STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

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

ROBERT JOHN MARS, and NANCY LEE MARS, husband and wife, *Plaintiffs*, vs. **BARBARA A. ALLEN,** *Defendant*.	Case No. **CV 2015 4364** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Barbara Allen's Motion for Summary Judgment.

This case arises out of a dispute over a purchase and sale agreement of real property located Kootenai County, State of Idaho, and described in Exhibit A to the Complaint (hereinafter "the subject property"). Complaint, p. 1 ¶ 1.2, Exh. A. The defendant, Barbara Allen, is the owner of the subject property. *Id.* The neighbors to the southwest of the subject property, Kirk and Shannon Dunkel, built a retaining wall and detached garage/shop, both of which significantly encroach onto the subject property. Declaration of Jeff Doty, pp. 2, 3, 4, ¶¶ 4, 5, 7, 12.

On April 13, 2015, Ms. Allen and the plaintiffs, Robert and Nancy Mars, executed a Purchase and Sale Agreement (PSA), whereby Ms. Allen agreed to sell the subject property to the Mars, subject to the conditions set forth within the PSA. *Id.*, p. 2 ¶ 3.1, Exh. B. The PSA was drafted by the Mars and their attorney. Declaration of Jeff Doty,

p. 3, ¶10.

The PSA provides in relevant part:

7. **Other Contingencies of Sale.** The sale of the Property is contingent upon the following conditions, which must be satisfied prior to closing. Failure of a contingent condition shall be cause for contract rescission.
   - 7.1. ~~**Financing.** Buyer shall be entitled to rescission if they are unable to obtain financing for the purchase of the Property.~~
   - 7.2. **Confirmation of Boundary Lines.** Buyer's confirmation of the boundary lines are a contingency of the sale and Buyer, in Buyer's sole discretion, may rescind this agreement due to concerns about the boundary lines and/or possible encroachments.

8. **Condition of Title.**
   - 8.1. **Warranty Deed.** Title shall be conveyed by warranty deed.
   - 8.2. **Marketable and Insurable Title.** Title shall be marketable and insurable.

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9. **Closing Matters.**

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- 9.1. **Date to Close.** Closing shall occur on or before Friday, May 8, 2015.

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- 9.7. **Duty of Close.** The parties each have a respective duty to the other to effect closing on or before the above stated day. Performance of this duty shall constitute depositing with the closing agency, by 12 o'clock noon on the day of closing, all funds and legal instruments necessary for the closing agent to effect closing.

- 9.8 **Failure to Close.** A party's failure to perform pursuant to paragraph 9.7 shall constitute default. If both parties fail to perform pursuant to paragraph 9.7, this contract is thereby rescinded, effective 5 p.m. on the day of closing, and the parties are thereafter mutually discharged of their duties to one another. In the event of rescission, Seller shall return the earnest money deposit in full.

Declaration of Jeff Doty, Exh. B, pp. 2, 3, ¶¶ 7.1-8.2, 9.1, 9.7-9.8. At the time the Mars executed the PSA they were aware of the potential encroachment, which was later confirmed after the PSA was executed, on or about April 24, 2015. Declaration of Jeff Doty, pp. 2, 4, ¶¶ 4, 12.

On May 8, 2015, the day scheduled for closing, the parties exchanged a series

of emails. *See* Declaration of Jeff Doty, pp. 5-8, ¶¶ 17-18; Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, pp. 2-5, ¶¶ 6, 8, 17, 23, 29. Ms. Allen was represented by her real estate agent, Jeff Doty, during this exchange and throughout the events of May 8, 2015. *See* Declaration of Jeff Doty. At 6:49 a.m. Pacific Standard Time, Mr. Mars emailed Mr. Doty to see if Ms. Allen would agree to an extension of the closing date. Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exh. C; *see* Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, p. 2 ¶ 6. Ms. Allen responded to Mr. Mars' request at 9:55 a.m., through Mr. Doty, and informed Mr. Mars that she would not agree to an extension, as she was prepared to close that day. Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exh. C. She also informed him that her appointment with the title company for closing would take place at 11:00 a.m. that morning. *Id.* At 9:56 a.m., Mr. Mars responded by email as follows: "Please let Barbara know that closing at 11 AM would be premature. We have until the end of the business day. Thanks!" *Id.* To that email, Mr. Doty responded: "Agreed. Barbara has an appointment at 11:00 for her side of closing." *Id.* At 2:12 p.m., Mr. Doty sent an email to Beverly Gagner. Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exh. H. Several other parties were copied on this email, which provides:

> To all concerned parties:
>
> Prior to Barbara Allen giving North Idaho Title the authorization to close, Barbara Allen is requesting Bob and Nancy Mars sign two documents.
>
> 1) Addendum #2 – Releasing Barbara Allen and Windermere CDA Realty from all liability regarding the encroachment.
>
> 2) The written agreement between Bob and Nancy Mars and Kirk and Shannon Dunckel agreeing to the resolution of said encroachment.

> *This document will be drafted and executed through the respective parties [sic] attorneys.
>
> Once these documents have been signed by all parties, Barbara Allen will give North Idaho Title authorization to close.

Id. On May 8, 2015, Addendum 2 was executed by both parties. Declaration of Jeff Doty, Exh. M.

It provides in pertinent part:

> Addendum 2 provides:
>
> The undersigned parties hereby agree as follows:
> 1) Buyer is aware of the encroachment onto said property from the adjacent property 5841 W. Clementson Rd.
>
> 2) Buyer agrees to release Barbara. [sic] A. Allen and Windermere CDA Realty from any and all liability pertaining to the encroachment.
>
> 3) All other terms and conditions remain the same.

Id.

Beverly Gagner, the Escrow Officer at North Idaho Title assigned to the sale of the subject property "received both the wire transfer and the signed closing documents from the Mars before 5:00 p.m. on May 8, 2015." Affidavit of Beverly Gagner, p. 2, ¶ 15. Ms. Gagner further attests that "Ms. Allen was scheduled to come in [to North Idaho Title] at 11:00 a.m. to sign the closing documents, but moved her appointment to 1:00 p.m. She signed the closing documents sometime between 1:10 and 2:00 p.m. on May 8, 2015. *Id.*, p. 2, ¶¶ 12, 13. Following the execution of Addendum 2, Mr. Mars instructed Ms. Gagner to withdraw Addendum 2 from the closing package. *Id.*, p. 3. ¶ 18. Mr. Mars then authorized Ms. Gagner to close the transaction on the subject property. *Id.*, p. 3, ¶ 19. Mr. Doty also contacted Ms. Gagner and informed her, "Ms. Allen was not authorizing [her] to close the traction until [she] received a signed Addendum 2 and a signed Settlement Statement from the Mars." *Id.*, p. 3, ¶ 20.

Ms. Gagner did not receive authorization from Ms. Allen to close the transaction on the subject property. *Id.*, p. 3, ¶ 21.

On June 19, 2015, the Mars initiated the instant action, seeking a judgment requiring Ms. Allen to specifically perform under the terms of the PSA and for an award of damages to be proven at trial. Complaint, p. 3, ¶¶ 1, 2.

On September 28, 2015, Ms. Allen moved for summary judgment. Her motion is supported by her "Memorandum in Support of Motion for Summary Judgment", the "Declaration of Barbara Allen", and the "Declaration of Jeff Doty". On October 14, 2015, the Mars filed "Plaintiffs' Response to Defendant's Motion for Summary Judgment", which is supported by the "Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment" and the "Affidavit of Beverly Gagner". On October 19, 2015, Ms. Allen filed "Defendant's Reply to Plaintiffs' Opposition to Summary Judgment" and the "Second Declaration of Jeff Doty".

On October 22, 2015, the Mars filed "Plaintiffs' Motion to Strike Second Declaration of Jeff Doty". On October 23, 2015, Ms. Allen filed "Defendant's Reply to Plaintiffs' Motion to Strike Second Declaration of Jeff Doty".

Oral argument was held on October 26, 2015. At that hearing the Court, pursuant to Idaho Rule of Civil Procedure 56(c) and *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 981 P.2d 236 (1999), granted Plaintiffs' Motion to Strike the Second Affidavit of Jeff Doty, finding Ms. Allen failed to show good cause why the Court should consider the untimely declaration. As such, the Court will not consider the Second Declaration of Jeff Doty in making its ruling on the Motion for Summary Judgment. For the reasons set forth below, the Court denies the Motion for Summary Judgment in its entirety.

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II. STANDARD OF REVIEW.

Summary judgment is proper "[i]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* I.R.C.P. 56(c). The moving party carries the burden of proving the absence of genuine issues of material fact. *Rouse v. Household Finance 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). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). Any facts in dispute are liberally construed in favor of the nonmoving party, with any inference reasonably drawn from the record done so in favor of the nonmoving party. *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007) (citing *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006)).

The establishment of an absence of a genuine issue of material fact by the moving party shifts the burden to the nonmoving party to provide specific facts showing there is a genuine issue for trial. *Id.* at 228, 159 P.3d at 864 (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (citing *Atwood v. Smith*, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). The non-moving party may use circumstantial evidence to create a genuine issue of material fact. *Edged In Stone, Inc. v. Northwest Power Systems, LLC*, 156 Idaho 176, 321 P.3d

726, 730 (2014) (citing *ParkWest Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)). To create a genuine issue, "[h]owever, the [nonmoving] party may not rest on a mere scintilla of evidence." *ParkWest Homes, LLC. v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013) (citing *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991)). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If reasonable people might reach conflicting inferences about the evidence, the motion for summary judgment must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979) (citing *Otts v. Brough*, 90 Idaho 124, 409 P.2d 95 (1965)).

III. TIMELINESS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

As a preliminary matter, plaintiffs object to defendant's motion for summary judgment as it was not made in compliance with the Court's pretrial order. Plaintiff's Response to Defendant's Motion for Summary Judgment, pp. 1, 3-4. In making the objection, plaintiff articulates no prejudice due to such timing. This Court finds there is no prejudice in this case.

On September 4, 2015, this Court filed its "Scheduling Order, Notice of Trial Setting and Initial Pretrial Order", following this Court's scheduling conference hearing held September 3, 2015. At that hearing, the parties agreed the matter should be tried relatively soon, and the parties agreed to the January 11, 2016, trial setting. That order requires motions for summary judgment be filed so as to be heard no later than 91 days (13 weeks) before trial. Thus, to be timely, any party would have had to file a motion for summary judgment on or before September 14, 2015. This would have been only ten

days after the scheduling conference. Defendant's motion for summary judgment was filed on September 28, 2015, two weeks beyond the deadline set in the court's pretrial order.

The Court specifically finds that failure to comply with that component of the pretrial order is not grounds for hearing and deciding this motion for summary judgment, or any motion for summary judgment. The requirement that motions for summary judgment be heard no later than 91 days before trial is only in place to protect the Court's calendar and the Court's ability to render a decision in a timely matter, relative to the trial date. If the Court hears a motion for summary judgment less than 91 days before trial, and the motion is exceedingly complicated requiring the Court to take the motion under advisement, then danger is that the Court will not issue a decision until just prior to the beginning of the court or jury trial. If the decision were dispositive, then the parties would have incurred great financial expense spending much time meeting the deadlines that are imposed the two weeks prior to trial.

Hearing this motion which was filed fourteen days late (yet still timely under I.R.C.P. 56) will not result in the Court rendering a decision on the eve of trial, given the fact that oral argument on the motion was held on October 26, 2015, eleven weeks before trial is scheduled to begin.

This Court can recall no occasion where such an objection has been sustained. If the case, or an issue in the case, can and should be resolved by summary judgment, that motion should be heard if at all possible. Over the past fourteen years there have been many counsel who either overlook the 91 day requirement, or, when they ask for a hearing time, are surprised that there are no hearing times for a month or more from the time requested, putting them out of compliance with that 91-day requirement. This Court has always allowed leeway from that requirement, if possible, again, because the

primary purpose is to protect the Court's calendar vis-à-vis the date of trial.

IV. ANALYSIS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. The Parties Agreed by Mutual Assent, as Evidenced Through Their Conduct, that the Duty to Close Would be Extended From the Originally Agreed Upon Time of Noon on May 8, 2015, to the Close of the Business Day on May 8, 2015,

Ms. Allen alleges both parties defaulted under Paragraph 9.7 of the PSA by failing to perform their duties by noon on May 8, 2015. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 12. She claims "under Paragraph 9.7 of the PSA, the parties had a duty to deposit all documents and funds necessary to close the transaction by 12 noon on May 8, 2015. There is no dispute that this did not happen." *Id.* Since both parties failed to effectuate closing by the noon deadline, under Paragraph 9.8 of the PSA, Ms. Allen contends the contract was rescinded at 5:00 p.m. on May 8, 2015, "and the parties [were] thereafter mutually discharged of their duties to one another." *Id.*, pp. 12-13 (quoting Declaration of Jeff Doty, Exh. B, p. 3, ¶ 9.8). As such, Ms. Allen maintains summary judgment should be granted in her favor because her obligation to sell the subject property to the Mars was discharged at 5:00 p.m. on May 8, 2015. *Id.*, pp. 13-14.

In response, the Mars allege there is a question of fact of whether the parties, through their actions and communications, waived or modified the noon deadline set required under the PSA. Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 5. The Mars maintain that through emails exchanged between Mr. Mars and Mr. Doty (as Ms. Allen's agent) the parties agreed to extend the noon deadline to the close of business day on May 8, 2015. *Id.*, pp. 5-6. Moreover, they claim this agreement is supported by the actions of both parties following the email exchange. *Id.*, p. 6. Specifically, the Mars contend Ms. Allen moved her closing appointment from

11:00 a.m. on May 8, 2015, to 1:00 p.m. on May 8, 2015. *Id.* Ms. Allen also requested the Mars sign Addendum 2 at 2:12 p.m. on May 8, 2015, via an email from Mr. Doty to Mr. Mars, where Mr. Doty wrote, "[o]nce these documents have been signed by all parties, Barbara Allen will give North Idaho Title authorization to close." *Id.* (quoting Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exhibit H). Finally, at 4:32 p.m., Mr. Doty emailed Mr. Mars informing Mr. Mars that Ms. Allen was requesting a 10 day extension of the closing to obtain legal advice. *Id.* Mr. Doty further informed Mr. Mars that without such an extension, Ms. Allen would not close and requested a response "ASAP since we are down to the wire for recording." *Id.* (quoting Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exhibit K). The Mars claims that viewing this evidence in the light most favorable to the Mars, there is a material issue of fact whether the closing deadline was extended to 5:00 p.m. *Id.*, p. 7.

The Court finds there is no genuine issue of material fact that the parties extended the deadline for closing to 5:00 p.m. on May 8, 2015. "[A] contract may be modified by mutual assent." *Pocatello Hosp., LLC v. Quail Ridge Medical Investor, LLC*, 156 Idaho 709, 717, 330 P.3d 1067, 1075 (2014) (citing *Watkins Co. v. Stearns*, 152 Idaho 531, 536, 272 P.3d 503, 508 (2012)). "The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of a change proposed by the other." *Id.* (citing *Ore-Ida Potato Products, Inc. v. Larsen*, 83 Idaho 290, 296, 362 P.2d 384, 387 (1961)).

While stated above, for ease of reference, paragraphs 9.7 and 9.8 of the PSA provide:

9.7. **Duty of Close.** The parties each have a respective duty to the other to effect closing on or before the above stated day. Performance of this duty shall constitute depositing with the closing agency, by 12 o'clock noon on the day of closing, all funds and legal instruments necessary for the closing agent to effect closing.

9.8 **Failure to Close.** A party's failure to perform pursuant to paragraph 9.7 shall constitute default. If both parties fail to perform pursuant to paragraph 9.7, this contract is thereby rescinded, effective 5 p.m. on the day of closing, and the parties are thereafter mutually discharged of their duties to one another.

Declaration of Jeff Doty, Exh. C, p. 3, ¶¶ 9.7-9.8. However, through the mutual assent and conduct of the parties, the undisputed evidence before this Court demonstrates the deadline was extended to close of the business day on May 8, 2015. On May 8, 2015, the scheduled date for closing, a series of emails were exchanged between Mr. Mars and Mr. Doty, an agent for Ms. Allen. *See* Declaration of Jeff Doty, pp. 5-8, ¶¶ 17-18; Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, pp. 2-5, ¶¶ 6, 8, 17, 23, 29. On May 8, 2015, at 6:49 a.m. Pacific Standard Time, Mr. Mars emailed Mr. Doty to see if Ms. Allen would agree to an extension of the closing date. Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exh. C; *see* Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, p. 2 ¶ 6. Ms. Allen responded to Mr. Mars' request at 9:55 a.m., through Mr. Doty, and informed Mr. Mars that she would not agree to an extension, as she was prepared to close that day, and informed him that her appointment with the title company for closing would take place at 11:00 a.m. that morning. Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exh. C. At 9:56 a.m., Mr. Mars responded by email as follows: "Please let Barbara know that closing at 11 AM would be premature. We have until the end of the business day. Thanks!" *Id.* To that email, Mr. Doty responded: "Agreed. Barbara has an appointment at 11:00 for her side of closing." *Id.* In his Declaration,

Mr. Doty claims the statement by Mr. Mars that the parties had until the end of the business day to close "was a misrepresentation of what the PSA actually stated, which I believe Robert Mars knew at that time. However, I did not pull up the PSA or consult with my client, and just accepted Robert Mars at his word that this was in fact correct. Neither the Mars nor Barbara Allen reduced to writing an addendum to the PSA to change the deadline for closing." Declaration of Jeff Doty, p. 6, ¶ c.

From the evidence presented to the Court it appears there is no addendum about extending the time for closing from noon to the close of the business day. Ms. Allen states, "Neither the Mars nor Barbara Allen reduced to writing any addendum to the PSA to change the deadline for closing." Memorandum in Support of Motin for Summary Judgment, p. 8, ¶ c. Implicit in that statement is the argument that the contract could only have been modified by an addendum. However, Ms. Allen has not presented the Court with any law to support her position that modifications to a contract can only be created by addendum. There is a writing between the parties or agents of the parties. "An agent is a person authorized to act for or in the place of the principal." *Edwards v. Mortgage Elec. Registration Sys., Inc.*, 154 Idaho 511, 517, 300 P.3d 43, 49 (2013) (quoting *Knutsen v. Cloud,* 142 Idaho 148, 151, 124 P.3d 1024, 1027 (2005)). "Pursuant to the grant of authority by the principal, the agent is the representative of the principal and **acts for, in the place of, and instead of, the principal**." 3 *Id.* (quoting Am. Jur. 2d *Agency* § 1 (2002) (emphasis added)). The authority of an agent is express, implied or apparent. Apparent authority "is created when the *principal* 'voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing authority.'" *Bailey,* 109 Idaho at

497, 708 P.2d at 902 (citing *Clements v. Jungert,* 90 Idaho 143, 152, 408 P.2d 810, 814 (1965); *Hieb v. Minnesota Farmers Union,* 105 Idaho 694, 697, 672 P.2d 572, 575 (Ct. App.1983)) (italics in original). While it may be true that Mr. Doty did not consult with Ms. Allen before he agreed to extend the noon deadline to the close of business day, the Mars were justified in believing that Mr. Doty had the authority, acting as Ms. Allen's agent, to agree to extend the deadline, and that he was acting pursuant to his existing authority. All of Ms. Allen's communications with the Mars on May 8, 2015, went through Mr. Doty.

Moreover, Ms. Allen's own conduct following Mr. Doty's assent to the extended deadline confirmed to the Mars that Ms. Allen had agreed to extend the closing to the end of the business day. "Ms. Allen was scheduled to come in [to North Idaho Title] at 11:00 a.m. to sign the closing documents, but moved her appointment to 1:00 p.m. She signed the closing documents sometime between 1:10 and 2:00 p.m. on May 8, 2015." Affidavit of Beverly Gagner, p. 2, ¶¶ 12, 13. At 2:12 p.m., Mr. Doty sent an email to Beverly Gagner. Affidavit of Robert John Mars in Opposition to Defendant's Motion for Summary Judgment, Exh. H. Several other parties were copied on this email, which provides:

> To all concerned parties:
>
> Prior to Barbara Allen giving North Idaho Title the authorization to close, Barbara Allen is requesting Bob and Nancy Mars sign two documents.
>
> 3) Addendum #2 – Releasing Barbara Allen and Windermere CDA Realty from all liability regarding the encroachment.
>
> 4) The written agreement between Bob and Nancy Mars and Kirk and Shannon Dunckel agreeing to the resolution of said encroachment.
> *This document will be drafted and executed through the respective parties [sic] attorneys.
>
> Once these documents have been signed by all parties, Barbara Allen will give North Idaho Title authorization to close.

Id.

There is no dispute of material fact that the parties modified the noon deadline in the PSA to the close of business day. The modification is in writing and the assent to the modification is evident from the course of conduct between the parties between noon and the close of business on May 8, 2015. Most of that conduct was on the part of Ms. Allen. It was Ms. Allen who moved her appointment with the closing agent from 11:00 a.m. to 1:00 p.m. It was Ms. Allen who continued attempting to negotiate the terms of the PSA past the noon deadline with the introduction of Addendum 2. It is also clear the Mars acted in accordance with the new deadline because Ms. Gagner "received both the wire transfer and the signed closing documents from the Mars before 5:00 p.m. on May 8, 2015." Affidavit of Beverly Gagner, p. 2, ¶ 15.

Since both parties agreed to the modification of Paragraph 9.7, Paragraph 9.8 is inapplicable to this issue of the noon deadline. There is no question of fact that the parties agreed to extend the deadline for closing to the close of the business day on May 8, 2015. The Mars closed by that deadline. Affidavit of Beverly Gagner, p. 2, ¶ 15. As such, the Court denies Ms. Allen's Motion for Summary Judgment on the issue of whether the Mars are in default for their failure to perform as required by Paragraph 9.7.

B. There is no Genuine Issue of Material Fact that Mars Performed Under the Modification, and Only One Party, Ms. Allen, Could Have Failed to Perform Under the Modification of Paragraph 9.7; Thus, Rescission is Not Available.

The Court also finds that there is no genuine issue of material fact that the PSA was not rescinded under Paragraph 9.8, as the Mars performed pursuant to the modification. Both parties needed to fail to perform for the contract to be rescinded. Ms. Allen is the only party that failed to close by the time agreed upon in the modification to Paragraph 9.7. Affidavit of Beverly Gagner, p. 3, ¶ 21. There is no

genuine issue of material fact that only one party failed to perform under the modification of Paragraph 9.7. Pursuant to Paragraph 9.8, if only one party fails to perform, that party is in default and the PSA is not rescinded. Ms. Allen is the only party who was potentially in default. Whether or not that default was excusable due to the Mars removing Addendum 2 from the final closing documents will be addressed in the following section.

C. The Mars' Request to Withdraw Addendum 2 From the Closing Documents did not Constitute a Material Breach Because the Addendum was not a Valid Modification to the Purchase and Sale Agreement Due to Lack of Consideration from Ms. Allen to the Mars.

Ms. Allen claims she was not required to give valid consideration in exchange for the release contained within the Addendum. Defendant's Reply to Plaintiffs' Opposition to Summary Judgment, p. 7. Since the terms of the Addendum were for a release of liability, she asserts it could be "gratuitous, or given for inadequate consideration." *Id.* (citing *Holve v.* Draper, 95 Idaho 193, 195, 505 P.2d 1265, 1267 (1973). In the alternative, at oral argument, counsel for Ms. Allen argued Addendum 2 provided clarification to the PSA by resolving issues with conflicting terms. At oral argument, her attorney claimed Addendum 2 confirmed that she was not liable for the encroachment, confirmed the boundary contingency of sale, and addressed the ambiguous and conflicting terms. Ms. Allen's attorney claimed that the clarity itself was consideration because clarification benefited both parties.

In response, the Mars maintain they "were under no obligation to sign a release, and the release they did sign is not enforceable" because Ms. Allen offered nothing in exchange for the release. Plaintiffs' Response to Defendant's Motion for Summary Judgment, p. 8.

Modification to a contract must be supported by valid consideration. *Washington*

Fed. Sav. v. Van Engelen, 153 Idaho 648, 653, 289 P.3d 50, 55 (2012). There is no valid consideration when a party merely promises to perform under the terms of the existing contract. *Great Plains Equip., Inc. v. NW Pipeline Corp.*, 132 Idaho 754, 769, 979 P.2d 627, 642 (1999). However, "the doing by one of the parties of something that he is not legally bound to do constitutes consideration for the other's promise to modify the terms of the original agreement." *Id.*

Addendum 2 provides:

> The undersigned parties hereby agree as follows:
> 1) Buyer is aware of the encroachment onto said property from the adjacent property 5841 W. Clementson Rd.
>
> 4) Buyer agrees to release Barbara. [sic] A. Allen and Windermere CDA Realty from any and all liability pertaining to the encroachment.
>
> 5) All other terms and conditions remain the same.

Declaration of Jeff Doty, Exh. M.

While the terms of the Addendum were about a release, it was executed in conjunction with an existing contract and attempted to modify the terms of that existing contract. As such, consideration from both parties was required. By agreeing to refrain from holding Ms. Allen liable, something they were not legally required to do, the Mars provided valid consideration. Ms. Allen has not produced any evidence, by affidavit or otherwise, of valid consideration she gave to the Mars in exchange for the Addendum. Her contention that her consideration was found in Section 7 of the PSA is without merit. "It is well established 'that a promise to do, or the doing of, what one is already bound by contract to do, is not valid consideration.'" *Great Plains Equip., Inc. v. NW Pipeline Corp.*, 132 Idaho 754, 769, 979 P.2d 627, 642 (1999) (quoting *Dashnea v. Panhandle Lumber, Co., Ltd.*, 57 Idaho 232, 238, 64 P.2d 390, 393 (1937) (citing 1 WILLISTON ON CONTRACTS, §§ 130, 103A)). Without evidence of additional valid

consideration, the Addendum was not a valid addition to the existing PSA.

Even if both parties gave valid consideration for the addition of Addendum 2, the Court disagrees that Addendum 2 clarified the ambiguities in the PSA. Addendum 2 did not resolve Ms. Allen's inability to convey marketable title by warranty deed. Addendum 2 merely confirmed in writing that the Mars were aware of the encroachment and relieved Ms. Allen of liability regarding the encroachment. That alone would not cure Ms. Allen's inability to convey the subject property to the Mars by warranty deed. This impossibility was raised by the Court at oral argument and will be addressed in further detail in section C of this Memorandum Decision and Order.

Ms. Allen also claims "Addendum 2 became an indelible part of the parties' agreement" after the Mars signed Addendum 2 and returned it to Ms. Gagner. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 12 (underline removed); Affidavit of Beverly Gagner, p. 3, ¶ 17. At that point, Ms. Allen contends the Addendum became a valid and enforceable contract and could not be retracted by the Mars without her consent. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 12. She maintains "[b]ecause the Contract itself required all modifications to be in writing, and because the contract was one for the sale of land, the State of Frauds would require that the parties sign a third addendum cancelling Addendum 2." Memorandum in Support of Defendant's Motion for Summary Judgment, p. 13. Ms. Allen contends the Mars were in breach when they refused to close the transaction without Addendum 2 being rescinded. *Id.* As such, Ms. Allen argues she "was not required to close the transaction only upon 'removal' of Addendum No. 2. . . ." *Id.*, p. 14. Ms. Allen also claims she "was not required to close the transaction only upon 'removal' of Addendum No. 2 . . . . By unequivocally refusing to close unless Addendum No. 2 was removed, it was ***Plaintiffs*** who breached the PSA,

not Allen." Memorandum in Support of Defendant's Motion for Summary Judgment, p. 13 (emphasis in original).

The Mars contend they did not breach the PSA by requiring that the Addendum be retracted. Plaintiffs' Response to Defendant's Motion for Summary Judgment, p. 7. They claim that under the terms of the PSA they were not required to sign a release as a condition of closing. *Id.* They argue that "even if the Mars retraction of the Addendum could be considered a breach, it [did] not relieve Ms. Allen of her obligation to close." *Id.*, p. 9. Since the Mars timely closed pursuant to the modification to Paragraph 9.7, they performed under the PSA, and the contract was not rescinded under Paragraph 9.8 of the PSA. *Id.*, p. 10.

As stated above, without evidence of valid consideration from both parties, the Addendum was not a valid addition to the existing PSA. As such, even if the Mars did not unilaterally rescind the Addendum, it would not have been enforceable against them. Since the Addendum was not valid, the Mars could not be in breach for removing it from the final closing documents. Without the Addendum, the only enforceable documents were the PSA and the modification to the PSA discussed in the previous section. There is no dispute of material fact that Ms. Allen failed to close by the end of the business day on May 8, 2015, pursuant to the agreement of the parties. While there may be other defenses which would support Ms. Allen not closing on May 8, 2015, those defenses have not been raised by Ms. Allen in this Motion.

For the reasons set forth above, there is no question of fact that the Mars were not in breach for refusing to close without removing the Addendum, as it was not a valid addition to the PSA. As such, Ms. Allen's Motion for Summary Judgment on this issue is denied.

D. While not Actually Argued by the Parties, but Referenced in Support of the Above Arguments, the Evidence Before the Court is That it Was Impossible for Ms. Allen to Perform Under the Purchase and Sale Agreement Because the Encroachment Would Have Precluded her From Conveying Title to the Mars by Warranty Deed or Providing Marketable and Insurable Title.

One way performance can be legally excused is under the doctrine of impossibility. *Haessly v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). At oral argument, the Court expressed its concerns about it being impossible for Ms. Allen to perform under the terms of PSA given the known encroachment. While Ms. Allen pled impossibility as an affirmative defense (Answer, Affirmative Defenses and Demand for Jury Trial, p. 3, ¶ 17) and references this impossibility on pages 11, 12 and 13 of her initial brief, and again at pages 8 and 9 of her reply brief in support of the issues discussed above, she does not actually raise the issue of impossibility in support of the instant Motion for Summary Judgment. The Mars also allude to impossibility on pages 4 and 5 of their response brief when they discuss a question of fact about whether they waived the contingency and decided to proceed to closing despite the encroachment. At oral argument, Ms. Allen informed the Court that she did not raise this issue on summary judgment because she thought it was an issue of fact and a defense to specific performance. The Mars responded by arguing that parties can purchase real property with a known encroachment. While that may be true, as shown below, the parties cannot purchase real property *via a warranty deed* with a known encroachment.

"The doctrine of impossibility operates to excuse performance when the bargained-for performance is no longer in existence or is no longer capable of being performed due to the unforeseen, supervening act of a third party." *Haessly*, 121 Idaho at 465, 825 P.2d at 1121. For a defendant to prove impossibility: "(1) a contingency

must occur; (2) performance must be impossible, *not just more difficult or more expensive*; and, (3) the nonoccurrence of the contingency must be a basic assumption of the agreement." *Id.* (emphasis added).

Knowing about the existence of an encroachment on the subject property, the Mars drafted a PSA that required Ms. Allen to convey title to the subject property by *warranty deed* and required that title be marketable and insurable. It is impossible for Ms. Allen to convey the subject property by warranty deed with marketable and insurable title given the encroachment.

"[T]he law imputes to the vendor a covenant that he will convey a marketable title, or according to many of the decisions, good title, unless the vendee stipulates to accept something else." *Blaine County Canal Co. v. Mays*, 65 Idaho 190, 142 P.2d 589, 593 (1943). "Marketable title is defined as 'one free and clear of all encumbrances.'" *Brown v. Yacht Club of Coeur d'Alene, Ltd.*, 111 Idaho 195, 197, 722 P.2d 1062, 1064 (Ct. App. 1986) (quoting *Metzker v. Lowther,* 69 Idaho 155, 166, 204 P.2d 1025, 1033 (1949)). Without resolving the issue with the encumbrance on the subject property, it is impossible for Ms. Allen to convey marketable title to the Mars. As written, at this time, Ms. Allen's performance is impossible. If the parties modified the existing PSA to allow her to convey title to the subject property by quitclaim deed, the Court would agree with the Mars that a party can purchase property with a known encroachment. However, it is impossible for a party to purchase a property with a known encroachment via warranty deed. Ms. Allen and the Dunkels did not remedy the encroachment issue before the date of closing. Barring a resolution to that issue, the PSA cannot be performed as written.

The Court acknowledges that this issue is not properly before it at this time and

will not rule on summary judgment on the defense of impossibility. Summary judgment can in certain instances be entered by the court *sua sponte* on grounds other than those raised by the moving party, but only when the party against whom the judgment will be entered is given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered. *Mason v. Tucker and Associates,* 125 Idaho 429, 432, 871 P.2d 846, 849 (Ct. App. 1994). The need for notice stems from I.R.C.P. 7(b)(1). *Id.* The parties are encouraged to submit briefing on this issue prior to trial because, given the evidence currently before this Court, it appears to be dispositive.

V. CONCLUSION AND ORDER.

For the reasons stated above, Ms. Allen's Motion for Summary Judgment must be denied.

IT IS HEREBY ORDERED defendant Barbara Allen's Motion for Summary Judgment is DENIED.

Entered this 29th day of November, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
D. Toby McLaughlin	208-263-7557	Michael G. Schmidt	664-4125

_____
Jeanne Clausen, Deputy Clerk