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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 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  
RECONSIDERATION OF DECISION  
AND ORDER ON CROSS-MOTIONS  
FOR SUMMARY JUDGMENT**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

On April 28, 2009, this Court entered its Memorandum Decision and Order on Cross-Motions for Summary Judgment. In that decision, this Court granted defendant Rifkind summary judgment on plaintiff Henley's claim of breach of contract. This Court found there were issues of disputed fact regarding the remainder of Rifkind's arguments on summary judgment, and that there were issues of material fact regarding all of Henley's claims for summary judgment.

On May 18, 2009, Rifkind filed "Defendant's Motion for Reconsideration" and filed a "Memorandum in Support of Defendant's Motion for Reconsideration". Rifkind asks this Court to reconsider its denial of Rifkind's claim for summary judgment on Henley's claim for breach of the implied covenant of good faith and fair dealing. Defendant's Motion for Reconsideration, p. 1. Rifkind claims that even though the Court found

contradictory inferences regarding whether or not Rifkind intentionally withheld information from Henley which Rifkind received from Lambrose regarding Bolton's interest in buying Rifkind's property, "[h]owever, as Rifkind had no duty under the Agreement to convey information to Plaintiffs, these contradictory inferences are irrelevant to Rifkind's Motion for Summary Judgment dismissal of Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing." Defendant's Memorandum in Support of Motion for Reconsideration, p. 4. Rifkind argues that his duty is set under the agreement that he had with Henley, and that there is not a separate contract action apart from the breach of contract claims. *Id.*, pp. 4-7. Rifkind also argues there is no causal connection between Rifkind's alleged acts and Henley's loss of a commission given Anderson's uncontroverted testimony. *Id.*, p. 8. Rifkind argues: "Even taking Lambrose's testimony, that Rifkind told Lambrose to keep Anderson and Bolton away until Plaintiffs' listing expired in the light most favorable to Plaintiffs, there is no causal connection between Rifkind's omission and any damage to Plaintiffs since Anderson had vowed to deal with Plaintiffs for reasons of his own." *Id.*

On May 28, 2009, Henley (and Windermere/Coeur d'Alene Realty, Inc.) filed "Plaintiffs' Response to Defendants Motion for Reconsideration and Plaintiffs' Cross-Motion for Reconsideration." Henley's argument in opposition to Rifkind's motion for reconsideration is that Henley's claim for breach of the implied covenant of good faith and fair dealing is still alive, because this Court did not conclude that an otherwise enforceable contract did not exist at all, rather, the Court simply held that express provision of the contract had not been breached, thereby leaving for the jury the question of whether the implied covenant of good faith and fair dealing had been breached. Plaintiffs' Response to Defendants' Motion for Reconsideration and Plaintiffs'

Cross-Motion for Reconsideration, p. 2. Henley's argument on *his* motion for reconsideration is that this Court's granting defendant Rifkind summary judgment on plaintiff Henley's claims of breach of contract (and not granting Henley summary judgment on Henley's breach of contract claim) should be reconsidered, because "Defendant's own expert, Realtor John Corcoran, testified at his deposition that he believed a realty sign is a form of advertisement, and a realtor would be entitled to a commission if his property was purchased by a buyer who discovered the property by his advertisement." *Id.*, p. 6.

Oral argument on the cross-motions for reconsideration was held on June 2, 2009. Counsel for Rifkind objected to the untimely filing of Henley's motion. Henley responded that Corcoran's deposition was not taken until May 14, 2009, and the transcript was not received by Henley's counsel until May 28, 2009. Affidavit of Shawn Nunley in Support of Plaintiffs' Motion to Shorten Time, p. 2, ¶ 2. This Court found that Henley's motion to reconsider was untimely, but overruled Rifkind's objection due to Rifkind being unable to show any prejudice. Henley's Motion to Shorten Time is granted.

A recitation of the facts as found by the Court in its April 28, 2009, Memorandum Decision and Order on Cross-Motions for Summary Judgment, may be helpful.

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.

## **II. STANDARD OF REVIEW.**

A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made *after* entry of final judgment may be filed within fourteen (14) days from the entry of such order...

I.R.C.P. 11(a)(2)(B). A trial court's decision to grant or deny a motion for

reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). Here, this Court's Memorandum Decision and Order on Summary Judgment was an interlocutory Order, and the parties' motions for reconsideration were therefore made before final judgment and are timely.

### **III. ANALYSIS.**

#### **A. Rifkind's Motion for Reconsideration.**

At issue on summary judgment was 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, but rather whether Henley was 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. This Court found Henley was unable to point to any facts in the record indicating he had introduced Bolton to the property. Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 13. "[O]ther 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." *Id.*

At issue in the present motion for reconsideration by Rifkind, is whether the Court's decision that Rifkind was entitled to summary judgment on Henley's breach of contract claims as to the express terms of the Agreement, necessarily means Rifkind is also entitled to summary judgment on Henley's claim of breach of the implied covenant

of good faith and fair dealing. Rifkind argues he did not violate, nullify or significantly impair any express terms of the agreement and the Agreement never required disclosure by Rifkind of all potential purchasers. Memorandum in Support of Motion for Reconsideration, p. 6. Because Idaho case law (1) does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing independently from a breach of contract claim; (2) allows only contract damages as remedy for the breach of the implied covenant of good faith and fair dealing; and (3) does not recognize any separate contract damages for breach of the implied covenant of good faith and fair dealing, Rifkind argues Henley's claim in this regard should be dismissed as a matter of law. *Id.*, p. 7.

Henley replies this Court's finding the express provisions of the contract were not breached does not preclude a finding that implied covenants were breached. Response to Defendant's Motion for Reconsideration, p. 2. Specifically, Henley argues Rifkind's:

...[P]urposeful failure to inform Plaintiff of a prospective buyer in Bolton and/or his patent direction to Lambrose to keep Bolton away from Plaintiff and/or his property thwarted Plaintiff from enjoying the benefits of the [Agreement], and thus violated the implied covenant of good faith and fair dealing, that, under Idaho law, exists in every contract.

*Id.*, p. 5.

"The implied covenant of good faith and fair dealing is...implied by law in the parties' contract." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 750, 9 P.3d 1204, 1216 (2000). The covenant "arises only regarding terms agreed to by the parties." *Taylor v. Browning*, 129 Idaho 483, 490, 927 P.2d 873, 880 (1996) (citing *Idaho First Nat'l. Bank v. Bliss Valley Foods*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991)). "The covenant requires that the parties perform, in good faith, the obligations imposed by their agreement". *Idaho Power Co.*, 134 Idaho 738, 750, 9 p.3d 1204, 1216.

Rifkind is correct in stating breach of the covenant does not give rise to an action separate from the breach of contract claim. Memorandum in Support of Motion to Dismiss, p. 5 (citing *Idaho First Nat'l Bank*, 121 Idaho 266, 289, 824 P.2d 841, 864). To clarify, the Idaho Supreme Court has specifically stated that “the fact that a contractual covenant, such as a covenant of good faith and fair dealing, is implied does not mean that a violation of such gives rise to an action in tort.” *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 102, 730 P.2d 1014, 1022. As Henley is not claiming an action in tort, the narrow issue for this Court is whether an action for breach of the implied covenant of good faith and fair dealing can be maintained after a breach of contract action, underlying the implied covenant, has been dismissed at summary judgment.

In its Order, this Court determined that Henley had not established the right to judgment as a matter of law on his claim that Section 6(b) of the Agreement entitled him to the commission because he erected a Windermere sign “without any additional act”. Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 13. This Court went on to find an issue of material fact as to whether Rifkind had breached the covenant of good faith and fair dealing. *Id.*, pp. 14-16. Although *related* to Henley’s claim for breach of contract regarding the unpaid commission, Henley’s claim of breach of the covenant of good faith and fair dealing *is based on Rifkind keeping the ultimate purchaser Bolton’s interest in the property from Henley*. See Response to Defendant’s Motion for Reconsideration, p. 4. The Court’s reasoning, that Henley had not performed sufficiently to “introduce” Bolton to the property during the term of the Agreement so as to gain entitlement to the commission, is not altogether related to Henley’s claim that Rifkind breached the covenant of good faith and fair dealing. Thus, despite not being entitled to a commission in this matter, Henley can maintain his claim for breach of the

implied covenant of good faith and fair dealing because Rifkind remained under an obligation, implied in law, to act in good faith and deal fairly with Henley. Additionally, under the theory of a breach of a covenant of good faith and fair dealing, it might not be relevant that: 1) Henley and his agency failed to return Anderson's call on behalf of Bolton, and 2) Anderson made the decision to wait until Henley's listing was done. That is an issue which can be argued at trial.

Put another way, the contract between Henley and Rifking is still there even though the express terms of that contract were not breached as found by this Court. However, the contract remains, and to the extent there are implied covenants of good faith and fair dealing under that contract, those implied covenants remain. Rifkind is under no obligation under the *express* terms of the written agreement to disclose any known interested party to Henley, but does that fact alone immunize him from the implied covenant to act in good faith toward Henley? Probably not. The issue at trial will be "Does Rifkind's holding the existence of Bolton from Henley, violate the covenant of good faith and fair dealing?" Rifkind's expert Corcoran expressed the opinion that it does not. Affidavit of Shawn C. Nunley in Support of Plaintiffs' Response to Defendants Motion for Reconsideration and Plaintiffs Cross Motion for Reconsideration, p. 2, ¶ 2, Exhibit A, p. 34, L. 23 – p. 35, L. 15. However, there are two problems with Corcoran's opinion which prevent summary judgment in favor of Rifkind on the issue of any breach by Rifkind of the implied covenant of good faith and fair dealing. First, that opinion is not *strong* enough to grant summary judgment upon in favor of Rifkind at this time ("I don't *think* he has to" was Corcoran's answer). (emphasis added). Second, it is a legal question. Corcoran recognized it was a legal question, as he testified: "Morally, probably should [seller should disclose the possible buyer to his realtor]. Under the law,

I don't think he has to." *Id.*, p. 35, Ll. 17-19. Yet no legal citation or basis was given for that opinion by Corcoran. Again, the strength of Corcoran's opinion ("...I don't *think* he has to") is an issue. (emphasis added).

This Court has already found the issue to be one for a jury, and nothing about the motion to reconsider changes this Court's opinion on that issue.

Rifkind appears to argue that a breach of the covenant of good faith and fair dealing arises only where there has been a breach of the contract. Memorandum in Support of Motion for Reconsideration, p. 5. But, while a breach of the covenant is a breach of the contract, because the covenant is implied in law into the contract, the converse is not therefore also true. A breach of the covenant of good faith and fair dealing can likely arise even where there has been no finding that a term of the contract was breached, in this case that term would have been Section 6(b) regarding the commission and Rifkind points to no authority directly supporting his contention. In support of his argument, Rifkind cites *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 108 P.3d 332 (2005), for the proposition that a plaintiff who would not have any contractual damages, because they have no legal right to a commission, cannot suffer damages for the breach of the implied covenant of good faith and fair dealing. Memorandum in Support of Motion for Reconsideration, p. 6, citing *Bakker*, 141 Idaho 185, 192, 108 P.3d 332, 339. *Bakker* however, is distinguishable from the instant matter.

*Bakker* involved a plaintiff's written employment contract with defendant to act as an on-site sales agent in Sun Valley, Idaho. 141 Idaho 185, 188, 108 P.3d 332, 335. Following *Bakker*'s termination, she sued for commission on a model unit for which she had found a buyer; *Bakker* sued alleging contractual and statutory claims for her wages

and a claim of *quantum meruit*. 141 Idaho 185, 188-89, 108 P.3d 332, 335-36. The District Court concluded her complaint did not encompass a claim for breach of the covenant of good faith and fair dealing and the Idaho Supreme Court upheld the District Court's summary judgment in favor of her former employer. *Id.* The Supreme Court noted, however:

If Thunder Springs had conspired to terminate the employment prematurely in order to avoid payment of the commission, then the covenant of good faith and fair dealing would be implicated; Bakker might still have a remedy. The fact is that Bakker had almost absolute control over the condition precedent to receiving the commission.

141 Idaho 185, 192, 108 P.3d 332, 339. It appears that in the matter before the Court, whether Rifkind alone or in conjunction with Anderson through Lambrose, conspired to avoid payment of the commission, thereby implicating the covenant of good faith and fair dealing, remains a question for a jury.

#### **B. Henley's Motion for Reconsideration.**

As stated above, Henley's argument on *his* motion for reconsideration is that this Court's granting defendant Rifkind summary judgment on plaintiff Henley's claims of breach of contract (and not granting Henley summary judgment on Henley's breach of contract claim) should be reconsidered, because "Defendant's own expert, Realtor John Corcoran, testified at his deposition that he believed a realty sign is a form of advertisement, and a realtor would be entitled to a commission if his property was purchased by a buyer who discovered the property by his advertisement." Plaintiffs' Response to Defendants' Motion for Reconsideration and Plaintiffs' Cross-Motion for Reconsideration, p. 6. Henley filed an "Affidavit of Shawn C. Nunley in Support of Plaintiffs' Response to Defendants Motion for Reconsideration and Plaintiffs Cross Motion for Reconsideration", to which is attached excerpts of the deposition of John

Corcoran. Affidavit of Shawn C. Nunley in Support of Plaintiffs' Response to Defendants Motion for Reconsideration and Plaintiffs Cross Motion for Reconsideration, p. 2, ¶ 2, Exhibit A.

In making the claim that Corcoran testified that a realty sign is an advertisement and if a buyer discovered the property via that advertisement, it would entitle the realtor to a commission, counsel for Henley misreads Corcoran's testimony.

Corcoran testified that an "introduction", in his opinion, means "Showing the property or meeting with the buyer, meeting with the seller." Affidavit of Shawn C. Nunley in Support of Plaintiffs' Response to Defendants Motion for Reconsideration and Plaintiffs Cross Motion for Reconsideration, p. 2, ¶ 2, Exhibit A, p. 20, Ll. 6-11.

Corcoran testified that "possibly" an advertisement could be an "introduction" (*Id.*, p. 21, Ll. 14-22), but only if the buyer "moved on it." *Id.*, p. 21, L. 23 – p. 22, L. 8. In the present case, it is undisputed that the prospective buyer did not "move on it" for two reasons: **first**, Henley and his agency failed to return Anderson's call on behalf of Bolton, and **second**, Anderson made the decision to wait until Henley's listing expired. As this Court stated at page eleven of its Memorandum Decision and Order on Cross-Motions for Summary Judgment:

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.

Nothing about Corcoran's deposition excerpts would cause this Court to change its

ruling granting defendant Rifkind summary judgment on plaintiff Henley's claims of breach of contract (and not granting Henley summary judgment on Henley's breach of contract claim).

**IV. CONCLUSION AND ORDER.**

For the reasons stated above, Rifkind's Motion for Reconsideration is DENIED, and Henley's Motion for Reconsideration is DENIED.

Entered this 3rd day of June, 2009.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of June, 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