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Agstar Financial Services v. Northwest Sand & Gravel Appellant's Reply Brief Dckt. 42932

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 42932

AGSTAR FINANCIAL SERVICES, ACA

Appellant-Plaintiff

v.

NORTHWEST SAND & GRAVEL, INC., GORDON PAVING COMPANY, INC.,
and BLACKROCK LAND HOLDINGS, LLC

Respondents-Defendants

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COURT OF APPEALS

APPELLANT/PLAINTIFF/CROSS-RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District in and for Twin Falls County
Case No. CV-2012-2731
The Honorable Randy J. Stoker, District Judge

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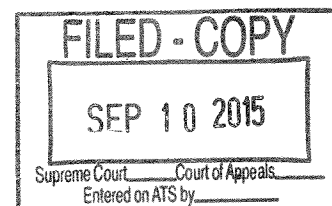


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I. STATEMENT OF THE CASE

A. Nature of the Case.

Fundamentally, this case asks the Court to consider the nature of a deficiency judgment pursued after a judicial foreclosure. A deficiency judgment determines whether a creditor can execute against the non-collateral of the debtor to satisfy its indebtedness as determined by the foreclosure. It is a simple post-judgment execution proceeding.

Similarly, the existence or nonexistence of a deficiency judgment does not change what has already been decided—that a secured party has an interest in particular collateral, which it can liquidate up to the amount of the indebtedness as already determined by the foreclosure judgment.

Because a deficiency proceeding is a post-judgment execution matter, fee awards for prosecuting or defending the matter should be analyzed under I.C. § 12-120(5). The district court improperly awarded Gordon Paving its fees under I.C. § 12-120(3).

However, the court properly recognized that the lack of a deficiency judgment does not alter whether the secured party can continue to liquidate collateral to satisfy its indebtedness. And, it properly awarded AgStar its fees for work related to liquidating the collateral.

AgStar asks this Court to affirm the district court's order allowing the personal property collateral sale and granting AgStar's exemption to the royalty check. It also asks this Court to affirm the award of collections fees to AgStar. And it asks this Court to make the district court's decisions consistent—the Court should hold that a deficiency judgment proceeding is a post-judgment matter not entitling Gordon Paving to attorney fees and costs.

B. Facts.

In addition to the facts already laid out by AgStar and Gordon Paving in their respective opening briefs, AgStar also notes that the district court's decision to allow AgStar to apply the royalty check to its judgment was based on the fact that the royalties were AgStar's collateral. (See Tr. p. 46 l. 25; p. 47 ll. 1-25 (Feb. 9, 2015).)

II. ADDITIONAL ISSUE ON CROSS-APPEAL

AgStar seeks costs and attorney fees for defending the cross-appeal as authorized by I.A.R. 40 and 41. AgStar bases its claim for fees on I.C. § 12-120(5) or, alternatively, the parties' agreement or I.C. § 12-120(3). The proper basis for its claim depends on this Court's resolution of the case.

III. REPLY ARGUMENT

A. The Deficiency Proceeding Cannot Be a "Civil Action" Under I.C. § 12-120(3), and Is Rather an Action to Collect on the Foreclosure Judgment.

The deficiency motion and the related evidentiary hearing cannot by definition be a "civil action." A "civil action" is defined by I.R.C.P. 3(a) as follows:

A civil action is commenced by the filing of a complaint petition or application with the court. Any filing party shall be designated as the plaintiff or petitioner, and any party against whom the same is filed shall be designated as the defendant or respondent. Complaints, petitions or applications shall be filed with a completed Supreme Court approved case information sheet in the following civil cases: guardianship, conservatorship, adoption, termination of parental rights, involuntary commitment, and child protection act. This case information sheet shall be exempt from disclosure according to I.C.A.R. 32. No claim, controversy or dispute, may be submitted to any court in the state for determination or judgment without filing a complaint or petition or application as provided in these rules; nor shall any judgment or decree be entered by any court without service of process upon all parties affected by such judgment or decree in the manner prescribed by these rules.

The Court looks to this definition for the purpose of attorney fee determinations. *See, e.g., Smith v. Washington County Idaho*, 150 Idaho 388, 391-92, 247 P.3d 615, 618-19 (2010). A civil action is one “commenced by the filing of a complaint . . . with the court,” and a proceeding that does not involve such a filing is not a civil action for the purposes of awarding attorney fees. I.R.C.P. 3(a); *see Smith*, 150 Idaho at 391-92, 247 P.3d at 618-19 (indicating that a petition for judicial review of an administrative decision is not a civil action).

The deficiency judgment proceeding was commenced by AgStar’s motion after the district court had already entered the Judgment and Decree of Foreclosure. (R. at 220-21.) AgStar did not file a complaint or other new action for the deficiency—it filed a post-judgment motion within the same case number as the foreclosure. Plainly, the deficiency proceeding cannot be a new civil action under I.R.C.P. 3(a). Rather, it is a post-judgment motion based on the previously entered foreclosure judgment.

Further, the deficiency proceeding cannot be considered a separate civil action because that would cause the district court’s judgment denying the deficiency to be improper. Rule 3(a) would not sanction that judgment unless it was derived from the original foreclosure complaint: “No claim, controversy or dispute, may be submitted to any court in the state for determination or judgment without filing a complaint or petition or application as provided in these rules.”

Thus the deficiency proceeding cannot be a standalone civil action under I.C. § 12-120(3)—it must arise out of the original foreclosure case. Here, the deficiency proceeding took place as a post-foreclosure judgment motion hearing. And while the district court entered a separate judgment on that motion (R. at 239), that judgment was derived from the initial

foreclosure judgment with its determination on indebtedness as specified by I.C. § 6-108 (“No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the *mortgage indebtedness, as determined by the decree*, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.” (emphasis added)).

Gordon Paving notes that a deficiency proceeding under a deed of trust pursuant to I.C. § 45-1512 is a separate civil action. The differences in the deed of trust statute and I.C. § 6-108 illustrate, however, that deficiency judgments from judicial foreclosures are to be treated as post-judgment proceedings, not as their own actions. Again, I.C. § 6-108 states:

No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment *in any case involving a foreclosure of a mortgage on real property* in any amount greater than the difference between the mortgage indebtedness, *as determined by the decree*, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

(Emphases added.) The statute specifically contemplates that the district court will determine whether a deficiency judgment should issue within the same foreclosure case, after the court enters a decree determining the overall indebtedness. In contrast, in a deed of trust deficiency proceeding, the indebtedness has yet been determined, and it requires a separate complaint or petition to be filed as required under I.R.C.P. 3(a). *See* I.C. § 45-1512.

In sum, the deficiency judgment proceeding is not its own civil action. It is a collections matter, occurring after foreclosure and arising out of the foreclosure decree.

B. If the Deficiency Proceeding Does Not Arise from the Foreclosure Judgment, It Must Arise from the Parties' Agreement, Which Bars Gordon Paving from Seeking Its Fees and Costs; the Provision Is Not Unconscionable.

The deficiency judgment does not arise out of the ether. AgStar argues that the right to a deficiency comes from the Judgment and Decree of Foreclosure itself, which is consistent with Gordon Paving's merger argument. However, if the Court somehow decides that I.C. § 12-120(3) applies, the parties' agreement governs the dispute and bars Gordon Paving from seeking its fees, as argued in AgStar's opening brief.

Gordon Paving's only true argument against the attorney fee provision in the parties' agreement is that it is unconscionable. With regard to unconscionability, the district court found that:

And the second reason that I find that it does not apply is that it would be, in my view, unconscionable to have a clause that allows a prevailing party in a case – I'll look into the prevailing party analysis here in a minute – a prevailing party have to pay their own fees. Then the other side, as a nonprevailing party, could collect their fees. That is the interpretation that has sort of been given to this clause, and I just don't accept that, and I'm not going to enforce that.

(Tr. p. 21 ll. 20-25; p. 22 ll. 1-5 (Nov. 10, 2014).)

While the district court viewed a contract provision disallowing a "prevailing party" from collecting its fees to be unconscionable, this sort of provision has already been sanctioned as enforceable under Idaho law. In *Moore v. Omnicare, Inc.*, the Supreme Court affirmed the hearing court's denial of attorney fees to a prevailing party, based on a contract provision that required each party to bear its own costs, including attorney fees. 141 Idaho 809, 818-19, 118 P.3d 141, 150-51 (2005). The Supreme Court reasoned that

[a]s recognized by the Court of Appeals, a general entitlement to an award of attorney's fees under I.C. § 12-120 will not override a valid agreement between parties which limits the dollar amount that may be claimed or awarded. In this case the parties contracted for a zero dollar amount or claim with respect to an award of attorney's fees.

Id. (citation omitted). “[T]he Idaho Supreme Court has . . . determined that parties may contract away their statutory right to attorney’s fees altogether.” *Novus Franchising, Inc. v. Oksendahl*, Nos. 07-1964 & 07-1965, 2008 WL 835681, at *3 (D. Minn. Mar. 27, 2008) (citing *Moore*, 141 Idaho at 817-18, 118 P.3d at 149-50).

Thus, the contract’s attorney fee provision is not unconscionable as a matter of law even though it prevents Gordon Paving from collecting its fees and costs.

Further, Gordon Paving raises an entirely new argument for the first time on appeal regarding procedural and substantive unconscionability of the contract term. In general, this Court does not consider issues raised for the first time on appeal. *State v. Rogers*, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004).

Nowhere below did Gordon Paving make any argument that the contract should be voided for unconscionability. (*See R.* at 298-302.) The only mention of unconscionability is the district court’s holding that, as a matter of law, such a fee provision is unconscionable. Of course, as discussed, this holding is contrary to Idaho precedent. Gordon Paving should not be allowed to raise the issue of unconscionability for the first time on appeal.

Lastly, the argument of unconscionability misrepresents the nature of the case. Gordon Paving failed to pay back most of the \$10 million it borrowed from AgStar, and AgStar has yet to be made whole. Gordon Paving brought the foreclosure and pursuit of the deficiency judgment

upon itself due to its default, and there is nothing unconscionable about AgStar's attempts to collect on the indebtedness.

IV. CROSS-APPEAL ARGUMENT

A. **The District Court Did Not Err in Allowing AgStar to Liquidate the Personal Property Collateral.**

In the Judgment and Decree of Foreclosure, the district court held that AgStar had a paramount lien in the personal property collateral, and that AgStar was entitled to sell it and apply the proceeds to the indebtedness as determined by the judgment. (R. at 179-80.) AgStar's failure to obtain a deficiency judgment does not change that.

Idaho's anti-deficiency statute bars recovery of a deficiency judgment greater than the mortgage indebtedness plus costs of foreclosure and sale, minus the reasonable value of the property:

No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

I.C. § 6-108.

The plain language of the statute does not bar a secured creditor from liquidating collateral in a serial fashion. The language only bars the entry of a deficiency judgment against the defendant personally without a determination of the fair market value of the property. While there are no Idaho cases directly on point, other courts that have addressed the issue have held that for the purposes of selling additional collateral, anti-deficiency statutes do not apply, and the

amount of the credit bid is applied to the debt rather than the fair market value in determining whether the creditor may realize on additional collateral.

For example, in *In re Merrick*, a case from the U.S. Bankruptcy Court, District of Utah (Central Division), the debtors executed a note in favor of a bank, secured by both a trust deed on a piece of commercial real estate and a trust deed on the debtors' personal residence. 483 B.R. 236, 237 (Bankr. D. Utah 2012). After the creditor sold the commercial property, and won the auction with a credit bid that did not satisfy the total indebtedness, the creditor filed a claim in the bankruptcy for the remaining amount due and began pursuing foreclosure against the residence. *Id.* at 238-39. The debtors argued that the creditor was barred from doing this by Utah's anti-deficiency statute, because the fair market value of the commercial residence exceeded the amount of the total indebtedness, and therefore the creditor could not pursue recovery on any remaining collateral. *Id.* at 239.

The court framed the issue as follows:

When a note is secured by two pieces of collateral, and the first piece of collateral is purchased by credit bid for an amount less than the total indebtedness under the note, does [Utah's anti-deficiency statute] require the secured creditor to subtract the fair market value of the sold collateral from the total indebtedness before pursuing the second piece of collateral?

Id. Utah's anti-deficiency statute is very similar to Idaho's, stating, in part:

The court may not render [a deficiency] judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale.

Utah Code § 57-1-32.

The court held that the anti-deficiency statute did not bar recovery against the second piece of collateral, stating that the creditor “is permitted to pursue a claim against the [remaining collateral] for the remaining indebtedness under the Note without first subtracting the fair market value of the [first piece of collateral] because such a claim is not an ‘action’ under Utah’s Anti-Deficiency Statute.” *Merrick*, 483 B.R. at 241.

In another case, *In re Madera Farms Partnership*, the Bankruptcy Appellate Panel of the Ninth Circuit was faced with a similar question. 66 B.R. 100 (B.A.P. 9th Cir. 1986). The secured creditor held a deed of trust with an assignment of rents clause. *Id.* at 101. The secured creditor had, during the course of the proceedings, stipulated that the fair market value of the real property exceeded the debt. *Id.* at 101-02. At the foreclosure sale, the secured creditor placed a winning credit bid in an amount less than the debt. *Id.* at 102. The secured creditor then sought to collect on the remaining debt by applying accrued rents to the deficiency. *Id.* The secured creditor maintained that “the amount bid at the foreclosure sale—not the fair market value of the property—should conclusively determine the credit against its claim” and that California’s anti-deficiency provisions did not apply when a creditor “seeks only to enforce its secured claim against additional collateral.” *Id.* The debtor argued that there was no indebtedness remaining, and that it should retain the rents. *Id.* It argued that any further recovery by the secured creditor would be unjust enrichment because the creditor was fully satisfied by the fair market value of the real property. *Id.* at 103-04.

The panel held in favor of the secured creditor, stating that the anti-deficiency statute “is concerned only with actions to recover deficiency judgments after the security is exhausted.” *Id.*

at 103 (citing *Hatch v. Security-First Nat'l Bank of L.A.*, 120 P.2d 869 (Cal. 1942); *Mortg. Guarantee Co. v. Sampsell*, 124 P.2d 353, 356 (Cal. Ct. App. 1942)). It also held that the stipulated fair market value “did not preclude [the secured creditor] from making a credit bid for less than that indebtedness.” *Id.* at 104. The court then applied the credit bid against the debt, allowing the secured creditor to receive the rents as additional security up to the amount of the debt. *Id.*

These cases are far from anomalous; other persuasive authority abounds. *E.g.*, *Phillips v. Utah State Credit Union*, 811 P.2d 174, 178 (Utah 1991) (“We therefore hold that where a creditor takes more than one item of security upon an obligation secured by a trust deed, the creditor is not precluded from making use of that additional security merely because the creditor has not sought a deficiency judgment within three months of a nonjudicial sale of one of the items covered by the trust deed property, nor is the creditor required to seek a deficiency judgment . . . in order to maintain its right to the additional security, so long as the security is applied toward the debt owed on the original loan.”); *Dreyfuss v. Union Bank of Cal.*, 11 P.3d 383, 406 (Cal. 2000) (“[A] creditor may proceed seriatim in foreclosing against multiple items of collateral without commencing a judicial action to determine the fair market value of each item sold, and crediting that amount to the debt, before proceeding with foreclosure sales of any additional collateral.”); *Donovick v. Seattle-First Nat'l Bank*, 757 P.2d 1378 (Wash. 1988) (same conclusion under Washington’s anti-deficiency statute); *see also Pfeiffer v. Morgan Stanley Credit Corp.*, 922 F. Supp. 2d 828, 832 (D. Ariz. 2012). The converse of this rule is the accepted

tenet that a credit bid for the full indebtedness causes that debt to be considered paid in full. *See, e.g., Willis v. Realty Country, Inc.*, 121 Idaho 312, 317, 824 P.2d 887, 892 (Ct. App. 1991).

The crux of these cases is that serial recovery of a debt on collateral is not the pursuit of a deficiency action against the debtor *personally*, and thus the anti-deficiency statute does not apply. Because the anti-deficiency statute does not apply, the *credit bid*—not the court’s finding of reasonable value—is applied to the total indebtedness to determine whether the creditor can continue to liquidate collateral.

Idaho’s anti-deficiency statute, by its language, only applies to actions sought against the debtor personally for an additional deficiency. AgStar failed to gain a deficiency judgment against Gordon Paving *personally*, which would have allowed it to execute on other property belonging to Gordon Paving that did not secure the debt. But, AgStar may still proceed against the remaining collateral to the extent that the credit bid has failed to satisfy the total indebtedness. The lack of a deficiency judgment does not undo what has already been decided—that AgStar is entitled to satisfy its judgment out of the collateral.

The total indebtedness at the time of the foreclosure decree was \$9,813,340.00, and that debt has since earned interest, in addition to attorney fees and costs. (*See R.* at 221.) The credit bid was only \$7.2 million and falls far short of making AgStar whole. (*Id.*) Because over \$2 million of indebtedness remained, the district court did not err in authorizing AgStar to proceed against the additional collateral.

B. Similarly, the District Court Did Not Err in Allowing AgStar to Realize on the Royalty Check.

For the same reasons discussed in the previous section, AgStar properly realized on the royalty check. AgStar was simply collecting on its security as it collected on the other personal property collateral. While Gordon Paving may be entitled to an offset in the amount of its judgment (if this Court holds that the fee judgment is proper), it is not entitled to execute upon the same collateral that AgStar seeks to satisfy the remaining debt.

C. The District Court Properly Awarded AgStar Its Post-Judgment Fees and Costs.

AgStar petitioned for and received its post-judgment fees and costs that were unrelated to the prosecution of the deficiency judgment. (R. at 317-73; 421-22.) AgStar petitioned for its fees under I.C. § 12-120(5), which states:

In all instances where a party is entitled to reasonable attorney's fees and costs under subsection (1), (2), (3) or (4) of this section, such party shall also be entitled to reasonable postjudgment attorney's fees and costs incurred in attempting to collect on the judgment. Such attorney's fees and costs shall be set by the court following the filing of a memorandum of attorney's fees and costs with notice to all parties and hearing.

The district court awarded AgStar its fees and costs under this subsection. (R. at 421.)

This subsection contains no deadline for filing (nor does I.R.C.P. 54 set a deadline for post-judgment fees and costs), although that appears to be Gordon Paving's only true objection to the award. (Resp. Brief at 16-17.) In any case, AgStar petitioned for its fees and costs related to liquidating the real and personal property, among other collection issues, within a reasonable amount of time. The Judgment and Decree of Foreclosure was entered in June 2013. (R. at 178.) The real property was sold to AgStar in November 2013. (R. at 199.) After receiving approval

from the district court, the personal property was sold in fall 2014. (R. at 282-83.) AgStar petitioned for post-judgment fees and costs in November 2014. (R. at 317-73.) To suggest that AgStar waited too long to petition for its fees and costs after this collections activity is absurd, and contrary to the language of the rule that provides no stated deadline.

V. CONCLUSION

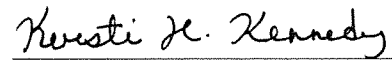
This appeal deals with a collections matter—the nature and effect of the deficiency judgment or lack thereof. The district court entered a decree foreclosing the real and personal property of Gordon Paving, and awarded AgStar its fees and costs for liquidating the collateral. The only abnormality was that the district court awarded Gordon Paving its fees for defeating a core collections proceeding—AgStar’s request for a general writ of execution in the form of a deficiency judgment. AgStar requests that this Court reverse that decision, because Gordon Paving is not entitled to collect fees for prevailing in a post-judgment proceeding on execution.

In sum, AgStar respectfully requests that the Court:

- 1) Affirm the district court’s September 19, 2014 order allowing AgStar to liquidate the personal property collateral;
- 2) Affirm the district court’s February 20, 2015 order allowing AgStar’s claim of exemption to the royalty check;
- 3) Affirm the district court’s February 10, 2014 order allowing AgStar’s post-judgment attorney fees and costs; and
- 4) Reverse the district court’s November 18, 2014 judgment awarding Gordon Paving its attorney fees and costs.

DATED: September 10, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of September, 2015, I served a true and correct copy of the foregoing **APPELLANT/PLAINTIFF/CROSS-RESPONDENT'S REPLY BRIEF** in the above-entitled matter as follows:

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