STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
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

GEORGE COMACK, *Plaintiff*, vs. **KIMBALL CARPETS, LLC, d/b/a PANHANDLE CARPET ONE FLOOR & HOME,** *Defendant*.	Case No. **CV 2010 461** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT KIMBALL'S MOTION IN LIMINE**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion in Limine filed by defendant Kimball Carpets, LLC d/b/a Panhandle Carpet One Floor & Home (Kimball). Jury trial is scheduled to begin Monday, October 24, 2011. Twenty days before that jury trial, on October 4, 2011, Kimball filed its motion in limine.

On January 20, 2010, plaintiff George Comack (Comack) filed his Complaint against his former employer, Kimball, alleging he had not been paid for various commissions earned prior to his resignation. Kimball filed its Answer, Counterclaim and Demand for Jury Trial on April 5, 2010. On August 12, 2010, this Court scheduled the matter for a three-day jury trial beginning April 18, 2011. No motion to dismiss nor a motion for summary judgment was filed by Kimball on this issue. Very little was filed in this action until March 4, 2011, when both parties stipulated to continue the trial, because "the parties wish to pursue meaningful mediation prior to incurring additional

costs with pre-trial preparation." This Court ordered mediation occur no later than April 20, 2011, the week the matter was originally to be tried. The parties in this case have failed to comply with this Court's March 4, 2011, Scheduling Order, by not reporting "…jointly to the Court in writing at least sixty (60) days prior to trial, setting forth when mediation occurred and the results of mediation." Scheduling Order, p. 7, ¶ 15.

On October 4, 2011, Kimball filed its motion in limine, seeking an Order of the Court determining that Comack's claims to commissions, after his signing of the most recent employment agreement between the parties, violates the parol evidence rule in light of the agreement's language that, "You will no longer be paid commissions…" Defendant's Motion in Limine, p. 2; Exhibit A to the Affidavit of Lisa Kimball. On October 6, 2011, Comack filed his Memorandum in Opposition to Defendant's Motion in Limine, arguing the parol evidence rule does not apply to the facts before the Court because the agreement contained no merger clause and:

> Because the August 1, 2009, agreement is incomplete and ambiguous on its face, and because this case involves multiple contracts, not merely negotiations leading up to a single contract, the parol evidence rule does not apply. Extrinsic evidence can be introduced to explain the agreements and the employment relationship between the parties from June 2007 through the end of his employment with the Defendant.

Memorandum in Opposition to Defendant's Motion in Limine, pp. 3-4. On October 17, 2011, Kimball filed its Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion in Limine, contending the mere lack of a merger clause does not render the agreement at issue ambiguous or incomplete; "[t]he Plaintiff wishes to add a term which sets forth that he is entitled to be paid commissions which is inconsistent with the written agreement." Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion in Limine, p. 3.

On October 11, 2011, Kimball filed its Witness List. In response, Comack filed a

motion in limine seeking to exclude the testimony of Shona McIntosh, a former Kimball employee who sought that Kimball pay her commissions, but whose claim before the Idaho Department of Labor was denied. Plaintiff's Motion in Limine re: Witnesses, p. 1. Comack argues such testimony is irrelevant and prejudicial and that the Department of Labor's decision in Ms. McIntosh's case is not *res judicata* and cannot form the basis of collateral estoppel in the instant matter. *Id.,* pp. 1-2. Comack's motion in limine regarding witnesses was not noticed-up for hearing at the October 18, 2011, hearing on Kimball's Motion in Limine, and has not been replied to by Kimball.

The Court heard oral argument on the motions in limine on October 18, 2011. Kimball had no objection to the Court's hearing Comack's motion in limine regarding witnesses, despite Comack's failure to notice the motion for hearing. Kimball stated there was no intention by Kimball to present any evidence regarding Ms. McIntosh's unsuccessful claim before the Department of Labor and that Kimball would only impeach Ms. McIntosh were she to claim she had been successful before the Department of Labor. The Court granted Comack's motion in limine on the record, and, later the same day signed an order prepared by Comack's attorney.

After hearing and argument on October 18, 2011, the Court took Kimball's Motion in Limine under advisement, understanding fully this matter is set for a three-day jury trial commencing on October 24, 2011.

II. STANDARD OF REVIEW.

Trial Courts have broad discretion when ruling on motions in limine; they are reviewed under an abuse of discretion standard. *Puckett v. Verska,* 144 Idaho 161, 167, 158 P.3d 937, 943 (2007). The Supreme Court has not found reversible error where a witness made a statement contrary to a motion in limine, received an admonishment, and the District Court later issued a curative instruction. *Id.* at 944; *see*

Van Brunt v. Stoddard, 136 Idaho 681, 686-687, 39 P.3d 621, 626- 627 (2001). Importantly, where a trial Court has unqualifiedly ruled on the admissibility of evidence in response to a motion in limine prior to trial, no further objection is necessary at trial and the issue is preserved for appellate review. *State v. Hester,* 114 Idaho 688, 700, 760 P.2d 27, 39 (1988); *Evans v. State*, 135 Idaho 422, 429, 18 P.3d. 227, 234 (Ct. App. 2001). However, where a trial judge elects to hear the foundation for evidence instead of definitively ruling on a motion in limine, the counsel opposing the evidence must object as the evidence is presented. *Kirk v. Ford Motor Co.,* 141 Idaho 697, 701, 116 P.3d 27, 31 (2005); *Hester*, 114 Idaho at 699.

III. ANALYSIS.

The contract at issue is attached to the Affidavit of Lisa Kimball, pp. 1-2, ¶ 3, Exhibit A. That contract is captioned: "Commission Contract for George Comack Revised for 8-01-09." The first paragraph reads:

> You will no longer be paid commissions; your new agreement is as follows:
> Yearly salary will be $45,000, which requires a minimum sales total of $750,000 per year. This salary will be divided into 12 months, equaling a monthly salary off $3,750. $2,500 of this salary will be paid at the first pay period of each month and the remaining $1,250 will be paid on the last pay period of each month.

Affidavit of Lisa Kimball, pp. 1-2, ¶ 3, Exhibit A. Comack began working at Kimball in July 2007. Complaint, p. 2, ¶ III. Comack claims he was owed commissions on various projects of Kimball's which had gone to contract with the customer, and some of those contracts had been paid in full by the customer and some in part. Complaint, p. 3, ¶ VII. Comack was not paid his commission for those older contracts, and is suing for those commissions. *Id.* ¶ VIII.

Kimball moves this Court for an Order in Limine determining Comack's claim for

commissions earned prior to the August 1, 2009, date at which the parties entered into their final employment agreement would violate the parol evidence rule as "Comack cannot be allowed to testify to a term contrary to the unambiguous language of the contract." Defendant's Motion in Limine, p. 2. Kimball concedes that the parties operated under several different compensation packages, some of which were not in writing, but that the most recent, entered into on August 1, 2009, stated, "You will no longer be paid commissions." *Id.,* p. 1, citing Exhibit A to the Affidavit of Lisa Kimball. Kimball cites to Washington case law discussing the "partial integration" exception to the parol evidence rule, arguing that partial integration may only be proved by extrinsic evidence so long as any collateral agreement is not inconsistent with the written agreement. *Id.,* p. 3. Here, Kimball argues, the August 1, 2009, agreement "speaks directly to the issue of the payment of further commissions and clearly and unambiguously sets forth that Comack will no longer be paid commissions." *Id.* At oral argument, Kimball's counsel argued simply that "more commissions" (which Kimball claims Comack is arguing) is contrary to the "no more commissions" language of the August 1, 2009, agreement.

In response, Comack argues each of the employment agreements entered into by the parties were separate and that the August 1, 2009, agreement "was not an integration or merger of all previous agreements, it was a completely new agreement which commenced on August 1, 2009." Memorandum in Opposition to Defendant's Motion in Limine, p. 2. Comack contends the parol evidence rule is inapplicable here in part because the agreement contains no merger clause; thus, Comack argues, the Court would need to find the August 1, 2009, agreement unambiguous and complete on its face in order to find it merged or integrated all prior contracts, which did each contemplate that Comack would be paid commissions. *Id.,* p. 3. Additionally, Comack

alleges the agreement is ambiguous and incomplete on its face because: a) it makes no reference to commissions earned, but not paid, up to the August 1, 2009, date; b) the term "yearly salary" is not used in reference to the beginning of the parties' employment relationship and is not backdated to the beginning of 2009, therefore, the agreement can be construed as only applying form August 1, 2009, onward; and c) the agreement is referred to as "revised" and "new", "which by itself creates an ambiguity in terms of its relationship to prior agreements" [which did contemplate Comack being compensated for commissions earned]. *Id.,* pp. 3-4. Comack seeks to present extrinsic evidence on the prior agreements which governed the parties' relationship to show the meaning of the prior agreements, the substance of the agreements themselves, and the parties' practices under those agreements. *Id.,* p. 4.

In *Gray v. Tri-Way Const. Services, Inc.,* 147 Idaho 378, 210 P.3d 63 (2009), the Idaho Supreme Court affirmed the District Court's grant of summary judgment dismissing Gray's breach of contract claim because the parties never reduced their employment agreement into writing, in violation of the statute of frauds. 147 Idaho 378, 384, 210 P.3d 63, 69. The Court wrote:

> …[T]he agreement contained an integration clause, demonstrating that the contract requires a writing for a full expression of the covenants and promises, as "[t]he salutary purpose of (an integration clause) is to preclude consideration of matters extrinsic to the agreement."

Id., citing *Star Phoenix Min. Co. v. Hecla Min. Co.,* 130 Idaho 223, 233, 939 P.2d 542, 552 (1997) (quoting *Havel v,. Kelsey-Hayes Co.,* 83 A.D.2d 380, 384, 445 N.Y.S.2d 333 (N.Y.A.D. 1981)). The August 1, 2009, agreement between the instant parties contained no such integration or merger clause. However, the Court's inquiry does not end due to this absence. Kimball is correct in positing that the mere lack of a merger clause does not render an agreement ambiguous or incomplete. *See* Defendant's

Reply to Plaintiff's Memorandum In Opposition to Defendant's Motion in Limine, pp. 1 *et seq.* The question of whether a contract contains ambiguity is a question of law over which reviewing courts exercise free review. *Cool v. Mountainview Landowners Coop. Assn.,* 139 Idaho 770, 772, 86 P.3d 484, 486 92004). "Although parol evidence generally cannot be submitted to contradict, vary, add or subtract from the terms of a written agreement that is deemed unambiguous on its face, there is an exception to this general rule where a latent ambiguity appears." *Knipe Land Co. v. Robertson,* 151 Idaho 449, ___, 259 P.3d 595, 601 (2011). "A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist." *Id.,* citing *Cool,* 139 Idaho 770, 773, 86 P.3d 484, 487. Where a latent ambiguity exists, the Court is to determine the intent of the parties at the time they entered into the contract. *Id.,* citing *Snoderly v. Bower,* 30 Idaho 484, 488, 166 P.265, 266 (1917) ("It is not for the court or jury to make a contract for the parties, but only to determine what the parties intended the ambiguous terms to mean at the time they entered into the agreement.").

Here, the Court finds a patent ambiguity exists. The agreement says "You will no longer be paid commissions". That language could mean "You will no longer be paid past commissions now due and owing to you", or, it could mean "From August 1, 2009, you will no longer be paid commissions on future work you do." If anything, the language is more clear toward Comack's interpretation, because the language looks toward the future…"You will no longer be paid commissions". Kimball's argument that the contract language includes past commissions is not supported by the contract language…there is nothing that mentions past commissions. That, at best, from Kimball's standpoint, is a vague contract, and the contract will be construed against the

drafter, which in this case, appears to be Kimball given the letterhead on the contract.

Even if there is no patent ambiguity, the August 1, 2009, agreement loses any certainty it has when applied to facts. This is latent ambiguity. No term of employment is listed in the agreement; that is, the August 1, 2009, agreement states no explicit beginning or end date. The agreement states it is "Revised for 8-01-09", indicating it went into effect beginning on that date. That also infers another contract was in effect up until that time. And the agreement states, "You will no longer be paid commissions", which certainly acknowledges commissions were previously paid, and also certainly indicates that they will not be paid in the future. But does "You will no longer be paid commissions" mean commissions already earned in the past and earned in the future, or does it simply mean commissions earned on customer contracts that Comack obtains for Kimball after August 1, 2009. In the agreement there is no mention of past commissions earned, but not paid, by the effective date of August 1, 2009. At best (again looking at it from Kimball's standpoint), the Court finds the August 1, 2009, agreement is ambiguous and vague. As such, this Court must determine the intent of the parties at the time they entered into the August 1, 2009, agreement with regard to previously-earned commissions prior to submitting the ultimate questions of fact in this case to the jury. The Court will have to wait and hear all extrinsic evidence on that issue. Once the Court makes that decision, it remains to be seen what issues will be presented to the jury for its determination.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny Kimball's Motion in Limine and consider extrinsic evidence to reconcile the latent ambiguity regarding Comack's purported earned but unpaid commissions.

For the reasons stated above,

IT IS HEREBY ORDERED Kimball's Motion in Limine is DENIED.

Entered this 19th day of October, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 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 #**
Randall R. Adams	6645380	Arthur M. Bistline	665-7290

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Jeanne Clausen, Deputy Clerk