

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

DONITA D. REMBER, ET AL,

Plaintiff,

vs.

GENEVIEVE P. PETERSON,

Defendant.

Case No. **CV 2011 1316**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Genevieve Peterson's (Peterson) motion for summary judgment.

On February 8, 2011, petitioners, Donita D. Rember and John P. Colis, through counsel Michael B. McFarland, filed their petition to quiet title to real property.

Respondent Peterson filed her Answer on February 22, 2011.

On April 12, 2011, Peterson filed a Notice of Service of requests for production of documents and interrogatories. Having received no response, on May 25, 2011, Peterson filed a motion to compel discovery responses. Rember and Colis failed to respond to the motion to compel with any written filing, and counsel for Rember and Colis failed to attend the June 9, 2011, hearing. On June 9, 2011, this Court entered its Order Compelling Discovery Response. The Court stated on the record at the June 9, 2011, hearing, and interlineated the proposed Order Compelling Discovery Response,

that the issue of “Sanctions are reserved to a later time.” Order Compelling Discovery Response, p. 2, ¶ 3. Peterson thereafter filed a motion for summary judgment, brief in support thereof, and statement of undisputed facts on July 8, 2011. Rember and Colis have not responded. Oral argument was held August 15, 2011. Counsel for Peterson appeared, counsel for Ember and Colis did not appear. This matter is currently set for a one-day court trial commencing on December 12, 2011.

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). In a matter set for a court trial (such as the present case), in which the court acts as the trier of fact, the District Judge is entitled to draw all reasonable inferences from any undisputed facts “because the court alone would be responsible for resolving the conflict between those

inferences.” *Parker v. Kokot*, 117 Idaho 963, 967, 793 P.2d 195, 199 (1990) (citing *Riverside Dev. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982)).

III. ANALYSIS.

Peterson’s brief in support of her motion for summary judgment is a model of brevity. She makes two points: (1) pursuant to Idaho Code § 55-508, interests in real property granted to two or more persons are tenancies-in-common and (2) “[a] co-tenant’s interest in property cannot be forfeited by reason of unwillingness or inability to share in protecting the co-owned property.” Respondent’s Brief in Support of Summary Judgment, pp. 1-2, citing *George v. Tanner*, 108 Idaho 40, 43, 696 P.2d 891, 894 (1985).

In the Petition to Quiet Title, Rember and Colis concede:

On November 24, 2007, Petitioner Donita Rember executed a Quitclaim Deed granting the subject real property to herself, John Colis, and Respondent Genevieve Peterson, grantees... Peterson resided at the property with the petitioners from September 2007 until approximately May, 2010. She paid no consideration for her interest in the real property, made no mortgage payments thereon, made no improvements to the property, and has not made any investment of any kind in the property. She is, however, a co-signer on the existing note, together with the petitioners... Respondent Genevieve Peterson no longer resides at the property, having moved to a retirement home.

Petition to Quiet Title to Real Property, p. 2, ¶¶ II-IV.

Title 6, Chapter 4 of the Idaho Code governs quieting title. An action to quiet title may be brought by any person against another who is claiming an estate or interest in real or personal property adverse to the person’s. I.C. § 6-401. An action to quiet title to real property lies in equity and there is no right to a jury trial in a determination of such adverse claims. *Shields v. Johnson*, 10 Idaho 476, 481-82, 79 P. 391, 393 (1904). Any person, whether in actual possession of property or not and whether holding legal or equitable title, may bring and maintain an action to quiet title against

another who claims an interest adverse to him. *The Mode v. Myers*, 30 Idaho 159, 165, 164 P. 91, 92 (1917).

The question facing this Court is whether Peterson's interest in the real property at issue is adverse to that of Rember and Colis. Nothing in the record before the Court indicates Peterson's tenant-in-common interest in the real property was at any time adverse to the possession and occupation of Rember and Colis. Peterson is correct in citing Idaho Code § 55-508 for the proposition that interests in real estate granted or devised to two or more individuals constitute a tenancy in common, "unless expressly declared in the grant or devise to be otherwise." I.C. § 55-508. The intent to establish that an absolute conveyance is not what it purports to be (e.g. that the parties intended to conveyance to be a mortgage) must be established by clear and convincing proof. *Bergen v. Johnson*, 21 Idaho 619, 625, 123 P. 484, 486-87 (1912). There is no evidence before the Court that Rember intended the quitclaim deed, signed on November 24, 2007, and conveying the real property at issue to herself, Colis, and Peterson, to be anything but what the deed states on its face. And, although Rember and Colis claim in their Petition that Peterson paid no consideration for her interest in the real property, the deed itself reads:

FOR VALUABLE CONSIDERATION OF TEN DOLLARS (\$10.00),
and other good and valuable consideration, cash in hand paid, the
receipt and sufficiency of which is hereby acknowledged...

Exhibit to Respondent's Motion for Summary Judgment. It follows that Peterson is entitled to the relief she seeks and Rember and Colis have not set forth any disputed issues of fact.

Additionally, and alternatively, this matter must be dismissed due to Rember and Colis' failure to comply with the Court's Order Compelling Discovery Response. Idaho Rule of Civil Procedure 37(b)(2)(C) provides dismissal of an action as a possible

sanction for a party's failure to comply with a discovery order. In the present case, due to the complete failure of Rember and Colis to comply with this Court's order, and due to the abject failure of Rember and Colis to prosecute this matter in any way (other than filing their petition), dismissal is the appropriate sanction. This Court has considered lesser sanctions, and finds them to be unsatisfactory given the inaction of Rember and Colis, or their attorney.

IV. CONCLUSION AND ORDER.

For the reasons stated above, summary judgment must be granted in favor of Peterson, against Rember and Colis. Additionally, the petition of Rember and Colis is dismissed as a sanction for their failure to comply with this Court's Order Compelling Discovery Response.

IT IS HEREBY ORDERED summary judgment is GRANTED in favor of Peterson, against Rember and Colis, and the petition of Rember and Colis is DISMISSED with prejudice. Counsel for Peterson shall prepare the appropriate judgment.

IT IS FURTHER ORDERED the petition of Rember and Colis is DISMISSED with prejudice due to the failure of Rember and Colis to comply with this Court's Order Compelling Discovery Response dated June 9, 2011.

IT IS FURTHER ORDERED

Entered this 15th day of August, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2011, 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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Jeanne Clausen, Deputy Clerk