

Uldaho Law

Digital Commons @ Uldaho Law

Idaho Supreme Court Records & Briefs, All

Idaho Supreme Court Records & Briefs

5-25-2018

Bergeman v. Select Portfolio Servicing Respondent's Brief 2 Dckt. 45338

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Bergeman v. Select Portfolio Servicing Respondent's Brief 2 Dckt. 45338" (2018). *Idaho Supreme Court Records & Briefs, All*. 7202.

https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/7202

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

DARIN BERGEMAN,

Plaintiff-Appellant,

v.

SELECT PORTFOLIO SERVICING, J.P.
MORGAN CHASE BANK, ALLIANCE
TITLE COMPANY, SILVERCREEK
REALTY GROUP, MOHAMED
ELABED, and JOHN DOES 1-6,

Defendants/Respondents.

Idaho Supreme Court Docket No. 45338

Bonneville County Case No. CV-17-1430

RESPONDENT'S BRIEF OF MOHAMED ELABED

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
FOR BONNEVILLE COUNTY
HONORABLE BRUCE L. PICKETT, PRESIDING

Robert K. Beck, Esq.
ROBERT K. BECK &
ASSOCIATES, P.C.
3456 E. 17th Street, Suite 215
Idaho Falls, ID 83406

For Appellant DARIN BERGEMAN

Elijah M. Watkins, Esq.
W. Christopher Pooser, Esq.
STOEL RIVES LLP
101 S. Boulevard, Suite 1900
Boise, ID 83702

For Respondent SELECT PORTFOLIO SERVICING

Steven L. Taggart, Esq.
MAYNES TAGGART PLLC
525 Park Ave., Suite 2E
Idaho Falls, ID 83402

For Respondent MOHAMED ELABED

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITY2

STATEMENT OF CASE4

 A. Nature of the Case.4

 B. Course of Proceedings.....4

 C. Statement of Facts.7

ISSUES PRESENTED ON APPEAL8

ARGUMENTS AND AUTHORITY8

 I. Applicable Standards of Review.8

 II. Bergeman had ample opportunity to present his case to the District Court in that he filed three versions of his complaint and never asked to amend again after the I.R.C.P. 12(b)(6) motion was granted..... 10

 III. Bergeman’s opening brief almost completely ignored the District Court’s 12(b)(6) decision..... 11

 IV. Before the District Court Bergeman also completely failed to engage any of the substantive arguments against his complaint under I.R.C.P. 12(b)(6). 14

 V. The District Court was correct in determining that the [Second] Amended Complaint failed to undermine the validity of the foreclosure sale. 16

 VI. The District Court’s determination on consolidation was correct. 18

 VII. The Court should only consider items actually in the record. 19

 VIII. Bergeman is not entitled to attorney fees on appeal while Elabed should be awarded both attorney fees and costs on appeal. 19

CONCLUSION20

TABLE OF CASES AND AUTHORITIES

Cases

<i>Bagley v. Thomason</i> , 149 Idaho 799, 241 P.3d 972, 977 (Idaho, 2010).....	20
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-5, 167 L.Ed.2d 929 (2007).....	9
<i>Branom v. Smith Frozen Foods of Idaho, Inc.</i> , 83 Idaho 502, 365 P.2d 958 (1961).....	9
<i>Branom</i> , 83 Idaho 502, 365 P.2d 958 (1961)	10
<i>Bream v. Benscoter</i> , 139 Idaho 364, 369, 79 P.3d 723, 728 (2003).....	20
<i>Carpenter v. Turrell</i> , 48 Idaho 645, 651-52, 227 P.3d 575, 581-82 (Idaho, 2000).....	15
<i>Coalition for Agriculture's Future v. Canyon County</i> , 160 Idaho 142, 145, 369 P.3d 920, 923 (2016).....	8
<i>Cummings v. Stephens</i> , 160 Idaho 847, 380 P.3d 168, 174 (Idaho, 2016)	11
<i>Foman v. Davis</i> , 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962)	10
<i>G & M Farms v. Funk Irr. Co.</i> , 119 Idaho 514, 518, 808 P.2d 851, 855 (1991)	12
<i>H.F.L.P., LLC v. City of Twin Falls</i> , 157 Idaho 672, 686, 339 P.3d 557, 571 (2014)	11
<i>Hipwell v. Challenger Pallet and Supply</i> , 124 Idaho 294, 299, 859 P.2d 330, 335 (Idaho, 1993) .	9
<i>Hogg v. Wolske</i> , 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006).....	11
<i>Hossner v. Idaho Forest Product Industries, Inc.</i> , 122 Idaho 413, 416, 835 P.2d 648, 651 (Idaho, 1992).....	15
<i>Houpt v. Wells Fargo Bank</i> , 160 Idaho 181, 370 P.3d 384, 392-93 (Idaho, 2016).....	15
<i>Joki v. State</i> , 162 Idaho 5, 8, 394 P.3d 48, 51 (2017).....	8
<i>Michalk v. Michalk</i> , 148 Idaho 224, 220 P.3d 580, 586 (Idaho, 2009)	19
<i>Minich v. Gem State Developers, Inc.</i> , 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979)	20
<i>Mueller v. Hill</i> , 158 Idaho 208, 212-13, 345 P.3d 998, 1002-03 (2015), <i>reh'g</i> denied (Apr. 13, 2015).....	13
<i>Nampa Charter School, Inc. v. DeLaPaz</i> , 140 Idaho 23, 29, 89 P.3d 863, 869 (2004)	10

<i>Nora v. Safeco Ins. Co.</i> , 577 P.2d 347, 352 (Idaho, 1978)(McFadden, dissenting).....	15
<i>Papason v. Allain</i> , 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).....	9
<i>Paslay v. A&B Irrigation Dist.</i> , 162 Idaho 866, 406 P.3d 878, 882 (Idaho, 2017).....	9
<i>Podalan v. Idaho Legal Aid Servs. Inc.</i> , 123 Idaho 937, 946, 854 P.2d 280, 289 (Ct.App. 1993)13	
<i>Reeves v. State</i> , 673 P.2d 444, 446, 105 Idaho 844, 846 (Idaho App., 1983).....	19
<i>Renshaw v. Mortg. Elec. Registration Sys., Inc.</i> , 315 P.3d 844 (Idaho, 2013).....	20
<i>Roell v. Boise City</i> , 134 Idaho 214, 216-17, 999 P.2d 251, 253-54 (Idaho, 2000).....	16
<i>Rueth v. State</i> , 103 Idaho 74, 644 P.2d 1333 (1982).....	10
<i>Smith v. Great Basin Grain Co.</i> , 98 Idaho 266, 272, 561 P.2d 1299, 1305 (1977).....	10
<i>State v. Wolf</i> , 102 Idaho 789, 640 P.2d 1190 (Ct.App.1982).....	19
<i>Stewart v. Arrington Constr. Co.</i> , 92 Idaho 526, 531, 446 P.2d 895, 900 (1968).....	9
<i>Wash. Fed. v. Hulsey</i> , 162 Idaho 742, 405 P.3d 1, 8 (Idaho, 2017).....	10
<i>Wing v. Amalgamated Sugar Co.</i> , 106 Idaho 905, 908, 684 P.2d 307, 310 (Idaho App., 1984)...	10
<i>Young v. City of Ketchum</i> , 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).....	9
Statutes	
Idaho Code § 45-1506(12).....	17
Idaho Code § 5-206.....	13
Rules	
I.A.R. 28.....	19
I.A.R. 35(e).....	19
I.A.R. 40(a).....	20
I.A.R. 41(a).....	20
I.R.C.P. 12(b)(6).....	8, 12
I.R.C.P. 15(a).....	10
I.R.C.P. 42(a).....	9

STATEMENT OF CASE

A. Nature of the Case.

On February 23, 2017, an approximately 2-acre property north of Idaho Falls located at 1623 W. 145 N., Idaho Falls, Idaho (hereafter “Property”), was sold at a non-judicial foreclosure sale. The buyer at that sale was Mohamed Elabed (hereinafter “Mr. Elabed” or “Elabed”). The deeded owner, Darin Bergeman (hereafter “Mr. Bergeman” or “Bergeman”), filed this action seeking to overturn that sale. Mr. Elabed, later joined by Defendant Select Portfolio Servicing, LLC (hereafter “SPS”), moved to dismiss Bergeman’s initial, amended and second amended complaints under I.R.C.P. 12(b)(6) for failure to state a claim. Mr. Bergeman also sought to consolidate this action with an eviction action brought by Mr. Elabed. Both of the 12(b)(6) motions were granted by the Honorable Judge Bruce L. Pickett (hereafter “District Court”) on June 5, 2017. (R. 103-112). He also denied the Bergeman’s Motion to Consolidate. (R. 98-101). This appeal by Mr. Bergeman attempts to overturn both decisions by the District Court. Yet, Mr. Bergeman failed to engage the arguments before the District Court and has now failed to do so before this Court in his opening brief. Accordingly, the District Court’s decisions should stand.

B. Course of Proceedings.

The Course of Proceedings provided by Mr. Bergeman is incomplete.

On March 9, 2017, Mr. Bergeman filed his initial Complaint. (R., pp. 7-35)¹.

¹ The Clerk’s Record on Appeal will be cited as “R.” The Supplemental Record on Appeal will be cited as “Supp. R.” The Reporter’s Transcript is of the Hearing on Motions held May 18, 2017 will be cited as “Tr.”

On March 27, 2017, Mr. Elabed filed a Verified Complaint for Eviction directed at the then occupant of the Property, Leslie Billman. (Supp. R., pp. 13-19).

On April 10, 2017, Mr. Bergeman filed his Amended Complaint. (R., pp. 67-95). He also simultaneously filed a Motion to Consolidate and Memorandum in Support of Motion to Consolidate this action and Mr. Elabed's eviction action. (Supp. R., pp. 1-3 and Supp. R, pp. 4-12).

On April 12, 2017, Mr. Elabed filed a Motion to Dismiss the Amended Complaint pursuant to I.R.C.P. 12(b)(6) (Supp. R., pp. 60-66) and an Objection to Motion to Consolidate. (Supp. R., pp. 67-83).

On April 21, 2017, Mr. Bergeman filed his [Second] Amended Complaint. (R., pp. 36-66).

On April 26, 2017, SPS filed Select Portfolio Servicing's Motion to Dismiss. (Supp. R., pp. 93-94) and a Memorandum in Support of Select Portfolio Servicing's Motion to Dismiss (Supp. R., 96-113). These documents were accompanied by a Declaration of Elijah M. Watkins in Support of Defendant Select Portfolio Servicing's Motion to Dismiss. (Supp. R., pp. 114-125).

On April 27, 2017, Mr. Bergeman filed an Objection to Rule 12(b)(6) Motion to Dismiss (Supp. R., 91-92) and a Memorandum in Support of Objection to Motion to Dismiss (Supp. R., pp. 84-90) directed at Mr. Elabed's April 12, 2017 Motion to Dismiss.

On May 1, 2017, Mr. Bergeman filed an Objection to Rule 12(b)(6) Motion to Dismiss directed at the Elabed motion to dismiss. (Supp. R., pp. 133-134). That same day he also filed

another Memorandum in Support of Objection to Motion to Dismiss. (Supp. R., pp. 126-132). Bergeman also that day filed an Objection to Motion to Dismiss and Motion to Vacate. (Supp. R., pp. 135-136). That document was accompanied by an Affidavit of Robert K. Beck. (Supp. R., pp. 137-139).

On May 2, 2017, Elabed's filed his Response to Objection to Motion to Dismiss and Motion to Vacate filed by Plaintiff and Reply in Support of Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6) with Respect to Defendant Mohamed Elabed. (Supp. R., 140-147).

On May 4, 2017, SPS filed Defendant Select Portfolio Servicing's response to Plaintiff's Objection to Motion to Dismiss and Motion to Vacate. (Supp. R., pp. 148-151).

On May 10, 2017, Bergeman filed an Objection to Rule 12(b)(6) Motion to Dismiss (Supp. R., pp. 170-71) and Memorandum in Support of Objection to Second Motion to Dismiss (Supp. R., pp. 172-80).

On May 17, 2018, SPS filed a Reply in Support of Select Portfolio Servicing's Motion to Dismiss. (Supp. R., pp. 181-93).

Oral argument on the Motions to Dismiss of both Elabed and Select Portfolio Servicing and Mr. Bergeman's Motion to Consolidate were held on May 18, 2017. (Tr., LL 1:1-53:3).

The Court on June 5, 2017 issued a pair of written decisions granting both the Motions to Dismiss (R., pp. 103-112) and denying the Motion to Consolidate (R., pp. 98-101). The District Court also filed simultaneously a Judgment of Dismissal. (R., pp. 96-97).

On June 12, 2017, Bergeman filed a Motion to Reconsider (Supp. R., pp. 194-95). Bergeman later withdrew the Motion to Reconsider (Supp. R., 196-97).

On July 13, 2017, Bergeman filed this Notice of Appeal. (R., pp. 117-119).

On September 24, 2017, the District Court entered a Judgment, dismissing the case with prejudice. (R., p. 120).

C. Statement of Facts.

These are the directly relevant facts as alleged by Mr. Bergeman in his [Second] Amended Complaint:

1. Mr. Bergeman's mother owned the property at issue. (R., p. 48).
2. Mr. Bergeman's mother was the party named on the loan on the property (R., p. 39, ¶¶ 12-13).
3. That loan was serviced during the relevant time period by SPS. (R., p. 61 – a better copy is located at R., p. 29).
4. Mr. Bergeman's mother died and the Property was deeded to him. (R., p. 36, ¶ 1).
5. The loan SPS serviced was never transferred from Mr. Bergeman's mother's name to Mr. Bergeman's. (R., p. 39, ¶ 13).
6. Mr. Bergeman was incarcerated in July of 2015. (R., p. 39, ¶ 12).
7. The loan on the Property went into default. (R., p. 55-57).
8. The amount due by March 1, 2017 to bring the loan current was \$17,932.87. (R., p. 61 – a better copy is located at R., p. 29).
9. Mr. Bergeman, through his father, only paid SPS \$16,000 before February 23, 2017. (R., p. 41, ¶ 16(c)).
10. The Property was foreclosed upon on February 23, 2017. (R., p. 41, ¶ 16(e)).

And, the District Court specified the following with regards to Mr. Elabed's role in its Opinion and Order on Plaintiff's Motion to Consolidate:

11. Mr. Elabed was the purchaser of the Property at the foreclosure sale held on February 23, 2017. (R., p. 98).

ISSUES PRESENTED ON APPEAL

1. Did the District Court err in dismissing the Second Amended Complaint pursuant to I.R.C.P. 12(b)(6)?
2. Did the District Court err in denying the Motion to Consolidate pursuant to I.R.C.P. 42(a) after dismissing this action?
3. Is Mr. Elabed entitled to his attorney fees and costs for this appeal pursuant to Idaho App. R. 40(a) and 41(a) and Idaho Code § 12-121?

ARGUMENTS AND AUTHORITY

I. Applicable Standards of Review.

A. For Motion to Dismiss under I.R.C.P. 12(b)(6)

With respect to the validity of a district court's determination with respect to a motion to dismiss under I.R.C.P. 12(b)(6), the appropriate standard of review is:

When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6) we apply the same standard of review we apply to a motion for summary judgment. After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.

Joki v. State, 162 Idaho 5, 8, 394 P.3d 48, 51 (2017) (quoting *Coalition for Agriculture's Future v. Canyon County*, 160 Idaho 142, 145, 369 P.3d 920, 923 (2016)) (internal citations and quotation marks omitted). "In addition, this Court reviews an appeal from an order of summary

judgment de novo, and this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Id.*

"A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-5, 167 L.Ed.2d 929 (2007) citing *Papason v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

"[A] court can dismiss an action under Rule 12(b)(6) if it considers only the complaint, despite whether a party has submitted additional materials to the record." *Paslay v. A&B Irrigation Dist.*, 162 Idaho 866, 406 P.3d 878, 882 (Idaho, 2017) citing *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 531, 446 P.2d 895, 900 (1968).

B. Motion to Consolidate under I.R.C.P. 42(a)

I.R.C.P. 42(a) provides "[i]f actions before the court involve a common question of law or fact, the court may . . . [order consolidation]. (emphasis added). Consolidation is a discretionary determination. *Hipwell v. Challenger Pallet and Supply*, 124 Idaho 294, 299, 859 P.2d 330, 335 (Idaho, 1993) citing *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 365 P.2d 958 (1961). "These decisions are committed to the trial court's sound discretion." *Wing*

v. Amalgamated Sugar Co., 106 Idaho 905, 908, 684 P.2d 307, 310 (Idaho App., 1984), *rev'd* other grounds, citing *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982) and *Branom*, 83 Idaho 502, 365 P.2d 958 (1961).

“To determine whether the district court abused its discretion, this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.” *Wash. Fed. v. Hulsey*, 162 Idaho 742, 405 P.3d 1, 8 (Idaho, 2017) citing *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 29, 89 P.3d 863, 869 (2004).

II. Bergeman had ample opportunity to present his case to the District Court in that he filed three versions of his complaint and never asked to amend again after the I.R.C.P. 12(b)(6) motion was granted.

In Idaho the right of a plaintiff to amend his or her complaint is limited. I.R.C.P. 15(a) states “a party may amend his pleading once as a matter of course at any time before a responsive pleading is served....” I.R.C.P. 15(a). Once an answer has been filed, however, “a party may amend a pleading only by leave of court....” *Id.*

Amendments can be denied for “repeated failure to cure deficiencies by amendment previously allowed”. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 272, 561 P.2d 1299, 1305 (1977) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962)).

Here, Bergeman had three chances to amend his complaint to provide facts that would

support his causes of action. He failed to do so.

And, in fact, he failed after dismissal, to ask the Court to amend his complaint yet again. (R., pp. 2-6).

Mr. Bergeman has had his day in court and simply fell short of setting forth viable claims.

III. Bergeman’s opening brief almost completely ignored the District Court’s 12(b)(6) decision.

The key point in this appeal is that Mr. Bergeman has never seriously contested the points made by District Court with respect to its I.R.C.P. 12(b)(6) decision. In fact, Mr. Bergeman’s opening brief ignores all of the reasoning and determinations of the District Court with respect to Elabed and SPS motions to dismiss. Bergeman Br., pp. 16-20. That is fatal as “issues on appeal are not considered unless they are properly supported by both authority and argument.” *H.F.L.P., LLC v. City of Twin Falls*, 157 Idaho 672, 686, 339 P.3d 557, 571 (2014). And, “[t]his Court has often stated: ‘We will not consider assignments of error not supported by argument and authority in the opening brief.’” *Cummings v. Stephens*, 160 Idaho 847, 380 P.3d 168, 174 (Idaho, 2016) citing *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006).

Here, by failing to engage either by argument or by authority any of the District Court’s reasoning on the I.R.C.P. 12(b)(6) issues, Bergeman’s tangential and unrelated arguments still do not undermine the District Court’s determination of the following issues.

A. District Court’s determination that Mr. Elabed and SPS were agents of each other.

The District Court assumed that Elabed and SPS were “agents” of each for purposes of

I.R.C.P. 12(b)(6) in that Bergeman has made such claim in his [Second] Amended Complaint. If the matter had proceeded Mr. Elabed would have strongly contested this claim as not a single fact links Mr. Elabed in anyway to SPS except he purchased the Property at a foreclosure sale. But, this point, did not matter, as to the validity of Bergeman's claims as discussed below.

B. Count I - Misrepresentation

The District Court decision provides the nine elements of fraud i.e. intentional misrepresentation and then points out that the [Second] Amended Complaint fails to plead facts that deal with the following required elements of fraud:

- Elabed or SPS' knowledge of the alleged statement's falsity (R., p. 106).
- That the Elabed or SPS intended for Bergeman to rely on any misrepresentation (*Id.*)
- Bergeman's right to rely on that statement (*Id.*)
- How Bergeman was injured by the alleged misstatement (*Id.*)

The District Court then stated that *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 518, 808 P.2d 851, 855 (1991) establishes that each element must be pled with particularity. These are independent grounds for dismissing the [Second] Amended Complaint under I.R.C.P. 12(b)(6). And, as noted above, Bergeman's opening brief failed to engage any of these points. (Bergeman Br., pp. 16-20).

C. Count I – Negligent Misrepresentation

As the District Court points out, for Bergeman to make such a claim he would need to identify a recognized legal duty that exists between himself and SPS and/or Elabed. (R., pp. 106-

107). He failed to do so in his [Second] Amended Complaint. *Id.* This is a mandatory requirement under Idaho law. *Podalan v. Idaho Legal Aid Servs. Inc.*, 123 Idaho 937, 946, 854 P.2d 280, 289 (Ct. App. 1993). Again, in his opening brief Bergman fails to engage this point at all. (Bergeman Br., pp. 16-20).

D. Count II – Trespass

As the District Court noted, to sustain a claim of trespass Bergman needed to show either actual possession or constructive possession of the property at issue. *See R.*, pp. 107-108. Actual possession requires a party to hold legal title. *Mueller v. Hill*, 158 Idaho 208, 212-13, 345 P.3d 998, 1002-03 (2015), *reh'g* denied (Apr. 13, 2015). But, Bergeman pled that the property had been foreclosed, terminating any interest he might hold. (*R.*, p. 41, ¶ 16(e)). As to constructive possession, such requires “the property has been held and possessed adversely to such legal title, for twenty (20) years”. Idaho Code § 5-206. Here, Bergeman could only have held the property “adversely” in the period between the foreclosure sale (February 23, 2017) and the filing of the action (March 9, 2017). Thus, the District Court was correct in determining that Bergeman could not sustain an action for trespass. Again, Bergeman’s opening brief fails to engage these points. (Bergeman Br., pp. 16-20).

E. Count II – Intentional Infliction of Emotional Distress

The District Court notes, correctly, that none of Bergeman’s allegations amount to “extreme” or “outrageous conduct”, providing a detailed analysis of the Idaho law on this point. (*R.*, pp. 109-110). Still again, in his opening brief, Bergeman fails to engage this point. (Bergeman Br., pp. 16-20).

F. Count II – Negligent Infliction of Emotional Distress

To make out this claim, under clear Idaho law, a plaintiff must show a legal duty and physical injury. As the District Court ruled, Bergeman failed to do either. (R., pp. 110-111). In his opening brief, Bergeman fails to mention this point at all. (Bergeman Br., pp. 16-20).

G. There was no Count III and Count IV simply requested attorney fees.

Bergeman’s [Second] Amended Complaint omitted any Count III. (R., p. 44). Count IV is a request for attorney fees. (R., pp. 44-45).

IV. Before the District Court Bergeman also completely failed to engage any of the substantive arguments against his complaint under I.R.C.P. 12(b)(6).

At the District Court, Bergeman was confronted repeatedly with substantive arguments as to why his complaints fell short. And, in each and every case, he failed to substantively engage any of the legal arguments or point out how his alleged facts met the required legal standards.

On April 12, 2017, Mr. Elabed filed a Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6) with Respect to Defendant Mohamed Elabed. (Supp. R., pp. 60-66). That motion pointed out:

- Bergeman had failed to plead the required Idaho elements of trespass (Supp. R., p. 62, ¶¶ 5-7).
- Bergeman had failed to plead intentional infliction of emotion distress, in particular the requirement that “defendant’s conduct was extreme and outrageous” and the only identified conduct by Mr. Elabed is that he has filed an eviction complaint. Further, pleading such requires a showing of physical injury which is completely lacking (Supp. R., pp. 62-65, ¶¶ 8-13).

- None of the elements for negligent infliction of emotional distress were pled by Bergeman (Supp. R., p. 65, ¶¶ 14-16).

On April 27, 2017, Bergeman filed a Memorandum in Support of Objection to Motion to Dismiss. (Supp. R., pp. 84-90). Not one of the above points was addressed. *Id.*

On April 27, 2017, SPS filed its Memorandum in Support of Select Portfolio Servicing's Motion to Dismiss. (Supp. R., pp. 96-113). This pleading pointed out the shortcomings of each of the counts contained in Bergeman's [Second] Amended Complaint.

On May 2, 2017, Mr. Elabed filed his Response to Objection to Motion to Dismiss and Motion to Vacate filed by Plaintiff and Reply in Support of Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6) with respect to Defendant Mohamed Elabed. (Supp. R., pp. 140-147). This took into account the slight modifications contained in the [Second] Amended Complaint. That Memorandum pointed out the failure of the trespass claim and outlined Idaho law on wrongful foreclosure, namely that the remedy was for monetary damages not return of the property. See *Houpt v. Wells Fargo Bank*, 160 Idaho 181, 370 P.3d 384, 392-93 (Idaho, 2016); *Nora v. Safeco Ins. Co.*, 99 Idaho 60, 65, 577 P.2d 347, 352 (Idaho, 1978)(McFadden, dissenting) ("In the classical trover action (conversion), the plaintiff seeks a forced sale of an item of personality to the defendant who has wrongfully taken or detained it. His damages are limited to the value of the item at the time of conversion plus interest. 3 Blackstone Comm. 153 (2 1st ed. 1844); 4 Sutherland on Damages, supra, § 1109 at 4209."); *Hossner v. Idaho Forest Product Industries, Inc.*, 122 Idaho 413, 416, 835 P.2d 648, 651 (Idaho, 1992) (monetary damages for conversion of timber); *Carpenter v. Turrell*, 48 Idaho 645, 651-52, 227 P.3d 575, 581-82 (Idaho, 2000)

(monetary damages for conversion of portable building); *Roell v. Boise City*, 134 Idaho 214, 216-17, 999 P .2d 251, 253-54 (Idaho, 2000) (award of monetary damages for personal property taken).

Bergeman failed to file any reply to the above. (R., pp. 2-6).

At the oral argument on May 18, 2017, counsel for Elabed laid out many of the same arguments. (Tr., LL 13:15- 20:5; 29:1-30:8). Yet, again, Mr. Bergeman’s counsel failed to substantively engage any of these points. (Tr., LL 20:7-28:24). Unsurprisingly, the District Court, on that record, granted the I.R.C.P. 12(b)(6) motions.

The same pattern is being followed before this Court. Mr. Bergeman focuses in his opening brief on alleged wrongdoing but utterly failed to engage the substantive points that his own complaint failed to meet, therefore invoking I.R.C.P. 12(b)(6). The proper response, now, is to do as the District Court did and uphold the District Court’s dismissal of this action.

V. The District Court was correct in determining that the [Second] Amended Complaint failed to undermine the validity of the foreclosure sale.

The only dismissed count of the [Second] Amended Complaint that Bergeman, to some degree, engages in his opening brief is Count One, which makes two assertions: 1) That SPS engaged in misrepresentation and 2) SPS engaged in negligent supervision. As noted *supra*, Bergeman failed to engage key decision points made by the District Court. But, even if Bergeman’s arguments were accepted by this Court, they still do not justify overturning the District Court decision.

First, with respect to the claim of misrepresentation and/or negligent supervision,

Bergeman argues that the District Court engaged in a “poor effort” and that “SPS was quite successful in persuading the District Court to focus on the relationship between SPS and Mr. Elabed”. (Bergeman Br., p. 17). Last, but not least, he suggests that “[p]erhaps that District Court saw that this case was one that would be very complex and difficult to manage – resulting in a an effort to manage this case by virtue of ordering its dismissal.” *Id.* He even suggests this Court might be “obtuse”. (Bergeman Br., p. 19).

Of note, Bergeman fails completely to cite to anywhere in the record and fails to point to any form of authority supporting his position. (Bergeman Br., pp. 16-20). He does assert that, if discovery is allowed to go forward, he will find something, somewhere to back up his claims.

But, the facts pled by Mr. Bergeman in his [Second] Amended Complaint support the District Court decision. First, he admitted that there was default on the loan. (R., p. 39, ¶ 12). Second, he points to a statement from SPS that shows the default just before the foreclosure sale is \$17,932.87. (R., p. 61 – a better copy is located at R., p. 29). Then, he pled that he only paid \$16,000, not the necessary \$17,932.87, to cure the default before the foreclosure sale was conducted. (R., p. 41, ¶ 16(c)).

None of that is legally relevant in that Idaho Code provides a cure period for a deed of trust for only 115 days. *See* Idaho Code § 45-1506(12). Yet, Bergeman never pled that he “cured” the default in the 115-day period. Instead he claims he made a large payment at some undetermined time. (R. p. 41, ¶ 16(f)). But, as noted above, he specifically stated that he only paid \$16,000 before the foreclosure sale.

The District Court’s decision was sound.

VI. The District Court’s determination on consolidation was correct.

The District Court exercised its discretion under I.R.C.P. 42(a) and denied Bergeman’s Motion to Consolidate.

The District Court cited to I.R.C.P. 42(a), including its “may” language as the appropriate framework for analysis.

The District Court then determined that there was not an overlap as to matters of law, pointing out the different claims of each complaint:

Foreclosure Complaint	Eviction Action
Misrepresentation Negligent Supervision Trespass Intentional Infliction of Emotion Distress Negligent Infliction of Emotional Distress	Tenancy and Eviction Proceedings under I.C. 6-310 and I.C. 45-1506(11).

(R., pp. 99-100).

The District Court also determined that there was no overlap of fact. (R., p. 100).

Before this Court, Mr. Bergeman has failed to engage the District Court’s analysis at all. (Bergeman Br., p. 20). This failure, as noted *supra*, is fatal in that failure to provide substantive analysis resolves the issue – in this case upholding the District Court’s determination.

Instead, his opening brief impugns the integrity of the District Court (“It is not hard to conclude that the District Court was more focused on the headache presented to it . . . It would appear that this poor decision by the District Court was motivated by an intense desire to avoid the headache of presiding over a case it did not properly perceive.” *Id.*).

There is a final basis for upholding the District's decision on this issue. If this Court upholds the I.R.C.P. 12(b)(6) dismissal, there is simply no action to consolidate with the eviction matter (which itself has since been resolved). *See, generally*, Bonneville County Case No. CV-17-1746.

VII. The Court should only consider items actually in the record.

Mr. Bergeman's opening brief is replete with multiple allegations and statements that are simply not part of the record before this Court. In fact, that brief lacks any citation to the record whatsoever. (Bergeman's Br., *generally*).

This is an independent basis for denying his appeal. His failure is a violation of the substance and spirit of I.A.R. 28 and I.A.R. 35(e). And, Bergeman's failure to cite is not resolved if items were not included in the record. "It is an appellant's duty to furnish the record upon which his assertions can be examined." *Reeves v. State*, 673 P.2d 444, 446, 105 Idaho 844, 846 (Idaho App., 1983) citing *State v. Wolf*, 102 Idaho 789, 640 P.2d 1190 (Ct. App. 1982).

This Court has previously declined to review arguments unsupported by either citations to the record or relevant legal authority. *Michalk v. Michalk*, 148 Idaho 224, 220 P.3d 580, 586 (Idaho, 2009). All unsupported statements without record citations should be completely disregarded.

VIII. Bergeman is not entitled to attorney fees on appeal while Elabed should be awarded both attorney fees and costs on appeal.

Bergeman argues he is entitled to attorney fees but fails to provide any legal basis for such. (Bergeman Br., pg. 10). "We have repeatedly held that we will not consider a request for

attorney fees on appeal that is not supported by legal authority or argument.” *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972, 977 (Idaho, 2010) citing *Bream v. Benscoter*, 139 Idaho 364, 369, 79 P.3d 723, 728 (2003). Bergeman should be denied attorney fees on appeal.

In contrast, Elabed believes he is entitled to attorney fees for this appeal pursuant to I.A.R. 41(a) through application of Idaho Code § 12-121 in that this case was “brought frivolously, unreasonably or without foundation.” Idaho Code § 12-121. “In normal circumstances, attorney fees will only be awarded under that statute when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.” *Renshaw v. Mortg. Elec. Registration Sys., Inc.*, 155 Idaho 656, 315 P.3d 844 (Idaho, 2013) citing *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). In that Bergeman has failed completely to engage on the merits such an award here is justified.

Also, if Elabed prevails in this action, he is also entitled to his costs under I.A.R. 40(a).

CONCLUSION

For these reasons, this Court should affirm the District Court on the I.R.C.P. 12(b)(6) issues and its denial of request for consolidation under I.R.C.P. 42(a). And, given the lack of legal or factual engagement, Elabed is entitled to attorney fees and costs on appeal.

DATED this 24th day of May, 2018.

MAYNES TAGGART PLLC



Steven L. Taggart

Attorney for Respondent MOHAMED ELABED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 25, 2018, I mailed two true and correct copies of the foregoing document to the designated parties as follows:

Via U.S. Mail First Class Prepaid

Robert K. Beck, Esq.
ROBERT K. BECK &
ASSOCIATES, P.C.
3456 E. 17th Street, Suite 215
Idaho Falls, ID 83406

Via U.S. Mail First Class Prepaid

Elijah M. Watkins, Esq.
W. Christopher Pooser, Esq.
STOEL RIVES LLP
101 S. Boulevard, Suite 1900
Boise, ID 83702

BY:



Theresa G. Carson
Legal Assistant