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Department of Water Resources

Kevin J. Beaton (ISB #3080)
STOEL RIVES LLP
101 S. Capitol Blvd., Ste. 1900
Boise, Idaho 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040

Attorneys for WaterOne Enterprises LLC,
a California limited liability company

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE SRBA	) Subcase No.: 51-04037
	)
Case No. 39576	) AFFIDAVIT OF TERESA A. HILL IN
	) SUPPORT OF WATERONE ENTERPRISES
	) LLC'S MOTION FOR SUMMARY
	) JUDGMENT AND MOTION TO
	) SUPPLEMENT OBJECTION AND FOR
	) ISSUANCE OF AMENDED DIRECTOR'S
	) REPORT

TERESA A. HILL, being duly sworn, deposes and states:

1. I am an attorney at Stoel Rives LLP, counsel of record for WaterOne Enterprises LLC. I am familiar with this case and make this affidavit based on my personal knowledge. I submit this affidavit in support of WaterOne Enterprises LLC's Motion for Summary Judgment and Motion to Supplement Objection and for Issuance of Amended Director's Report.

2. Attached hereto as Exhibit "A" is a true and correct copy of *WaterOne Enterprises, LLC v. Olivas*, Case No. CV 2001-03402, Memorandum Decision and Order issued November 5, 2002 by District Judge Morfitt.

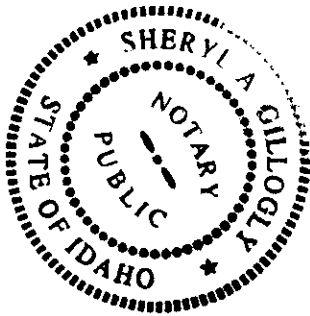
DATED this 17th day of January, 2003.

AFFIDAVIT OF TERESA A. HILL IN SUPPORT OF WATERONE ENTERPRISES LLC'S
MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUPPLEMENT OBJECTION
AND FOR ISSUANCE OF AMENDED DIRECTOR'S REPORT - 1

Boise-152005.1 0050632-00001

Teresa A. Hill
Teresa A. Hill

SUBSCRIBED AND SWORN to before me this 17th day of January, 2003.



Sheryl A. Gillogly
NOTARY PUBLIC in and for the
State of Idaho, residing at: Boise
My Commission Expires: 11/21/04

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2003, I caused to be served a true copy of the foregoing AFFIDAVIT OF TERESA A. HILL IN SUPPORT OF WATERONE ENTERPRISES LLC'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUPPLEMENT OBJECTION AND FOR ISSUANCE OF AMENDED DIRECTOR'S REPORT upon the following individuals, in the following manner:

David J. Barber
Deputy Attorney General
Natural Resources Division
P.O. Box 4449
Boise, Idaho 83711-4449

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Purity Sweet
390 W. 100 S.
Paul, Idaho 83347

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Janet O'Crowley
16 Stubb Road
Carey, Idaho 83320-5026

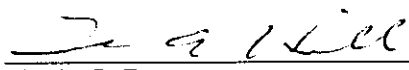
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Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

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United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

☐ Overnight Mail
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b2 Kevin J. Beaton

FILED

11:20 A.M. P.M.

NOV 05 2002

CYNTHIA EATON, CLERK

Cynthia Eaton
Deputy ClerkRECEIVED
NOV 11 2002IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEEWATERONE ENTERPRISES, LLC,)
a California Limited Liability Company,)
THOMAS SCROGGINS, an individual,)
and VIRGINIA CANAVERO, an)
individual,)

Plaintiffs,)

Case No. CV 2001-03402

-vs-)

MATTHEW OLIVAS and TRINA)
OLIVAS, et al.,)

Defendants.)

MEMORANDUM DECISION
AND ORDERMATTHEW OLIVAS and TRINA)
OLIVAS, husband and wife; DON DOZIER,)
an individual, NANCY DOZIER, an)
individual, DANNY CRYSTAL, an)
individual, TRUST COMPANY OF)
AMERICA, and HIGH DESERT)
RESOURCES, LLC, an Idaho limited)
liability company, PURITY SWEET, INC.,)
An Idaho corporation,)Counterclaimants and)
Cross-claimants,)

MEMORANDUM DECISION AND ORDER

1

EXHIBIT A

-vs-

WATERONE ENTERPRISES, LLC, a
California Limited Liability Company,
THOMAS SCROGGINS, an individual, and
VIRGINIA CANAVERO, and individual,

Counterdefendants,

JOE SHELTON, C. CRELLIN SCOTT,
And TRUST COMPANY OF AMERICA
as custodian for C. CRELLIN SCOTT,

Cross-Defendants.

The above-entitled case came on regularly for hearing before the Court on various motions. Plaintiffs/Counterdefendants (hereafter referred to as "Plaintiffs") appeared through their counsel of record, Kimbell D. Gourley. Defendants/Counterclaimants/Cross-claimants Matthew Olivas, Trina Olivas, Don Dozier, Nancy Dozier, Brent Dozier, Danny Crystal, Trust Company of America (as Trustee for Nancy Dozier), High Desert Resources, LLC and Purity Sweet, Inc., (hereafter collectively referred to as "Olivas Defendants") appeared through their attorney of record Randy J. Stoker.

Defendant Sylvia Olivas having previously been defaulted, did not appear, either in person or by counsel.

The status and representation of Defendants/Cross-Defendants, Joseph Shelton, C. Crellin Scott, Trust Company of America (as custodian for C. Crellin Scott) and High Desert Resources, LLC (hereafter "Shelton Defendants") in these motions is unclear. On January 23, 2002 the Olivas Defendants, through their then attorney Mr. Donald

Chisholm filed an answer, counterclaim as well as a cross-claim against Shelton, Scott and Trust Company of America (as custodian for C. Crellin Scott) (hereafter TCA-Scott). Thereafter, Mr. J. Dee May, on behalf of Shelton, Scott, TCA-Scott and High Desert Resources, LLC, filed an answer, counterclaim and cross-claim against the Olivas Defendants excluding High Desert Resources and thereafter, a reply to the cross-claim of the Olivas Defendants. At that point, both Mr. Chisholm and Mr. May were purporting to represent High Desert Resources. Pursuant to stipulation, the Court entered an Order requiring the Olivas Defendants to file an amended answer, counterclaim and cross-claim. Pursuant to that Order, Mr. Chisholm filed on April 1, 2002 an amended answer and counterclaims but no cross-claims. The heading on the pleadings reflects that Mr. Chisholm was "Attorney for all Named Defendants, except Sylvia Olivas." The amended answer and counterclaims purports to assert a counter claim against Plaintiffs on behalf of defendants Shelton, Scott and TCA-Scott; all of whom were at that time represented by Mr. May. On June 17, 2002, Mr. Chisholm filed his motion to withdraw as counsel for the defendants. That motion was granted on June 25, 2002 over the objection of the Plaintiffs. Thereafter, on July 5, 2002, Mr. May filed a notice of appearance on behalf of High Desert Resources and 'reiterate[d]' that he is the attorney representing Shelton, Scott and TCA-Scott. Each of the Olivas Defendants then filed notices of appearance *pro se*.

On August 22, 2002 Mr. Stoker substituted in as attorney for the Shelton Defendants in place of Mr. May and on September 3, 2002, entered his appearance as attorney for the Olivas Defendants. Mr. Stoker thus appears to be in the unique position of representing both the cross-claimants and the cross-defendants in this action.

The Court having heard and carefully considered the arguments of counsel, the affidavits, and briefs filed in support of and in opposition to the various motions together with the file and records in this case, and good cause appearing, finds and concludes as follows:

Background and Procedural History

This litigation involves a parcel of real property situated in Owyhee County Idaho commonly known as "Murphy Hot Springs" and/or "Desert Hot Springs" (hereafter "Murphy Hot Springs"). At issue is the ownership of and right to the possession of Murphy Hot Springs, the ownership of Waterone Enterprises, LLC, a California limited liability company (hereafter "Waterone California"), the ownership of the Amended Order, Judgment and Decree of Foreclosure related to Murphy Hot Springs entered in the case entitled *Showalter v. Olivas*, Owyhee County Case No. CV 96-1314, as well as various claims of the parties for breach of contract.

In 1994, Harry and Anita Showalter owned Murphy Hot Springs. The Showalter's conveyed Murphy Hot Springs via a warranty deed to Sylvia Olivas on February 7, 1994. To secure payment of a portion of the purchase price, Olivas executed a deed of trust in favor of the Showalters.

On September 9, 1997, Sylvia Olivas conveyed Murphy Hot Springs to her brother Matthew Olivas via a quitclaim deed.

On May 12, 2000, this Court entered an Amended Order, Judgment and Decree of Foreclosure in favor of the Showalters pursuant to the deed of trust on Murphy Hot Springs securing payment of the obligations owing by the Sylvia, Matthew and Trina Olivas.

Thereafter, on July 13, 2000 Matthew and Trina Olivas filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. The Olivases listed themselves as owners of Murphy Hot Springs in the bankruptcy schedules. The Olivases' Chapter 11 bankruptcy was converted to a Chapter 7 by order of the United States Bankruptcy Court on October 26, 2000, and Lois Murphy was appointed as the bankruptcy trustee.

On January 12, 2001 the bankruptcy trustee, held a public auction to sell the Olivases' interest in Murphy Hot Springs. Waterone California bid \$85,000 for Murphy Hot Springs, and was the highest bidder. On January 17, 2001, Ms. Murphy executed a Trustee Quitclaim Deed ("the trustee's deed") conveying the bankruptcy estate's interest in Murphy Hot Springs to Waterone California with an address of 251 Versailles Court, Tracy California, 95376.

The trustee's deed stated:

Sale is subject to all liens or claims with all valid liens remaining attached to the property. The following claims will remain with the property after the sale: Judgment of Foreclosure in *Showalter v. Olivas*, Case No., ... Rights of redemptions, exemptions and all liens and encumbrances of record including easements and property taxes.

On March 28, 2001, Waterone Enterprises, LLC, an Idaho limited liability company (hereafter "Waterone Idaho") filed articles of organization with the Idaho Secretary of State, listing an address of 2410 Gem Ave. Emmett, Idaho 83617

On June 15, 2001, the Bankruptcy Court executed an order approving the trustee's sale of property to "Waterone Enterprises, LLC."

On December 3, 2001 Waterone Enterprises, LLC, a California limited liability company, registered with the Idaho Secretary of State.

On December 11, 2001, Waterone California filed a complaint in this case asserting causes of action for quiet title and slander of title, ejectment and restitution of the property, declaratory judgment as to the ownership of "Waterone," declaratory judgment as to ownership of the amended judgment and decree of foreclosure and attorney fees and costs. Defendants answered and asserted various counterclaims and cross-claims.

Motions Before the Court

(1) Plaintiffs' Motion for Partial Summary Judgment; (2) Defendants' Motion to Continue Summary Judgment Proceedings; (3) Plaintiffs' Motion to Strike Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment and Affidavit of Danny Crystal; and, (4) Waterone Idaho's Motion to Intervene

Analysis

I. Defendants' Motion to Continue Summary Judgment Proceedings

The Court will first address the Defendants' Motion to Continue Summary Judgment Proceedings.

The Court finds that Plaintiffs' Motion for Partial Summary Judgment was filed June 13, 2002 and originally noticed for hearing on July 12, 2002. Thereafter the attorney representing the Olivas Defendants filed a motion for leave to withdraw as counsel and noticed his motion to withdraw for hearing on June 24, 2002. Plaintiffs filed their objection to the motion. On June 24, 2002 the Court granted the Olivas defendants' then counsel's motion to withdraw as attorney of record pursuant to I.R.C.P. 11(b)(3). The withdrawal of the Olivas Defendants' attorney precluded the Court from addressing Plaintiffs' motion for partial summary judgment noticed for July 12, 2002. Thereafter, on

or about July 15, 2002 each of the Olivas defendants filed a notice of *pro se* appearance pursuant to rule 11(b)(3). On August 6, 2002 Plaintiffs filed an amended notice of hearing noticing their motion for partial summary judgment for hearing before the Court on September 13, 2002. Thereafter, on August 22 and September 3, 2002 Randy J. Stoker entered his appearance on behalf of all Defendants and filed a motion to continue the summary judgment proceedings pursuant to I.R.C.P. 56(f) asserting that he had just been retained on behalf of the defendants, that no discovery has been conducted in the case and that he was filing a motion to intervene on behalf of Waterone Idaho which is a necessary party to a full adjudication of the issues presented by Plaintiffs' motion.

The Court's decision to grant or deny a motion for continuance under I.R.C.P. 56(f) is one of discretion. See *Johnston v. Pascoe*, 100 Idaho 414, 418-19 (1979).

The Court finds and concludes that Plaintiffs' motion for partial summary judgment was originally filed June 13, 2002, some ninety (90) days prior to the hearing noticed for September 13, 2002. The Court further finds and concludes that Plaintiffs' motion for partial summary judgment had previously been noticed for hearing in July and that the withdrawal of counsel for the Olivas Defendants, over the objection of the Plaintiffs, mandated that the July hearing be vacated. The Olivas Defendants each entered *pro se* appearances in July 2002. The non-Olivas Defendants were represented by Mr. May at all times prior to Mr. Stoker's substitution for Mr. May on August 22, 2002.

The Court further finds and concludes that Plaintiffs' motion for partial summary judgment addresses only the issues of the ownership and the right of possession of the real property. Issues relating to the ownership of Waterone California, the Amended

Order, Judgment and Decree of Foreclosure and related breach of contract claims are outside the ambit of Plaintiffs' motion.

The Court further finds and concludes that the affidavit of Defendants' counsel filed in support of their motion to continue does present sufficient facts to justify this Court's determination that Defendants cannot present, by affidavit, facts essential to justify Defendants' opposition to Plaintiffs' motion. Nor does counsel's affidavit present facts that reasonably establish that depositions or additional discovery in this case would disclose facts essential to justify Defendants' opposition to the motion.

The Court cannot find and conclude, based upon the affidavit presented, that yet another continuance of the hearing on Plaintiffs' Motion for Partial Summary Judgment is appropriate or that additional time would allow Defendants to present facts essential to justify Defendants' opposition to Plaintiffs' Motion of Partial Summary Judgment.

Therefore, Defendants' Motion to Continue Summary Judgment Proceedings be and is hereby, DENIED.

II. Plaintiffs' Motion to Strike Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment and Affidavit of Danny Crystal

The basis for Plaintiffs' motion to strike is two-fold. First, Plaintiffs correctly assert that the filings are untimely pursuant to I.R.C.P. 56(c). Second, Plaintiffs assert that the Affidavit of Danny Crystal does not comply with the requirements of I.R.C.P. 56(e).

At the scheduled hearing on September 13th, and for the purpose of insuring that their motion would be heard, Plaintiffs', in effect, withdrew their timeliness objection. Therefore, Plaintiffs' motion to strike on the grounds of untimely filing was withdrawn and is hereby DENIED.

I.R.C.P. 56(e) sets forth the requirements for affidavits in support and in opposition to summary judgment. Rule 56(e) provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. (emphasis added).

Plaintiffs' Motion for Partial Summary Judgment is heard and determined by the Court. The Court can determine, and will disregard and not rely upon, any averments in the affidavit of Danny Crystal that are not in compliance with the requirements established by Rule 56(e). Therefore, Plaintiffs' motion to strike the affidavit of Danny Crystal is DENIED.

III. Plaintiffs' Motion for Partial Summary Judgment

A. Standards for Summary Judgment

Summary judgment is appropriate where the pleadings, depositions, admissions and affidavits on file show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 606 (1995). At all times, the burden of proving the absence of a genuine issue of material facts rests upon the moving party. *G and M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517 (1991).

As a general rule, in consideration of the motion, the court must liberally construe the facts and inferences contained in the existing record in favor of the party opposing the motion. *Bonz v. Sudweeks*, 119 Idaho 539, 541 (1991).

To withstand a motion for summary judgment, the opposing party's case must be anchored in something more solid than speculation. A mere scintilla of evidence is not sufficient to create a genuine issue of material fact. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853 (Ct. App. 1986). The party opposing the motion may not merely rest on the allegations contained in the pleadings; rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party. I.R.C.P. 56(e); *Ambrose v. Buhl Joint School Dist. #412*, 126 Idaho 581, 584 (Ct. App. 1995).

Supporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. I.R.C.P. 56(e).

B. Findings of Facts and Conclusions of Law

Plaintiffs seek a partial summary judgment declaring: 1) Waterone California is the fee simple owner of Murphy Hot Springs, and that Defendants have slandered such title by the execution and recording of "wild" deeds and conveyances; 2) that Waterone California is entitled to the immediate possession of Murphy Hot Springs and the issuance of a writ of ejectment or assistance; and, 3) the Courts declaration that neither Trina nor Matthew Olivas possess a homestead exemption or a right of redemption with respect to the Murphy Hot Springs property.

1) Undisputed Facts

Showalters conveyed Murphy Hot Springs to Sylvia Olivas, by warranty deed, on February 7, 1994.

Sylvia Olivas executed a deed of trust in favor of Showalters to secure payment of a portion of the purchase price.

On September 9, 1997, Sylvia Olivas conveyed Murphy Hot Springs to the Defendant Matthew Olivas, by quitclaim deed.

On May 12, 2000 this Court entered an Amended Order, Judgment and Decree of Foreclosure on the obligations owed by Sylvia Olivas and the defendant's Matthew Olivas and Trina Olivas pursuant to the promissory notes secured by the deed of trust on the Murphy Hot Springs Property.

On July 13, 2000, Matthew and Trina Olivas filed for relief under Chapter 11 of the United States Bankruptcy Code.

The Olivases filed schedules in the bankruptcy proceedings asserting ownership of Murphy Hot Springs subject to liens and encumbrances.

On October 26, 2000, the United States Bankruptcy Court converted the Olivases' Chapter 11 bankruptcy proceedings to a Chapter 7 bankruptcy and appointed Lois Murphy as the Chapter 7 trustee.

On or about December 14, 2000, the Chapter 7 trustee filed her Notice of Sale by Trustee with the United States Bankruptcy Court thereby giving notice to all interested parties of her intent to sell all of the bankruptcy estate's interest in all real and personal property including the Murphy Hot Springs property and the cash bond on deposit with the Owyhee County Court.

No objections were made to the proposed sale.

Pursuant to notice, on January 12, 2001, the bankruptcy trustee, acting through her attorney, held a public auction for the purpose of selling the Murphy Hot Springs property.

Waterone Enterprises LLC, a California limited liability company was the successful bidder at the trustee's sale with a bid of \$85,000.00.

On January 17, 2001, the bankruptcy trustee executed a trustee's quitclaim deed whereby the trustee conveyed all of the bankruptcy estate's interest in the Murphy Hot Spings property to Waterone Enterprises.

The Trustee's Quitclaim Deed conveyed Murphy Hot Springs to Waterone Enterprises LLC at 251 Versailles Ct., Tracy, California 95376. The Trustee's Quitclaim deed provided:

WHEREAS, [Trustee] sold and [Waterone] purchased at said auction whatever rights the bankruptcy estate may have had in the real property of the Debtors being subject to an Amended Order, Judgment and Decree of Foreclosure filed May 12, 2000 and various other liens and encumbrances including IRS liens; and, ... Grantor does hereby release and quitclaim to [Waterone], . . . any right, title, interest, and estate the debtors and the bankruptcy estate may have had by operation of law or otherwise in and to . . . [the real property]. Said conveyance is made subject to all liens and encumbrances of any kind remaining on the property . . .

On June 15, 2001 the United States Bankruptcy Court entered its order approving the Trustee's sale of real and personal property "subject to all liens, encumbrances and claims, which remain attached to such Property." The Bankruptcy Court's order ratified, confirmed and approved the sale of Murphy Hot Springs to Waterone Enterprises, LLC subject to [the] foreclosure judgment"

Articles of Organization of Waterone Enterprises, LLC, a California limited liability company were filed with the Secretary of State of the State of California on July 5, 2000.

The Articles of Organization reflect that the street address of the principal executive office of Waterone Enterprises, LLC is 251 Versailles Court, Tracy, California 95376 and that Virginia Canavero and Thomas Scroggins are the managers and members of the limited liability company.

On March 28, 2001 Articles of Organization under the name of Waterone Enterprises LLC were filed with the Secretary of State of the State of Idaho. The Articles of Organization were filed by Attorney Clayne S. Zollinger, Jr. at the request of Thomas Scroggins and Waterone Enterprises, LLC, a California limited liability company.

Waterone Enterprises, LLC, a California limited liability company registered with the Secretary of State of the State of Idaho on December 3, 2001.

This action was commenced by Plaintiffs filing of their verified complaint on December 11, 2001.

2) Right of Redemption and Homestead Exemption

Defendants assert that partial summary judgment is inappropriate in this case for the reason that the Olivases have a right of redemption and a homestead exemption in the Murphy Hot Springs real property that was not extinguished by the Chapter 7 bankruptcy trustee's sale of the property.

Defendants predicate their argument on the language contained in the Notice of Sale by Trustee filed in the Bankruptcy Court on December 15, 2000, as follows:

5. TREATMENT OF EXISTING LIENS: Sale is subject to all liens or claims with all valid liens remaining attached to the property. The following claims will remain with the property after the sale: Judgment of Foreclosure in *Showalter v. Olivis* (sic) Case No. CV 96-01314, 3rd Judicial District, Owyee (sic) County, State of Idaho, filed 5/12/00 in favor of Showalter or assigns; **Rights of redemptions, exemptions** and all liens and encumbrances

of record including easements and property taxes.
(Underlining and italics in original. Bold emphasis added).

Defendants also cite nearly identical language contained in the Report of Sale by Trustee filed with the Bankruptcy Court on March 14, 2001 and attached as Exhibit 20 to the Affidavit of Danny Crystal filed September 6, 2002. Plaintiffs have objected to consideration of Exhibit 20 asserting that Mr. Crystal lacks the knowledge to lay a foundation for that Exhibit. The Court agrees. Rule 56(e) requires that "[S]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." The Court will therefore not consider the language contained in Exhibit 20 to the Crystal affidavit. The same language, however, is contained in the Notice of Sale by Trustee attached to the Affidavit of Lois Murphy that was filed by Plaintiffs.

Defendants rely on the language of the Trustee's Quitclaim Deed and the Notice of Sale by Trustee and have cited no authority in support of their arguments.

a) Right of Redemption

A judgment debtor's right of redemption in Idaho is statutory. Chapter 3, Title 11, Idaho Code, provides for "Levy and Sale Under Execution." I.C. § 11-301 provides for execution of a writ against the property of a judgment debtor by the sheriff. I.C. § 11-302 provides for notice that is required prior to the sale of property on execution while § 11-304 provides the procedures for the conduct of the sale of property under execution. I.C. § 11-310 and Chapter 4, Title 11, Idaho Code, provide that a judgment debtor or his successor may redeem real property from the purchaser within the time specified in I.C. § 11-402 following a sale under execution.

The Idaho statutory scheme provides a right of redemption to a judgment debtor whose real property is sold pursuant to a writ of execution.

In this case, there was no sale under execution pursuant to the Amended Order. Judgment and Decree of Foreclosure entered by this Court in *Showalter v. Olivas* and, thus no right of redemption has arisen under Idaho law. Defendants have provided no authority or argument that a the sale of a bankrupt's real property by a bankruptcy trustee gives rise to any right of redemption under either Idaho or federal law.

The Court finds and concludes, as a matter of law that Defendants have no right of redemption as to the Murphy Hot Springs real property pursuant to Title 11, Idaho Code.

The Court further finds and concludes, as a matter of law that Defendants' claim to a right of redemption, which has survived sale by the bankruptcy trustee, is without merit.

The Court still further finds and concludes that there is no genuine issue of material fact relating to Defendants' claim of a right of redemption to the real property and that Plaintiffs are entitled to summary judgment on that issue.

b) Homestead Exemption

The homestead exemption is also a creature of statute. Idaho statutes provide as follows:

55-1001. Definitions. – For purposes of this chapter:

(2) "Homestead" means and consists of the dwelling house or the mobile home in which the owner resides or intends to reside Property included in the homestead must be actually intended or used as a principal home for the owner.

* * * *

(4) "Owner" includes, but is not limited to, a purchaser under a deed of trust, mortgage, or contract, or a person who takes the subject property under a life estate. (emphasis added).

Idaho Code § 55-1003 states in pertinent part:

A homestead may consist of lands . . . regardless of area, but the homestead exemption amount shall not exceed the lesser of (i) the total net value of the lands, mobile home, and improvements as described in section 55-1001, Idaho Code; or (ii) the sum of fifty thousand dollars (\$50,000).

Idaho Code § 55-1005 states:

The homestead is subject to execution or forced sale in satisfaction of judgments obtained: . . . (3) on debts secured by mortgages, deeds of trust or other consensual liens upon the premises, executed and acknowledged by the husband and wife or by an unmarried claimant. (4) On debts secured by mortgages, deeds of trust or other consensual liens upon the premises, executed and recorded before the homestead became effective.

Idaho Code § 55-1008 further provides:

(1) Except as provided in section 55-1005, Idaho Code, the homestead is exempt from attachment and from execution or forced sale for the debts of the owner up to the amount specified in section 55-1003, Idaho Code. . . . (emphasis added).

Chapter 11, Title 55, Idaho Code, provides for the Sale of Homestead on Execution. I.C. § 55-1112 provides that if a sale on execution is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the [judgment debtor] and the balance applied to the satisfaction of the execution.

The commencement of a bankruptcy case creates an estate in bankruptcy which is comprised, in essence, of all of the debtor's property; once the property becomes a part of the estate, an individual debtor may exempt certain property from the bankruptcy estate.

In the bankruptcy context, "exempting" property means removing the property from the bankruptcy estate and thereby excluding the exempted property from bankruptcy administration and distribution to creditors. *See* 9A Am. Jur. 2d, Bankruptcy § 1245

Unless applicable state law provides otherwise, the Bankruptcy Code permits an individual debtor to exempt from the estate property listed as exemptible by the Bankruptcy Code or under applicable state or local law. *Id.*, § 1247. Under Idaho law, a Chapter 7 debtor can claim the homestead exemption provided by I.C. § 55-1003 in the bankruptcy proceedings.

The United States Bankruptcy Code, 11 U.S.C § 541(a) provides:

The commencement of a case under section 301 . . . of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. (emphasis added).

With certain exceptions not applicable in this case, the United States District Courts have original and exclusive jurisdiction of all cases under the Bankruptcy Code. 9 Am. Jur. 2d, Bankruptcy § 560.

Defendants have provided no authority that Defendants' homestead exemption, if indeed they had any such homestead exemption under Idaho law, survives the Chapter 7 Trustee's sale of Murphy Hot Springs.

Defendants have failed to present any evidence by way of affidavit or otherwise that they at any time qualified for a homestead exemption on the Murphy Hot Springs property pursuant to I.C. § 55-1001 *et seq.* The existence of disputed facts will not defeat summary judgment when a party fails to make a showing sufficient to establish the

existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Garzee v. Barkley*, 121 Idaho 771 (Ct. App. 1992).

Further, the Court finds and concludes, as a matter of law that Defendants ceased to be the "owner" of Murphy Hot Springs upon sale of the real property by the Chapter 7 Trustee and that Defendants have no homestead exemption in the real property sold by the Chapter 7 Trustee.

The Court further finds and concludes, as a matter of law that Defendants claim to a homestead exemption in the Murphy Hot Springs property, which has survived sale by the bankruptcy trustee, is without merit.

The Court still further finds and concludes that there is no genuine issue of material fact relating to Defendants claim of a homestead exemption in the real property and Plaintiffs are entitled to summary judgment on that issue.

3) Identity of the Purchaser at the Chapter 7 Trustee's Sale

Defendants state that the "real question before the court is 'who was the purchaser of the trustee's position at the bankruptcy sale?'" (*Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment* at p. 8). Defendants argue, in essence, that the trustee's deed is ambiguous because there are two entities known as Waterone Enterprises, LLC - one organized under the laws of the State of California and one organized under the laws of the State of Idaho. Defendants further assert that Waterone California was not registered in the State of Idaho at the time of the Chapter 7 Trustee's sale and was thus precluded from conducting business in the State of Idaho.

a) Ambiguity

"In construing a deed the court should seek and, if possible, give effect to the intention of the parties." *Currie v. Walkinshaw*, 113, Idaho 586, 589 (Ct. App. 1987).

The Court of Appeals continued:

If the language of a deed is plain and unambiguous the intention of the parties must be ascertained from the deed, and parol evidence, that is, documentary, oral or real evidence extrinsic to the deed itself, is not admissible to ascertain intent. . . . Thus, where a written instrument is clear and unambiguous, its interpretation is a matter of law But where an instrument is ambiguous, interpretation of that instrument is a matter of fact for the trier of fact.

Id.

The Chapter 7 Trustee's public auction sale of the real property occurred on January 12, 2001. The Chapter 7 Trustee's quitclaim deed was executed by the Trustee on January 17, 2001 and recorded in the records of Owyhee County, Idaho on March 19, 2001.

The Grantee of the Trustee's Quitclaim Deed is "Waterone Enterprises, LLC . . . at 251 Versailles Ct., Tracy, CA 95376."

Waterone Enterprises, LLC, a California limited liability company filed its Articles of Organization with the Secretary of State of the State of California on July 5, 2000.

The Limited Liability Company - Statement of Information reflects that the street address of the principal executive office of Waterone Enterprises, LLC, a California Limited Liability Company is 251 Versailles Court, Tracy, CA 95376.

The organizational documents for Waterone Idaho were not filed with the Secretary of State of the State of Idaho until March 28, 2001; more than two months after

the Trustee's Sale and the Trustee's execution of the quitclaim deed and some nine (9) days after the recording of the quitclaim deed.

The Court finds and concludes that events occurring subsequent to execution and recordation of a deed do not render the deed ambiguous.

The Court further finds and concludes that the Chapter 7 Trustee's Quitclaim deed is unambiguous and that its interpretation presents a question of law rather than of fact.

The Court still further finds and concludes that there is no genuine issue of material fact relating to the identity of the grantee of the quitclaim deed and Plaintiffs are entitled to summary judgment on that issue.

b) Failure of Waterone California to Register in Idaho

Defendants next seemingly assert that Waterone California could not purchase the real property at the Trustee's sale because it had failed to register with the Idaho Secretary of State as a foreign limited liability company prior to transacting business in the State of Idaho as required by I.C. § 53-651.

Waterone did not register as a foreign limited liability company with the Idaho Secretary of State until December 3, 2001.

Registration is required prior to transacting business in this state. I.C. § 53-656 addresses the transaction of business in this state without registration. I.C. § 53-656(1) provides that a foreign limited liability company transacting business in this state may not maintain an action, suit, or proceedings in a court of this state until it has registered in this state. (emphasis added). In this case, Waterone California registered with the Idaho Secretary of State prior to the commencement of this action.

I.C. § 53-656 (4) and (5) also provide for civil penalties enforceable by the Attorney General as well as injunctive relief.

I.C. § 53-656 further provides: "(2) The failure of a foreign limited liability company to register in this state does not: (a) Impair the validity of any contract or act of the foreign limited liability company."

Further, I.C. § 53-657 provides:

(1) The following activities of a foreign limited liability company, among others, do not constitute transacting business within the meaning of this chapter: (i) Owning, without more, real or personal property

The Court finds and concludes, as a matter of law, that Waterone California's failure to register with the Idaho Secretary of State as a foreign limited liability company prior to the purchase of Murphy Hot Springs at the Chapter 7 Trustee's sale neither impairs the validity of its purchase of the real property nor does it create any ambiguity in the deed. Plaintiffs are entitled to summary judgment on that issue.

4) Summary – Fee Simple Ownership of Murphy Hot Springs

The Court finds and concludes that its ruling on the issues addressed above preclude any genuine issue of material fact as to the fee simple ownership of Murphy Hot Springs by Waterone Enterprises, LLC, a California limited liability company, and that Plaintiffs are entitled to partial summary judgment on that issue.

5) Writ of Ejectment

Plaintiffs further seek partial summary judgment decreeing that Waterone California is entitled to the immediate possession of Murphy Hot Springs and the issuance of a writ of ejectment directing the Owyhee County Sheriff to evict all parties on the property and deliver possession thereof to Plaintiffs.

To show entitlement to a writ of ejectment, Plaintiffs "must allege and prove: 1) ownership, 2) possession by the defendants, and 3) refusal of the defendants to surrender possession." *Pro Indiviso, Inc. v. Mid-Mile Holding Trust*, 131 Idaho 741, 745 (1998) (citing *Petty v. Petty*, 70 Idaho 473 (1950)).

A writ of assistance is a form of process issued by a court of equity to transfer the possession of property, and more specifically lands, the title or right to which it has previously adjudicated The sole question to be determined on the motion is whether applicant has a right, as against the party in possession to use the writ to obtain possession. In the absence of any claim of an independent paramount title, the only question on such application is whether the decree has or has not been complied with.

Id. at 746 (quoting *Eagle Rock Corp. v. Idamont Hotel Co.*, 60 Idaho 639, 647 (1939)).

This Court has determined that Waterone California is the owner of the Murphy Hot Springs real property by quitclaim deed received from the Chapter 7 bankruptcy trustee. Thus, there is no genuine issue of material fact as to the first element of an action for ejectment. The only affidavit on file addressing the remaining elements is that of Thomas Scroggins. In paragraph 19 of his Affidavit, Mr. Scroggins states: "That it is your affiant's understanding and belief that Matthew Olivas and/or other Defendants are in possession of the Property, and are preventing Waterone from taking possession of the Property." The averments in paragraph 19 of Mr. Scroggins affidavit do not satisfy the requirements of Rule 56(e) and are thus insufficient to establish the remaining two elements.

The Court finds and concludes that Plaintiffs have failed to meet their burden of establishing that there are no genuine issues of material fact and that they are entitled to a

writ of ejectment as a matter of law. Plaintiffs motion for partial summary judgment and issuance of a writ of ejectment is, therefore, DENIED.

6) Slander of Title

In order to maintain a cause of action for slander of title, the Plaintiffs have the burden of showing: 1) the uttering or publishing of slanderous statements; 2) when the statements were false; 3) with malice; and, 4) resulting in special damages.

Those elements of an action for slander of title were first enunciated by our Supreme Court in *Matheson v. Harris*, 98 Idaho 758, 759 (1977). In *Matheson*, the Supreme Court noted that the parties to the appeal had agreed that "... slander of title is premised upon a false and malicious statement, be it oral or written, made in disparagement of a person's title to real or personal property causing him special damages." *Id.* The four elements of slander of title set forth in *Matheson*, have since been cited by our Court of Appeals. See *Baker v. Boren*, 129 Idaho 885, 897 (Ct. App. 1997). In a slander action not involving title to real property, our Supreme Court has defined "express malice" or "malice in fact" to mean: "... the publication of defamatory matter in bad faith, without belief in the truth of the matter published, or with reckless disregard of the truth or falsity of the matter." *Barlow v. International Harvester Company*, 95 Idaho 881, 892 (1974).

Utilizing the explanation of slander of title found in *Matheson*, the Court finds and concludes that the Defendants have executed and published written statements in disparagement of Waterone California's title to the Murphy Hot Springs real property and that those written statements asserting claims of ownership of some interest in the Murphy Hot Springs real property were false. The Court further finds and concludes that

Plaintiffs bear the burden of proving at trial that the false statements were uttered or published with malice and that the false statements caused Plaintiff special damages.

The Court finds and concludes that the pleadings and affidavits on file fail to establish the elements of malice and special damages.

The Court finds and concludes that Plaintiffs' motion for partial summary judgment on the issue of slander of title be DENIED.

7) Waterone Idaho's Motion to Intervene

On September 6, 2002 Defendants' counsel filed a motion to intervene on behalf of Waterone Enterprises, LLC, an Idaho limited liability company and noticed for hearing on September 13, 2002.

As determined above, Waterone Idaho was organized subsequent to the conveyance of the real property at issue in this case and was thus not in existence at the time of the bankruptcy trustee's sale.

The undisputed affidavit of Clayne S. Zollinger, Jr. reflects that he filed the Articles of Organization for Waterone Idaho and that he filed those Articles at the behest of Thomas Scroggins and Waterone California, Plaintiffs in this action.

Defendants' motion to allow Waterone Idaho to intervene is not supported by affidavit.

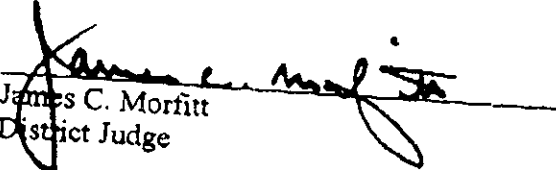
The Court finds and concludes that Defendants' motion to allow Waterone Idaho to intervene fails to establish a basis for either intervention as a matter of right or permissive intervention. Waterone Idaho's motion to intervene is DENIED, without prejudice.

Therefore,

ORDER

IT IS HEREBY ORDERED, and this does ORDER, that Plaintiffs' Motion for Partial Summary Judgment be, and is hereby, GRANTED, in part, and DENIED, in part.

DATED: NOV 5 2002


James C. Morfitt
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the forgoing Memorandum Decision and Order was mailed to the following persons on this 5th day of November 2002.

Kimbell D. Gourley
JONES, GLEDHILL, HESS, ANDREWS,
FUHRMAN, BRADBURY & EIDEN, P.A.
Attorneys at Law
P.O. Box 1097
Boise, ID 83701

Randy J. Stoker
RANDY J. STOKER CHARTERED
204 Fourth Avenue East
P.O. Box 225
Twin Falls, ID 83303-0225

CYNTHIA EATON

~~G. Noel Hales~~

Clerk of the District Court

BY: 

Deputy Clerk