STATE OF IDAHO)
County of KOOTENAI) ss
FILED 6/27/19
AT 11:45 O'Clock A M
CLERK, DISTRICT COURT
Deputy

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

ALICIA GANGI, an individual,,
Plaintiff,

VS.

MARK W. DEBOLT and JANE DOE DEBOLT, individuals,

Defendants.

Case No. **CV 28-18-5145**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO STRIKE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter comes before the Court on Plaintiff Alicia Gangi's (Gangi) Motion for Summary Judgment. Gangi requests the Court grant summary judgment on her claim for declaratory relief as against Defendant Mark Debolt (Debolt).

Debolt entered into a Purchase and Sale Agreement (Debolt Agreement) in 2012 to purchase a parcel of real property from the Arthur III & Trudy Elliot Family Trust (Sellers). Decl. of Mark W. Debolt in Opp'n to Pl.'s Mot. for Summ. J. (Debolt Decl.), ¶¶ 5, 6. Included in an addendum to the 2012 Debolt Agreement, Sellers granted and sold an easement to Debolt. Aff. Of Arthur M. Bistline in Supp. of Pl.'s Mot. for Summ. J. (Aff. Of Arthur M. Bistline), Ex. A; Debolt Decl., ¶ 8; Compl., ¶ 9. Debolt, along with co-owner Claire Humphrey, remains the owner of the property to this day. *Id.* at ¶¶ 3, 4. Sellers also owned a vacant parcel of land adjacent to Debolt's property. *Id.* at ¶ 7. In

2017, Sellers sold the vacant parcel of land to Gangi. Compl., ¶¶ 1, 2; Debolt Decl., ¶¶ 6, 7, Ex. D. From this point forward, each party takes a separate and opposing view as to the remainder of the facts.

Gangi asserts that "Plaintiff's predecessor in interest and Defendants agreed that an additional residence could be served by the existing water system and attempted to secure a water right that allowed for three residences to be served by the existing system." Compl., ¶ 6. Debolt denies this. Answer, ¶ 6. Gangi further asserts that after she purchased the property, "Defendants declared that she had no right to use the existing water system to provide domestic water service to the subject property." Compl., ¶ 7. To this, Debolt admits. Answer, ¶ 7.

Debolt asserts the purchase of his property from Sellers "was contingent upon Sellers granting an easement for the 'sole and exclusive use' of the deck and tank area." Debolt Decl., ¶ 8. Debolt states, "[a]s purchasers, we wanted absolute control and use over the area since it was the sole source of our domestic and irrigation water supply." *Id.* at ¶ 9. Debolt further asserts that the Debolt Agreement "paperwork provides that I asked Sellers to provide a 'sole and exclusive' easement for the Easement Area," being the water tank and deck. *Id.* at ¶ 10, Ex. C. Debolt states that Sellers never challenged their possession and use of the water tank and deck, which "included any realtors showing what is now [Gangi]'s property." *Id.* at ¶ 15. Debolt further states, "[t]he real estate agent even inquired of me before Ms. Gangi purchased the lot if we would sell the exclusive easement listed in the Agreement. We declined." *Id.* at ¶ 17.

On June 25, 2018, Gangi filed a Verified Complaint for Declaratory Relief. On August 7, 2018, Debolt filed an Answer. On September 12, 2018, Gangi filed a Motion for Summary Judgment, Plaintiff's Memorandum in Support of Motion for Summary

Judgment, and Affidavit of Arthur M. Bistline in Support of Plaintiff's Motion for Summary Judgment. Also on September 12, 2018, counsel for Gangi filed a Notice of Hearing scheduling a hearing on Gangi's motion for summary judgment for October 10, 2018. On October 1, 2018, counsel for Gangi sent an email to a different district judge's court clerk, seeking to vacate the October 10, 2018, hearing. Gangi's motion sat dormant until May 15, 2019, when counsel for Gangi filed a Notice of Hearing scheduling oral argument for June 25, 2019. On June 11, 2019, Debolt filed Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Declaration of Mark W. Debolt in Opposition to Plaintiff's Motion for Summary Judgment. On June 18, 2019, Gangi filed Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Also on June 18, 2019, counsel for Gangi filed Plaintiff's Motion to Strike the Declaration of Mark W. Debolt in Opposition to Plaintiff's Motion for Summary Judgment. Oral argument was held on June 25, 2019, following which this Court took Gangi's Motion for Summary Judgment under advisement. Currently, this case has not been set for trial.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of*

> *Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden . . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

III. ANALYSIS

The Easement Agreement at issue here was dated September 12, 2012, signed by Gangi's predecessor in interest (Sellers), in favor of Debolt. Aff. Of Arthur M. Bistline, Ex. A. That Easement Agreement also concerns an easement for ingress and egress, which is not in dispute in this lawsuit. The portion of the Easement Agreement which is in dispute is that portion which addresses Debolt's rights to an underground water holding tank and deck above the underground holding tank, both of which are on

Gangi's property. *Id.* The specific language of that portion of the Easement Agreement reads:

> WHEREAS, certain improvements, appurtenances and features to wit: an underground water holding tank and deck above the underground holding tank, are located on that property retained and possessed by Grantor, and WHEREAS, the Grantor and Grantee are desirous of maintaining said improvements and appurtenances to wit: that underground water holding tank and deck above the underground holding tank located on Grantor's property for the use and enjoyment of the Grantee; and
> WHEREAS, the Grantor has agreed, for good and valuable consideration paid by the Grantee the receipt of which Grantor hereby acknowledges, to rant to the Grantee an easement for use and quiet enjoyment of said underground water holding tank and arid deck above the underground holding tank and more particularly described in Exhibit "B" (Easemerit Deck/Water Tank) attached hereto, including an easement to access the same and to access any and all subsurface lines, pipes, conduits or similar features as may, from time to time, be necessary to effectuate inspections, repairs, maintenance or replacement of the same; and

Id.

The issue presented by the parties is whether the easement granted to Debolt by Gangi's predecessors is exclusive. Gangi argues that the plain language of the Easement Agreement "in no way indicates that it is exclusive," and that the easement does not include "the word 'exclusive,' so it cannot be interpreted to provide for an exclusive easement." Pl.'s Mem. in Supp. of Mot. for Summ. J., 2–3. Debolt argues that the "plain language of the Easement Agreement...provides for an exclusive easement to the underground water tank and deck." Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J., 1, 4. In the alternative, Debolt asserts that "the language in the Agreement creates an ambiguity," which thus creates a genuine issue of material fact. *Id.* at 1, 6.

Both parties have cited to *Latham v. Garner*, 105 Idaho 854, 673 P.2d 1048 (1983), in support of their respective arguments. In *Latham*, two easements (referred to as one by the Court) were granted to the defendants by the owners of the adjacent

properties. 105 Idaho at 855, 673 P.2d at 1049. "The trial court determined that the easement was granted for the exclusive use and benefit of the defendants." On appeal, the issue before the Supreme Court of Idaho was "whether the trial court was correct in concluding that the instruments granting the easement to defendants conveyed an easement solely for defendants' use, to the exclusion of the owner of the servient estate." *Id.* The documents granting the easement to the defendants were described as follows: "they were entitled 'easement'; they described the roads in detail, containing words of grant; and, they specifically provided that the easements and rights-of-way granted to the defendants were 'exclusively for their use, and unto their successors and assigns forever.'" *Id.*

"[A]n exclusive easement is an unusual interest in land; it has been said to amount to almost a conveyance of the fee." *Id.* at 856, 673 P.2d at 1050 (citing *Mitchell v. Land*, 355 P.2d 682, 685 (Alaska 1960); *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 110 P.2d 983, 985 (1941); *Keeler v. Haky*, 160 Cal.App.2d 471, 325 P.2d 648, 651 (1958); 2 Thompson, Real Property § 426 (1980)). "The grant of an exclusive easement conveys unfettered rights to the owner of the easement to use that easement for purposes specified in the grant to the exclusion of all others." *Id.* "Because an exclusive grant in effect strips the servient estate owner of the right to use his land for certain purposes, thus limiting his fee, exclusive easements are not generally favored by the courts." *Id.* (citing *Hoffman v. Capitol Cablevision System, Inc.*, 52 A.D.2d 313, 383 N.Y.S.2d 674, 676 (1976)). Nevertheless, exclusive easements can be created if the parties agree to do so. *Id.* The Court goes on to explain that "[t]he reason most often cited for finding a particular easement non-exclusive is that the granting instrument does not clearly and specifically provide for

exclusivity in the dominant estate." *Id.* at 857, 673 P.2d at 1051 (citing *Holbrook v. Telesio*, 225 Cal.App.2d 152, 37 Cal.Rptr. 153 (1964), *Mitchell v. Land*, 355 P.2d 682, 685 (Alaska 1960)). "No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention." *Id.* (quoting *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 110 P.2d 983, 985 (1941)).

Turning to Idaho case law, the Idaho Supreme Court states, "[o]ur cases are clear that the legal effect of an unambiguous written document must be decided by the trial court as a question of law." *Id.* (citing *J.R. Simplot Co. v. Chambers*, 82 Idaho 104, 350 P.2d 211 (1960); *Ohms v. Church of the Nazarene*, 64 Idaho 262, 130 P.2d 679 (1942)). "If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact." *Id.* (citing *Rutter v. McLaughlin*, 101 Idaho 292, 612 P.2d 135 (1980)).

The *Latham* Court found that the documents granting the easement were ambiguous and should have been interpreted as a question of fact. *Id.* Specifically, the Court found that "[t]he mere use of the word 'exclusive' in creating an easement is not, in and of itself, sufficient to preclude use by the owner of the servient estate." *Id.* The Court went on to explain:

> An instrument which is reasonably subject to conflicting interpretation is ambiguous. *See Rutter v. McLaughlin*, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980). The phrase "exclusively for their use" lends itself, without contortion, to a number of interpretations. The instrument could be interpreted as (1) the grant of an easement right of way to the grantee, the defendants herein, to the exclusion of all others, except the grantor; or (2) the grant of an easement right of way excluding all others, including the grantor; or, (3) as the grant of a fee simple estate to the grantee. Thus, the instrument is reasonably subject to conflicting interpretations and as such is ambiguous.

> When an instrument is ambiguous in nature, the intention of the parties as reflected by all of the circumstances in existence at the time the easement was given must be considered in construing the granting instrument. *Quinn v. Stone*, 75 Idaho 243, 250, 270 P.2d 825, 829–30 (1954); *see Cusic v. Givens*, 70 Idaho 229, 215 P.2d 297 (1950). Therefore, the trial court should have considered extrinsic evidence of the circumstances and intentions of the original parties to the easement. We remand to the trial court to make a finding of fact regarding the intentions of the parties to the instrument of conveyance. In making such a factual finding, the trial court must consider all of the extrinsic evidence in the record to determine what the intentions of the parties were when they executed and accepted the instrument. *See Hogan v. Blakney*, 73 Idaho 274, 251 P.2d 209 (1952); *Campbell v. Weesbrod*, 73 Idaho 82, 245 P.2d 1052 (1952) (court must seek and give effect to intention of parties): *see also, Gardner v. Fliegel*, 92 Idaho 767, 450 P.2d 990 (1969).

Id. at 858, 673 P.2d at 1052.

Here, the first determination the Court must make is whether the Easement Agreement is ambiguous. The Easement Agreement does not contain the word "exclusive," but does contain the following sentence: "...the Grantor hereby grants to the Grantee, and Grantee's heirs and assigns, full and free right and authority to use the existing underground water holding tank and deck above the underground holding tank..." Aff. of Arthur M. Bistline, Ex. A. The Court must determine whether the phrase "full and free right and authority to use" is ambiguous.

Neither Gangi nor Debolt cite to any Idaho case law that would help to explain what the above phrase may mean. Additionally, this Court could not locate any Idaho case law that lends weight to what the phrase may mean. Gangi merely stated that the phrase "is not a concept in property law." Pl.'s Mem. in Supp. of Mot. for Summ. J., 4–5. However, in her Reply, Gangi states that the phrase has an established legal meaning – "it means the 'union of good title with actual possession.'" Pl.'s Reply to Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J., 1. However, the Court respectfully disagrees with Gangi's assertion and notes that Gangi simply provided the definition of

"full right." The term "full right" is defined as "[t]he union of good title with actual possession," and the word "free" is defined as "unburdened," as it relates to land. *Black's Law Dictionary*, 673, 681 (7th ed. 1999). The terms "free right," "free authority," and "full authority," are not defined by Black's Law Dictionary.

Next, the Court will look to case law of nearby states for guidance. In *Morsbach v. Thurston County*, the Supreme Court of Washington was faced with determining whether the granting instrument in the case before it granted an easement or a fee simple. 152 Wash. 562, 278 P. 686 (1929). In making that determination, the court discussed numerous other cases, including one that was very similar to the case before it. *Id.* at 569, 278 P. at 688. In that similar case, the granting instrument granted and conveyed "the full and free right of way" to the railway company. *Id.* (citing *Lockwood v. Ohio River R. Co.*, 103 F. 243, 245 (4th Cir. 1900)). After determining that the granting instrument did not convey a fee simple, but instead conveyed an easement, the Court in *Lockwood* stated, "[t]he granting clause of this instrument conveys only a right of way, which is a mere easement, the owner of the soil retaining his exclusive right in all mines, timber, and earth for every purpose not incompatible with the use for which it is granted." *Id.* at 570, 278 P. at 689 (quoting *Lockwood* at 247). The phrase "full and free right of way" was found to convey an easement where the owner retained "his exclusive right" in all of the places provided for in the granting instrument. Therefore, the Washington case indicates that the phrase "full and free right" means an exclusive right. *See also Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 41 S.E. 340, 344 (1902).

In the California case of *Keeler v. Haky*, though the facts are distinguishable from the matter currently before this Court, the phrase "full and free right" was included in the granting instrument. 160 Cal. App. 2d 471, 473, 325 P.2d 648, 649 (1958).

However, like the Washington Court in *Morsbach*, the California Court found the following:

> The terms clearly show that until 2027, the grantees, in common with others having like right, have the unrestricted right to pass and repass over a private alleyway of explicit description and location, for all purposes connected with the use of their land. We cannot hold in line with the trial court's ruling that by the employment of the terms 'full and free' and 'all purposes' the use was intended to be exclusive to the grantees and for all purposes connected with their property. The document clearly indicates that the right which is unrestricted, or 'free and full' is the right to 'pass and repass' across the easement, and even the extent of this right is limited by the use of others who have the same, or like, right. The phrase 'all purposes' as used in the instrument does not imply that all rights in connection with the use of the dominant estate are conveyed, but only the right to pass and repass for all purposes connected with the use of grantees' land. A fair interpretation of the language of the conveyance permits the grantees to pass and repass for all purposes connected with the use of their estate.

Id. at 474–75, 325 P.2d at 650 (emphasis added). Therefore, the California case indicates that the phrase "full and free right" means only that the right is unrestricted, but not exclusive.

Here, the Easement Agreement states clearly that Debolt has the full and free right and authority to use of the existing underground water holding tank and deck above the holding tank. Following the Washington case, the phrase could be interpreted to mean that the right is exclusive to Debolt and any future owner of the vacant parcel upon which the water tank and deck reside would be prohibited from using it. Following the California case, the phrase could be interpreted to mean that Debolt's right and authority to use the water tank and deck is unrestricted; Debolt's right is not hindered in any way (say by some prior recording of an easement involving only the use of the deck).

Because the Easement Agreement is reasonably subject to conflicting interpretations, the Court finds that it is ambiguous. Because the Easement Agreement

is ambiguous, the intention of the parties, as reflected by the circumstances that existed at the time the Easement Agreement was created, must be considered in construing its meaning. Because the Easement Agreement is ambiguous and the intention of the parties is relevant, Gangi's Motion to Strike must be denied. Therefore, the Court will now consider extrinsic evidence of the circumstances and intentions of the original parties to the Easement Agreement. The consideration of extrinsic evidence at this summary judgment juncture is not for the purpose of making a final decision on the case, but rather is for the purpose of determining if there is conflicting evidence concerning the parties' intent, which needs to be tested in the crucible of a trial.

On Page 2, Line 70 of the Debolt Agreement, Addendum No. 1 is listed after the following language: "[t]his Agreement is made subject to the following special terms, considerations and/or contingencies which must be satisfied prior to closing." Debolt Decl., Ex. C. Addendum No. 1 to the Debolt Agreement states that the "[s]ale shall include easements on property in neighboring lot [...]" and lists, "[t]he sole and exclusive use and enjoyment of deck above the water supply and underground holding tank." *Id.* However, while the Debolt Agreement was signed by Sellers, Addendum No. 1 was not. *See id.* Therefore, in considering extrinsic evidence of the circumstances and intentions of the original parties to the Easement Agreement, the Court finds that there is evidence that the Easement Agreement was intended to be exclusive. Because the Sellers' signatures are absent from the only document providing the "sole and exclusive use" of the water tank and deck, the evidentiary value of that piece of evidence diminishes, but that evidence still provides some evidence which may establish that the Easement Agreement was intended to be exclusive.

Additionally, on Page 2, Line 66 of the Vacant Land Purchase and Sale Agreement (Gangi Agreement), an additional term or condition listed by Gangi

requested the "Seller to obtain approval for purchaser to use observation deck located on the property." *Id.* at Ex. D. The Court notes that only the observation deck is mentioned in the Gangi Agreement; the underground water tank is not mentioned at all. In the first counter offer made by Sellers, Line 31 provided that "line 66 regarding observation deck is removed." *Id.* That same statement was included in the second counter offer made by Sellers. *Id.* The second counter offer also contains Gangi's signature, indicating that she accepted the removal of Line 66 from the Gangi Agreement and thus accepted that she did not have permission to use the observation deck. *See id.*

In summary, because the Easement Agreement was found to be ambiguous, the Court considered extrinsic evidence to help determine the intent of the parties. Because there exists evidence indicating that the Easement Agreement could be exclusive as argued by Debolt, and not exclusive as argued by Gangi, summary judgment in favor of Gangi is not appropriate at this time. Therefore, because Gangi has not met her burden of demonstrating the absence of a genuine issue of material fact, Gangi's Motion for Summary Judgment must be denied.

IV. CONCLUSION AND ORDER

For the reasons stated above, the Easement Agreement is ambiguous as to whether an exclusive easement was created. Because the Easement Agreement is found to be ambiguous in that aspect, the Court has considered extrinsic evidence to determine if there is conflicting evidence on the parties' intent to create an exclusive easement. The Court finds there is conflicting evidence on the issue of the parties' intent. For these reasons, Gangi's Motion for Summary Judgment is denied.

IT IS HEREBY ORDERED Gangi's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED a scheduling conference will be held on July 30,

2019, at 2:00 p.m. to determine a trial date.

Dated this 27th day of June, 2019.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of June, 2019 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Arthur M. Bistline
arthur@bistlinelaw.com ✓

Peter J. Smith IV
peter@smithmalek.com ✓

By _____
Jeanne Clausen, Secretary