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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**

A&H ESPRESSO TITLE LOANS, INC.,)
)
 Plaintiff,)
 vs.)
)
 KEITH N. WORLEY and NICOLE T.)
 WORLEY,)
)
 Defendant.)
)
)
)
 _____)

Case No. **CV 2013 4395**

**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFF'S
MOTION FOR WRIT OF
POSSESSION**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

A. Procedural History.

This matter is before the Court on Motion for Writ of Possession filed by plaintiff A&H Espresso Title Loans, Inc., on February 28, 2014. Oral argument on the motion was held on March 14, 2014.

On June 12, 2013, A&H filed its "Complaint for Over \$10,000" (Complaint). The Complaint only claims damages against defendants Keith and Nicole Worley (Worleys), in the amount of \$15,000.00 plus \$75.00 per day interest based on a pawn loan. Complaint, p. 2, ¶¶ IV, VI. A&H claims Worleys granted A&H a security interest in Worleys' black 2006 Mastercraft boat, to secure the payment of the pawn loan. *Id.*, ¶ 7. In their Complaint, A&H does not make a claim for possession of the boat.

On July 29, 2013, Worleys filed their "Answer, Counterclaim and Demand for Jury Trial." Worleys admit they obtained a loan from A&H but deny it was a pawn loan

and deny they granted A&H a security interest in their boat. Answer, Counterclaim and Demand for Jury Trial, p. 2, ¶¶ 3, 4.

Without moving to amend their complaint, A&H filed “Plaintiff’s Motion for Writ of Possession” on February 28, 2014, supported by a “Memorandum in Support of Plaintiff’s Motion for Writ of Possession”, “Affidavit of Matthew T. Ries in Support of Plaintiff’s Motion for Writ of Possession”, and “Affidavit of Billy Henderson in Support of Motion for Writ of Possession.” On March 7, 2014, Worleys filed “Defendant’s [sic] Response to Plaintiff’s Motion for Writ of Possession”, and an “Affidavit of Keith Worley.” On March 12, 2014, A&H filed its “Reply Memorandum in Support of Plaintiff’s Motion for Prejudgment Writ of Possession Under I.C. 8-301.”

B. Factual Background Per Parties.

This action was commenced by the A&H Espresso Title Loans Inc. seeking a monetary judgment against Worleys for an unpaid loan. Complaint, p. 5. Pending the outcome of this litigation, A&H seeks possession of a 2008 Master Craft Boat and trailer on which it claims it holds a security interest. *Id.*; Memorandum in Support of Motion for Writ of Possession, p. 2.

On July 28, 2010, Keith Worley obtained a pawn loan from A&H in the amount of \$15,000.00 plus interest at a rate of 15% every thirty (30) days or \$75 per day. Complaint, p. 2 ¶ IV, VI. According to A&H, Keith granted A&H a security interest in a 2008 Master Craft Boat and trailer until the pawn loan, fees and interest were paid in full. *Id.* at p. 2 ¶ VII. The boat and trailer have separate vehicle identification numbers. *Id.* While A&H normally takes possessions of property used for security, A&H allowed the Worleys to continue to use the boat and trailer because Keith Worley had a loan history with A&H going back to 2008. *Id.* at p. 2 ¶ VIII; Memorandum in Support of Plaintiff’s Motion for Prejudgment Writ of Possession under I.C. § 8-301, p. 4. A&H

claims Worleys have breached the terms of the pawn agreement by not making any payments. Complaint, p. 3 ¶ IX.

The Worleys dispute the loan was made using the boat trailer as part of the security. Affidavit of Keith Worley, p. 2 ¶ 4; Answer. And in any event, Worleys claim the loan was repaid in cash, in full, in August 2010. *Id.*; Answer, Counterclaim and Demand for Jury trial, p. 3 ¶ 17. Worleys do not have a receipt for the payment to A&H. Affidavit of Keith Worley, p. 2 ¶ 3; Answer, Counterclaim and Demand for Jury trial, p. 3 ¶ 18. According to the Worleys, A&H told Keith Worley the titles would be mailed to him. Answer, Counterclaim and Demand for Jury trial, p. 3 ¶ 19. Prior to the initiation of this litigation, the boat was removed from the State of Idaho. Affidavit of Keith Worley, p. 2 ¶ 5.

In February 2011, a lien was placed upon the title of the boat by A&H. *Id.* at p. 4 ¶ 22. The Worleys claim “[A&H], and in particular [A&H president] Billy Henderson, caused Counterclaimant Keith Worley’s signature to be forged on a Power of Attorney and had said forged signature illegally notarized. The notary involved has been sanctioned by the State of Washington and the investigation is ongoing.” *Id.* at p. 4 ¶ 22; Affidavit of Keith Worley, p. 2 ¶ 7. Worleys claim this forgery was then used to obtain the lien. Defendants’ response to Plaintiff’s Motion for Writ of Possession, p. 3. Moreover, they claim that the pawn ticket and title loan attached to A&H’s Complaint are forged. See Answer, Counterclaim and Demand for Jury trial, p. 4 ¶ 27.

On February 28, 2014, A&H moved for the issuance of a writ of possession to allow the sheriff to obtain possession of the boat and trailer pending the outcome of this litigation. See Memorandum in Support of Plaintiff’s Motion for Prejudgment Writ of Possession under I.C. § 8-301. The Worleys oppose this motion, but have agreed to

“enter into a consent order that prohibits them from destroying, harming, or selling the Boat” pending the outcome of this litigation.” Defendant’s Response to Plaintiff’s Motion for Writ of Possession, p. 5.

II. ANALYSIS.

Actions for claim and delivery of personal property are governed by Idaho Code § 8-301 *et seq.* It provides that “[t]he plaintiff in an *action to recover the possession of personal property* may, at the time of issuance of summons, or at any time before trial, claim the delivery of such property to him as provided in this chapter.” I.C. § 8-301 (emphasis added). The requirements for claim of delivery are governed by Idaho Code § 8-302(1). I.C. § 8-302(1). Specifically, it requires the plaintiff to show by verified complaint or affidavit:

- (a) That the plaintiff is the owner of the property claimed or is entitled to the possession thereof, and the source of such title or right; and if plaintiff’s interest in such property is based upon a written instrument, a copy thereof shall be attached;
- (b) That the property is wrongfully detained by the defendant, the means by which the defendant came into possession thereof, and the cause of such detention according to his best knowledge, information and belief;
- (c) A particular description of the property, a statement of its actual value, and a statement to his best knowledge, information, and belief concerning the location of the property and of the residence and business address, if any, of the defendant;
- (d) That the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure.

Id. Moreover, “[t]o sustain an action in claim and delivery plaintiff must show a right to the immediate possession of the property at the time the action is commenced.

Morrison v. Quality Produce, Inc., 92 Idaho 448, 450-51, 444 P.2d 409, 411-12 (1968)

(citing *National Motor Service Co. v. Walters*, 85 Idaho 349, 379 P.2d 643 (1963); *Smith*

v. Cooper, 73 Idaho 99, 245 P.2d 816 (1952); *Commercial Credit Co. v. Mizer*, 50 Idaho 388, 296 P. 580 (1931); *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 260 P. 168 (1927); *Cunningham v. Stoner*, 10 Idaho 549, 79 P. 228 (1904); I.C. § 8-302).

The plaintiff is not required to establish ownership. *American Fruit Growers v. Walmstad*, 44 Idaho 786, ____, 260 P. 168, 171 (1927).

A&H contends it has set forth the necessary evidence required by I.C. § 8-301 *et seq.* Between the contract signed by Keith Worley and the title to the boat, A&H claims it is the owner of the boat. Memorandum in Support of Plaintiff's Motion for Prejudgment Writ of Possession Under I.C. § 8-301, p. 12. A&H maintains the contract entered into by the Worleys and A&H grants A&H a security interest in the boat and granted A&H the right to transfer title immediately. *Id.* p. at 16. Moreover, A&H claims the power of attorney submitted by it to the Oregon State Marine Board is valid and not forged. *Id.* at p. 15. In any event, A&H claims the Oregon State Marine Board does not require a power of attorney for Keith Worley to transfer title to A&H. *Id.* at pp. 16-17, citing O.R.S. § 830.750. Merely signing the title was sufficient to give A&H ownership of the boat. *Id.* The Court notes A&H makes an anticipatory argument claiming it is valid to place a title loan on a boat pursuant to Idaho Code § 28-46-502(4), however, since the defendants do not counter this point, it is not discussed further. *Id.* at p. 13.

The Worleys object to a writ of possession, arguing the balance on the loan is paid in full, negating any entitlement of possession by A&H. Defendants' Response to Plaintiff's Motion for Writ of Possession, p. 3. However, even if the loan had not been paid, since this is not a suit for possession, the Worleys argue writ of possession is not a remedy available to A&H under Idaho Code § 8-301. *Id.* Worleys further argue that any ownership or lien interest by A&H in the boat is fraudulent, since the title lien was

obtained by fraud. *Id.* In support of this, Worleys claim the power of attorney used to obtain a lien on the boat was forged and the forged signature was illegally notarized. *Id.* Because A&H was able to obtain a lien on the boat, Worleys claim the Worleys cannot sell the boat to an innocent purchaser, so Worleys claim there is no evidence of threat or damage to the property. *Id.* at p. 4. In further support of their argument against a writ of possession, they argue that A&H has a history of misconduct. *Id.* However, Worleys provide no admissible evidence to support this claim. Finally, Worleys claim a writ of possession is impractical in this case because the boat is located outside the State of Idaho, no title loan was made for the trailer, and A&H has since gone out of business, so there is not a location to store the property within the jurisdiction of this Court. *Id.* at pp. 4-5.

As mentioned above, A&H's "Complaint for Over \$10,000" is a claim for damages only, it does not state a claim for the recovery of personal property. Idaho Code § 8-301 *et seq.* only governs actions for the recovery of personal property. That section reads, in its entirety: The plaintiff in an action to recover the possession of personal property may, at the time of the issuance of the summons, or at any time before trial, claim the delivery of such property to him as provided in this chapter." I.C. § 8-301. It is unclear whether A&H must amend its complaint, or, if the Motion for Writ of Possession, which is supported by affidavits, is sufficient under I.C. § 8-302(1).

In its "Complaint for Over \$10,000.00", A&H does not state that it is the owner, or was in possession, or is entitled to the possession of the personal property in question. Rather, A&H states "the defendant has refused to deliver the pawned collateral to the plaintiff and plaintiff believe the defendant is secreting the collateral from the plaintiff, and the defendants have failed to apprise the plaintiffs of the collateral's location as

required by the pawn agreement” and seeks confirmation in the security interest in the boat and trailer.” Complaint, p. 3 ¶¶ X, XIII. Even A&H’s “Answer, Affirmative Defenses and Counterclaims” filed August 15, 2013, contains no claim that A&H is entitled to possession of the boat. A&H argues it has sufficiently plead possession of the boat, as “A&H Espresso is clearly seeking to enforce the security agreement as set forth in paragraph XIII of the Complaint and paragraph 2 of the Prayer for Relief.” Reply Memorandum in Support of Motion for Writ of Possession, p. 5. Paragraph 2 of the Complaint for Over \$10,000” reads: “For an order confirming the plaintiffs security interest in the pawned property, a 2008 Master craft boat and trailer VIN# MBCNHMHS7L208, WA license # OR U424809 Trailer VIN# 19MSB242582D40162.” Complaint for Over \$10,000, p. 5, ¶ 2. That, coupled with the fact that Idaho law “...allows a secured creditor a right to possession and for sale of the collateral as the remedies allow for the secured creditor”, and the fact that Idaho is a notice pleading state, is sufficient, according to A&H. Reply Memorandum in Support of Motion for Writ of Possession, p. 5.

This Court finds that even A&H need not amend its complaint and even if the motion and affidavits are sufficient to place the issue before this Court, A&H has failed to show that it is entitled to immediate possession of the property requested. Most importantly, there is a dispute over whether the defendants paid off the loan and whether the pawn ticket and title loan attached to A&H’s Complaint are valid documents. While the issue Worleys have raised regarding the notary seem to lack merit, there appears to be a dispute of material fact regarding payment of the loan. A&H claims Worleys defense that they paid the loan is “beyond unbelievable.” Reply Memorandum in Support of Motion for Writ of Possession, p. 3. A&H claims this is so because of the multitude of loans Keith Worley took out over the years, each payment

on all these loans was evidenced by a receipt, yet “Mr. Worley nevertheless conveniently contends that he never received a receipt for the last two loan payments he made in August, 2010 where he allegedly paid back the loan for the 2007 Mustang and for the Boat.” *Id.*, pp. 2-3. A&H notes that Worleys then moved to Nevada and they never sought title for the Mustang or the Boat which they now value at over \$54,000. *Id.*, p. 6. While Worleys claims might be found “beyond unbelievable” by the jury at trial, this Court is unable to make credibility determinations at this time. The fact that A&H sat on its hands for two and a half years before bringing this lawsuit might be found by the jury to be equally “beyond believable.” That fact is at least circumstantial evidence that Worleys may have made this payment to A&H and received no receipt for such payment.

As a result of this factual dispute, there is no legal basis at this time for the issuance of a writ of possession in this case.

In A&H’s Reply Memorandum in Support of Motion for Writ of Possession, A&H for the first time turns its analysis into one under I.R.C.P. 65(e)(1), (e)(2) and (e)(3), three separate grounds for a *preliminary injunction*. Reply Memorandum in Support of Motion for Writ of Possession, pp. 12-20. Thus, in its reply brief, A&H switched horses from a Writ of Possession to a Motion for Preliminary Injunction. Because the Motion for Preliminary Injunction was first raised in its reply brief, A&H has provided Worleys absolutely no opportunity to brief the issue of injunctive relief. By now arguing injunctive relief, A&H has violated I.R.C.P. 7(a) and 7(b)(1), because they have not filed a “motion” for injunctive relief. Even if this last second submission could be determined a “motion” (and it cannot), A&H has violated I.R.C.P. 7(b)(3)(A) by not filing such fourteen days before hearing. A&H filed its Reply Memorandum in Support of Motion for Writ of Possession, on March 12, 2014, a mere two days before hearing. At oral

argument, counsel for A&H stated, incredulously, the reason A&H has turned to injunctive relief (without making a motion for such), is, “we are running out of time.” The Court will not entertain A&H’s claims (not a motion) for injunctive relief and disregards all such analysis put forth by A&H.

Finally, the Court is cognizant of the timing of the entire course of conduct between the parties and the course of litigation. According to A&H, it sent Keith Worley a Notice to Cure Default in November 2010. Memorandum in Support of Writ of Possession, pp. 5-6. This lawsuit was not filed until June 12, 2013, two and one half years after Worleys were apparently in default. Then, after filing its “Complaint for Over \$10,000”, A&H did not file its Motion for Writ of Possession for another seven months, on February 28, 2014, which was less than five months before July 7, 2014, trial date. While the Court must give motions for writs of possession prompt attention and decision (I.C. § 8-312), and this Court issues this decision twenty days after taking the matter under advisement, A&H has not proceeded with urgency. Because a pivotal factual issue at trial, payment or non-payment of the loan by Worleys, must be resolved at trial; and because that issue will apparently be resolved by a lack of documentation and thus, based upon credibility of witness testimony; and because the trial is only three months away, A&H’s Motion for Writ of Possession must be denied.

III. CONCLUSION AND ORDER.

For the reasons stated above, A&H’s Motion for Writ of Possession must be denied.

IT IS HEREBY ORDERED plaintiff A&H’s Motion for Writ of Possession is DENIED.

Entered this 4TH day of April, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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