STATE OF IDAHO)
County of BONNER)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

SCOTT S. ENGLE, et ux,

Plaintiffs,

vs.

THOMAS R. BERTACCHINI.

Defendants.

Case No. **S CV 2008 1750**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment brought by defendant Thomas Bertacchini (Bertacchini). On December 1, 2007, Bertacchini entered into a Seller's Representation Agreement with Gordon Hudson (Hudson) regarding the property at issue in this matter, Lot 10A of Block 1 of the Replat of Sherwood Terrace. On January 14, 2008, plaintiffs Scott and Patricia Engle (Engles) submitted an offer to purchase through Hudson, supported by earnest money of $2,000 paid to Hudson. The Engles' offer was accepted by Bertacchini on January 14, 2008, and the parties executed a Purchase and Sale Agreement. The transaction was to close on or before February 15, 2008, at First American Title's Office in Sandpoint, Idaho.

One year earlier, Bertacchini had replatted Lots 5, 6, and 10 of Sherwoood Terrace along with some unplatted property. As a result of this replatting, some

encumbrances owed by Bertacchini to Option One Mortgage and Countrywide Mortgage left Lot 10A, at issue here, over-encumbered by an Option One Deed of Trust in an amount over $300,000.00, a second Deed of Trust to William and Diane Hellar in the amount of $150,000.00, and a third Deed of Trust to Countrywide in an amount of $90,000.00.

Within a week of opening escrow, First American title completed a preliminary title commitment and transmitted it to Hudson on January 30, 2008. Hudson thereafter contacted Bertacchini, who assured Hudson the problems would be resolved. Hudson then informed Engles of his discussion with Bertacchini. On February 12, 2008, Engles directed Holly Bauer (Bauer) at First American Title to provide the preliminary title commitment to their counsel, Mr. Diehl.

The encumbrances on Lot 10A exceeded $550,000.00. Option One was unwilling to release or reconvey its Deed of Trust without full payment which amounted to more than $300,000.00. On September 25, 2008, Engles filed this action seeking specific performance. They also recorded a lis pendens on the property in Bonner County. This matter is currently set for a three-day court trial beginning October 19, 2009.

On February 11, 2009, Bertacchini filed “Defendant’s Motion for Summary Judgment and Motion to Quash Lis Pendens and Notice of Hearing”, along with a “Memorandum in Support of Defendant’s Motion for Summary Judgment and Motion to Quash Lis Pendens”, an “Affidavit of Tom Bertacchini” and “Affidavit of Holly Bauer”. On February 18, 2008, after his motion for summary judgment was filed, Bertacchini filed the “Affidavit of Gordon Hudson”. No objection has been made to this late filing by Engles. I.R.C.P. 56(c). On February 27, 2009, Engles filed a “Memorandum of Points

and Authorities in Opposition to Defendant's Motion for Summary Judgment", an "Affidavit of Scott Engle", "Affidavit of Holly Bauer" and "Affidavit of J. T. Diehl". On March 2, 2009, Engles filed an "Affidavit of Gordon Hudson". No objection has been made to this late filing by Bertacchini. I.R.C.P. 56(c). On March 4, 2009, Bertacchini filed "Defendant's Reply Memorandum in Support of Defendant's Motion for Summary Judgment." Oral argument was held on March 11, 2009.

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). Where, as here, a case is scheduled for court trial, the trier of fact is entitled to arrive at the most reasonable inferences based on undisputed evidence properly before it; the test for reviewing inferences drawn by the trial court is whether the record reasonably supports the inferences. *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004). The Court may grant summary judgment

despite the possibility of conflicting inferences. *Id.*

III. ANALYSIS.

A. *Johnson v. Lambros,* 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

Bertacchini moves for summary judgment and argues *Johnson v. Lambros,* 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006), is dispositive. Memorandum in Support of Motion for Summary Judgment, p. 5. Under *Lambros,* the Engles could seek specific performance, a remedy outside the agreement, but only if Bertacchini failed to make a good faith effort to cure title defects. 143 Idaho 468, 476, 147 P.3d 100, 108.

Bertacchini contends the language at issue in the Purchase and Sale Agreement in *Lambros* is identical to that in the instant matter and the Idaho Supreme Court's ruling in *Lambros* provides the Purchase and Sale Agreement contains Engles' sole remedy when title is defective. Memorandum in Support of Motion for Summary Judgment, p. 6. Bertacchini goes on to argue it was Engles who in fact breached the Purchase and Sale Agreement by not objecting in writing to the conditions of the title as set forth in the Preliminary Title Commitment and Engles therefore forfeit their right under the contract to a refund of the $2,000 earnest money deposit. *Id.,* p. 8. Bertacchini argues delivery of marketable title is a condition precedent to any obligation to close and where the title defects are beyond the control of the seller, specific performance is not a remedy available to the buyer in an action on the contract because the condition precedent, delivery of marketable title, is beyond the seller's control. *Id.,* p. 9.

Engles argue disputed material issues of fact precluding summary judgment in favor of Bertacchini include: the closing date of the transaction; whether *Lambros* is dispositive; whether Hudson was solely the seller Bertacchini's agent or acted as agent

for both buyer and seller; whether Engles ever received the preliminary title commitment; and whether Bertacchini breached the Purchase and Sale Agreement by failing to timely close or timely deliver the preliminary title commitment to Engles. Memorandum in Opposition to Motion for Summary Judgment, pp. 3-7.

The contract language is found at ¶ 8 of the Purchase and Sale Agreement:

> **8. TITLE INSURANCE**
>
> **(A) TITLE COMMITMENT**: Prior to closing the transaction, SELLER shall furnish to BUYER a commitment of a title insurance policy showing the condition of the title to said premises. BUYER shall have 5 business day(s) from receipt of the commitment or not less than twenty-four (24) hours prior to closing, within which to object in writing to the condition of the title as set forth in the commitment. If BUYER does not so object, BUYER shall be deemed to have accepted the condition of title. It is agreed that if the title of said premises is not marketable, or cannot be made so within 5 business day(s) after notice containing a written statement of defect is delivered to SELLER, BUYER's Earnest Money deposit will be returned to BUYER and SELLER shall pay for the cost of title insurance cancellation fee, escrow and legal fees, if any.

Affidavit of Tom Bertacchini, p. 3, Exhibit A, p. 3, ¶ 8. Just as in this case, in *Lambros,* the seller (Lambros), obtained a title insurance commitment which revealed for the first time a *lis pendens* on the property and the existence of a lawsuit by a third party who was attempting to enforce an option to purchase the property. 143 Idaho 468, 470, 147 P.3d 100, 102. Instead of terminating the transaction, Johnson and Lambros executed an addendum stating: (1) Johnson was willing and able to close, but Lambros was unable to close and provide clear, unencumbered title on the closing date; (2) Johnson was willing to extend the closing date by one month; and (3) the purpose of the addendum was to allow seller to take whatever action was necessary to provide clear title to the property. *Id.* Shortly thereafter, Johnson and Lambros executed another addendum extending the closing date again while Lambros sought summary judgment against the third party. 143 Idaho 468, 470-71, 147 P.3d 100, 102-03. Lambros was

unable to obtain summary judgment because the third party filed for bankruptcy and Lambros was unable to clear title for several years. 143 Idaho 468, 471, 147 P.3d 100, 103. Johnson filed an action for breach of the Agreement and a court trial was held. *Id.* The district court trial judge found the Agreement and addenda did not contain a promise by Lambros to clear title, but rather gave Johnson the right to a refund of his earnest money as the sole remedy if Lambros could not deliver title satisfactory to Johnson. *Id.* The Idaho Court of Appeals affirmed, holding that the addenda only extended the time for Lambros to secure good title; it did not create an additional legal duty outside the terms of the original contract. Lambros was still to convey marketable and insurable title, but if this could not occur, "the exclusive remedy for such a failure" was requiring a refund of Johnson's earnest money and requiring Lambros to bear certain costs incurred during the attempt to perform. 143 Idaho 468, 474, 147 P.3d 100, 106. The Idaho Court of Appeals went on to hold that a seller may have an implied obligation to make a good faith effort to secure clear title where conveyance of clear title is a condition precedent to completion of the sale, but a remedy outside the Purchase and Sale Agreement is only available to a buyer where a seller fails to make a good faith effort to cure title defects. 143 Idaho 468, 476, 147 P.3d 100, 108. (quoting *Naso v. Haque,* 289 A.D.2d 309, 310, 734 N.Y.S.2d 214 (N.Y.App.Div. 2001) ("the defendants' inability to convey marketable title was self-created, the remedy limitation clause in the contract of sale did not bar the plaintiff from seeking specific performance.")

Thus, in the present case, as in *Lambros,* the issue for this Court is whether Bertacchini's efforts to clear title were reasonable and sufficient. In *Lambros,* the trial court found Lambros' obligation met through attempts to secure a judgment in the third-party's lawsuit and the evidence not establishing that the third party was willing to accept

money to release the *lis pendens.* 143 Idaho 468, 476, 147 P.3d 100, 108. Here, Bertacchini claims he "began working on the title defect, first through the title company and is still, to this day, working diligently to clear title to Lot 10A." Reply Memorandum in Support of Motion for Summary Judgment, p. 11. Bertacchini states he was able to "obtain a modification of Option One's Deed of Trust", makes no mention of the Hellar Deed of Trust, and is "still working with Countrywide Mortgage in an attempt to obtain a release of their Deed of Trust…" Affidavit of Tom Bertacchini, pp. 3-4.

As argued by Engles, *Lambros* was decided following a bench trial and the trial judge and Court of Appeals considered the evidence presented in determining whether Lambros made a good faith effort to obtain marketable title. Memorandum in Opposition to Motion for Summary Judgment, p. 6. Engles argue there is a question of fact as to whether Bertacchini exercised good faith in attempting to provide insurable and marketable title, precluding summary judgment. *Id.,* p. 7.

Engles' argument is well taken. Bertacchini has not identified specifically how he intended to clear title to the lot and unlike in *Lambros,* it is certainly a reasonable inference for this Court to make from the evidence submitted that each holder of the Deeds of Trust would have accepted money to release the Deeds of Trust (as opposed to the *lis pendens* holder in *Lambros*). Additionally, at the court trial, evidence of Lambros' seeking summary judgment against the third party in the suit against him was readily available to the Court; while in the present case, there is no evidence whatsoever of Bertacchini's efforts to eliminate these liens by paying them off. All this Court has is Bertacchini's conclusory claims that: "I have worked diligently with both title companies, First American Title Company and North Idaho Title, to remedy the problems described above", "Finally, in August, 2008, we were able to obtain a modification of Option One's

Deed of Trust", and "To date I am still working with Countrywide Mortgage in an attempt to obtain a Release of their Deed of Trust as it encumbers the replatted Lot 10A." Affidavit of Tom Bertacchini, p. 3.

Bertacchini makes the claim that: "…delivery of marketable title is beyond the control of the seller." Memorandum in Support of Defendant's Motion for Summary Judgment and Motion to Quash Lis Pendens, p. 9. In *Lambros* a third party beyond control of the seller was in play. In the present case, all that is at play are encumbrances placed upon the land presumably by Bertacchini. Whether Bertacchini or another was responsible for placing those encumbrances on Bertacchini's land, it is a very logical inference that Bertacchini can clear those encumbrances by simply paying off the obligations they secure. Bertacchini, the seller, controls the encumbrances.

At summary judgment, Bertacchini's burden is to show there is no dispute of material fact on the issue of whether Bertacchini made a good faith effort to cure title defects under *Lambros*, 143 Idaho 468, 476, 147 P.3d 100, 108. This Court finds there is an issue of material fact as to whether or not Bertacchini made a good faith effort to cure title defects under *Lambros*. If he did not make a good faith effort, Engles may go beyond the contract remedy of return of their earnest money and sue for specific performance. At oral argument on summary judgment, counsel for Engles pointed out the Engles' verified complaint alleges that as of September 22, 2008, Bertacchini "…has relisted the property at a higher price through another realtor which evidences his willful, deliberate and bad faith efforts at denying Plaintiffs the benefit of their bargain." Complaint for Specific Performance, p. 3, ¶ XV. If, seven months after the closing with Engles was to occur, Bertacchini is still offering for sale this same property with the same title problems, at an even higher price, there is certainly an issue of fact as to

Bertacchini's good faith or lack thereof.

B. Dispute of Fact as to Whether Engles Received the Title Commitment.

1. Dispute of Fact as to Hudson acting as Engles' Agent.

There appears to be no dispute of fact that Hudson received the Title Commitment. Engles claim they did not receive the Title Commitment. Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, p. 5. If Hudson was acting as Engles' agent, then Engles would be deemed to have received the Title Commitment. There is a dispute of fact as to whether Hudson was the Engles' agent.

Bertacchini states in his affidavit: "Mr. Hudson also acted as the selling agent representing the Buyers, Scott and Patricia Engle…" Affidavit of Tom Bertacchini, p. 3. Bauer of First American Title claims in her affidavit: "Our records reflect that on January 30, 2008, the preliminary commitment for title insurance was finalized and faxed at 12:32 p.m. to Gordon Hudson, as agent for Buyer and Sellers in this transaction." Affidavit of Holly Baur, p. 2. (emphasis added). Counsel for Bertacchini claims: "Both the Seller, Mr. Bertacchini, and the Buyers, Mr. and Mrs. Engle, were represented by licensed agent/broker, Gordon Hudson of The Property Shoppe. See Exhibit "A" to Affidavit of Tom Bertacchini. Memorandum in Support of Defendant's Motion for Summary Judgment and Motion to Quash Lis Pendens, p. 2. Exhibit A of Bertacchini's affidavit is the "RE-24 Vacant Land Real Estate Purchase and Sale Agreement and Receipt for Earnest Money". The problem is, nothing in that agreement indicates Hudson is the agent of the Engles. The agreement indicates just the contrary at paragraph 30, Section 1. At oral argument, counsel for Bertacchini was asked what about that agreement gave any indication that Hudson was agent for the Engles?

Counsel for Bertacchini responded that the first portion of the first page of that agreement gave such indication. The best counsel for Bertacchini could argue was Property Shoppe is the "Listing Agency", and Gordon Hudson is the "Listing Agent" and Property Shoppe is the "Selling Agency" and Gordon Hudson is the "Selling Agent", and somehow, that makes Hudson Engles' agent. This Court is not at all persuaded by that argument. Even if there were any basis for that strained interpretation of the contract, the contract later demolishes that interpretation. Paragraph 30, Section 1 makes it clear "the brokerage [Hudson] working with the BUYER(S) is acting as a NONAGENT for the BUYER(S)". Had Engles moved for summary judgment on that issue, it would have to have been granted based on the state of the evidence at this time. The claims under oath by Bertacchini and Bauer as to Hudson being Engles' agent, at least based on the evidence before the Court at this time, are simply not credible.

Engles contend there is a dispute of fact as to whether Hudson acted as agent for both buyer and seller or just the seller Bertacchini. Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, p. 3. Although Bertacchini claims Hudson represented both the seller and the buyers (Memorandum in Support of Motion for Summary Judgment, p. 2; Affidavit of Tom Bertacchini, p. 3), Hudson himself states he was in an exclusive Seller representation Agreement with Bertacchini. March 2, 2009, Affidavit of Gordon Hudson, p. 1, ¶ 3. Engles argue they had no knowledge of the problems revealed by the preliminary title commitment, and if Hudson was not the Engles' agent, then Hudson's knowledge of the problems as of January 30, 2008, would not be imputed to the Engles. Memorandum in Opposition to Motion for Summary Judgment, p. 4. In this regard, Hudson himself states he informed both "the Buyers and Seller of the title problems and that First American Title was

working on it" on January 30, 2008. February 18, 2009, Affidavit of Gordon Hudson, p. 2. Bertacchini argues whether or not Hudson was Engles' agent is not a determinative issue because Engles' counsel, Mr. Diehl, was also provided with a preliminary title report forty-eight hours before the time set for closing. Reply Memorandum in Support of Motion for Summary Judgment, p. 5. Bertacchini again argues even if Engles had objected to the title condition as required by the Purchase and Sale Agreement, their only remedy would have been a refund of the earnest money deposit. *Id.,* p. 6.

However, Bertacchini's argument presupposes Bertacchini made a good faith effort to secure clear title, which remains very much in dispute. Additionally, the Purchase and Sale Agreement and Affidavit of Hudson all indicate Hudson was the exclusive seller's agent and that Hudson only told Engles of problems with the title condition and that Bertacchini had assured him "the problems would be resolved and to proceed with closing as soon as possible." Affidavit of Gordon Hudson, p. 2, ¶ 6. Other than Bertacchini's agency argument, there is no indication in the record Engles had any knowledge of the title defects.

2. Delivery of Title Commitment to Engles' Attorney.

Bauer claims under oath that: On February 13, 2008, at 4:05 p.m. I emailed the preliminary title report to Mr. Diehl and to his assistant, Dana Anderson." Affidavit of Holly Bauer, p. 3. At oral argument, Engles' counsel pointed out the contact requires the title commitment go to the buyers, not the buyers' agent. No party has briefed the legal consequence of such language.

C. Dispute of Fact as to the Closing Date.

Engles claim that while the Purchase and Sale Agreement provides closing was to take place no later that February 15, 2008, Bertacchini requested, through Hudson,

that Engles accelerate the closing date, and that Engles did wire funds and were ready, willing and able to close the transaction on February 5, 2008. Memorandum in Opposition to Motion for Summary Judgment, pp. 4-5. Engles also argue this expedited act at the request of Bertacchini was completed by Engles before Engles received the preliminary title commitment. *Id.,* p. 5. As stated, *supra,* whether Hudson was an agent of Engles remains disputed. If Hudson was not Engles' agent, Hudson's knowledge of title defects on January 30, 2008, could not be imputed to them. *Id.,* p. 4. Engles argue the parties by mutual consent altered the Purchase and Sale Agreement closing date. *Id.,* pp. 4-5. Bertacchini argues it is not material whether or not Engles tendered funds into escrow on February 5, 2008, because no facts presented support a modified closing deadline and that date was always to be no later than February 15, 2008. Reply Memorandum in Support of Motion for Summary Judgment, pp. 7-8.

Whether the closing date was modified by the parties to February 5, 2009, is an issue in dispute. The date of closing is material as it determines whether Bertacchini timely furnished the title commitment to Engles and whether the fact of multiple Deeds of Trust encumbering the property (which would make the February 15, 2008, closing impossible), was communicated to the Engles prior to closing. If Engles were not informed of the title problems by the time they tendered funds on February 5, 2009, they could not have objected in writing or otherwise, and they would not have known to ask to extend the closing. In fact, it was Bertacchini's request for an early closing and Hudson's assurance that "Defendant would take care of encumbrances and close as soon as the money was available" which caused Engles to incur appraisal and loan fees in accommodating the request and depositing funds on February 5, 2008. Memorandum in Opposition to Motion for Summary Judgment, p. 5. Questions of

material fact remain as to: whether Hudson was an agent for Engles; whether Engles had knowledge of title defects as of the January 30, 2008, date Hudson knew of them; whether the parties mutually consented to close on a fixed date earlier than the February 15, 2008, closing date; and whether Bertacchini timely furnished the preliminary title commitment to Engles.

D. Attorney's Fees.

Bertacchini claims he is entitled to an award of fees and costs pursuant to Paragraph 24 of the Purchase and Sale Agreement and, additionally, is entitled to Engles' earnest money deposit which he claims Engles forfeited by failing to comply with the terms and conditions of the Agreement. Memorandum in Support of Motion for Summary Judgment, p. 10. Engles argue they are entitled to the return of their earnest money deposit, costs and fees incurred, and the "other lawful rights and remedies" to which they are entitled under Paragraph 24 of the Agreement. Memorandum in Opposition to Motion for Summary Judgment, p. 9. As discussed above, specific performance is available where a seller's inability to convey marketable title is self-created. Bertacchini, at least at this summary juncture, has not sufficiently demonstrated his reasonable, good-faith efforts to clear title such that Engles would not be permitted to seek specific performance as a remedy. Here, though a question of fact remains regarding whether the closing date was February 15, 2008, or an earlier date, Bertacchini was unable to convey clear title on any date up to and including February 15, 2008. Therefore, it appears it may have been Bertacchini who defaulted. If so, Bertacchini is not entitled to retain the earnest money agreement and he must pay costs and fees incurred by Engles pursuant to the Purchase and Sale Agreement, ¶ 24.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED for the reasons stated above, Defendant's Motion for Summary Judgment in **DENIED** its entirety.

Entered this 16th day of March, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2009, 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 #**
J.T. Diehl	208-263-8983	Brent C. Featherston	208-263-0400

_____
Jeanne Clausen, Deputy Clerk