

on the subject property for over six years. Since the time of its original lease, Affordable Auto Sales has leased additional parcels of land within the tract to support its business operations. Judith McGee sought to acquire the real property to guarantee that her son's business could continue its operations on the property so long as it desired to remain there and further to provide for the continued expansion of the business on the property. Dan Davis is a licensed realtor in the State of Idaho and the licensed real estate broker for Defendant Property Research, Inc., which does business under the name of "Dan Davis Realty."

The December 4, 2006, agreement appears to have Dan Davis' signature on behalf of the seller, but the Court cannot find any portion of that document that identifies the seller as D&P North Idaho Lands. The seller is shown as Daniel L. Davis on the last page of the agreement. There appears to be no dispute D&P North Idaho Lands has all or part interest in this land. Plaintiffs' Statement of Material Facts Not in Dispute, p. 2, ¶2. That December 4, 2006, agreement required the seller to furnish a preliminary title commitment. That preliminary title commitment indicates title was vested in "Daniel L. Davis and Renelle R. Davis, individually, and as surviving partners in D&P North Idaho Lands, a general partnership." Defendants' Statement of Material Facts, p. 5. (The Court cannot find the title report in evidence, but plaintiffs have not objected to this statement of material fact made by defendants). Judith McGee had seven days from receipt of this preliminary title report and no later than seven days before closing to object to the condition of title. She did not object. *Id.* It is not known when Judith McGee received a copy of that title report.

On January 16, 2007, Dan Davis signed another "RE-23 Commercial/Investment Real Estate Purchase and Sale Agreement", and Judith McGee signed such document

on January 18, 2007. McGee Affidavit, Exhibit 3; Hislop Affidavit Exhibit 1. The last page of this agreement identifies Daniel L. Davis and Renelle Davis as the sellers. Again, no mention is made in the agreement of D&P North Idaho Lands as being the sellers. While Dan Davis signed this agreement, Renelle Davis did not. *Id.* Several reasons have been given as to why Renelle Davis refused to sign. Defendants' Statement of Material Facts, pp. 5-6. None of these reasons are relevant to this Court's analysis on summary judgment.

All documents required to close the buyer's portion of the transaction were properly signed by Judith McGee and received by the closing agent at 8:58 a.m. on the morning of February 5, 2007, the closing date. Affidavit of Debbie Hislop, p. 2. All funds required from the buyer to close the transaction were received by the escrow agent on the afternoon of February 5, 2007. *Id.* All of the exchange documents necessary to complete the buyer's portion of the transaction were received from the exchange company at 8:58 am on February 5, 2007. *Id.* The defendants failed to appear for closing on February 5, 2007.

On February 7, 2007, Judith McGee filed her complaint in this matter against D&P North Idaho Lands, Estate of James P. Purvis, Daniel L. Davis and Renelle R. Davis, and Property Research, Inc., seeking specific performance of the contract. James P. Purvis was also a partner in D&P North Idaho Lands, along with Dan Davis. Renelle Davis is Dan Davis' wife. D&P North Idaho Lands is an Idaho partnership with Dan Davis and Renelle Davis as surviving partners. Property Research, Inc. is an Idaho corporation doing business as Dan Davis Realty and for whom Dan Davis was the principal realtor and broker. Amended Complaint, ¶¶ 2-10. On March 13, 2007, Judith McGee filed an Amended Complaint, adding Steve and Elaine Mathers and Affordable

Auto Sales, L.L.C. as plaintiffs. On May 3, 2007, defendants filed an Answer to the Complaint. On January 9, 2008, plaintiffs filed their Motion for Partial Summary Judgment, as to the issue of whether they are entitled to specific performance. This motion was supported by an Affidavit of Debbie Hislop, a Supplemental Affidavit of Debbie Hislop, an Affidavit of Judith McGee, Plaintiffs' Statement of Material Facts not in Dispute, and Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, all filed January 9, 2008. On January 30, 2008, defendants filed: Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment, Defendants' Statement of Material Facts, and the Affidavit of Dan Davis. On February 6, 2008, plaintiffs filed their Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment. Oral argument was heard on February 7, 2008. The Court had read all pleadings filed prior to oral argument, but had not received the Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment before oral argument. Accordingly, the matter was taken under advisement. The Court has read Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment.

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). 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) (citation omitted). In ruling on a motion for summary judgment, the trial court is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983). However, “When an action, as here, will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.” *P. O. Ventures v. Loucks*, 144 Idaho 233, 159 P.3d 870 (2007), citing, *Intermountain Forest Mangement*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). Should the evidence reveal no disputed issues of material fact, then summary judgment should be granted. *Smith*, 128 Idaho at 718, 918 P.2d at 587 (citation omitted).

III. ANALYSIS.

There are several issues here: Which agreement controls, the December 2006 agreement or January 2007 agreement? Was the latter agreement a modification or a novation of the former agreement? Who had the capacity to bind the seller in each of those two agreements? Who had the capacity to convey the property on the part of the seller? Was there a modification to the agreement by the buyer just prior to scheduled closing on February 5, 2007? Was the closing date extended by the seller?

A. Which agreement controls?

Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment focuses on the December 2006 agreement and does not even mention the January 2007 agreement. Plaintiffs’ Statement of Material Facts does not mention the January 2007 agreement. Even plaintiffs’ Reply Memorandum in Support of Motion for Partial Summary Judgment focuses on the December 2006 agreement. Plaintiffs’

Reply Memorandum in Support of Motion for Partial Summary Judgment, pp. 8-10.

However, the Affidavit of Debbie Hislop, filed on behalf of plaintiffs, fails to mention the December 2006 agreement. Debbie Hislop was the escrow assistant for closing agent Scott Skolrud, both worked for Kootenai Title Company. Hislop refers to the closing documents, and attaches all closing documents as Exhibit 1 to her affidavit. Affidavit of Debbie Hislop, p. 2, ¶ 6, Exhibit 1. The December 2006 agreement does not appear in those documents. Only the January 2007 agreement is in the closing documents.

Judith McGee explains how the January 2007 agreement came to be:

8. Around January 16, 2007 Defendant Daniel L. Davis Advised me that he wanted to modify the December 4, 2006 Agreement to ensure that a mortgage on the property owed to Washington Trust Bank was wrapped along with an underlying trust deed that Defendant Daniel L. Davis had granted on the property to the heirs of Patrick Purvis, who, prior to his death in January or February 2007 had been Defendant Daniel Davis' partner in Defendant D&P North Idaho Lands. The requested modifications were not material to me and so I agreed and Defendant Daniel L. Davis provided a modified "RE-23 Commercial/Investment Real Estate Purchase and Sale Agreement" which I signed to accept the modified term. A true and correct copy of the January 16, 2007 RE-23 reflecting the agreement to wrap the Washington Trust Bank mortgage and the Purvis Estate's Deed of Trust is attached as "Exhibit 3" to this Affidavit.

Affidavit of Judith A. McGee in Support of Plaintiffs' Motion for Summary Judgment, p. 3, ¶ 8. Thus, it would appear Judith McGee considers the January 2007 agreement the agreement that was to be closed upon, similar to Debbie Hislop, escrow assistant to the closing agent.

This second agreement, the January 2007 agreement, contains a signature line for Renelle Davis (Affidavit of Debbie Hislop, Exhibit 1), where the December 2006 agreement only had a signature line for Dan Davis and had the signatures of Dan Davis.

Affidavit of Judith A. McGee in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 1. Defendants argue the fact that the January 2007 agreement contains a

signature line means "...the parties themselves clearly accepted the fact of Renelle Davis' interest in the Property." This Court is not persuaded by defendants' argument. In signing a document in January 2007 as an accommodation for Dan Davis, which was similar to the one she signed in December 2006, it is doubtful Judith McGee "accepted" Renelle Davis as a seller.

It may make a big difference which agreement controls. Plaintiffs' claim: "There is no dispute that prior to December 21, 2006 the record owner of the subject real property was D&P North Idaho Lands, an Idaho general partnership and that Dan Davis was the only surviving partner of that partnership and had the express authority to convey that property pursuant to the Statement of Partnership Authority on file with the Idaho Secretary of State's Office." Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 4. The same argument is made at page 7. The significance of that date according to plaintiffs is: "It is undisputable from the recording stamp on the Personal Representative's Deed that it was recorded on December 21, 2006 at the request of the law firm of Brown, Justh and Romero." Plaintiffs claim that firm represented estate of Purvis. *Id.* Dan Davis had authority to enter into the December 2006 contract, authority to bind the p-ship, authority to sell a partnership asset. Earnest money changed hands from Judith McGee to Dan Davis directly, all funds needed to close were timely sent to the escrow agent by Judith McGee, and Judith McGee never objected to title. With those facts, can there be specific performance as to the partnership, even if there is a issue as to some other possible interest in the title? In the December 2006 agreement, Renelle Davis is not a party to that agreement. Can that contract be enforced as to only the partnership interest?

The big issue is there appears to be an issue as to which of the two agreements

controls. Defendants, the escrow assistant and Judith McGee seem to think it is the January 2007 agreement that controls. Counsel for plaintiffs argues it is the December 2006 agreement which controls. There is a disputed issue of material fact.

B. Was the latter agreement a modification or a novation of the first?

Because there is an issue of material fact as to which agreement controls, the Court will not address this issue.

C. Who had the capacity to bind the seller to the agreement?

Defendants seem to concede Dan Davis had the authority to bind the seller to this agreement, if the seller is limited to the partnership. Defendants admit the partnership **owned** the property, but defendants argue both Dan and Renelle Davis owned the property as well. Any partner can **convey** that partnership property, but if there is an ownership interest in someone else, that other interest cannot be conveyed.

Defendants argue that ownership of the partnership property is determined by the intent of the partners:

3. Ultimately, it is the intention of the partners that controls whether property belongs to the partnership or to one or more of the partners in their individual capacities, at least among the partners themselves.

I.C. § 53-3-204, Official Comment 3. Defendants argue that the Estate of Patrick Purvis conveyed a one-half interest in the real estate owned by the partnership (D&P North Idaho Lands) to the Davises, both individually, and as surviving partners in D&P North Idaho Lands. Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment, p. 5. Intent of the partners is an issue of fact. Also, resolution of this issue depends in part on which agreement controls, the December 2006 agreement or the January 2007 agreement.

Neither side to this dispute briefed what happens if Renelle Davis does have an interest. Dan Davis had authority to bind the partnership to this contract. Clearly Dan Davis' signature would not bind Renelle Davis *if* she has an interest. If the Davises have a community property interest, "community real property cannot be conveyed by a husband without execution and acknowledgement of a deed by the wife. *Keller v. Rogstad*, 112 Idaho 484, 733 P.2d 705 (1987). A contract to convey community real property which is not signed and acknowledged by both husband and wife is void. *Thomas v. Stevens*, 69 Idaho 100, 203 P.2d 597 (1949). But while the contract between the Davises and Judith McGee would be void, does Judith McGee still have a valid contract with the partnership for the partnerships' share of this property?

If Judith McGee performed all she needed to do to close, and she has not objected to the title policy that perhaps lists an interest in Renelle Davis (the Court cannot find a copy of the title policy in the file), is Judith McGee entitled to specific performance against the partnership, with Renelle Davis' interest alone to be litigated?

D. Who had the capacity to convey the property on the part of the seller?

This issue, and the issue above, essentially turn on the question of "who is the seller"? If the seller, and owner of the property is the partnership, Judith McGee may be entitled to specific performance (depending on the resolution of the issues below). If the property is in part owned by Renelle Davis, certainly specific performance as to that interest may not be granted. Because there is an issue as to ownership of the subject property, summary judgment is inappropriate.

E. Was there a modification to the agreement by the buyer just prior to scheduled closing on February 5, 2007?

The day before closing, on Sunday, February 4, 2007, a series of emails between Judith McGee and Affidavit of Dan Davis in Opposition to Plaintiffs' Motion for

Summary Judgment, Exhibit 5. Dan Davis claims to have received these emails *after* the closing date. *Id.* Obviously then these emails did nothing to affect Dan Davis' actions or inactions on February 5, 2007. The pertinent emails are between Judith McGee and the escrow assistant. The email by Judith McGee on February 4, 2007, concerns a request for the buyer to hold title differently than anticipated, adding her son as a 50% interest holder. On February 5, 2007, Hislop responds "there wouldn't be any way to have the documents changes and have signed originals today...". In other words, Hislop in her email response simply put an end to that request by Judith McGee as it related to the February 5, 2007 closing date. As discussed below, there is a dispute of fact as to whether there was further discussion regarding an extension.

Through her affidavit, Judith McGee testified she signed each of the closing documents sent to her by Kootenai Title Company, and further that she returned those closing documents to Kootenai Title Company by Federal Express. In Debbie Hislop's affidavit, she testified that all of Judith McGee's required closing documents were properly signed and in the possession of Kootenai Title Company on February 5, 2007. Affidavit of Debbie Hislop, p. 2, ¶ 6. Kootenai County Title Company also timely received from Judith McGee all the required funds to close the transaction. *Id.* P. 3, ¶ 7. There is no dispute that all of the buyer's signed documents and all of the buyer's necessary funds were timely received into escrow from the buyer on the closing date.

There is simply no evidence before the Court at this time that Judith McGee was attempting to repudiate either agreement with her request to change the name of the buyer.

F. Was there an extension to the closing date given by the seller?

Dan Davis claims he did not agree to an extension of the closing. Affidavit of

Dan Davis in Opposition to Plaintiffs' Motion for Summary Judgment, p. 4, ¶ 9. On the other hand, Debbie Hislop claims when she relayed Judith McGee's "inquiry" about changing in part the names of the buyer to Dan Davis on the morning of February 5, 2007, Dan Davis "...told me that he had no objection so long as it didn't take more than a couple of additional days to close the deal." There is a dispute of material fact as to this issue.

IV. CONCLUSION AND ORDER.

While Dan Davis had the authority to enter into either of these agreements on behalf of the partnership, there is an issue as to whether there is another interest as a seller to this transaction. There is an issue as to which agreement controls and was to be closed upon. Neither party has briefed the effect of Renelle Davis' interest (if there is an interest) on specific performance. Plaintiffs did not request partial summary judgment for specific performance as against the partnership alone, as plaintiffs requested partial summary judgment on the issue of specific performance as against all defendants. There are material issues of fact as to: which agreement controls the December 2006 agreement or January 2007 agreement; was the latter agreement a modification or a novation of the former agreement; who had the capacity to bind the seller in each of those two agreements; who had the capacity to convey the property on the part of the seller; who was the seller; was there an extension to the closing date give by the seller. There is no dispute of material fact that there was no modification to the agreement by the buyer just prior to scheduled closing on February 5, 2007.

Because there are issues of fact on almost all major issues, partial summary judgment must be denied.

IT IS HEREBY ORDERED plaintiffs' motion for partial summary judgment is

DENIED.

Entered this 11th day of February, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2008, 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>	<u>Lawyer</u>	<u>Fax #</u>
Richard K. Kuck	667-3379	Peter C. Erbland	664-6338

Deputy Clerk