STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

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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 KOOTENAI

MACDONALD FAMILY LIMITED PARTNERSHIP AN IDAHO LIMITED PARTNERSHIP, ET AL,

Plaintiff,

vs.

SCOTT LEE HERMAN, ET UX,

Defendant.

Case No. **CV 2010 2164**

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

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's second Motion for Summary Judgment filed October 15, 2010. In its August 24, 2010, Memorandum Decision and Order, this Court set forth the factual and procedural history of this case:

> 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.
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> 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.

Amended Memorandum Decision and Order on: Plaintiff's Motion for Summary Judgment; Plaintiff's Motion to Strike; and Defendant's Motion to Shorten Time (Motion to Enlarge Time); and Order Scheduling Trial, pp. 1-3. This matter is currently scheduled for a five-day court trial commencing on March 14, 2011.

On October 15, 2010, MFLP filed its Second Motion for Summary Judgment and Notice of Hearing, scheduling the hearing for November 16, 2010. The second motion for summary judgment is solely on the issue of whether there had been loan forgiveness. In addition to the motion, MFLP filed its "Memorandum in Support of Plaintiff's Second Motion for Summary Judgment", an "Affidavit of Timothy David Orrison in Support of Second Motion for Summary Judgment", an "Affidavit of Don Macdonald in Support of Plaintiff's Second Motion for Summary Judgment" and an

"Affidavit of Scott Poorman in Support of Plaintiff's Second Motion for Summary Judgment". In spite of a month passing between the filing of MFLP's second motion for summary judgment and hearing on the motion, Herman has not objected to, or replied to, that second motion for summary judgment. Oral argument was held on November 16, 2010. Hermans' counsel appeared and was allowed to argue. Hermans' counsel relied solely upon the Affidavit of Scott Herman in Opposition to Motion for Summary Judgment filed on August 12, 2010, in response to MFLP's *first* motion for summary judgment. At oral argument, Hermans' counsel claimed such affidavit created a disputed issue of fact.

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

In its August 24, 2010, decision on MFLP's first motion for summary judgment, this Court wrote:

> 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 [not] 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.

Amended Memorandum Decision and Order on: Plaintiff's Motion for Summary Judgment; Plaintiff's Motion to Strike; and Defendant's Motion to Shorten Time (Motion to Enlarge Time); and Order Scheduling Trial, p. 11.

Subsequent to this Court's Order denying them summary judgment on the issue of debt-forgiveness, MFLP states, "additional documents and information have come to light that help explain the defendants' position on this issue." Memorandum in Support

of Plaintiff's Second Motion for Summary Judgment, p. 7. MFLP clarifies that Hermans never tendered a signed deed in lieu of foreclosure to MFLP. *Id.* Instead, Hermans entered into a written agreement to sell the subject property to the Orrisons, and in that agreement, Hermans acknowledged their continuing ownership of the property and their exclusive authority to convey title. *Id.,* p. 8. And Hermans executed an Addendum to that purchase and sale agreement that specifically referenced the balance owed to MFLP by Hermans on the promissory note. *Id*. MFLP also quotes Scott Herman's deposition testimony, in which Scott Herman testified to a telephone call between he and Don Macdonald leading him to operate under the impression that his deeding the property back to MFLP would amount to forgiveness of the debt, but that he had no evidence, documents, or other information to support his claim. *Id.,* p. 11. It is MFLP's contention that:

> …[I]t was the completion of the sale between the defendants and Mr. and Mrs. Orrison that would "seal the deal" and result in a cancellation of the plaintiff's foreclosure. It is an uncontested fact that the defendants voluntarily cancelled their sale to Mr. and Mrs. Orrison. Before the defendants cancelled their sale to the Orrisons, they received a letter from the plaintiff that specifically informed them that the trustee's foreclosure sale would go forward if the Herman/Orrison transaction did not close.

Id., p. 10.

In the Affidavit of Timothy David Orrison in Support of Second Motion for Summary Judgment, filed on October 15, 2010, Orrison testifies that he and his wife sought to purchase the subject property, but were informed that their purchase from the Hermans would remain encumbered with the deed of trust to MFLP. Affidavit of Timothy David Orrison, p. 2, ¶ 7. Orrison agreed to purchase the property from Hermans upon the understanding that the MFLP (and/or Don Macdonald himself) would have no recourse against Orrisons personally if the balance of the Hermans' promissory

note were not paid; MFLP and/or Macdonald "would have no recourse against us personally, but could only foreclose the Herman deed of trust against the property." *Id.* Orrisons thereafter cancelled their Residential Purchase and Sale Agreement, and Addendum thereto, because the new warranty deed received from Kootenai County Title Company "said that we were assuming and agreeing to pay the Herman's deed of trust recorded on April 26, 2006." *Id.,* p. 3, ¶ 11.

Again, Hermans did not reply to the instant second motion for summary judgment, save for counsel's oral argument that Scott Herman's affidavit filed August 12, 2010, creates an issue of fact. Although questions of material fact existed at the time this Court considered MFLP's first motion for summary judgment, MFLP has proffered new evidence supporting its contention that there was no forgiveness of the debt. This new evidence has not been rebutted (or even responded to) by Hermans in any way.

Scott Herman's affidavit claims: "The plaintiff said he would accept a deed in lieu of foreclosure and forgive our debt." Affidavit of Scott Herman in Opposition to Motion for Summary Judgment, p. 1, ¶ 3. Scott Herman then claims the Hermans found the possible buyers, the Orrisons, and:

> The plaintiff [Macdonald] 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.

Id., p. 2, ¶ 5. Don Macdonald admits he *discussed* over the phone with Scott Herman the possibility of [Hermans] deeding the Spirit Lake Property back to the Macdonald

Family Limited Partnership in-lieu of a foreclosure." Affidavit of Don Macdonald in Support of Second Motion for Summary Judgment, p. 2, ¶ 6. However, Don Macdonald then includes much more *detail* about this *discussion*, and makes it clear there was no agreement because Hermans subsequently failed to do certain things. The affidavit of Scott Herman never discusses these details, and thus, Hermans have completely failed to rebut the uncontroverted evidence on these details. Not only that, MFLP recently took the deposition of Scott Herman, and his deposition testimony *corroborates* Don Macdonald's *details* provided in his new affidavit.

The *details* are as follows. At the time Don Macdonald discussed the idea of a deed in lieu of foreclosure with Scott Herman, Don Macdonald was not aware that the Hermans had granted second and third deeds of trust against the Spirit Lake property. Affidavit of Don Macdonald in Support of Second Motion for Summary Judgment, p. 2, ¶ 6. Thus, the property was encumbered *by the acts of the Hermans*, and a deed in lieu of foreclosure would be problematic in light of those encumbrances *placed by the Hermans*. Don Macdonald told Scott Herman in that phone call that Don Macdonald would obtain a title report on the property and "…then we could discuss the option of a deed-in-lieu further." *Id.* As would be expected, the title report showed the encumbrances placed on the property by the Hermans. *Id.,* p. 3, ¶ 8. Don Macdonald then told Scott Herman he "…was unwilling to accept a deed in lieu of foreclosure from the defendants because of the additional debt secured against their property." *Id.,* ¶ 9. Don Macdonald told Scott Herman if a buyer was willing to assume Hermans' debt to MFLP or pay an amount in excess of the Hermans note to MFLP, "…then I would cancel the foreclosure." *Id.* The Hermans then signed quitclaim deeds to allow for such to occur (*Id.,* p. 4, ¶¶ 13, 14) if a buyer was found, and it appeared such a buyer, the

Orrisons, was found. However, *it was Hermans' actions that prevented such sale from occurring*. Don Macdonald states that after presenting Hermans with a promissory note to the Hermans:

> On or about December 21, 2009, I sent a letter and a proposed Prommisory Note in the amount of $9,000 to the defendants. A true and correct copy of my letter and proposed Pormissory Note are attached and incorporated herein as **Exhibit "8"**.
> On or about December 24, 2009, I was contacted by Scott Herman by telephone. Mr. Herman informed me that he would not sign the proposed $9,000 Promissory Note and he would not pay any amount of the expenses I had incurred to sell the Spirit Lake Property. At that time I informed Mr. Herman that I would go forward with the trustee's foreclosure sale unless the Herman's sale to Mr. and Mrs. Orrison was completed.

Id., p. 6, ¶ ¶ 20-21. The $9,000 note from Hermans to MFLP was to cover the interest that was due from Hermans to MFLP. *Id.,* Exhibit 8.

Scott Herman's affidavit makes no mention of the encumbrances he and his wife placed on the property while they owned it, and makes no mention of their refusal to sign the promissory note to pay the back interest if the deed-in-lieu of foreclosure process were used. In his recent deposition, Scott Herman even admitted that it was *the completion of the sale* between Hermans and the Orrisons that would result in a cancellation of the plaintiff's foreclosure, and nothing else. Affidavit of Scott L. Poorman in Support of Second Motion for Summary Judgment, pp. 1-2, ¶¶ 2-3; Exhibit 1, pp. 36, L. 16 – p. 37, L. 12.

It is an uncontradicted fact that Hermans cancelled their sale to the Orrisons, the Hermans refused to sign the promissory note and Don Macdonald informed the Hermans that he would go forward with the trustee's foreclosure sale. Affidavit of Don Macdonald in Support of Second Motion for Summary Judgment, p. 6, ¶ ¶ 20-21. It is an uncontradicted fact that Hermans never tendered a signed deed-in-lieu of foreclosure instrument to MFLP.

It is not understandable how Hermans could place additional encumbrances on the property they bought from MFLP, not disclose that fact to MFLP, not bring their delinquent interest current, and yet think they had an *agreement* as to all terms on how to use a deed in lieu of foreclosure. Not only is it not understandable, the deposition of Scott Herman shows such agreement never occurred. Scott Herman admitted in his deposition that the conditions precedent to the debt being forgiven never occurred. The performance of those conditions precedent were only in the control of the Hermans. Affidavit of Scott L. Poorman in Support of Second Motion for Summary Judgment, pp. 1-2, ¶¶ 2-3; Exhibit 1, p. 68, L. 4 – p. 71, L. 6. Specifically, cancellation of the foreclosure sale was contingent on the sale to the Orrisons actually being completed, and that cancellation of the foreclosure sale contingent on Hermans agreeing to sign and pay the $9,000 note. *Id.* The only reason the foreclosure sale was not averted is due to Hermans' refusal. Thus, summary judgment is appropriate. While there was discussion about forgiveness of the debt, it was only *discussion*, not *agreement*. The only reason it did not become an *agreement* was because Hermans refused to do what Don Macdonald was requiring Hermans to do in order to avoid the foreclosure.

At oral argument, counsel for the Hermans argued that there was evidence indicating that Hermans *relied* upon the promise that MFLP would forgive the debt: 1) the Hermans moved out of the residence, and 2) they cooperated in signing the deeds. First of all, Hermans have never raised the affirmative defense of detrimental reliance in their answer or in any other pleading. Second, Hermans' eleventh-hour claim made at oral argument that Hermans relied upon MFLP's forgiveness of the debt, ignores Scott Herman's own testimony as discussed above. Third, the conclusion (that MFLP would accept a deed in lieu of foreclosure and forgive our debt) made by Scott Herman in his

affidavit filed August 12, 2010, is unsupported by Scott Herman's own subsequent deposition testimony. This is not a situation where there are contradictory statements made by Scott Herman in one affidavit as compared to another, a situation which the Idaho Supreme Court has held would still create an issue for trial sufficient to withstand summary judgment. *Stanley v. Lennox Industries, Inc.,* 140 Idaho 785, 789, 102 P.3d 1104, 1108 (2004). Rather, this is a situation where Scott Herman first made a conclusory statement in his affidavit, and that conclusory statement was not supported by other portions of his affidavit, and the conclusory statements made by Herman in his affidavit were not supported and were in fact contradicted in his later deposition. Simply stated, Scott Herman's conclusions are not supported by Scott Herman's own facts. Conclusions in affidavits which are unsupported are insufficient to create an issue of material fact. I.R.C.P. 56(e); *Casey v. Highlands Ins. Co.,* 100 Idaho 505, 600 P.2d 1387 (1979); *Corbridge v. Clark Equipment Co.,* 112 Idaho 85, 730 P.2d 1005 (1986); *Hecla Mining Co. v. Star-Morning Mining Co.,* 122 Idaho 778, 844 P.2d 706 (1992); *State v. Shama Resources Ltd. Partnership,* 127 Idaho 267, 899 P.2d 977 (1995). Since this would be a court trial, this Court 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). The only probable inference is there was no agreement, no promise to forgive Hermans' debt. While there were discussions about forgiveness of the debt, those discussions were contingent upon the Hermans doing additional things, which Scott Herman admits they never did.

IV. CONCLUSION AND ORDER.

For the reasons stated above, plaintiff MFLP's Second Motion for Summary Judgment must be granted.

IT IS HEREBY ORDERED plaintiff MFLP's Second Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED the trial scheduled for March 14, 2011, is VACATED.

IT IS FURTHER ORDERED plaintiff MFLP is in all aspects the prevailing party. Counsel for MFLP is directed to prepare a judgment consistent with this memorandum decision and order.

Entered this 17th day of November, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 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	665-7290

_____
Jeanne Clausen, Deputy Clerk