

STATE OF IDAHO )  
County of KOOTENAI )<sup>SS</sup>

FILED 11/16/2022

AT 4:55 O'Clock P. 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**

**COPPER BASIN CONSTRUCTION, INC.,** )  
 )  
 *Plaintiff/Counterdefendant,* )  
 vs. )  
 )  
 **BEYOND GREEN, INC.,** )  
 )  
 *Defendant/Counterclaimant.* )  
 \_\_\_\_\_ )

Case No. **CV28-21-4981**

**MEMORANDUM DECISION AND  
ORDER DENYING DEFENDANT'S  
MOTION FOR RECONSIDERATION  
AND PLAINTIFF'S MOTION TO  
STRIKE**

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This matter is before the Court on defendant Beyond Green, Inc.'s (Beyond Green) Motion for Reconsideration filed on October 24, 2022. Beyond Green seeks "pursuant to Rule 11.2(b)(1), I.R.C.P., hereby moves this Court to reconsider its denial of the summary judgment motion filed by Beyond Green." Mot. for Recons. 1. Additionally before the Court is the plaintiff Copper Basin Construction, Inc.'s (Copper Basin) Motion to Strike Jeff Bornholdt and Chris Kronbergs' Declaration in Support of the Motion for Reconsideration.

On September 7, 2022, this Court filed its Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment. It is entirely unexplained by Beyond Green why it waited 47 days after this Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, to file its Motion for Reconsider, given the fact that this case is scheduled for a five-day jury trial to begin on December 12, 2022, only 28 days after oral argument was held on Beyond Green's

Motion to Reconsider, said oral argument occurred on November 15, 2022. Perhaps Beyond Green realized it was time barred (relative to the trial date and the deadlines set forth in this Court's scheduling order filed December 2, 2021) to bring a second motion for summary judgment, so it's only remaining hope was to try to call what could have been a second motion for summary judgment, a motion to reconsider this Court's ruling on the first (and only) motion for summary judgment.

The following summary of the sequence of facts leading up to this litigation, and the pleadings which frame this litigation, was set forth in this Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment:

Both Copper Basin and Beyond Green are Idaho corporations. Ver. Compl. ¶ 1-2; Ans. and Counterclaim (Ans.) ¶ 3-4. Beyond Green owns approximately forty-four acres of real property in Post Falls, Idaho, for which it entered into a Purchase Agreement and Escrow Instructions (PSA) with Copper Basin on February 5, 2021. Ver. Compl. ¶¶ 4-5; Ans. ¶¶ 6-7. On February 5, 2021, Copper Basin deposited \$25,000 into escrow, and on May 4, 2021, Copper Basin deposited an additional \$75,000 for due diligence. Ver. Compl. ¶ 6; Ans. ¶ 8. The PSA contains a provision indicating that construction of Cecil Road may be a condition precedent to closing on the property pursuant to the PSA. Ver. Compl. ¶ 7; Ans. ¶ 9. On July 8, 2021, "Copper Basin learned that Beyond Green had entered into an agreement to sell adjacent property to Harlan Douglass Properties, LLC . . . Beyond Green [allegedly] requested that Copper Basin agree to modify the PSA to require that Copper Basin take responsibility for the construction of Cecil Road." Ver. Compl. ¶ 9; Ans. ¶ 11. On July 26, 2021, at 2:19 p.m., Copper Basin sent an email to Beyond Green that Copper Basin intended to proceed with the purchase of the Property pursuant to the terms set forth in the PSA signed on February 5, 2021. Ver. Compl. ¶ 10; Ans. ¶ 11. A few hours later, on July 26, 2021, at 5:05 p.m., Beyond Green emailed Copper Basin, informing it that they were not moving forward with closing on the property. Ver. Compl. ¶ 10 [this is the second ¶ 10]; Ans. ¶ 12.

The next day, on July 27, 2021, Copper Basin filed a Complaint against Beyond Green for breach of contract. Copper Basin seeks an order of specific performance of the terms of the PSA against Beyond Green, as well as direct and consequential damages "estimated to exceed the sum of TEN MILLION DOLLARS (\$10,000,000,00)", attorneys' fees, and punitive damages pursuant to Idaho Code § 6-1604. Ver. Compl. 6, ¶¶ 1, 2.

On August 31, 2021, Beyond Green filed its Answer and Counterclaim. Beyond Green's Counterclaim is for slander of title and abuse of process for filing a notice of lis pendens in the present action that contained property not subject to the PSA. Ans. 4-6, ¶¶ 27-36. Beyond Green demanded a jury trial. Ans. 6.

On September 23, 2021, Copper Basin filed its Answer to (Beyond Green's) Counterclaim.

Mem. Decision and Order Den. Def.'s Mot. for Summ. J., 1-2.

The fundamental problem with Beyond Green's Motion to Reconsider is that it raises entirely new issues as compared to the summary judgment motion. Doing so is not allowed under the Idaho Rules of Civil Procedure.

The focus of Beyond Green's Motion for Summary Judgment was set forth by this Court in its Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment:

On July 16, 2022, Copper Basin filed its Motion for Summary Judgment, and Memorandum in Support of Defendant's Motion for Summary Judgment and declarations of Chad Johnson, Chris Kronberg, and Gerald Dicker in support of its motion.

On August 23, 2022, Copper Basin filed its Objection and Memorandum in Opposition to Defendant's Motion for Summary Judgment and declarations of Greg Gervais, Paul W. Daugharty, and Steve White in support thereof.

On August 30, 2022, Beyond Green filed its Reply Memorandum in Support of Summary Judgment Motion.

**The primary issues on motion for summary judgment is whether the PSA is enforceable against Beyond Green and whether the initial Notice of Lis Pendens filed by Copper Basin included property that was not subject to the PSA.**

Mem. Decision and Order Den. Def.'s Mot. for Summ. J., 5-6. (bold added). In its "Analysis" portion of that memorandum decision, this Court reiterated:

**Beyond Green argues first that the PSA is unenforceable because it "leaves critical terms to be negotiated in the future" and is an "agreement to agree".** Mem. in Supp. of Mot. for Summ. J. 5, 7. Specifically, it argues:

By its own plain language, the Agreement at issue in this case has necessary terms that are left for future negotiation and

the Agreement is therefore unenforceable. The necessary terms include an agreement on the construction of Cecil Road:

Provided, further, the parties hereto must agree upon the following: (1) party or entity responsible for construction of Cecil Road; (2) allocation of cost and expense; and (3) Cecil Road development plan and schedule.

The Agreement specifically states that construction of Cecil Road is a condition precedent to the closing of the sale. The Agreement leaves for future negotiations who will be responsible for construction of Cecil Road, who will pay for the construction of Cecil Road, and the creation of the development plan and schedule for construction of Cecil Road. Obviously, because these critical terms are left for future negotiations, there is no meeting of the minds as to those terms and the Agreement is unenforceable.

*Id.* at 6-7 (internal citations omitted). It further argues:

[*Spokane Structures v. Equitable Investments, LLC*, 148 Idaho 604 (2005); *Maroun v. Wyreless Systems, Inc.*, 141 Idaho at 614; and *Dale's Service Co., Inc. v. Jones*, 96 Idaho 662 (1975)], as well as the clear language of the Agreement itself, make obvious that the Agreement left essential terms to be negotiated in the future, creating an unenforceable agreement to agree. No meeting of the minds or mutuality of agreement existed as to the "(1) party or entity responsible for Cecil Road; (2) allocation of cost and expense; and (3) Cecil Road development plan and schedule." No doubt exists that these are material terms, as the Agreement itself states that they are conditions precedent to Copper Basin closing on the sale. As a matter of law, the Agreement is unenforceable, and the Complaint should be dismissed.

*Id.* at 9.

Mem. Decision and Order Den. Def.'s Mot. for Summ. J., 8-9. (bold added).

In its Motion for Reconsideration, Beyond Green urges this Court to reconsider its denial of Beyond Green's motion for summary judgment, "for the reason that the conditions precedent or contingencies set forth in the "Purchase Agreement and Escrow Instructions" ("PSA") are not enforceable against BGI, Copper Basin Construction, Inc. has not alleged an enforceable agreement requiring BGI to construct or pay for Cecil Road, and Copper Basin Construction, Inc. **cannot alter the PSA by parol evidence to create an agreement requiring BGI to construct or pay for Cecil**

**Road.”** Mot. for Recons. 1-2. (bold added). This is where Beyond Green first injects an issue which was never raised in its motion for summary judgment. At no point in this Court’s Memorandum Decision and Order Denying Defendant’s Motion for Summary Judgment did this Court discuss a separate verbal agreement to construct or pay for Cecil Road.

In its Reply Memorandum in Support of Motion for Reconsideration, Beyond Green then doubles down on this new argument of a new contract requiring Beyond Green to Build or pay for Cecil Road. Beyond Green now argues for the first time:

Copper Basin’s breach of contract claim rests exclusively on the PSA. Copper Basin is now attempting to revise its contract claim against Beyond Green by adding an alleged verbal agreement that required Beyond Green to build Cecil Road before Copper Basin would go to closing. No such verbal agreement exists, and even if it did, it was integrated into the PSA and is no longer enforceable. Because the PSA expressly deals with Cecil Road, any alleged verbal agreement regarding Cecil Road is inadmissible parol evidence. Further, any amendment to the PSA had to be in writing, so a verbal agreement, if it existed, could not have amended the PSA. Moreover, the rules of civil procedure do not permit Copper Basin to add a new contract claim in a response to a motion for reconsideration or in response to a summary judgment motion.

Reply. Mem. In Supp. of Mot. For Recons. and in Opp’n. to Pl.’s Mot.s to Amend and Strike, 2. As set forth below, the Court finds Beyond Green’s Reply Memorandum was untimely filed. While the Court has now read this reply memorandum, the Court will not address any of the arguments contained therein because it was untimely filed. The Court quotes from that reply brief immediately above only to show how far afield Beyond Green has strayed from its original motion for summary judgment.

It is alleged by Copper Basin in its Verified Complaint, that, “The PSA provided that the construction of Cecil Road was a condition precedent to Copper Basin’s obligations under the PSA. Beyond Green was responsible for the construction of Cecil Road.” Verified Comp. 2, ¶ 7. However, this Court finds it is beyond dispute, that any

dispute of fact as that whether there was any side agreement by Beyond Green to build Cecil Road, was not a part of Beyond Green's motion for summary judgment.

As mentioned above, Beyond Green filed its motion for reconsideration, memorandum in support and Declarations of Jeff Bornholdt and Chris Kronberg on October 24, 2022. Copper Basin filed its Objection and Memorandum in Opposition to Defendant's Motion for Reconsideration on November 8, 2022. As discussed, Beyond Green untimely filed its Reply Memorandum in Support of Motion for Reconsideration and in Opposition to Plaintiff's Motions to Amend and Strike on November 14, 2022. Oral argument on Beyond Green's motion for reconsideration was held the next day, on November 15, 2022. At the conclusion of that hearing, this Court denied Beyond Green's motion for reconsideration and Copper Basin's Motion to Strike for purposes of the Motion for Reconsideration. This written opinion clarifies this Court's reasoning for such decision.

## **II. STANDARD OF REVIEW**

Beyond Green makes its motion for reconsideration "pursuant to Rule 11.2(b)(1)." Mot. for Recons. 1. Idaho Rule of Civil Procedure 11.2(b)(1) is a motion to reconsider an interlocutory order. This is the appropriate rule. As noted by Beyond Green, "A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order." Mem. in Supp. of Mot. for Recons. 8, citing *Johnson v. North Idaho College*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012). However, those new facts, or the new case law, or new facts and new case law would have to then be applied to the previous order of the Court which is sought to be reconsidered. It is entirely

disingenuous of Beyond Green to argue that it has new facts and thus should be allowed to bring an entirely different summary judgment motion under the guise of a motion for reconsideration.

While “a district court has no discretion to decide whether to entertain a motion for reconsideration”, (*Fisk v. McDonald*, 167 Idaho 870, 893, 477 P.3d 924, 947 (2021)), the Idaho Supreme Court did not state that a district court cannot deny a motion to reconsider which is not in reality a motion to reconsider. This Court “entertains” Beyond Green’s motion to reconsider, and denies such as improperly brought.

### III. ANALYSIS

#### **A. Beyond Green’s Reply Memorandum for Reconsideration and in Opposition to Plaintiff’s Motions to Amend and Strike, was Untimely Filed and While Beyond Green’s Reply Memorandum has now Been Read by This Court, it will not be Considered by This Court in Beyond Green’s Motion for Reconsideration.**

At oral argument, counsel for Beyond Green stated that Beyond Green’s Reply Memorandum for Reconsideration and in Opposition to Plaintiff’s Motions to Amend and Strike, was timely filed under I.R.C.P. 7(3)(C). That rule requires “The moving party may file a reply brief or memorandum, which must be filed with the court and served so as to be received by the parties at least 2 days prior to the hearing.” However, under I.R.C.P. 2.2(a)(1), you “exclude the day of the event that triggers the period” and “include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” In this case, oral argument on Beyond Green’s motion for reconsideration was held on Tuesday, November 15, 2022. Counsel for Beyond Green represented to the Court at oral argument on November 15, 2022, that he had filed

Beyond Green's Reply Memorandum for Reconsideration and in Opposition to Plaintiff's Motions to Amend and Strike, the prior morning, on Monday, November 14, 2022. Such argument ignores a plain reading of the rules. In this case, under I.R.C.P. 7(3)(C), one would exclude the day of the event that triggers the period, that event is the oral argument. One would include the last day of the period, which would be the last day one could file the reply brief, which would have been Sunday, November 13, 2022. Because Beyond Green's reply memorandum had to have been filed no later than Sunday, November 13, 2022, as I.R.C.P. 2.2 makes clear, neither Sunday, November 13, 2022, nor Saturday, November 12, 2022, count, so Beyond Green's reply memorandum had to have been filed on Friday, November 12, 2022, and it was not. It is untimely. At oral argument, counsel for Beyond Green did not argue that he had "good cause" for an "exception to the time limits" which can be granted by the Court under I.R.C.P. 7(H). Counsel for Copper Basin was candid with the Court that he had read Beyond Green's reply memorandum, but opposing counsel's having done so does not change the fact that Beyond Green's reply memorandum was not timely filed. It also does not change the fact that no good cause exception was sought by counsel for Beyond Green.

**B. Beyond Green's Motion for Reconsideration Improperly Raises Issues Not Previously Raised by Beyond Green in its Motion for Summary Judgment.**

As set forth above at the outset of this memorandum decision on reconsideration, as set forth by Beyond Green, "The primary issues on motion for summary judgment is **whether the PSA is enforceable against Beyond Green and whether the initial Notice of Lis Pendens filed by Copper Basin included property that was not subject to the PSA.**" Mem. Decision and Order Den. Def.'s Mot. for

Summ. J., 6. (bold added). A plain reading of this Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, shows that **these were the only two issues** decided by this Court in denying Beyond Green's motion for summary judgment. Nothing could be clearer.

In its Motion for Reconsideration, Beyond Green argues this Court to reconsider its denial of Beyond Green's motion for summary judgment, "for the reason that the conditions precedent or contingencies set forth in the "Purchase Agreement and Escrow Instructions" ("PSA") are not enforceable against BGI, Copper Basin Construction, Inc. has not alleged an enforceable agreement requiring BGI to construct or pay for Cecil Road, and Copper Basin Construction, Inc. **cannot alter the PSA by parol evidence to create an agreement requiring BGI to construct or pay for Cecil Road.**" Mot. for Recons. 1-2. (bold added). Beyond Green has now introduced a completely new **issue** (not new evidence or new law) which was never raised in Beyond Green's motion for summary judgment. At no point in this Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment did this Court discuss a separate verbal agreement to construct or pay for Cecil Road. Accordingly, this is an improper motion to reconsider under I.R.C.P. 11.2(b)(1). Stated quite simply, Beyond Green is asking this Court to "reconsider" something which it has not previously, "considered."

**C. This Court Finds at this Point, Copper Basin at Present has not Placed any "Motion" to Amend Before this Court.**

In its briefing opposing the motion to reconsider, Copper Basin claims, "Copper Basin should be allowed to amend the claims to assert a breach of contract claim resulting from Beyond Green's refusal to construct Cecil Road." Obj. and Mem. in Opp'n to Def.'s Mot for Recons. 8. Copper Basin in its briefing then goes on to cite to

I.R.C.P. 15, which allows amendment of claims. This Court cannot decipher what Copper Basin means by asking this Court to allow Copper Basin to “amend the claims.” The Court notes, as mentioned above, that Copper Basin has alleged, “Beyond Green was responsible for the construction of Cecil Road.” Verified Comp. 2, ¶ 7. Thus, Copper Basin has made a “claim”, and nothing changes that fact. If Copper Basin feels that it needs to ask this Court to “allow” Copper Basin to do something, then it needs to follow the Idaho Rules of Civil Procedure and make a “motion” for a “court order” under I.R.C.P. 7(b)(1). Copper Basin has arguably done this as on November 8, 2022, it filed its combined Motion to Strike and Motion to Amend Pleadings. What Copper Basin had not done as of the November 15, 2022, oral argument on Beyond Green’s motion for reconsideration, is notice this motion up for a hearing. While Copper Basin in its briefing on that motion for reconsideration, ruminates that it “should be allowed to amend the claims” (Obj. and Mem. in Opp’n to Def.’s Mot for Recons. 8-9), it has not brought the issue of a motion to amend before this court for a hearing.

#### **IV. CONCLUSION AND ORDER.**

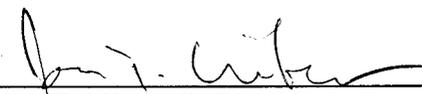
For the foregoing reasons, defendant Beyond Green’s Motion for Reconsideration must be denied.

For the foregoing reasons, plaintiff Copper Basin’s Motion to Strike is denied.

IT IS HEREBY ORDERED defendant Beyond Green’s Motion for Reconsideration is **DENIED**.

IT IS HEREBY ORDERED plaintiff Copper Basin’s Motion to Strike is **DENIED**.

Entered this 16<sup>th</sup> day of November, 2022.

  
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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the 16<sup>th</sup> day of November, 2022, 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>email</u>              | <u>Lawyer</u>  | <u>email</u>                   |
|-----------------------|---------------------------|----------------|--------------------------------|
| Paul Daugharty        | paul@pdaughartylaw.com ✓  | E. Don Copple  | edcopples@davisoncopples.com ✓ |
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Jeanne Clausen, Deputy Clerk