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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**

AED, INC., an Idaho Corporation,)
)
) *Plaintiff,*)
)
 vs.)
)
) **KDC INVESTMENTS, LLC, a Virginia LLC,**)
) **and LEE CHAKLOS and KRYSTAL**)
) **CHAKLOS, individually,**)
) *Defendants.*)
)
)
)
 _____)

Case No. **CV 2010 7217**
**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFF AED'S
(SECOND) MOTION FOR
RECONSIDERATION**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This litigation started by plaintiff AED on August 23, 2010, involves the sale and future demolition of a bridge over the Ohio River. AED sold this bridge to defendant KDC via a written agreement entered into on May 20, 2010. AED claims eleven days later, on June 1, 2010, KDC entered into an agreement with AED to have AED perform the demolition work on the same bridge AED had just sold to KDC. This Court quieted title to the bridge in KDC based on the purchase agreement.

Because there is an Order from a federal district judge to have the bridge demolished by December 2011, and because AED's filing of this instant lawsuit brought a halt to KDC's bridge demolition process, KDC has at all times sought to speed this litigation along. Due to the utter lack of basis for this second motion to reconsider filed by AED on February 4, 2011, (AED's "Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment"), this

motion appears to be nothing more than AED's attempt to filibuster KDC's ability to demolish the bridge. This is AED's second "motion for reconsideration" within six weeks. AED now argues that since "The Court ruled that the promise by KDC to hire AED [to demolish the bridge] is illegal...the remainder of the agreement [the purchase agreement] is illegal based on Quiring..." Memorandum in Support of Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 3. This new argument is not based on any new admissible evidence, and misinterprets the Idaho Supreme Court decision in *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

This Court has set forth the factual and procedural history of this case in its December 15, 2010, Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction:

This matter is before the Court on defendant KDC Investments LLC's (KDC) Motion for Preliminary Injunction filed November 17, 2010. This Court finds there are too many unanswered questions to grant such relief.

This lawsuit involves the sale of a bridge across the Ohio River on the Ohio/West Virginia border. Due to a December 23, 2009, Order from Federal District Court in Ohio, that bridge must be demolished no later than December 21, 2011. Affidavit of Krystal Chaklos in Support of Motion for Expedited Hearing, filed October 6, 2010, Exhibit C, p. 1. Defendant KDC bought the bridge from plaintiff AED, Inc. (AED) via what will be referred to as the "purchase agreement", a document signed May 20, 2010. Amended Complaint, Exhibit A. Under the terms of that purchase agreement, KDC assumed responsibility for "proper demolition and removal [of the bridge] on or before June 1, 2011." *Id.*, p. 1. Subsequently, a separate "demolition agreement" between the parties was at least discussed, if not executed. At the end of the "demolition agreement" AED's Eric J. Kelly, Sr. signed the document on June 1, 2010, as did KDC's Krystal Chaklos, also on June 1, 2010. However, the "demolition agreement" which is titled a "proposal" lacks a signature by any person from KDC on the first page "accepting" the agreement. The "purchase agreement" clearly places the responsibility to demolish the bridge on KDC. The "demolition agreement", if it was in fact executed by KDC, places that responsibility on AED. AED filed this lawsuit, and KDC claims the moment AED filed this lawsuit KDC's efforts to demolish the bridge

stopped as a result of a letter sent the United States Coast Guard "...until the court sorts out ownership of the Bellaire Bridge." Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010, Exhibit 2. KDC then moved for a preliminary injunction "...prohibiting AED from repudiating the Purchase Agreement so that KDC Investments can continue its efforts to demolish and remove the Bridge..." Memorandum in Support of Motion for Mandatory Injunction, p. 20.

AED, an Idaho corporation, filed its Complaint and Jury Demand in the instant matter on August 23, 2010. AED alleged defendant KDC Investments, LLC, a Virginia LLC, and defendants Lee Chaklos and Krystal Chaklos individually (hereinafter "KDC" collectively) induced AED to enter into an agreement to sell a bridge to KDC via a promise that AED would be hired to later demolish said bridge. Complaint, p. 1, ¶ 6; Amended Complaint, p. 2, ¶ 9. AED alleges: "Said promise was material to the parties' transaction and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge." Amended Complaint, p. 2, ¶ 9. This allegation is completely contrary to the written language found in the "purchase agreement." The "purchase agreement" places the responsibility for demolition of the bridge squarely and solely upon KDC. Amended Complaint, Exhibit A. AED would only have the right to demolish the bridge if KDC failed to do so. Amended Complaint, p. 2, ¶ 7. AED's Amended Complaint alleges fraud in the inducement and breach of contract, and seeks rescission, damages, or specific performance. Amended Complaint, pp. 3-4. In the Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, filed on November 9, 2010, KDC counterclaims fraud, breach of contract, and seeks a declaratory judgment to quiet title to the bridge. Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, pp. 8-10.

On November 17, 2010, KDC filed its motion for preliminary injunction and memorandum and affidavits in support thereof, asking this Court to enjoin "AED from continuing to breach the sale agreement by repudiating its validity and seeking to rescind the agreement so that KDC Investments may continue the demolition process in order to demolish and remove the Bridge by June 1, 2011." Memorandum in Support of Motion for Mandatory Injunction, p. 2. KDC noticed a hearing for November 24, 2010. AED filed its Objection to Defendants' Motion for Preliminary Injunction on November 18, 2010, arguing only procedural, not substantive, issues with regard to KDC's motion.

On November 22, 2010, KDC filed its Reply to Plaintiff's Objection to Defendant KDC Investments, LLC's Motion for Mandatory Injunction. At oral argument on November 24, 2010, the Court indicated its frustration with both sides: with KDC for not filing its motion for preliminary injunction until November 17, 2010, in spite of the fact that at a hearing held October 22, 2010, this Court set aside that November 17, 2010, date for hearing additional motions; and with AED for not making any substantive argument opposing the preliminary injunction, choosing instead to simply

complain that KDC had violated I.R.C.P. 7(b)(3)(A) by not providing written notice of the motion fourteen days prior to the hearing. At the November 24, 2010, hearing, the Court re-scheduled oral argument on KDC's motion for preliminary injunction to December 6, 2010, providing AED with more than the requisite notice under I.R.C.P. 7(b)(3)(A). At the November 24, 2010, hearing, due to the time-sensitive nature of this case, and with the agreement of counsel for both sides, this Court also scheduled this case for a three-day jury trial beginning February 22, 2011. Following the hearing on November 24, 2010, AED filed a "Motion to Strike Portions of Krystal Chaklos Affidavit." On November 24, 2010, AED also filed the "Affidavit of Mark Wilburn in Support of Plaintiff's Objection to Issuance [sic] of Preliminary Injunction" and the "Affidavit of Eric J. Kelly in Support of Plaintiff's Objection to Issuance [sic] of Preliminary Injunction." On November 29, 2010, AED filed "Plaintiff's Response to Issuance of Preliminary Injunction", providing the Court with AED's substantive arguments regarding KDC's motion for preliminary injunction. On December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction." Also on December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Motion to Strike Affidavits of Eric J. Kelly and Mark Wilburn." On December 3, 2010, KDC filed an "Affidavit of Lee Chaklos in Support of Motion for Preliminary Injunction" and an "Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction".

On December 6, 2010, the same day scheduled for oral argument, AED filed a "Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos" and a motion to shorten time to hear such motion at the hearing scheduled for December 6, 2010. Also on December 6, 2010, AED filed a pleading entitled "Plaintiff's Notice of Filing" to which was attached the Idaho Secretary of State's Corporation Reinstatement Certificate dated December 3, 2010. Oral argument was held on December 6, 2010. At that hearing, counsel for KDC had no objection to AED's motion to shorten time to hear AED's Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos. Argument was then heard on that motion to strike, at the conclusion of which this Court denied AED's Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos.

Next, argument was heard on KDC's motion to strike the affidavits of Eric J. Kelly and Mark Wilburn. At the conclusion of that argument, the Court granted KDC's motion to strike the affidavit of Eric J. Kelly as to all paragraphs except paragraphs 15-22 and the exhibits attached referred to in those paragraphs, and the Court granted KDC's motion to strike the affidavit of Mark Wilburn in its entirety. The Court then heard oral argument on KDC's motion for preliminary injunction, following which the Court took said motion under advisement.

The bridge at issue is the Bellaire Toll Bridge which spans the Ohio River on the border of Ohio and West Virginia, connecting the towns of Bellaire, Ohio and Benwood, West Virginia. Memorandum in Support of Motion for Preliminary Injunction, p. 1. Demolition of the bridge was the subject of a federal lawsuit resulting in an Order requiring AED to

demolish and remove the bridge by December 11, 2011. Amended Complaint, p. 1, ¶ 5.

KDC and AED entered into an Asset Purchase and Liability Assumption Agreement (purchase agreement) on May 20, 2010, in which AED sold the bridge to KDC for \$25,000. Memorandum in Support of Motion for Mandatory Injunction, p. 2. AED's initiation of this litigation in Idaho has brought demolition efforts to a halt, according to KDC. *Id.* KDC now seeks a preliminary injunction "to prohibit AED from continuing to breach the Purchase Agreement by repudiating its validity and seeking to rescind the Agreement." Reply to Plaintiff's Objection to Defendant KDC Investment, LLC's Motion for Mandatory Injunction, p. 4.

Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, pp. 1-6. This Court determined the remaining questions of fact and unresolved issues of law precluded it from granting KDC the injunctive relief it sought. *Id.*, pp. 27-28.

On December 15, 2010, KDC filed its Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and the Affidavits of Randall Schmitz, Lee Chaklos, and Krystal Chaklos in support of the motion. This Court's Pretrial Order, dated November 24, 2010, required the party opposing any motion for summary judgment to serve and file materials objecting thereto no later than 14 days before hearing on the motion. Hearing on KDC's motion for summary judgment was held on January 12, 2011. This Court heard oral argument on AED's motion to reconsider the Court's ruling that AED was not entitled to rescission of the contract on January 26, 2011. On January 31, 2011, the Court issued its Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment and Denying Plaintiff AED's Motion for Reconsideration. On February 3, 2011, the parties stipulated to dismiss Counts I and II of KDC's counterclaim without prejudice. On February 4, 2011, AED filed the motion for reconsideration now before the Court. AED now asks this Court to vacate its earlier decision quieting title of the bridge in KDC, or

alternatively, “set the matter for Jury Trial on the sole issue of whether AED would have sold the bridge without the agreement that AED perform the blast.” Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment, pp. 1-2.

Oral argument on AED’s “Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment” was held on February 14, 2011. At oral argument, this Court took under advisement KDC’s Motion to Strike the Affidavit of Eric J. Kelly in Support of Plaintiff’s Motion to Reconsider Court’s Decision and Order Granting Defendant KDC’s Motion for Summary Judgment. That affidavit of Kelly, filed on February 4, 2011, sets forth how much AED would have spent blasting the bridge, and AED’s memorandum makes the argument as to how much profit AED would have made from blasting the bridge, in an effort to show how important the demolition agreement was to the purchase agreement. As shown below, this is simply more extrinsic evidence that is not admissible, thus, it is not relevant. Additionally, Kelly’s affidavit lacked foundation.

II. STANDARD OF REVIEW.

A trial court’s decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

III. ANALYSIS.

In its Memorandum in Support of Motion for Reconsideration, AED argues the purchase agreement between the parties is illegal because the consideration upon

which the agreement was based is illegal. Memorandum in Support of Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 1. AED argues:

In this case, the agreement to sell the bridge was contingent upon execution and performance of a contract [sic] for AED to blast the bridge. KDC did in fact execute a document for AED to perform the work and has clearly stated that it had a present intent to perform that obligation incident to the agreement to buy the bridge. This consideration for the sale of the bridge consisted of the TWENTY-FIVE THOUSAND DOLLARS AND NO/100 CENTS (\$25,000.00) recited in the contract, as well as the illegal agreement to perform the blasting work.

Id., p. 2. It is important to note that there is no citation given to the record for these three sentences written by counsel for AED. Perhaps the reason for a lack of citation is the fact that there *is* nothing in the record which supports any of these three sentences. The purchase agreement does not reference the demolition agreement in any way, and the purchase agreement contains a merger clause. The purchase agreement was entered into eleven days before the demolition agreement, if the demolition agreement was even entered into. Since the purchase agreement is clear and unambiguous and contains a merger clause, any extrinsic evidence is barred by parol evidence. Additionally, any extrinsic evidence would not be allowed because AED has not asked this Court to reconsider its dismissal of AED's fraud claims. But, the ultimate frustration the Court has with AED's counsel's failure to cite any portion of the record comes from the fact that even *if* there were some basis to allow extrinsic evidence (there isn't), AED's counsel's own client, Eric J. Kelly, Jr., testified that AED's proposal to blast the bridge was just that, a "proposal", and that the proposal was separate from sale of the bridge. Deposition of Eric J. Kelly, Sr., January 27, 2011, p. 76, L. 24 – p. 77, L. 13. AED's counsel then makes the following claim: "Here, there is no question that the sales contract would not have been signed but for the illegal consideration of the

blasting agreement.” Memorandum in Support of Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment, p. 1. Counsel for AED repeats this mantra: “In this case, the undisputed evidence is that AED would not have sold the bridge to KDC without the commitment by KDC to hire AED to blast the bridge.” *Id.*, p. 4. Repetition does not make something true. Repetition does not create admissible evidence. Again, there is no citation to support these claims by AED’s counsel and these bald claims are completely unsupported by any admissible evidence, and, in fact are contradicted by AED’s own client Eric J. Kelly, Sr. AED states it would not have entered into the purchase agreement to sell the bridge to KDC but for the agreement that AED would perform blasting work. *Id.*, p. 3. AED argues the demolition agreement cannot be separated from the purchase agreement; “[b]oth are illegal if the blasting contract is illegal.” *Id.*, p. 4. AED cites *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997), as support for its contention that because the sale of the bridge was based on illegal consideration (the demolition contract determined by this Court to be an illegal contract), the purchase agreement is unenforceable and the Court should vacate the portion of its Order declaring KDC the owner of the bridge. *Id.*, p. 5. In the alternative, AED requests the Court set for jury trial the sole issue of whether AED would have sold the bridge without the agreement that AED would perform demolition of the bridge. *Id.* But the issue of “whether AED would have sold the bridge without the agreement that AED would perform the demolition of the bridge” is completely irrelevant given the contract language in the purchase agreement.

KDC responds AED’s argument that the demolition agreement was consideration for the purchase agreement is directly contrary to all admissible evidence. Defendants’

Memorandum in Opposition to Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 2. KDC argues the purchase agreement itself recites the consideration which supported it (which does not include the demolition agreement later determined by this Court to be illegal). *Id.*, pp. 3-4. KDC also notes the purchase agreement contains a merger clause, which limits the parties' agreement to that set forth in the purchase agreement itself. *Id.*, p. 4. KDC argues:

According to the plain and unambiguous language of the Purchase Agreement, the consideration for the Bridge was \$25,000 plus those additional promises expressed within the terms of the Purchase Agreement. If the promises are not expressed within the Purchase Agreement, they are not part of the consideration for the sale of the Bridge. Nowhere within the Purchase Agreement is a separate agreement for AED to blast the Bridge discussed or even referenced. Contrary to AED's assertion, the illegal "demolition agreement" was not part of the consideration for the purchase and sale of the Bridge, nor was the sale contingent upon anything.

Id., pp. 4- 5. KDC notes Eric Kelly's deposition testimony in which he stated the purchase and demolitions agreements were separate; KDC posits the demolition agreement's being illegal has no bearing on the validity of the purchase agreement. *Id.*, p. 5. Finally, KDC argues AED appears to rely on extrinsic evidence to change the terms of the purchase agreement (which AED does not claim is ambiguous), in violation of the parol evidence rule. *Id.*, p. 6.

AED replies:

KDC argues that this Court should not consider the fact that the agreement to sell the bridge was entirely dependent on the agreement that AED be allowed to blast the bridge because this Court ruled that AED could not prove that KDC entered in the blast agreement without having any intention to perform that agreement.

Plaintiff's Reply to Defendants' Response on Motion to Reconsider, p. 1. AED goes on to state that parol evidence is always admissible to show the illegality of a contract. *Id.*,

p. 2.

AED claims the issue of illegality can be raised at any time. Case law supports that proposition, even in light of a merger clause. (“parol evidence rule does not apply to averments of fraud, misrepresentation, mutual mistake, or other matters which render a contract void or voidable.” *Tusch Enterprises v. Coffin*, 113 Idaho 37, 45, 740 P.2d 1022, 1030 (1987)). Here, AED argues since the “demolition agreement” has been found to be illegal, and since the demolition agreement formed the consideration for the “purchase agreement”, the purchase agreement is thus, illegal, and the purchase agreement should be set aside and title in the bridge quieted in AED. In making that argument, AED asks this Court to make unsupported inferential leaps and simultaneously ignore evidence. To buy into AED’s argument, the Court would have to infer the demolition agreement formed *the* consideration of the purchase agreement. That inference would ignore the fact that the according to the language of the purchase agreement, the purchase agreement is supported *solely* by \$25,000.00 in consideration. The consideration is in fact just the opposite of what AED now claims. This Court would have to ignore the fact that the purchase agreement does not make one reference or even an implication that AED could blast the bridge, nor does it infer that a demolition agreement is in the making or is in any way being contemplated by the parties. This Court would have to ignore the fact that the purchase agreement was entered into before the demolition agreement, but after any discussions about the possibility of AED blasting the bridge had occurred, and yet, the purchase agreement is completely silent on the issue. Had the purchase agreement been entirely supported by illegal consideration, AED might be able to bring in parol evidence. But here, the purchase agreement is still supported by significant consideration in the amount of

\$25,000.00. That alone makes the purchase agreement “legal”. If other *additional* consideration turns out to be illegal, that does not turn the “legal” consideration (the \$25,000.00) into illegal consideration. Had the illegal demolition agreement been entered into *before* the purchase agreement, then there might be more to AED’s argument. But here, the demolition agreement did not even exist at the time the purchase agreement was entered into.

If AED’s counsel truly thought the purchase agreement was illegal due to a lack of consideration due to the demolition agreement being illegal, AED should have specifically raised such issue in its complaint or its amended complaint. It did not. There has never even been a prior argument that the purchase agreement was ambiguous, let alone illegal.

What has happened is, a couple of weeks ago this Court found the demolition agreement to be illegal (due to AED’s failure to obtain the proper licensing in West Virginia), then, AED’s counsel took that new legal determination, overlaid it on the *Quiring* case, and came up with this creative argument. The truly disturbing feature to AED’s argument is it ignores the fact that it was AED’s own foibles that caused the demolition agreement to be illegal. In essence, AED argues: “We screwed up and didn’t get a valid contractor’s license, which caused the demolition agreement to be invalid, and even though the purchase agreement doesn’t reference the demolition agreement or our [AED’s] ability to blast, and even though we’ve kept the \$25,000 consideration for the purchase agreement, we would in any event like this Court to find that the purchase agreement *the* consideration of the demolition agreement, and since it was illegal, find the purchase agreement was illegal, and give us the bridge back.” That takes some nerve. To understand the complete irrationality of AED’s argument, this

Court's decision on the illegality of the demolition agreement must be reviewed. This

Court wrote, just over two weeks ago:

KDC argues AED's breach of contract claim on the "demolition agreement" must be dismissed because the demolition contract was illegal given AED's failure to obtain a valid contractor's license before entering into the demolition agreement. Memorandum in Support of Motion for Summary Judgment, pp. 9-12. KDC claims: "It is undisputed that AED did not have its West Virginia contractor's license at the time of entering the demolition agreement and did not receive it until October 17, 2010." *Id.*, p. 11. No citation is given for this claim. The Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8, places the fact in the record, and places the burden on AED to rebut the claim. Krystal Chaklos of KDC states:

KDC did not pay the \$30,000 to AED because AED never supplied any of the necessary permits or licenses to perform operations in West Virginia. KDC repeatedly informed AED that it needed a West Virginia contractor's license to perform the blasting. However, at no time did AED ever provide proof that it obtained a West Virginia contractor's license.

Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8.

It is KDC's contention that the demolition agreement between the parties is illegal, and therefore void, because it amounts to a contract to perform an act prohibited by law; that is, AED entered into the demolition agreement without the required West Virginia contractor's license. *Id.*, p. 9. AED does not deny it lacked a contractor's license when it entered into the contract. AED instead argues the *purpose* of the contract was not illegal, thus, the contract itself is not rendered illegal. Response to Summary Judgment, p. 5. AED states it had the ability to obtain a valid West Virginia contractor's license (and eventually did so), and further, West Virginia law does not render a contract illegal for failure to obtain proper government approval. *Id.*, p. 6.

KDC cites for this Court the Idaho Supreme Court case *Trees v. Kersey*, 138 Idaho 3, 56 P.3d 765 (2002), as being factually similar. *Id.*, p. 10. AED states the purpose of the agreement here, unlike the one in *Trees*, was not to break the law. Response to Summary Judgment, p. 5. In *Trees*, the general contractor plaintiff lost its public works license and bonding capacity, but entered into an agreement with a second general contractor, "which provided that the Kersseys would bid on the project in their name, procure the bond, insurance, and pay the bills, and Trees would be responsible for everything else, including acting as the general contractor on the job." 138 Idaho 3, 5, 56 P.3d 765, 767. In Idaho, an illegal contract is one which "rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy." *Trees*, 138 Idaho 3, 6, 56 P.3d 765, 768, citing *Quiring v. Quiring*, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997). As quoted by KDC, a contract "made for

the purpose of furthering any matter or thing which is prohibited by statute...is void.” *Kunz v. Lobo Lodge*, 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App. 1999). Memorandum in Support of Motion for Summary Judgment, p. 11. The District Court in *Trees* had enforced the illegal contract between the parties, finding that a joint venture existed. The Idaho Supreme Court found this to be error. 138 Idaho 3, 9-10, 56 P.3d 765, 771-72. However, because of the unique facts of the case, particularly the District Court’s finding that Kerseys had committed many instances of fraud independent of the wrong committed to the public, the Idaho Supreme Court opted not to strictly apply the illegality doctrine, but rather applied a fraud exception. 138 Idaho 3, 10, 56 P.3d 765, 772. (holding the Kerseys could not benefit from the joint venture agreement, engage in fraudulent conduct, and then seek to avoid enforcement of the agreement.)

In their Purchase Agreement in this case, AED and KDC agreed the terms of the agreement be controlled and interpreted according to Idaho law. Purchase Agreement, p. 11, ¶ 36. Such choice of law provisions are addressed by Idaho Code § 28-1-105:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or such other state or nation shall cover their rights and duties. Failing such agreement, this act applies to transactions bearing an appropriate relation to the state.

I.C. § 28-105(1). The requirements of the Idaho Contractor Registration Act (and/or the Idaho Public Works Contractors Act) and the West Virginia Contractor Licensing Act are substantially similar. Both require a contractor to be registered or licensed in order to engage in the business or act in the capacity of a contractor or when holding himself out as a contractor. See I.C. § 54-1902(1); I.C. § 54-5201(1); W.Va.Code § 21-11-1. Both the Idaho and West Virginia Codes contemplate the licensing and registration requirements to apply when a person submits a bid to perform construction; there is no requirement that actual construction be performed. I.C. § 54-1901(b); I.C. § 54-5203(4)(a); W.Va. Code § 21-11-3(c). Because of the choice of law provision in the Purchase Agreement, Idaho law controls regarding submission of bids and entering into contracts to perform construction while not properly licensed and/or registered.

A court has a duty to *sua sponte* raise the issue of illegality of a contract. *Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445 (2004) (holding a contract between a general contractor and subcontractor on a public works project was void for failure of the subcontractor to have a public works license and that both the district courts and Appellate Courts of Idaho have a duty to raise the issue of illegality.); *ParkWest Homes, LLC v. Barnson*, 149 Idaho 603, ___, 238 P.3d 203, 208 (2010). In Idaho, where a public works contractor does not fall within an exemption listed in I.C. § 54-1903, and is required to have a

public works license, the failure by a subcontractor to have the requisite license will render its contract with a general contractor illegal, “because the contract constituted an agreement to perform an illegal act.” *Barry*, 140 Idaho 827, 832, 103 P.3d 440, 445. The Idaho Supreme Court in *Barry* found the contract between a general contractor and the illegally unlicensed subcontractor to be illegal and therefore unenforceable, but then went on to determine whether either party was entitled to its damages outside the existence of a legal contract; the Court held the illegally unlicensed subcontractor was entitled to recover under the theory of unjust enrichment. 140 Idaho 827, 833, 103 P.3d 440, 446. The *Trees* decision, as argued by AED, is likely inapposite as the purpose of the contract in *Trees* was from its inception to engage in illegal behavior.

Here, the facts are more similar to those in *Barry*. The contract would have been illegal by virtue of AED’s failure to properly register/and or be licensed. In the instant matter, KDC’s repudiation of the contract was based, at least in part, upon AED’s failure to obtain the necessary licensing/registration. The date on which precisely AED obtained its West Virginia contractor’s license is unclear, but likely did not happen until October 17, 2010. It is undisputed that AED did not have its West Virginia contractor’s license at the time of contracting. In his affidavit, dated November 24, 2010, Mark Wilburn testifies AED “has acquired all necessary permits to demolish the bridge, other than permission of the United States Coast Guard.” Affidavit of Mark Wilburn, p. 1, ¶ 3. But November 24, 2010, is not the relevant time period.

Even in the light most favorable to AED, the non-moving party, the motion for summary judgment by KDC on the issue of illegality of the underlying demolition agreement must be granted. Because a contractor must be licensed at the time a bid is submitted, and AED has presented this Court with no evidence as to what precise date upon which it became licensed, AED could not have properly submitted the bid in *spring* of 2010 and then later secure appropriate licensing in the *fall* of 2010. At the time of actual *performance* of this executory contract, it is likely that AED could have had, or perhaps even would have had, any necessary licensing/registration to perform the contract as agreed upon by the parties. However, there is simply nothing before the Court to indicate that this licensing/registration was in place at the time AED submitted the bid which gave rise to the demolition agreement.

KDC is entitled to summary judgment on its claim that AED lacked the required license and lacked the required permits at the time it entered into the demolition agreement. The demolition agreement is an illegal contract. KDC is entitled to summary judgment against AED on its breach of contract claims on that agreement.

Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration, pp. 12-16. After re-reading this decision, in addition to the obvious fact that it was AED’s mistake in not

obtaining the proper licensing that cause the demolition agreement to be illegal, another fact should jump out at the reader. The *purpose* of the demolition agreement was to, oddly enough, demolish a bridge. AED didn't have the proper licensing to do that job at the time it entered into the demolition agreement, which meant, by law, AED lacked the ability to enter into that demolition agreement. The *purpose* of the purchase agreement was to *sell* the bridge to AED. No special licensing is required to sell the bridge. As just mentioned, this Court wrote:

In Idaho, where a public works contractor does not fall within an exemption listed in I.C. § 54-1903, and is required to have a public works license, the failure by a subcontractor to have the requisite license will render its contract with a general contractor illegal, "because the contract constituted an agreement to perform an illegal act." *Barry*, 140 Idaho 827, 832, 103 P.3d 440, 445.

Id., p. 15. Thus, AED's demolition agreement with KDC is an agreement to perform an illegal act (due solely to AED's own negligent act in failing to get the proper licensing, an issue only AED controlled), and thus, an illegal agreement. However, nothing about AED's negligent act caused AED to be unable to convey title to the bridge eleven days before any demolition agreement was entered into. Nothing about AED's own negligent act in failing to obtain the proper licensing caused AED to lack the capacity to contract with KDC to sell KDC the bridge.

To allow AED the ability to use AED's own error in failing to get the required licensing (which seven months later this Court determined caused the demolition agreement to be illegal), to now have this Court also declare the purchase agreement illegal, would allow AED, only with the benefit of hindsight (this Court's decision two weeks ago) to transcend both space and time, as only AED knew at the time that it lacked the required license, to invalidate the sale of the bridge. This would allow any party in AED's position to surreptitiously create its own poison pill, to be used later when

that party finds such position advantageous. This Court, and all of contract law, will not countenance such an absurd result.

AED contends that *Quiring* is directly on point as it also dealt with a signed contract making no mention of a separate, illegal agreement, but which would not exist but for the separate illegal agreement. “*Quiring* is directly on point and because the execution of the sales contract was entirely dependent on the illegal blast contract, the sales contract is also illegal.” Plaintiff’s Reply to Defendants’ Response on Motion to Reconsider, p. 2.

In *Quiring*, the case relied upon by AED, divorcing spouses appeared before a notary at a title company in Nampa, Idaho and signed an agreement (later held to be illegal as against public policy) and a quitclaim deed. 130 Idaho 560, 562, 944 P.2d 695, 697. Lynn Quiring (Lynn) had accused Ron Quiring (Ron) of sexual impropriety and allegedly threatened to contact law enforcement if Ron did not quitclaim the couple’s residence to her. Ron drafted a handwritten agreement stating he would relinquish his interest in the residence so long as: any and all past differences be forgotten, the parties part amicably with no further contact, Ron would pay no further compensation as his amount of equity in the home compensated his wife and children for any support until the children reached an age where no further support was required, and that a divorce was pending and the details of personal property in the home would be separately agreed upon. *Id.* The Idaho Supreme Court found the consideration to be that “Ron’s acquiescence in the quitclaim deed was supported by Lynn’s acquiescence in the agreement. 130 Idaho 560, 567, 944 P.2d 695, 702. The Court held the agreement was unenforceable as against public policy for two reasons: (1) Lynn could not contract to refrain from contacting law enforcement regarding allegations

of sexual improprieties with a child, and (2) the quitclaim deed conveyed property to Lynn based on consideration that amounted to obtaining the transfer of property by threat of arrest or exposure to hatred, contempt, or ridicule. *Id.* Ron testified that the agreement meant Lynn would not report the alleged sexual improprieties to law enforcement, amounting to theft by extortion. *Id.* Because the Agreement was held illegal, and the agreement formed the sole consideration for the quitclaim deed, the magistrate's distribution of property according to the agreement was reversed and the determination giving Lynn sole title to the property through the quitclaim deed was reversed. 130 Idaho 560, 568, 944 P.2d 695, 703. In the present case, the purchase agreement is supported by consideration (the \$25,000.00), the purchase agreement specifically states the consideration is limited to what is expressed to be consideration in the purchase agreement and nowhere in the purchase agreement is the demolition agreement ever discussed.

Quiring is not on point. First of all, *Quiring* is distinguishable from the instant matter **temporally**. In *Quiring*, the agreements to refrain from contacting law enforcement in violation of I.C. § 16-1619 and the agreement to transfer a quitclaim deed by threat in violation of I.C. § 18-2403 were entered into *at the same time*. The agreements were executed before the same notary at the same time. In the present case, on the other hand, it is undisputed that the purchase agreement was entered into on May 10, 2010. A separate demolition agreement *may* have been entered into by the parties on June 1, 2010, although even that is unclear because the demolition agreement is entitled a "proposal" and no agent of KDC's signed the demolition agreement's first page, accepting the agreement, there may remain some question regarding the propriety of the agreement. Nonetheless, because the two agreements in

the instant matter are dated over three weeks apart, and the two agreements in *Quiring* occurred simultaneously, *Quiring* is simply not instructive. Second, in addition to the temporal distinction, the instant matter is distinguishable from *Quiring* **factually**. In *Quiring*, the agreement to refrain from contacting law enforcement in violation of I.C. § 16-1619 and the agreement to transfer a quitclaim deed, were consideration for each other. The two agreements were two sides of the same coin. In the present case, there is no reference in the purchase agreement to allow AED to perform the demolition of the bridge it was selling to KDC.

It is patently obvious AED *believes* it had a promise by KDC that KDC would use AED to blast the bridge. AED has a three-fold problem promulgating this belief. First, AED has no admissible evidence to prove such “belief” because the purchase agreement it entered into is not ambiguous. Second, Kelly’s deposition cited above shows the “belief” is at the very least internally contradicted by AED, if not unfounded. Third, from a legal standpoint, this belief is irrelevant. The intention of the parties to a contract is determined by what intention is expressed by the language used; the issue is *not* the intention existing in the minds of the parties. *Tapper v. Idaho Irr. Co.*, 36 Idaho 78, 210 P. 591 (1922). *See also Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965) (intent of parties to written agreement is to be ascertained from the language contained therein); *McCallum v. Campbell-Simpson Motor Co.*, 82 Idaho 160, 349 P.2d 986 (1960) (a contract must be construed according to the plain language used by the parties); *Wood v. Simonson*, 108 Idaho 699, 701 P.2d 319 (Ct.App.1985) (when the language of a contract is clear, the meaning of that contract and the intent of the parties must be determined from the plain meaning of the contract’s own words).

What KDC argues, and what has not been properly disputed by AED, is that the

purchase agreement was a separate agreement from the demolition agreement. Thus, there is no reference in the purchase agreement to any existing or future demolition agreement. This Court has found the purchase agreement is not ambiguous. Absent a showing by AED that the purchase agreement was ambiguous (which AED has failed to do), this Court cannot consider parol evidence and alter the written agreement of the parties. See *Cannon v. Perry*, 144 Idaho 728, 170 P.3d 393 (2007) (parol evidence is admissible to clarify an ambiguous contract). This Court has not determined the purchase agreement to be illegal, and there is simply nothing before the Court (other than Eric Kelly's arguably self-serving affidavit) to indicate that the demolition agreement was to form a portion of the consideration supporting the purchase agreement, which was entered into more than one week prior to the demolition agreement and makes no reference to it.

IV. CONCLUSION AND ORDER.

For the reasons set forth above,

IT IS HEREBY ORDERED AED's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED KDC'S Motion to Strike the Affidavit of Eric J. Kelly in Support of Plaintiff's Motion to Reconsider Court's Decision and Order Granting Defendant KDC's Motion for Summary Judgment is GRANTED.

Entered this 14th day of February, 2011.

John T. Mitchell, District Judge

Certificate of Service

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

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