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

BELFOR USA GROUP, INC.,

Plaintiff,

vs.

COEUR D'ALENE LEASING COMPANY, INC., ET AL,

Defendant.

Case No. **CV 2010 3187**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Partial Summary Judgment of plaintiff Belfor USA Group, Inc., (Belfor).

Belfor filed its Complaint on April 16, 2010. Thereafter, counsel for Maurice and Karen Griggs, trustees of the Val & Karen Griggs Living Trust (Griggs collectively), and Lou Vermeer (Vermeer) filed a Notice of Appearance on April 30, 2010. On May 12, 2010, Belfor filed Affidavits of Service, testifying that its process server successfully served the Griggs and Vermeer. On May 11, 2010, Faye Bies (Bies), a member of defendant Beauty Bay Holdings, LLC, (Beauty Bay), filed a notice captioned "Acceptance of Service." This pleading appears to be a Special Appearance, as Bies purports to enter the appearance of Beauty Bay without waiving I.R.C.P 12(b) defenses. Bies' "Acceptance of Service" states all further pleadings and papers, "except process", should be served upon Beauty Bay's registered agent, CT Corporation System in

Seattle, Washington. On May 12, 2010, Belfor filed an Affidavit of Service indicating its process server served process on Beauty Bay via CT Corporation System on April 23, 2010 at 8:30 a.m. Belfor attempted service upon defendant Lewis Kulczzyk on April 28, 2010, and filed an Affidavit of Service on May 12, 2010, indicating it was unable to do so. Belfor also attempted service upon defendant Coeur d'Alene Leasing, through their registered Agent, Bies, on April 26, 2010, but was unable to do so; Belfor's Affidavit of Service was filed on May 12, 2010. Beauty Bay's counsel, Tyler Wirick, filed Beauty Bay's Answer on May 24, 2010. And, on June 2, 2010, counsel for Griggs and Vermeer, Toby McLaughlin filed their Answer.

Belfor filed its "Motion for Order of Default Against Defendants Coeur d'Alene Leasing and Order Allowing Service by Publication on Defendant Kulczzyk" on October 13, 2010, filing a declaration in support thereof on the same date. A copy of Coeur d'Alene Leasing's Answer was received by the parties the morning of the hearing and the motion for default was taken down as moot. The Court granted Belfor's motion to serve Kulczzyk by publication on November 29, 2010.

On March 28, 2011, Belfor filed its Partial Motion for Summary Judgment against Coeur d'Alene Leasing and Beauty Bay Holdings, requesting that the Court dismiss all counterclaims filed "for want of discovery and for want of any factual evidence upon the record to support them." Motion for Partial Summary Judgment, p. 1. Belfor filed its Memorandum in Support of Partial Motion for Summary Judgment, Affidavit of Gary Valkenaar and Declaration of Counsel Milton G. Rowland in support of the dispositive motion on the same date. Coeur d'Alene Leasing/Beauty Bay Holdings filed its Defendants' Brief in Opposition to Summary Judgment on April 18, 2011. This filing was untimely under I.R.C.P. 56. On April 21, 2011, Belfor filed Plaintiff's Reply in Support of its Motion for Summary Judgment. This filing was untimely under I.R.C.P.

56, but understandable given the fact that Coeur d'Alene Leasing/Beauty Bay Holdings had finally responded just three days earlier. Oral argument was held on April 25, 2011. This case is scheduled for a three-day jury trial beginning June 3, 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).

III. ANALYSIS.

Belfor asks this Court to grant it summary judgment on all of Coeur d'Alene Leasing's affirmative defenses as Coeur d'Alene Leasing has not provided any evidence to support its counterclaims or affirmative defenses. Memorandum in Support of Plaintiff Belfor USA Group, Inc's Partial Motion for Summary Judgment, pp. 5, *et seq.* Coeur d'Alene Leasing responds in opposition, arguing that its failure to respond to

discovery requests with regard to its affirmative defenses and counterclaims should have given rise to a motion to compel, not a motion for summary judgment. Brief in Opposition to Summary Judgment, p. 1. Coeur d'Alene Leasing asks the Court to "balance the equities", taking into account Mr. Bies' auto accident in early January 2011 and that any prejudice to Belfor would be minimal. *Id.,* p. 4. To this, Belfor replies Coeur d'Alene Leasing not only untimely filed its opposition to the motion for summary judgment under I.R.C.P. 56(c), but also failed to meet its burden on summary judgment pursuant to I.R.C.P. 56(e). Plaintiff's Reply in Support of Motion for Partial Summary Judgment, pp.3- 4. Belfor notes, "by defendant not meeting its burden and asking the court to construe Plaintiff's motion as one to compel, Defendant attempts to preserve claims for which it has no evidence, essentially creating a four-day trial out of a two-day trial for no good reason." *Id.,* p. 5.

There is simply no authority for Coeur d'Alene Leasing's position in the instant matter. Although a motion to compel *could* have been sought by Belfor, Belfor was under no obligation to only seek the relief Coeur d'Alene Leasing now believes Belfor should have sought. The Idaho Rules of Civil Procedure permit either party to move for summary judgment on all or part of a claim, counterclaim, cross-claim or motion to obtain declaratory judgment after the expiration of twenty days from service of process or a party's appearance. I.R.C.P. 56(a). The motion must be filed at least sixty days before the trial date. *Id.* Here, counsel for Coeur d'Alene Leasing filed an Answer on November 29, 2010, and Coeur d'Alene Leasing concedes receiving discovery requests in December 2010. *See* Brief in Opposition to Summary Judgment, p. 2. It appears to be Coeur d'Alene Leasing's contention that the automobile accident of Faye Bies, and his subsequent inability to correctly answer questions about his business due to his

taking prescription pain medication, should result in the Court converting Belfor's motion for summary judgment on Coeur d'Alene Leasing's counterclaims and affirmative defenses into a motion to compel. Additionally, while Coeur d'Alene Leasing mentions on two occasions the parties' having agreed to stipulate to a trial continuance, no such stipulation has been filed and such a motion is not before the Court. *See* Affidavit of Tyler Wirick, p. 2, ¶ 11; Brief in Opposition to Summary Judgment, p. 2.

Whether or not the parties purport to have agreed to continue the trial date is of little import. The decision to grant or deny a trial continuance is vested in the Court's discretion. *State v. Ward,* 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). "Trial Judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *State v. Carman,* 114 Idaho 791, 793, 760 P.2d 1207, 1209 (Ct.App. 1988), quoting *Morris v. Slappy* 461 U.S. 1, 11, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983). In the instant matter, the Court does not have a motion to continue before it. Coeur d'Alene Leasing's assertion that an agreed-upon continuance between the parties mitigates any possible prejudice to Belfor can be given no weight.

Dispositive of the issue before the Court is the Idaho Supreme Court's decision in *Chandler v. Hayden,* 147 Idaho 765, 215 P.3d 485 (2009). In *Chandler,* the Idaho Supreme Court answered the question of which party nears the burden of production as to a non-moving defendant's affirmative defenses; "we conclude that a nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment." 147 Idaho 765, 771, 215 P.3d 485, 491. The Court held its decision was supported by the language of I.R.C.P. 56(e), which states: "When a

motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of that party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.,* quoting I.R.C.P. 56(e). Chandler gives an excellent discussion as to the four reasons why *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), should be applied in Idaho, making it clear that for purposes of summary judgment, the party who bears the burden of production at trial (Coeur d'Alene Leasing in this case) bears the burden at summary judgment of presenting evidence in support of an affirmative defense in response to that summary judgment motion. 147 Idaho 765, 771, 215 P.3d 485, 491. First, the Idaho Supreme Court found *Harper v. Delaware Valley Broadcasters, Inc.,* 743 F.Supp. 1076 (D.Del. 1990), to be instructive. 147 Idaho 765, 770, 215 P.3d 485, 490. Second, the Idaho Supreme Court distinguished *GECC Financial Corp. v. Jafarian,* 80 Hawaii 118, 905 P.2d 624 (Hawaii 1995). *Id.* Third, the Idaho Supreme Court quoted the portion of *Celotex* that provided: "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* Fourth, the Idaho Supreme Court noted: "Requiring a nonmoving defendant to present evidence in support of an affirmative defense in opposition to a motion for summary judgment is also consistent with the language of I.R.C.P. 56(e), which provides: 'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial.'" *Id.* Indeed, that is all Coeur d'Alene Leasing has done in the present case, relied on its denials of Belfor's allegations in its complaint.

Coeur d'Alene Leasing could look at summary judgment of its affirmative defenses and counterclaims as a harsh result. However, the bar it has to meet at this juncture is very low. Still, Coeur d'Alene Leasing has failed to meet that low threshold. All Coeur d'Alene Leasing would have need to have done would be to truly document Faye Bies' condition. All we have is the Affidavit of Tyler Wirick, counsel for Coeur d'Alene Leasing, that: "In the first part of January, Mr. Bies was involved in a serious car accident", "Mr. Bies was hospitalized for over two weeks" and "Mr. Bies continues to take prescription pain medications that affect his ability to coherently answer questions about his businesses." Affidavit of Tyler Wirick, p. 2, ¶¶ 7-9. No doubt Tyler Wirick is an officer of the Court, and there is no reason to doubt Tyler Wirick's veracity. But Tyler Wirick is not Faye Bies' physician. If Faye Bies is that incapacitated he cannot assist his attorney in his defense, then a physician's affidavit would be expected by this Court, and easily obtained by Bies. Several other facts trouble this Court. It must be kept in mind that Coeur d'Alene Leasing's Answer was filed November 29, 2010 (and it is filed by the same counsel and is similar to the Answer filed by Beauty Bay Holdings on May 24, 2010). In order for Tyler Wirick to satisfy the obligations set upon him under I.R.C.P. 11(a)(1), he would have had to have a good faith belief *at that time* (November 29, 2010) that all the affirmative defenses listed in that Answer were well grounded in fact. Not only that, but Wirick would have had two *more* months (after the Answer and before Bies' car wreck) to acquire *additional* information from his client Bies with which to support those alleged affirmative defenses. This information had to have been gathered at the time the Answer was filed on November 29, 2010, and it is presumed more information was obtained as time marched on toward the June 20,

2011, trial date, which was established and made known to Wirick and his client on October 26, 2010. Finally, these affirmative defenses and counterclaims are document driven. To the extent they are not document driven, they are driven *entirely* by facts that have occurred *in the past*. The affirmative defenses and counterclaims deal with issues *particularly* in Bies' knowledge. Coeur d'Alene Leasing's affirmative defenses are: 1) failure to state a claim, 2) no privity of contract, 3) laches, 4) unjust enrichment, 5) breach of contract by Belfor, 6) lack of consideration, 7) misrepresentation and fraud, 8) estoppel and waiver, 9) statute of frauds, 10) material breach by Belfor and 11) failure to comply with Idaho lien laws. Answer, pp. 5-6. Coeur d'Alene Leasing's Counterclaims are: 1) Breach of Contract, and 2) Negligence. One who finds themselves in the situation Bies and Tyler Wirick found themselves in on November 26, 2010 (the date the Answer was prepared), cannot make these allegations and claims in the Answer *without some basis in fact*. Even if Bies is currently on pain medications, all he needed to do is tell his attorney where the documents are, and even that begs the question: "Did Bies share these doucments with his attorney when Bies' Answer to the Complaint was filed?"

When viewed in this light, summary judgment is not only not harsh, it is the result mandated as a matter of law, based on Coeur d'Alene Leasing's/Bies' inaction. Because Coeur d'Alene Leasing has failed to present even a scintilla of evidence to support its affirmative defenses and counterclaims, no genuine issues of material fact preclude summary judgment on those issues and Belfor is entitled to partial summary judgment in this respect.

IV. CONCLUSION AND ORDER.

For the reasons stated above, Belfor's motion for partial summary judgment must be granted.

IT IS HEREBY ORDERED Belfor's Motion for Partial Summary Judgment is GRANTED, Coeur d'Alene Leasing's counterclaims and affirmative defenses contained in its Answer filed November 29, 2010, are DISMISSED as a matter of fact and law. Coeur d'Alene Leasing retains its general denials set forth in its Answer, because Belfor at all times has the burden of proof on those matters.

Entered this 27th day of May, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 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 #
John Ray Nelson	866-749-9343	D. Toby McLaughlin	208-263-7557
Tyler S. Wirick	208-292-4201		

_____
Jeanne Clausen, Deputy Clerk