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

**LEON ATKINSON,**

*Plaintiff,*

vs.

**NANCY LAUX, and spouse, BRUCE AND  
SHARON CARDE.**

*Defendants.*

Case No. **S CV 2008 827**

**MEMORANDUM DECISION AND  
ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

Plaintiff Leon Atkinson (Atkinson) alleges that when he purchased a rental property from defendants, the agreement contemplated one-half ownership of a well. Atkinson states he entered into an agreement in which defendants would provide water to each unit of the property, but he does not recall entering into the agreement with the specific provision regarding water to each rental unit, as he believed he'd purchased partial ownership of the well. A letter from defendants has been provided to the Court stating that license for use of water would be revoked; the water cut-off date was extended from Nov. 30, 2007 to May 21, 2008. On May 16, 2008, Atkinson noticed up a show cause hearing regarding the termination of the water supply. Atkinson sought a temporary restraining order to cease any action to stop the flow of water from the well in dispute and this Court denied the motion on June 20, 2008.

As nothing had been filed in the case for over six months, a Notice of Proposed

Dismissal was issued on January 1, 2009, and since no response was filed by any party, an Order of Dismissal was filed by the Court on February 4, 2009. Atkinson sought an Order of this Court vacating judgment pursuant to I.R.C.P. 60(b)(1),(3), and (6), which this Court granted on May 26, 2009.

Defendants now move this Court to dismiss the action pursuant to I.R.C.P. 12(b)(6). Oral argument was held on August 11, 2009. Atkinson appeared in person, Bruce Greene appeared telephonically on behalf of defendants. An “Amended Complaint Regarding Real Property Water Rights and Civil Rights Violations and Declaratory Judgment, Demand for Jury Trial” was filed by Atkinson just prior to oral argument. The Court found at oral argument that defendants’ Motion to Dismiss is a “responsive pleading” pursuant to I.R.C.P. 15(a), and thus, Atkinson needed to file a motion for leave to amend pursuant to that rule, and obtain a ruling from the Court, in order for the filing of the “Amended Complaint” to have any validity.

## **II. ANALYSIS.**

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schools For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopoulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is

entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. See *Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

Defendants argue only:

The Complaint seeks restraining order, which the Court has already properly denied. Additionally, as shown by Defendant's affidavit the water line at issue was dug up and capped off due to Plaintiff's non-payment. The Defendants thereafter dug his own well, or had other drill same, making this issue and any temporary orders moot anyway. If there was ever a justifiable controversy pled, there no longer is one; hence dismissal is appropriate.

Motion to Dismiss and Notice, p. 1. Atkinson has not replied to the motion to dismiss.

At oral argument, Atkinson noted that the original pleading was for injunctive relief, but at all times he intended to file an amended complaint.

At issue is whether, viewing all inferences in the record and pleadings in favor of Atkinson, a claim for relief has been stated such that Atkinson is entitled to offer evidence to support his claims.

This matter is before the Court as a result of a "Complaint RE Water Rights" filed by Plaintiff on May 16, 2008. The entire Complaint reads:

COMES NOW Leon Atkinson, pro se, plaintiff in the above action and hereby requests the Court to retrain, stop and cease any action to stop the flow of water from the well in dispute between Plaintiff and Defendants.

Plaintiff alleges that if this act is not stopped, it will cause great hardship to Plaintiff. Plaintiff is on dialysis and doing dialysis at home at the residence

in question. Plaintiff alleges that a sterile environment must be maintained for this procedure which would be impossible without water. In addition, hardship would be imposed on Plaintiff's tenants which include two children.

Complaint RE Water Rights, p. 1. Plaintiff re-filed the Complaint quoted *supra* in its entirety on November 17, 2008, only changing the *pro se* language to *in propria persona*. Thus, the relief sought, and the behavior complained of, remains the same: Atkinson is asking the Court to restrain any action by defendants to stop the flow of water from the disputed well. Atkinson has submitted no additional evidence, by way of affidavit, etc., to support his complaint. As argued by defendants, this court has previously ruled, on June 18, 2008, that Atkinson's request for a temporary restraining order must be denied as Atkinson failed to demonstrate an clear right to the relief sought (the underlying well dispute is not before the Court based on the Complaint filed by Atkinson) or irreparable harm or injury.

This matter having remained before the Court for over one year, and Atkinson having presented no further evidence of waste and/or great or irreparable injury, weighs against the damages claimed by Atkinson in his Complaint. And, although more than one year has passed, Atkinson has not sought to litigate the underlying property issues with respect to the well. This necessarily mitigates against his being entitled to the injunctive relief demanded. Even though defendants reference to an affidavit stating the water line has already been dug up, capped, and defendant has dug his own well, such affidavits are not in the Court file. However, even without those affidavits, Atkinson has nevertheless not met his burden of showing entitlement to the injunctive relief sought. *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)

Further, a temporary injunction will not usually be allowed where its effect is to give plaintiff principal relief he seeks without bringing the cause to trial. *Rowland v.*

*Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869, 872 (1925); *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720, 722(1936); *Gilbert v. Elder*, 65 Idaho 383, 144 P.2d 194, 195 (1943). Although the Idaho Supreme Court has not banned outright preliminary injunctions in cases where a grant would have the effect of giving a party all the relief sought in the action, it does absolutely require the moving party to "show a clear right to the relief sought." *Farm Service, Inc. v. U.S. Steel Corp.*, 90 Idaho 570, 586, 414 P.2d 898, 906-07 (1966).

Here, Atkinson has not demonstrated an entitlement to the relief sought, has not shown waste or irreparable injury would result if the request is denied, and only seeks the same relief previously denied by this Court in his new Complaint. Giving Atkinson all reasonable inferences, defendants are entitled to their Motion to Dismiss.

### III. ORDER.

IT IS HEREBY ORDERED that defendants' Motion to Dismiss is GRANTED.

Entered this 11<sup>th</sup> day of AUGUST, 2009.

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John T. Mitchell, District Judge

#### Certificate of Service

I certify that on the \_\_\_\_\_ day of August, 2009, 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>Pro Se Plaintiff</u>	<u>Fax #</u>
Bruce Greene	208 265-2451	Leon Atkinson P. O. Box 1282 Sandpoint, ID 83864	

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Deputy Clerk