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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 KOOTENAI**

**RANDY HENLEY, a single person, and** )  
**WINDERMERE/COEUR D'ALENE REALTY,** )  
**INC., an Idaho Corporation,** )  
 )  
*Plaintiffs,* )  
vs. )  
 )  
**RICHARD RIFKIND.** )  
 )  
*Defendant.* )  
\_\_\_\_\_ )

Case No. **CV 2007 5739**

**MEMORANDUM DECISION AND  
ORDER ON CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

Plaintiff Randy Henley (Henley) is a real estate agent and works for plaintiff Windermere/Coeur d'Alene Realty, Inc. (Windermere). Henley and defendant Richard Rifkind (Rifkind) entered into an Exclusive Seller's Representation Agreement on September 10, 2004. Under the agreement, Henley was to act as Rifkind's realtor and sell Rifkind's real property located at 4583 Old River Rd. in Kingston, Idaho. Henley and Rifkind agreed to offer the property for \$2,225,000.00, and in the event of a sale during the listing period, Henley would receive a 10% commission. According to Henley, he would also receive the 10% commission if the property sold within 180-days after expiration of the agreement if the property were sold to any person who had examined, been introduced to, or been shown the property during the listing agreement term. The term of the agreement was from September 13, 2004, to March 10, 2005.

On June 3, 2005, Dan Bolton (Bolton), through his agent Ed Anderson

(Anderson), entered into a Purchase and Sale Agreement to buy Rifkind's property for \$2,225,000.00. The transaction closed on May 10, 2006. On August 9, 2007, Henley and Windermere filed this lawsuit against Rifkind to collect Henley's commission.

On December 18, 2008, Rifkind filed his motion for summary judgment to dismiss all of Henley's claims because Henley did not procure, produce, or introduce Bolton as a potential buyer as contemplated by the Agreement. Rifkind also alleges Henley breached his duty as a broker to Rifkind and committed fraud in the execution, thereby excusing Rifkind from paying any commission.

On January 16, 2009, Henley filed his motion for summary judgment on his breach of contract claim and his claim for breach of the implied covenant of good faith and fair dealing because Rifkind has not paid him \$225,000.00, the 10% commission. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 1. In fact, 10% commission would be \$222,500.00.

Both parties filed briefs regarding their respective motions. Oral argument was held on March 25, 2009. This matter is currently set for a five-day jury trial commencing June 15, 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); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). Such a rule is proper where the matter is to be tried to a jury, because even though evidentiary facts may be undisputed, those evidentiary facts may yield conflicting inferences as to what the ultimate facts of a case are. *Id.* If such conflicting inferences are possible, then summary judgment would deprive the parties of the right to have the jury make the decision on the matter. *Id.* Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish that there is no genuine issue of material fact. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 650 P.2d 657, 661, n. 1. This is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues of theories. *Id.*

### **III. ANALYSIS.**

#### **A. Breach the Contract.**

Rifkind argues he did not breach his agreement with Henley (Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 10-18), and Rifkind argues Henley cannot recover his commission as Henley materially breached his agreement with Rifkind by not returning Anderson's call. *Id.*, pp. 24-25. Both arguments will be discussed.

## **1. The Seller Rifkind Did Not Breach His Contract With His Agent Henley.**

Henley claims Rifkind breached the contract at issue by failing to pay him the 10% commission upon sale of the property to a buyer during the six-month period following expiration of the Exclusive Seller Representation Agreement (Agreement). Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 1-2. Henley argues he is entitled to summary judgment on the breach of contract claim because the Agreement entitles him to the commission regardless of whose efforts procured a buyer. *Id.*, p. 6. Henley states the plain language of the Agreement entitles him to a commission if the subject property is sold within 180 days after expiration of the Agreement, if sold "to a person who had examined, been introduced to or been shown the Subject Property during the listing period", and Bolton, through his agent Anderson, learned of the property from the Windermere signs Henley had erected on the property. *Id.*, pp. 6-7. Henley argues his erection of the sign, along with his taking of hundreds of photos, his taking out advertisements in numerous publications, advertising on local cable television, taking calls on the property, arranging for other realtors to visit the property, and visiting the property himself numerous times, furthered Bolton's purchase. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 4-5. "[G]iven that [Bolton] learned of the property during Plaintiffs' listing, and not some other realtor's listing, indicates that [Henley's] efforts led to the sale." Memorandum in Support of Plaintiffs' Motion for Summary Judgment, p. 11. Henley also states John Lambrose, Rifkind's neighbor, had learned of Bolton's interest in the property and told Rifkind of Bolton's interest during Henley's listing term. *Id.*, p. 3.

Rifkind replies that Henley never produced a ready, willing, and able purchaser during the term of the agreement. Memorandum in Support of Defendant's Motion for

Summary Judgment, p. 13. Rifkind states Bolton, through Anderson, was never willing to purchase the property while it was listed with Henley, in part because Henley had not returned a telephone call placed by Anderson to Windermere inquiring about the property in late February or early March, 2005. *Id.*, pp. 7, 13. Rifkind argues Bolton and Anderson learned no information about the property from the sign; they did not learn the property was for sale, the sale price, whether the business was included in the sale, or the acreage of the property. *Id.*, p. 7. Rifkind argues even if Henley had returned Anderson's call, Anderson would not have shown Bolton the property unless Henley had agreed to split the 10% commission. *Id.*, citing Anderson Dep., p. 50, L. 22 – p. 51, L. 4; Anderson Affidavit, ¶ 15. Further, Rifkind claims his neighbor Lambrose, also a friend of Anderson's, informed Anderson that Henley's listing of Rifkind's property would soon expire, and "Anderson intentionally waited until Henley's listing was expired to contact Rifkind to introduce Bolton to the Subject Property." *Id.*, p. 8, citing Anderson Depo., p. 18, Ll. 16-19; p. 45, Ll. 3-9, Ll. 13-22; p. 27, Ll. 11-14; Anderson Affidavit, ¶¶ 18, 19. And Rifkind states Anderson, Bolton's agent, was introduced to the property in 2000 by Rifkind via a conversation discussing sale of the property and subsequently by his knowledge that the subject property was listed with ReMax through the Corcorans before Henley's listing. Reply Brief to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 2.

At issue here is not whether Henley acted to "procure a purchaser ready, willing and able to purchase, transfer or exchange the property on the terms stated herein or on any other price and terms agreed to in writing..." See Affidavit of Joel P. Hazel, Ex. A, at ¶ 6(A). Both parties concede Henley did not procure a ready, willing and able buyer during the term of the Agreement.

Plaintiffs do not dispute that the Subject Property did not sell during the Agreement's listing period. Rather, Henley's argument is that he is entitled to commissions under the 180-day tail found in Paragraph 6(b) of the Agreement.

Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, p.

5. Rifkind claims: "Henley is not entitled to a commission as a matter of law because he did not fulfill the terms of the Agreement and/or the common law requirement of producing, procuring, and or introducing a ready, willing and able buyer to the Subject Property." Memorandum in Support of Defendant's Motion for Summary Judgment, p. 13.

The issue before this Court is whether Paragraph 6(B) is applicable. The language of the provision is:

Further, the brokerage fee [of 10%] is payable if the property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged or optioned or agreed to be sold, exchanged or optioned within 180 days following expiration of the term hereof to any person who has examined, been introduced to or been shown the property during the term hereof.

Affidavit of Joel P. Hazel, Ex. A, at ¶ 6(B). Paragraph 6(B) is terminated upon Rifkind's entering into an Exclusive Right to Sell Agreement to market the property at issue with another broker. *Id.*, at ¶ 6(C). Other than Rifkind stating Anderson dually represented Bolton and Rifkin in the actual sale, no evidence relevant to ¶ 6(C) has been provided to the Court. Justice Bistline wrote at some length about exclusive listing agreements:

Exclusive listings are not unknown or uncommon. The teeth in exclusive listings are ordinarily, as here, the provisions whereby the broker protects the right to a commission even though his own efforts may fail to produce a qualified buyer. The built-in protection here attempted is found in the language of the listing agreement which declares that the broker shall receive six percent of the selling price not only if he finds a buyer, but, as here applicable, if the owner "sells, trades or in any way disposes of the property" within the term of the listing agreement.

*Richard B. Smith Real Estate, Inc v. Knudson*, 107 Idaho 597, 600, 691 P.2d 1212,

1215 (1984) (J. Bistline, dissenting). In the instant matter, Henley is purportedly still entitled to a commission if the property is sold, exchanged or optioned, or agreed to be sold, exchanged or optioned, within 180 days of the March 10, 2005, expiration date where the property is sold to an individual who examined, was introduced to, or was shown the property during the term of the Agreement. Bolton did not examine the property and was not shown the property between September 13, 2004, and March 10, 2005. Henley's argument is that he "introduced" Bolton within the meaning of Idaho case law, citing *Kepler v. Arave*, 117 Idaho 946, 793 P.2d 178 (1990). In *Kepler*, however, the seller, Arave, misrepresented to the ultimate purchaser that Kepler's listing had expired and the Purchase and Sale Agreement was entered into before expiration of the listing agreement. 117 Idaho 946, 947, 793 P.2d 178, 179. In reciting the facts of the case, the Idaho Supreme Court stated:

Over the listing period, Kepler expended considerable time, effort and money in attempting to find a buyer for the property. He talked to a number of people about the property and did research on other possible buyers. He showed the property to V.F. Klinetobe of Boise, Ron Elsworth of Denver, Keving Fleenor of Idaho Falls, Porter Hogan of Springfield, Idaho, and a party from Minnesota. At his own expense he ran advertisements which included photographs of the property in local newspapers and real estate magazines. He assisted in the Liljenquist negotiations which resulted in the latter submitting an offer. He prevailed in causing other realtors to show the property.

*Id.* The *Kepler* case dealt with whether the contract between Kepler and the Araves was an exclusive listing entitling Kepler to a commission where earnest money had been deposited prior to expiration of the agreement. 117 Idaho 946, 949, 793 P.2d 178, 181. The *Kepler* Court did not analyze whether Kepler had "introduced" the purchaser and is not on point in the instant matter. Henley also cites *Wood v. Broderson*, 12 Idaho 190, 191, 85 P. 490 (1906), for the proposition that formal introductions are not necessary to find a commission owing to the realtor. Memorandum in Support of

Plaintiff's Motion for Summary Judgment, p. 7. In *Wood*, the Idaho Supreme Court stated:

While it is here found appellant "never sold defendant's land," nor "notify the defendant or his agent that he sold said property," \*\*\* or that he had found a purchaser for said land, \*\*\* nor did plaintiff ever present a purchaser to the defendant," as under the issues appellant to earn his commission was not required to "sell said land" nor formally "notify" the defendant that he has sold the same or that he had found a purchaser or "presented" a purchaser to respondent. *It was sufficient if the appellant found a purchaser, showed him the land and explained its desirability as a purchase.*

12 Idaho 190, 191, 85 P. 490, 491 (emphasis added). *Wood* is not on point for the matter before this Court because it involves a broker who procured a purchaser such that "introduction" was "a clear cut issue and considerable testimony [was] received thereon", and the appellant/broker in *Wood* alleged in his complaint that he'd taken persons out to view the property for the purpose of buying it. 12 Idaho 190, 191, 85 P. 490, 491.

Rifkind argues Henley's passively placing a sign on property does not suffice to constitute an introduction "where no active efforts on Henley's part culminated in negotiations between Bolton and Rifkind." Memorandum in Support of Defendant's Motion for Summary Judgment, p. 15. Rifkind cites *Petersen v. Swanson*, 51 Idaho 46, 1 P.2d 630 (1931) and the Louisiana case *Cramer v. Guericco*, 331 So.2d 550 (La.App. 1 Cir. 1976) in support of his position. *Id.*, p. 12. *Petersen* dealt with a broker who found a party who was ready, willing and able to exchange his property for that of the seller, where the broker alleged he was defrauded out of the commission due by seller's agent conspiring to complete the deal directly with the other party. 51 Idaho 46, 49, 1 P.2d 630, 633. The Idaho Supreme Court in *Peterson* cited 9 CORPUS JURIS p. 619, § 99:

After a broker has found a customer and commenced negotiations, neither the principal nor the customer can break them off and defeat the broker's

right to a commission by concluding the transaction without his aid. Nor can a principal reject an offer made by a person found by a broker and then without the broker's intervention sell to the same person and thus defeat the broker's right to a commission. A broker is entitled to a commission for effecting a sale, although he takes no part in the negotiations, where the sale is effected as the result of his introducing the customer and the principal or of his putting them into communication; the principal cannot defeat the right to compensation by closing the transaction directly with the customer without the broker's further aid.

51 Idaho 49, 50, 1 P.2d 630, 631. In *Cramer*, as quoted by Rifkind, the Louisiana Court of Appeals for the First District did not agree with the plaintiff real estate broker's claim of being entitled to a commission six months after expiration of the listing agreement if the purchasers "had become interested in the property as a result of their (the broker's) efforts in advertising it." 331 So.2d 550, 552. Just as in the instant case, in *Cramer*, the broker Cramer sued the seller for the broker's commission. The broker had held an open house and through that process, the buyer, Kuetemeyer was introduced to the house and made an offer, which was rejected by the seller. 331 So.2d 550, 551. Another open house occurred and Kuetemeyers made another offer which was refused. Kuetemeyers then abandoned their efforts to purchase the property. *Id.* Then, Cramer's listing expired and the sellers signed a listing agreement with another realtor. *Id.* Kuetemeyers' agent talked them into making a higher offer, which was accepted. After the sale closed, Cramer sued for his commission. *Id.* At trial, the court found Cramer was not entitled to the commission as he was not the procuring cause of the sale, and the court also found the six-month clause after the expiration of the listing agreement was not applicable. 331 So.2d 550, 552.

Procuring cause refers to the efforts of a broker in introducing or interesting a purchaser and means that negotiations eventually leading to a sale must be the result of some active effort of the broker. *Womack Agencies, Inc. v. Fisher*, 86 So.2d 732 (La.App.1<sup>st</sup> Cir. 1956). However, the mere fact that a sale may have been in some way aided by the previous efforts of the broker does not of itself entitle the broker to a

commission. *Bullis & Thomas v. Calvert*, 162 La. 378, 110 S. 621 (1926). The following language defining 'procuring cause' is found in *Sleet v. Williams*, supra, and is cited from 12 C. J. S. Brokers s 91, page 208:

'As used in that branch of the law relating to brokers' commissions, the terms 'procuring cause,' 'efficient cause,' and 'proximate cause' have substantially, if not quite, the same meaning and are often used interchangeably; they refer to a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing and able to buy on the principal's terms.' (291 So.2d at 498)

A review of the evidence presented herein convinces us that the plaintiff is not one who set in motion an uninterrupted series of events which resulted in the ultimate sale or procurement of a purchaser ready, willing and able to buy on the vendor's terms. Admittedly, the Kuetemeyers were interested in the property when they first noticed the plaintiffs' 'For Sale' sign and attended their 'Open House,' and in consequence thereof they made two offers, one oral and one written, and both were submitted to the owners by the agents and both were rejected, as neither conformed to the terms of the listing agreement. Subsequent to the rejection of said offers, the plaintiffs lost the exclusive listing on the property, being replaced by Guaranty Agency. With the intervention of the third realtor, Tony Bourgeois, Guaranty was able to obtain acceptance of the Kuetemeyers' offer of \$46,000. The plaintiffs were not in any manner involved with the negotiations which took place subsequent to their replacement by Guaranty, and as a result of the Guaranty and Bourgeois efforts, an offer \$3,500 higher than the best offer obtained by plaintiffs was finally accepted by the owners.

We conclude that the sale was not the result of some active effort of the plaintiffs but instead resulted from the combined efforts of the two new realtors, Bourgeois and Guaranty Agency. These realtors entered the picture only after negotiations among the owners, the plaintiffs and the Kuetemeyers had terminated in failure and after plaintiffs' exclusive listing had expired.

This is not a case where the owners fraudulently sought to prevent the plaintiffs from recovering their commission; in fact, the owners did not even know the Kuetemeyers were the prospective purchasers in the two offers obtained by plaintiffs.

The finding by the trial judge that plaintiffs were not the procuring cause of the instant sale, a finding which by its very nature is factual, has not been shown to be manifestly erroneous and is correct.

331 So.2d 550, 552-53. Cramer was found to not be the procuring cause even though

his sign led to the eventual buyer coming to two open houses by Cramer. In the present case, all Henley did was put up a sign. Likewise, the present case "...is not a case where the owners [Rifkind] fraudulently sought to prevent [Henley/Windermere CDA Realty] from recovering their commission." The facts of this case are Anderson (the buyer Bolton's agent), not Rifkind, thwarted Henley's commission. In doing so, Anderson, who is not a party to this lawsuit, does not seem to have acted fraudulently, instead appears to have acted legitimately for two reasons: First, he was frustrated that Henley/Windermere CDA Realty did not return his call in regard to Rifkind's property; and second, he was concerned as to how quickly his client Bolton was buying other property in the area. *Id.*, p. 8, citing Anderson Depo., p. 43, Ll. 21-25; p. 18, Ll. 16-19; p. 45, Ll. 3-9, Ll. 13-22; p. 27, Ll. 8-14; Anderson Affidavit, ¶¶ 12, 13, 18, 19.

As an alternative ground, the Louisiana Court of Appeals in *Cramer*, held the listing agreement's six-month clause applied only to sale by the owners and does not apply to a new agent operating under a valid listing agreement selling the property to a purchaser "who has initially become interested in the property as a result of the efforts of the first listing agent." 331 So.2d 550, 554-555. The Louisiana Court of Appeals also did not find the plaintiff procured the sale where the sale "was not the result of some active efforts of the plaintiffs but instead resulted from the combined efforts of the two new realtors..." 331, So.2d 550, 553.

Perhaps most directly on point is *Piedmont Consultants of Statesville, Inc. v. Baba*, 48 N.C.App 160, 268 S.E.2d 222 (1980), where the Court held the broker's services and actions were the procuring cause of the sale because the buyer contacted the broker in response to the broker's sign on the seller's property *and the broker and buyer discussed sale of the property*. 48 N.C.App. 160, 163, 268 S.E.2d 222, 224.

*Piedmont Consultants* involved these uncontested facts that: the seller's broker placed a "For Sale" sign on the property; the buyer saw the sign and contacted seller's agent; the seller's agent and buyer discussed sale of the property; defendants (property owners/sellers) sold the property to the buyer within 180 days after the exclusive right to sell had expired; and the sellers did not pay the plaintiff seller's real estate agent any commission. *Id.* The North Carolina Court of Appeals held:

If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commission (sic) provided the case is not taken out of the rule by the contract of employment. *Trust Co. v. Goode*, 164 N.C. 19, 80 S.E. 62. The term procuring cause refers to "a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms." 12 C.J.S. Brokers s 91, p. 209 (1938). Accord, 12 Am.Jur.2d Brokers s 190 (1964)."

48 N.C.App. 160, 163-64, 268 S.E.2d 222, 224. The North Carolina Court of Appeals upheld the trial court's grant of summary judgment in favor of the selling agent that he was entitled to his commission, finding:

Plaintiff [seller's agent] was the procuring cause of the sale in a direct manner, by introducing the purchasers to the owners of the property. Haneline's first contact with plaintiff came after he noticed the "For Sale" sign on the subject property.

48 N.C.App. 160, 164, 268 S.E.2d 222, 224. Obviously, the introduction by the seller's agent to the buyer, and the discussion between the seller's agent and the buyer were important facts. The facts in *Piedmont Consultants* are different from those in the instant case. Henley did not at any time discuss sale of the property with Bolton or his agent Anderson. In *Piedmont Consultants*, the seller's agent and the buyer *discussed* the property. Unlike the brokers in the Idaho cases of *Kepler* and *Wood*, as well as the

brokers in *Cramer* and *Piedmont Consultants*, Henley did not show the subject property to even one person, much less several persons and especially Bolton.

A broker is the procuring cause of a sale if the sale is “the direct and proximate cause of his efforts or services.” *Piedmont Consultants*, 48 N.C.App. 160, 163, 268 S.E.2d 222, 224. Procuring cause refers to “a cause originating or setting in motion a series of events which, without break in their continuity result in accomplishment of the prime object of the employment of the broker”. *Id.*, quoting 12 CORPUS JURIS SECUNDUM § 91, P. 209 (1938). Because Henley cannot point to any facts in the record indicating he introduced Bolton to the property, other than having erected a Windermere “For Sale” sign, without any additional act, Henley has not established the right to judgment as a matter of law. Henley’s placing of the sign prompted Bolton’s agent Anderson to call Windermere. No information was exchanged in that call that led to the sale. When Anderson’s call was not returned by Henley nor anyone else at Windermere, any subsequent events resulting in sale had a break in continuity. Rifkind is entitled to summary judgment on Henley’s claim against Rifkind for breach of contract.

## **2. Rifkind is Not Entitled to Summary Judgment on Rifkind’s Claim That Henley Breached His Contract With Rifkind.**

Rifkind argues Henley materially breached the agreement by failing to return Anderson’s call, failing to conduct himself in a professional manner, and not bothering to show the property even once during the listing. Memorandum in Support of Defendant’s Motion for Summary Judgment, pp. 24-25. Henley argues he did not materially breach the agreement as he complied with the duties listed in ¶ 14 of the Agreement and that he promptly listed the property, advertised the property and acted in good faith. Memorandum in Opposition to Defendant’s Motion for Summary Judgment, p. 15. Henley states the fact he was not present when other realtors may have brought clients

to view the property is irrelevant and the fact that he never received any request from a prospective viewer regarding the property is simply not his fault. *Id.*, pp. 15-16.

Paragraph 14 of the agreement reads:

**14. DUTIES TO A CLIENT.** The brokerage and affiliated licensees representing a SELLER are agents of the Client and owe the following duties as set forth in Idaho Code, Section 54-2087; 1. To perform the terms of the written agreement with the client; 2. To exercise reasonable skill and care; 3. To promote the best interests of the client in good faith, honesty and fair dealing including, but not limited to: (a) disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee; (b) seeking a buyer to purchase the seller's property at a price, and under terms and conditions acceptable to the seller and assisting in the negotiation therefore; (c) or where mutually agreed upon by the parties in a separate signed written agreement, requesting reasonable proof of a prospective buyer's financial ability to purchase the real property which is the subject matter of the transaction. When such requests have been agreed to in writing, this duty may be satisfied by any appropriate method suitable to the transaction or, when deemed necessary by the real estate licensee, by advising the client to consult with an accountant, lawyer, or other professional as dictated by the transaction. 4) A duty of confidentiality which may continue after the end of the representation, 5) properly account for money or property in care of the brokerage.

There is no dispute that Henley ignored Anderson's call on behalf of Bolton.

Whether that is a failure to "exercise reasonable skill and care" is an issue for trial. And the remaining allegations by Rifkind may not fall within the duties listed in ¶ 14 (set forth I.C. § 54-2087), so long as Henley used *reasonable* skill and care. Rifkind is not entitled to summary judgment on the issue of Henley's material breach.

**B. There is an Issue of Material Fact as to Whether Seller Rifkind Breached the Covenant of Good Faith and Fair Dealing With Henley.**

Henley argues Rifkind interfered with Henley's ability to perform under the Agreement by Rifkind's statement to Lambrose to keep Bolton and Anderson away from the property until Henley's listing expired. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 13. Henley argues Rifkind's knowledge of Bolton's offer,

and refusal to pass the information on to Henley or close the deal himself during the listing period, constituted breach of the implied covenants of good faith and fair dealing.

*Id.*, p. 14. Rifkind responds he did not nullify or impair any benefit of the Agreement because Henley would only have been entitled to the commission had he procured, produced, or introduced Bolton as the purchaser during the term of the Agreement, which did not occur. Reply Brief in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, p. 12.

The parties do not agree as to whether Rifkind shared the information he received from Lambrose (that Bolton had expressed interest in the property) with Henley. Rifkind states "the uncontested testimony of Rifkind is that he shared the information he received from Lambrose with Henley in late February 2005." *Id.*, citing Affidavit of Rifkind, ¶ 11. Rifkind also points out Henley had not returned the telephone call placed by Anderson on Bolton's behalf. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 19. Henley, on the other hand, argues "Bolton would have been introduced but for Rifkind's purposeful decision to not pass on Lambrose's information or act on it himself." Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 14, n. 2.

In Rifkind's deposition, counsel for Henley inquired as to how Rifkind communicated Bolton's interest to Henley. Rifkin responded:

That's what I kept saying to Henley, I said, "You know, I don't understand. Here's this guy buying all this property in Shoshone County and we're not hearing from him. You know, hey, Randy, what's happening here.

Affidavit of Shawn Nunley, Ex. B, p. 23, Ll. 5-9. This testimony has not been refuted by Henley in briefing. Henley states he had no knowledge of Anderson's telephone call and cannot find any record of the call, but argues such a "mistake" does not amount to a

material breach on the part of Henley. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 16. Because this is a jury trial and this Court may not resolve conflicting inferences, this disputed issue of fact precludes summary judgment. *See supra, Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Henley has provided this Court with no support for the argument that there was intentional withholding of information from Henley. However, because of the possibility of conflicting inferences, Rifkind is not entitled to summary judgment on Henley's breach of implied covenants claim.

### **C. Estoppel.**

Rifkind also argues Henley should be estopped from asserting Henley's claims for breach of contract and breach of the covenant of good faith and fair dealing against Rifkind, because Henley's position in this litigation is inconsistent with Henley's earlier position when he failed to return Anderson's call. Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 19-21. Specifically, Rifkind argues: "...Henley took the position that a real estate transaction between Bolton and Rifkind was not worth his [Henley's] time or energy as evidenced by his failure to return Anderson's call or act upon Rifkind's instruction to follow up with Anderson", and "...once the transaction between Bolton and Rifkind was completed, albeit through no efforts or endeavors of his own, Henley changes his position by asserting in the above-entitled lawsuit that he was entitled to a commission for bringing about said transaction."

*Id.*, pp. 20-21. Quasi-estoppel applies where:

(1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from the one he or she had previously derived a benefit or acquiesced in.

*Id.*, p. 20, citing *C & G Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 145, 75 P.3d 194, 199 (2003). Rifkind states he was disadvantaged because the deal would have been structured differently had Rifkind known Henley would later claim to have introduced Bolton as a purchaser. It appears Henley's prior position, if failing to act at all can be considered a position, did not induce Rifkind to change his position and did not garner Henley any advantage. Henley's failure to act only caused time to pass without a buyer on the line. As a result of that passage of time, Bolton emerged. Due to the passage of time, Rifkind thought he could deal directly with this prospective buyer, and Rifkind negotiated to sell his property for \$2,225,000.00, without an agent, such that Rifkind would net the \$2,225,000.00. There is no cause and effect relationship between (1) the offending party [Henley] taking a different position [seeking his commission] than his original position [not bothering to return a phone call], and (2) either (a) the offending party [Henley] gained an advantage or caused a disadvantage to the other party [Rifkind]; or (b) the other party [Rifkind] was induced to change positions. While these things may have happened, the causal link is missing. Also, because Henley and Rifkind originally agreed to sell the property for \$2,225,000.00, Rifkind would not have netted that amount had the property been sold by Henley. Instead he would have netted 90% of the amount. Therefore, Rifkind's claim that his disadvantage was his inability to structure the deal so as to net \$2,225,000.00 is unpersuasive. Rifkind has not established his entitlement to judgment as a matter of law on the issue of quasi-estoppel.

**D. There is an Issue of Material Fact as to Whether Seller Rifkind Agreed to the 180-day Term in the Agreement.**

Rifkind argues Henley committed fraud or violated the statute of frauds by

Henley's adding ¶ 6(B) of the agreement *after* Rifkind had signed the agreement.

Memorandum in Support of Defendant's Motion for Summary Judgment, p. 23.

Paragraph 6(B) extends the term of the agreement by 180 days if Henley introduced or procured a purchaser during the original term. Rifkind states he never would have entered into the Agreement had he known of the 180-day extension period, making that omission a material one. *Id.* Henley argues Rifkind was aware of, and expressly agreed to the 180-day tail in the Agreement. Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 2.

The parties cite to different portions of the deposition transcript in support of their positions. Henley cites to his own answer stating that he is 100% sure the 180 days was filled in on ¶ 6(B) before Rifkind's signing. Affidavit of Joel Hazel, Randy Henley Transcript, p. 28, LI. 15-21. Rifkind points to the testimony several pages later in which Henley is unable to recall precisely when all handwritten spaces on the agreement were filled in. *Id.*, p. 31-32, LI. 22-25, 1-4; pp. 33-34, LI. 23-25, 1-5. At oral argument, counsel for Rifkind argued: "Contradicting ones self in sworn statements does not manufacture a contested issue of material fact." In essence, Rifkind argues Henley's inconsistent testimony should render him not credible, leaving the testimony of Rifkind (that Henley added ¶ 6(B) after Rifkind signed the agreement), uncontradicted. While it might make sense for inconsistent testimony to result in a finding of lack of credibility, and this Court has so found in the past, the Idaho Supreme Court has a different opinion.

The district court also stated that it discounted the engineer's opinions in his affidavit because they contradicted his prior opinion. It is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact.

*Stanley v. Lennox*, 140 Idaho 785, 789, 102 OP.3d 1104, 1108 (2004). On the other hand, the Idaho Court of Appeals recently wrote:

It is impossible to determine whether Detective Pietrzak suffered a mere lapse of memory or whether he intentionally sought to validate the discovery of the marijuana on different grounds in the two hearings. In the end, for purposes of appellate review, it does not matter, for the inconsistency compels the question whether the detective can be believed at all. \* \* \* The district court's finding that Detective Pietrzak was a credible witness cannot be upheld where the record plainly shows that he was not. He presented under oath, two irreconcilable versions of events and at the second hearing made no effort to retract or correct his earlier sworn testimony. In our view, a witness who has testified under oath to two patently inconsistent descriptions of events and has not offered any explanation for the inconsistency cannot be deemed "credible" in either instance.

*State of Idaho v. Munoz*, 2009 Opinion No. 20, 09.7 ICAR 334, 336 (Ct.App. March 25, 2009). *Stanley* and *Munoz* seem difficult to reconcile, but it does not seem clear to this Court at this summary judgment juncture whether or not Henley has had the opportunity to explain these inconsistencies. Henley should be allowed that opportunity, and the credibility of such explanation will be assessed by the trier of fact.

Here, the facts are in dispute as to when ¶ 6(B) materialized. Accordingly, since there is a dispute of fact as to when ¶ 6(B) appeared on the agreement, Rifkind is not entitled to summary judgment on his claim that Henley committed fraud by adding this paragraph after Rifkind signed the agreement. For the same reason, Rifkind is not entitled to summary judgment on his claim that Henley violated the statute of frauds by adding this paragraph after Rifkind signed the agreement.

#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above, Rifkind is entitled to summary judgment on Henley's claims of breach of contract. There are issues of disputed fact regarding the remainder of Rifkind's arguments on summary judgment. There are issues of material

fact regarding all of Henley's claims for summary judgment.

IT IS HEREBY ORDERED Rifkind's motion for summary judgment on Henley's claims of breach of contract are GRANTED.

IT IS FURTHER ORDERED Rifkind's remaining grounds for his motion for summary judgment are DENIED.

IT IS FURTHER ORDERED Henley's motion for summary judgment is DENIED.

Entered this 28<sup>th</sup> day of April, 2009.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of April, 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**  
Shawn C. Nunley

**Fax #**  
667-8503

| **Lawyer**  
Joel P. Hazel

**Fax #**  
667-8470

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Jeanne Clausen, Deputy Clerk