UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs, All

Idaho Supreme Court Records & Briefs

9-11-2015

Union Bank, N.A. v. JV L.L.C. Appellant's Brief Dckt. 42479

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Union Bank, N.A. v. JV L.L.C. Appellant's Brief Dckt. 42479" (2015). *Idaho Supreme Court Records & Briefs, All*. 6583.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6583

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE

STATE OF IDAHO

UNION BANK, N.A., a national banking association,

Plaintiff/Respondent,

vs.

JV L.L.C., an Idaho limited liability company,

Defendant/Appellant,

And

NORTH IDAHO RESORTS, LLC, an Idaho limited liability company,

Defendant/Appellant,

And

PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company, DAN JACOBSON, an individual, SAGE HOLDINGS LLC, an Idaho limited liability company, TIMBERLINE INVESTMENTS, LLC, an Idaho limited liability company, STEVEN G. LAZAR, an individual, an individual, AMY KORENGUT, an individual, HLT REAL ESTATE LLC, PANHANDLE STATE BANK, an Idaho corporation, R.E. LOANS, LLC, a California limited liability company, WELLS FARGO FOOTHILL, INC, a Delaware corporation, PEND OREILLE BONNER DEVELOPMENT HOLDINGS,

DOCKET NO. 42479

(Bonner County Case 2011-0135)

APPELLANT'S BRIEF

FILED - COPY
SEP 11 2015
Supreme Court____Court of Appeals____
Entered on ATS by____

INC., a Nevada corporation,)
PENSCO TRUST CO. custodian)
f/b/a Barney Ng, a California)
corporation, MORTGAGE FUND '08)
LLC, a California limited)
liability company, B-K)
LIGHTING, INC., a California)
corporation, FREDERICK J.)
GRANT, an individual, CHRISTINE)
GRANT, an individual, RUSS)
CAPITAL GROUP, LLC, an Arizona)
limited liability company,)
JOSEPH DUSSICH, an individual,)
MOUNTAIN WEST BANK, an Idaho)
corporation, STATE OF IDAHO,)
Department of Revenue and)
Taxation, MONTAHENO INVESTMENTS)
LLC, a Nevada limited liability)
company, TOYON INVESTMENTS LLC,)
a Nevada limited liability)
company, CHARLES W. REEVES and)
ANN B. REEVES, husband and)
wife, ACI NORTHWEST, INC., an)
Idaho corporation, DOES 1)
through 20 inclusive,)
)
Defendants/Respondents.)
)

* * * * *

Appeal from the District Court of the First
Judicial District of the State of Idaho,
in and for the County of Bonner

* * * * *

THE HONORABLE MICHAEL GRIFFIN, DISTRICT JUDGE, PRESIDING

* * * * *

Gary A. Finney
Finney Finney & Finney, P.A.
120 E. Lake Street, Ste 317
Sandpoint, ID 83864
Attorney for Appellant, JV

Christopher Pooser
Stoehl Rives, LLC
101 S. Capital Blvd., Ste 1900
Boise, ID 83702-7705
Attorney for Respondent, Bank

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES. 3

STATEMENT OF THE CASE 4

(i) NATURE OF THE CASE. 4

(ii) COURSE OF PROCEEDINGS 5

1) JV's Motion for Judgment on the Pleadings was the first proceeding and it was denied by the District Judge.

2) Then the Bank made a Motion for a Partial Summary Judgment that it held the 1st priority mortgage because JV signed a Subordination Agreement, which was granted by the District Judge.

3) JV made a motion to alter, amend and reconsider the Court's partial summary judgment, which the District Judge denied.

4) The action was set for trial.

5) JV moved to compel the Bank to furnish an entire copy of the Debt Restructure Agreement and Settlement Agreement, dated 19 November, 2010, made between the Bank, Merschel, Bolby, and POBD which the District Judge denied, except for a redacted copy.

6) Shortly before Trial, without any notice, the District Judge wrote a Letter, dated April 30, 2014, stating that JV could not sit at counsel table in defense of the Bank's action.

7) JV filed its written Objections to the Court's Letter, which the District Judge never responded to, nor take it up on the record, or at all.

8) At the time the Trial began the District Judge orally said he was "bifurcating" the trial and proceeded as stated.

9) The District Judge finally entered its decision entitled Findings, filed June 3, 2014. After which a final Judgment was entered.

10) This appeal resulted.

(iii) STATEMENT OF FACTS. 6

ISSUES PRESENTED ON APPEAL. 10

ATTORNEY FEES ON APPEAL. 11

ARGUMENT. 12

CONCLUSION. 41

TABLE OF CASES AND AUTHORITIES

CASES	PAGES
Fox v. Cosgulf 64 Idaho 448, 133 P.2d 930 (1943)	13
Smith v. Radna 31 Idaho 423, 173 P. 970 (1918)	13
Dahlquist v. Mattson 48 Idaho 378, 233 P. 883 (1925)	13
Washington Federal Sav. V. Van Engelen 153 Idaho 648 at 657 (2012)	20
Capstar Radio Operating Co. v. Lawrence 135 Idaho 411 at 417 (2012)	21, 22
Nield v. Pocatello Health Service 156 Idaho 802, 332 P.3d 714 (2014)	32
Bradbury v. Idaho Judicial Counsel 136 Idaho 63, 28 P.3d 1006 (2001)	37, 38
Maresh v. State, Dept. of Health and Welfare 132 Idaho 221 at 226, 970 P.2d 14 (1998)	37, 38
Williams v. Idaho State Board of Real Estate Appraiser 157 Idaho 496, 337 P.3d (2012)	39

IDAHO RULES OF CIVIL PROCEDURE

IRCP 8(a)(1) and (2)	13
IRCP 56(c)and (d)	21, 33
IRCP 16(b)	27, 33
IRCP 42(b)	27
IRCP 54(a)	34

IDAHO CODE

None

STATEMENT OF THE CASE

(i) NATURE OF THE CASE.

The First National Bank hereinafter "Bank" brought this action to foreclose on a 5.0 million dollar mortgage recorded March 25, 2008 against the landowner, Pend Oreille Bonner Development, hereinafter "POBD". The real estate was called Lake Front on Pend Oreille Lake in Bonner County, located at "Trestle Creek", which will be used to describe the real estate at issue. The owner, PODB, let the action go to default/judgment. There were several other Defendants, one being JV, LLC who had the first priority Mortgage recorded June 19, 2006 on Trestle Creek and the other Defendant was the vendor who sold to POBD, being identified as North Idaho Resorts, hereinafter "NIR". The Bank sought priority over JV by reason of a Subordination Agreement recorded August 6, 2008. This appeal is by JV. NIR has an appeal in this action, but filed under a separate docket number.

(ii) COURSE OF PROCEEDINGS.

The course of the proceedings in the trial and hearing below and its disposition by the District Court involved:

The Bank filed a Complaint and then an Amended Complaint. JV filed an Answer, Counterclaim, and Cross-Claim. The Counterclaim by JV was to foreclose its June 19, 2006 Mortgage on Trestle Creek.

JV filed a Motion for Judgment on the Pleadings, which was denied.

The Bank filed a motion for partial summary judgment, which was granted.

JV moved to amend, alter, and reconsider the partial summary judgment, which was denied. JV sought production of the Debt Restructure Agreement and Settlement Agreement, dated 19 November, 2010, which was denied, except for a redacted version.

The case went to trial; but the District Judge by Letter denied JV to participate at trial. At trial the judge announced a bifurcated trial, which did not allow JV to proceed on its Counterclaim - only on its cross-claim against NIR. The action was tried and the court rendered its findings/conclusions and a final judgment was entered in favor of the Bank, JV filed this Appeal.

(iii) STATEMENT OF FACTS.

JV held the initial first mortgage on Trestle Creek, recorded June 19, 2006, which mortgage was granted by the Trestle Creek owner, POBD. POBD was developing a golf course with Lots to sell at a separate location called the Idaho Club and on a property called Moose Mountain. POBD needed money for the Idaho Club and Moose Mountain, but very little development was going on at Trestle Creek by POBD. POBD had no banking relationship with the Bank, in California. POBD was owned by Reeves 20%, Merschel 40%, and Bolby 40%. Merschel and Bolby had substantial business dealing with the California Bank, so they proceeded to get a short term loan from their Bank in California. Bolby and Merschel arranged for a Bank loan of $5,000,000 to POBD, by giving personal loan guarantees and by each pledging collateral of cash deposits at the Bank, $2.5 million each, for a cash collateral pledge of $5.0 million. The California Bank was doing several million dollars of business with Merschel and Bolby, but had no business with POBD. There was no real estate collateral mortgage at all. The loan was disbursed by the Bank to POBD's bank in Sandpoint, Idaho by wire transfer. The Bank first deducted some financing fees and some prepaid interest, leaving $4.5 million as the wire transfer. This occurred about October 29, 2007. This loan was short-term and became due. POBD could not pay the $5.0 million loan, so to extend the loan

for a term of years the Bank took a mortgage from POBD recorded March 25, 2008, on the Trestle Creek property in Idaho. The Bank obtained a Loan Policy of Title Insurance from First American Title Company of Sandpoint, Idaho. A copy of that Loan Policy was furnished and is in the record of this action. The Loan Policy insured the Bank for its March 25, 2008 loan Trestle Creek, showing it as a second recorded mortgage behind JV's existing June 19, 2006 mortgage for $2.65 million secured on Trestle Creek, in the Loan Policy by showing as a Special Exception to coverage for item 26 being JV's June 19, 2006 Mortgage. As of the March 25, 2008 mortgage to the Bank, the Bank held the $5.0 million cash pledges of Merschel and Bolby plus a second mortgage on Trestle Creek. The only loan money disbursed by the Bank was the October 29, 2007 wire transfer of $4.5 million to POBD's bank account in Idaho. The Bank did not ever disburse any more or further loan money. The Bank disbursed no money for the March 25, 2008 loan secured by its mortgage.

Merschel and Bolby wanted to get their $5.0 million cash pledge released. The POBD manager in Idaho was Charles Reeves and he went to James Berry the manager of JV to solicit a subordination agreement putting JV's June 19, 2006 mortgage behind the March 25, 2008 Bank Mortgage, Since POBD already had the entire October 29, 2007 loan money, and had granted as additional security the mortgage recorded

March 25, 2008 on Trestle Creek the issue arose of how to turn the Bank's second position mortgage into a first position mortgage, so Herschel and Bolby could get their $5.0 million cash collateral released. The Bank had no involvement on that matter. To accomplish getting JV to subordinate its 1st lien mortgage securing 2.65 million owed to JV by POBD, Reeves contacted Berry, manager of JV, and made representations that POBD was getting a new loan of $5.0 million to put into the development of Trestle Creek, condominiums, townhouses, and improvements on the real estate, which would increase Trestle Creek's value and from the sales produce additional income to JV for additional partial mortgage release payments from POBD to JV. POBD and JV negotiated and recorded a two-part Third Amendment to Indebtedness and to Real Estate Security, and Subordination Agreement recorded June 24, 2008 (it is at R., Vol. VI, pp. 1380-1384). Part of that Third Amendment covered Moose Mountain which is not at issue, but for Trestle Creek JV agreed (paragraph 7. b) to subordinate its present first lien priority to "***a new (emphasis added) first lien priority of no more than $5,000,000.00." The provisions for JV to receive partial mortgage release payments was for $20,000.00 per condominium and $20,000.00 per single platted Lots.

The additional promises and representations are explained in the Affidavit of James Berry, plus 3 emails

from POBD's lawyer Sterling. None of these represented facts were true. Attorney Sterling himself prepared another Subordination Agreement, at Reeves' request and emailed it to JV's counsel for Berry. The 3 emails from Sterling were all after the 2007 loan and the 2008 mortgage to the Bank; however, they fraudulently stated that Chuck (Reeves) was working on negotiating a loan from the Bank for $5,000,000.00. The Subordination Agreement was drawn to look like the Bank was involved and a Bank Officer would sign it. After JV signed, no one from the Bank signed it, the Bank never even saw the Subordination Agreement. POBD never made any payments to the Bank, and when the Bank ordered a foreclosure litigation report in 2010 - the Subordination Agreement showed up as a recorded document. The Bank then seized on the Subordination Agreement and filed this action to foreclose its March 25, 2008 Mortgage. JV defended on it not being "an agreement", it was ambiguous, there was no consideration to JV, and the representation, promises, and facts made through Reeves and Sterling's emails made the Subordination Agreement unenforceable and rescinded.

The facts formed the basis of this lawsuit.

ISSUES PRESENTED ON APPEAL.

I. THE DISTRICT JUDGE'S FAILURE TO GRANT JV JUDGMENT ON THE PLEADING IS ERROR.

II. THE DISTRICT JUDGE'S GRANT OF PARTIAL SUMMARY JUDGMENT FOR THE BANK AS TO PRIORITY BASED ON THE SUBORDINATION AGREEMENT, WAS NOT BASED ON UNDISPUTED ISSUES OF MATERIAL FACT, AND THE BANK WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW, SO THE DISTRICT JUDGE ERRED.

III. THE DISTRICT COURT ERRED IN DENYING JV'S MOTION TO ALTER/AMEND THE GRANT OF PARTIAL SUMMARY JUDGMENT, AS THE DISTRICT COURT REFUSED TO CONSIDER JV'S ADDITIONAL DOCUMENTS AND EMAIL LETTERS FROM POBD'S ATTORNEY STERLING.

IV. THE DISTRICT COURT ERRED IN REFUSING TO ALLOW JV TO DISCOVER THE DEBT RESTRUCTURE AND SETTLEMENT AGREEMENT, DATED 19 NOVEMBER, 2010 BETWEEN THE BANK, MERSCHEL, AND BOLBY, EXCEPT FOR A REDACTED VERSION.

V. THE DISTRICT JUDGE'S LETTER, DATED APRIL 30, 2014, IN DENYING JV THE DUE PROCESS OF THE TRIAL, REASONABLE NOTICE AND OPPORTUNITY TO BE HEARD WAS ERROR BY THE DISTRICT JUDGE.

VI. THE DISTRICT JUDGE, AT OPENING OF THE TRIAL ANNOUNCED THAT A BIFURCATED TRIAL WOULD BE HELD, DENYING DUE PROCESS TO JV.

VII. THE ISSUES PRESENTED ABOVE, ISSUES IV, V AND VI, ALL INVOLVED PROCEDURAL DUE PROCESS BY THE DISTRICT COURT, CONCERNING THE PROPERTY RIGHTS (JV'S JUNE 19, 2006 MORTGAGE) OF JV.

ATTORNEY FEES ON APPEAL.

JV does not claim attorney fees on appeal.

ARGUMENT

I. THE DISTRICT JUDGE'S FAILURE TO GRANT JV JUDGMENT ON THE PLEADING IS ERROR.

The Bank filed a Complaint (R., Vol. I, p. 65) and then a First Amended Complaint (R., Vol. I, p. 122). Both pleadings alleged the Bank's Mortgage was recorded August 6, 2008 and the JV's Mortgage was recorded June 19, 2006. The First Amended Complaint, Factual Allegations, paragraph 32 allege the Bank's Mortgage recording date, (R., Vol. I, p. 128), and in paragraph 42 alleged JV's interest to be a mortgage recorded June 19, 2006 (Tr. Vol. 1, p. 132, paragraph 43).

The First Amended Complaint does not have any factual allegation that JV's Mortgage was "subordinate" to the Bank's Mortgage. The only mention of such a word (subordinate) is in the Bank's Prayer for Relief, was as to its First Claim For Relief, which was merely to reform the legal description, which includes paragraph 3 at the 3rd line down, it states that the interest of every Defendant is "***subject to, subordinate to, and junior to and inferior to Plaintiff's Mortgage as reformed…". (R., Vol. I, p. 135).

As to the Second Claim for Relief (Mortgage Foreclosure) request for relief (prayer) in paragraph 5, seeks "For a determination that the lien created by the Note and Mortgage is valid, enforceable and existing as against

the Defendants and the property described herein, and for a decree of foreclosure." (R., Vol I, p. 135, para 5).

Nowhere does it allege the Bank's Mortgage is of any particular "priority", nor that it is a 1st priority mortgage. A complaint must conform to I.R.C.P. 8(a)(1)(2) a short plain statement of the claim showing that the pleader is entitled to relief. "The purpose of the complaint is to give defendant information of all material facts on which plaintiff relies to support his demand, which facts may be stated only in ordinary and concise language." (*Fox v. Cosgulf;* 64 Idaho 448, 133 P.2d 930 (1943). "The prayer of a complaint is nothing more than a statement of the pleader's opinion of what the facts stated in the complaint entitles him to receive." (*Smith v. Radna,* 31 Idaho 423, 173 P. 970 (1918). This is because, "Prayer for relief forms no part of statement of cause of action; facts alleged and not relief demanded are of chief importance." (*Dahlquist v. Mattson*, 48 Idaho 378, 233 P. 883 (1925).

JV's Answer to First Amended Complaint, Counterclaim and Cross-Claim, in paragraph 61 alleged its Mortgage recorded June 19, 2006, is first in time/first in right by Idaho's statutory race-notice recording acts, and in paragraph 62, that the interest of the Bank by its recorded Mortgage is inferior to the recorded mortgage of JV. (R., Vol. I, p. 191, paras 61 and 63).

In summary, neither the Bank's First Amended Complaint, nor the Answer/counterclaim by JV allege any facts about or the wording "Subordination Agreement". The Subordination Agreement was outside of the factual pleadings of either the Bank or JV; however the Court denied JV's motion for judgment on the pleadings, stating that "The Court has not considered any matters outside the pleadings." (Order Denying Motion, R. Vol IV, p. 928). Without any alleged facts, other than the respective mortgage recording dates, i.e., Bank on August 6, 2008, and JV on June 19, 2006. The District Court should have granted JV's Motion for Judgment on the Pleading.

The Court erred in failing to grant JV's Motion for Judgment on the Pleadings.

The Court stated that it considered only the pleadings however the pleadings being admitted as true were that the Bank's Mortgage of August 6, 2008, was recorded subsequent to JV's Mortgage recorded June 19, 2006. There is no factual basis alleged to the contrary.

II. THE DISTRICT JUDGE'S GRANT OF PARTIAL SUMMARY JUDGMENT FOR THE BANK AS TO PRIORITY BASED ON THE SUBORDINATION AGREEMENT, WAS NOT BASED ON UNDISPUTED ISSUES OF MATERIAL FACT, AND THE BANK WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW, SO THE DISTRICT JUDGE ERRED.

Based on the standards for granting a summary judgment it was an error by the District Court. The District Court accurately set forth the LEGAL STANDARDS, but erred in applying them to the facts and law. The Bank argued that

its Mortgage (2008) was superior in priority to JV's Mortgage (2006) because of a Subordination Agreement (recorded August 6, 2008). (See, Subordination Agreement, R. Vol IV, pp. 952-958).

JV asserted that the Subordination Agreement was not binding on JV based on the Affidavit of James W. Berry, his Affidavit testimony (R., Vol. VI, pp. 1234-1236) is, as follows:

para 5 - the Bank gave no consideration for its 2008 Mortgage.

para 6 - JV had no contract or agreement with the Bank.

para 7 - The Bank never presented the Subordination Agreement to JV.

para 8 - The owner, POBD, through Charles Reeves, manager, contacted Berry about August 1, 2008, and told him POBD had managed to arrange a $5.0 million loan from a bank, and the funds would be used to finish platting and building improvements, Condominiums and Townhouses, at Trestle Creek.

para 9 - Reeves told Berry that in order to receive the $5.0 million for those purposes, JV would need to subordinate its Mortgage to a new mortgage. It was not disclosed that POBD, in 2007, had already borrowed and received the $5.0 million from the Bank, and that the money was already spent. Reeves did not disclose that there would actually be no money coming to POBD for platting or

construction use at Trestle Creek.

<u>para 10</u> - Reeves told Berry that the $5.0 million loan from the Bank would be spent on Trestle Creek for improvements and construction that would enhance the value of the real estate securing JV's Mortgage by at least the $5.0 million.

<u>para 11</u> - Reeves promised that the new Bank loan would be used to build Condominiums or Townhouses to be sold, and that POBD would pay JV for partial releases of JV's Mortgage.

<u>para 12</u> - The $5.0 million to POBD from the Bank would increase the value of JV's Mortgage security and would increase monetary payments by the partial releases as Condominiums and Townhouses were sold.

<u>para 13</u> - JV did not know that the $5.0 million loan from the Bank had already occurred in 2007.

<u>para 14</u> - JV received nothing; no consideration for the Subordination Agreement, and the Subordination Agreement was obtained from JV on the fraudulent misrepresentations of Mr. Reeves.

<u>para 17</u> - Reeve's representations to JV was that 83 Condo Units and 13 Townhouses would be built on the Trestle Creek property using the $5.0 million to be borrowed from the Bank, and as POBD sold these, it agreed to pay JV, in addition to the regular monthly payments, for partial releases at $20,000.00 per Condo Unit and $20,000.00 per

Townhouse. The color copy drawings from Reeves given to Berry for platting Condominiums and Boat Storage, were attached to Berry's Affidavit.

para 18 - about the time of the Subordination Agreement, August 1, 2008, POBD made no more payments to JV on its note and mortgage, there were never any condominiums or townhouses built, and POBD went into default on any payment or performance to JV to date (15 July 2013). The Bank did not file any Affidavit(s) contravening Berry's Affidavit.

JV further submitted its Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, and attached four (4) different documents which were the Bank's records of the 2007 loan, the money disbursement from the Bank to POBD for $4,500,000.00 on October 29, 2007, the Loan Agreement POBD/Bank October 29, 2007, personal guarantees from Merschel and from Bolby, and the October 29, 2007 Pledge Agreements whereby Merschel and Bolby each put up Pledged Collateral of deposit account no. 101435493 with the Bank limited to $2,500,000.00, plus interest (by Merschel) (R., Vol VI, p. 1278)) and for Bolby deposit account no. 100065580 at the Bank - $2,500,000.00. (R., Vol. Vi, p 1293).

The October 29, 2007 loan to POBD by the Bank, had no real estate security, but it had personal guarantees of Bolby and Merschel, and the Pledged Collateral accounts at

the Bank ($2.5 million each) totaling $5,000,000.00 posted as cash collateral.

The Bank did not file any motion, objection, or affidavit contesting Berry' Affidavit for JV. The hearing on the Bank's Motion was telephonically on July 29, 2013 and it is transcribed at Tr., Vol. 1, pp. 14-55. At the argument, JV's attorney pointed out that the Subordination Agreement was recorded by First American Title, a non-party to it. There was a place on the Subordination Agreement for signature of the Bank by Name: ___________ (Niraj Mahaharaj), Title: Senior Relationship Manager, but it was NOT signed for the Bank by Niraj Mahaharaj, or at all. (Subordination Agreement, R., Vol. 4, p. 954). The Subordination Agreement was only signed by JV, by its managers, and for POBD, by Charles Reeves, its President. The Bank's actual loan documents had no wording about getting a real estate mortgage or a Subordination Agreement - nowhere. The Bank's attorney, at argument admitted the loan documents do not use the word subordination. (Tr., Vol. 1, p 51).

The Bank, by Affidavit of Terrilyn S. Barron, as subsequent record keeper, furnished a Credit Authorization, Summary Purposes, last sentence saying,

> "Portion of the proceeds will pay-off a $2,000,000 private seller carryback note originating from the purchase of the subject property in June 2006" (It is in the record, R., Vol. V, p. 1035).

Obviously, that private loan originating from the purchase of the real estate at Trestle Creek is the June 19, 2006 first mortgage ($2.65 million) to JV, granted by POBD at the date it acquired the Trestle Creek property, On the same page is "Description: Assignment of deposit totaling $5,000M Chip Bolby MMA#100065580; $2,500M, Thomas Merschel MMA#101435493; $2,500M.

In other words, POBD was to use the 2007 Loan of $5 million to pay-off $2.0 to JV, which it did not do. The Bank being well secured with the collateral deposits totaling $5 million.

District Court entered a Memorandum on Partial Summary Judgment Re: JV, LLC, and an Order Granting Partial Summary Judgment Re JV, LLC that the Bank's Mortgage recorded March 25, 2008 had priority over JV's Mortgage, recorded June 19, 2006. (R., Vol. VI, pp. 2342-1346)

The Court's Memorandum is the only "finding/conclusion" made by the Court, next to last paragraph:

> "that a valid subrogation (sic) contract was entered into by which JV's mortgage was made inferior to UB's Mortgage."

(Memorandum - 4, R., Vol. VI, p. 1343)

The Court used the word "subrogation", but probably meant "subordination". JV submits there was no "contract" at all with the Bank - the Bank did not sign the Subordination Agreement. The District Court went on to find the Plaintiff (Bank) is clearly the beneficiary of the contract, which was

never raised by the Bank. The Subordination Agreement stated "Creditor agrees with FNB". JV is the creditor and FNB is the Bank as a contracting party, but FNB (Bank's) signature line is blank - unsigned at all, so there is no contract/agreement between the Bank and JV.

The Affidavit of James Berry stated that JV received no consideration, yet the District Judge found there was consideration, meaning he had to have weighed conflicting evidence to the contrary.

At the oral argument on the Bank's partial summary judgment motion, the Bank's Attorney John Miller during oral argument admitted, in reference to the Subordination Agreement, that there is a signature block for the Bank to sign, but the Bank was never presented the document to sign before it was recorded. (Tr., Vol 1, p. 23, ll.1-5).

JV's Affidavit of James Berry set forth elements of fraud defined as:

> Fraud.
>
> [25-28] "Fraud consists of '(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.'"

Washington Federal Sav. V. Van Engelen
153 Idaho 648 at 657 (2012)

STANDARD ON SUMMARY JUDGMENT MOTION

The District Judge's grant of partial summary judgment to the Bank was only on the issue of priority of mortgages. JV pled a Counterclaim to adjudicate the amount of money owed JV and to foreclose its mortgage in a one-action rule foreclosure. (R., Vol. I, pp. 185-189). The District Judge set forth the correct standards, but then entirely ignored the Affidavit of Berry as to creating factual issues. The District Judge failed to apply IRCP 56(c) or IRCP 56(d). These Rules say the summary judgment shall be rendered if the pleadings, depositions, admissions, together with the affidavits submitted show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (IRCP 56(c)). Further, the District Judge's partial summary judgment did not conform to IRCP 56(d) because the only issue was priority of mortgage as a partial summary judgment, which was not rendered upon the whole case for all relief asked. The District Judge did not make any required Order specifying the facts without controversy, the facts controverted, the relief not in controversy, and directing further proceedings in the action.

STANDARD OF REVIEW

In *Capstar Radio Operating Co. v. Lawrence,* 135 Idaho 411 at 417 (2012), the Idaho Supreme Court uses the same "Standard of Review" on appeal as is to be used by the

District Court's original ruling. The standard is that,

> "[1-3] On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion. *Shawver v. Huckleberry Estates, OLOLC,* 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law." I.R.C.P. 56(c). The facts must be liberally construed in favor of the non-moving party. *Renzo v. Idaho State Dep't of Agric.,* 149 Idaho 777, 779, 241 P.3d 950, 952 (2010).
>
> > When an action will be tried before a court without a jury, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts. Drawing probable inferences under such circumstances is permissible because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial. However, if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper.
> >
> > *Citing, also to Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P3d 575, 578 (2009) (internal citations omitted)."

The *Capstar, supra,* 153 Idaho 411 at 416, held that all the evidence presented genuine issues of material fact, and that summary judgment was not a proper method to dispose of a case with so much conflicting evidence.

The instant case should not have been resolved on the partial summary judgment motion. JV opposed the motion with documentary evidence <u>and</u> the Affidavit of James Berry. The Bank did not object to any of the Affidavit of James Berry

and the Bank did not submit any affidavit disputing James Berry's Affidavit. The Affidavit of James Berry created genuine issues of material fact preventing a partial summary judgment.

III. THE DISTRICT COURT ERRED IN DENYING JV'S MOTION TO ALTER/AMEND THE GRANT OF PARTIAL SUMMARY JUDGMENT, AS THE DISTRICT COURT REFUSED TO CONSIDER JV'S ADDITIONAL DOCUMENTS AND EMAIL LETTERS FROM POBD'S ATTORNEY STERLING.

Part of JV's Motion to Alter, Amend, and Reconsider was submitting additional facts and evidence taken from the actual recorded Third Amendment of June 24, 2008, and

Exhibits 5, 6, and 7 to Berry's deposition, which were from Attorney Sterling - attorney for POBD

No 5 - Sterling's letter of March 31, 2008

No 6 - Sterling's letter of July 24, 2008 (12:07p.m.)

No 7 - Sterling's letter of July 24, 2008 (4:27p.m.)

POBD's Attorney Sterling's Involvement

The misrepresentation of facts that were submitted by Attorney Sterling to induce JV to sign the Subordination Agreement came in 3 emails sent by Sterling for JV's attorney's consideration. These were produced by JV as Exhibits at the deposition of James Berry. The 3 emails are Berry Exhibits No. 5, 6, and 7, in support of JV's Motion for the Court to alter and amend its Order Granting Partial Summary Judgment, are in the appeal record in R. VI, p. 1386, 1387, and 1388, as follows:

Attorney Sterling email of March 31, 2008 (R., Vol. VI, p. 1386.

Attorney Sterling forwarded copies of his March 31, 2008 email to Reeves, Merschel and Bolby in which he says he represents the Idaho Club working closely with Chuck Reeves and his partners (Merschel and Bolby). Chuck Reeves is negotiating a loan from First National Bank (the Bank) in Monterey, California in the principal amount of $5,000,000.00. Berry and his entity JV has agreed to subordinate its mortgage on the Lake Parcels (Trestle Creek) which is currently in first position, to a new (emphasis added) first in favor of FNB. Sterling states his understanding that JV is amenable to subordinating its mortgage to any new first which takes out and replaces the FNB first.

JV submits that this email is false because by its date of March 31, 2008, POBD (the Idaho Club) has already received the $5.0 million from the Bank on October 29, 2007, and had spent it paying creditors. A "new first lien" is also false because 5 days earlier POBD had already given the Bank a mortgage on Trestle Creek for 5 million, recorded March 25, 2008, which was then a new second priority lien behind JV's June 19, 2006 mortgage.

Attorney Sterling's email of July 24, 2008 (R., Vol. VI, p. 1387).

As of July 24, 2008 Sterling is aiming to close the initial funding by Monday, but that First National Bank has been very, very, slow in responding.

JV submits this is false because the Bank's second priority mortgage was already recorded March 25, 2008, 4 months previous.

Berry Exhibit (R., Vol. VI at page 1388).

Attorney Sterling writes to JV's attorney and copies Mr. Reeves, dated July 24, 2008. He states Mr. Reeves has obtained a loan commitment. Reeves/Sterling are in a "taffy pull" with First National Bank (the Bank), that is causing all the delay. At the closing of the first draw POBD proposes to leave Jim Berry's JV, LLC deed of trust (sic) lien in first position on the Lake Parcels (Trestle Creek). This is the security position he has now. POBD would make certain payments to JV per the Third Amendment to the Note by August 1, after which JV would subordinate its lien on the Lake Parcels to the lien securing First National Bank's lien. Attorney Sterling recognizes that JV had requested a title report, but Sterling doesn't furnish it because it will confuse matters more, and because it does not show the Third Amendment to the JV note. It shows a subordination which will be cancelled at close of escrow.

JV submits that even though Attorney Sterling on July 24, 2008 states the title commitment does not show the recorded Third Amendment, it was in fact recorded June 24, 2008. It is also false, because the Bank had the Loan Policy of Title Insurance insuring the Bank's March 25, 2008 recorded Mortgage, "subject to", Special Exception No. 26 from the coverage by reason of JV's June 19, 2006 recorded first priority loan.

JV made a Motion to Alter and Amend the Partial Summary Judgment Re: JV, LLC and a Motion to Reconsider (R. Vol VI, pp. 1361-1388) and supported it with a Memorandum and supporting documents from depositions of Berry and of Reeves. This Motion pointed out that the Bank filed no affidavits in opposition to the Affidavit of James W. Berry (filed September 15, 2013). As a fact the Bank gave no consideration and did not even enter into or sign the Subordination Agreement, the Subordination Agreement had conflicting provisions making it ambiguous and it was an error for the Court to "weigh" matters and conclude otherwise.

JV's Motion to Alter, Amend and Reconsider, was supported by additional documents, including a Third Amendment between JV and POBD (by Reeves) recorded June 24, 2008, in which JV agreed as follows:

> "b. On the Trestle Creek property the present first lien priority of JV, LLC shall be subordinate and inferior to the new (emphasis added) first lien priority of no more than $5,000,000.00".

(R., Vol. VI, p. 1366)

JV contended that the Bank's 2007 loan of $5.0 million, and the Bank's second priority mortgage recorded March 28, 2008 could not be a new first lien as stated in the Third Amendment recorded much later on June 24, 2008. Further, the Subordination Agreement, first paragraph stated it was entered into by and between the Bank and JV for a loan now or hereinafter made by FNB. A loan "hereinafter made" must be a loan made at a later date. The Bank loan of $5.0 million had long since been made on October 29, 2007.

Rule 42(b) Separate Trials, states that the court, …, may order a separate trial, for the reasons stated in the rule. In the instant action, the District Court did not enter any "order" about separate or bifurcated trial. The District Judge did not follow Rule 16(b) to enter a pretrial order, or Rule 42(b) to order separate trials. The District Judge's Letter of April 30, 2014, denying JV the opportunity to be in and at the trial of the Bank's lawsuit, is in error and should be set aside by the Supreme Court and a new trial be ordered.

"It is axiomatic that, evidence may not be admitted before an objection is considered and determined," (stated in *Neld, supra*, 156 Idaho 802 at 814).

When the trial commenced, because of the District Judge's Letter of April 30, 2014, JV and JV's counsel were seated, not at counsel table, but in the audience. The Court recognized this by saying:

> "***In the Courtroom also is Mr. Finney representing JV, LLC. Does he have the hearing thing back there?" (Tr., Vol. 2, p. 106, ll. 3-4) The reference to the "hearing thing is a headphone, hearing aid, furnished by the bailiff to persons with hearing issues.

The first part of the suddenly bifurcated trial was the Bank v. NIR, the vendor of Trestle Creek to POBD, as Buyer. On the Bank's case Mr. Reeves, as officer/manager of POBD testified about the mortgage debt to JV that,

a) POBD was assuming a note from JV Loans, which is referred to as the Berry Note.

(Tr., Vol. 2, p. 119, ll. 1-7)

b) the JV loan was probably in the range of one and a half to $2 million range.

(Tr., Vol. 2, p. 119, ll. 16-18)

c) Reeves recalled receiving, in October of 2007, $5 million loan proceeds.

(Tr., Vol. 2, p. 123, ll.1-12)

d) In March of 2008, POBD proceeded to provide collateral for the loan on the lake properties for the $5 million loan he had just talked about. (lake properties is Trestle Creek).

(Tr., Vol. 2, p. 126, ll. 19-22)

e) The initial $5.0 million was borrowed in October, 2007, but the bank wanted some collateral, so we gave them some collateral - signed the document for collateral on the Lake. (Lake is Trestle Creek), which was March 25, 2008. JV submits the Bank had 5.0 million in cash collateral.

(Tr., Vol. 2, p. 127, ll. 1-9)

Mr. Reeves became subject to cross-examination by Attorney Weeks, counsel for NIR, and he testified the loan from the Bank was with a gentleman named Niraj Mahaharaj. (Tr. Vol. 2, p. 149, ll. 17-21) Reeves didn't directly deal with the Bank because his 2 partners (Merschel and Bolby) had the lending relationship. (Tr., Vol 2, p. 151, ll. 16-25) Reeves was working with JV to get its Mortgage subordinated to the Bank. POBD's attorney Sterling was working on getting a mortgage subordination agreement. (Tr. Vol. 2, p. 164, ll. 1-8).

JV, to make it perfectly clear, states the Bank didn't loan any money on Trestle Creek in March 2008 because the money was already loaned based solely on the credit and cash pledges of Merschel and Bolby on the October 29, 2007 loan, which was due January 29, 2008. (Tr., Vol. 2, p. 173, ll. 13-32).

Reeves, on further cross-examination, testified and admitted,

a) POBD assumed the JV note and never paid it. (Tr., Vol. 2, p. 174, ll. 20-25).

b) Part of the purchase and sale was to assume the note, and then it became our obligation, and POBD was in breach of the agreement because it hasn't paid the JV note, we are in breach because we assumed the JV loans and haven't paid that back. (Tr., Vol. 2, p. 175, ll. 1-9).

IV. <u>THE DISTRICT COURT ERRED IN REFUSING TO ALLOW JV TO DISCOVER THE DEBT RESTRUCTURE AGREEMENT AND SETTLEMENT AGREEMENT, DATED 19 NOVEMBER, 2010 BETWEEN THE BANK, MERSCHEL, AND BOLBY, EXCEPT FOR A REDACTED VERSION</u>.

JV prepared for the Trial which was set for May 12 and 13, 2014, by filing JV's Pretrial Memorandum, Witness, and Exhibits plus JV's Amended Exhibit List A through S.

At the hearing on December 20, 2013, JV's attorney asked for discovery of a "global settlement" (Debt Restructure Agreement and Settlement Agreement, dated 19 Nov 2010) by the Bank and Merschel, Bolby, and POBD. This would undoubtedly cover facts of this action by the Bank against POBD, as it is the "global settlement" between the Bank and POBD, plaintiff and defendant in this action. (Tr., Vol 2, p. 95). When JV's counsel, at a hearing on December 20, 2013 said he had a preliminary motion seeking a "global settlement" document. The Bank's attorney Miller said "I don't have a problem giving him the global settlement document. (Tr., Vol 2, p. 96, ll. 9-11).

Through discovery, JV had tried to obtain a Debt Restructure Agreement and Settlement Agreement reached between POBD and the Bank, which District Judge Griffin

refused to compel the Bank to disclose, except for a heavily redacted copy. The Court's Order Re: Discovery was filed April 18, 2014 (R., Vol. II, p. 1539) denying JV's request for the Bank to produce the full Debt Restructure and Settlement Statement, dated 19 November, 2010, made with the Bank by Bolby, Merschel, and POBD. The District Judge ordered that only a redacted copy (filed under seal) be furnished to JV. The Court wrote that "it did not find the agreement to be relevant to the remaining issues in this case; however the document may lead to discovery of relevant evidence." (Order Re: Discovery, R., Vol. VII, p. 1539). The Court did not state or define "the remaining issues" or how the document may lead to relevant evidence.

JV submits that the document could not be used to lead to discovery of relevant evidence - because the District Judge refused furnishing the entire document to JV. The <u>redacted</u> Debt Restructure and Settlement Agreement, is in evidence as Defendant's NIR Exhibit SSS, and in paragraph 3 <u>Reaffirmation of Obligations</u> - it was agreed that <u>all</u> of the terms and conditions of the Loan Documents would remain in force and effect. JV submits that clause would mean that the Bank still held the 5.0 million cash collateral from Bolby and Merschel; however, JV believes the 5.0 million was released from the Collateral Pledges, and either returned to Merschel and Bolby or applied to other debt they had at a Monterey, California Bank. This issue also involves

procedural due process.

V. THE DISTRICT JUDGE'S LETTER, DATED APRIL 30, 2014, IN DENYING JV THE DUE PROCESS OF THE TRIAL, REASONABLE NOTICE AND OPPORTUNITY TO BE HEARD WAS ERROR BY THE DISTRICT JUDGE.

Shortly before trial, with no notice or opportunity for JV to be heard, District Judge Griffin wrote a "letter" of April 30, 2014 stating JV and JV's counsel, Attorney Gary Finney, could not be present at counsel table for the Bank's case, and could only be a spectator.

JV then filed a written Objection and Motion to Set Aside the Court's Letter to Counsel, dated April 30, 2014, and Motion to Reconsider (R., Vol. VII, pp.1658-1667). The District Judge did not even take up JV's Objection and Motion, which pointed out that the Court's Letter, not in Order form, denied JV due process, notice, opportunity to be heard, and a fair trial. Further that any of the District Court's interlocutory Orders could still be altered, amended, and set aside at any time on JV's motions, as long as made within fourteen (14) days of the final judgment. JV's Objection and Motion was specific, and pointed out that *Nield v. Pocatello Health Service*, filed February 14, 2014 stated as the standard - that the trial court, on a motion to reconsider, is required to consider any new or additional facts that bear on the correction of the order being reconsidered. "A rehearing or reconsideration usually involves new or additional facts, and a more comprehensive presentation of both law and fact." (*Nield v. Pocatello*

Health Service, 156 Idaho 802, 332 P.3d 714 (2014)).

The Court's Letter denying JV and counsel to participate at trial in defense of the Bank's lawsuit fails to comply with Rule 16(b) Final pre-trial procedures. IRCP 16(b) states, at least thirty (30) days before trial, the court shall (emphasis added) engage in a pretrial process, and shall be on the record and any rulings of the Court shall be reflected in minute entry prepared as ordered by the Court. In this instant action, the Court's Letter denying JV any opportunity to be heard or even to participate in the trial is contrary to Rule 16(b). Also, the District Judge did not comply with Rule 56(d). The Bank's only pretrial motion was for a partial summary judgment. Rule 56(d) required the District Judge to specify facts deemed established and the trial shall be conducted accordingly. In this action the District Court's only pretrial order, was on the Bank's motion for summary judgment on priority on the Bank's 2008 Mortgage. JV never filed any summary judgment motion, JV only responded by memorandums and affidavits to the Bank's partial summary judgment motion. JV was entitled to be at the trial and to defend and assert its Counterclaim against the Bank.

VI. THE DISTRICT JUDGE, AT OPENING OF THE TRIAL ANNOUNCED THAT A BIFURCATED TRIAL WOULD BE HELD, DENYING DUE PROCESS TO JV.

The case was set for Trial. JV prepared and filed a Trial Memorandum, JV's Exhibits, and JV's Witness List. A

few days before trial, the District Judge wrote a letter to counsel stating that JV could not participate in the trial and could not sit at the counsel table. At the Trial the District Judge opened by stating, for the very first time that, he was bifurcating the trial, first would be the Bank against defendant, NIR, and then JV against NIR/V.P., Inc. on JV's cross-claim. JV had pled a counterclaim against the Bank, which the Judge did not mention. Somehow the District Judge seemed to believe that everything was final in the Bank's favor against JV, even though the summary judgment was only partial on the single issue of priority of the Bank's Mortgage against JV's Mortgage. JV submits the Court prior ruling was only an "interlocutory" Order.

The Bank's case went to trial against NIR, without JV being able to participate at all. Then JV went to trial on its cross-claim against NIR/V.P., which is not an issue on this appeal. The District Court's judgments had some problems as not complying with IRCP 54(a), which were ultimately corrected. This appeal results by JV.

It is undisputed that the Bank, did not sign "this Agreement", did not record it, and did not know where the original was located, and it was not referred to in the Bank's Policy of Mortgage Insurance (Policy No. 2291210-S). The Bank first found out about the existence of the Subordination Agreement when the Bank obtained a mortgage foreclosure report for this action filed January 28, 2011,

about three (3) years after the fact. This document is entitled GUARANTEE by First American Title Company, Litigation Guarantee, to the Bank, as the Assured, date of guarantee is December 27, 2010 in the record at R., Vol. V, pp. 1064-1082. This was the first time ever showing the recorded Subrogation Agreement in Special Exception, Part II, Exception No. 24 (at R., Vol. V, p. 1069). Rick Lynskey, for First American Title Company, in support of the Bank's motion for partial summary judgment made a Supplemental Affidavit, furnishing a copy of the original Loan Policy issued by First American Title Company on March 25, 2008, the date of recordation of the Bank's Mortgage in this matter. The Loan Policy of Title Insurance issued by First American Title is Policy No. 2291210-S at R., Vol. V, pp. 1087-1099. The Loan Policy, dated March 25, 2008, does not disclose the Subordination Agreement, because the Subordination Agreement was not recorded until August 6, 2008.

The Bank could not have relied upon the August 6, 2008 Subordination Agreement because its loan of money was October 29, 2007, and its Mortgage was recorded previously on March 25, 2008. The Bank's Mortgage was recorded approximately four (4) months before the Subordination Agreement was recorded August 6, 2008. In summary, from the Bank's own Loan Policy, it actually <u>knew</u> or should have known by constructive notice that JV had a prior recorded

Mortgage on June 19, 2006, and the Bank held a later subsequent mortgage recorded March 25, 2008, almost two (2) years later than JV's Mortgage.

JV points out that the District Judge's statement that the "court's prior summary judgment disposed of all issues between JV, LLC and Union Bank" is inaccurate because the Bank's motion was only a partial summary judgment motion on the issue of priority of mortgages, so it could not be that "all issues were disposed of". Secondly, the Court's prior partial summary judgment was only interlocutory, meaning it could be changed at any time, with the cut-off date being fourteen (14) days after final Judgment.

The District Court by Letter said JV will not be at counsel table. At the trial commencement, on the record the District Court said that it would be a bifurcated trial. As to JV that meant JV could only try its cross-claim against NIR.

VII. THE ISSUES PRESENTED ABOVE, ISSUES IV, V AND VI, ALL INVOLVED PROCEDURAL DUE PROCESS BY THE DISTRICT COURT, CONCERNING THE PROPERTY RIGHTS (JV'S JUNE 19, 2006 MORTGAGE) OF JV.

These two (2) statements/directives of the Court deprive JV of a fair trial, without any due process. First, JV responded to the Letter by JV's Objection and Motion to set aside the Court's Letter to Counsel, dated April 30, 2014 and Motion to Reconsider. The District Judge made no response, no hearing was held, and it was apparently disregarded by the District Judge.

The Letter and the District Judge's statement at trial commencement as to his "bifurcating" the trial, both came without notice, without hearing, and no opportunity to be heard - at all. This is the denial of JV's procedural due process rights. The Idaho Supreme Court case of *Bradbury v. Idaho Judicial Counsel,* 136 Idaho 63, 28 P.3d 1006 (2001), on the issue of procedural due process holds:

> "2. Procedural Due Process
>
> A procedural due process inquiry is focused on determining whether the procedure employed is fair. The due process clause of the Fourteenth Amendment "prohibits deprivation of life, liberty, or property without 'fundamental fairness' through governmental conduct that offends the community's sense of justice, decency and fair play." *Maresh v. State, Dept. of Health and Welfare*, 132 Idaho 221, 225-26, 970 P.2d 14, 19-20 (1998) *citing Moran v. Burbine,* 475 U.S. 412, 432-34, 106 S.Ct. 1135, 1146-47, 89 L.Ed.2d 410, 428-29 (1986). Procedural due process is the aspect of due process relating to the minimal requirements of notice and a hearing if the deprivation of a significant life, liberty, or property interest may occur. A deprivation of property encompasses claims where there is a legitimate claim or entitlement to the asserted benefit under either state or federal law. *See id. Citing Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972). The minimal requirements are that "there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard." *Aberdeen-Springfield Canal Co.,* 133 Idaho at 91, 982 P.2d at 926, *citing State v. Rhoades,* 121 Idaho 63, 72, 822 P.2d 960 969 (1991); *see also A.E. "Ed" Fridenstine v. Idaho Dep't of Administration,* 133 Idaho 188, 983 P.2d 842 (1999). The opportunity to be heard must

> occur "at a meaningful time and in a meaningful manner" in order to satisfy the due process requirement. *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926, *citing Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998); *see also City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169? (1997)."

Due process is a flexible concept called for as warranted by the particular situation. A court must engage in a two-step process. First is whether the interest is in liberty or property. If so, the Court next determines what process is due.

Bradbury v. Idaho Judicial Counsel,
136 Idaho 63 at 72

In the instant action, the District Court did not engage in any of the due process requirements or in the two-step analysis. JV's property interest was to have a trial on matters of its property interest, i.e., JV's June 19, 2006 Mortgage encumbering the real estate at issue. It was fundamentally unfair for the Judge's Letter ruling and its announcing bifurcation of the trial. JV's property interests are created by existing mortgage foreclosure laws and Idaho case law. The Idaho Supreme Court has held that,

"The United States Supreme Court has noted that property interest, under the 14th Amendment to the United States Constitution are created…by existing rules…such as state law." (*Maresh v. State, Dept. of Health and Welfare*, 132 Idaho 221 at 226, 970 P.2d 14 (1998). Idaho's due process clause of the Idaho Constitution, Article 1, Section

13, is "substantially the same as its federal counterpart, and Idaho considers the rational used in deciding Fourteenth Amendment due process cases."

Without being granted any due process by the District Court, JV could not establish its property right in its 2006 Mortgage. Even if JV only had a second priority mortgage it should have been allowed to go to trial. The District Court should be reversed and a new trial granted to JV.

Procedural Due Process concerning JV's property interest matters of JV's June 19, 2006 recorded Mortgage requires due process. Under both the Idaho and United States Constitution, the right to procedural due process requires… "a fair trial in a fair tribunal." (cases cited) (*Williams v. Idaho State Board of Real Estate Appraiser,* 157 Idaho 496, 337 P.3d (2012) at 157 Idaho, page 505). Due process is not precisely defined but the phrase expresses "fundamental fairness". (*Williams v. Idaho State Board of Real Estate Appraiser,* 157 Idaho 496 at 505). Fundamental fairness procedural due process calls for procedural protections as are warranted by the particular situation. (*Williams v. Idaho State Board of Real Estate Appraiser,* 157 Idaho 496 at 501).

In the instant action, three (3) matters denied JV of procedural due process which are:

1. The District Judge's refusal to require the full Debt Restructure Agreement and Settlement Agreement to JV's

counsel, on discovery.

2. The District Judge's Letter of April 30, 2014, denying JV and counsel to be involved in the trial by POBD against JV and NIR.

3. The District Judge's announcement, at the trial commencement, that he would proceed to try the POBD case and then separately try the JV cross-claim against NIR.

CONCLUSION

1. JV's Motion for Judgment on the Pleadings should have been granted.

2. On the Bank's motion for partial summary judgment as to mortgage priority, the District Judge stated the correct standards, but did not apply those standards. The Bank's motion should have been denied.

3. JV's motion to alter, amend, and reconsider the District Judge's granting of a partial summary judgment to the Bank should have been granted based on the standards for summary judgment.

4. The Court's refusal to furnish the Debt Restructure and Settlement Agreement was error. The "redacted" version could not lead to any relevant discovery. This resulted in an "unfair trial" for JV, especially because the Court's Letter of April 30, 2014 denied any trial to JV as relates to JV and the Bank, concerning their respective mortgages.

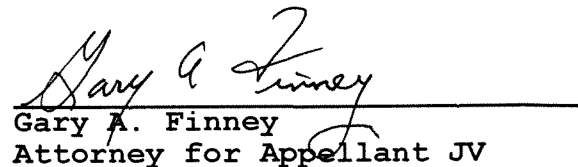
5. The Court's Letter of April 30, 2014, denied due process to JV.

6. The Court's "bifurcated" trial denied due process to JV.

REQUEST FOR RELIEF

JV requests the Idaho Supreme Court to reverse the District Court and its final judgment and to remand the action for trial on all the issues.

RESPECTFULLY SUBMITTED this 8TH day of September, 2015.



Gary A. Finney
Attorney for Appellant JV

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing was served as indicated, this 8th day of September, 2015, and addressed as follows:

Christopher Pooser
Stoehl Rives, LLC
101 S. Capital Blvd., Ste 1900
Boise, ID 83702-7705
VIA US MAIL