

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
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CLERK, DISTRICT COURT
J. J. Smith
DEPUTY
2

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

**LIBERTY BANKERS LIFE INSURANCE
COMPANY, an Oklahoma insurance
company,**

Plaintiff,

vs.

**WITHERSPOON, KELLEY,
DAVENPORT & TOOLE, P.S., a
Washington corporation; THE POINT AT
POST FALLS, L.L.C., an Idaho limited
liability company; POST FALLS
ALNDING MARINA, L.L.C.; and JOHN
AND JANE DOES 1-100,**

Defendant.

**WITHERSPOON, KELLEY,
DAVENPORT & TOOLE, P.S., a
Washington corporation,**

Counterclaim Plaintiff,

vs.

**LIBERTY BANKERS LIFE INSURANCE
COMPANY, an Oklahoma insurance
company,**

Case No. CV-2013-1092

**FINDINGS OF FACTS AND
CONCLUSIONS OF LAW**

**WITHERSPOON, KELLEY,
DAVENPORT & TOOLE, P.S., a
Washington corporation,**

Counterclaim Plaintiff,

vs.

**LIBERTY BANKERS LIFE INSURANCE
COMPANY, an Oklahoma insurance
company,**

Counterclaim Defendant.

This matter came before the Court for trial on the remaining issues on December 16, 2013. Following a two day bench trial the Court took the matters under advisement.

The Court has reviewed the files and records herein, and has heard the arguments presented by counsel. Now, being fully advised in the premises and good cause appearing therefore, the Court enters its Findings of Fact and Conclusions of Law.

STIPULATED FACTS

Prior to trial the parties stipulated as to the following facts:

1. Plaintiff/Counterdefendant, LIBERTY BANKERS LIFE INSURANCE COMPANY (“Liberty”), is an Oklahoma corporation.
2. Defendant/Counterplaintiff, WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S. (“WKDT”), is a Washington corporation.
3. Defendant, THE POINT AT POST FALLS, L.L.C. (“The Point”), was an Idaho limited liability company. The Point was dissolved on February 27, 2013.
4. Defendant, POST FALLS LANDING MARINA, L.L.C., was an Idaho limited liability company. Post Falls Landing Marina, L.L.C. was administratively dissolved by the Idaho Secretary of State on July 22, 2011.

5. During September 2001, The Point purchased approximately 34 acres of real property in Post Falls, Idaho from Louisiana-Pacific. The property, which formerly served as a L-P sawmill, is bordered by Spokane Street to the East and the Spokane River to the South.
6. On December 19, 2003, The Point was issued an Encroachment Permit for the construction of a marina, dock, ship store, log boom, and launching pier in the Spokane River adjacent to the Post Falls Landing.
7. Defendant, WKDT, previously represented a number of business entities associated with Harry A. Green, including The Point.
8. In September 2004, in order to secure payment of fees and costs incurred, The Point and various Harry Green related entities granted WKDT a Promissory Note in the principal amount of \$164,171.85. The Promissory Note was secured by a Deed of Trust encumbering the Post Falls Landing property. The Note was subsequently modified to increase the principal balance owed.
9. On August 26, 2005, Liberty and The Point, entered into a Loan Agreement whereby Liberty agreed to loan The Point money for the development of the Post Falls Landing project. That same day, The Point executed and delivered a Promissory Note to Liberty whereby it promised to pay the sum of \$3,934,390.00 subject to terms and conditions thereof.
10. In consideration of this extension of credit, The Point executed and delivered a Deed of Trust to Liberty. The Deed of Trust serves as security for the Promissory Note and encumbers nine (9) individual parcels of real property which comprise the Post Falls Landing project.

11. As a condition to Liberty's agreement to loan The Point money, it obtained a Subordination Agreement from WKDT which was subsequently recorded as Kootenai County Instrument No. 1975500 on August 26, 2005.
12. WKDT executed additional Subordination Agreements on February 14, 2007, May 25, 2007, December 30, 2008, November 4, 2009, and August 10, 2010. The substance of the Agreements is substantially identical to that recited in the August 23, 2005 Agreement.
13. By agreement dated August 30, 2006, Liberty agreed to extend additional credit to The Point as part of the construction of a commercial marina at The Point at Post Falls. By agreement dated December 11, 2006, Liberty extended The Point additional credit which included credit for cost overruns incurred in the construction of the Post Falls Landing Marina. Using these funds, The Point constructed a commercial marina at the Post Falls Landing which is commonly known as the Post Falls Landing Marina.
14. On May 23, 2007 The Point granted Liberty an assignment of leases and rents derived from the Post Falls Landing Marina. That Assignment of the Points's interest in leases and rents was never recorded.
15. The Post Falls Landing Marina consists of 142 boat slips and a floating convenience store and fuel pumps. Fuel tanks are located on adjacent real property and service the fuel pumps via submerged fuel lines. In addition, power and water lines service the slips via lines connected to the adjacent real property.
16. The Point began operating the Post Falls Landing Marina no later than the summer of 2008. The Post Falls Landing Marina generated revenues from boat moorage, fuel, and the convenience store.
 - a. In 2009, the Marina reported \$12,900.00 in revenues to IDL;

- b. In 2010, the Marina reported \$17,850.00 in revenues to IDL;
- c. In 2011, the Marina reported \$18,043.00 in revenues to IDL.

The Marina has not been open to the public since the Fall 2011.

17. By agreement dated April 30, 2010, Liberty and The Point agreed to extend the maturity date of the Promissory Note to June 30, 2011.

18. By Agreement dated August 6, 2010, The Point and the Green related entities agreed to modify the terms of the deed of trust they had granted WKDT. Specifically, the Agreement extended the maturity of WKDT's promissory note to June 30, 2011, and purported to grant WKDT a security interest in the following personal property:

- a. State of Idaho/Department of Lands Encroachment Permit and Submerged Lands Lease – Commercial Lease No. B-2199
- b. All fixtures, machinery, equipment, inventory, and personal property of whatever nature used in connection with the marina and convenience store facility now and hereafter constructed upon, attached, or adjacent to the Property;
- c. All of the marina and convenience store facilities constructed on or adjacent to and attached to the Property, including the convenience store and other buildings located upon the marina facility, including piers, docks, ramps, walkways, lighting, and all other personal property constituting the marina facility; and
- d. The rents, income, profits, insurance proceeds, accounts receivable, and all other intangible personal property related in any way to the marina and convenience store facility and its business operations.

19. On September 7, 2010, WKDT caused a UCC Financing Statement to be filed with the Idaho Secretary of State. The Financing Statement states that it covers the following collateral owned by The Point:

State of Idaho/Department of Lands Encroachment Permit and Submerged Lands Las {sic} – Commercial Lease No. B-2199; all fixtures, machinery, equipment, inventory and personal property of whatever nature used in connection with the marina and convenience store facility now and hereafter constructed upon, attached or adjacent to the property; all of the marina and convenience store facilities constructed on or adjacent to and attached to the property, including the convenience store and other buildings located upon the marina facility, including piers, docks, ramps, walkways, lighting and all other personal property constituting the marina facility; and the rents income, profits, insurance proceeds, accounts receivable and all other intangible personal property related in any way to the marina and convenience store facility and its business operations.

20. The Point failed to pay off the loan balance when the Promissory Note between the Point and Liberty matured on June 30, 2011.

21. On August 12, 2011, Liberty directed the successor trustee of its Deed of Trust to foreclose the instrument non-judicially. A notice of default was subsequently recorded on August 18, 2011 declaring The Point in default of the terms of its note.

22. Due to successive bankruptcy filings by The Point, a trustee's sale was not able to take place until November 2012. On November 14, 2012 at 11:00 a.m., the real property encumbered by the Deed of Trust was conveyed to Liberty by a Trustee's Deed in exchange for its credit bid in the amount of \$3,404,000.00. The Trustee's Deed was recorded with the Kootenai County Recorder that same day.

FINDINGS OF FACT

The Court adopts the stipulated facts and makes the following additional findings of fact:

1. Denny Davis, as an agent of WKDT, prepared the subordination agreements entered into between WKDT and Liberty. (Trial Test. Denny Davis).

2. WKDT Agreement intentionally deleted the “renewals, extensions and/or modifications” from subparagraph (1) of the August 10, 2010 Subordination Agreement in order to prevent WKDT from being in a position where it would have to agree to future subordination agreements. (Trial Test. of D. Davis).
3. WKDT had some knowledge that Liberty wished to execute an Eighth Loan Modification Agreement with the Point, however, WKDT did not become aware that the Eighth Loan Modification Agreement was actually executed until early 2013. (Trial Test. of D. Davis).
 - a. WKDT and Liberty never executed a subordination agreement with respect to the Eighth Loan Modification Agreement.
4. The Eighth Loan Modification Agreement intended that parcels A, D, and E would be released from the original deed of trust between Liberty and the Point.
 - a. Parcels A, D, and E were to be released in order to comply with Florida requirements; those parcels were to then secure a construction loan component. (Trial Test. Bradford Phillips; Ex. JJ).
5. The Post Falls Landing Marina is connected to the upland property through one ramp connection and through gas, water, and electrical lines. (Trial Test. Bradford Phillips; Dep. Of Harry Green, P. 30-32).
 - a. The Post Falls Landing Marina as originally proposed was to have at least five ramp connections to the upland property. (Trial Test. Bradford Phillips; Ex. 3).
6. The Post Falls Landing Marina was contemplated as a feature of the Post Falls Landing Development. (Trial Test. Bradford Phillips; Dep. Of Harry Green, P. 14-15).

7. The Marina was designed to “pull apart” and “unplug”. (Dep. of Harry A. Green, P. 14-15, 30-32, & 42).
8. The Marina was built for the Post Falls Landing location, however, it was designed such that it could be located anywhere. (Dep. of Harry A. Green, P. 30-32, & 42).
9. Harry A. Green, the project’s developer did not intend for the Marina to be a permanent amenity of the Post Falls Landing project. (Dep. of Harry A. Green, P. 14-15, 30-32, & 42).

- a. According to Mr. Green, the dock was designed to pull apart “in case the Department of Lands didn’t issue a permit or pulled some of the stunts that Jim Brady pulled.” *Id.* at 42.

10. The Third Modification of Deed of Trust and Modification to First Replacement

Promissory Note, entered into between WKDT, the Point, and Pier 21 On the Boardwalk, granted WKDT a security interest in personal property identified as the marina and the improvements thereto, along with any rents, income, provides, insurance proceeds, and accounts receivable therefrom. (Trial Test. D. Denny; Exhibit R).

- a. WKDT perfected its security interest in the marina and its improvements, rents, income, profits, insurance proceeds, and accounts receivable by filing a UCC Financing Statement on September 7, 2010. *Id.*
- b. Liberty took no action to perfect a security interest in the Point’s personal property.

11. The Idaho Department of Lands can only accept an encroachment application from the owner or the lessee of the littoral rights of the adjacent upland land beyond the ordinary high water mark. (Trial Test. James P. Brady).

- a. At this point, Liberty is the owner of the adjacent upland is.
- b. On February 22, 2013, the Idaho Department of Lands issued a Commercial Submerged Lands Lease, Lease No. B220036 to Liberty Bankers Life Insurance Company. (Exhibit 38).

12. Any in submerged lands lease previously held by the Point or Post Falls Landing was terminated sometime in 2009. (Trial Test. James P. Brady).

CONCLUSIONS OF LAW

I. WHETHER WKDT AGREED TO SUBORDINATE ITS LIEN UNDER THE 8TH LOAN MODIFICATION AGREEMENT

It is undisputed that WKDT and Liberty entered into a series of subordination agreements under which WKDT agreed to subordinate its lien against the Point at Post Falls' property to Liberty's lien. It is disputed, however, whether, according to those agreements, WKDT agreed to subordinate its lien under the 8th Loan Modification Agreement.¹

When interpreting a contract, the Court first looks to the plain language of the document. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013). In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). Additionally, the contract should be construed against the party who prepared it; in this case WKDT. *Petra Inc.*, 154 Idaho at 437, 299 P.3d at 244; (Trial Test. Denny Davis).

The first subordination agreement entered into between Liberty and WKDT was executed on August 23, 2005. In pertinent part the agreement stated that:

¹ The Court has previously ruled that Liberty is estopped from denying the enforceability of the 8th Loan Modification Agreement.

NOW, THEREFORE, in consideration of the mutual benefits accruing to the parties hereto and other valuable consideration, the receipt and sufficiency of which consideration is hereby acknowledged and in order to induce Lender to make the loan above referred to, it is hereby declared, understood and agreed as follows:

- (1) That said deed of trust securing said note in favor of Lender, and any renewals or extensions thereof, shall unconditionally be and remain at all time {sic} a lien or charge on the property therein described, prior and superior to the lien or charge of the deed of trust first above mentioned.

(Ex. F).

Additional, substantially similar, subordination agreements were entered into between Liberty and WKDT on August 23, 2005 (Ex. H), February 14, 2007 (Ex. K), May 25, 2007 (Ex. L), and December 30, 2008 (Ex. M)² and November 4, 2009 (Ex. O).

On April 30, 2010 The Point and Liberty executed their Seventh Loan Modification Agreement. (See Ex. Q). Subsequently, Liberty and WKDT entered into an additional Subordination Agreement on August 10, 2010.³ (Ex. Q). The August 10, 2010 Subordination Agreement stated:

NOW, THEREFORE, in consideration of the mutual benefits accruing to the parties hereto and other valuable consideration, the receipt and sufficiency of which consideration is hereby acknowledged and in order to induce Lender to make the loan above referred to, it is hereby declared, understood and agreed as follows:

- (1) That said deed of trust securing said note in favor of Lender shall unconditionally be and remain at all time {sic} a lien or charge on the property therein described, prior and superior to the lien or charge of the deed of trust first above mentioned.

² The December 30, 2008 Subordination Agreement, Exhibit M, deviated slightly from the language of the first subordination agreement. The December 30, 2008 Subordination Agreement stated :

That said deed of trust securing said note in favor of Lender, and any *renewals, extensions and/or modifications* thereof, shall unconditionally be and remain at all time {sic} a lien or charge on the property therein described, prior and superior to the lien or charge of the deed of trust first above mentioned.

(emphasis added). This language was also used on the November 4, 2009 Subordination Agreement, Exhibit O.

³ Additionally, on August 6, 2010 WKDT and the Point and Pier 21 on the Boardwalk, LLC, entered into the Third Modification of Deed of Trust. This modification modified the amount due under the Promissory Note between WKDT and the Point and purported to take a security interest in certain personal property owned by The Point and Pier 21. This modification was recorded on September 7, 2010.

(Ex. Q). According to the testimony of Mr. Davis, a shareholder at WKDT and author of the subordination agreements, the August 10, 2010 Subordination Agreement intentionally deleted the “renewals, extensions and/or modifications” from subparagraph (1) in order to prevent WKDT from being in a position where it would have to agree to future subordination agreements. (Trial Test. of D. Davis).

At some point in August 2011 Mr. Davis received a telephone call from Bradford Phillips, President of Liberty, regarding the possible Eighth Loan Modification Agreement. (Trial Test. D. Davis). According to Mr. Davis, WKDT received a blank copy of the Eighth Loan Modification Agreement, as well as some additional loan documents, however, WKDT did not become aware that the Eighth Loan Modification Agreement had been executed until they were at mediation in early 2013. (Trial Test. D. Davis). WKDT and Liberty never executed a Subordination Agreement with respect to the Eighth Loan Modification Agreement.

The original deed of trust between Liberty and the Point encumbered ten parcels. The Eighth Loan Modification Agreement released parcels A, D, and E from the original deed of trust and secured those parcels under a separate deed of trust. (Ex. JJ).⁴ The release of parcels A, D, and E from the original deed of trust was done in order to divide Liberty’s loan to the Point into construction and non-construction components. (Trial Test. Bradford Phillips).⁵

⁴ The Eighth Loan Modification Agreement states in pertinent party that:

Contemporaneously with the execution of this Agreement, Borrower is executing construction and development loan documents evidenced by a note in the original principal amount of \$2,545,843.31, payable to Lender (the “\$2,545,843.31 Promissory Note), secured by, among other things a deed of trust encumbering the property described in **Exhibit “C”** attached hereto. Since the property described in the attached **Exhibit “C”** is part of the property described in the attached **Exhibit “A”**, Lender shall execute a *Partial Release of Lien* to release the property described in the attached **Exhibit “C”** from the Deed of Trust securing the Note modified by this agreement in exchange for a principal payment of \$750,000.00 which shall be advanced by Lender under the \$2,545,843.31 Promissory Note.

⁵ Pursuant to the Court’s October 15, 2013 Memorandum Decision and Order, Liberty is estopped from denying the enforceability of the Eighth Loan Modification Agreement. The Court’s finding was based upon the testimony of Bradford Phillips in the previous case between Liberty and Harry Green. Furthermore, the Court notes that despite

Looking to the plain language of the August 10, 2010 Subordination Agreement, the Court finds that it is not ambiguous and therefore should be construed in accordance with its plain meaning. The language of the August 10, 2010 Subordination Agreement is clear that unlike its predecessor subordination agreements, it does not apply to any renewals, extensions, or modifications of the deed of trust. According to the plain language of the August 10, 2010 Subordination Agreement, the Court finds that WKDT agreed to subordinate its lien to Liberty's original deed of trust; the Court further finds, however, that WKDT did not agree to subordinate its lien to Liberty's deed of trust discussed in ¶ 24 of the Eighth Loan Modification Agreement and pertaining to parcels A, D, and E.

II. EFFECT OF WKDT'S FAILURE TO SUBORDINATE ITS LIEN UNDER THE EIGHTH LOAN MODIFICATION AGREEMENT

Having determined that WKDT did not subordinate its lien as to the deed of trust discussed in ¶ 24 of the Eighth Loan Modification Agreement and encumbering parcels A, D, and E, and that the Eighth Loan Modification is enforceable as between Liberty and the Point, the Court must now determine what effect that has on the parties' respective priorities and Liberty's trustee's deed. In the case at bar, WKDT recorded its original deed of trust, entered into between WKDT and the Point, on October 4, 2004; under that deed of trust secured an obligation of \$164,171.85. WKDT and the Point executed a First Replacement Promissory Note on December 19, 2006, which increased the principal amount owing to \$283,614.00. (Ex. J). On July 30, 2009, WKDT and the Point executed a Second Modification of Deed of Trust and Modification to the First Replacement Promissory Note, which increased the obligation due under the note to \$610,663.03. (Ex. N). Finally, on August 6, 2010, WKDT, the Point, and Pier 21 executed a Third Modification of Deed of Trust and Modification to First Replacement

the fact that Liberty never recorded the Eighth Loan Modification Agreement, "[a]n unrecorded instrument is valid as between the parties thereto and those who have notice thereof." I.C. § 55-815.

Promissory Note increasing the amount due under the Note to \$751,557.35. (Ex. R). The August 6, 2010 Modification was filed on September 7, 2010.

No supplemental deed of trust was ever recorded with respect to Liberty's interest in parcels, A, D, and E, as was required by the Eighth Loan Modification Agreement. Therefore, the Court finds that pursuant to I.C. § 45-108, WKDT's lien is valid against and superior to all rights, liens and claims acquired by Liberty as to parcels A, D, and E.

Because Liberty released parcels A, D, and E from the original deed of trust, under which WKDT had agreed to subordinate its lien, and because WKDT did not agree to subordinate its lien to the deed of trust discussed in ¶ 24 of the Eighth Loan Modification Agreement, and pursuant to I.C. § 45-108, the Court finds that WKDT's senior lien holds first priority as to parcels, A, D, and E.

In considering the impact of WKDT's senior lien on Liberty's trustee's deed, the Court is mindful that "[o]rdinarily, a junior mortgagee may foreclose first, with the purchaser taking subject to the senior's lien." *First Sec. Bank of Idaho, N.A. v. Stauffer*, 112 Idaho 133, 140, 730 P.2d 1053, 1060 (Ct. App. 1986). A reading of I.C. § 45-1508⁶ together with I.C. § 45-1506(2)⁷

⁶ I.C. § 45-1508 states in pertinent part that:

A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. . . .

⁷ I.C. § 45-1506(2) states that:

Subsequent to recording notice of default as hereinbefore provided, and at least one hundred twenty (120) days before the day fixed by the trustee for the trustee's sale, notice of such sale shall be given by registered or certified mail, return receipt requested, to the last known address of the following persons or their legal representatives, if any:

- (a) The grantor in the trust deed and any person requesting notice of record as provided in section 45-1511, Idaho Code.
- (b) Any successor in interest of the grantor including, but not limited to, a grantee, transferee or lessee, whose interest appears of record prior to the recording of the notice of default, or where the trustee or the beneficiary has actual notice of such interest.

also supports a conclusion that while Liberty was authorized to foreclose its junior lien with respect to parcels A, D, and E, Liberty as the credit-bid purchaser took parcels A, D, and E subject to WKDT's first priority lien.

III. POST FALLS LANDING MARINA'S STATUS AS PERSONAL PROPERTY OR FIXTURE

The test in Idaho to determine whether a particular article is a fixture to real property is three-fold: 1) annexation to the realty, actual or constructive; 2) adaptation to the use or purpose of the underlying realty; 3) intention to make the article a permanent fixture. *Rayl v. Shull Enterprises, Inc.*, 108 Idaho 524, 527, 700 P.2d 567, 570 (1984); *Rowan v. Riley*, 139 Idaho 49, 55, 72 P.3d 889, 895 (2003); *Everitt v. Higgins*, 122 Idaho 708, 711, 838 P.2d 311, 314 (Ct.App. 1992). Once an item becomes a fixture, it is considered part of the realty until or unless it is severed by the fee owner. *Everitt*, 122 Idaho 708, 711, 838 P.2d 311, 314. Whether an item is personal property or a fixture is generally a mixed question of law and fact. *Rayl*, 108 Idaho 524, 527, 700 P.2d 567, 570. However, this determination can be a pure question of law when only one reasonable conclusion may be drawn from the evidence. *Id.*

Annexation is considered in light of the actual relationship of the object to the realty. *Id.* However, a fixture also may be constructively annexed to the real property. *Id.* Constructive annexation may be found "where the objects, although not themselves attached to the realty, comprise a necessary, integral or working part of some other object which is attached . . ." *Rayl*, 108 Idaho 524, 528, 700 P.2d 567, 571.

The adaptation part of the test is normally met when the particular object is "clearly adapted to the use to which the realty is devoted." *Id.* The question is whether the real property

(c) Any person having a lien or interest subsequent to the interest of the trustee in the trust deed where such lien or interest appears of record prior to the recording of the notice of default, or where the trustee or the beneficiary has actual notice of such lien or interest.

is “peculiarly valuable in use because of the continued presence of the annexed property thereon . . . [A]n object placed on the realty may become a fixture if it is a *necessary or at least a useful adjunct to the realty*, considering the purposes to which the latter is devoted.” *Id.* (emphasis in original). The fact an item is “adapted for and necessary to the use of a particular property” does not, however, require a finding that the item is a fixture. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, ___, 297 P.3d 222, 231 (2012).

The intention prong is regarded as the most important element in determining whether an item is a fixture or personal property. *Id.* Additionally, annexation and adaptation are used to assist the fact finder in determining the parties’ intent. *Id.* The intention is determined by the surrounding circumstances at the time of installation, not the undisclosed purpose of the annexor. *Id.* It is the implied intention manifested by the act, not the subjective intent of the install and frame of mind that is important. *Id.* The objective intention may be inferred from:

- (1) The nature of the article; (2) the manner of annexation to the land; (3) the injury to the land, if any, by its removal; (4) the completeness with which the chattel is integrated with the use to which the land is being put; (5) the relation which the annexer has with the land such as licensee, tenant at will or for years or for life or fee owner; (6) the relation which the annexer has with the chattel such as owner, bailee or converter; (7) the local custom respecting treating such chattel as personal property or a fixture; (8) the time, place and degree of social, economic and cultural development, (e.g., a luxury in one generation is a necessity in another . . .); and (9) all other relevant facts surrounding the annexation.

Id.

In the case at bar, WKDT argues that the Post Falls Landing Marina and the improvements thereto constitute personal property; Liberty contends that the items are fixtures to the real estate. Applying the three prong test set forth in *Rayl* the Court finds that the Post Falls Landing Marina and the improvements thereto satisfy the annexation prong because they are connected to the real property through one ramp connection to the upland property and through

gas, water, and electrical lines. (Trial Test. of Bradford A. Phillips; Dep. of Harry A. Green, P. 30-32). The Court further finds that the Post Falls Landing Marina and the improvements thereto are useful to the adjunct real property, as a marina was contemplated as a part of the overall development, therefore satisfying the adaptation prong. (Trial Test. of Bradford A. Phillips; Dep. of Harry A. Green, P. 14-15).

As noted above, however, the most important prong of the *Rayl* test is whether the Post Falls Landing Marina and the improvements thereto were intended to be permanent fixtures to the real estate. In ruling on this issue, the Court considers the following evidence: the Marina was contemplated as a feature of the Post Falls Landing development; the Marina was designed to “pull apart” and “unplug”; the Marina was built for the Post Falls Landing location, however, it was designed such that it could be located anywhere; the Post Falls Landing Marina was originally proposed as having at least five ramp connections to the upland property but was ultimately designed to have only one ramp connection; and Harry A. Green, the project’s developer testified at his deposition that he did not necessarily intend for the Marina to be a permanent amenity of the Post Falls Landing project. (Dep. of Harry A. Green, P. 14-15, 30-32, & 42; Trial Test. Bradford Phillips; Ex. 3; Ex. SS). According to Mr. Green, the dock was designed to pull apart “in case the Department of Lands didn’t issue a permit or pulled some of the stunts that Jim Brady pulled.” *Id.* at 42. Essentially, Mr. Green designed a dock which could be relocated and pulled apart because he did not trust the Department of Lands and its agent Jim Brady; Mr. Green’s subjective intent that the Marina and its improvements were not permanent is supported by the fact that the Marina’s design was altered to have only one ramp connection rather than the originally proposed five.

Based upon the foregoing circumstances at the time of installation of the Marina, the Court finds that at the time of the installation of the Post Falls Landing Marina and the improvements thereto, it was not intended that it would be a permanent fixture to the real estate. Because it was not intended that the Marina and its improvements would be permanent, the third, and most important prong, of the fixtures analysis is not satisfied, and the Court finds that the Post Falls Landing Marina and the improvements thereto constitute personal property.

IV. EFFECT OF THE POST FALLS LANDING MARINA'S STATUS AS PERSONAL PROPERTY

According to the terms of WKDT's Third Modification of Deed of Trust and Modification to First Replacement Promissory Note, Exhibit R, the Point and Pier 21 On the Boardwalk granted WKDT a security interest in personal property identified as the marina and the improvements thereto, along with any rents, income, provides, insurance proceeds, and accounts receivable therefrom. The Court finds that WKDT perfected its security interest in the marina and its improvements, rents, income, profits, insurance proceeds, and accounts receivable by filing a UCC Financing Statement on September 7, 2010. Liberty took no action to perfect a security interest in the Point's personal property. Additionally, the Court finds that the previous iterations of the deed of trust between WKDT, the Point, and Pier 21 are irrelevant as to the Marina and do not affect WKDT's lien priority as to the Marina.

Therefore, the Court finds that pursuant to I.C. § 28-9-322, WKDT has a first priority lien against the marina and improvements thereto because WKDT has a perfected security interest in that personal property.

V. WHETHER LIBERTY OR WKDT HOLDS AN INTEREST IN THE ENCROACHMENT PERMIT AND SUBMERGED LAND LEASE

In Idaho, generally a riparian owner (navigable river or stream) or a littoral owner (navigable lake) holds title down to the ordinary high water mark (“OHWM”). *West v. Smith*, 95 Idaho 550, 554, 511 P.2d 1326, 1330 (1973). The State of Idaho holds the title to the beds of all navigable bodies of water below the OHWM for the use and benefit of all people. *Id.*; *Erickson v. State*, 132 Idaho 208, 209, 970 P.2d 1, 2 (1998). However, a littoral landowner also generally possesses certain littoral rights appurtenant to his ownership of lake front property. *Id.* Such rights include the right of access to the water and, subject to state regulation, the right to build wharves and piers in aid of navigation. *Id.* The right of access is said to be a valuable right and “in many instances . . . the controlling aspect of the value of (littoral lands).” *Id.* (quotations in original).

According to the trial testimony James P. Brady, the Idaho Department of Lands can only accept an encroachment application from the owner or the lessee of the littoral rights of the adjacent upland land beyond the OHWM. In this case, the Court finds that the owner of the adjacent upland is, at present, Liberty. Additionally, the Idaho Department of Lands issued Commercial Submerged Lands Lease, Lease No. B220036 to Liberty Bankers Life Insurance Company on February 22, 2013. (Exhibit 38).

The Court finds that because Liberty is the riparian upland owner, and because the Idaho Department of Lands issued Liberty a Commercial Submerged Lands Lease in February 2013, Liberty holds now an interest in an encroachment permit and submerged lands lease located adjacent the Post Falls Landing Development. The Court further notes that any in submerged lands lease previously held by the Point or Post Falls Landing was terminated sometime in 2009. (Trial Test. James P. Brady).

VI. WKDT's CLAIM OF BEING AN INTENDED BENEFICIARY UNDER THE EIGHTH LOAN MODIFICATION AGREEMENT

Pursuant to the conclusions of law as stated above, the Court need not reach this issue as it is now moot.

VII. WKDT'S CLAIMS OF TRESPASS AND SLANDER OF TITLE

At trial, WKDT did not present any evidence or argument on its claims for Trespass and Slander of Title. Therefore, WKDT failed to meet its burden on those claims, and the Court finds in favor of Liberty as to those claims.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. WKDT's lien on parcels A, D, and E is hereby moved into first position; pursuant to the statute Liberty took the property at the trustee's sale subject to WKDT's lien.
2. Because the Post Falls Landing Marina and its improvements were not intended to be permanent fixtures of the Post Falls Landing project, the third, and most important element of *Rayl* fixtures analysis is not satisfied. Therefore, and the Court finds that the Post Falls Landing Marina and the improvements thereto constitute personal property in which WKDT has a perfected, first-priority security interest.
3. The Court finds that because Liberty is the riparian upland owner, and because the Idaho Department of Lands issued Liberty a Commercial Submerged Lands Lease in February 2013, Liberty holds now an interest in an Idaho Department of Lands encroachment permit and submerged lands lease located adjacent the Post Falls Landing Development. The Court further finds that any submerged lands lease previously held by the Point or Post Falls Landing was terminated by the Idaho Department of lands in 2009.
4. WKDT's claim that it was an intended beneficiary of the Eighth Loan Modification Agreement has been rendered moot by the Court's findings.

5. WKDT failed to meet its burden on its claims of Trespass and Slander of Title because WKDT did not present any argument or evidence on those issues; therefore, the Court finds in favor of Liberty as to WKDT's claims for Trespass and Slander of Title.

Entered this 8 day of January, 2014.


Benjamin R. Simpson, District Judge

CERTIFICATE OF MAILING/DELIVERY

On this 8 day of January, 2014, a true and correct copy of the foregoing was mailed in the U.S. Mail, postage prepaid, sent via facsimile, hand delivered or sent via interoffice mail as indicated below to the following:

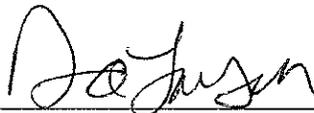
Jonathon D. Hallin
LUKINS & ANNIS
601 E. Front Avenue, Ste. 502
Coeur d'Alene, Idaho 83814
Fax: 206-666-4112

Mailed
 Hand Delivered
 Faxed

John F. Magnuson
ATTORNEY AT LAW
P.O. Box 2350
1250 Northwood Center Court, Ste. A
Coeur d'Alene, ID 83814
Fax: 208-667-0500

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8296

By 
Deputy Clerk