

STATE OF IDAHO)
County of BONNER)^{ss}

FILED _____

AT _____ O'Clock _____ 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 BONNER**

**INSIGHT LLC, an Idaho Limited Liability
Company, DONALD F. HUTTON, an
unmarried man, et al.,**

Plaintiffs,

vs.

**SUMMIT, INC., an Idaho Corporation, RON
HAZEL, an individual et al..**

Defendants.

Case No. **S CV 2008 1538**

**ORDER ON PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND BACKGROUND.

Because the other defendants have been defaulted, plaintiffs on April 7, 2008, filed their Motion for Summary Judgment against defendants Patrick and Monica Gunter only. Plaintiffs are lenders and are owners and holders of a promissory note secured by a mortgage and by a deed of trust. Complaint, p. 2, ¶ 1.

The Gunters sold the property at issue to Summit, Inc., (Summit). Gunters are owners and holders of a deed of trust securing some of the property at issue in the instant action. Complaint, p. 3, ¶ 7. The Gunters financed a portion of Summit's purchase and accepted a promissory note for \$200,000 from Summit secured by the deed of trust.

In June 2006, Summit executed a note for \$616,000 in favor of Independent Mortgage Ltd. Co. (IMLC); the note was secured by a mortgage recorded in first priority

on June 19, 2006. Complaint, pp. 3-5. ¶¶ 8-13. On October 10, 2008, plaintiffs initiated the foreclosure action at issue by filing this Complaint, after Summit and guarantors Ron Hazel and Daren Brott defaulted. On April 7, 2008, plaintiffs filed their Motion for Summary Judgment against defendants Patrick and Monica Gunter. Plaintiffs seek summary judgment on the issue of lien priority because Gunters claim they have the more senior secured interest because, although their interest was recorded after plaintiffs', plaintiffs (specifically Independent Mortgage) was aware of the Gunters' deed of trust in the property, but Gunters were not aware of Independent Mortgage's claim to an interest in the property until well after the Gunters closed. Defendants Gunters filed an answer and demanded a jury trial. This matter is not yet set for a jury trial.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714,

718, 918 P.2d 583, 587 (1996).

III. ANALYSIS.

A. Motion to Strike.

As a preliminary matter, at oral argument on May 13, 2009, this Court denied defendants' Motion to Strike the Affidavit (of Casey S. Krivor) in Support of Motion for Summary Judgment. The Court's decision regarding a motion to strike is a matter of discretion. *State v. Campbell*, 123 Idaho 922, 925, 854 P.2d 265, 268 (Ct.App. 1993). At oral argument defendants were unable to articulate any prejudice caused by the untimely filing of Krivor's affidavit.

B. Motion for Summary Judgment.

Idaho is a race-notice state. The Idaho Supreme Court has explained the purpose of the race-notice recording act:

The purpose of the recording act in a race notice jurisdiction, like Idaho, is to allow recorded interests to be effective against unrecorded interests when the recorded interest is taken for a valuable consideration and in good faith, i.e. without knowledge, either actual or constructive, that unrecorded interests exist.

Froman v. Madden, 13 Idaho 138, 88 P. 894 (1907). Where one purchases or encumbers with notice of inconsistent claims, one does not do so in good faith and similarly, where one fails to investigate open or obviously inconsistent claims, one cannot take in good faith. *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974) (quoting *Amerco, Inc. v. Tullar*, 182 Cal.App.2d 336, 6 Cal.Rptr. 7 (1960)). Idaho Code § 55-606 states:

Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumberer, who in good faith, and for valuable consideration, acquires a title or lien by an instrument or valid judgment lien that is first duly recorded.

Idaho Code § 55-812 is entitled Unrecorded Conveyance Void Against Subsequent Purchasers and reads, in relevant part:

Every 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.

Here, the mortgage given to Independent Mortgage was recorded before the Gunters' interest. Motion for Summary Judgment, p. 4; Defendants' Supplemental Response to Plaintiffs' Motion for Summary Judgment, pp. 4-5. Gunters argue that they were without notice of Independent Mortgage's security interest, but that Independent Mortgage had notice of their interest. Defendants' Supplemental Response to Plaintiffs' Motion for Summary Judgment, pp. 4-5. Gunters argue Independent Mortgage, since it knew of Gunters' interest, "cannot be said to have acted in good faith in its actions." *Id.*, citing *Farm Bureau Finance Co., Inc. v. Carney*, 100 Idaho 745, 747-48, 605 P.2d 509, 511-512 (1980) ("When a subsequent encumberancer or purchaser has actual knowledge of a prior interest, it makes no difference whether the prior interest was properly acknowledged and recorded. I.C. §§ 55-606, 55-812.") As such, Gunters argue Independent Mortgage was not acting in good faith, i.e. "without knowledge." *Id.* It appears there is no dispute that Independent Mortgage knew of Gunters' interest before Independent Mortgage loaned and directed the escrow agent (Easyway Escrow) to record Independent Mortgage's interest first. Supplemental Affidavit (of Casey S. Krivor) In Support of Motion for Summary Judgment, p. 2, ¶¶ 3, 4.

Plaintiffs rely on *Estate of Skvorak v. Security Union Title Insurance Company*, , 140 Idaho 16, 89 P.3d 856 (2004), for the proposition that where two purchase money mortgages compete for priority, the first to record is entitled to priority and whether the initial encumberer is a good faith purchaser is not relevant. Reply Memorandum in

Support of Motion for Summary Judgment, pp. 4-5. *Skvorak* involved the sale of a parcel known as “Gold Cup” from the Skvoraks to the purchasers the Sylvesters. The purchasers Sylvesters received the down payment amount from Crown Pacific and that amount was secured through a mortgage with Crown Pacific. 140 Idaho 16, 18, 89 P.3d 856, 857. Later the same day, the Sylvesters executed a mortgage in favor of the Skvoraks to secure the balance. *Id.* Crown Pacific recorded its mortgage on January 19, 1995, and Skvoraks mortgage and warranty deed was recorded twelve days later on January 31, 1995. *Id.* In determining Crown Pacific’s mortgage had priority, the Idaho Supreme Court noted Crown Pacific executed and recorded its mortgage twelve days before the Skvoraks and the Skvoraks were not good faith purchasers because they knew of the Crown Pacific Mortgage. 140 Idaho 16, 23, 89 P.3d 856, 863.

Gunters argue *Skvorak* is inapposite as the factual difference between that case and the instant matter lies in the vendor in *Skvorak* (the Skvoraks) having notice of the third party purchase money mortgage, and the vendors in the instant case (Gunters) having been “completely unaware” of the third party mortgage:

In *Skvorak* the sellers of the real property were aware that the buyer was financing the remainder of the purchase price with a third party. In this case the sellers of the real property were not aware that the buyer was financing the remainder of the purchase price with a third party.

Memorandum in Support of Motion to Strike and in Response to Plaintiff’s Reply memorandum, p. 4. Despite plaintiffs’ argument, the Court in *Skvorak* determined that whether Crown Pacific was a good faith purchaser was *irrelevant* because it had recorded twelve days before the Skvoraks, but as to Idaho’s recording statutes:

Whether Crown Pacific is a good faith purchaser in this case is irrelevant because Crown Pacific was the initial encumbrancer. Therefore, these rules do not apply to Crown Pacific and to that extent the district court erred.

140 Idaho 16, 22-23, 89 P.3d 856, 862-63. Thus, the Idaho Supreme Court's analysis in *Skvorak* revolved around which party was the "initial encumbrancer." Crown Pacific was the "initial encumbrancer", presumably because of the following sequence:

The morning of January 13, 1995, the Sylvesters and Norm Suenkel (Suenkel), resource officer for Crown Pacific, met at Lamanna's office and executed a mortgage in favor of Crown Pacific for the down payment. Lamanna and the Skvoraks were not present at this meeting, but Cox notarized the Crown Pacific mortgage. The Sylvesters also executed a promissory note for \$450,075, a log purchase agreement, and a UCC-1 financing agreement, all of which Crown Pacific prepared. Later that day, the Sylvesters returned to Lamanna's office and executed a mortgage in favor of the Skvoraks to secure payment on a promissory note for the balance, and accepted delivery of the deed. Cox also notarized this mortgage. Crown Pacific recorded its mortgage January 19, 1995. Linda Skvorak recorded the Skvoraks' mortgage and warranty deed on January 31, 1995.

140 Idaho 16, 18, 89 P.3d 856, 858. The Idaho Supreme Court in *Skvorak* then analyzed whether Skvoraks, a *subsequent* mortgagee (though still a purchase money mortgagee) were good faith purchasers. 140 Idaho 16, 22-23, 89 P.3d 856, 862-63.

The district court had found that there was sufficient evidence that the Skvoraks knew of the Crown Pacific mortgage interest and did not take as a good faith purchaser, and the Idaho Supreme Court upheld that finding. 140 Idaho 16, 22, 89 P.3d 856, 862.

In the present case, the recordation of the two interests occurred within minutes of each other. But what is unclear, at least at this summary judgment juncture, is who the *initial* mortgagee/encumberer is and who the *subsequent* mortgagee/encumberer is.

It *appears* plaintiffs may be the subsequent mortgagees/encumberers based on their knowledge of the prior existing (yet at the time, unrecorded) deed of trust already encumbering the property at issue. Casey S. Krivor, Manager of Independent Mortgage, stated in his affidavit that Mr. Hazel [president of defendants Summit] asked Krivor if Independent Mortgage would finance 100% of the \$799,000 purchase price for

Summit to purchase this property from Gunters, and Krivor declined, advising Hazel that Independent Mortgage would not consider making a loan of more than 75% loan to value. Affidavit (of Casey S. Krivor) in Support of Motion for Summary Judgment, p. 2,

¶ 2. Krivor then stated:

Mr. Hazel [president of defendants Summit] later advised me that the sellers, Mr. and Mrs. Gunter, had agreed to carry back \$200,000 of the purchase price. A loan of \$616,000 was acceptable to IMLC [Independent Mortgage] since it would thus be protected by at least 25% in additional value.

Id., ¶ 3.

However, it also *appears* Gunters may be the subsequent encumbrancers, since Gunters perhaps should have expected Summit was financing this purchase because Summit needed Gunters “help” in order to make this sale go through. Monica Gunter explains that she and her husband were under the “...understanding that Summit, Inc., would be paying cash without financing [other than Gunters agreeing to carry a \$200,000 note on the property] the remainder of the balance due on the property.” Affidavit of Monica Gunter, p. 2, ¶ 4. That must be put in context with Monica Gunter’s claim that in the original agreement between Gunters and Summit, Summit would be paying the entire sales price and that:

The Agreement did not provide for a financing contingency for the buyer Summit, Inc. It was our understanding that Summit, Inc. would be paying cash at closing for the property without financing.

Affidavit of Monica Gunter, p. 2, ¶ 3. The Real Estate Purchase and Sale Agreement does state that the balance (other than the \$1,000 earnest money) would be paid as follows: “cash at closing”. *Id.*, Exhibit 1. “Cash at closing” would occur even if there were financing. The form itself does not provide for a financing contingency (or no financing contingency), so Gunters argument is not overly persuasive.

The exhibits provided do not answer the question. Plaintiffs claim defendants executed a note in favor of plaintiffs on June 19, 2006. Complaint, p. 3, ¶ 8. However, the note between defendants and Gunters is likewise dated June 19, 2006. Affidavit of Monica Gunter, p. 3, ¶ 7, Exhibit 5.

At summary judgment, this court cannot determine who is the *initial* mortgagee/encumberer is and who the subsequent mortgagee/encumberer. That being the key distinguishing factor in *Skvorak*, this Court cannot grant plaintiffs' motion for summary judgment at this time. There is dispute over this key material issue of fact.

If plaintiffs are the initial encumbrancer, then it matters not if they knew of Gunters' interest. Plaintiffs would prevail over Gunters even though they knew of Gunters' interest. However, if plaintiffs are the subsequent encumbrancer, then plaintiffs did not act in good faith because they knew of Gunters' interest. In that sense, the issue of initial versus subsequent encumbrancer is not only a material issue of fact, it is a dispositive issue of material fact.

IV. CONCLUSION AND ORDER.

Because there is a dispute over a material issue of fact as to whether plaintiffs are the initial encumbrancer or the subsequent encumbrancer, as compared to Gunters, plaintiffs' Motion for Summary Judgment must be denied at this time.

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

Entered this 24th day of July, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Tevis Hull

Fax #
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| Lawyer
James Paulsen

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Deputy Clerk