

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**

DENICE ELLISON, et al,)
)
) *Plaintiff,*)
 vs.)
)
) **LANDI GORTON-GIANINO, et al,**)
)
) *Defendant.*)
 _____)

Case No. **CV 2008 9615**

**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFFS'
MOTION FOR ENTRY OF AMENDED
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiffs' Motion for Entry of Amended Judgment, filed on January 14, 2011. Oral argument was held on April 11, 2011. Henry Madsen appeared for plaintiffs and Landi Gorton-Gianino appeared *pro se*.

Plaintiffs Denice Ellison and Christopher Shaw (Ellison and Shaw) filed their Complaint on November 28, 2008, alleging breach of contract, unjust enrichment, conversion, and fraud, *inter alia*, against defendants. Following default by Jeremy Gianino and stipulation for dismissal of Defendants Brenny and Tana Ross, this matter proceeded to a two-day court trial commencing on October 26, 2010. At that trial, Landi Gorton-Gianino (Gianino) represented herself *pro se*. Plaintiffs prevailed at trial. Judgment was entered by this Court on December 1, 2010, against Landi Gorton-Gianino and Jeremy Gianino, in the amount of \$100,000.00, jointly and severally, with the Court reserving jurisdiction to entry of a further order with regard to attorney fees and costs against Gianino individually. Judgment, p. 2, ¶ 3.

On January 14, 2011, counsel for Ellison and Shaw filed a motion for entry of an amended judgment, pursuant to Idaho Rules of Civil Procedure 7, 54(b), and 58(a), asking the Court to amend the Judgment to include an award of attorney fees and costs. Plaintiffs' Motion for Entry of Amended Judgment, p. 1.

II. STANDARD OF REVIEW.

A district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford*, 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). A Motion to Alter or Amend a Judgment, pursuant to I.R.C.P. 59(e), must be filed within fourteen days after entry of Judgment and is reviewed under the abuse of discretion standard. *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007).

III. ANALYSIS.

It would seem counsel for Ellison and Shaw seeks an Order of this Court amending its December 1, 2010, Judgment because a memorandum of costs was not timely filed under I.R.C.P. 54(d)(5). Counsel for Ellison and Shaw denied such was the situation at the April 11, 2011, hearing. Instead, counsel argued the Court has reserved jurisdiction on the issue of attorney fees and costs, but conceded that in doing so, the Court at no time granted an extension of the time requirements of I.R. C.P. 54(d)(5).

Under I.R.C.P. 54(d), a memorandum of costs must be filed no later than fourteen days after entry of judgment and “[f]ailure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right to costs.” I.R.C.P. 54(d)(5). Attorney fee requests “shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs...” I.R.C.P. 54(e)(5). Thus, a request for fees must also be filed no later than fourteen days after

entry of Judgment. Here, Judgment was entered on December 1, 2010. Any memorandum of costs and fees must have been filed by December 15, 2010, or be deemed waived.

Counsel for Ellison and Shaw moved the Court to amend its Judgment to allow for fees and costs pursuant to I.R.C.P. 7, 54(b), and 58(a). Idaho Rule of Civil Procedure 7 deals with forms and time-limits applying to pleadings and motions. Idaho Rule of Civil Procedure 54(b) involves certification of partial judgments as final when more than one claim is presented in an action. And, I.R.C.P. 58(a) sets forth the steps involved in making entry of a judgment final.

None of the rules cited by counsel for Ellison and Shaw are applicable to the relief he seeks. A more proper vehicle may have been a motion to alter or amend a judgment (although altering the Judgment to include a definite amount of fees and costs would have likely violated Gianino's 54(d)(6) rule-based ability to object within fourteen days to both the award of costs and fees generally and the amount specifically), but I.R.C.P. 59 *also* requires the motion be filed within fourteen days of entry of Judgment. I.R.C.P. 59(e).

The Idaho Supreme Court has upheld a district court's allowing an untimely request for fees via filing of an amended memorandum of costs. *Ada County Highway Dist. v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983). And, the Idaho Court of Appeals has ruled that a District Court may, upon motion, exercise its discretion and grant an extension of the fourteen-day limit on filing a memorandum found in Rule 54(d)(5). *Camp v. Jiminez*, 107 Idaho 878, 883, 693 P.2d 1080, 1085 (Ct.App. 1984). *Camp* involved the question of whether an objection to the lack of verification of a memorandum of costs and fees was timely; because the lower court had the discretion

to extend the time for filing a memorandum, and a second timely memorandum cured the verification defect, the award of costs and fees in the case was upheld. *Id.*

Applicable to the instant matter, the Court in *Camp* wrote:

The rule further provides that “[f]ailure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right to costs.” This language plainly prescribes waiver as the consequence of an untimely filing...

Id.

Here, counsel for Ellison and Shaw has set forth no proper authority for the relief sought and has failed to even identify for the Court any reasons for the untimely filing, much less something approaching good cause. Additionally, there was no motion by counsel for Ellison and Shaw seeking that the Court allow an untimely request for costs and fees, or seeking to extend the time within which counsel was to file the memorandum.

At oral argument on April 11, 2011, counsel for Ellison and Shaw claimed that the fact that this Court “reserved jurisdiction” on the issue of attorney fees (which this Court did in the language this Court used in the judgment and the findings of fact), somehow, but without any legal argument, causes the fourteen-day time limit to not be applicable to his clients. The Court is not persuaded by that argument. Nothing was said at that the conclusion of trial that the fourteen-day time limit would be inapplicable, stayed or otherwise done away with. The Motion for Entry of an Amended Judgment is nothing more than an impermissible end run around the time limit imposed by I.R.C.P. 54(d)(5). That is not allowed due to the mandatory language in that rule.

IV. CONCLUSION AND ORDER.

For the reasons stated above, due to the mandatory language in I.R.C.P. 54(d)(5) “[f]ailure to file such memorandum of costs within the period prescribed by this

rule shall be a waiver of the right to costs”, the motion of Ellison and Shaw for costs and fees (improperly framed as a motion for entry of an amended judgment), is denied.

IT IS HEREBY ORDERED the Motion for Entry of an Amended Judgment is DENIED. Any request by Ellison and Shaw for attorney fees is untimely, and is, accordingly, DENIED.

Entered this 12TH day of April, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>
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Landi Gorton Gianino, pro se 517 S. 12 th St. Coeur d’Alene, ID 83814	

Jeanne Clausen, Deputy Clerk