STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____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

TOWER ASSET SUB INC., a Delaware Corporation, and SPECTRA SITE, LLC., a Delaware limited liability company,

Plaintiffs,

vs.

DOUGLAS LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

Case No. CV 03-4621

ORDER DENYING DEFENDANTS' MOTION FOR PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER, and ORDER SCHEDULING JURY TRIAL ON DEFENDANTS' COUNTERCLAIM

I. BACKGROUND.

This matter is before the Court on the "Motion for Permission to Appeal From an Interlocutory Order", filed by defendants Douglas and Brenda Lawrence (Lawrences, collectively).

On November 5, 2010, this Court issued its "Order Granting Plaintiff Partial Summary Judgment and Declaring Easement Rights." On August 17, 2011, this Court issued its "Order Denying Defendants' Motion to Certify the Partial Summary Judgment as Provided for by I.R.C.P. 54(b)". On August 25, 2011, defendants Lawrences timely

(under I.A.R. 12(b)) filed "Defendants' Motion for Permission to Appeal From an Interlocutory Order" and an "Affidavit of Douglas Lawrence in Support of Defendants' Motion for Permission to Appeal From an Interlocutory Order". On September 8, 2011, Tower Asset Sub Inc., and Spectra Site, LLC (Tower), filed "Plaintiff's Opposition to Defendant's Motion for Permission to Appeal From Interlocutory Order." Oral argument was held on September 14, 2011, and Lawrences' Motion for Permission to Appeal from Interlocutory Order was taken under advisement at that time.

In reviewing the file while that motion was under advisement, this Court was unable to find a counterclaim for breach of contract or counterclaim for trespass has ever been plead by defendants Lawrences. Accordingly, this Court issued its Order Scheduling Status Conference, directing the parties to appear at a hearing on September 27, 2011, and point out where in the pleadings such counterclaims are made. At that September 27, 2011, hearing, counsel for Tower claimed that paragraphs four and five of the Answer, Counter-Claim and Demand for Jury Trial, filed on September 20, 2004, contained such counterclaims under a liberal pleading construction. That counterclaim seeks "an injunction enjoining the Plaintiff from using Defendants' land for any purpose whatsoever should it be established the Plaintiff has no express easement in its favor", and it seeks declaratory relief declaring the rights and obligations of the parties in light of the licensing agreement. Answer, Counter-Claim and Demand for Jury Trial, pp. 3-4, ¶¶ 4, 5.

Brenda Lawrence did not appear at this hearing. At the hearing, Douglas P. Lawrences agreed with counsel for Tower's position, and added that the Lawrences'

paragraphs eight and nine discuss breach of the licensing agreement. Those paragraphs read:

> 8. Nextel has breached the "licensing agreement" by attempting to assign rights to third parties, including Plaintiff.
> 9. Nextel has breached the "licensing agreement" by authorizing third parties to use the access provided in the licensing agreement.

Answer, Counter-Claim and Demand for Jury Trial, pp. 3-4, ¶¶ 4, 5. Douglas Lawrence's argument ignores that Nextel was not in 2004, is not now, and never has been in this litigation, a party.

Nonetheless, a liberal construction of the pleadings, coupled with the fact that the parties are in agreement that a breach of contract has been pled, leave the Lawrences' Motion for Permission to Appeal from Interlocutory Order, at issue.

II. STANDARD OF REVIEW.

Trial court judges have discretion as to whether to issue an I.R.C.P. 54(b) certificate or not. *Pichon v. Broekmeier, Inc.,* 99 Idaho 598, 602, 586 P.2d 1042, 1046 (1978); *Willis v. Larsen,* 110 Idaho 818, 822, 718 P.2d 1256, 1260 (Ct.App. 1986). Pursuant to I.R.C.P. 54(b), where more than one claim for relief is presented in an action or multiple parties are involved, the court may direct the entry of final judgment on one or more of the claims between one or more of the parties. I.R.C.P. 54(b). For a judgment to be certified as final and appealable under I.R.C.P. 54(b), the order granting judgment must finally resolve one or more of the claims between some or all of the parties; if the judgment does not, it is error for the trial court to certify an interlocutory order as final under I.R.C.P. 54(b). *U.S. v. City of Challis,* 133 Idaho 525, 528, 988 P.2d 1199, 1202 (1999); *Rife v.*

Long, 127 Idaho 841, 845, 908 P.2d 143, 147 (1995). Even where a party does not challenge the issuance of a Rule 54(b) certificate allowing an appeal, the fact that the district court certifies a judgment as final and appealable does not restrict the reviewing courts' right to review the matter. *City of Challis,* 133 Idaho 525, 528, 988 P.2d 1199, 1202.

Where an order is not appealable as a matter of right under Idaho Appellate Rule 11, it can in some circumstances be accepted as a permissive appeal of an interlocutory order. I.A.R. 12; *Idaho Dept. of Labor v. Sunset Marts, Inc.,* 140 Idaho 207, 91 P.3d 1111 (2004). Idaho Appellate Rule 12 states that permission may be granted to appeal an interlocutory order or decree of the district court which "involves a controlling question of law as to which there is substantial grounds for difference of opinion and as to which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation."

III. ANALYSIS.

The Lawrences, both appearing *pro se,* move this Court for an Order permitting them to appeal from the Court's interlocutory "Order Denying Defendants' Motion to Certify the Partial Summary Judgment as Provided for by I.R.C.P. 54(b)", filed August 17, 2011. Lawrences motion is framed as one seeking relief under Idaho Appellate Rules 12(a) and (b) (permissive appeal by the Idaho Supreme Court or this Court, respectively), but Lawrences motion essentially is 1) another motion to disqualify this Court for cause under I.R.C.P. 40(d)(2), and 2) a motion for reconsideration of this

Court's August 17, 2011, "Order Denying Defendants' Motion to Certify the Partial Summary Judgment as Provided for by I.R.C.P. 54(b)." Lawrences argue this Court has long harbored bias or prejudice against them, and continues to do so. Defendants' Motion for Permission to Appeal from an Interlocutory Order, p. 2. The entirety of the Affidavit of Douglas Lawrence purports to set forth evidence of this bias and prejudice, which is "of such a magnitude and extent as to render [this Court] incapable of being an impartial judge in the two lawsuits my wife and I are defending in his Court." Affidavit of Douglas Lawrence in Support of Defendants' Motion for Permission to Appeal from an Interlocutory Order, p. 2, ¶ 2 (emphasis in original). In response, Tower argues merely ruling in favor of an opposing party does not demonstrate bias on the part of this Court as to Lawrences. Plaintiff's Opposition to Defendant's Motion for Permission to Appeal, p. 2. "As long as the Court is reasoned in its decision, there is no bias. Lawrence does not present anything demonstrating that this Court was not reasoned in its decision." *Id.*

A review of the file in the instant matter reveals the Court finds itself in a familiar position. On June 6, 2007, Lawrences, then represented by counsel, John P. Whelan, filed a motion to disqualify the Court for cause. The Court, in its June 25, 2007, Memorandum Decision and Order Denying Motion for Disqualification for Cause went to great lengths to list and explain all interactions it had had with Lawrences' prior counsel, determining "[t]he undersigned can unequivocally state that he has no bias or prejudice against Mr. Whelan at present, nor did he on November 21, 2001." Memorandum Decision and Order Denying Motion for Disqualification for Cause, I.R.C.P. 40(d)(2), p.

9. Similar to the argument proffered by Tower in the instant matter before the Court, the Court, back on June 25, 2007, wrote:

> In any contested motion, usually one side wins, one side loses. Sometimes one party wins in part and loses in part. Just because one side wins does not mean the judge's decision was based upon bias or prejudice against the party who lost or their attorney.

Id., p. 10. On November 8, 2007, Lawrences filed a Renewed Motion to Disqualify for Cause. In the Affidavit of John P. Whelan filed in Support of the Renewed Motion for Disqualification for Cause, Whelan states he filed a complaint with the Idaho Judicial Council alleging this Court engaged in behavior violative of the Idaho Code of Judicial Conduct. Affidavit of John P. Whelan in Support of Renewed Motion for Disqualification for Cause, pp. 2-3. Whelan goes on to state this Court improperly accused him of lying on the record during an October 31, 2007, hearing. *Id.* In its November 30, 2007 Order, the Court noted the absence of case law provided by Lawrences on the issue of disqualification. Memorandum and Order Denying Defendants' Renewed Motion for Permission to Appeal from an Interlocutory Order, p. 3. The Court wrote:

> On the issue of disqualification, the Court cited on the record several cases it had reviewed as to why it was denying the renewed motion for disqualification. While these cases cited support both granting and denying a motion for disqualification, the reason is they are naturally fact driven.
>
> Even if this Court could get beyond the lack of an issue of controlling case law as to which there is substantial grounds for difference of opinion, from a practical standpoint, an immediate appeal from the Court's decision on renewed motions for disqualification would not "materially advance the orderly resolution of the litigation."

Id., pp. 3-4. The instant claim of bias and prejudice is premised upon the court's purported long-standing animus regarding Lawrences.

Douglas Lawrence's affidavit in support of the motion for permission to appeal notes the issues upon which the Idaho Supreme Court reversed this Court and a litany of other discrepancies and errors in the Court's 2007 and 2008 Orders (presumably on motions for summary judgment). Douglas Lawrence's Affidavit claims there exists no testimony by anyone named Harold Funk, contrary to the Court's findings. Affidavit of Douglas Lawrence in Support of Defendants' Motion for Permission to Appeal from an Interlocutory Order, p. 3, ¶ 5(a). The Court file shows the Affidavit of Harold Funk was filed on August 17, 2004. Douglas Lawrence also claims there was no Affidavit by a Thomas Mack. *Id.,* ¶ 5(b). However, the Affidavit of John Mack was filed by Lawrences then-counsel on May 31, 2006, and, interestingly, makes reference to Harold Funk's Affidavit. There is a scrivener's error by the Court resulted in attributing the affidavit to a "Thomas" Mack instead of John Mack. Importantly, Lawrences raise issues with Orders entered by the Court over three years ago; well beyond the time limits imposed by the Idaho Rules of Civil Procedure for moving to alter or amend a judgment (I.R.C.P. 59(e)), moving for relief from an judgment or order due to clerical mistakes (I.R.C.P. 60(a)), or moving for relief on the grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud (I.R.C.P. 60(b)). Lawrences failure to timely move to correct perceived error cannot be said to amount to bias or prejudice on the part of this Court.

Lawrences have also brought numerous motions for permission to appeal from an interlocutory order, and attendant motions for reconsideration on rulings thereon. On July 9, 2007, Lawrences filed a motion for reconsideration and a motion to permit appeal form an interlocutory order, both with regard to this Court's Memorandum Decision and Order Denying Motion for Disqualification for Cause. The Court denied the motions via written Order filed August 7, 2007. *See* Order Denying Defendants' Motion to Reconsider and Motion for Permissive Appeal. A Renewed Motion for Permission to Appeal from an Interlocutory Order was filed by Lawrences on November 13, 2007. The Court filed its Memorandum Decision and Order Denying Defendants' Renewed Motion for Permission to Appeal from an Interlocutory Order on November 30, 2007.

The instant motion is, in effect, one asking the Court to reconsider its August 17, 2011, Order Denying Defendants' Motion to Certify the Partial Summary Judgment, denying Lawrences' July 27, 2011, Defendants' Motion Requesting the Court to Certify the Partial Summary Judgment as Provided for by I.R.C.P. 54(b). In addition to Lawrences' oft-repeated allegations of this Court's purported bias or prejudice against them, Lawrences argue the Court should certify its Order Granting Partial Summary Judgment and Declaring Easement Rights, entered November 15, 2010, as appealable because the ruling resolved the easement issues "coupled with the fact that the Lawrences have repeatedly filed motions for disqualification of this Court for cause, it seems only fitting and appropriate that the Lawrences are afforded the opportunity to

have this Court's rulings reviewed by the appellate Court." Defendants' Motion for Permission to Appeal from an Interlocutory Order, p. 4. Lawrences go on to argue the Court misapplied *Brinkmeyer v. Brinkmeyer,* 135 Idaho 596, 21 P.3d 918 (2001) in analyzing and denying their July 27, 2011, motion for a Rule 54(b) certificate. *Id.,* pp. 4-6. Lawrences concede the matter is one committed to the discretion of the Court, but nonetheless argue *Brinkmeyer* involved a divorce proceeding and the case was therefore inapposite to the matter before the Court because "[t]he trial court in a divorce proceeding will necessarily have a wider and broader discretionary power in certifying appealable order." *Id.,* pp. 4-5. No citation is given by Lawrences for the proposition that the degree of discretion afforded a Court in granting a Rule 54(b) Certificate varies with regard to divorces as opposed to "other civil matters."

This Court did cite to *Brinkmeyer* on the record during the August 16, 2011, hearing on Lawrence's motion for a permissive appeal. The Court's reference was not to the "cooling off" period in divorces during which parties have the time to reflect and possibly reconcile, but rather to the following discussion of rule 54(b) certificates:

> In order for a partial judgment to be certified as final and appealable under I.R.C.P. 54(b), the order granting partial judgment must finally resolve one or more of the claims between the parties. *Toney v. Coeur d'Alene School Dist. No. 271,* 117 Idaho 785, 786, 792 P.2d 350, 351 (1990). If it does not, it is error for a trial court to certify any interlocutory order as final under I.R.C.P. 54(b). *Id., see also Rife v. Long,* 127 Idaho 841, 845, 908 P.2d 143, 147 (1995). The purpose of Rule 54(b) is to avoid piecemeal appeals. The decision to grant or deny a 54(b) certificate rests in the sound discretion of the trial judge who is best able to evaluate the situation. *Swope v. Swope,* 112 Idaho 947, 948, 739 P.2d 273, 277 (1987).

135 Idaho 596, 599, 21 P.3d 918, 921. At hearing on the matter, the Court stated it was not persuaded anything had changed in the instant case; the Court had difficulty understanding how granting an interlocutory appeal would serve to avoid piecemeal appeals, and had nothing before it to indicate there would not be two appeals no matter what its decision on August 16, 2011, was.

Plaintiffs object to Lawrences' instant motion, arguing the remaining breach of contract claim "should be resolved by motion practice before trial." Plaintiff's Opposition to Defendant's Motion for Permissive Appeal, p. 2.

> Lawrence complains of delay in the resolution of this case. An interlocutory appeal exacerbates this issue. As noted by the Court, completion of the case allows all issues that potentially could be raised on appeal to advance in a uniform manner. Given the age of this case, an interlocutory appeal is not desirable and further delay potentially prejudices defense of the breach of contract claim.

Id.

Lawrences have not explicitly argued the Court abused its discretion in denying their request for a Rule 54(b) certificate; although, the argument is likely being implicitly made via the Lawrences' moving to, again, disqualify the Court for cause. The Court certainly has nothing before it now which would serve to change the Court's determination on this issue. The Court has recognized the matter as one committed to its discretion and acted within the bounds of its discretion and consistently with the legal standards applicable to the choices available to it, and reached its decision by an exercise of reason. *See Cantwell v. City of Boise,* 146 Idaho 127, 134, 191 P.3d 205, 212 (2008). Neither party has cogently explained how an interlocutory appeal on the

summary judgment and later jury trial on the counterclaim (with a possible appeal following), will result in less judicial resources being expended, compared to a trial on the counterclaim and then one appeal at that time on all issues. The Court on its own accord can find no such legitimate explanation as to how an interlocutory appeal on the summary judgment and later jury trial on the counterclaim (with a possible subsequent appeal) is in the best interest of justice.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court denies Lawrences' motion.

IT IS HEREBY ORDERED the "Motion for Permission to Appeal From an Interlocutory Order", filed by defendants Douglas and Brenda Lawrence is DENIED.

IT IS FURTHER ORDERED all remaining issued to be tried are scheduled for a five-day jury trial beginning November 14, 2011. Should the parties need additional time to prepare for such jury trial, or if five days is not sufficient time within which to conduct the jury trial, it is incumbent upon the parties to notice a hearing with the Court.

DATED this 27th day of September, 2011.

JOHN T. MITCHELL
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Douglas P. and Brenda J. Lawrence
P.O. Box 1027
Coeur d'Alene, ID 83814 (U.S. Mail)

Susan P. Weeks
1626 Lincoln Way
Coeur d'Alene, ID 83814 Fax: (208) 664-1684

_____
Jeanne Clausen, Deputy Clerk of Court