

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**

IDAHO INDEPENDENT BANK,)
)
 Plaintiff,)
 vs.)
)
 JACK MANNIX, individually and as Co-)
 Trustee of THE JACK E. MANNIX &)
 ELIZABETH R. MANNIX FAMILY TRUST,)
)
 Defendant.)
 _____)

Case No. **CV 2011 7528**

**MEMORANDUM DECISION AND
ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff Idaho Independent Bank's (IIB) Motion for Summary Judgment, filed April 5, 2012, seeking a monetary judgment against defendants Jack and Elizabeth Mannix, individually and as co-trustees of the Jack E. Mannix and Elizabeth R. Mannix Family Trust Dated October 2, 1990 (Trust).

On January 21, 2003, Jack and Elizabeth Mannix obtained a \$412,500.00 loan from IIB and in exchange signed a promissory note and secured payment of the promissory note by a deed of trust against real property. Memorandum in Support of Motion for Summary Judgment, pp. 2-3. The real property securing the loan was a 1.191 acre lot at Black Rock, overlooking Coeur d'Alene Lake, which Mannixes bought in 2003 for \$550,000.00. Affidavit of Jack Mannix, p. 1, ¶ 2, p. 2, ¶ 5, Exhibit A. Thereafter, Jack and Elizabeth Mannix executed four additional promissory notes, renewing the original loan, modifying repayment terms, and extending the maturity date.

On August 12, 2009, when Jack and Elizabeth Mannix executed the fourth renewal of the loan, The Jack E. Mannix and Elizabeth R. Mannix Family Trust Dated October 2, 1990 (Trust) executed an unconditional Commercial Guaranty of the obligation at issue. *Id.*, p. 4; Affidavit of Jill Hathaway in Support of Motion for Summary Judgment, pp. 5-6, ¶ 15. IIB alleges Jack and Elizabeth Mannix defaulted on the obligation (with the Trust thereby breaching its guaranty) by failing to pay the note according to its terms. *Id.*, p. 5; Affidavit of Jill Hathaway in Support of Motion for Summary Judgment, p. 6, ¶ 18. As a result of the default, IIB caused the real property to be sold in a foreclosure sale on July 25, 2011. *Id.*, p. 6, ¶ 19. IIB now seeks default judgment for the difference between the amount of the debt (principal, interest, and cost of the sale for a total of \$324,565.55) minus the greater of the amount of the sale or the fair market value (here, the amount of the sale is claimed by IIB to have exceeded the fair market value). *Id.*, pp. 6-7, ¶¶ 21-24. The appraised value of the property was \$79,900.00. Affidavit of Donald F. Anderson in Support of Motion for Summary Judgment, p. 2, ¶ 5, Exhibit A. The amount IIB successfully bid at the foreclosure sale, \$90,000.00, IIB claims exceeded the fair market value of the real property. Reply Memorandum in Support of Motion for Summary Judgment, p. 9. IIB now seeks a deficiency judgment pursuant to I.C. § 45-1512 for \$234,565.55, plus interest accruing at \$44.34 *per diem* and attorney's fees and costs. Affidavit of Jill Hathaway in Support of Motion for Summary Judgment, pp. 6-7, ¶¶ 21-24.

On April 5, 2012, IIB filed its Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and the affidavits of Jill Hathaway, Beth Coonts, and Donald Anderson in support of the motion for summary judgment. On April 25, 2012, defendants filed their memorandum in opposition to the motion and the

Affidavit of Jack Mannix. On May 7, 2012, IIB filed its Reply Memorandum in Support of Motion for Summary Judgment. This matter is presently scheduled for a three-day court trial beginning February 11, 2013.

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); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). Neither party to this matter has requested a jury trial. In cases set for a court trial, the Court is entitled to arrive at the most probable inference to be drawn from the undisputed evidence presented to it. *J.R. Simplot v. Bosen*, 144 Idaho 611, 618, 167 P.3d 748, 755 (2006). “The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences.” *Id.*, citing *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004).

III. ANALYSIS.

IIB's motion for summary judgment is now before the Court. With its Motion for Summary Judgment, IIB submits the Affidavit of Jill Hathaway, credit relationship manager with IIB, and exhibits thereto. Hathaway has set forth the facts surrounding the notes, deeds of trust, security agreements, and guaranties involved in the instant matter, as well as those involved in the default, non-judicial foreclosure and purchase of the property by IIB for a credit bid of \$90,000.00. Hathaway testifies the fourth of five promissory notes executed by Jack and Elizabeth Mannix on August 12, 2009, was executed and delivered on the same date as the Trust's commercial guaranty of "the full and punctual payment, performance, and satisfaction of all indebtedness owed". Affidavit of Jill Hathaway in Support of Motion for Summary Judgment, p. 5, ¶¶ 14-15.

IIB has also provided the Court with the Affidavit of Donald Anderson in Support of Motion for Summary Judgment. Anderson testifies that he is a general appraiser and was retained by IIB to conduct a field review appraisal of the property at issue. Affidavit of Donald Anderson in Support of Motion for Summary Judgment, p. 2, ¶¶ 2-3. Mr. Anderson states, "[i]t is my opinion that the fair market value of the Real Property, as of July 14, 2011, was \$79,900.00." *Id.*, at ¶ 5. IIB states the trustee's sale of the property at issue in this matter occurred on July 25, 2011, and its Verified Complaint was filed on September 19, 2011. Memorandum in Support of Motion for Summary Judgment, p. 9, citing Affidavit of Jill Hathaway in Support of Motion for Summary Judgment, p. 6, ¶ 19.

In light of the foregoing, IIB requests this Court determine no question of fact remain and that IIB is entitled to judgment for the deficiency amount of \$234,565.55 (plus interest, costs and fees), jointly and severally as against Jack and Elizabeth

Mannix individually and against the Trust in light of the breach of the guaranty.
Memorandum in Support of Motion for Summary Judgment, pp. 9-11.

In opposition to IIB's motion for summary judgment, defendants make two arguments. First, that a question of fact remains as to the fair market value of the property at issue because Jack Mannix, as owner, is competent to testify to the property's value and opines the property is worth at least \$323,091.00. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 2, citing Affidavit of Jack Mannix, p. 2, ¶ 10. Second, as a matter of public policy, defendants argue courts are wary of banks' claims for deficiency judgments which may result in a windfall to a lender who could collect the deficiency and then sell the property for an even larger amount. *Id.*, pp. 3-4. Defendants then go on to argue, without citation, that because banks fully scrutinize both the strength of the borrowers and the value of the security, it is not inequitable for the shortfall to be borne by the bank which is financially better equipped to absorb the loss. *Id.* This public policy argument of defendants is simply insufficient to establish IIB is not entitled to judgment as a matter of law. The Idaho Supreme Court in *Evans v. Sawtooth Partners, v. Hara's, Inc.*, 111 Idaho 381, 387, 723 P.2d 925, 931 (1986), held, "Idaho Code § 45-1512 limits, but does not eliminate, deficiency judgments."

IIB replies to the defendants' opposition by characterizing Jack Mannix's opinion on fair market value as self-serving and unsupported. Reply Memorandum in Support of Motion for Summary Judgment, p. 5. IIB supports its position by providing discovery responses proffered by defendants which indicate nothing supporting defendants' belief as to the fair market value has been produced. *Id.*, pp. 6-8. Finally, IIB argues there is no support of defendants' contention that IIB should bear the risk of the property's loss in value, but rather that I.C. § 45-1512 determines the manner by which the Court finds

a judgment amount: the amount by which the entire indebtedness owed at the time of sale exceeds the fair market value or the amount for which the property sold. *Id.*, p. 10.

Here, IIB argues, “based on the credit bid of \$90,000.00 at the sale, IIB is seeking even less [than] the amount owed after crediting the fair market value of the Property.”

Id.

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.

I.C. § 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, IIB seeks the difference between the outstanding debt and the amount for which the property was sold. This amount is less than the outstanding debt minus the fair market of the value, because on IIB’s credit bid at the foreclosure sale, the property sold for approximately \$10,000.00 more than IIB’s appraiser’s testimony on the fair market value at the time of the sale.

As argued by defendants, a real property owner may testify as to its value. *Weaver v. Village of Bancroft*, 92 Idaho 189, 439 P.2d 697 (1968). An owner is deemed competent to so testify because he or she is presumed to be familiar with the property's current value by virtue of inquiries, comparisons, purchases and sales. *Rankin v. Caldwell*, 15 Idaho 625, 99 P. 108 (1908). But, valuation is a question of fact. *Evans v. Sawtooth Partners*, 111 Idaho 381, 385, 723 P.2d 925, 929 (Ct.App. 1986). In a case such as this, where the Court sits as trier of fact, the Court is entitled to arrive at the most probable inference to be drawn from the undisputed evidence presented to it. *Bosen*, 144 Idaho 611, 618, 167 P.3d 748, 755. As quoted *supra*, "[t]he test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.* In *Evans*, the Court of Appeals found no error in the District Court's valuation of a property at \$317,000, where the District Court had before it evidence of an offer to purchase the property for \$300,000, and dueling appraisers who valued the property at \$265,000 for the sellers and at \$340,000 for the limited partnership. 111 Idaho 381, 385, 723 P.2d 925, 929. The total indebtedness in *Evans* was \$317, 000, which the District Court determined to be the fair market value in its decision to disallow any deficiency judgment. 111 Idaho 381, 387, 723 P.2d 925, 931. The District Court's finding was supported by substantial evidence in the record and its disallowance of any deficiency was upheld. *Id.*

Here, the court has no such evidence of offers and counteroffers for sale before it. Rather, the unobjected-to testimony of Donald Anderson places the value at the time of sale at \$79,900.00. And the unobjected-to testimony of Jack Mannix sets the value of the property at approximately \$323,091.00, although this testimony was decried as self-serving and unsupported by IIB. While IIB casts aspersions that Mannix's affidavit

is speculative and conclusory (Reply Memorandum in Support of Motion for Summary Judgment, p. 2), no “objection” was made. Mannix’s opinion appears to be based, in part, on the Kootenai County Assessor’s Office assessed value in 2011 of \$323,091.00. Mannix Affidavit, p. 2, ¶ 9, Exhibit A. As correctly argued by IIB, Mannix’s testimony does not set forth how assessments for tax purposes relate to the fair market value; that is, what a willing buyer would pay to a willing seller. See Reply Memorandum in Support of Motion for Summary Judgment, p. 5. However, in *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979), the Idaho Supreme Court stated, “[t]his Court has consistently held that the only criterion for determining value of property for ad valorem tax purposes is the full cash or market value.” 100 Idaho 59, 64, 593 P.2d 394, 399 (citations omitted). The *Merris* Court stated:

In our opinion the valuation of taxable property for assessment purposes must reasonably approximate the fair market value of the property in order to effectuate the policy embodied in ID. CONST. Art. 7, § 5.

100 Idaho 59, 63, 593 P.2d 394, 398. At oral argument, counsel for IIB argued there is no legal basis to rely on the tax assessment for fair market value. The Court disagrees with that proposition. *Merris* indicates that valuation of property for assessment purposes *must* reasonably approximate the fair market value of the property, but it does not state that such always happens, otherwise, why would there be valuation appeals? There is nothing in *Merris* that gives an assessed valuation the automatic evidentiary equivalent of fair market value. At oral argument, counsel for defendants also argued that Idaho Code § 63-205, allows this Court to take county property tax assessments as evidence of fair market value. Idaho Code § 63-205 does not provide any support for that proposition, that the Court can take assessed value as evidence of fair market value. That statute simply states that property shall be assessed at market value. This

Court finds that *Merris* and I.C. § 63-205 allow this Court to give a 2011 assessment some evidentiary value as to fair market value on July 25, 2011, at least at this summary judgment juncture.

The problem with Mannix's affidavit is it is conclusory. The Idaho Supreme Court has held that the rule has long been settled in Idaho that an owner of property is competent to express an opinion as to its value, and is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales. *Howes v. Curtis*, 104 Idaho 563, 568, 661 P. 2d 729, 734 (1983). Thus, Mannix is *competent* to testify as to the value of his land in this matter. However, competency does not cure Mannix's conclusory affidavit. In this case, Mannix's affidavit offers little to support that "presumption", because Mannix states little to support his knowledge of any "inquiries, comparisons, purchases and sales." Mannix states: "During the years I was a member of this private and exclusive development, I received monthly and, sometimes, weekly updates of sales data from Black Rock staff." Affidavit of Jack Mannix, p. 3, ¶ 6. That is essentially useless information as nowhere in Mannix's affidavit does he state *when* he was a member of Black Rock. The only time period that is relevant regarding fair market value, is the date of the foreclosure sale, July 25, 2011. Nowhere in Mannix's affidavit does he state whether any of this "sales data" he received even occurred during that time period. The weight to be given the owners testimony regarding the value of his land depends on the owner's background, knowledge and experience. *Brazier v. Brazier*, 111 Idaho 692, 697, 726 P.2d 1143, 1148 (Ct.App. 1986). In the present case, Mannix's affidavit is not to be accorded much weight, because he provides no detail as to how he formed his opinion. The Idaho Court of Appeals has held:

Affidavits supporting or opposing a summary judgment motion 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. Idaho Rule of Civil Procedure 56(e). These requirements are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge.” (extensive citations omitted).

Posey v. Ford Motor Credit Corp., 141 Idaho 477, 483, 111 P.3d 162, 168 (Ct.App. 2005). It is only Mannix’s statement as to the assessed value of his property in 2011 that has any evidentiary value at this time.

The Court has before it conflicting evidence as to the fair market value of the property at issue. Defendants place the value at approximately \$323,091.00, while IIB places the value at approximately \$80,000.00. Although this case is set for a court trial and the Court is entitled to arrive at the most probable inference to be drawn from the undisputed evidence presented to it, the evidence as to fair market value here is simply not undisputed. See *Bosen*, 144 Idaho 611, 618, 167 P.3d 748, 755. While this Court affords Mannix’s affidavit little weight, it has *some weight* only because it sets for the assessed value for his parcel in 2011.

IIB argues that defendants’ discovery responses cause the defendants to lack any admissible evidence to contradict IIB’s expert’s valuation of \$79,900.00. In discovery, IIB requested defendants admit the property value at the time of foreclosure was less than \$90,000.00, to which defendants denied. Reply Memorandum in Support of Motion for Summary Judgment, p. 2; Affidavit of Beth Coonts in Support of Motion for Summary Judgment, Exhibit B. When asked to give the reasons for such denial, defendants refused. *Id.* Apparently defendants failed to update that discovery response, and defendants now defend the summary judgment motion by coming forth with Mannix’s affidavit which sets forth a value. IIB argues this “...is an abuse of

process and should be prohibited.” *Id.* While the Court appreciates IIB’s frustration with defendants’ failure to supplement discovery, no motion for a protective order has been filed by IIB, and Mannix’s affidavit was timely filed under I.R.C.P. 56(c).

Ultimately, defendants have not presented any material issues of fact or established any reason why IIB should not be entitled to summary judgment on the questions of whether the contract was breached by all defendants or whether the defendant Trust should be jointly and severally liable for any deficiency which may result in light of the Trust’s guaranty and the breach of that guaranty by the Trust which followed defendants’ default. A non-moving party must submit evidence, by affidavit or otherwise, contradicting the evidence submitted by the moving party in order to survive summary judgment. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007). Defendants have not done so with regard to the breach of the contract by defendants or the Trust’s breach of its guaranty.

However, a question of material fact remains as to the actual amount of the fair market value of the property. The Idaho Supreme Court in *Evans* identified the real question as being whether the District Court’s fair market value finding is supported by substantial evidence. Substantial evidence, in turn, is defined as “such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.” *Evans v. Hara’s, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993) (citing *Kinney v. Tupperware Co.*, 117 Idaho 765, 769, 792 P.2d 330, 334 (1990)). It is this “substantial evidence” standard which has not been met by either party in regard to establishing the fair market value of the property in this case at this summary judgment juncture.

IV. CONCLUSION.

For the reasons stated above, it is proper for this Court to exercise its discretion and grant summary judgment in favor of IIB on the breach by the Trust of its guarantee, and upon the Trust's being jointly and severally liable to IIB. Because questions of fact remain as to the fair market value, as there is only disputed evidence before the Court on this issue at this time, it is proper for this Court to deny IIB's motion for summary judgment as to the deficiency judgment itself.

IT IS HEREBY ORDERED summary judgment is granted in favor of IIB on the breach by the Trust of its guarantee, and upon the Trust's being jointly and severally liable to IIB.

IT IS FURTHER ORDERED summary judgment is denied on the issue of the amount of the deficiency judgment.

Entered this 9th day of May, 2012.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>		<u>Lawyer</u>	<u>Fax #</u>
Beth Coonts/ Sheila Scwager	208 954-5261		April Linscott	208 667-1939

Jeanne Clausen, Deputy Clerk