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First Bank of Lincoln v. Land Title of Nez Perce County, Inc. Appellant's Brief Dckt. 46000

IN THE SUPREME COURT OF THE STATE OF IDAHO

FIRST BANK OF LINCOLN, a Montana bank corporation,

Plaintiff/First Bank,

vs.

LAND TITLE OF NEZ PERCE COUNTY INC., an Idaho Corporation,

Defendant/Land Title.

SUPREME COURT NO. 46000-2018

FIRST BANK OF LINCOLN'S BRIEF

APPEAL FROM THE DISTRICT COURT OF SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF NEZ PERCE

*

HONORABLE JEFF BRUDIE, DISTRICT JUDGE PRESIDING

*

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I. INTRODUCTION

This matter derives from a series of real estate transactions entered into by Donald Tuschoff ("Tuschoff") regarding a Clarkston, Washington bowling alley ("Bowling Alley") and a Lincoln, Montana hotel ("Hotel") and loan issues regarding these properties.

This appeal is from cross-motions for summary judgment. Montana law applies to the issues before this Court. At summary judgment, the trial court erred when it dismissed First Bank's causes of action against Land Title on the basis of the full credit bid rule as allegedly expressed in *Rocky Mountain Bank v. Stuart*, 280 Mont. 74, 81, 928 P.2d 243, 247 (1996). *Rocky Mountain Bank* is not determinative Montana law.

The factual evidence supporting First Bank's arguments is found in CR 50 – 77, CR 89 – 101, CR 116 – 121, CR 235 – 246, CR 252 – 256, CR 293 – 301, CR 305 – 398, CR 415 – 428, CR 508 – 547, and CR 556 – 595. Specific citations to the record are included in First Bank's Factual and Procedural Background, *infra* and throughout our legal argument.

First Bank requests that this Court hold that the trial court erred, grant summary judgment to First Bank as a matter of law, and award First Bank its attorney fees and costs.

II. ARGUMENT SUMMARY

Tuschoff sold a Bowling Alley to Schwab. Schwab financed the sale by executing a note, payable to Tuschoff in monthly installments. Tuschoff placed the Schwab/Tuschoff note and deed of trust in escrow with Land Title of Nez Perce County ("Land Title"). Land Title held the loan documents and collected and distributed payments.

Tuschoff and Laurie Parks ("Tuschoff/Parks") endeavored to borrow money from First Bank of Lincoln ("First Bank") to purchase the Hotel. Because the Hotel owners could not prove adequate cash flow, Tuschoff offered additional collateral to secure the loan and assigned the Schwab/Tuschoff Bowling Alley deed of trust to First Bank. Without the additional collateral, the Hotel loan would not have taken place. First Bank recorded the deed of trust assignment in Asotin County, Washington.

Unbeknownst to First Bank, Schwab sold the Bowling Alley to Banana Belt Gaming LLC ("Banana Belt"). First Bank's interest in the Schwab/Tuschoff deed of trust appeared in the title commitment that was provided to Land Title. In closing instructions, Land Title was directed to pay off the deed of trust, so as to provide clear title. At closing, contrary to the instructions, Land Title paid the balance owing on the Schwab/Tuschoff deed of trust, to Tuschoff, paid nothing to First Bank, did not clear the exception, and failed to secure a release of the assigned deed of trust.

First Bank learned of the Bowling Alley sale when Tuschoff/Park's Hotel loan came due. Tuschoff refused to return the misdirected funds and defaulted on the Hotel loan. First Bank conducted a non-judicial sale of the Hotel, made a successful full credit bid, and eventually sold the Hotel to a bona fide purchaser for about $190,000.00.

First Bank sued Tuschoff and Banana Belt in Washington. Banana Belt successfully moved for summary judgment arguing that Banana Belt's payment of the Schwab/Tuschoff note extinguished First Bank's assigned Schwab/Tuschoff deed of trust. First Bank appealed. The Washington Court of Appeals held that Montana law was unclear regarding

whether First Bank's election to foreclose non-judicially against the Hotel extinguished the underlying obligation and it directed Banana Belt to file suit in Montana to resolve this issue.

First Bank sued Land Title in Idaho to recover the misdirected, assigned deed of trust funds. Land Title moved for summary judgment, arguing that given the full credit bid, the underlying debt no longer existed. Land Title's motion was granted and First Bank appealed the decision to this Court.

First Bank sued Tuschoff/Parks in Montana to recover the remaining amount owed on the loan. Tuschoff/Parks moved for summary judgment, arguing that by making a full credit bid, any amount due on the Hotel loan was extinguished. The Montana court denied summary judgment, stating that because the parties' loan documents acknowledged that the Hotel property was not adequate to secure the loan, and that additional security was required in order to obtain the commercial loan, this raised an issue of fact that precluded summary judgment.

In short, on the same facts and arguments: (1) the Washington Appeals Court held it could not properly discern Montana law (Appendix 1 - 7); (2) the Montana trial court denied summary judgment and requested more evidence as to the loan amount still owing (Appendix 8-10); and, (3) the Idaho trial court granted summary judgment holding there is no deficiency. CR 647.

Montana law applies to this matter. The purpose of the anti-deficiency statute in the Montana Small Tract Financing Act ("MSTFA") is to protect residential borrowers from

lenders who would purposefully tender "low ball" bids at foreclosure sales, thereby leaving the borrower with debt. These circumstances do not exist at bar, hence, the MSTFA's anti-deficiency statute does not apply.

Montana courts have held that a loan made in furtherance of a commercial transaction is not subject to the limitations on deficiency judgments as provided by the MSTFA. Because the trust indenture at bar was not for an occupied, single family, residential property, but a commercial transaction for a Hotel, an amount owing can be calculated.

Montana law cautions against relying on the amount bid at the foreclosure sale as the sole determinant of the fair market value of the property at issue. In the instant case, the fair market value was determined by what a good faith buyer subsequently paid for the Hotel property.

The Hotel was not adequate to secure First Bank's loan. This necessitated a pledge of additional security. Where two pieces of collateral are required to secure a commercial loan, the non-judicial foreclosure of one piece of collateral does not affect the right to recover funds from the separate obligation that is the other collateral. Such a holding defeats the purpose of having adequate collateral to secure a loan and the mutual assent reflected in the loan agreement. Also, it would wreak havoc on a mortgage system that relies upon sufficient collateral to make loans.

The lower court's determination based on the full credit bid rule does not fit the facts or the law of this case. The "full credit bid rule" applies to lenders and borrowers. It does not

bar an over-secured lender, from bringing actions against non-borrower third-parties such as Land Title.

The public and each of the component parts of our lending system have a substantial interest in being able to rely on a robust system and our courts should support such a vibrant and sustainable system.

III. FACTUAL AND PROCEDURAL BACKGROUND

Tuschoff bought a Clarkston, Washington Bowling Alley from the Humphreys. Tuschoff financed the sale by executing a note and deed of trust. CR 293, ¶ 1.1, CR 310 – 314. In 1998, Tuschoff sold the Bowling Alley to Schwab. Schwab financed the sale by executing a note, payable to Tuschoff in monthly installments. CR 293, ¶ 1.3. To secure repayment, Schwab executed a deed of trust listing Tuschoff as the beneficiary. This deed of trust stated:

> This deed is for the purpose of securing performance of each agreement of Grantor herein contained, and payment of the sum of One Million One Hundred Thousand and No/100 Dollars ($1,100,000.00) with interest, in accordance with the terms of a promissory note of even date herewith payable to Beneficiary or order, and made by Grantor, and such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

CR 310 – 313. Tuschoff recorded the Schwab/Tuschoff deed of trust with the Asotin County Auditor's Office. The Humphreys remained senior lienholders. Tuschoff placed the Schwab/Tuschoff note and deed of trust in escrow with Land Title, which held the loan

documents, collected Schwab's monthly payments, and disbursed those payments to Tuschoff and the Humphreys. CR 294, ¶ 1.3.

On January 27, 2011, First Bank lent $440,000.00 to Tuschoff and his daughter Laurie Parks ("Tuschoff/Parks") so they could purchase the Hotel. When the loan was applied for, the then Hotel owners lacked financial statements that proved adequate cash flow. To secure the loan, Tuschoff agreed to provide additional collateral by assigning his interest in the Schwab/Tuschoff deed of trust and a security interest in the Schwab/Tuschoff note. CR 72 – 76. First Bank agreed to the loan in exchange for the additional collateral. Tuschoff/Parks thereafter signed a promissory note for $440,000.00 that was partially secured by a deed of trust against the Hotel. CR 55 – 70, CR 117, CR 123, CR 294, ¶ 1.4 – 1.6. That note was payable in full on February 1, 2014 and it contained a due-on-sale clause that allowed First Bank to "declare the entire balance of this Note to be immediately due and payable upon the ... sale of ... any part of the Property," earlier defined as "any property ... that secures ... performance of the obligations of this Loan." CR 57, ¶ 12, Tuschoff executed further documents to provide the additional agreed-on collateral. Specifically, he executed an "Assignment Beneficial Interest in Deed of Trust," by which he assigned his interest in the Schwab/Tuschoff deed of trust to First Bank. The assignment broadly assigned "all right title and interest in said Note and all rights accrued under said Deed of Trust." *Id.* First Bank recorded the assignment with the Asotin County Auditor. CR 123 – 124, CR 294, ¶ 1.4 – 1.6.

Tuschoff also signed a security agreement wherein he granted First Bank a security interest in all property described therein. First Bank filed a UCC-1 statement with the Washington Department of Licensing providing notice of its secured interest in:

> [a]ll instruments, including ... promissory notes ... . DEED OF TRUST Chattel Paper issued to DONALD C. TUSCHOFF by . [sic] and executed on October 22, 1998 in the amount of $1,100,000.00 ... secured by [the bowling alley property]. (emphasis added).

CR 392.

Unbeknownst to First Bank, Schwab sold the Bowling Alley to Banana Belt. CR 124, CR 294, ¶1.7. Banana Belt hired First American Title to close the sale. First American's Tonja Hatcher ("Hatcher") handled the closing. Hatcher obtained the title commitment on the Bowling Alley property and reviewed it. She noticed in paragraph 21 (CR 344) of the title commitment an exception that listed the Humphreys/Tuschoff deed of trust. She also noticed in paragraph 23 (CR 345) an exception that listed Tuschoff's assignment of the Schwab/Tuschoff deed of trust to First Bank. CR 295, ¶ 1.8 - ¶ 1.10.

Banana Belt borrowed $600,000.00 from Columbia Bank to finance the Bowling Alley purchase. Columbia Bank sent a letter instructing First American to assure that its lien rights were in first position and "request[ed] that exceptions [listed in paragraphs] 21 and 23 [in the title commitment] be released." CP 294, ¶ 1.7; CR 376 – 377.

Hatcher sent an email to Land Title's employee, Rita Johnson ("Johnson"), who handled the Humphreys/Tuschoff-Schwab/Tuschoff note escrow accounts, requesting the payoff amount for the notes. Hatcher's email attached the pages of the title commitment that

listed the Humphreys/Tuschoff deed of trust and the Schwab/Tuschoff deed of trust. Hatcher drew an arrow next to Tuschoff's assignment of the Schwab/Tuschoff deed of trust to First Bank. Neither Hatcher nor Johnson contacted First Bank regarding the Bowling Alley resale, First Bank's interest in the deed of trust, or the ultimate pay-off of the note. CR 296, ¶ 1.13 – 1.15; CR 297, ¶ 1.16 – 1.17; CR 353; CR 357; CR 359; CR 361; CR 366.

As closing approached, Hatcher sent a follow-up email to Johnson requesting confirmation that Land Title would pay off the deeds of trust, so as to guarantee clear title to Banana Belt and Columbia Bank. Johnson responded to Hatcher writing: "This is a wrap and both Deeds of Trust will be paid." CR 296, ¶ 1.18 – 1.19; CR 371; CR 373; CR 398.

Johnson emailed Hatcher a payoff quote for the Schwab/Tuschoff note, which showed an outstanding balance of $359,271.82. First American sent a check for $359,271.82, to Land Title which represented full payoff for the Schwab/Tuschoff note. CR 298, ¶ 1.22.

Upon closing, contrary to her representations, Johnson disbursed the Bowling Alley sale proceeds to the Humphreys and to Tuschoff (CR 124), without addressing First Bank's security interest or the assigned deed of trust and without obtaining a release from First Bank. CR 298, ¶1.23 – ¶ 1.25; CR 386 – 87.

When First Bank's Hotel loan matured, a $400,430.42 principal balance existed. In reviewing whether to renew the loan, First Bank learned the Bowling Alley had been sold without its knowledge and the sale funds disbursed to the Humphreys and Tuschoff.

(CR 124). Tuschoff refused to return the funds he had wrongly received from Land Title and he defaulted on the Hotel loan. CR 298, ¶ 1.26.

On August 25, 2014, First Bank held a non-judicial foreclosure sale of the Hotel. It made a successful full credit bid on the property. In 2015, First Bank sold the Hotel to a bona fide purchaser for $190,000.00. CR 299, 1.28 – 1.29.

First Bank sued Tuschoff and Banana Belt in Asotin County Superior Court, seeking a declaratory judgment that Tuschoff's assignment of his interest in the Schwab/Tuschoff deed of trust remained a valid lien against the Bowling Alley. Banana Belt moved for summary judgment and an order to quiet title and reconvey the Schwab/Tuschoff deed of trust. Banana Belt's principal argument was that its payment to Schwab extinguished the Schwab/Tuschoff deed of trust. First Bank filed a cross-motion for summary judgment. The trial court granted Banana Belt's motion and denied First Bank's motion. First Bank appealed, requesting that the Washington Appeals Court grant summary judgment in its favor.

On April 14, 2016, the Washington Appeals Court issued *First Bank of Lincoln v. Tuschoff, et al.*, 193 Wn. App. 413, 375 P.3d 687 (Div. III, 2016) (Appendix 1 – 7). The opinion states, in relevant part:

> Most of the issues on appeal involve whether Banana Belt's purchase of the bowling alley is subject to First Bank's recorded assigned deed of trust. In the published portion of this opinion, we answer these issues in the affirmative, in favor of First Bank. The last issue on appeal is whether First Bank's election to foreclose non-judicially against the Hotel Lincoln property in Montana extinguished the underlying obligation and also the Schwab/Tuschoff deed of trust. In the unpublished portion, we direct Banana

> Belt to file suit in Montana to have this issue resolved, due to the fact that resolution of this issue requires application of Montana law and because the controlling precedent is unclear. In general, we reverse and remand for the trial court to proceed consistent with this opinion.

Tuschoff, 193 Wn. App. at 416, 375 P.3d at 689-90 (emphasis added).

On the same facts, First Bank sued Land Title in the Second Judicial District for the County of Nez Perce, for negligence, breach of contract and money damages. In cross-motions for summary judgment, both parties agreed that Montana law applied to the deficiency issue before this Court.[1] As did Banana Belt in the Washington matter, Land Title argued that by tendering a full credit bid on the Hotel, First Bank received full payment of the underlying obligation; *ergo*, there was no deficiency. The trial court granted Land Title's motion and First Bank has appealed.

First Bank sued Tuschoff/Parks in the District Court of the First Judicial District of the State of Montana (Case No. DDV 2014-326). Default judgment was obtained against Tuschoff. Parks moved for summary judgment, arguing that by tendering a full credit bid, no deficiency was owed. The Honorable James P. Reynolds denied Park's summary judgment motion, reasoning that the parties acknowledged the Hotel was inadequate to secure First Bank's loan and agreed to a pledge of additional security in the form of the Washington Bowling Alley. Appendix 8 – 19. The court requested additional evidence about the intrinsic value of the Hotel to determine what amount remained owing. Pursuant to Judge Reynolds'

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[1] *See,* Land Title's Memorandum In Support of Summary Judgment (CR 135-137); First Bank's Memorandum in Support of Its Cross-Motion for Summary Judgment (CR 268-269); and, Land Title's Response in Opposition to Motion for Summary Judgment (CR 471 - 472, 474 - 475).

holding, First Bank has filed a second motion that provides the additional evidence requested by Judge Reynolds. *See*, Appendix 20 – 59.

IV. ISSUES ON APPEAL

Under Montana law, did the lower court err when it determined that a loan made in furtherance of a commercial transaction is subject to limitations on deficiency judgments?

Where Montana courts have determined that a loan made in furtherance of a commercial transaction is not subject to the limitations on deficiency judgment as provided by the MSTFA, and where two pieces of collateral are required to secure a commercial loan, did the lower court err when it held that the non-judicial foreclosure of one piece of collateral, precludes the right to recover funds from the other piece of collateral?

Did the lower court err when it determined that pursuant to *Rocky Mountain Bank v. Stuart*, 280 Mont. 74, 81, 928 P.2d 243, 247 (1996), the full credit bid rule bars a lender from bringing an action against a non-borrower third-party?

Whether pursuant to I.A.R. 41(a), I.C. § 12-120(3) and/or I.C. § 12-121, attorney fees should be awarded to First Bank?

V. ATTORNEY FEES ON APPEAL

The trial court ordered attorneys' fees and costs to Land Title under I.C. § 12-120(3). Pursuant to I.A.R. 41(a), I.C. § 12-120(3) and/or I.C. § 12-121, First Bank requests an award of attorneys' fees and costs.

VI. LEGAL ARGUMENT

A. Standard Of Review For Appeal From Cross-Motions For Summary Judgment.

"In an appeal from an order granting summary judgment, this Court's standard of review is the same as that used by the trial court in ruling on the motion." *Summers v. Cambridge Joint Sch. Dist. No. 432*, 139 Idaho 953, 88 P.3d 772 (2004).

The standard applied when deciding or reviewing a ruling on a motion for summary judgment is not lessened simply because both parties have moved for summary judgment. *Kromrei v. AID Ins. Co.,* 110 Idaho 549, 551, 716 P.2d 1321, 1323 (1986); *Farmer's Ins. of Idaho v. Brown,* 97 Idaho 380, 381-82, 544 P.2d 1150, 1151-52 (1976). When both parties have "filed cross-motions for summary judgment relying on the same facts, issues and theories" and therefore "effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment." *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.,* 136 Idaho 233, 235, 31 P.3d 921, 923 (2001) (*Intermountain* was cited by the Court for the standard of review in *Nettleton v. Canyon Outdoor Media, LLC*, 163 Idaho 70, 408 P.3d 68, 71 (2017)). In order to determine whether either party is entitled to summary judgment, this Court must examine each motion separately, reviewing the record and the reasonable inferences that can be drawn from it in favor of each party's opposition to the motions for summary judgment. *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995).

Although circumstantial evidence can create a genuine issue for trial, a mere scintilla of evidence is insufficient to demonstrate the existence of a genuine issue of material fact.

Callies v. O'Neal, 147 Idaho 841, 846, 216 P.3d 130, 135 (2009). Thus, the slightest doubt as to the facts will not forestall summary judgment. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.3d 67, 70 (1996). "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." *Lapham v. Stewart*, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002).

"[T]his Court is not bound by the legal conclusions of the district court and is free to draw its own conclusion from the facts presented." *Corp. of Presiding Bishop of Church of Jesus Chris of Latter-Day Saints v. Ada County*, 123 Idaho 410, 415, 849 P.2d 83, 88 (1993). Whether a party is entitled to judgment as a matter of law, in light of material facts that are not in genuine dispute, is a question for free review. *Williams v. Paramo*, 775 F.3d 1182 (9th Cir. 2015); *Robinson v. Mueller*, 156 Idaho 237, 322 P.3d 319 (Ct. App. 2014).

B. Montana Law Applies To The Issue At Bar.

In cross-motions for summary judgment, both parties argued that Montana law applies to the loan deficiency issue that is before this Court. *See*, Footnote 1, *supra.* The trial court also found that Montana law applies.[2]

C. The Lower Court Erred When It Held That The Full Credit Bid Rule Keeps A Lender Who Has Secured A Loan By Two Pieces Of Collateral From Being Made Whole By Obtaining Funds From Both Pieces Of Collateral.

In the trial court, both parties moved for summary judgment. Citing *Rocky Mountain Bank v. Stuart*, 280 Mont. 74, 928 P.2d 243 (1996), the trial court held that because First

[2] "Montana has the most significant relationship to the issue at hand, therefore the Court shall apply Montana law in determining this issue." CR 651, Fn 7.

Bank was the only bidder at the foreclosure sale and bid the full amount owed by Tuschoff, there was no longer an outstanding debt between Tuschoff and First Bank. Thus, the assignment between Tuschoff and First Bank vis-à-vis the Bowling Alley as collateral for Tuschoff's debt was extinguished. The holding is incorrect under Montana law. When First Bank determined that the loan was in default based on the payoff of the assigned deed of trust, there was still owed $362,000.00 in principal, plus interest accrued. A subsequent purchaser paid First Bank $193,147.70 for the property. Prior to the subsequent sale of the property, First Bank paid property taxes, recording fees, publication and service of the foreclosure notice, utilities, and other expenses associated with maintaining the property, which are considered "collection costs" for purposes of First Bank's records.

Not including contractually required legal fees and costs or additional accruing interest, the total principal, interest, and collection costs owed to First Bank by Tuschoff/Parks after deducting the property's sale price is $292,348.70.[3]

1. Montana Law Precludes Deficiency Judgments Only In Matters Involving Occupied, Single Family Residential Property.

Under the MSTFA, Title 71, Chapter 1, Part 3, Mont. Code Ann., a transfer in trust of an interest in real property may be made to secure the performance of an obligation of a grantor. A power of sale is conferred upon the trustee to be exercised after a breach of the obligation for which the transfer is security. Mont. Code Ann. § 71-1-304. When a trust indenture is foreclosed by advertisement and sale, the MSTFA prohibits a deficiency

[3] *See* Affidavit of John T. Gill, Appendix 58 - 59.

judgment. Mont. Code Ann. § 71-1-317. However, the Montana Supreme Court has consistently limited this statutory prohibition to deeds of trust used as security for the financing of occupied, single-family, residential property. *See, e.g. First State Bank of Forsyth v. Chunkapura*, 226 Mont. 54, 734 P.2d 1203 (1987) ("Our opinion in this cause is . . . to be considered as precedent only for trust deeds related to occupied, single family residential property." Order on Rehearing, 734 P.2d at 1211). *See also, First Federal Savings and Loan Association of Missoula v. Anderson*, 238 Mont. 296, 777 P.2d 1281 (1989), where the Montana Court upheld *Chunkapura,* so far as it relates to single family, occupied residential property.

Montana law limiting the preclusion of a deficiency judgment to occupied, single family, residential property was affirmed by the Montana Supreme Court in *Trs. of Wash.-Idaho-Mont. Carpenters-Emp'rs Ret. Trust Fund v. Galleria P'ship*, 239 Mont. 250, 780 P.2d 608 (1989) ("*Galleria I*") where the Court determined "[w]hen a lender holding a trust indenture as security chooses to foreclose under the mortgage laws, *Chunkapura* as modified holds that except for occupied single family residential property, lenders can obtain a deficiency judgment even on trust indentures." 239 Mont. at 258, 780 P.2d at 613.

The matter at bar does not involve an occupied, single family, residential property, rather it encompasses a commercial loan for a hotel and the additional and separate collateral of a bowling alley. Hence, under Montana law, First Bank is not precluded from obtaining a deficiency judgment. Under the facts of the instant case, the legal concept of a "deficiency" is somewhat out of place, because the loan at issue could not have occurred

without First Bank being over-secured with a security interest in the Hotel, and a security interest in the Bowling Alley. A true deficiency could only occur where both pieces of collateral were foreclosed and there was still an amount due on the loan.

Additionally, this case factually differs from majority Montana case law regarding trust indentures, because most of the cases in which the Montana Supreme Court have considered trust indentures and excess debts involve matters where there was one item of collateral, (generally, property purchased with the loan proceeds) not multiple items of collateral as presented here.

2. The Standard For Valuing Real Property In Montana For The Purposes Of Determining A Deficiency Remains Fair Market Value.

Under Montana law, the standard for valuing real property for the purposes of determining a deficiency remains fair market value. *Bank of Baker v. Mikelson Land Co.*, 294 Mont. 64, 71, 979 P.2d 180, 185 (1999), *citing, Trs. of Wash.-Idaho-Mont. Carpenters-Emp'rs Ret. Trust Fund v. Galleria P'ship, supra*, ("*Galleria I*"), and *Trs. of Wash.-Idaho-Mont. Carpenters-Emp'rs Ret. Trust Fund v. Galleria P'ship*, 250 Mont. 175, 185, 819 P.2d 158, 164 (1991) ("*Galleria II*").

In *Galleria I,* the Montana Supreme Court determined that a lender's low-ball bid at foreclosure did not represent the "intrinsic" value of the property, and therefore had no bearing on the borrower's deficiency. The case was remanded to the trial court to determine the objective, fair-market value after a hearing. *Galleria I* further provides that the actual fair market price, not the bid amount, determines whether a deficiency exists. In *Galleria I,*

the Court addressed an under-bid, but because the principle was that the fair market value is the true measure of the position of the foreclosing party, and the Court's broad equitable powers apply here to "do complete justice," the Court indicated it must likewise determine the fair market value of property that was over-bid at the foreclosure sale. *See, Galleria I,* 239 Mont. 265, 780 P.2d 617 ("the actual bid . . . is only a matter of degree"). Once that had occurred at the trial court, and the issue was back on appeal, the Montana Supreme Court affirmed the conclusion that a trial court has broad discretion to consider evidence when determining the "intrinsic" value of the property, because foreclosure drives prices down. 250 Mont. 186-87, 819 P.2d 165, (*Galleria II*).

Land Title's argument that First Bank's full credit bid satisfied the entire amount owing and conflicts with Montana law as established by *Chunkapura* and *Galleria I.* In *First Bank v. Tuschoff/Parks* (Case No. DDV 2014-326), the Montana District Court is currently considering evidence to determine the fair market value of the property and the deficiency amount. *See* Appendix 20 – 59.

Had Tuschoff not assigned his beneficial rights in the Bowling Alley trust indenture to First Bank, First Bank would not have loaned Tuschoff/Parks money to purchase the Hotel property. When Tuschoff assigned his beneficial rights to First Bank, First Bank became the new beneficiary of the trust indenture. The language of the trust indenture still controlled, but with Tuschoff's assignment working as an addendum, and providing further direction and loan protection.

It is a red herring to become mired in the question of "deficiency judgment," because First Bank was over-secured until Land Title ignored the assignment of the Bowling Alley trust indenture. It is more proper to consider the amount still owed on the Hotel a "deficiency debt," instead of a "deficiency requiring a deficiency judgment," because, but for Land Title's misfeasance, First Bank would have been fully collateralized.

Further, when Tuschoff/Parks defaulted on their Hotel loan obligations, First Bank could have foreclosed on the Bowling Alley collateral, in Washington. This, First Bank was unable to do, because despite a duty to do so, Land Title never contacted First Bank regarding the Bowling Alley sale, the assigned interest in the deed of trust, or the ultimate pay-off of the note.

3. Montana Law Protects Over-Secured Lenders.

AVCO Fin. Servs. of Billings One, Inc., v. Christiaens, 201 Mont. 117, 652 P.2d 220 (1982) while not directly on point, demonstrates the principle that Montana law protects over-secured lenders. In *AVCO*, the Christiaens obtained a loan from AVCO and executed a promissory note and security agreement which gave AVCO a lien on household goods and two older automobiles. The Christiaens also provided a second trust indenture lien on their Butte real property. When the Christiaens defaulted on the loan, AVCO obtained a default judgment. AVCO then brought a declaratory judgment action to determine if the judgment constituted a lien on property the Christiaens owned in Silver Bow County. The District Court of the Second Judicial District for Silver Bow County held there was no effective lien; AVCO appealed.

On appeal, the Christiaens argued that AVCO must first take possession of the collateral and reasonably dispose of it before attempting to acquire a deficiency and because AVCO did not repossess the collateral, it should be precluded from attempting to enforce its judgment via sale of their Silver Bow County property.

The Montana Supreme Court began its analysis by discussing Mont. Code Ann. § 30-9A-610, which states: "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." *AVCO* at 120, 652 P.2d at 222. The *AVCO* court also addressed Utah law and Mont. Code Ann. § 30-9A-601, which allow a creditor, on default, to take advantage of several items of either collateral or property which could be executed upon in judgment, in order to be paid. Accordingly, the Court held that a secured creditor is not required to first take possession and dispose of collateral, before obtaining a judgment and execution upon other property owned by a debtor. 201 Mont. at 120.

AVCO is relevant to the case at bar, because it recognizes that lenders who hold multiple items of collateral have the ability to be efficiently paid by executing upon whatever is available to them. In the instant case, First Bank had an indisputable security interest in the Bowling Alley. Land Title was aware of First Bank's interest, but due to Land Title's negligence, First Bank was unable to take advantage of the property that over-secured its Hotel loan. Hence, Land Title ruined First Bank's ability to recognize the value

of its over-security, in violation of Montana's law giving creditors the ability to benefit from their protected creditor position.

Because First Bank took positive steps to ensure that the Tuschoff/Parks Hotel loan was over-secured, *AVCO's* principles can be followed without offending the MSTFA. *AVCO* also removes any need to discuss the applicability of deficiency judgments under the MSTFA. First Bank's loss (whether reduced to judgment against the debtor or not, but which would be unnecessary but for failure of the collateral) is determined by taking the amount of the original debt at the time of the borrowers' default, reducing it by the fair market value of the foreclosed-upon property, regardless of the amount of the beneficiary's credit bid (*Galleria I* at 265, 780 P.2d at 617), and then determining the degree to which the "lost" Washington collateral would have covered what remained of the original debt.

4. *Rocky Mountain Bank v. Stuart* Is Not Determinative Montana Law.

The trial court rests its holding on *Rocky Mountain Bank v. Stuart*, 280 Mont. 74 928, P.2d 243 (1996). *Rocky Mountain Bank* is not determinative Montana law nor does it overrule the cases cited above.

Rocky Mountain Bank's self-described legal issues were: (1) was the non-judicial foreclosure sale under the MSTFA properly conducted, and, (2) was the debtor entitled to notice to vacate the trust property after the non-judicial foreclosure sale under the MSTFA? *Rocky Mountain Bank*, 280 Mont. at 77, 928 P.2d at 245. Neither issue is before this Court, nor do these holdings resolve the issues at bar. Further, the material facts of *Rocky Mountain Bank* and the matter at bar are different.

In *Rocky Mountain Bank,* Stuart borrowed money from the bank and executed a trust indenture covering his residential property in Blaine County, Montana. *Id.* The trust indenture conveyed the property to a trustee and named the bank as the beneficiary. Stuart defaulted on the loan. The trustee held non-judicial foreclosure proceedings under the MSTFA. At the time of foreclosure, Stuart owed the bank $97,051.63 in principal and interest. *Id.* The bank was the only bidder at the sale and it made a $69,900.00 "credit bid," which the trustee accepted over Stuart's objection. The trustee executed and recorded a trustee's deed conveying the trust property to the bank. Stuart remained in possession of the trust property and refused to vacate. The bank brought an action for possession and for attorney fees and costs.

The bank moved for summary judgment, contending: (1) that its "credit bid" complied with the MSTFA's "cash" requirements and, (2) that Stuart was not entitled to notice to vacate. *Id.* at 78, 928 P.2d at 245. Stuart filed a cross-motion, claiming that the foreclosure sale was improperly conducted because the bank did not pay the trustee in cash, or alternatively, the bank's complaint for possession was premature, because he was entitled to post-sale notice to vacate and the bank did not give such notice. The bank's motion was granted, Stuart's motion was denied, and he appealed. *Id.*, 928 P.2d at 246.

On appeal, the Court applied the ordinary meaning of the word "cash" and found that as used in the MSTFA, "the statutory phrase 'shall pay the price bid in cash,' meant that paying the price bid in money or its equivalent immediately or promptly after the foreclosure sale satisfies the statute." *Id.* at 80, 928 P.2d at 246. It concluded: "that an

accepted 'credit bid' by the trust indenture beneficiary at a non-judicial MSTFA foreclosure sale, defined as the prompt application of the bid amount to the trust indenture grantor's outstanding debt, constitutes payment by the purchaser of the price bid in cash as required by [the MSTFA]." *Id.* at 81, 928 P.2d at 247. Thus, the Court held that the sale was proper.

The *Rocky Mountain Bank* Court noted: "[t]he following facts are undisputed. On July 28, 1979, Stuart executed a trust indenture covering residential property (trust property) in Blaine County, Montana." *Id.* at 77, 928 P.2d 245. As set forth above in § C (1), *supra*, deficiency preclusion in Montana is limited to occupied, single family, residential properties. *Rocky Mountain Bank* does not address the commercial deficiency that is at issue at bar and therefore does not apply.

Rocky Mountain Bank also involves but one piece of collateral, not the two items of collateral that is presented here. Thus, *Rocky Mountain Bank* is materially different from the case at bar where two pieces of collateral were required.

In *First Bank of Lincoln v. Tuschoff, et al.*, 193 Wn. App. 413, 375 P.3d 687 (2016) (the Washington matter on the same facts that is before this Court), defendant, Banana Belt argued that when it paid the underlying Schwab/Tuschoff note, that satisfied the deed of trust because a security interest cannot exist without an obligation. Division III disagreed, stating:

> The flaw in Banana Belt's argument is that the Hotel Lincoln note created a separate obligation against the bowling alley property. Although Banana Belt's payment to Mr. Tuschoff extinguished Mr. Tuschoff's right to foreclose if Schwab failed to pay the Schwab/Tuschoff note, it did not

extinguish First Bank's right to foreclose if Mr. Tuschoff failed to pay the Hotel Lincoln note – a separate obligation that encumbered the property.

193 Wn. App at 423, 375 P.3d at 693 (emphasis added), Appendix 4. Hence, Division III specifically recognized that the Hotel note created a separate obligation against the Bowling Alley property and it did not extinguish First Bank's right to foreclose if Tuschoff failed to pay the Hotel note. A similar flaw exists in Land Title's argument and the trial court's holding, because while the Hotel foreclosure addressed the collateral that was the Hotel, if there was a deficiency, First Bank still had the right to foreclose on the second and separate source of collateral that was the Bowling Alley. Hence, *Rocky Mountain Bank* is inapplicable.

The limited legal issue *Rocky Mountain Bank* resolves (in the context of the MSTFA, is a lender's credit the same as cash?) is not what is at issue in this matter (where a lender is over-collateralized and via a full credit bid, forecloses on one piece of collateral, but after resale of said collateral, an amount remains owing, is the lender precluded from foreclosing on the second item of collateral?). Hence, *Rocky Mountain Bank* does not constitute determinative law and the trial court erred when it held otherwise.

D. The Full Credit Bid Rule Does Not Bar Causes Of Action Against Non-Borrower Third Parties Such As First Bank.

Whether the full credit rule bars a cause of action against a non-borrower, third party such as First Bank does not appear to have been addressed in Montana or Idaho, hence, it's a matter of first impression. As such, we look to other jurisdictions for guidance. Those jurisdictions hold that lenders who assert a full credit bid, can bring an action against

tortfeasor, non-borrower, third-parties. Hence, the trial court erred when it dismissed First Bank's case.

In *Bank of America, NA v. First American Title Insurance Co.*, 499 Mich. 74, 878 N.W.2d 816 (2016), the Michigan Supreme Court, sitting *en banc*, addressed the scope of the full credit bid rule and the inter-relationship between the bid rule and deficiency statutes.

In *Bank of America*, a mortgage broker submitted loan packages to the bank. The bank sent closing instructions to defendants Westminster Abstract and Patriot Title who agreed to close the loans for a fee. The closing instructions required that defendant First American include closing protection letters whereby it agreed to reimburse the bank for losses incurred in connection with the closings arising out of the fraud or dishonesty of the closing agents.

Unbeknownst to the bank, the property values for which it was providing loans had been inflated by fraudulent appraisals and paid straw buyers. Shortly after closing, all four borrowers defaulted. The bank foreclosed all four properties by advertisement and later purchased them at sheriff sales via full credit bids. The bank then sold all the properties to bona fide purchasers and lost roughly $7 million in the process.

During the foreclosure proceedings, the bank discovered the underlying fraud and brought suit against First American, Westminster, and Patriot. Pertinent to the appeal, the bank asserted a claim against Westminster, alleging that it violated the specific terms of the closing instructions, and a claim against First American for recovery under the CPLs for the actual losses arising from Westminster's and Patriot's fraud and dishonesty. Defendants

moved for summary judgment. The trial court granted summary judgment as to all claims and denied the bank's reconsideration motions. The Court of Appeals affirmed in part, relying on the full credit bid rule as discussed in *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich. App. 63, 761 N.W.2d 832 (2008) and concluded that certain claims were barred by plaintiff's full credit bids at the foreclosure sales. Bank of America appealed.

The Michigan Supreme Court first addressed Michigan's statutory scheme, vis-à-vis lenders, borrowers, defaults and foreclosures, including its anti-deficiency statute, concluding, that "[u]nder the full credit bid rule, a lender who takes title following a full credit bid 'is precluded for purposes of collecting its debt from later claiming that the property is actually worth less than the bid.'" *Bank of America*, 499 Mich. at 89, 878 N.W.2d at 823. However, the Court then discussed the applicability of the rule in other contexts, noting: "in this case, we must determine whether the full credit bid rule applies to bar contract claims against non-borrower third parties." *Id.* at 91, 878 N.W.2d at 824.

The Court analyzed *New Freedom, supra,* and the cases cited therein. Several of these cases, are also applicable to the facts at bar and are discussed below. The *Bank of America* Court was persuaded by *Alliance Mortgage v. Rothwell*, 10 Cal. 4th 1226, 900 P.2d 601 (1995), and *Kolodge v Boyd*, 88 Cal.App.4th 349, 105 Cal. Rptr. 2d 749 (2001), "as those courts recognized, the full credit bid rule is related to the anti-deficiency statute, and its purpose is merely to resolve the question of the value of the property for purposes of determining whether the mortgage debt was satisfied. It is not concerned with the relationship between the lender and third parties and was simply not intended to cut off all

remedies a mortgagee might have against non-borrower third parties." *Bank of America,* 449 Mich. at 96, 878 N.W.2d at 827.

The *Bank of America* Court concluded:

> In sum, although the full credit bid rule is not a creature of statute, we are cognizant of its relationship to the foreclosure by advertisement and anti-deficiency statutes. Those statutes are carefully designed to govern the relationship between, and establish the rights and liabilities of, the mortgagee and mortgagor--not nonborrower third parties. Like the courts in *Alliance Mortgage* and *Kolodge*, we conclude that there is no justification for extending the protections of the rule to alter the contractual rights and liabilities between a mortgagee and nonborrower third parties. Therefore, we hold that the full credit bid rule does not bar contract claims by a mortgagee against nonborrower third parties, and we overrule *New Freedom* to the extent that it conflicts with our decision today.

Id. at 98-99, 878 N.W.2d at 828-29 (emphasis added). The *Bank of America* Court further held that closing instructions constitute a contract upon which a breach of contract claim can be brought. *Id.* at 80, 878 N.W.2d at 818.

In the case at bar, when Tuschoff assigned his beneficial rights in the Bowling Alley property to First Bank, it stood in Tuschoff's shoes and any duty and obligation Land Title had vis-à-vis its client, Tuschoff was owed to First Bank. Given Land Title's failure to follow closing instructions, which required Land Title to pay off the exceptions listed in the title commitment, First Bank asserted breach of contract, specific performance, and third-party beneficiary claims against Land Title. CR 235 – 247. In accordance with *Bank of America, supra,* despite First Bank's full credit bid on the Hotel, First Bank's actions against Land Title remain viable and the closing instructions constitute a contract upon which a

breach of contract claim can be asserted. Thus, the trial court erred when it dismissed First Bank's case on the basis of the full credit rule as expressed in *Rocky Mountain Bank, supra.*

In *Alliance Mortgage v. Rothwell, supra*, the California Supreme Court considered the effect of a mortgagee's full credit bid on a claim of fraud in the inducement of the underlying loan obligation against the nonborrower, third-party defendants. *Alliance Mortgage*, 10 Cal. 4th at 1235, 900 P.2d at 605. After a lengthy review of California's anti-deficiency statute, the full credit bid rule, and applicable case law, the *Alliance Mortgage* Court concluded that a mortgagee's full credit bid did not, as a matter of law, bar its fraud claims against the defendants, as long as the mortgagee could establish that "its full credit bids were a proximate result of defendants' fraud, and that in the absence of such fraud it would not, in all reasonable probability, have made the bids." *Id.* at 1246-47, 900 P.2d at 614. In so doing, the California Court recognized that the full credit bid rule was not intended to immunize wrongdoers from the consequences of their fraudulent acts.

In *Kolodge v Boyd, supra*, the issue before the California Court of Appeals was whether the full credit bid rule barred claims of negligence and negligent misrepresentation against an appraiser. *Kolodge*, 88 Cal. App. 4th at 353. In holding that the rule does not bar such claims, the *Kolodge* Court noted that, although *Alliance Mortgage, supra,* only considered the full credit bid rule in relation to fraud claims, "the rationale of *Alliance*, as well as the authorities the court relied upon, strongly suggest such bids also do not as a matter of law bar any other tort claims against third parties who are not borrowers . . .." *Id.* at 364. The *Kolodge* Court recognized that the full credit bid rule was designed "to ensure

the integrity of non-judicial foreclosure sales insofar as such sales may relate to the debtor protection policies of the anti-deficiency statutes." *Id.* at 356. Further, "[l]ike the anti-deficiency statutes, the full credit bid rule is not concerned about the relationship between the lender and third parties, but only the relationship between the lender and the borrower . . . ." *Id.* at 365-66.

After reviewing *Cornelison v Kornbluth*, 15 Cal.3d 590, 607, 125 Cal.Rptr. 557 (1975) which established the full credit bid rule in California, the *Kolodge* Court observed that the decision provided "no reason to think a full credit bid establishes the value of the property for any purpose other than a determination whether the borrower subject to the lien has satisfied the secured obligation." *Kolodge at 368.* Then, after analyzing *Pacific Inland Bank v. Ainsworth*, 41 Cal.App.4th 277, 48 Cal. Rptr. 2d 489 (1995) the *Kolodge* Court concluded that the case was "wrongly decided and decline[d] to follow it," noting that the "[a]pplication of the [full credit bid] rule to bar claims against tortfeasors not party to the [promissory] note goes far beyond the purpose of the rule and is simply irrational." *Kolodge,* 88 Cal. App. 4th at 370.

In *Glenham v. Palzer*, 58 Wn. App. 294, 792 P.2d 511 (Div. I, 1990), a group of investors sued multiple parties alleging violation of state securities and consumer protect acts, common-law fraud, negligence, and breach of fiduciary duty, in connection with real estate investments. On the basis of RCW 61.24.100 (Washington's deficiency statute), the defendants moved for summary judgment. The trial court dismissed stating that the borrowers' obligations were satisfied by plaintiffs making full credit bids at a nonjudicial

foreclosure sale or accepting deeds to the secured property in lieu of foreclosure. The Court of Appeals reversed, holding that those plaintiffs who were secured creditors could recover deficiencies against defendants who were not obligors under the loan agreement relating to the debt. In so doing the Court noted:

> In this case, the defendants seeking to be immunized from liability by the statutory satisfaction of the secured debt are not obligors on the secured obligations. They are all third parties to the loan transaction. We find no indication in RCW 61.24.100 or related statutes of a legislative intent to allow strangers to the loan transactions to be protected by the anti-deficiency statute. Nor do we see where extending the application of the statute to non-obligors accused of tortious conduct and violation of unrelated statutes would serve any purpose consistent with our perception of the legislative intent. Failing to apply the anti-deficiency provisions to third persons does not offend any of the basic objectives of the deed of trust act. We therefore hold that the provisions of RCW 61.24.100 are not applicable to these defendants. The statutory language providing that foreclosure satisfies the obligation and prohibiting deficiency decrees on that obligation can reasonably be limited in its application on the facts of this case to the obligors on the secured loans.

Glenham, 58 Wn. App. at 298, 792 P.2d at 553.

Applying the law expressed in these three cases (*Alliance Mortgage, supra*, *Kolodge, supra,* and *Glanham, supra,*) to the instant case, First Bank's First Amended Complaint (CR 235 – 247) asserts causes of action for negligence, breach of contract, specific performance, and estoppel. While First Bank has not asserted a fraud action against Land Title (*Alliance, supra*) its other causes of actions bring it within the causes of action asserted in *Kolodge, supra*, and *Glenham, supra*. Hence, the trial court erred when it held that First Bank's full credit bid extinguished its causes of action against Land Title.

E. Under The Same Facts and Legal Grounds Of This Matter, The Montana District Court Denied Summary Judgment, The Idaho Court Granted Summary Judgment. This Court Should Follow Montana Law.

A comparison of the Order on Motion for Summary Judgment issued by Judge Reynolds in Montana District Court of the First Judicial District (*See,* Appendix 8 – 19) with the Order of Summary Judgment issued in this matter (CR pgs. 723 - 730) establishes that as did Land Title in this matter, Tuschoff/Parks moved for summary judgment asserting that by bidding the full loan amount at the foreclosure sale, First Bank received full payment and satisfaction of its underlying obligation. The Montana court denied summary judgment, stating that the *Galleria* decisions, *supra,* provide several legal principles that apply to the Hotel transactions.

First, the Montana court noted that because the trust indenture was not for a single-family residence, but for a commercial transaction, a deficiency amount owing could be calculated. Appendix 16.

Second, foreclosing on a trust indenture for a commercial transaction can result in a deficiency amount being owed to the lender. The Montana court stated: "The example used is that a low-ball bid on a trust indenture foreclosure would be inappropriate in determining what the lender was owed. Thus, in this case, the Bank could claim a deficiency amount owing if the amount bid was insufficient to satisfy the Bank's loan." Appendix 17.

Third, *Galleria*, *supra*, cautions against relying on the amount bid at the foreclosure sale as the sole determinant of the fair market value of the Hotel. The Court noted that the parties acknowledged that the Hotel was not adequate to secure the Hotel loan and

necessitated the pledge of additional security from the Bowling Alley. Hence, this raised a genuine issue of material fact and the Court will need to acquire additional evidence to determine if First Bank is owed a deficiency amount by Tuschoff/Parks. Appendix 17 – 18.

In accordance with the Montana court's request, First Bank's Montana counsel has moved for summary judgment and provided the evidence necessary to determine the amount of the deficiency. *See*, Appendix 20 – 59.

Inasmuch as both parties and the trial court have determined that Montana law applies, this Court should follow it and deny Land Title's summary judgment motion. Further, and under the law above-stated, the Court should grant First Bank's summary judgment motion on the issue of deficiency judgment and the full credit bid rule.

F. The Public Has a Substantial Interest In a Dependable Mortgage System.

A majority of persons and entities cannot afford to purchase real property without the aid of the lender. Hence, a robust, trustworthy, lending system is of critical importance to our financial system and to all of us.

The United States lending/financial system is interdependent and as we learned during the 2008 financial crisis, only as strong as the weakest link. When one link gives way, the chain is broken, a significant portion of the financial system comes down, and many are dragged down with it, whether they were directly involved in a specific transaction or not.

Our lending system is founded in contract and has checks and balances that are meant to ensure a dependable and stable system. As part of these checks and balances,

lenders will not make loans that do not have adequate security as a contrary system is not sustainable. Title companies ensure that when property is sold, clear title is delivered because a divergent system is not untenable. Escrow companies handle millions of dollars in transactions and ensure that funds are properly handled and delivered correctly. States and counties have created a national system whereby one can file and document one's property rights, so that others have notice of them. For this interdependent system to be viable, all of its component parts must work in harmony, and the public has a substantial, vested interested to see that it does.

In the instant matter, the system functioned properly, to a point: sufficient equity did not exist in the property Tuschoff/Parks wished to purchase, so First Bank obtained two pieces of collateral to cover its loan. First Bank, Washington State and Asotin County worked together to ensure others had notice of First Bank's Bowling Alley security interest via appropriate filings. First American Title performed its work: First Bank's security interest appeared as an exception in its title report and First American informed the escrow company, Land Title, of First Bank's exception. In closing instructions, Land Title was directed to pay off First Bank, so as to deliver clear title to the Bowling Alley purchaser, Banana Belt and its lender, Colombia Bank. Within the system, Land Title, as it should have done, represented that it would pay off the exception. Shortly thereafter, the weak link of the chain appeared when Land Title misdirected all of the Bowling Alley escrow funds to Tuschoff, failed to pay off First Bank's exception, or deliver clear title to Banana Belt and Colombia Bank.

Our legal system is a component part of the overall system and when a chain breaks, our laws should be construed in a manner such that the weakest link is held responsible for that which it proximately causes. In this instance, as the chain was breaking, First Bank had no knowledge of it, was unable to do anything about it, and was simply dragged down by it. But for Land Title failing to do what the system required it to do, we would not be in Court. The public and each component part of the lending system have a substantial interest in being able to rely on a robust and interdependent lending system and our legal system should support such a system.

VII. CONCLUSION

First Bank loaned Tuschoff/Parks funds to purchase the Hotel Lincoln. First Bank would not have made the loan were it not secured by the Hotel and the Bowling Alley. First Bank recorded the Tuschoff's Bowling Alley deed of trust assignment in Asotin County and filed a UCC-1 statement with the Washington Department of Licensing. As a result, First Bank's beneficial interest in the Bowling Alley appeared in the title commitment. Land Title was informed of First Bank's beneficial interest, was instructed to pay it off so as to provide clear title to the purchaser, and Land Title represented that it would do so.

Contrary to its representations, Land Title did not follow the closing instructions or do what it said it would do. When Tuschoff defaulted on the Hotel loan, First Bank foreclosed on the Hotel, and because, as was known at the outset, there was not enough equity in the Hotel to cover the loan, looked to its security in the Bowling Alley to cover what Tuschoff would further owe. Due to First Banks' negligence, no funds could be

derived from the Bowling Alley security. Not including contractually required legal fees and costs or additional accruing interest, Land Title proximately caused First Bank a $292,348.70 loss.

Montana law allows deficiency judgments in matters involving commercial loans. The standard for valuing real property in Montana for the purposes of determining a deficiency remains fair market value. Montana law (Mont. Code Ann. § 30-9A-601 and 610) protects over-secured lenders. But for Land Title's negligence, First Bank would have remained over-secured and able to take advantage of Montana law and its Bowling Alley collateral.

Rocky Mountain Bank v. Stuart, *supra*, is not determinative Montana law and the trial court erred when it held otherwise.

The full credit bid rule applies between lenders and borrowers and protects defaulting consumers at the time of foreclosure. The rule does not apply to, nor was it intended to protect negligent third parties who ignore closing instructions. Lenders, who in good faith, assert a full credit bid to foreclose commercial property can bring an action against tortfeasor, non-borrower, third-parties such as Land Title and the trial court erred when it held otherwise.

Under the same facts and legal grounds of this matter, the Montana District Court denied summary judgment. This Court should follow Montana law and as to the full credit bid rule and deficiency judgments grant summary judgment in favor of First Bank as a matter of law.

The public and each of the components of the lending system have a substantial interest in being able to rely on a robust lending system and our legal system should support such.

Pursuant to I.A.R. 41(a), I.C. § 12-120(3) and/or I.C. § 12-121, First Bank requests an award of attorneys' fees and costs.

DATED this 24th day of September, 2018.

PAINE HAMBLEN LLP

By: _____
Scott C. Cifrese, ISBA #4965
Gregory S. Johnson, ISBA #9664
Attorneys for Appellant/First Bank

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of September, 2018, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

- ☐ U.S. Mail
- ☐ Overnight Delivery
- ☐ Hand Delivered
- ☐ Via Fax: (208) 388-1300
- ☒ Court Email

Gregory S. Johnson

I:\SPODOCS\41175\00002\PLEAD\1739804