. (R, Vol. 1, p. 40) None of the *Sleight* deficiencies exist here and the instrument's recording imparts constructive notice on Golub. Further Kirk-Scott's reliance on *Matheson v. Harris*, 98 Idaho 758, 761, 572 P.2d 861, 864 (1977)(instrument not signed by sellers imparted constructive notice and holding "[i]f entitled to recordation, it was constructive notice as to its contents"), controls because *Matheson* was decided in 1977 - - - nine years after *Sleight* was decided.

Additional issues of fact exist as to whether the default judgment was supported by valuable consideration. For *Mountain Home Lumber Co., Ltd. v. Swartout,* 30 Idaho 559, 166 P. 271 (1917) and *Rexburg Lumber Co. v. Purrington,* 62 Idaho 461, 113 P.2d 511, 513-514 (1941), make clear that a judgment merely credited on the purchase price is not supported by valuable consideration. Golub admits to crediting the default judgment against the real property's price. (R. Vol. 1, p. 524) Golub argues *Swartout* does not apply because it did not address the validity or priority of the lien at issue. (Resp. Br. at 23) Kirk-Scott did not cite *Swartout* for that proposition: it cited *Swartout* for the proposition that a credit bid is not valuable consideration - - - precisely the case here.

E. The trial court improperly relied on *In re Schwartz* in determining that Kirk-Scott's Deed of Trust was void and improperly allowed Golub double recovery.

Kirk-Scott argued that the trial court erred in applying *In re Schwartz,* 954 F.2d 569 (9th Cir. 1992) by not addressing the standing requirements set out in *In re Brooks*, 79 B.R. 479, 481 (Bankr. 9th Cir.1987) *aff'd,* 871 F.2d 89 (9th Cir.1989). Golub argues that Golub did not need to challenge Kirk-Scott's post bankruptcy petition recording of the Deed of Trust because the recording was void as a matter of law. Golub misreads Kirk-Scott's argument. The trial court relied on *Schwartz* for the proposition that the Deed of Trust was void. But in order for *Schwartz* to apply the entity seeking to void the recordation must have standing as set out under *Brooks.* And *Brooks* held that a post-petition re-recording of deed of trust could not 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 Schwartz,* favorably cites *Brooks*

and *Brooks'* standing requirement. 871 F.2d at 90. *Schwartz* did not overrule, question, or dispose of *Brooks*. *Brooks'* standing requirement controls and the trial court erred not considering whether Golub had standing under *Brooks*.

Kirk-Scott moved to compel Golub to disclose the amount of settlement money it received from the Peterson defendants, the trial court mooted Kirk-Scott's motion, and sanctioned Kirk-Scott when Kirk-Scott addressed that issue on reconsideration. The trial court's sanctioning of the Golub's double recovery contravenes *Gunter v. Murphy's Lounge, LLC,* 141 Idaho 16, 31 (2005), which holds "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."

Golub tries to distinguish *Gunter,* which (like the 2007 Action) involved breach of contract and tortious interference claims, by claiming that "this is [not] a contract case." (Resp. Br. p. 36-37) Golub's argument is not supported by the record or the law. The record reflects that Golub brought contract and tort claims as part of its 2007 Action. (R, Vol. 1, p. 166-168) Accordingly *Gunter* applies and the trial court erred in not allowing Kirk-Scott to determine the amount of recovery by which Golub's default judgment should be reduced.

F. Kirk-Scott should not have been sanctioned for asking the trial court to reduce the judgment, address Golubs' double recovery, and address Golub's credibility regarding the IC 55-606 "good faith" issue.

Golub correctly points out that Kirk-Scott brought its "Motion to Amend the Judgment" under IRCP 59(a)(1), (6) & (7). (Resp. Br. at 37) Under those standards Kirk-Scott sought to inform the trial court of legal and factual errors that occurred in the proceedings by addressing,

inter alia, Golub's sworn testimony that Golub was entitled to, at best, $464,000 of the $941,000, Golub's double recovery, and Golub's credibility as it related to the IC 55-606 "good faith" issue. (Kirk-Scott Br. pg 40) Kirk-Scott's motion was proper under Rule 59 and the trial court abused its discretion by sanctioning Kirk-Scott for bringing the motion.

Golub then argues that Kirk-Scott's motion was a veiled Rule 11(a)(2)(B) motion insofar as it sought to review the trial court's denial of Kirk-Scott's Rule 60 motions. (Resp. Br. pg. 38) That argument fails for two reasons. First, Kirk-Scott withdrew the Rule 60(b)(4) component of its reconsideration motion. (Kirk-Scott Br. pg. 40) Second, the trial court undisputedly did not address Kirk-Scott's Rule 60(b)(5) and Rule 60(b)(6) motions in its August 9th or August 19th orders. One cannot violate IRCP 11(a)(2)(B) by asking the trial court to reconsider a Rule 60 motion that the trial court did not decide in the first place. The trial court erred in sanctioning Kirk-Scott for seeking reconsideration of the Rule 60(b)(5) and 60(b)(6) motions the trial court never decided.

Sanctions are a court management tool and are to be used narrowly. *Landvik by Landvik v. Herbert*, 130 Idaho 54, 61 (Ct. App. 1997). The trial court abused its discretion by not following that rule. The trial court not only ignored *Landvick* but *sua sponte* issued its sanctions motion against Kirk-Scott while ignoring the undisputed fact (addressed at the summary judgment and reconsideration stages) that Golub, by Golub's own words, was not entitled to at least half of the $941,000.

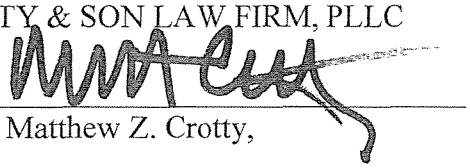
Should this Court reverse the trial court Kirk-Scott respectfully requests remand to a new trial judge. Kirk-Scott reserves the right to bring that motion should it become necessary.

IV. CONCLUSION

The trial court should be reversed, Kirk-Scott's Motion to Vacate should be granted, Golubs' Motion for Summary Judgment should be denied, and the trial court's *sua sponte* sanctions order against Kirk-Scott should be vacated.

Dated: April 30, 2014.

CROTTY & SON LAW FIRM, PLLC

By: 

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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 by the method indicated below, and addressed to all counsel of record as follows:

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