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IN THE SUPREME COURT OF THE
STATE OF IDAHO

GENESIS GOLF BUILDERS, INC.,)
formerly known as National Golf)
Builders, Inc., a Nevada)
corporation,)
)
Plaintiff,)
v.)
)
PEND OREILLE BONNER DEVELOPMENT,)
LLC, a Nevada limited liability)
company; et al.)
)
Defendants.)
)
_____)
)
VALIANT IDAHO, LLC, an Idaho limited)
liability company,)
)
Third Party Plaintiff-Cross)
Claimant-Respondent,)
v.)
)
JV L.L.C., an Idaho limited)
liability company,)
)
Defendant-Third Party)
Plaintiff-Cross Defendant-)
Appellant.)
_____)
)

DOCKET NO. 44584-2016
(Bonner County
Case CV-2009-1810)

APPELLANT'S REPLY BRIEF

APPELLANT'S REPLY BRIEF

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

THE HONORABLE BARBARA BUCHANAN, DISTRICT JUDGE, PRESIDING

John A. Finney
Finney Finney & Finney, P.A.
120 East Lake Street, Ste 317
Sandpoint, Idaho 83864
ATTORNEY FOR APPELLANT JV

Richard L. Stacey
McConnell Wagner Sykes
& Stacey PLLC
827 East Park Blvd, Ste 201
Boise, ID 83712
ATTORNEY FOR RESPONDENT VALIANT

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REBUTTAL ARGUMENT ON APPEAL

I. JV'S PLEADINGS, RESPONSES, AND MOTIONS RAISED THE TAX REDEMPTION SUBROGATION CLAIM, INCLUDING TITLE THEORY AND LIEN THEORY

A. JV's Pleading Raised Subrogation Under Title Theory Or Lien Theory

On September 15, 2015, JV filed its JV L.L.L.'s [sic - L.L.C.'s] Special Appearance Contesting Jurisdiction; And JV L.L.C.'s Answer To Complaint; And JV L.L.C.'s Answer To Valiant Idaho, LLC's Counterclaim, Cross-Claim And Third Party Complaint For Judicial Foreclosure; And JV L.L.C.'s Cross-Claim; And JV L.L.C.'s Third Party Complaint, which was verified by JV (herein "JV's Claims Pleading"). (R. Vol VII p 784-843). JV specifically pled for relief based upon the tax redemption payment by JV to Bonner County and specifically asserted a first priority lien as to the property redeemed. There are several provisions in JV's Claims Pleading relevant to the issues on appeal.

Paragraph 51 of JV's Claims Pleading (R. Vol VII p 795-796), raised the Lien Theory, and provided as follows:

51. JV L.L.C. admits paragraph 44, except denies that Valiant paid "to redeem the Idaho Club Property", as Valiant paid only to redeem a portion of the Idaho Club Property real property. JV, had previous in time to Valiant, paid Bonner County to redeem and did redeem a portion of the Idaho Club Property being a portion of the property referred to as Moose Mountain. Valiant did not redeem from Bonner County, nor did Valiant pay real estate taxes on the Moose Mountain real estate that was redeemed by JV. The tax parcels and real estate redeemed by JV are as stated in JV's

Notice of Redemption, dated July 1, 2014, a copy of which is attached hereto as JV L.L.C.'s Exhibit D. JV paid the Bonner County Tax Collector for the 2008 through 2014 real estate taxes pursuant to its redemption in the sum of \$140,999.86, paid July 1, 2014. JV L.L.C. claims the real estate tax redemption payment as the first priority lien as to the real estate redeemed by JV.

Paragraph 63 of JV's Claims Pleading (R. Vol VII p 797), raised the Title Theory, and provided as follows:

63. JV L.L.C. admits the dollar amount of payment by Valiant as alleged in paragraph 55; however JV denies the remainder as Valiant may not have been a party entitled to "redeem" and the stated payment was not "to redeem the Idaho Club Property" as JV had previously redeemed a portion of the Idaho Club Property. JV has title to the property it redeemed as real estate pursuant to the recorded Tax Redemption Deed from Bonner County to JV on the redeemed Moose Mountain Property.

Paragraph 74 of JV's Claims Pleading (R. Vol VII p 798), provided as follows:

74. JV L.L.C. admits paragraph 66, except Valiant may not have been entitled to redeem and JV's redemption is superior to Valiant.

Paragraph 100 of JV's Claims Pleading (R. Vol VII p 802-803), made reference to the document attached thereto as Exhibit D JV's Notice of Redemption, dated July 1, 2014. The said Exhibit D. Notice of Redemption was attached (R. Vol VII p 827-828).

Paragraph 108 of JV's Claims Pleading (R. Vol VII p 805-806)

contains "JV L.L.C.'S Prayer for Relief", and provided in subparagraph 5, as follows:

5. For Judgment in the amount of \$140,999.86 paid by JV to redeem from the Bonner County Tax Deed and for a first priority lien against the redeemed real estate. JV's Claims Pleading raised the issues and claims of both the Title Theory and the Lien Theory.

B. VALIANT'S Motion Sought Relief On The Lien Theory

On January 20, 2015, VALIANT filed its Valiant Idaho, LLC's Motion For Summary Judgment Against JV, L.L.C., North Idaho Resorts, LLC, and VP, Incorporated and its supporting pleadings (R. Vol XIV p 1720-1746). In VALIANT's Memorandum In Support Of Valiant Idaho, LLC's Motion For Summary Judgment Against JV, L.L.C., North Idaho Resorts, LLC, and VP, Incorporated, filed January 20, 2015 (R. Vol XIV p 1725-1746) VALIANT argued that Idaho Code § 45-114 was applicable and that Idaho Code § 45-105 was applicable. VALIANT in part II. Statement of Facts, subparts A.5. and A.6. of its memorandum set forth its alleged facts regarding its July 7, 2014 redemption payment and the Redemption Deed issued in favor of VALIANT and argued that "Pursuant to the Seventh Cause of Action alleged in the Valiant Complaint, Valiant seeks to foreclose the Redemption Deed and for an adjudication that Valiant's interest in the real property therein is superior and senior in right to any claimed interest in the real property by Claimants." (R. Vol XIV p 1731-1732). Valiant in its part IV. Argument, subpart E. of its memorandum specifically set forth the provisions of Idaho Code § 45-114 and argued that the priority as

to the amount paid for redemption for a tax deed was "at a minimum" that of the existing debts priority, and by that argument asserted that a greater priority based upon the subrogation statute Idaho Code § 45-114 to the tax lien and interest of Bonner County. (R. Vol XIV p 1742-1743).

C. JV's Opposition To Summary Judgment Set Forth The Lien Theory and Title Theory

On February 2, 2015, JV filed in opposition to VALIANT's motion for summary judgment, its JV L.L.C.'s Memorandum In Opposition To Valiant Idaho, LLC's Motion For Summary Judgment. (R. Vol XIX p 2076 - Vol XX p. 2322). In that opposition, JV specifically argued for priority over Valiant Idaho based upon the tax redemption payment by JV to Bonner County. JV set forth argument regarding the Notice of Redemption and the Redemption Deed (R. Vol XIX p 2099) and attached the Notice of Redemption as Exhibit L and the Redemption Deed as Exhibit M (R. Vol XX p 2301-2307).

D. The District Court Identified The Redemption Deed Arguments Made By VALIANT

The District Court, in its Memorandum Decision & Order Granting Valiant Idaho, LLC's Motion For Summary Judgment Against JV, L.L.C., North Idaho Resorts, LLC, and VP, Incorporated, entered April 14, 2015, identified VALIANT's argument that it not only relied upon being able to add the tax redemption payment to its debt, but that it "also" sought to foreclose pursuant to the tax redemption deed. (R. Vol XXII p 2566). The District Court specifically ruled that "VALIANT's Redemption Deed Has Priority

Over JV" setting forth, but not analyzing, the provisions of Idaho Code § 45-113 (lienholder's right to redeem), Idaho Code § 45-114 (inferior lienholder's right to redeem and right to be subrogated).

E. JV Sought Reconsideration Relief And Affirmative Motion For Subrogation Based Upon Title Theory And Lien Theory

On July 30, 2015, JV filed its JV L.L.C.'s Motion To Alter, Amend, And Reconsider The Court's Memorandum Decision And Order Re: JV L.L.C.'s Motions To Reconsider, And JV L.L.C.'s Motion For Partial Summary Judgment For Affirmative Relief Concerning JV L.L.C.'s Redemption Deed And As To Valiant's Redemption Deed; And Request For Hearing. (R. Vol XXV p 2967-2980). This motion by JV set forth the arguments brought forward on this appeal regarding JV being subrogated to the position of Bonner County by the redemption payment and the Redemption Deed, whether as owner by the failure of Valiant to subsequently redeem within 14 months ("Title Theory") or by having the first priority encumbrance as to the amount paid in redemption ("Lien Theory"). There is no need to fully reproduce the arguments in the motion in this brief, as the pleading is in the record on appeal, but JV highlights certain portions of the argument.

JV argued that "1. Upon the Notice of Redemption, payment of \$140,999.86 and by the Redemption Deed, JV became subrogated to the first (1st) lien position previously held by Bonner County for unpaid delinquent taxes under Tax Deed (Exhibit I):...." (R. Vol XXV p 2971-2972). JV set forth the relevant statutory provisions of Idaho Code § 45-114 and argued that "Therefore, as part of JV's

mortgage foreclosure, JV is entitled to enforce the tax redemption payment of \$140,999.86, on the 5 tax parcels of JV's Redemption Deed in the subrogated first lien position of the Bonner County tax lien." (R. Vol XXV p 2973). These arguments were in regards to the Lien Theory of the subrogated interest.

JV further argued that "JV MAY HAVE RECEIVED TITLE BY ITS REDEMPTION DEED." (R. Vol XXV p 2974). In the motion, JV argued that Valiant did not effectuate a subsequent redemption from JV during the 14 month statutory period. These arguments were in regards to the Title Theory of the subrogated interest held by JV.

JV set forth in its motion an "IN CONCLUSION" section summarizing the arguments that by its mortgage, its redemption payment, its redemption deed, and Valiant's redemption deed (which did not include the property in JV's redemption deed) that JV was subrogated to the first lien position of Bonner County as to the 5 parcels described in the Redemption Deed. (R. Vol XXV p 2978).

JV sought affirmative relief by its motion, which was denied by the District Court, without any additional analysis or consideration of the statutory subrogation rights.

F. JV Thoroughly Raised And Asserted Its Statutory Right Of Subrogation Under The Alternatives Of Title Theory And Lien Theory

It cannot be said that JV failed to raise its claims for subrogation based upon payment of the tax redemption to the interest of the County. JV pled, opposed summary judgment, and sought summary judgment on its statutory subrogation claim to the priority interests of the County tax lien and deed.

Although both Valiant and JV raised the subrogation claims

pursuant to Idaho Code § 45-114, and although the District Court set forth the statute in its decisions, the District Court did not analyze or give effect to the subrogation rights pursuant to the statute to JV.

G. JV Has A Statutory Right Of Subrogation And Merely Adding The Amount Paid To The Inferior Interest Does Not Afford Any Protection, Which Is Contrary To Statute (And Equity)

While it is correct that the provisions of the various mortgages provide for the addition for the payment of taxes to the secured debt, and while Idaho Code § 45-105 does provide the statutory basis for the same result, that does not mean that a lender, in the event of several liens with varying priority, is not afforded the protection and benefit of Idaho Code § 45-114. The provision of Idaho Code § 45-105 provides for permissive, not mandatory or exclusive, relief. Idaho Code § 45-105, which uses the term "may" rather than "shall" must be read in concert with Idaho Code §§ 45-113 and 45-114. Idaho Code § 45-105 provides as follows:

45-105. SATISFACTION OF PRIOR LIEN. Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists.

Idaho Code §§ 45-113 and 45-114 (underline emphasis added) provide, as follows:

45-113. RIGHT TO REDEEM FROM LIEN. Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed.

45-114. RIGHTS OF JUNIOR LIENOR. One who has a lien inferior to another, upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and,
2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests upon satisfying the claim secured thereby.

These rights are in addition to merely adding the amount paid to the existing indebtedness with the existing priority. These rights to be subrogated are paramount when there are "junior lienors" and these rights protect the junior lienor that redeems with new money, and protects the new money by subrogation to the interest with the greater priority.

Pursuant to subrogation, the junior lienor, here JV, is substituted into the place of the County, with either Title or a Priority Lien.

The circumstances involving multiple lienors distinguishes the issues in this matter, and the subrogated rights of JV to the interest of Bonner County, from the facts of Hardy v. McGill, 137 Idaho 280 (2002) and the case of Trusty v. Ray, 73 Idaho 232 (1952) cited by VALIANT. Neither case involved facts where multiple lienors existed or where a junior lienor redeemed, and by statute is subrogated. Those cases rejected the Title Theory in the circumstance where there was only a single lienor and in the circumstance where there was a dispute over the lien. Those cases did not address the multiple lienholder situation and did not discuss the lien theory or the title theory based upon the statutory subordination provision.

H. JV Is Not Limited By The Title 63 Redemption Statutes

The provisions of Idaho Code § 63-1007 and § 63-1010 do not provide for a specific remedy limiting the rights of the junior

lienor who exercised the right to redeem and pays new money to a priority lienor to protect its junior interest. Those statutes do not limit the applicability of Idaho Code §§ 45-113 and 45-114, and are in the same title and chapter as the provisions of Idaho Code § 45-105 relied upon for the permissive right to add the payment to the existing encumbrance.

Those provisions are silent as to the interest acquired by the redemptioner from the conveyance of the Redemption Deed issued from the County to the redemptioner (not issued to the prior owner or record). The statutory provisions of Idaho Code § 45-114 are the specific applicable statutes.

II. JV Has A Subrogated Priority Interest

In summary, the relief requested is for the subrogated interest of JV to be given effect by reversing the District Court's findings and conclusion, and last entered judgment and last entered decree of foreclosure, and ordering one of the alternative reliefs sought, specifically either:

1. Under the title theory that JV, by the Redemption Deed and the passing of 14 months, holds fee simple absolute title free and clear of any of the interests held by VALIANT (and any other claimants) in the real estate redeemed; or,

2. Under the lien theory that JV holds the super first priority lien of the County for the amount of the taxes paid in redemption, and that JV is entitled to foreclose upon the same for the amount paid plus interest, with a first priority lien as compared to the interest acquired by VALIANT (and any other claimants) by the Sheriff's foreclosure sale process on

the real property described in the Redemption Deed.

This relief effectuates the subrogated interests of JV to the County's interest by the Tax Deed and Redemption Deed process. This relief affords JV as an inferior lienor the protection provided for in the applicable statutes.

II. THE DISTRICT COURT ERRED IN AWARDING COSTS AGAINST JV

In the Appellant's Brief, JV correctly set forth the total costs awarded to VALIANT of \$41,479.69 and that the District Court's arbitrarily allocated 37.5% against JV, which means that portion was not awarded against the secured debt enforced by the encumbrance upon the real property. JV argued that all the costs of the foreclosure properly awarded should all be awarded against the indebtedness for foreclosure against the real property security.

JV also addressed specific items, a portion of which were allocated against JV, by the District Court's arbitrary in toto allocation rather than a cost by cost analysis and allocation.

In summary, the properly awardable costs of the foreclosure should all be allocated to and added to the secured indebtedness of POBD and not against JV. The award against JV should be vacated. If any amount is properly awardable against JV, most of the items sought should be disallowed as against JV.

III. THE SANCTIONS AGAINST JV AND ATTORNEY GARY FINNEY SHOULD BE VACATED

I.R.C.P. 11(c)(2) provides that a motion for sanctions "... must be served under Rule 5, but it must not be filed or be

presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service....” This language conclusively provides for a 21 day period to allow a party against whom a rule 11 violation is asserted, the opportunity to correct it. The arguments for interpretation brought forward by VALIANT would totally remove the 21 day period from the rule.

As to the assertion that Gary Finney “in his personal capacity” did not appeal, VALIANT recognizes the controlling precedence of Smith v. Treasure Valley Seed Co., LLC, 161 Idaho 107 (2016) and its holding that an appeal signed by an attorney which identifies as an issue on appeal an award of sanctions against the attorney is sufficient. There is no separate “personal capacity” in which the appeal must be pursued.

At no time was JV and/or attorney Gary Finney given the opportunity to withdraw or appropriately correct the challenged filing within 21 days. The sanctions should be vacated.

CONCLUSION

The Appellant JV is entitled to relief vacating the Judgment and the Decree of Foreclosure and remanding for JV to be subrogated to the County's tax deed interest under either the title theory or the lien theory. JV is entitled to have the award of costs vacated and the costs disallowed. JV and Gary Finney are entitled to have the imposition of sanctions vacated.

RESPECTFULLY SUBMITTED this 16 day of March, 2018.

/s/
JOHN A. FINNEY
FINNEY FINNEY & FINNEY, P.A.
Attorney for Appellant JV

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of March, 2018, two (2) true and correct copies of the foregoing, were served by deposit in the U.S. Mail, postage prepaid, and were addressed to:

Richard L. Stacey
McConnell Wagner Sykes
& Stacey PLLC
827 East Park Blvd, Ste 201
Boise, ID 83712

/s/