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Bennett v. Bank of Eastern Oregon Respondent's Brief Dckt. 47346

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRET W. BENNETT, an individual, and MARY E. BENNETT, an individual,
Plaintiffs/Appellants,

vs.

BANK OF EASTERN OREGON, a national banking association,
Defendant/Respondent.

SUPREME COURT NO. 47346-2019

Case No.: CV38-19-0402

RESPONDENT'S BRIEF

Appeal from the District Court of the Third Judicial District for Payette County.

Honorable Susan E. Wiebe, District Judge, presiding.

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II. DEFENDANT'S STATEMENT OF THE CASE

A. Nature of the Case

The nature of the case is more accurately stated as follows:

This is an action for quiet title by the grantors of a deed of trust securing a loan from Defendant/Respondent, Bank of Eastern Oregon ("BEO"). The debt secured by the deed of trust remains unpaid, but the foreclosure remedies for the deed of trust have expired.

In addition, the Plaintiffs/Appellants, Brett W. and Mary E. Bennett ("Bennetts") seek quiet title against a personal judgment for the debt partially secured by the deed of trust and which has expired by operation of law and is no longer a cloud on Bennetts' title.

B. Course of proceedings in Trial Court

BEO agrees with the Bennetts' statement of the course of proceedings in District Court.

C. Statement of Facts

BEO accepts Bennetts' statement of facts with the following additions.

The Bennetts admit that their bankruptcy discharge did not void BEO's lien from the deed of trust (R.p. 66, L.5-6). It appears from the bankruptcy record that Bennetts' real property was released to Bennetts for administration pursuant to 11 U.S.C. 554(c).

III. DEFENDANT'S STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Is the grantor of a deed of trust, the remedies for which have expired, entitled to quiet title without alleging or tendering payment for the secured debt?
2. Is *Trusty v. Ray,* 73 Idaho 232 (1952), still good law?

3. Is it error to deny quiet title against a judgment which is expired and unenforceable by operation of law and no longer creates a cloud on title?
4. Is the filing of a foreign judgment pursuant to the Uniform Enforcement of Foreign Judgment Act (EFJA), as opposed to the proceeding which produced the foreign judgment, an "act or proceeding" under Idaho's one action rule, Idaho Code § 45-1503(1)?

IV. ATTORNEY FEES ON APPEAL

A. BEO is entitled to attorney's fees on appeal under Idaho Code § 12-121.

Due to the frivolous nature of the present litigation, Bennetts should be responsible for reasonable attorney fees incurred by BEO in defending this appeal.

In any civil action, the court may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. Idaho Code § 12-121. This statutory power is discretionary; the Court will award attorney fees when the Court is left with the *abiding belief* that the appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation. *Minich v. Gem State Developers*, 99 Idaho 911, 918 (1979) (emphasis added).

The Idaho Supreme Court has held that maintaining an action in instances where previous case law definitively contradicts a claimant's position can be a basis for finding that litigation is frivolous and that the opposing party is entitled to attorney's fees under Idaho Code § 12-121. *Cameron v. Neal*, 130 Idaho 898, 902 (1997) (holding that, since plaintiffs had ignored the

guidance of established case law in manufacturing elements of a claim, the action was frivolous and that the defendant was entitled to attorney fees under § 12-121).

Similar to *Cameron*, Bennetts are maintaining the current action in direct contradiction of established case law. Prior to initiating this action, Bennetts had guidance from *Trusty v. Ray*, a definitive ruling on the issues they raise, based on a set of directly analogous facts, upheld by dozens of subsequent decisions, telling them that their quiet title action was without merit. In *Trusty v. Ray*, the Idaho Supreme Court held unequivocally that a mortgagor and any subsequent purchaser in privity with that mortgagor cannot quiet title to real property without paying their debt even when enforcement of the mortgage is barred by the statute of limitations. *Trusty v. Ray*, 73 Idaho 232, 236-37 (1952). Even with the benefit of guidance from *Trusty*, Bennetts seeks to quiet title on real property without satisfying their mortgage debt.

Such inequitable conduct in direct contradiction of established case law constitutes frivolous litigation under § 12-121. BEO therefore asks this Court to award reasonable attorney's fees on appeal incurred in defending the Bennetts' frivolous claims.

V. ARGUMENT

A. Bennetts' action for quiet title against the expired judgment lien is moot because the judgment fails to create a cloud on title by operation of law, and because it involves a debt for which a remaining deed of trust exists.

In ruling on the motion to dismiss relating to the expired judgment, the Trial Court did not rule (as suggested by Bennetts' App. Br., p.10) that the Bennetts "may not maintain an

action..." Rather, the Court correctly noted that it is a "nonissue" (Tr. p. 24, L. 14-16). It is a nonissue for three reasons.

1. **Bennetts' action to quiet title for the expired judgment lien is moot because there is, by operation of law, no cloud on title.**

Chapter 10 of the Idaho Code makes clear that liens resulting from the recordation of a judgment expire by operation of law and cease to encumber property following expiration. As written in 2011, at the time of recordation of the abstract of judgment, liens resulting from such recordation "continue[d] five (5) years from the date of the judgment", unless the judgment was satisfied before such time. Idaho Code § 10-1110 (2011 version). Idaho Code § 10-1111 also reiterates the impact of the five (5) year lien when discussing the ability to renew such liens, where it reads: "Unless the judgment has been satisfied, at any time prior to *the expiration of the lien* created by section 10-1110, Idaho Code." (emphasis added). This language means that impact of a failure to renew is not simply a loss of the lien's priority position with respect the property, the lien is lost and renewal of the judgment and refiling is required to gain a new lien interest in the property. "Idaho Code section 10-1111(1) does not allow for sua sponte renewal" *Grazer v. Jones*, 154 Idaho 58, 69 (2013). Idaho law simply does not allow a lien to continue to encumber the property past the applicable time allowed by statute.

2. **Bennetts conceded that the expired judgment lien no longer creates a cloud on title.**

In the course of argument in the Trial Court, the judge questioned whether the judgment is a nonissue, asking Bennetts' counsel, "It does not show up on a title report; right?" (Tr. p.24,

L.14-16) Bennetts' counsel responded: "Well, your honor, it did previously show up on a title report. And I think the title company may have taken it off based upon some argument." (Tr. p.24, L. 17-20).

Where the judgment has expired by operation of law, and is admittedly removed as an exception on the title report, there is no error in denying the request for quiet title.

3. Bennetts' claim regarding the judgment is moot because the lien of the deed of trust remains a lien against the property regardless of the judgment.

As discussed below, the lien of the deed of trust survives even after expiration of BEO's remedies for its enforcement. In these circumstances, quieting title against the expired judgment would be merely a symbolic act. If it were error to deny quiet title in this situation, it would be harmless error Idaho R. Civ. P. 61.

4. Bennetts cite no authority for an obligation to "release" an expired judgment lien and have not pleaded a claim for declaratory judgment.

Bennetts allege in their complaint (R. p. 9, L. 18-19, p. 10, L. 4-5) and repeatedly refer to BEO's "failure" and "refusal" to release the judgment lien or reconvey their interest in the trust deed. (App. Br., p. 11-12). However, Bennetts do not cite to any source creating the duty on the part of BEO to take any affirmative action with respect to these obligations. Certainly, a creditor is obligated to satisfy a judgment or deed trust once it is paid in full, but has no duty to remove or satisfy otherwise. To read otherwise would force a creditor to incorrectly assert the debt has been satisfied when such is not the case.

Bennetts also argue, for the first time, that the trial court's ruling "denies the Bennetts' standing to seek a declaratory judgment in this matter" (App. Br., p. 11). Bennetts did not plead a claim for declaratory judgment in the complaint and did not raise any issue regarding declaratory judgment in their brief or argument in the trial court.

B. Because of this Court's holding in *Trusty v. Ray*, Bennetts may not seek quiet title against the deed of trust without alleging or tendering payment.

Bennetts are not entitled to the remedy of quiet title against BEO because they have not pled tender of the debt obligation owing for which the trust deed is security. Idaho law is well settled in this regard under the principles enumerated in *Trusty v. Ray*, which remain unimpaired by Idaho Code § 6-411 and § 6-413: "The general rule is that a mortgagor or his successor in interest cannot quiet title against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run against the right to foreclose the mortgage." *Trusty v. Ray*, 73 Idaho 232, 236 (1952).

While a quiet title action is a challenge to the defendant's interest in the property, the plaintiff is asserting his or her own interest in the property in bringing the action. *Eagle Equity Fund, LLC v. TitleOne Corporation*, 161 Idaho 355, 362 (2016) (citing *Silver Eagle Mining Co. v. State*, 153 Idaho 179, 181 (2012)). A plaintiff seeking to quiet title "must succeed on the strength of his or her own interest and may not rely upon the weakness of his or her adversary's interest." *Aldape v. Akins*, 105 Idaho 254, 260 (Ct. App. 1983) (citing *Pincock v. Pocatello Gold & Copper Min. Co. Inc.*, 100 Idaho 325, 331 (1979)).

Bennetts do not deny that the holding of *Trusty v. Ray* would bar their claim for quiet title against Defendant; instead their entire argument is based on the contention that the holding of *Trusty v. Ray* conflicts with § 6-411 and § 6-413 and is therefore superseded by the enactment of those statutes. Despite the apparent conflict between the language contained in § 6-413 with the holding of *Trusty*, a review of the equitable principles which form the basis for *Trusty* show that the two are able to co-exist without conflict.

Idaho courts have long held that those who seek equity must do equity. *Burke Land & Live-Stock Co. v. Wells, Fargo & Co.*, 7 Idaho 42, 59 (1900). That principle has been held to apply to quiet title actions. Quiet title suits are equitable claims for relief by a party seeking to clear title. *Beal v. Mars Larsen Ranch Corp. Inc.*, 99 Idaho 662, 667 (1978). A mortgage made unenforceable by the running of the applicable statute of limitations still qualifies as a cloud on title to real property. When clearing a cloud on title, a mortgagor's duty to act equitably by paying his debt continues even after enforcement has been barred by the statute of limitations. *Mendini v. Milner*, 47 Idaho 439, 445-46 (1929); *Miller v. Monroe*, 50 Idaho 726, 731 (1931). A statute of limitations may not be used other than as a shield or defense against the enforcement of a claim; it may not be used as a sword. 164 A.L.R. 1387.

In order to "do equity" as a condition to receive the equitable relief sought in a suit for quiet title, a "mortgagor or other person under a moral obligation to pay a debt notwithstanding the bar of its enforcement arising from the statute of limitations . . . may have such a mortgage lien removed as a cloud only upon the condition that he pay the amount which in equity he owes." *Id.* "Where there is no privity of relation between the mortgagor and the person seeking

to have the mortgage removed as a cloud, or to have his title quieted as against the mortgagee, and the latter is under no moral obligation to pay the mortgage debt, the courts seem generally to regard the situation as one appropriate for granting of affirmative relief without exacting any condition of payment." *Id.*

As a preliminary matter, *Trusty v. Ray* was decided 17 months following the enactment of the two (2) statutes relied upon by the Bennetts. Bennetts ask this Court to presume that because the Court in *Trusty* did not specifically cite to § 6-411 and § 6-413, no party called attention to these new statutes as applicable to the case, or that it was decided on a different statutory scheme. In support of this argument, Bennetts cite the statutes listed in *Trusty* which specifically relate to the applicable statutes of limitations which applied to the mortgage in question. As Idaho Code § 6-401 codifies the right to bring quiet title actions in Idaho and was enacted in 1937, the case was certainly analyzed under the framework of the statutory scheme outlined in Title 6, Chapter 4 of the Idaho Code. Further contradicting Bennetts' argument that the Court may not have been aware of new legislation applicable to the case at bar is the dissenting opinion issued by Justice Keeton where an amendment to Idaho Code § 55-817 made by the same legislative session enacting § 6-411 and § 6-413 was noted. See *Trusty*, 73 Idaho at 239. Had the enactment of § 6-411 and § 6-413 had the effect asserted by Bennetts in this case, the outcome of *Trusty* would have been different.

Sections 6-411 and 6-413 address situations where a party seeking to quiet title against the interest of a mortgage which has been barred by the applicable statute of limitations and the party seeking such relief is not in privity with the original mortgagor or is not under a

moral obligation to pay the mortgage debt, he or she may be granted the equitable relief. Any interpretation of these statutes contrary to this interpretation would grant mortgagors a windfall in an equitable case by allowing them to remove a lien against real property without paying the underlying obligation they are morally obligated to satisfy. This is inconsistent with the maxim of one must do equity to receive equity.

Idaho Courts have repeatedly cited *Trusty v. Ray* in dismissing case after case where a party seeks to quiet title against a lien created by a mortgage and where the plaintiff has failed to plead payment or tender of the secured obligation. *See Purdy v. Aegis Wholesale Corp.*, Civil No. 1:11-cv-00640-EJL-REB, 2012 WL 4470945 (D. Idaho Aug. 17, 2012); *In re Mullin*, 402 B.R. 353 (Bankr. D. Idaho 2008); *Ohlsen v. Bank of America, N.A.*, Civil No. 1:11-cv-00357-BLW-REB, 2012 WL 3285587 (D. Idaho Aug. 10, 2012); *Hobson v. Wells Fargo Bank, N.A.*, No. 1:11–cv–00196–BLW, 2012 WL 505917 (D. Idaho Feb. 15, 2012). Also worth noting are two articles published in the Idaho State Bar journal which have confirmed the status of Idaho law as it applies to the case at bar as BEO argues here. Derrick J. O'Neill & Lewis N. Stoddard, *Zombies Attack!,* The Advocate, Nov./Dec. 2019, at 36; Kelly Greene McConnell, *No Free Houses: Few Mortgages Have Fatal Flaws*, The Advocate, Jan., 2012, at 30.

Modern Idaho Supreme Court decisions have continued to uphold the principles articulated in *Trusty*. In *Losee v. Idaho Co.*, the Idaho Supreme Court held that in order to remove a cloud upon title, a debtor has the burden of showing that the title is free from encumbrance. *Losee v. Idaho Co.*, 148 Idaho 219, 222 (2009). Under Idaho Law, lapse of the statutory period does not remove an encumbrance. A statute of limitations in Idaho is a statute of

repose, "lapse of the statutory period bars the remedy to enforce the debt but does not extinguish the debt." *Hirning v. Webb*, 91 Idaho 229, 231 (1966).

Nothing in § 6-411 and § 6-413 does anything to abrogate the long held principle that mortgagors cannot assert superior title to a mortgagee where a moral obligation exists to pay the underlying debt unless the debt has been paid or tender therefore has been made. Absent such a pleading, Bennetts' quiet title suit must be dismissed.

C. Bennetts' filing of its Oregon judgment pursuant to the EFJA does not run afoul of Idaho's One Action rule codified in Idaho Code § § 45-1503 and 6-101.

Bennetts' interpretation of Idaho Code § § 45-1503 and 6-101 would establish a dangerous approach to the Court's interpretation of Idaho's one action rule and the codified exceptions in direct contravention of the language set forth in Idaho Code § 6-101(2). While it is true Idaho's adoption of a one action rule does restrict the common law right to bring an action on a debt, note or bond secured by a mortgage, such statutes should be strictly construed because they are a derogation of a common-law right to pursue alternative remedies at the same time. 59 C.J.S. *Mortgages* § 455 (2019). The Idaho Legislature has codified this principle in the exceptions to the one action rule set out in Idaho Code § 6-101(3) and the directive of Idaho Code § 6-101(2) which requires the rule be "construed in order to permit a secured creditor to realize upon collateral for a debt or other obligation otherwise agreed upon by the debtor and creditor." Bennetts urged interpretation runs directly in opposition to this intent behind the one-action rule's limitations.

BEO's filing of the foreign judgment is permitted under of the one-action rule. The impact of the one action rule is to bar an action to foreclose on the trust deed, not to invalidate the lien of the trust deed. The Court should uphold the Trial Court's dismissal of Bennetts' claim.

1. **Domestication of a Foreign Judgment which is exempt under Idaho Code §6-101(3)(d) is not a separate action from the underlying suit and therefore does not violate the one action rule.**

Bennetts ask this Court to hold that the simple act of filing a judgment under the Enforcement of Foreign Judgments Act (EFJA) qualifies, on its own, as an "action" for the recovery of a debt. Such a contention is contradictory to Idaho case law and the purposes and intent behind Idaho's one action rule.

As a preliminary matter, the filing of a foreign judgment under the EFJA is not a case separate from the underlying action. *Grazer v. Jones*, 154 Idaho 58 (2013). Furthermore, the filing of a foreign judgment under the EFJA is not properly considered an action based on the foreign judgment. *Id.* at 65. Idaho case law is clear; the filing of a foreign judgment is simply an extension of the underlying action and is not a separate act to seek in personam recovery from the debtor.

The filing of a foreign judgment does not, on its own, create any execution against the assets of the debtor. A party filing a foreign judgment must pursue execution on that judgment in order to realize on the obligation reflected in the judgment. Until such action is taken, there is nothing distinct from the underlying case to violate the one action rule. This was precisely the point behind the holding in *Grazer*; no new Idaho judgment is created by an EFJA filing. Absent

a separate "action" on the debt, the one-action rule is not violated and Plaintiff would retain the defense created in Idaho Code § 45-1503 in the event the judgment creditor sought execution of the foreign judgment.

Even if such a filing of a foreign judgment under the EFJA was a separate action, distinct from the underlying case, Idaho Code § 6-101(m) would exempt it from application of the one action rule because the registration of the judgment does not, by itself, include the collection of the debt or the enforcement of the obligation. This is the only interpretation which keeps the mandate of Idaho Code § 6-101(2) intact.

2. **The impact of violation of the one action rule is a bar to foreclosure of the trust deed, not invalidation of the lien of the trust deed as suggested by Bennetts.**

Idaho Code § 45-1505(4) bars foreclosure of a trust deed by advertisement and sale where another action, suit or proceed has been commenced and not dismissed. Idaho Code § 45-1503 provides a further remedy in form of blocking judicial action against the grantor unless the action is specifically exempt. Nowhere in the statute does the Idaho legislature indicate an intent that violation of the one action rule should invalidate the lien of the trust deed. Because the one action rule is a derogation of the common law right to pursue alternative remedies, the Court should not imply any impact to the statute not clearly manifested in the language approved by the legislature. Had the legislature intended for a violation of the one action rule to invalidate the lien of the trust deed, it could have easily so provided. The Court should interpret the language of the statutes narrowly. Even if BEO was found to have violated the one act rule by filing its own judgment, had the impact would simply be the loss of the ability to foreclose on the trust deed.

As discussed above, the inability to foreclose on a trust deed does not invalidate the lien against the property.

At its core, Idaho's one action rule is a defense to actions on debts secured by real property. Bennetts ask this Court, in a case in equity, to use the rule to grant them a windfall. Such an outcome is directly contrary to the principles articulated in the *Trusty* case as discussed above. Neither Idaho's one action rule nor the principles of equity allow such an outcome.

Liens of trust deeds are hard to eliminate for good reason. Where an obligation is secured by a trust deed, the liability to pay the debt rests upon the mortgaged land as well as upon the mortgagor. *Gerken v. Davidson Grocery Co.*, 50 Idaho 315, 321 (1931). The *Trusty* decision already holds that even where a beneficiary is barred from enforcing its remedies under the trust deed, the lien should survive where equity requires a moral duty to pay the underlying obligation. The same is true for Idaho's one action rule. Even if a violation of the rule were found to have occurred, where the underlying obligation secured by the trust deed remains unpaid, the mortgagor should not be entitled to quiet title against the mortgagee. Any other application of the one-action rule would violate the principles established in the *Trusty* decision.

Bennetts do not deny that they have not paid the obligation secured by the trust deed to BEO, nor have they tendered payment thereon. Bennetts further admit their discharge in bankruptcy did not remove the lien of the trust deed against the property. (R.p. 66, L. 5-6) Despite these admissions, Bennetts ask this Court to hold that a court siting in equity should grant them title to the property free of the lien despite the fact the debt remains unpaid to Defendant. The Court should not allow such a windfall to occur. These principles can only be

maintained by holding the remedy for violation of the one action rule to be a loss of foreclosure remedies and not an invalidation of the lien of the trust deed.

D. Bennetts are not entitled to attorney fees on appeal because Idaho Code § 12-120(3) does not apply in a suit for quiet title.

In *Brower v. E.I. DuPont*, the Idaho Supreme Court limited the scope of Idaho Code § 12-120(3). In *Brower*, false representations by DuPont caused a farmer who bought herbicide to miss out on several years of farm income when the herbicide prevented safe cultivation of the land for an unexpectedly prolonged period. *Brower v. E.I. DuPont de Nemours & Co.*, 117 Idaho 780, 780 (1990). The Court held that the award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case. The test is instead, "whether the commercial transaction comprises the gravamen of the lawsuit." *Id.* at 784. Fees are not appropriate under § 12-120(3) unless the commercial transaction is *integral to the claim*, and *constitutes the basis* upon which the party is attempting to recover. *Id.* (emphasis added). In that case, while there was indeed a sale of goods, the claim was based on pre-sale conduct and post-sale harm that arose from the use of the product. The case did not revolve around the commercial transaction itself sufficiently to implicate § 12-120(3). *Id.*

In *Merrill v. Gibson*, the Idaho Supreme Court ruled directly on whether § 12-120(3) applies to quiet title claims. It does not. *Merrill v. Gibson*, 139 Idaho 840, 845-46. In *Merrill*, a property dispute developed between a farmer and his financier regarding whether the money given to the farmer when he first occupied the property was a loan to finance the farmer's purchase of the land, or a land purchase by the financier in which the farmer became a

commercial tenant whose periodic payments to the financier were rent. The financier eventually filed a quiet title action to settle the dispute in Court. *Id.* at 843. In assessing the availability of attorney fees under § 12-120(3), the Court held that the quiet title action involved a determination of property rights that does not support an award of attorney fees under the statute. *Id.* at 845-46. A quiet title action involves the determination of rights to a piece of real property; it does not involve the validity or breach of a commercial transaction. *Id.* at 846.

In this case, the Bennetts are seeking attorney's fees in an equitable action to quiet title. This is precisely the situation that was considered in *Merrill*. The Bennetts seek a judgment definitively establishing their interest a piece of real property. The economic transaction in the background of the relationship between the parties is so tangential to the current action that it cannot reasonably be considered the gravamen of the lawsuit. Therefore, attorney's fees are not recoverable under § 12-120(3).

VI. CONCLUSION

BEO requests that this Court affirm the District Court's judgment dismissing Bennetts' action for failure to state a claim.

Dated this 4th of February, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2020, I filed the foregoing RESPONDENT'S BRIEF electronically through the Idaho electronic filing system.

I FURTHER CERTIFY that the foregoing document will be served electronically by the electronic filing system on the following parties:

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