STATE OF IDAHO)
County of BONNER)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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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**

MEMORANDUM DECISION AND ORDER ON RECONSIDERATION OF ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND BACKGROUND.

On July 24, 2009, this Court entered its Order on Plaintiffs' Motion for Summary Judgment. On August 3, 2009, plaintiffs filed a Motion and Notice of Motion for Reconsideration, and a Memorandum in Support of Motion for Reconsideration. On August 21, 2009, Defendants Gunters filed Defendants Gunters' Memorandum in Response to Plaintiffs' Motion for Reconsideration. Later that same day, plaintiffs filed their Reply Memorandum in Support of Motion for Reconsideration. On September 29, 2009, oral argument was held on plaintiffs' motion for reconsideration. At the conclusion of that hearing, this Court took the plaintiffs' motion for reconsideration under advisement.

The following are the procedural history and factual background from this Court's July 24, 2009, Order on Plaintiffs' Motion for Summary Judgment:

> 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.

Order on Plaintiffs' Motion for Summary Judgment, pp. 1-2.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros,* 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). A motion for reconsideration of an interlocutory order of the trial court may be made at any time before entry of the final judgment, but not later than fourteen days after entry of the final judgment. I.R.C.P. 11(A)(2)(B).

III. ANALYSIS.

In denying Plaintiffs' Motion for Summary Judgment, this Court wrote in its July 24, 2009, Order on Plaintiffs' Motion for Summary Judgment: "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." Order on Plaintiffs' Motion for Summary Judgment, p. 8. The Court's analysis was as follows:

> 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 Mortgate 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.

Order on Plaintiffs' Motion for Summary Judgment, pp. 3-8.

In this Court's Order on Plaintiffs' Motion for Summary Judgment, it reasoned pursuant to the Idaho Supreme Court's decision in *Estate of Skvorak v. Security Union Title Ins. Co.,* 140 Idaho 16, 89 P.3d 856 (2004), a disputed issue of material fact remained as to whether plaintiffs or the defendants Gunters were the initial encumbrancer. Accordingly, this Court denied plaintiffs' motion for summary judgment. Order on Plaintiffs' Motion for Summary Judgment, p. 8. This Court noted the

recordation of the two interests in this matter occurred within moments of each other. *Id.,* p. 6. Plaintiffs may have been the subsequent encumbrancer based on their knowledge of a prior-existing, but unrecorded, deed of trust already being in place. *Id.* However, Gunters may also have been the subsequent encumbrancer because they "perhaps should have expected Summit was financing this purchase because Summit needed Gunters' 'help' in order to make this sale go through." *Id.,* p. 7.

Plaintiffs move for reconsideration, arguing that this Court erred in distinguishing between an "initial encumbrancer" and the first party to record. Memorandum in Support of Motion for Reconsideration, p. 2. Plaintiffs argue that although generally the first party to record does not take in good faith when the party has actual or constructive notice of a prior existing claim, *Estate of Skvorak* makes knowledge of an existing claim irrelevant where two purchase-money mortgages are involved. *Id.,* p. 3. "The rules that would otherwise pertain to knowledge of another's senior interest do not apply when dealing with two or more purchase money mortgages." *Id.* And, "a sampling of the express language [the Idaho Supreme Court] used makes it crystal clear that 'initial encumberancer' means the first encumbrancer to record and nothing else". *Id.*

In response, Gunters argue the reasoning in *Estate of Skvorak* must be limited to cases involving similar facts, that is, two purchase money mortgagors who are both not good faith encumbrancers because each had notice of the other. Memorandum in Response to Plaintiffs' Motion for Reconsideration, p. 2. "Unlike [*Estate of*] *Skvorak,* this case involves a dispute over the priority of two purchase money encumbrancers where only one encumberancer had notice of the other." *Id.,* p. 3. Gunters state *Estate of Skvorak* stands for the proposition that only where neither of two purchase money mortgagors are good faith encumbrancers is priority established by who records first.

Id., pp. 2-3.

This Court is being asked, again, to determine whether the Supreme Court's analysis in *Estate of Skvorak* is equally applicable here. The facts in *Estate of Skvorak,* as argued by Gunters, differ from the facts of the instant case. In *Estate of Skvorak,* the District Court determined both purchase money mortgagors had notice of each other's mortgages prior to recording and at issue was the priority between two purchase money mortgages executed in the same transaction. 140 Idaho 16, 19, 89 P.3d 856, 859. The Supreme Court determined that the rule that one who purchases or encumbers with notice of an inconsistent claim does not take in good faith was inapplicable to the Skvoraks, who recorded twelve days after defendants/appellants and had knowledge of defendants/appellants' plans and intent to advance the down payment amount. 140 Idaho 16, 22, 89 P.3d 856, 862.

In the instant case, to the extent there remains a genuine issue of fact as to whether Gunters had constructive knowledge of plaintiffs' recordation, denial of plaintiffs' summary judgment motion was proper. While plaintiffs argue Gunters had such knowledge because plaintiffs recorded first (Memorandum in Support of Motion for Reconsideration, p. 4, n. 1), mere seconds elapsed between the two recordations in this case and there would have likely been no computer entry or other record of plaintiffs' filing available to Gunters. It is likely unreasonable to require the recording clerk to recognize a filing as being applicable to one filed seconds later and to so notify the subsequent filer, the Gunters. It is even more unreasonable to require such recognition, let alone appreciation of such by Gunters. Plaintiffs have set forth no evidence to establish that Gunters had actual knowledge of the first-recorded mortgage. The instant facts vary from *Estate of Skvorak* in that there has been no finding here that both

encumbrances were part of the same transaction or that "the vendor has notice of the third party's mortgage *and* [the third party purchase money mortgage] was recorded first." *See* 140 Idaho 16, 22, 89 P.3d 856 (emphasis added).

As aptly put by Gunters' counsel at oral argument, Idaho is a "race-notice" state, and *Estate of Skvorak* discusses the "race" component of that statute since both parties were aware of each other and both parties were aware there was going to be two encumbrancers. Thus, the "notice" component was not at issue in *Estate of Skvorak.*. In the present case, there is at least a dispute of fact as to whether the Gunters had notice of plaintiffs. To adopt the result plaintiffs desire and to adopt plaintiffs' argument that this case is identical to *Estate of Skvorak* would turn Idaho's "race-notice" statute (Idaho Code § 55-606, Order on Plaintiffs' Motion for Summary Judgment, p. 3), into a "race" only statute. That is for the Idaho Legislature, and is not the province of this Court.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED plaintiffs' Motion for Reconsideration is DENIED.

Entered this 20th day of October, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 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	Fax #	Lawyer	Fax #
Catherine Dullea	(208) 265-1556	Charles Dean	(208) 664-9844
Douglas Marfice/April Linscott	(208) 664-5884		

_____
Deputy Clerk