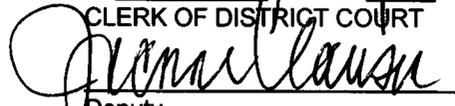


FILED 4/5/19

AT 12:45 o'Clock P. M

CLERK OF DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**MICHAL E. MARDOCK and JULIE A.
MARDOCK, husband and wife,**)
)
) *Plaintiffs,*)
)
vs.)
)
**MICHAEL McCLAUGHRY an individual,
VIRGINIA McCLAUGHRY, et al.,**)
)
) *Defendants.*)
)

Case No. **CV28-19-0343**

**MEMORANDUM DECISION AND
ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This action is before the Court on a Motion for Summary Judgment brought by plaintiffs Michal Mardock and Julie Mardock (the Mardocks) on their claim for ejectment against defendants Virginia McCloughry and Michael McCloughry (the McCloughrys). Oral arguments took place on April 3, 2019, and the matter was thereafter taken under advisement by the Court. For the reasons set forth below, the Mardocks' Motion for Summary Judgment is granted.

On January 27, 2011, Lee Robertson (Robertson), as grantor, executed a Deed of Trust encumbering the property located at 16289 W. Summerfield Road, Post Falls, Idaho 83854 (Property).¹ Mem. in Supp. of Pls.' Mot. for Summ. J., 2. Bank of

¹ In the Deed of Trust, the Property is also described as: A TRACT OF LAND LOCATED IN THE NORTHWEST QUARTER OF SECTION 17, TOWNSHIP 50 NORTH, RANGE 5 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS, IN-WIT: COMMENCING AT THE NORTH QUARTER CORNER OF SAID

America, N.A., was named as beneficiary to the Deed of Trust. *Id.* On March 28, 2011, the Deed of Trust was recorded with the Kootenai County Recorder's Office as Instrument Number 2307546000. *Id.*; see Decl. of Counsel, Ex. B. Lee Robertson subsequently defaulted on his obligation secured by the Deed of Trust. *Id.* Shortly thereafter, the successor trustee began non-judicial foreclosure proceedings. *Id.* The successor trustee recorded a Notice of Default with the Kootenai County Recorder's Office on April 18, 2018. *Id.*; see Decl. of Counsel, Ex. B. The next day, the successor trustee mailed a copy of the Notice of Default and Notice of Trustee's Sale to

SECTION 17, WHICH IS MARKED BY AN IRON ROD WITH ALUMINUM CAP FROM WHICH THE NORTHWEST CORNER OF SAID SECTION 17 BEARS NORTH 87°23'19" WEST, A DISTANCE OF 2709 38 FEET THENCE ALONG THE NORTH LINE OF SAID SECTION 17, NORTH 87°23' 19" WEST, A DISTANCE OF 281.02 FEET TO A SET 5/8 INCH IRON ROD AND CAP FOR THE POINT OF BEGINNING; THENCE SOUTH 03°04'35" WEST A DISTANCE OF 298.72 FEET TO A SET 5/8 INCH IRON ROD AND CAP; THENCE SOUTH 25°38'34" EAST, A DISTANCE OF 492.17 FEET TO A SET 5/8 INCH IRON ROD AND CAP ON THE CENTERLINE OF A 60.00 FOOT WIDE PRIVATE ROAD EASEMENT (SEE PRIVATE ROAD EASEMENT AGREEMENT RECORDED UNDER INSTRUMENT NO. 1289994); THENCE ALONG THE CENTERLINE OF SAID PRIVATE ROAD EASEMENT THE FOLLOWING FOUR (4) CENTERLINE COURSES: 1. SOUTH 58°33'12" WEST A DISTANCE OF 148 92 FEET TO A POINT OF CURVATURE; THENCE 2. ALONG THE ARC OF A CURVE TO THE RIGHT, WHICH IS CONCAVE TO THE NORTH, HAVING A RADIUS OF 300.15 FEET, THROUGH A CENTRAL ANGLE OF 58°28'23", AN ARC DISTANCE OF 306.32 FEET TO A POINT OF TANGENCY WHOSE CHORD BARS SOUTH 87°47'23' WEST, 293.20 FEET; THENCE 3. NORTH 62°58' 25" WEST, A DISTANCE OF 88.43 FEET TO A SET 5/8 INCH IRON ROD AND CAP AT A POINT OF CURVATURE; THENCE 4. ALONG THE ARC OF A CURVE TO THE LEFT, WHICH IS CONCAVE TO THE SOUTHWEST; HAVING A RADIUS OF 273.13 FEET THROUGH A CENTRAL ANGLE OF 35°38'43", AN ARC DISTANCE OF 169.92 FEET, TO A POINT OF TANGENCY WHOSE CHORD BEARS NORTH 45°19'48" WEST 167.20 FEET; THENCE 5. NORTH 63°09'09" WEST, A DISTANCE OF 91.74 FEET, TO A POINT OF CURVATURE; THENCE 6. ALONG THE ARC OF A CURVE TO THE RIGHT, WHICH IS CONCAVE TO THE NORTHEAST, HAVING A RADIUS OF 88.82 FEET, THROUGH A CENTRAL ANGLE OF 12°22'56", AN ARC DISTANCE OF 19.20 FEET WHOSE CHORD BEARS NORTH 56°57'41" WEST, 19.16 FEET, TO A SET 5/8 INCH IRON ROD AND CAP; THENCE NORTH 06°33'25" EAST, A DISTANCE OF 646.51 FEET TO A SET 5/8 INCH IRON ROD AND CAP ON THE NORTH LINE OF SAID SECTION 17; THENCE SOUTH 87°23'19" EAST, A DISTANCE OF 445.00 FEET OF THE POINT OF BEGINNING.

Robertson and to the occupants of the Property – the McClaughrys. *Id.* The sale was scheduled for, and held on, September 5, 2018, at 9:00 a.m. in Coeur d’Alene, Idaho. *Id.* at 2–3; see Decl. of Counsel, Ex. A.

At the sale, the Property was conveyed to Federal National Mortgage Association (Fannie Mae), and the Deed of Trust was subsequently recorded with the Kootenai County Recorder’s Office on September 11, 2018. *Id.* at 3; see Decl. of Counsel, Ex. B. On January 11, 2019, Fannie Mae conveyed legal title to the Property to the Mardocks by Special Warranty Deed, which was recorded that same day with the Kootenai County Recorder’s Office. *Id.*; see Decl. of Counsel, Ex. C. Because the McClaughrys currently remain in possession of the Property, the Mardocks are seeking to eject the McClaughrys from the Property. *Id.* at 2; see Verified Answer and Countercl., 2, ¶ 5.

The Mardocks filed their Verified Complaint on January 14, 2019, putting forth their single claim of ejectment against the McClaughrys. On February 13, 2019, the McClaughrys, *pro se*, filed their Verified Answer and Counterclaim, alleging a claim of conversion against the Mardocks. On February 25, 2019, the Mardocks filed their Answer to Counterclaim. On March 4, 2019, the Mardocks filed a Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and Declaration of Counsel. On March 19, 2019, the McClaughrys filed Opposition to Plaintiff’s Motion for Summary Judgment and Memorandum of Points and Authorities Supporting Defendants’ Case. On March 25, 2019, the McClaughrys filed First Affidavit of Michael McClaughry, and the Mardocks filed Supplemental Declaration of Counsel. On March 26, 2019, the Mardocks filed Reply Brief in Support of Plaintiffs’ Motion for Summary

Judgment. Lastly, relevant to this matter, the McClaughrys filed First Affidavit of Virginia McClaughry on March 29, 2019.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by “citing to particular parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” I.R.C.P. 56(c).

If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). “Once the moving party establishes the absence of a genuine issue of material

fact, the burden shifts to the non-moving party” to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party “must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). “Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep’t of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet “the ‘genuine issue of material fact’ burden . . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.” *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). “Such an absence of evidence may be established either by an affirmative showing with the moving party’s own evidence or by a review of all the nonmoving party’s evidence and the contention that such proof of an element is

lacking.” *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; see also *Heath* at 712, 8 P.3d at 1255.

III. ANALYSIS

A. The McClaughrys do not have a valid legal claim to the Property by way of oral gift or adverse possession.

McClaughrys claim their right to the Property oral gift by Robertson and by adverse possession. The Mardocks assert that the McClaughrys’ claims of oral gift and adverse possession, fail as a matter of law. Mem. in Supp. of Pls.’ Mot. for Summ. J., 11. Specifically, the Mardocks argue that because Idaho is a race-notice recording state, and no written conveyance has ever been recorded purporting to show that the McClaughrys own the Property, any oral gift purportedly made by Robertson was made void pursuant to Idaho Code Section 55-812. *Id.* at 11–12. The Mardocks also argue that the McClaughrys cannot succeed on an adverse possession claim, as it is defeated by Robertson’s alleged gift to Virginia and the fact that the McClaughrys occupied the Property with permission by Robertson.

The McClaughrys argue that Robertson, father of Virginia, wanted to provide Virginia with a home. Verified Answer and Countercl., 5. The McClaughrys put forth that Robertson purchased the Property in May of 1996, gifted the Property to Virginia, and paid for the construction of a main house and guest house on the Property. *Id.*; Opp’n to Pls.’ Mot. for Summ. J., 2. The McClaughrys also claim that “[i]n 2001,

Virginia became fee simple title owner by adverse possession...” Opp’n to Pls.’ Mot. for Summ. J., 2. Based on the above claims, the McClaughrys argue that the Deed of Trust executed by Robertson in 2011 was invalid, as the McClaughrys were the rightful owners of the Property. Verified Answer and Countercl., 6–7.

In *Insight LLC v. Gunter*, 154 Idaho 779, 302 P.3d 1052 (2013), the Idaho Supreme Court provided a clear explanation of Idaho’s race-notice statute and the necessary elements that must be present for a prior conveyance to be void. “Idaho’s race-notice statute provides that ‘[e]very conveyance of real property is ... void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.’” *Id.* at 787, 302 P.3d at 1060 (quoting I.C. § 55–812). “Our race-notice statute only voids a prior conveyance if (1) the subsequent conveyance was made in good faith and for valuable consideration; and (2) the subsequent conveyance is the first duly recorded.” *Id.* “Idaho law defines ‘conveyance’ as ‘the instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or encumbered.’” *Id.* (quoting I.C. § 55–813).

As stated above, the McClaughrys have asserted that Robertson orally gifted the Property to Virginia. Opp’n to Pls.’ Mot. for Summ. J., 2. However, the McClaughrys have not submitted any documentation showing that Robertson actually conveyed the Property to them. The Mardocks’ attorney searched the Kootenai County Recorder’s real estate records and “was unable to locate any recorded deeds granted to either of the [McClaghrys] and which purport to grant an interest to any real property located in Kootenai County.” Decl. of Counsel, ¶ 5. The absence of any recorded conveyance was confirmed by the McClaughrys, who responded by stating, “[i]t was an oral conveyance, not written, so of course it wasn’t recorded.” Opp’n to Pls.’ Mot. for Summ.

J., 25. Based on the above information, it has been affirmatively established that the conveyance of the Property by Robertson to the McClaughrys was neither in writing, nor was it recorded.²

In sum, the Property records do not indicate that the McClaughrys, at any point in time, held valid legal title to the Property. The Property records from the Kootenai County Recorder's Office clearly show that the chain of title passed to Robertson in May of 1996 when he first purchased the Property; from Robertson to Fannie May, as trustee, and Bank of America, as beneficiary, in March of 2011; to Fannie Mae following the trustee's sale in September of 2018; and from Fannie Mae to the Mardocks in January of 2019. Memorandum of Points and Authorities Supporting Defs.' Case, Ex. 3; Decl. of Counsel, Ex. B; Decl. of Counsel, Ex. C. The Mardocks purchased the Property from Fannie Mae for value, Fannie Mae conveyed a special warranty deed to the Mardocks, and that deed was recorded on January 11, 2019. See Decl. of Counsel, Ex. C. Therefore, pursuant to Idaho Code Section 55-812, the alleged prior unrecorded gift of the Property to the McClaughrys is void because the subsequent conveyance to the Mardocks was made in good faith, for value, and was recorded first.

The McClaughrys next assert that after they were orally gifted the Property by Robertson in 1996, they achieved valid ownership of the Property by way of adverse possession. Opp'n to Pls.' Mot. for Summ. J., 2, 26; First Aff. of Virginia McClaughry, 6. For the reasons discussed below, the McClaughrys' argument fails as a matter of law.

In *Berg v. Fairman*, the Idaho Supreme Court provides an excellent explanation of adverse possession and its requirements:

Our statutes, I.C. §§ 5–209 and 5–210 delineate the requirements for an adverse possession claim not made upon the existence of a written

² Because Idaho law defines a conveyance as an "instrument in writing," the purported oral gift by Robertson does not qualify as a proper conveyance. See I.C. § 55-813.

instrument and require five³ years continuous actual occupation, which occupation is defined as protection of the claimed property by a substantial enclosure and usual cultivation or improvement. Previous decisions of this Court have firmly established that the burden of showing all of the essential elements of adverse possession is upon the party seeking title thereunder. *Loomis v. Union Pacific Railroad Co.*, 97 Idaho 341, 544 P.2d 299 (1975); *Smith v. Smith*, 95 Idaho 477, 511 P.2d 294 (1973); *Hamilton v. Village of McCall*, 90 Idaho 253, 409 P.2d 393 (1965). Further, claimant must prove every element of adverse possession by clear and satisfactory evidence. *Loomis v. Union Pacific Railroad Co.*, *supra*. As our authorities also hold, the burden of claimant to show possession of disputed property was hostile to that of the real owner and not with the permission of the real owner since "occupation without hostile intent" does not constitute adverse possession. *Hamilton v. Village of McCall*, *supra* at 258, 409 P.2d at 396; *Pleasants v. Henry*, 36 Idaho 728, 213 P. 565 (1923).

If the initial entry of the adverse claimant upon the disputed land was with the permission of the record owner, "the statute of limitation will not begin to run against the true owner until the adverse claimant establishes exclusive right in himself," and once it has been established that an adverse claimant's initial entry upon disputed land was with the permission of the record owner, "only an unequivocal act by the permissive user brought home to the true owner will start the running of the statute of limitations." *Gameson v. Remer*, 96 Idaho 789, 537 P.2d 631 (1975). When one occupies the land of a blood relative, such occupation is presumptively with the permission of the true owner. *Tremayne v. Taylor*, 101 Idaho 792, 621 P.2d 408 (1980); *Smith v. Smith*, *supra*.

107 Idaho 441, 443, 690 P.2d 896, 898 (1984). Additionally, in *Luce v. Marble*, the Idaho Supreme Court stated:

Oral claims for adverse possession are governed by Idaho Code § 5-210. This section requires that the land being claimed have been enclosed or that the land being claimed be cultivated or improved, that the possession be for a period of five years and that the adverse possessor pay all taxes levied and assessed on the land. The party claiming adverse possession must prove all of the essential elements of adverse possession by clear and satisfactory evidence. *Roark v. Bentley*, 139 Idaho 793, 796, 86 P.3d 507, 510 (2004). In addition to the requirements of I.C. § 5-210, this includes that the possession has been actual, open, visible, notorious, continuous and hostile to the party against whom the claim is made. *Winn v. Eaton*, 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct.App.1996) (citing *Kolouch v. Kramer*, 120 Idaho 65, 67-68, 813 P.2d 876, 878-79 (1991)).

³ The statutory requirement for continuous actual occupation has since been changed to 20 years. I.C. § 5-210.

142 Idaho 264, 272, 127 P.3d 167, 175 (2005).

Here, the two elements at issue are 1) the requirement that the party claiming adverse possession paid all taxes levied and assessed on the land, and 2) the requirement that the possession be hostile to the party against who the claim is made. On the issue of taxes, it has been stated repeatedly that the McClaughrys told Robertson not to forget to pay the taxes on the Property. First Aff. of Virginia McClaughry, 5; Mem. and Points of Authorities Supporting Defs.' Case, 7. It has been further stated that "[t]o monitor that the taxes were paid [by Robertson], Virginia had the statements sent to her so she could see they were paid. That practice continued from 1996 through 2018." Mem. and Points of Authorities Supporting Defs.' Case, 7. This evidence shows that Robertson was the only person who paid the taxes on the Property. Further, the McClaughrys have not once stated that they themselves directly paid taxes on the Property, and have provided no evidence of such. Therefore, the McClaughrys have failed to establish the element of adverse possession requiring the adverse possessor to pay taxes on the Property.

Additionally, on the issue of hostility, the burden is on the McClaughrys to show that their possession of the Property was hostile to that of Robertson's. Specifically, the McClaughrys were required to show that their occupation of the Property was without the permission of Robertson, the true owner, as occupation without hostile intent does not constitute adverse possession. By the McClaughrys' own statements, Robertson purchased the Property, paid for the construction of a home on the Property, and paid all taxes on the Property – all for the benefit of the McClaughrys. Evidence submitted by the McClaughrys show that the McClaughrys had Robertson's permission to live on the Property. As stated above in *Berg v. Fairman*, if the initial entry by the McClaughrys

was with permission of the record owner, being Robertson, the statute of limitations for adverse possession would only begin to run against Robertson if and when the McClaughrys establish an exclusive right in themselves and perform an unequivocal act “brought home to the true owner.” 107 Idaho 441, 443, 690 P.2d 896, 898 (1984). However, no evidence has been submitted indicating that, at any point in time, the McClaughrys’ possession of the Property was ever hostile to that of Robertson’s.⁴ Therefore, the statute of limitations for adverse possession had never begun to run. In sum, the McClaughrys have failed to establish the element of adverse possession requiring the possession of the Property to be hostile.

Overall, the McClaughrys have not established that they have a valid legal claim to the Property, either by an oral unrecorded gift or through adverse possession. The absence of evidence on multiple elements that the McClaughrys would be required to prove at trial has been established.

Finally, the Mardocks submitted to the Court the McClaughrys’ voluntary petition for bankruptcy relief (voluntary petition), which was filled out, signed, and filed by the McClaughrys on October 18, 2018. Suppl. Decl. of Counsel, Ex. D. The McClaughrys’ voluntary petition specifically represented to the Bankruptcy Court that they did not own the Property, but instead had actually leased it from Robertson. Reply Br. in Supp. of Pls.’ Mot. for Summ. J., 3. The voluntary petition provides that the McClaughrys did not own any legal or equitable interest in any residence, building, land or other similar property. *Id.* at 2. The voluntary petition provides that the McClaughrys had not filed a claim or lawsuit against a third party. *Id.* at 2. The voluntary petition provides that the McClaughrys did not own any property that was foreclosed upon within one year of filing

⁴ The Court notes that the McClaughrys have not provided any evidence indicating that they filed a quiet title action against Robertson claiming title by adverse possession.

bankruptcy, which occurred on October 18, 2018. *Id.* at 3. Lastly, the voluntary petition contains the McClaughrys' signatures, indicating that they "declare under penalty of perjury that the answers are true and correct." *Id.* at 4. Based on this information alone, the McClaughrys' argument that, in 1996, Robertson gifted ownership of the Property to the McClaughrys will not succeed, as the McClaughrys clearly stated to the Bankruptcy Court that they were in a lease with Robertson at the time the voluntary petition was filed on October 18, 2018. Additionally, based on the above information, the McClaughrys' argument that they adversely possessed the Property will not succeed, as one cannot adversely possess property that they are leasing.

While not addressed by the parties in briefing, the Court must also address whether McClaughrys, debtors in a bankruptcy proceeding, are judicially estopped from making their ownership claims before this Court. The Court finds they are judicially estopped.

A debtor in a bankruptcy proceeding is required to disclose all existing and potential assets. *McCallister v. Dixon*, 154 Idaho 891, 895, 303 P.3d 578, 582 (2013) (citing 11 U.S.C. §§ 521(1), 541(a)(7)). "[T]itle to the debtor's assets, including causes of action that belong to the debtor when bankruptcy is filed, vest in the bankruptcy estate." *Id.* at 898, 303 P.3d at 585 (citing *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir.2008)).

The doctrine of "[j]udicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Id.* at 894, 303 P.3d at 581 (citing *A & J Const. Co. v. Wood*, 141 Idaho 682, 684, 116 P.3d 12, 14 (2005)). Judicial estoppel will be applied "when the debtor has knowledge of enough facts to know that a potential cause of action exists *during the*

pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset.” *Id.* at 895, 303 P.3d at 582 (citing *A&J Const. Co.*, 141 Idaho at 686, 116 P.3d at 16 (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002)) (emphasis added). It is necessary “to discourage debtors from concealing potential assets.” *Id.* (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir.2001); *Burnes*, 291 F.3d at 1286; *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir.1988)). The focus of the inquiry is the on knowledge of the party, not the intent of the party. *Id.* (citing *McKay v. Owens*, 130 Idaho 148, 155, 937 P.2d 1222, 1229 (1997)).

In this case, the doctrine of judicial estoppel precludes McClaughrys from pursuing their claims of ownership of the Property. Again, the McClaughrys’ voluntary petition specifically provides that they did not own the Property, but instead had actually leased it from Robertson. Reply Br. in Supp. of Pls.’ Mot. for Summ. J., 3.

B. The McClaughrys allegation of conversion against the Mardocks fails as a matter of law.

The McClaughrys have alleged a claim of conversion against the Mardocks, but have not provided any valid legal argument. Verified Answer and Countercl., 4–14. The McClaughrys’ claim for conversion against the Mardocks fails as a matter of law, as conversion only applies to tangible personal property. In *Medical Recovery Services, LLC v. Bonneville Billing and Collections, Inc.*, the Idaho Supreme Court stated the following:

Generally, conversion is defined as a distinct act of dominion wrongfully asserted over another’s personal property in denial of or inconsistent with [his] rights therein.” *Carpenter v. Turrell*, 148 Idaho 645, 650, 227 P.3d 575, 580 (2010) (quoting *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743, 979 P.2d 605, 616 (1999)). “In other words, conversion is a dealing by a person with chattels not belonging to him, in a manner inconsistent with the rights of the owner.” *Carver v. Ketchum*, 53 Idaho

595, 601, 26 P.2d 139, 141 (1933). “This definition can be broken down into three elements which are required for a claim of conversion to be valid: (1) that the charged party wrongfully gained dominion of property; (2) that property is owned or possessed by plaintiff at the time of possession; and (3) the property in question is **personal property**.” *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010).

...
“Personal property” is “[a]ny movable or intangible thing that is subject to ownership and **not classified as real property**.” Black’s Law Dictionary 1337 (9th ed.2009). Many courts have limited conversion actions to tangible personal property because conversion, as a cause of action, is “based on the theory that the property converted was findable;” i.e. tangible. Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, 1991 B.Y.U.L.Rev. 1681, 1699 (1991).

157 Idaho 395, 400, 336 P.3d 802, 807 (2014) (emphasis added).

Because the McClaughrys are alleging a claim for conversion regarding real property, the claim fails as a matter of law and need not be discussed further by the Court.

C. There are no genuine issues of material fact on the Mardocks’ claim for ejectment against the McClaughrys.

The McClaughrys assert that Robertson was not the true owner of the Property when he signed the Deed of Trust that encumbered the Property. The McClaughrys have argued, instead, that they are the true owners of the Property by way of gift and adverse possession. However, as discussed above, those arguments were without merit. Additionally, the chain of title makes clear that Robertson was the true owner of the Property at the time he signed the Deed of Trust. There is no documentation on record purporting to grant ownership of the Property to the McClaughrys. Robertson eventually defaulted on his loan payments, which lead to the foreclosure and sale of the Property. The Property was lawfully purchased by Fannie Mae, and subsequently sold to the Mardocks for value.

An action for “[e]jection requires proof of (1) ownership, (2) possession by the defendants, and (3) refusal of the defendants to surrender possession.” *Ada Cty. Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 369, 179 P.3d 323, 332 (2008); *PHH Mortg. Servs. Corp. v. Ferreira*, 146 Idaho 631, 637, 200 P.3d 1180, 1186 (2009); *Pro Indiviso, Inc. v. Mid-Mile Holding Trust*, 131 Idaho 741, 745, 963 P.2d 1178, 1182 (1998).

Here, the Mardocks have provided the Court with proof of ownership by submission of the Special Warranty Deed. Decl. of Counsel, Ex. C. That deed clearly shows that Fannie Mae conveyed valid legal title to the Property to the Mardocks on January 11, 2019. *Id.* Additionally, as discussed above, no evidence has been submitted by the McClaughrys showing that they have a valid claim to the Property. Therefore, the Mardocks are the lawful owners of the Property. Next, the McClaughrys admit that they currently possess the Property. Verified Answer and Countercl., 2 (“We admit the portion of paragraph 16 that states: the defendants remain in possession of the Subject Property...”). Lastly, the third and final element has been established by the McClaughrys’ active participation in this lawsuit and numerous assertions that they are the rightful owners of the Property. Therefore, all three elements in this action for ejection have been proven by the Mardocks.

In conclusion, there are no genuine issues of material fact on the Mardocks’ claim for ejection against the McClaughrys.

IV. CONCLUSION

For the reasons stated above, plaintiffs’ Motion for Summary Judgment must be granted in all aspects. There is no issue of material fact and the applicable law is quite clear. Mardocks are entitled to judgment as a matter of law on their claim of ejection

against the McClaughrys. Mardocks are entitled to judgment as a matter of law on McClaughrys' counterclaim of conversion.

The Court finds plaintiffs Mardocks are the prevailing party in all aspects as against defendants McClaughrys. Mardocks have claimed attorney's fees and costs against McClaughrys pursuant to I.R.C.P. 54(e)(4). Verified Complaint, 5, ¶ 19. Other than that, Mardocks have not set forth a basis for attorney's fees. This Court finds that attorney fees are awarded, if sought by Mardocks against McClaughrys, under Idaho Code Section 12-121. This Court, in compliance of I.R.C.P. 54(e)(2) specifically finds that McClaughrys have frivolously, unreasonably and without foundation, defended this action brought by Mardocks. This Court, in compliance of I.R.C.P. 54(e)(2) specifically finds that McClaughrys frivolously, unreasonably and without foundation, brought their counterclaim of conversion against Mardocks. McClaughrys have presented no facts supporting their claims, no cogent legal arguments supporting their claims, their claims are contradictory (gift vs. adverse possession) internally within this lawsuit, and their claims are directly contrary to claims made under oath to the Bankruptcy Court.

IT IS HEREBY ORDERED plaintiffs' Motion for Summary Judgment is GRANTED.

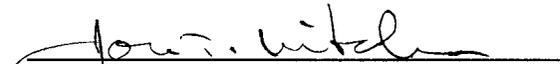
IT IS FURTHER ORDERED plaintiffs' claim of ejectment against defendants is GRANTED.

IT IS FURTHER ORDERED defendants' counterclaim of conversion is DISMISSED.

IT IS FURTHER ORDERED plaintiffs are the prevailing party in this litigation and plaintiffs are entitled to fees against defendants under Idaho Code Section 12-121.

IT IS FURTHER ORDERED plaintiffs prepare judgment(s) consistent with this memorandum decision and order.

Entered this 5th day of April, 2019.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 5th day of April, 2019, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
Jonathon Hallin	jhallin@lukins.com ✓
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Michael McClaughry, Pro Se	vandm@icehouse.net ✓


Jeanne Clausen, Deputy Clerk