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Safaris Unlimited, LLC v. Von Jones Appellant's Reply Brief Dckt. 44914

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SAFARIS UNLIMITED, a Georgia limited liability company,

Plaintiff/Respondent,

vs.

MIKE VON JONES,

Defendant/Appellant.

Supreme Court Docket No. 44914-2017
Twin Falls County No. CV-2013-2706

APPELLANT/CROSS RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District
for Twin Falls County Case No. CV-2013-2706
Honorable Randy J. Stoker, District Judge presiding.

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STATEMENT OF THE CASE

Cross Appeal

Judge Stoker’s decision regarding the issue of the sheriff’s sale of *Mike Jones v. Jeremy Sligar and Overtime Garage, LLC*; Twin Falls County Case No. CV42-16-1554 (the “Sligar Lawsuit”), can be summarized as follows: (1) levy and execution upon litigation is not, *per se*, a violation of Idaho Law; (2) the amount bid, \$2,500.00, for the Sligar Lawsuit was grossly inadequate; (3) the fact the Sligar Lawsuit is unliquidated and the fact there is some evidence of collusion between Counsel for Safaris and Sligar creates sufficient slight additional circumstances justifying the setting aside of the sheriff’s sale.

Judge Stoker made the following statements at the hearing on this matter:

I’m ruling that there’s nothing wrong with having levied upon this litigation.

...

[T]he sale has got to represent some reasonable relation between the value of the bid and the value of the property. I don’t think it’s necessarily limited to real property, though I recognize the cases in Idaho have addressed that issue are involving real estate. I don’t see that it makes any difference.

...

But I will find, pursuant to that case, yeah, that there is a gross inadequacy and quote/unquote additional circumstances, and the additional circumstances is just the whole nature of this case.

...

Well, the additional circumstances is the nature of this case, that it is an unliquidated litigation, and though I’m finding that you can levy upon and sell that, that creates a whole issue here of what’s the right amount to bid? Do you bid 10,000, 50,000, 125,000? I mean, it’s the nature of – the argument that the defendcant is making her is that that’s the whole problem with unlitigated claims is you don’t know what they’re really worth, like real estate. And I think that is the set of additional circumstances that differentiates this case from, perhaps, others.

...

MR. GADD: . . .

I apologize for repeating, but it's the gross inadequacy of consideration and the fact that there's an unliquidated cause of action, that's the additional circumstances?

THE COURT: Yes.

MR. LARSEN: He also made reference to potential conflict in [Respondent/Cross Appellant] owning [the Sligar Lawsuit] and the ability to reach a fair resolution.

THE COURT: That's the third thing. And I'm not casting aspersions on your law firm. Please understand that. That's not what I'm saying at all. I think it's inherent, you walk out and settle this case for 122,000 bucks, that the whole problem here. Maybe that's what it's worth. I don't know.

Tr. Vol. II, p. 39-40, L25, 1-2; p. 40, L13-18; p. 43, L19-22; p. 44, L.6-16; p. 45, L2-15.

ARGUMENT

A. JUDGE STOKER PROPERLY SET ASIDE THE SHERIFF'S SALE OF THE SLIGAR LAWSUIT BECAUSE THE PURCHASE PRICE WAS GROSSLY INADEQUATE AND SLIGHT ADDITIONAL CIRCUMSTANCES EXIST JUSTIFYING SETTING ASIDE THE SALE.

Judge Stoker properly perceived the issue before him as discretionary. He acted within the boundaries of such discretion and he acted consistently with the applicable legal standards. He also reached his decision by an exercise of reason.

Respondent/Cross Appellant acknowledges Judge Stoker properly perceived his decision as discretionary. Moreover, Judge Stoker identified the same legal standard that Respondent/Cross Appellant identify in its briefing. Tr. Vol. II, P. 40, L3 – P.41, L9; P.43, L19-22; P44, L6-P45, L16. The standard for setting aside a sheriff's sale is (1) gross inadequacy of consideration and (2) *very* slight additional circumstances. *Fed. Land Bank of Spokane v. Curts*, 45 Idaho 414, 262 P. 877, 880 (1927); *Gaskill v. Neal*, 77 Idaho 428 (1956). Respondent/Cross Appellant argue Judge Stoker failed to act consistently with applicable legal standards and failed to exercise reason. What

Respondent/Cross Appellant is really asking is for this Court to reevaluate the facts and second guess Judge Stoker's opinion.

1. Judge Stoker Did Not Have to Find a Specific Value of the Sligar Lawsuit to Find The Bid Was Grossly Inadequate.

Judge Stoker had before him substantial, uncontroverted evidence that the value of the Sligar Lawsuit was significantly more than the bid submitted by Respondent/Cross Appellant. Judge Stoker took Judicial Notice of an affidavit filed in the Sligar Lawsuit, wherein Mike Jones testified the value of the Sligar Lawsuit was substantial. Jones testified he invested in excess of \$700,000.00 into the company that is being dissolved and he testified his valuation of the present assets of the company exceeded \$2,000,000.00. Tr. Vol. II, P.5, 4-20; R. 84 – 85. Judge Stoker asked counsel for Respondent/Cross Appellant, “Well, Mr. Gadd, the real issue here is, I mean, can you make a cognizable argument that \$2,500 against what appears to be a many hundred thousand dollar potential lawsuit is reasonable under that case that Mr. Larsen cited?” Tr. Vol. II, P. 20, L4-8. Counsel dodged and reframed the question, failing to provide any evidence or argument that the Sligar Lawsuit was not a “many hundred thousand dollar potential lawsuit.” *Id.* at P. 20, L9 – P. 21, L18.

While Judge Stoker did not find a specific value for the Sligar Litigation, the only evidence he had before him suggesting its true value was the testimony of Mr. Jones, which put that value in the neighborhood of \$2,000,000.00. Respondent/Cross Appellant produced no evidence, other than the evidence of its own bid to purchase the Sligar Lawsuit, to controvert Mr. Jones' valuation of the asset. Respondent/Cross Appellant argues the bid it submitted is an indication of the asset's fair

market value. This argument ignores reality. Although the Sheriff is the seller, he is only selling at the request of the judgment creditor. Thus, the judgment creditor's purchase, at about 2% of the full judgment amount, is not an arm's length transaction, but is much more akin to selling the asset to himself. Under such circumstances, it is not an adequate measure of fair market value.

The evidence before Judge Stoker suggested the bid of \$2,500.00 was equal to approximately .125% of the value of the Sligar Lawsuit. By comparison, in *Gaskill*, the facts were that if the sheriff's sale stood, "appellant has paid only \$426.12 for \$11,000.00 worth of property. This is grossly inadequate consideration." *Gaskill*, 77 Idaho at 432, 293 P.2d at 960.

No evidence was offered to contradict Jones' testimony of the value of the asset. Based on these facts, Judge Stoker reasonably concluded the bid was grossly inadequate compared to the approximate value of the lawsuit.

2. Very Slight Additional Circumstances Exist in this Case.

Irregularities in the sale is not the only circumstance the will justify setting aside a sheriff's sale. *Phillips v. Blazier-Henry*, 153 Idaho 724, 729, 302 P.3d 349, 354 (2013). As the most recent Idaho Supreme Court case to address the issue of when it is appropriate to set aside a sheriff's sale, *Phillips* reviewed *Gibbs*, *Curts*, *Gaskill*, and *Suchan*. Respondent/Cross Appellant would have This Court believe that after reviewing the foregoing cases, the proper synthesis of the law on the matter is that "very slight additional circumstances" only exists when irregularities in the sale have occurred. The *Phillips* court, however, synthesized the law differently and summarized the commonality between *Curts*, and *Gaskill* (where relief from the sale was granted) and the distinction

from *Suchan* (where relief from sale was denied) as follows, “The foregoing cases had one additional fact in common – they were all cases in which the party injured by the grossly inadequate sale price and additional circumstance was the judgment debtor.” *Phillips*, 154 Idaho at 729, 302 P.3d at 354. In addition, the *Phillips* court concluded, “This Court has not previously held that gross inadequacy of price, standing alone, provide grounds for setting aside a sheriff’s sale. Our decisions have uniformly held that there must be some irregularity in the sale *or other slight additional circumstance.*” *Id.* at 730, 302 P.3d at 355. If it was the intention of This Court to limit the grounds on which a sheriff’s sale can be set aside to gross inadequacy and irregularities in the sale, the court would not have included the language, “or other slight additional circumstance.”

Other slight additional circumstances exist in this case. There is no dispute that all the cases cited by Respondent/Cross Appellant and discussed herein involve the sale of real property. Idaho has never addressed what “slight additional circumstances” are required when considering the sale of unliquidated litigation. Thus, this case is distinguishable from all of the Idaho authorities on the matter. The one standard that is clear from the *Phillips* case, however, is that if the additional circumstances cause harm to the judgment debtor, then they should be found to be adequate. Judge Stoker based his decision on this standard.

Judge Stoker first stated the slight “additional circumstances is just the whole nature of this case.” Tr. Vol. II, P. 43, L21-22. He later clarified:

Well, the additional circumstances is the nature of this case, that it is an unliquidated litigation, and though I’m finding that you can levy upon and sell that, that creates a whole issue here of what’s the right amount to bid? Do you bid 10,000, 50,000, 125,000? I mean, it’s the nature of – the argument that the defendant is making here

is that that's the whole problem with unlitigated claims is you don't know what they're really worth, like real estate. And I think that is the set of additional circumstances that differentiates this case from, perhaps, others.

...

MR. LARSEN: He also made reference to potential conflict in Safaris owning this litigation and the ability to reach a fair resolution.

THE COURT: That's the third thing. And I'm not casting aspersions on your law firm. Please understand that. That's not what I'm saying at all. I think it's inherent, you walk out and settle this case for 122,000 bucks, that's the whole problem here. Maybe that's what it's worth. I don't know.

Id., P.44, L6 – P.45, L15.

Thus, Judge Stoker was acting consistently with the *Phillips* case in finding that other slight additional circumstances, other than just irregularities with the sale, existed in this case. Those circumstances were that the asset sold involved unliquidated litigation and the potential for harm to the judgment debtor is very likely.

Although Judge Stoker did not base his decision on Idaho Code § 11-304, which requires the Sheriff to not sell more property than can reasonably satisfy the judgment, that statute supports a finding that the sale of unliquidated litigation creates sufficient "slight additional circumstances." If there is evidence the price is grossly inadequate and the value of the asset cannot be determined, one must ask how the Sheriff can comply with the requirements of I.C. § 11-304 and work significant hardship upon the judgment debtor.

Sound public policy supports Judge Stoker's reasoned decision to deny the sale of unliquidated litigation via public auction. The potential ramifications to the court system and justice system are astonishing. By way of example, a litigant of modest means with a judgment against

him/her would be vastly deterred from initiating litigation against a wrongdoer. Why would the litigant expend the time and money to litigate this matter if their judgment creditor could swoop in and reap the awards (especially if the ultimate verdict is significantly more than the judgment)? Further, why would an attorney take such a case (especially if being taken on a contingency fee basis)? Likewise, a defendant could purchase the cause of action against him or her and then choose to dismiss the matter (something that has happened and is happening in states that allow these causes of action to be sold). *See Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208 (Utah 1999). Allowing a judgment creditor to purchase the debtor's litigation at a substantial discount serves a great disservice to the public policy of Idaho, its residents, and the public's access to courts.

In this specific case, allowing the sale to stand would work great harm to Appellant/Cross Respondent. If this sale is allowed to stand, one of four things will happen: (1) Safari's will litigate the Sligar Lawsuit (using the extensive work and discovery Jones has already amassed) and secure a substantial judgment against the defendants in that case; (2) Safari's will settle this matter for pennies on the dollar; (3) Safari's will litigate the matter and fail for lack of effort or desire; or (4) Jones will continue to litigate this matter and Safari's will claim one hundred percent of any verdict recovered. All of these outcomes are highly inequitable to Jones.

Assuming Respondent/Cross Appellant secures a significant judgment against the defendants in the Sligar Lawsuit, that would be the Respondent/Cross Appellant's judgment. Respondent/Cross Appellant would have a continuing deficiency judgment against Jones in the amount of approximately \$120,000.00 and it would then have a judgment against the defendants in the Sligar

Lawsuit for damages caused by the defendants to the Appellant/Cross Respondent. The conclusion would be that Appellant/Cross Respondent would lose his claims against the defendants (and his ability to pay the Judgment), while still owing significant amounts to Respondent/Cross Appellant.

Alternatively, if Respondent/Cross Appellant settles the matter for pennies on the dollar, the defendants in that case maybe be getting away with bad acts with no real repercussions. Likewise, Appellant/Cross Respondent will have no opportunity to have his day in court and be made whole from the defendants' alleged wrongful conduct. Moreover, he'd still owe a significant judgment to Respondent/Cross Appellant.

In the event Respondent/Cross Appellant litigates this matter and fails, it would remain inequitable to Appellant/ Cross Respondent because he would not have had the opportunity to pursue the damages for wrongs *he suffered* at the hands of the Defendants. Finally, in the event Jones is required to litigate this case, he will incur all the expenses, but not be allowed to recover any of the proceeds of such efforts.

Given the dearth of law in Idaho governing the sale of unliquidated litigation and the strong public policy reasons against allowing such a sale, how can this Court conclude that Judge Stoker did not act consistently with applicable legal standards and did not reach his decision by an exercise of reason?

B. APPELLANT CONSIDERS THE ORIGINAL ISSUES ON APPEAL TO BE FULLY SUBMITTED.

The issues raised by Appellant in the opening brief are sufficiently covered in such brief and additional briefing will not substantially add to the discussion. Appellant considers those issues fully

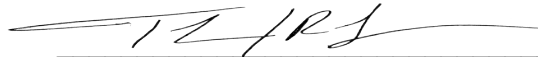
submitted to the Court for its sound review.

CONCLUSION

For the foregoing reasons, the Judge Stoker's decision regarding the cross appeal should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of December, 2017.

WILLIAMS, MESERVY & LOTH SPEICH, LLP



THEODORE R. LARSEN

Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 13th day of December, 2017, I caused to be served two copies the foregoing document as follows:

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THEODORE R. LARSEN