STATE OF IDAHO)
County of KOOTENAI)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 KOOTENAI

MACDONALD FAMILY LIMITED PARTNERSHIP, Don Macdonald, general partner, *Plaintiff*, vs. **SCOTT LEE HERMAN, and NANCY SUE HERMAN, husband and wife,** *Defendants*.	Case No. **CV 2010 2164** *AMENDED* **MEMORANDUM DECISION AND ORDER ON: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; PLAINTIFF'S MOTION TO STRIKE; AND DEFENDANTS' MOTION TO SHORTEN TIME (MOTION TO ENLARGE TIME); AND ORDER SCHEDULING TRIAL**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's Motion for Summary Judgment and other motions that arise out of that motion for summary judgment.

On March 17, 2010, Don Macdonald (Macdonald) filed a *pro se* Complaint for Deficiency on behalf of the plaintiff Macdonald Family Limited Partnership (MFLP) for a deficiency judgment following the Trustee's Sale of property MFLP sold to defendants Scott and Nancy Herman (Hermans). Hermans executed a promissory note in favor of the MFLP on April 24, 2006, in the amount of $89,000. Complaint, p. 2, ¶ 3. As part of the same transaction, Hermans executed and delivered a deed of trust for real property for the benefit of the MFLP to secure payment of the promissory note. *Id.,* ¶ 4. MFLP alleges defendants defaulted on repayment of the promissory note and the entire balance on the note, plus interest, minus offset for the amount the property sold for, is now past due. *Id.,* p. 3, ¶ 6. MFLP states the amount owed on the promissory note as

of March 5, 2010, was $101,270.85. Affidavit of Don Macdonald, p. 3, ¶ 11. MFLP claims other costs, fees, and expenses resulting from the default in the amount of $4,266.09. *Id.,* ¶ 12. The trustee's sale was held on March 5, 2010, at which the property securing the note sold for $73,210.00, and the remaining principal balance owed is $32,326.94 plus interest (which continues to accrue at $7.08 per day). *Id.,* p. 4, ¶¶ 14, 15, 17.

Both MFLP and Hermans initially appeared *pro se.* On June 22, 2010, this Court informed Don Macdonald at the hearing on a motion to compel that he could only represent himself and could not represent the MFLP. At that same hearing the Court also informed Scott Herman that he could represent only himself and could not represent Nancy Herman. (*See Weston v. Gritman Memorial Hospital,* 99 Idaho 717, 720, 587 P.2d 1252, 1255 (1978) ("[It is] the inherent right of a natural person to represent himself pro se, but this right does not extend to representation of other persons or corporations.") The Court vacated hearing on the motion to compel. On June 28, 2010, Scott Poorman, attorney for MFLP, filed his Notice of Appearance. At the August 23, 2010, hearing, attorney April Linscott appeared on behalf of the Hermans.

On June 18, 2010, while still *pro se,* Macdonald filed a motion for summary judgment on behalf of the MFLP. On July 23, 2010, counsel for MFLP filed a memorandum in support of the motion for summary judgment and the supporting affidavit of Macdonald. On August 12, 2010, Scott Herman filed a motion to shorten time (presumably intended to be a motion to enlarge time pursuant to I.R.C.P. 6(b)), requesting additional time in which to respond to the motion for summary judgment. Scott Herman and Nancy Herman filed an Opposition to Motion for Summary Judgment and the supporting Affidavit of Scott Herman on August 12, 2010. On August 13, 2010,

MFLP moved this Court to strike the Affidavit of Scott Herman. On August 23, 2010, oral argument was held on all motions.

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). In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982).

III. ANALYSIS

A. Hermans' Motion to Shorten Time (Motion to Enlarge Time).

Scott Herman's (Nancy Sue Herman did not sign this pleading) motion to shorten time was filed on August 12, 2010, but was never noticed up for hearing. Nancy

Herman never filed any materials regarding this issue. Scott Herman argues an Order shortening time is appropriate because he "believed that the court ordered this case to be dismissed because it was filed by a pro se entity" and he had been unable to determine whether the case remained set by August 12, 2010. Motion to Shorten Time, p. 1.

Idaho Rule of Civil Procedure 7(b)(3) requires motions and notices of the hearing thereon to be filed and served so that they are received by the parties no later than fourteen days before the time set for hearing. I.R.C.P. 7(b)(3)(A). Affidavits supporting a motion shall be served with the motion and any opposing affidavits must be filed and served so they are received no later than seven days before hearing. I.R.C.P. 7(b)(3)(B). It appears Scott Herman's motion to shorten time was intended to be a motion for enlargement of time. The decision to grant or deny enlargement is one of discretion, as evidenced by the permissive language utilized in Rule 6. Rule 6(b) states:

> When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation, which does not disturb the orderly dispatch of business or the convenience of the court, filed in the action, before or after the expiration of the specified time period, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but the time may not be extended for taking any action under rules 50(b), 52(b), 59(b), (d), (e) and 60(b) except to the extent and under the conditions stated in them.

I.R.C.P. 6(b) (emphasis added).

Here, hearing on the motion for summary judgment was scheduled for August 23, 2010, and took place on that day. The motion itself was filed on June 18,

2010, and the memorandum and affidavit in support thereof were filed on July 23, 2010. Idaho Rule of Civil Procedure 56(c) requires answering brief and affidavits to be served at least fourteen days before hearing, altering the deadlines regarding motions for summary judgment from those addressed in Rule 7(b)(3). It follows that any opposing affidavit filed by Hermans would have been due by August 9, 2010, fourteen days before the hearing. Thus, filing a responsive memorandum in opposition and an affidavit on August 12, 2010, was untimely under the Rules. And, Herman's motion to shorten time (or, precisely, for enlargement of time) was made after the expiration of the specified time period, necessitating his demonstrating excusable neglect. I.R.C.P. 6(b). Herman did not establish excusable neglect prior to the hearing, and his attorney did not establish excusable neglect at the hearing. However, counsel for MFLP candidly admitted his client was not prejudiced by the Hermans' filing three days late. Additionally, I.R.C.P. 61 provides this Court is to disregard any error or defect in the proceeding, at every stage of the proceeding, which does not affect the substantial rights of the parties. I.R.C.P. 61; *L & L Furniture Mart, Inc. v. Boise Water Corp.,* 120 Idaho 107, 813 P.2d 918 (Ct.App. 1991). Because MFLP admitted no prejudice, this Court exercised its discretion at the August 23, 2010, hearing, and granted Scott Herman's motion to shorten (enlarge) time.

B. MFLP's Motion to Strike.

MFLP moves this Court for an Order striking the Affidavit of Scott Herman filed August 12, 2010. Plaintiff's Motion to Strike, p. 1. MFLP argues Herman has not complied with Rule 56(c) and has "not shown good cause for the mandatory 14 day time limit to be shortened." *Id.* MFLP states Scott Herman's confusion regarding the status of the case regarding the parties' *pro se* appearance was eliminated when Hermans

were served with MFLP's affidavit and memorandum on June 23, 2010. MFLP argues: "The defendants' *self-imposed* confusion does not excuse the untimely filing of Scott Herman's affidavit." *Id.,* p. 2. Alternatively, MFLP asks this Court to strike specific portions of Herman's affidavit not based on his own personal knowledge and/or which would not be admissible into evidence: paragraph 4 refers to a hearsay conversation regarding a purchase agreement between Herman and a third party and Exhibit A to the affidavit consists of the agreement; paragraph 5 refers to a quitclaim deed which is not provided pursuant to I.R.E. 1002; paragraph 8 refers to hearsay statements by third parties and Exhibit C "is not certified and appears to be an altered copy of a recorded Warranty Deed"' and paragraph 9 makes an "unsupported claim" that the value of the home at foreclosure was the amount owed to the plaintiff. Motion to Strike, pp. 2-3.

As to MFLP's alternative argument to strike portions of the Affidavit of Scott Herman, the arguments are well-taken in part.

In paragraph 4, Herman first states what "we" discussed with MFLP; thereafter, he states a third party agreed to purchase the property at issue and references the agreement attached at Exhibit A. The entirety of paragraph 4 appears to be based on Herman's personal knowledge and matters referred to in the affidavit are attached thereto in compliance with I.R.C.P. 56(e). The paragraph is admissible, but the Court remains free to give it the weight to which it feels it is entitled. *See City of McCall v. Seubert,* 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006). At August 23, 2010, hearing, this Court held MFLP's motion to strike is denied as to the first sentence of paragraph 4, and granted as to the second, third, fourth and fifth sentences, and as to Exhibit A. The Court stated it did not agree with the "verbal act" exception applied as cited by Hermans' counsel.

Paragraph 5 refers to a quitclaim deed which is not attached to the affidavit as required by I.R.C.P. 56(e). Herman explains "we" signed the quitclaim deed and failed to keep a copy. At the August 23, 2010, hearing, counsel for Herman claimed the statements in that paragraph are admissions of a party opponent. At oral argument, counsel for MFLP relied upon the best evidence rule and I.R.E. 1002. However, I.R.E. 1004(1), (2), (3) and perhaps (4), specifically allows testimony about a document which cannot be found. Accordingly, MFLP's motion to strike paragraph 5 must be denied. Even though the Court permits the statement regarding the quitclaim deed to remain, any evidentiary value of such an arguably self-serving statement without documentary support would be very little.

Paragraph 8 again appears to be based upon Herman's personal knowledge and the document referred to in the affidavit is attached. It is unclear how the document was "altered" according to MFLP. At the August 23, 2010, hearing, counsel for Hermans substituted a certified copy of that document. MFLP's motion to strike paragraph 8 is granted as to the last sentence, but denied as to all other parts of paragraph 8 (public records exception) and Exhibit C. Again, the Court remains free to give the document the weight to which it is entitled.

And, paragraph 9, as argued by MFLP, contains Herman's opinion regarding the fair market value of the property. As argued by MFLP, this statement alone is an unsupported statement of opinion. An owner may give testimony as to value of his or her own land. *Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.,* 132 Idaho 295, 306, 971 P.2d 1119, 1130 (1998). However, paragraph 9 does not state a value. Instead, Scott Herman simply comes up with conclusory argument that: "The fair market value of the property at the time of the foreclosure sale was at least as much as

what the plaintiff claims we owe them." Accordingly, MFLP's motion to strike paragraph 9 is granted.

C. MFLP's Motion for Summary Judgment Re: Deficiency.

Idaho Code § 45-1512 states:

> At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.

Idaho Code § 45-1512 limits recovery of a deficiency to:

> …the difference between the outstanding indebtedness and the amount for which the property is sold by the trustee, or to the difference between the indebtedness and the fair market value of the property, whichever is less.

Evans v. Sawtooth Partners, 111 Idaho 381, 383, 723 P.2d 925, 927 (Ct.App. 1986). Here, MFLP seeks the difference between the outstanding debt and the amount for which the property sold (which equals the fair market value of the property in this case). MFLP states: "The plaintiff's complaint also sets forth the amount received by the trustee for the sale of the collateral ($73,210), and the fair market value of the subject property at the time of the sale ($73,210) as evidenced by the assessed value determined by the Kootenai County Assessor on January 1, 2009." Memorandum in Support of Motion for Summary Judgment, pp. 4-5. In their Opposition to Motion for

Summary Judgment, Hermans make two arguments: (1) that the parties agreed Hermans' providing MFLP with a quitclaim deed in lieu of foreclosure would result in Herman's entire indebtedness being forgiven, and, alternatively, (2) that the fair market value of the home at the time of the sale was "at least as great as the amount that the Hermans owed on the property at the time of the deed in lieu." Opposition to Motion for Summary Judgment, pp. 2-3. Herman argues a property owner has been held qualified to testify as to the value of property by the Idaho Supreme Court. *Id.,* p. 3, citing *Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.,* 132 Idaho 295, 306, 971 P.2d 1119, 1130 (1998). Therefore, Herman argues, at least a question of fact remains as to the fair market value of the property in this case. Opposition to Motion for Summary Judgment, pp. 2-3.

Empire Lumber dealt with, in part, whether the District Court had properly admitted the testimony of the President of Empire Lumber on damage valuations resulting from the loss of the building. 132 Idaho 295, 306, 971 P.2d 1119, 1130. The Idaho Supreme Court noted that the rule is the owner of property is qualified to testify as to its value. *Id., citing Pocatello Auto Color Inc. v. Akzo Coatings, Inc.,* 127 Idaho 41, 43, 896 P.2d 949, 951, (1995), and *Weaver v. Village of Bancroft,* 92 Idaho 189, 193, 439 P.2d 697, 701 (1968) However, in *Empire Lumber,* the Idaho Supreme Court specifically noted:

> …Klaue testified as to the amount for which he would be willing to sell the building. His testimony did not merely state his conclusions as to the amount of the monetary damage he sustained, but also set forth the facts and reasoning behind his valuation allowing the jury to determine damages based on these facts as others presented at trial. Further, <u>there was other expert testimony regarding the value of the building,</u> and in the Special Verdict, the jury did not accept Klaue's value determination.

Id. (emphasis added). In the present case, we have none of these features.

Here, only MFLP has provided competent evidence of any sort regarding the fair market value of the property. *See* Exhibit A to Affidavit of Scott Poorman. That evidence is quite compelling as it is the valuation given by the Kootenai County Assessor. Although Hermans argue that the fair market value of the property at the time of the sale was equal to or exceeded the amount owed by them, they simply provide this Court with no credible evidence of such claim. *See Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87-88, 996 P.2d 303, 306-07 (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; the Court considers only that material contained in affidavits and depositions which is based on personal knowledge and which would be admissible at trial.). As to the evidence of value, all Hermans have provided is the affidavit of Scott Herman in which he arrives at no dollar amount of value for the property. Instead Scott Herman simply states: "The fair market value of the property at the time of the foreclosure sale was at least as much as what the plaintiff claims we owe them." Affidavit of Scott Herman in Opposition to Motion for Summary Judgment, p. 3, ¶ 9. That is simply a conclusion, with no basis for that conclusion, and a conclusion which fails to state a value. On the other hand, MFLP has produced evidence of the assessed value of the land. Additionally, at the sale there was no other bidders, which bolsters the fact that the Kootenai County Assessor had accurately valued the property at the time. As mentioned above, in any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Accordingly, summary judgment is granted

in favor of MFLP to the extent that the fair market value of the property at the time of the sale has been established, at $73,210.00. Complaint for Deficiency, p. 3, ¶ 6, Exhibit "E".

Hermans also argue they provided a quitclaim deed in lieu of foreclosure, yet, other than the claim made by Scott Herman, there is no evidence to support that claim. Scott Herman claims:

> 5. The plaintiff said that he would rather have the contract be directly between him and the buyers. He asked us to sign a quit claim deed giving the property back to him. He told us that if we deeded the property back to him he would sell the property to the Orrisons and that we would be completely forgiven on our obligation and the foreclosure process would be stopped. Because the plaintiff promised to forgive our debt and stop the foreclosure we signed the quit claim deed and moved out of the property. After we signed the quit claim deed we gave it to the plaintiff and did not keep a copy.

Affidavit of Scott Herman in Opposition to Motion for Summary Judgment, p. 2, ¶ 5. However, MFLP has failed to contradict these claims. At oral argument, counsel for MFLP argued that MFLP's act of foreclosing is evidence that the debt was forgiven. While that conclusion has some logic, that conclusion is just that, a conclusion, and it is a conclusion based on no evidence. At this point, this Court cannot grant MFLP summary judgment on the issue of a lack of forgiveness of the debt.

That issue will be set for a court trial.

IV. CONCLUSION AND ORDER.

For the reasons stated above;

IT IS HEREBY ORDERED Scott Herman's motion to shorten (enlarge) time is GRANTED.

IT IS FURTHER ORDERED MFLP's motion to strike is GRANTED only to the extent that: regarding paragraph 4, MFLP's motion to strike is denied as to the first

sentence of paragraph 4, and granted as to the second, third, fourth and fifth sentences, and as to Exhibit A; regarding paragraph I.R.E. 1004(1), (2), (3) and perhaps (4), specifically allows testimony about a document which cannot be found, accordingly, MFLP's motion to strike paragraph 5 is denied; regarding paragraph 8, MFLP's motion to strike paragraph 8 is granted as to the last sentence, but denied as to all other parts of paragraph 8 (public records exception) and Exhibit C; and regarding paragraph 9, MFLP's motion to strike paragraph 9 is granted.

IT IS FURTHER ORDERED MFLP's motion for summary judgment is GRANTED in favor of MFLP as to the fair market value of the property at the time of the sale being established at $73,210.00; and MFLP's motion for summary judgment on the issue of a lack of forgiveness of the debt *is DENIED*.

IT IS FURTHER ORDERED this matter is now scheduled for a five day court trial on that issue to begin on March 14, 2011.

Entered this 24th day of August, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2010, 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 #**
Scott L. Poorman	772-6811	April LInscott	664-5884

_____
Jeanne Clausen, Deputy Clerk