

STATE OF IDAHO }  
COUNTY OF ~~KOOTENAI~~ } ss shoshone  
FILED: 1/12/12  
AT 10:35 O'CLOCK AM  
CLERK, DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE**

	)	<b>CASE NO. CV-2011-441</b>
HECLA LIMITED, a Delaware corporation,	)	
	)	
Plaintiff,	)	MEMORANDUM OPINION AND
	)	ORDER RE: HECLA'S MOTION
v.	)	FOR SUMMARY JUDGMENT
	)	AND DEFENDANT'S MOTION
MAX LARSON, KAREN HILL, JOHN DOE,	)	SUMMARY JUDGMENT
PERSONAL REPRESENTATIVE OF THE	)	
ESTATE OF NORMA ZIMMER, LEMPI	)	
LARSON, WAINO LINDROOS, EMMA	)	
NELSON, EVA HILL, EINO WILLIAM	)	
LINDROOS, and all unknown heirs and	)	
devisees of the above persons, and all	)	
unknown owners, unknown heirs, and devisees	)	
of the named Defendants that may be	)	
deceased, unknown spouses of the Defendants)	)	
that may be married, and all other persons	)	
claiming or who might claim any right, title,	)	
estate or interest in or lien or encumbrance	)	
adverse to, Plaintiff's ownership, or any cloud	)	
upon Plaintiff's title, to the real property	)	
described below, or any part thereof, whether	)	
such claim be present or contingent, with	)	
respect to:	)	
	)	
The subsurface mineral estate underlying the	)	
following described real property:	)	
	)	
Northeast Quarter (NE1/4) of Section	)	
Thirty-six (36), Township Forty-eight (48)	)	

North, Range Five (5) East, B.M., Shoshone	)
County, Idaho, (less right-of-way for railroad	)
and other purposes) containing approximately	)
142.5 acres;	)
	)
	)
Defendants.	)

William F. Boyd, RAMSDEN & LYONS, LLP, for Plaintiff Hecla Limited, LLC.

Mary V. York, HOLLAND & HART, LLP, for Defendants Max Larson, the Estate of Max Larson, Karen Hill, Mark Zimmer as Executor of the Estate of Norma Zimmer and Trustee of the Zimmer Survivor Trust.

**I. FINDINGS OF FACT**

Most of the facts of this case are not disputed. Gust Lindroos owned two parcels of property, totaling approximately 213.27 acres, in Shoshone County. Gust had five children during his first marriage: Lempi Larson, Waino Lindroos, Emma Nelson, Eva Hill, and Eino William Lindroos. Gust subsequently married Selma. Gust died on March 13, 1940, and Selma Lindroos was appointed the administratrix of Gust's estate.

Gust's children and the named Defendants are the heirs of Gust Lindroos' estate ("Gust's Heirs"). Kay Larson (deceased), Max Larson, and Norma Zimmer (deceased) are the children of Lempi Larson, and they and their children have an interest in the Gust Lindroos estate, as well as the Norma Zimmer Estate and the Zimmer Survivor Trust. Karen Hill is the daughter of Eva Hill, and conveyed any interest she had in the estate of Gust Lindroos to the Norma Zimmer Estate and Zimmer Survivor Trust. Norma's son Mark Zimmer is the executor of the Norma Zimmer Estate and trustee of the Zimmer Survivor Trust. Elma Sacco, Nancy Sullo, and Joyce Robins are the children of Waino Lindroos. Barbara Parker and Margaret Heuiki are the children of Emma Nelson, and Gary Lindroos and William B. Lindroos (deceased) are the children

of Eino William Lindroos. William B. Lindroos is survived by Doreen Lindroos. Gust's Heirs have the following interest in the Gust Lindroos estate: Max Larson 1/15, Norma Zimmer 1/15, Kay Larson 1/15, Kay Larson's three children 1/45 each; Elma Sacco 1/15, Nancy Sullo 1/15, Joyce Robins 1/15; Barbara Parker 1/10, Margaret Heuki 1/10; Karen Hill 1/5; Gary Lindroos 1/10, Doreen Lindroos 1/10.

Gust's estate was not immediately probated. On September 5, 1951, after Gust's death, Selma and S.K. Garrett entered into an "Agreement to Purchase and Option Contract" ("Cortez Contract") regarding the two parcels of property owned by Gust.<sup>1</sup> According to Paragraph 1 of the Cortez Agreement, Selma agreed to "sell" and S.K. Garrett agreed to "purchase" one of the parcels, known as the Nystrum Property, for \$4,500. The proceeds of the sale were to be used to "discharge" a mortgage on the Nystrum Property in the amount of \$700 and the rest paid to Selma.

The second parcel, known as the Section 36 parcel, is addressed in Paragraph 2 of the Cortez Contract as follows:

The party of the first part hereby agrees to sell to the party of the second part and the second party hereby agrees to buy the following described property, to-wit:

Northeast Quarter (NE1/4) of Section Thirty Six (36), township forty-eight (48) North, Range Five (5), E. B. M. Shoshone County, Idaho, (less right-of-way for railroad and other purposes), containing approximately 142.5 acres.

The parties agreed that the price of the property would be "\$50,000 payable as royalties upon all ores produced from the property . . . at a rate of 5% of the net smelter returns on said ores." S.K. Garrett agreed to pay Selma \$150 per month "for life" as advance royalties, but the payments would not "accrue" to Selma's heirs.

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<sup>1</sup> The Cortez Contract was recorded in Shoshone County on September 7, 1951.  
MEMORANDUM OPINION AND ORDER RE: HECLA'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (HECLA Limited v. Max Larson, et al., (CV-2011-441)) - 3

The Cortez Contract allowed Selma “the use and benefit of the surface of [Section 36] until [S.K. Garrett] shall purchase the right to use such portions thereof,” and that Selma would have during her lifetime the “exclusive use . . . of the surface rights to a ten (10) acre tract surrounding her farm buildings which she shall designate and which [S.K. Garrett] shall mark upon the ground.” (Paragraph 3, Cortez Contract.) S.K. Garrett was allowed to conduct exploration, mining and processing activities on Section 36 according to numerous standards and restrictions set forth in the Cortez Contract. (Paragraphs 4-6, Cortez Contract.) Notably, Paragraph 6, states that “it is his intention to proceed diligently with the mineral exploration of such property.”

Regarding taxes, the parties agreed that S.K. Garrett would “pay promptly when due any and all state and county taxes which shall be levied upon said property beginning with said taxes for the second half of the year 1951, except that such taxes as may be levied upon the 10 acres of land reserved to the use of [Selma] during her lifetime which taxes shall be paid by the first party.” (Paragraph 8.)

Paragraph 10 of the Cortez Contract required that Selma “execute a good and sufficient deed to [Section 36] and deposit the same in escrow with the Idaho First National Bank, Wallace, Idaho . . . This contract shall be instructions to deliver said deed to [S.K. Garrett] or his assignees at such time as the royalty hereunder shall have been completed.” The parties agreed that the Cortez Contract would bind the “parties hereto, their heirs, successors, and assigns,” and further agreed in Paragraph 13 that S.K. Garrett would expend up to \$500 to repair certain fences and barns on Section 36, as well as purchase animal feed and some personal items for Selma.

As required by Paragraph 9, S.K. Garrett formed the Cortez Silver-Lead Corporation ("Cortez Corp.") and assigned his interest in the Cortez Contract to the Cortez Corp. on October 24, 1952. Selma died on February 26, 1955, and left her property to a "Lahja Silvi Lehvilla" of Finland. After her death, there was some question regarding whether Selma had a community interest in Section 36 such that the property was part of her estate, or whether Section 36 was Gust's separate property and therefore remained with estate. As a result, in 1955 the Cortez Corp. entered into an "Agreement" with Gust's Heirs ("1955 Agreement"). According to the 1955 Agreement, the Cortez Corp. had 1) paid Selma \$4,500 for the Nystrum Property and discharged the \$700 mortgage, 2) paid Selma \$150 per month for 40 months, and 3) made \$500 of purchases and repairs as per Paragraph 13 of the Cortez Agreement. The 1955 Agreement does not reference whether 1) a deed was executed and placed in escrow, 2) the ten acre parcel was marked as per Paragraph 3, or 3) whether the Cortez Corp or S.K. Garrett paid the taxes on Section 36 as per Paragraph 8.

The parties also agreed as follows:

1. Second parties hereby ratify and adopt as their own said [Cortez Contract] of September 5, 1951, entered into by and between the said S.K. Garrett, acting on behalf of said Cortez Silver-Lead Corporation, and the said Selma Lindroos, including in said adoption the performance made thereunder to date by first party to said Selma Lindroos.
2. [Cortez Corporation] hereby agrees, subject to all the terms and conditions of said [Cortez Contract] to render performance to [Gust's Heirs], and each of them, as their interests in said 142.5 acre tract may ultimately be determined by the Probate Court of Shoshone County, Idaho, or by such other Court as may have or acquire jurisdiction to resolve conflicts concerning the heir ship of said property, or as such interest may be determined by agreement, if any, between second parties and said Lahja Silvi Lehvilla.

3. [Cortez Corporation] agrees that it will in no way oppose or contest any claim to said 142.5 acre tract which [Gust's Heirs], or any of them, may desire to make.

Each of Gust's five children signed the document.

On February 4, 1957, the Shoshone County probate court issued a "Decree of Distribution" ("1957 Decree") stating that Section 36 was the separate property of Gust Lindroos, and that Gust's Heirs maintained an equal interest in Section 36. On July 16, 1962, Gust's Heirs sold the surface estate of Section 36 to Florence C. Angle.

Gust's Heirs provide documentary evidence that after the probate court entered the 1957 Decree the Cortez Corp. attempted to compel performance of Paragraph 10 of the Cortez Contract, and induce Gust's Heirs to execute quitclaim deeds to Section 36 for placement in escrow. (Exhibits E and F, Affidavit of Mary York.) The Cortez Corp. attempted to accomplish performance by sending Gust's Heirs letters on August 5, 1958 and October 3, 1958, with form quitclaim deeds for Gust's Heirs to execute. The letters to Gust's Heirs from the Cortez Corp. are unsigned and the deeds attached to the letters were not executed. Notably, the letter dated October 3, 1958 states:

Cortez has now entered into a contract with Hecla and Bunker Hill to explore the Lindroos property from the west drift of the Silver Mountain Property. Hecla is the operating company and is presently running diamond drill holes from the west for the drift, and if the work is abandoned it will never again be possible to enter this deep drift to explore the Lindroos property.

Hecla has told us that it will absolutely not continue this program unless each of you place a deed in escrow with the Idaho First national Bank of Wallace, Idaho, to be delivered to Hecla after the full purchase price has been paid. This will mean that the chance to explore this property and perhaps get your money for you will be lost forever.

(Ex. E, Aff. York.) There is no evidence presented that Gust's Heirs signed the quitclaim deeds after receiving this letter.

The Cortez Corp. later assigned its interest in the Cortez Contract to Hecla Mining Co., now Hecla Limited, on October 21, 1965 ("1965 Assignment"). Regarding the payment of taxes on the property as per Paragraph 8, there is some evidence. It appears that the surface rights and possibly the mineral subsurface rights to Section 36 were divided and sold to various individuals who subsequently paid the surface taxes on the parcels. According to the Affidavit of Mary York, Section 36 now consists of sixteen parcels with separate tax identification numbers. Attached to the Affidavit of York are tax records from Shoshone County showing that between 1997-2011 Hecla Limited paid taxes on the following parcels in Section 36: Tax ID: RP48N05E360250, RP48N05E360500, RP48N05E360900, RP48N05E361800A. Taxes on the other twelve parcels were paid by various individuals. However, Hecla Limited counters this evidence with the Affidavit of Michael K. Branstetter. This affidavit and the attached exhibits show that Hecla paid the taxes on Section 36's subsurface mineral rights, while other parties paid taxes on the surface property and personal property.

Hecla Limited filed a petition for declaratory judgment on July 11, 2011, seeking to "pay the purchase price in exchange for a conveyance of the second parcel of real property to Hecla Limited that was agreed to be bought and sold, that is located in Section 36." According to the petition, Hecla Limited has "paid to some of the heirs of Gust Lindroos their fractional share of the purchase price, and they have given to Hecla Limited in return a conveyance of their interest of the subsurface of the Section 36 real property." More specifically, Hecla Limited seeks a declaration that the following Gust's Heirs must convey to Hecla Limited only the subsurface mineral rights to Section 36 and in return receive the following specified amount of money based on the Cortez Contract

and the heir's interest in Gust's estate: "Max Larson is entitled to payment of the sum of \$2,900, Karen Hill is entitled to payment of the sum of \$8,700 and the Estate of Norma Zimmer is entitled to payment of the sum of \$2,900." Hecla Limited also seeks a judgment that no other persons have an interest in the mineral subsurface rights to Section 36.

The parties submitted cross-motions for summary judgment with supporting affidavits, and this Court heard from the parties on December 14, 2011, before taking the matter under advisement.

## II. LEGAL STANDARDS

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the "pleadings, depositions, and admissions on file, together with any affidavits." Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987). Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). "If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least (14) days prior to the date of the hearing." I.R.C.P. 56(c). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be

denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

Idaho Code § 10-1201 allows this Court to declare the “rights, status or other legal relations” of persons, and the declaration “may be either positive or negative in form and effect.” The declaration shall have the same effect as a final judgment or decree. I.C. § 10-1201. The construction of a contract is a proper subject of a declaratory action. I.C. § 10-1203. A court “may refuse to enter a judgment or decree, where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” I.C. § 10-1206. The “purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered. I.C. § 10-1212.

“Although the Declaratory Judgment Act, Idaho Code Title 10, chapter 12, bestows the authority to declare rights, status, or other legal relations, that authority is circumscribed by the rule that ‘a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists.’” Schneider v. Howe, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006), *citing* Harris v. Cassia County, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). “Generally, justiciability questions are divisible into several sub-categories: advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions and administrative questions.” Howe, 142 Idaho at 772, 133 P.3d at 1237, *citing* Miles v. Idaho Power Co., 116 Idaho 635, 639, 778 P.2d 757, 761 (1989).

### III. DISCUSSION

The parties agree that at the time Selma and S.K. Garrett entered into the Cortez Contract, Selma did not have an ownership interest in Section 36. However, the parties agree that Gust's Heirs adopted and assented to the terms of the Cortez Contract by entering into the 1955 Agreement. The parties also agree that the Cortez Contract was properly assigned from S.K. Garrett to the Cortez Corp. in 1952, and from the Cortez Corp. to Hecla Limited in 1965. The parties also agree that the 1957 Decree establishes that Gust's ownership in Section 36 was his separate property and that Gust's Heirs take equally in the property.

However, Gust's Heirs argue enforcement of the terms of the Cortez Contract is barred by the statute of limitations. This Court agrees that this issue is dispositive.

#### A. Hecla's Claims are Barred by the Statute of Limitations

Idaho Code § 5-216 allows for "an action upon any contract, obligation or liability founded upon an instrument in writing" to be brought within five years of the "breach of the contract." Cuevas v. Barraza, 146 Idaho 511, 517, 198 P.3d 740, 746 (Ct. App. 2008). The statute of limitation in I.C. § 5-216 is an affirmative defense for which the defendants bear the burden of proof.<sup>2</sup> Mason v. Tucker & Associates, 125 Idaho 429, 437, 871 P.2d 846, 854 (Ct. App. 1994), *citing* Hawley v. Green, 117 Idaho at 504, 788

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<sup>2</sup> It is well established that a party must specifically plead as an affirmative defense the application of a statute of limitations. Franz v. Idaho Artesian Well & Drilling Co., 5 Idaho 71, 46 P. 1026 (1896). In this matter, Gust's Heirs did not specifically plead the statute of limitations as an affirmative defense in their "Answer to Petition for Declaratory Judgment," but raise it specifically in the "Defendant's Motion for Summary Judgment." However, in Gust's Heirs' Answer, the "Seventeenth Defense" includes the following: "[Gust's Heirs] have not yet conducted discovery in this action and, therefore, expressly reserve the right to amend their answer to add additional or supplemental defenses, or to file and serve other responsive pleadings, allegations, or claims as necessary and appropriate as discovery is undertaken." Because Hecla Limited does not object to the assertion of the statute of limitations defense as raised by Gust's Heirs and because the statute of limitation defense is clearly based on documentation that Gust's Heirs acquired, this Court determines that Gust's Heirs may assert the statute of limitations defense in the Defendant's Motion for Summary Judgment.

P.2d at 1327 (1990). "As the parties moving for summary judgment, the defendants bear the burden of demonstrating the absence of a genuine issue of fact material to their statute of limitation defense." Mason, 125 Idaho at 437, 871 P.2d at 854, *citing Hawley*, 117 Idaho at 504, 788 P.2d at 1327; Petricevich v. Salmon River Canal Co., 92 Idaho 865, 868, 452 P.2d 362, 365 (1969).

Materiality of a breach was discussed in Independence Lead Mines v. Hecla Mining Co.:

A breach of contract is non-performance of any contractual duty of immediate performance. Idaho Power Co. v. Cogeneration Inc., 134 Idaho 738, 746, 9 P.3d 1204, 1212. It is a failure, without legal excuse, to perform any promise which forms the whole or part of a contract. Id. "A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." Ervin Const. Co. v. Van Orden, 125 Idaho 695, 699, 874 P.2d 506, 510 (1993). Whether a breach of contract is material is a question of fact. Id. at 700, 874 P.2d at 511.

143 Idaho 22, 28, 137 P.3d 409, 415 (2006).

In this case it is clear that multiple breaches of the Cortez Contract have occurred, but the breach material to the contract occurred upon failure of Selma and Gust's Heirs to "execute a good and sufficient deed to [Section 36] and deposit the same in escrow with the Idaho First National Bank, Wallace, Idaho." As set forth in Paragraph 2 of the Cortez Contract, the deal between Selma and S.K. Garrett was to sell the surface and the subsurface rights to Section 36, with Selma maintaining a life estate in ten acres of the property. Performance of Paragraph 10 forms a large part of the Cortez Contract because without execution of the deed, S.K. Garrett would not obtain any surface or subsurface rights to Section 36 and the remainder of the contract could not be performed by either party. Thus, execution of the deed "touches the

fundamental purpose of the contract,” the transfer of the property rights, and failure to execute the deed defeats the object of entering into the Cortez Contract, that being the exploration and mining of Section 36.

Gust’s Heirs similarly breached the Cortez Contract after they adopted it in the 1955 Agreement. It is undisputed that Gust’s Heirs not only refused to execute the required deed to transfer the surface and subsurface rights to the Cortez Corp., but also that Gust’s Heirs sold at least the surface rights to the entirety of Section 36 to a third party. Because of the action and inaction of Gust’s Heirs, neither Paragraph 2, the transfer of the property, nor Paragraph 10, the execution of the deed, occurred. The importance of the execution of the deed to the Cortez Corp., as well as Hecla Limited, is apparent in Exhibits E and F of the York Affidavit. These letters show that Gust’s Heirs failed to perform even when the Cortez Corp. and Hecla Limited demanded performance. Thus, it is upon the failure of Gust’s Heirs to perform their obligation to execute a deed to Section 36 in the Cortez Contract and the sale of Section 36 to a third party after entry of the 1957 Decree settling Gust’s Heir’s interest in Section 36.

The Cortez Corp. and subsequently Hecla Limited were clearly aware that Gust’s Heirs failed to perform their obligations under the Cortez Contract, but did nothing to seek enforcement of the Cortez Contract until the year 2011. Thus, more than five years has passed since Gust’s Heirs refused to perform the Cortez Contract and sold Section 36 to a third party. As a result, Hecla Limited’s petition and the claims therein is barred by the limitations set forth in I.C. § 5-216.

#### IV. CONCLUSION

The Plaintiff's Motion for Summary Judgment is hereby DENIED. The Defendant's Motion for Summary Judgment is hereby GRANTED, and the Plaintiff's Petition for Declaratory Judgment is hereby DISMISSED.

DATED this 12<sup>th</sup> day of January, 2012.



John Patrick Luster  
District Judge

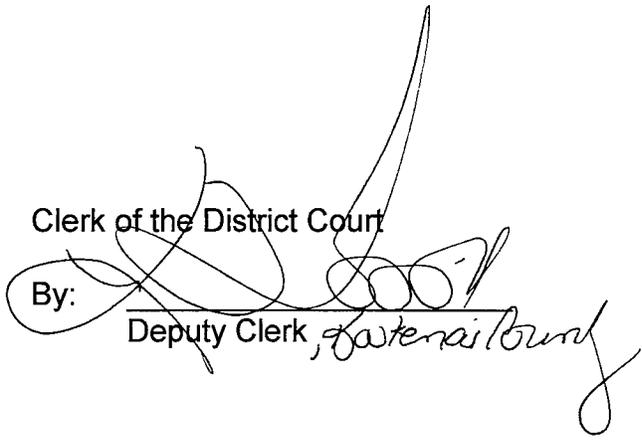
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: HECLA'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 12 day of January, 2012 to the following:

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Clerk of the District Court

By: 

Deputy Clerk, *Kateris Lund*