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

BRANDON SHINNEMAN,

Plaintiff,

vs.

MATT SURPLUS d/b/a THE GUTTER GUYS,

Defendant.

Case No. **CV 2010 7967**

MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff Brandon Shinneman's (Shinneman) motion for summary judgment filed January 31, 2011.

On September 15, 2010, Shinneman filed his complaint against defendant Matt Surplus, d/b/a The Gutter Guys (Surplus) for the amount of $30,124.00 plus interest. Shinneman and Surplus entered into a "hard money agreement loan" on July 17, 2007. Shinneman alleges Surplus has defaulted on the repayment terms and, as of September 1, 2010, owes Shinneman $30,124.00. Complaint, p. 2, ¶¶ V and VI. This matter is currently scheduled for a four-day jury trial commencing on November 14, 2011.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P.

56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). A trial court's findings of fact will only be set aside if unsupported by substantial, competent evidence, i.e. if clearly erroneous. *Neider v. Shaw,* 138 Idaho 503, 506, 65 P.3d 525, 528 (2003). The Supreme Court freely reviews questions of law. *Id.*

III. ANALYSIS.

Shinneman argues no dispute exists with regard to the facts that: (1) there is a valid agreement between the parties, (2) Surplus breached the agreement, and (3) Shinneman has been damaged in the amount of $30, 526 in principal and interest as a result of the breach. Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 3-4. Surplus responds the parties' agreement is ambiguous. Memorandum in Opposition to Motion for Summary Judgment, p. 2. Additionally, Surplus argues Shinneman should be estopped from taking a position in this matter contrary to the position he took in his responses to interrogatories dated January 23, 2009, in a divorce action. *Id.,* pp. 3-4. Surplus has provided this Court with

Shinneman's responses to interrogatories in his divorce action. In those responses Shinneman stated under oath that he had not loaned money to anyone during the previous five years in an amount exceeding $500. Exhibit A to the Affidavit of Kacey Wall, p. 7.

Contract formation requires a meeting of the minds on all material terms of the contract. *Barry v. Pacific West Construction,* 140 Idaho 827, 831, 103 P.3d 440, 444 (2004). In *Elliot v. Darwin Neibaur Farms,* 138 Idaho 774, 779, 69 P.3d 1035, 1040 (2003), the Idaho Supreme Court wrote:

> Construction of the meaning of a contract begins with the language of the contract. If the contract's terms are clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words. If, however, the contract is determined to be ambiguous, the interpretation of the document is a question of fact which focuses upon the intent of the parties.
>
> In determining whether a contract is ambiguous, this Court ascertains whether the contract is reasonably subject to conflicting interpretation. The determination and legal effect of a contractual provision is a question of law where the contract is clear and unambiguous, and courts cannot revise the contract in order to change or make a better agreement for the parties. (Citations omitted).

Where a contract is complete on its face and is unambiguous, extrinsic evidence of prior or contemporaneous discussions or negotiations are not admissible to contradict, vary, alter, add to, or detract from the terms of the contract. *Howard v. Perry,* 141 Idaho 139, 141-42, 106 P.3d 465, 467-68 (2008).

Here, the contract entered into by Shinneman and Surplus is extremely sparse. The agreement is for a $26,000 loan amount with 20% interest, for a total of $31,200 to be repaid by Surplus. The agreement states:

> Terms: Monthly installments are to made [sic] to Mr. Shinneman every month for the period of 4-6 months.

Exhibit 1 to the Complaint. If there is a default by "The Gutter Guys" following the "6 month end date", Shinneman will be entitled to all accounts receivable of "The Gutter Guys." *Id.* In his affidavit, Shinneman states Surplus repaid $10,000 in the six months following execution of the contract. Affidavit of Brandon Shinneman, p. 2, ¶ 4. Thereafter, Surplus paid an additional $3,000 between September and November, 2008. *Id.,* ¶ 5. Shinneman testifies:

> I have a business called Affordable Bouncers. Affordable Bouncers rents inflatable bouncing equipment for children's parties and functions. As a further agreement for repayment on the promissory note, I agreed to credit Matt Surplus for 30% of the business that he brought in for Affordable Bouncers. Because I am not entirely sure what business he brought in from the date of our promissory note and thereafter, I agree to give his credit for 30% of all of the business. As of today, that credit amounts to $1,075.

Id., pp. 3-4, ¶ 7. It follows that Surplus has repaid $14, 075 of the loan amount.

Dulcie Fica, a bookkeeper for Shinneman's counsel, testifies to calculating the amount now due and owing, including interest calculated from January 2008 to February 28, 2011, and taking into account all payments and credits. Affidavit of Dulcie Fica, p. 2, ¶ 2. She calculates the interest as amounting to $13, 401, bringing the total amount owed to $30, 526. *Id.,* ¶ 3.

In his memorandum, Shinneman concedes the question of whether interest was intended to accrue following the 4-6 month term of the loan "may not be clear from the promissory note", but argues "[t]he logical conclusion is that it was intended to continue to accrue." Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 3 fn. 1. This is discussed below. Surplus argues that the contract is ambiguous because the payment terms and interest rate are lacking and Surplus disputes that any amount is left due and owing. Memorandum in Opposition to Motion for Summary Judgment, p. 2.

Shinneman replies the contract is unambiguous; Surplus "was obligated to pay the Plaintiff $31,200 within six months of July 17, 2007. If he did not pay in full by then, interest on the balance accrued at 20% per annum." Response to Defendant's Memorandum in Opposition to Motion for Summary Judgment, p. 2.

The plain language of the contract sets forth that Shinneman will loan Surplus $26,000 at 20% interest for a total of $31,200 to be repaid 4-6 months after July 17, 2007. The question for this Court is whether the 20% interest amount is reasonably subject to conflicting interpretation, rendering the term ambiguous. The parties make no mention of the interest term applying following the 4-to-6-month repayment term has expired. And, the parties go so far as to calculate the entire amount of interest to be paid by Surplus, 20% of the loan amount for a total of $5,200. The only mention of default made in the agreement concerns Shinneman being entitled to all accounts receivable of the Gutter Guys if Surplus defaults in any way. Surplus states in his affidavit that he never agreed to interest accruing at the rate of 20% per year. Affidavit of Matt Surplus in Opposition to Motion for Summary Judgment, p. 2, ¶ 4.

This Court finds certain terms of the parties' agreement are not ambiguous as a matter of law: the original amount of the loan ($26,000), the length of time of the agreement (6 months), the interest rate to be applied (20% per six months), and the fact that nothing in the agreement discusses interest beyond six months. Thus, it follows that the Court cannot consider extrinsic evidence of the parties' intent regarding the length of interest (beyond the six-month period) and Shinneman is *not* entitled to interest, at least not under the contract, above and beyond the $5,200 agreed to by the parties in writing.

Shinneman's argument in footnote one of his brief is:

> The only thing that may not be clear from the promissory note is whether interest was intended to accrue after the 6 month term in the

> event that the promissory not was not paid in full by that time. The logical conclusion is that it was intended to continue to accrue.

Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 3, n. 1. To state that the issue of interest after six months "may not be clear from the promissory note" is an incredible understatement. It is "not clear" only because it is *not discussed* in the agreement. And, in order to get to that "logical conclusion" the Court would have to find the agreement ambiguous on that term. The Court finds the agreement is not ambiguous on that term. That term is simply completely omitted in the agreement language. Because the agreement does not specify any specific rate of interest after six months, nor does it discuss the concept of interest in any way after six months, summary judgment must be granted *against* Shinneman and in favor of Surplus. Summary judgment can be granted for any party, not just the moving party, on any or all the causes of action involved, under I.R.C.P. 56, thus allowing trial courts flexibility in determining the form of relief granted in summary judgment orders. *Harwood v. Talbert,* 136 Idaho 672, 677, 39 P.3d 612, 617 (2001), *citing Brummett v. Edinger,* 106 Idaho 724, 726, 682 P.2d 1271, 1273 (1984). If there is to be evidence at trial of interest beyond the six-month term of the "hard money agreement loan", it will have to be on some theory other than the express terms of the agreement.

The agreement is so sparse, it is not clear from the *language* of the agreement whether it is 20% interest *per year* (as one would normally consider how interest accrues and is measured), or 20% over the six-month agreement term. However, the *form* of the agreement itself provides this clarification without looking to extrinsic evidence. The form itself provides clarification by doing the math: the interest rate is specified at 20%, the amount of total interest is specified at $5,200; the length of the loan is six months. It is obvious from the form of the agreement that the interest is 20% per six months. Thus,

summary judgment on the amount of the underlying initial debt in the amount of $31,200 ($26,000 loaned and interest due in six months of $5,200) is warranted. This is the only issue upon which the Court can grant plaintiff summary judgment.

Surplus' disputing there being any balance left due and owing cannot, by itself, be enough to survive summary judgment. In Idaho, it is axiomatic that a mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel,* 134, Idaho 84, 87, 996 P.2d 303, 306. In his affidavit, Surplus testifies he has paid Shinneman approximately $15,687.50, has not received credit for running Shinneman's Affordable Bouncers business, has not received credit for 30% of the business Surplus brought into Affordable Bouncers, and has received no accounting regarding Affordable Bouncers. Affidavit of Matt Surplus in Oppositon to Motion for Summary Judgment, p. 2, ¶ 4. In the light most favorable to Surplus, questions of material fact remain as to how much Surplus has in fact repaid to Shinneman. Although the Court will not look to extrinsic evidence to determine the intent of the parties with regard to an unambiguous contract, the parties here having reached outside agreements relating to the repayment of the loan, which in no way contradicts, varies, alters, adds to, or detracts from the terms of the contract, is proper. Both parties concur there was an agreement that Surplus would be credited to some extent for his work with Affordable Bouncers. Shinneman posits this credit amounts to precisely $1,075 while Surplus argues he never received any accounting for the business and, additionally, was never paid or credited for the two years he "ran" Affordable Bouncers. There is before the Court a material question of fact as to the amount remaining due and owing from Surplus to Shinneman. Therefore, there is a question of whether there is any amount left due and owing.

In his memorandum in opposition to motion for summary judgment, Surplus also argues the doctrine of judicial estoppel should apply to Shinneman's instant claim because as part of his 2008 divorce proceeding, in his January 23, 2009, responses to interrogatories propounded by his (then) wife, Shinneman made a sworn statement that he did not gift or loan to anyone any amount over $500 in the five years prior to January 23, 2009. Memorandum in Opposition to Motion for Summary Judgment, pp. 3-4. The responses have been put before the Court via affidavits and Shinneman has made no motion to strike the same. Instead, Shinneman replies applying the doctrine of judicial estoppel here would not be appropriate because there is no evidence of a judical admission resulting in Shinneman's obtaining an advantage in another proceeding; "[t]here is no evidence that the Plaintiff is attempting to play 'fast and loose' with the judicial system." Response to Defendant's Memorandum in Opposition to Motion for Summary Judgment, p. 3.

The doctrine of judicial estoppel prohibits a party from taking a position in a subsequent proceeding that is inconsistent with the position it took in a previous proceeding. *Riley v. W.R. Holdings, LLC,* 143 Idaho 116, 121-22, 138 P.3d 316, 321-22 (2006). When a litigant, through sworn statements, "obtains a judgment, advantage, or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject matter." *Loomis v. Church,* 76 Idaho 87, 93-94, 277 P.2d 561, 565 (1954). The doctrine of judicial estoppel is equitable and exists to protect the judicial process; it is invoked by a court at its discretion. *Riley,* 143 Idaho 116, 122, 138 P.3d 316, 322 (quoting *Sword v. Sweet,* 140 Idaho 242, 252, 92 P.3d 492, 502 (2004)). The party asserting judicial

estoppel must demonstrate that the sworn statement at issue was used to obtain a judgment, advantage, or consideration from another party. *Loomis,* 76 Idaho 87, 93-94, 277 P.2d 561, 565.

Here, Shinneman made a sworn statement in January 2009 that he had not gifted or loaned any amount over $500 to anyone in the previous five years. Several months later, in September of 2010, Shinneman filed his Complaint in the instant matter, alleging Surplus defaulted on a loan made by Shinneman on July 17, 2007. Shinneman argues that his sworn responses to his ex-wife's discovery requests do not amount to a "judicial admission." Response to Defendant's Memorandum in Opposition to Motion for Summary Judgment, pp. 2-3. As difficult as that may be for Surplus to understand, Shinneman is correct. In *Cordova v. Bonneville County Joint School District No. 93,* the Idaho Supreme Court wrote:

> … statements in interrogatories and depositions are not "formal act[s] or statement[s] made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *See Strouse v. K-Tek, Inc.,* 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Ct.App.1997). The purpose of depositions, like that of interrogatories is the discovery of facts. An admission goes to the question of proof of those facts. *See Straley v. Idaho Nuclear Corp.,* 94 Idaho 917, 923, 500 P.2d 218, 224 (1972) (stating the purpose of interrogatories and their distinct nature from admissions).

144 Idaho 637, 640 fn. 1, 167 P.3d 774, 777 fn. 1 (2007). Answers to interrogatories are treated as evidence only when they have been offered and admitted. *Crollard v. Crollard,* 104 Idaho 189, 190, 657 P.2d 486, 488 (Ct.App. 1983). But, a judicial admission is "a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *Sun Valley Potato Growers, Inc. v. Texas refinery Corp.,* 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). "A judicial admission is a

deliberate, clear, unequivocal statement of a party about a concrete fact within the party's peculiar knowledge, not a matter of law…[and] not opinion." 29A AM.JUR.2d, *Evidence* § 770 (1994). Idaho courts have held judicial admissions do not include a party's allegations in a complaint filed in a separate but related lawsuit. *Curtis v. Canyon County Highway Dist. No. 4,* 122 Idaho 73, 84, 831 P.2d 541, 552 (1992), overruled on other grounds by *Lawton v. City of Pocatello,* 126 Idaho 454, 462, 886 P.2d 330, 338 (1994). In the matter now before the Court, Shinneman's discovery responses do not amount to judicial admissions, though they were statements of Shinneman's knowledge and not matters of law or opinion. Shinneman's concededly wrong and arguably misleading response regarding loans only went to dispensing with his ex-wife's need for proof as to any accounts receivable due and owing to Shinneman.

Shinneman also argues he received no advantage in another proceeding as a result of his incorrect discovery response. Response to Defendant's Memorandum in Opposition to Motion for Summary Judgment, p. 3. Shinneman testifies in his affidavit that the money he lent Surplus came from a line of credit held by him and his ex-wife during their marriage, and the terms of their divorce dictated Shinneman would take responsibility for the line of credit. Second Affidavit of Brandon Shinneman, pp. 1-2, ¶¶ 2-3. "No one obtained any advantage or benefit because I inadvertently left out the loan to Matt Surplus in the interrogatory answer." *Id.,* at ¶ 3. Ultimately, the party asserting judicial estoppel, Surplus, must demonstrate that the sworn statement at issue was used to obtain a judgment, advantage, or consideration from another party. *Loomis,* 76 Idaho 87, 93-94, 277 P.2d 561, 565. Surplus has not done so here.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court grants plaintiff partial summary judgment on

the amount of the underlying debt owed by Surplus to Shinneman ($26,000.00), the interest rate (20%) over six months totaling $5,200.00, for a total debt owed by Surplus to Shinneman at the end of the six month period of the agreement in the amount of $31,200.00. There is a dispute of fact as to amounts paid and credits that should be applied against this amount owed. Summary judgment must be granted in favor of Surplus on the undisputed fact that the agreement does not specify any interest beyond the six-month period. Summary judgment must be granted in favor of Shinneman on the legal issue that judicial estoppel does not apply in this case.

IT IS HEREBY ORDERED partial summary judgment is GRANTED in favor of Shinneman on the amount of the underlying debt owed by Surplus to Shinneman ($26,000.00), the interest rate (20%) over six months totaling $5,200.00, for a total debt owed by Surplus to Shinneman at the end of the six month period of the agreement in the amount of $31,200.00. Partial summary judgment is GRANTED in favor of Shinneman and against Surplus on the legal issue that judicial estoppel does not apply in this case. All other issues in Shinneman's motion for summary judgment are DENIED as there is an issue of material fact.

IT IS FURTHER ORDERED partial summary judgment is GRANTED in favor of Surplus and against Shinneman on the fact that the agreement does not specify any interest beyond the six-month period.

Entered this 1st day of March, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2011, 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 #
Gary I. Amendola	765-1046	Paul W. Daugherty	666-0550

_____
Jeanne Clausen, Deputy Clerk