STATE OF IDAHO)
County of BONNER)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

RICKIE A. VOORHIES, ET UX,)
)
Plaintiffs,)
)
vs.)
)
NORTH IDAHO GROUP, LLC dba CENTURY 21 ON THE LAKE, NORTH IDAHO GROUP, LLC, dba CENTURY 21 ON THE LAKE, ARROWHEAD RANCH WATER COMPANY, MICHAEL D. BENNETT, and the Estate of ROBERT VERNON HILL,)
Defendants.)

Case No. **S CV 2008 993**

MEMORANDUM DECISION AND ORDER: 1) GRANTING PLAINTIFFS' MOTION TO STRIKE, AND 2) GRANTING IN PART AND DENYING IN PART DEFENDANT ARROWHEAD RANCH WATER COMPANY'S AND DEFENDANT MICHAEL D. BENNETT'S MOTION FOR SUMMARY JUDGMENT

Attorneys:

For the Plaintiff - Todd M. Reed
For Defendants Arrowhead Ranch Water Co. and Michael D. Bennett - Susan P. Weeks

I. PROCEDURAL HISTORY AND BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment brought by Defendants Arrowhead Ranch Water Company (ARWC) and Michael D. Bennett (Bennett). Plaintiffs Rickie and Linda Voorhies (Voorhies) purchased property located at 2807 Cocolalla Loop Road in Cocolalla, Idaho, on December 7, 2007. Voorhies claim ARWC and Bennett breached their contract (the Water Service Agreement); misrepresented to the Voorhies, and violated the Idaho Consumer Protection Act. Complaint, pp. 4-9. Voorhies claim the property was listed by defendant North Idaho Group, LLC d/b/a "Century 21 on the Lake" (Century 21) as being part of a community

water system, but Voorhies were never informed to whom to pay the monthly water fee. The Complaint does not specify how Voorhies learned it was ARWC which needed to be paid. However, the Complaint states:

> On or about March 21, 2008, since Plaintiffs had not received any information and after determining that it was ARROWHEAD that needed to be paid, they sent a letter to them paying the fee of Thirty-five Dollars ($35.00) per month for a total of One Hundred Five Dollars ($105.00) being due for the months of December, January and February.

Complaint, p. 3, ¶ X. The check was returned by ARWC or Bennett's agent and after return of the check, Voorhies were informed the water contract with the prior owner of the property, Robert Vernon Hill, had been cancelled and Voorhies would need to pay a $16,000.00 "hook-up fee". *Id.,* p. 4, ¶ XII. Voorhies filed their Complaint on June 13, 2008, claiming misrepresentation by Century 21 and the Estate of Robert Vernon Hill and breach of contract and violation of the Consumer Protection Act by ARWC and Bennett.

On June 23, 2009, Judge Charles Hosack entered a temporary retraining order prohibiting ARWC and/or Bennett from not delivering water to the residence at 2807 Cocolalla Loop Road, inter alia. On July 2, 2009, the Court entered a preliminary injunction upon stipulation by the parties prohibiting ARWC and Bennett from not delivering water to the residence and again restraining ARWC and Bennett from harassing or intimidating the Voorhies, and requiring the Voorhies to maintain monthly payments and keep the $500.00 bond with the Bonner County Clerk until further order of the Court. This matter is currently set for a three-day jury trial commencing August 16, 2010.

Bennett and ARWC filed their Memorandum in Support of Motion for Summary Judgment back on September 4, 2009. At the time the motion for summary judgment

was filed on September 4, 2009, a three-day jury trial was scheduled for November 2, 2009. Accordingly, filing of the motion for summary judgment on September 4, 2009, was untimely, according to this Court's Scheduling Order Order filed July 17, 2009. On September 17, 2009, Voorhies filed their Objection to Motion for Summary Judgment. On September 29, 2009, Judge Hosack filed an Order to Continue Motion for Summary Judgment and Trial based on the "stipulation from the parties." There is no "stipulation" in the Court file. On October 6, 2009, this Court scheduled the trial for March 29, 2010. Voorhies filed their Memorandum in Opposition to Motion for Summary Judgment on November 27, 2010. On December 1, 2009, Bennett and ARWC finally filed an Amended Notice of Hearing, scheduling their summary judgment motion for January 27, 2009 [2010]. That hearing was vacated by the Court because, upon Judge Hosack's retirement, all his cases were assigned to District Judge Ben Simpson, who disqualified himself on this matter. The undersigned was reassigned to this case. On March 29, 2010, this Court entered another scheduling order, continuing the trial in this matter until August 16, 2010. Bennett and AWRC filed their Reply Memorandum in Support of Renewed Motion for Summary Judgment on June 10, 2010. Hearing on the Motion for Summary Judgment was held on July 26, 2010.

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).

III. ANALYSIS OF SUMMARY JUDGMENT MOTION.

A. Introduction and Position of the Parties.

On September 4, 2009, ARWC and Bennett filed their motion for summary judgment, arguing a water service agreement was entered into by Bennetts and Voorhies' predecessor-in-interest, Robert Vernon Hill, in August, 2000. Memorandum in Support of Motion for Summary Judgment, 2. The agreement provided for termination of services if payment for water use fell into arrears for ninety days or more and Hill's account fell into arrears of which he had been notified by certified letter on February 15, 2008. *Id.,* p. 3. Further, the Agreement by its terms provided no assignment of rights was allowed without express written permission, which Voorhies never sought or received. *Id.* ARWC and Bennett argue no privity of contract existed such that Voorhies could now claim breach of contract; no contract either written or oral existed between Voorhies and Bennett. *Id.,* p. 4. And, because no contract existed between ARWC/Bennett and Voorhies, there can have been no violation of the Consumer Protection Act by ARWC/Bennett. *Id.,* p. 5. ARWC and Bennett argue they are entitled to summary judgment and "Voorhies must look to Hill and his realtor for relief"… because "representations about [the] ability to obtain water from Bennetts was made by

individuals other than the Bennetts." *Id.*

In response, Voorhies argue disputed material facts remain, including whether a termination of the contract for water services between Hill and defendants ever occurred and whether the Estate of Hill ever received notice of termination of water access of any request for payment. Memorandum in Opposition to Motion for Summary Judgment, p. 3. Voorhies argue the lack of such notice or request in the record demonstrates the existence of this disputed fact. *Id.,* p. 4. Additionally, Voorhies argue they were not on notice of the water service agreement because it was never recorded and was not part of the title report, but that they "can stand in as a third party beneficiary of the contract between Hill and the Defendants." *Id.*, citing *Idaho Power Co. v. Hulett,* 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). Voorhies argue the fact the agreement was to run with the land to benefit successors, assigns and heirs demonstrates Voorhies were beneficiaries "as identified in this contract for water to the land that they now own." *Id.* Voorhies claim they have been denied the "right" to take over the contract between ARWC /Bennett and Hill and (1) whether notice was given, (2) whether such notice was sufficient to terminate the agreement, and (3) whether it was unreasonable to deem the contract breached "by the failure to transfer the contract to the Plaintiffs" remain questions for the trier of fact. *Id.* Finally, Voorhies argue the Consumer Protection Act continues to apply because Bennett (through ARWC) "participates in a trade or commerce by delivering water to individuals and therefore falls within the definition of the Act." *Id.,* p. 5. Voorhies claims the allegations in the record thus far show facts exist upon which the trier of fact could find a violation of the Act. *Id.*

B. Breach of Contract and Third-Party Beneficiary.

As argued by ARWC and Bennett, there is no evidence in the record before this

Court that any contract, written or oral, was ever entered into by the parties to this motion for summary judgment. And as identified by ARWC/Bennett, the issues before this Court are: (1) whether Voorhies are third-party beneficiaries to a contract entered into by others and (2) whether there was rescission of the contract before Voorhies attempted to enforce it. Reply Memorandum in Support of Renewed Motion for Summary Judgment, p. 2. The case cited by Voorhies, *Idaho Power Co. v. Hulet,* specifically states: "[u]nder Idaho law, if a party can demonstrate that a contract was made expressly for its benefit, it may enforce that contract, *prior to rescission*, as a third-party beneficiary." 140 Idaho 110, 112, 90 P.3d 335, 337, citing I.C. § 29-102. (italics added). The Idaho Supreme Court in *Idaho Power* held:

> The test for determining a party's status as a third-party beneficiary capable of properly invoking the protection of I.C. § 29-102, is whether the agreement reflects an intent to benefit the third party. *Stewart v. Arrington Constr. Co.,* 92 Idaho 526, 446 P.2d 895 (1968). The third party must show that the contract was made "primarily for his benefit, and that is not sufficient that he be a mere incidental beneficiary." Further, "[T]he contract itself must express an intent to benefit the third party. This intent must be gleaned from the contract itself unless that document is ambiguous, whereupon the circumstances surrounding its formation may be considered." *Adkinson Corp. v. American Bldg., Co.,* 107 Idaho 406, 409, 690 P.2d 341, 344 (1984).

140 Idaho 110, 112-13, 90 P.3d 335, 337-38. Here, ARWC and Bennett argue:

> Voorhies are not third party beneficiaries to the Bennett/Hill water service agreement. Voorhies claim fails because the contract expresses no clear intent by the actual parties to the contract to benefit a third party absent an assignment and it imposes no duty imposed on one of the contracting parties, the performance of which is necessary to render the third party a direct benefit intended by the parties to the contract…the water service agreement does not show a clear intent to establish future owners of the Hill lot as primary beneficiaries of the Hill/Bennett agreement absent an approved assignment of the contract. There is no clause that imposes a duty on Bennett to extend the agreement to subsequent owners absent an approved assignment of the contract.

Reply Memorandum in Support of Renewed Motion for Summary Judgment, p. 5.

ARWC and Bennett's argument is well-taken. There is *no* evidence before the Court of any express intent to benefit any third party in the water service agreement. And, it certainly cannot be said that the agreement was entered into *primarily* for the benefit of a third party. Voorhies have brought forth no evidence to show the water service agreement entered into in December 2000, seven years before Voorhies purchased Hill's property, was intended to primarily benefit them.

Voorhies argue the agreement provides it shall run with the land to benefit successors, assigns and heirs, which demonstrates they are intended beneficiaries. Memorandum in Opposition to Motion for Summary Judgment, p. 4. ARWC and Bennett in reply argue the agreement "required an approved assignment before a third party successor would acquire the benefits of the contract. Thus, the beneficiary in this circumstance is an incidental beneficiary." Reply Memorandum in Support of Renewed Motion for Summary Judgment, pp. 5-6.

The assignment clause in the agreement reads:

> User agrees that he shall not assign any provisions of this agreement except with the express permission of the Owner. The approval of Owner shall not be unreasonably withheld. Any assignment approved by the Owner shall be attached hereto and made a part hereof in writing. This agreement is a covenant running with the land of the Owner and User, and shall be binding upon the heirs, successors and assigns of each party.

Affidavit of Michael D. Bennett in Support of Summary Judgment, Exhibit A, p. 3, ¶ 11. It is axiomatic that an unambiguous contract language will be given its plain meaning. *Intermountain Eye and Laser Center, PLLC v. Miller,* 142 Idaho 218, 222, 127 P.3d 121, 125 (2005). A contract is interpreted to determine the intent of the parties at the time of contracting. *Opportunity, LLC v. Ossewarde,* 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). And, in determining the parties' intent, the contract is considered as a whole.

Daugharty v. Post Falls Highway Dist., 134 Idaho 731, 735, 9 P.3d 534, 538 (2000). If a contract is found to be ambiguous, its interpretation is a question of fact. *Daugharty,* 134 Idaho 731, 735, 9 P.3d 534, 538. Whether a contract is ambiguous is a question of law. *Boel v. Stewart Title Guar. Co.,* 137 Idaho 9, 13, 43 P.3d 768, 772 (2002). Here, it is only the Assignment clause which mentions the agreement running with the land. Neither party argues the Agreement is ambiguous. This Court can therefore give the agreement language its plain, ordinary meaning. It is the assignment clause, the requirements that a user seek permission of the owner to assign any agreement provisions, that such approval not be unreasonably withheld by the owner, and that any approved assignment be attached to the agreement and become a part thereof, which shall run with the land and be binding upon assignees (properly requested and approved), heirs, and successors. Voorhies have pointed the Court to no support for their contention that the assignment clause running with the land in any way binds the Owner (ARWC/Bennett) to provide water to successors-in-interest to a signatory of the agreement.

Where no privity of contract exists between a plaintiff and defendant, the only possible contractual duty owed plaintiff by defendant would be under a third party beneficiary theory. *Sharp v. W.H. Moore, Inc.,* 118 Idaho 297, 305, 796 P.2d 506, 514 (1990). And, for the third party to be able to recover, it must be shown the contract was made for his direct benefit; merely being an incidental beneficiary is not sufficient. *Adkinson,* 107 Idaho 406, 409, 690 P.2d 341, 344. No such showing has been made by Voorhies. Therefore, ARWC and Bennett are entitled to summary judgment on the breach of contract issue.

At oral argument, counsel for ARWC and Bennett relied upon *Partout v. Harper*,

145 Idaho 683, 183 P.3d 771 (2008). This case was not cited to the Court in briefing by either party. The Court reviewed that case following oral argument. *Partout* only strengthens this Court's analysis under the third party beneficiary theory. All *Partout* does is reiterate the long-standing rule that the third party (Voorhies) must show the agreement reflects an intent to benefit the third party, that the contract was made primarily for the benefit of the third party, and it is not sufficient that the third party is a mere incidental beneficiary to the contract. 145 Idaho 683, 686, 183 P.3d 771, 774. Voorhies have established none of these things at this summary judgment juncture.

C. Recission Before Voorhies' Attempted to Enforce Agreement.

The next question for the Court is whether the agreement was rescinded before Voorhies attempted to enforce it. In this respect, Voorhies argue disputed questions of fact remain in light of:

> Robert V. Hill's estate was being probated and prior to the termination letter being sent, there was notice given to all creditors that any debts must be presented to the estate's attorney….Furthermore, this notice had been published by January 8, 2008 and notice sent to the Court on probate. The record is completely bare of any proof ever being sent to the estate requesting payment or of notification of termination of water access.

Memorandum in Opposition to Motion for Summary Judgment, p. 3. ARWC and Bennett argue there is no support for the contention that rescission by Bennett for non-payment is somehow ineffective because Hill was deceased at the time of rescission and notice of termination was not sent to the estate. Reply Memorandum in Support of Renewed Motion for Summary Judgment, p. 6. ARWC and Bennett state the termination clause of the agreement, upon ninety or more days of non-payment, requires only written notice to the User at the User's address via certified mail with return receipt requested. *Id.,* p. 7. Bennett argues he provided notice to the address provided by Hill and neither the Estate of Hill nor Voorhies ever provided any alternative

addresses. *Id.,* pp. 7-8.

The probate of Hill was filed in Bonner County on October 29, 2007, and Robert J. Hill was appointed the personal representative of the estate. Memorandum in Opposition to Motion for Summary Judgment, p. 2. After Voorhies purchased the property in December 2007, they never received any certified mailing at their physical address, which was previously Hill's address. Affidavit of Linda Voorhies in Opposition to Motion for Summary Judgment, p. 3, ¶ 9. Voorhies also state no certified mail was sent to the address of the Estate of Robert Vernon Hill. Memorandum in Opposition to Motion for Summary Judgment, p. 2. However, this latter statement is not supported by even a scintilla of evidence. There is no affidavit from Hill's estate and the Estate has, in fact, never appeared in this action. *See Samuel,* 134 Idaho 84, 87, 996 P.2d 303, 306. See discussion below regarding the Motion to Strike.

D. Consumer Protection Act Violation.

The Consumer Protection Act's (CPA) purpose is to "protect both consumers and businesses against unfair methods of competition and unfair and deceptive practices in the conduct of trade or commerce and to provide efficient and economical procedures to secure such protection." I.C. § 48-601. The Act should be construed liberally. *Id.* Real property clearly falls within the definition of "goods" in the act. *Fenn v. Noah,* 142 Idaho 775, 780, 133 P.3d 1240, 1245 (2006); I.C. § 48-602(6). In *Fenn,* involving a buyer's suit against a predecessor in interest to the seller resulting from a survey not matching the fence lines, the Supreme Court upheld summary judgment in favor of the seller's predecessor in interest, Noah, where Fenn failed to raise any genuine issue of material facts as to whether Noah's representations were unfair or deceptive under the Act. *Id.* The Court found Noah's incorrect metes and

bounds description was not misrepresentation because under Idaho law, Fenn would take title to the property described in the deed, not what he believed he possessed. *Id.* The Court also found Noah was not acting in the conduct of trade or commerce in discussing a survey and extending an offer to Fenn. 142 Idaho 775, 780-81, 133 P.3d 1240, 1245-46.

Here, Voorhies argue the fact of the sale, not a contract existing between Voorhies and ARWC/Bennett, is the critical fact. Memorandum in Opposition to Motion for Summary Judgment, p. 5, citing *Western Acceptance Corp. v. Jones,* 117 Idaho 399, 788 P.2d 214 (1999). In this respect, ARWC/Bennett only state there is no contract between these parties and "Bennett never represented there was one, so it cannot be said he engaged in an act or practice that was misleading, false, or deceptive to the Voorhies." Memorandum in Support of Motion for Summary Judgment, p. 5. In their Reply Memorandum in Support of Renewed Motion for Summary Judgment, ARWC/Bennett do not even address the CPA violation.

The CPA violation alleged by Voorhies in the Complaint does not appear to relate to the direct failure of ARWC/Bennett to provide them water (in theory, as at this time a preliminary injunction is requiring water be provided to Voorhies), but rather to the demand of over $16,000 in a "rehook-up" fee. Complaint, p. 8, ¶ XXXV. For this reason, there need be no contract between the parties in order for the CPA to apply. The acts or practices deemed unlawful under the CPA are those "in the conduct of any trade or commerce" in I.C. § 48-603 *et seq.* The terms "trade" and commerce" are defined in the CPA as "the advertising, offering for sale, sale, or distribution of any goods or services, directly or indirectly affecting the people of this state." *Western Acceptance,* 117 Idaho 399, 401, 788 P.2d 214, 216, quoting I.C. § 48-602(2).

Presumably, here Voorhies seek redress under subsection (18), by engaging in "any unconscionable method, act or practice in the conduct of trade or commerce…" In determining whether an act or practice was unconscionable, the Court must evaluate: whether the alleged violator knowingly took advantage of a consumer unable to protect his interests because of a physical infirmity, ignorance, illiteracy, inability to understand the language, etc.; whether the violator knew at the time of the transaction the price sought grossly exceeded the price of similar goods or services (although price alone is insufficient o prove an unconscionable method, act, or practice); whether the alleged violator knowingly induced the consumer to enter into an agreement excessively one-sided in favor of the alleged violator; and whether the sales conduct/pattern of sales conduct would outrage or offend the public conscience. I.C. § 48-603C.

Voorhies have submitted the affidavit of Charles Charlebois (Charlebois) to survive summary judgment on this issue. Charlebois states he is also supplied water by Bennett, but never entered into a water service agreement with Bennett, and had been told by Bennett: "…that the old contract that went with the original purchaser of the property would remain, since it ran with the land. He also stated at that time that when I wanted to sell my property that the new owner would have to execute and agreement with him." Affidavit of Charles Charlesbois in Opposition of Motion for Summary Judgment, p. 2.

Because no contract need be in place for a violation of the CPA to occur, and because Voorhies have at least raised the question of whether ARWC/Bennett knowingly engaged in unconscionable practices, methods, or acts, this Court finds summary judgment in favor of defendants on the CPA claim to be improper at this time.

IV. ANALYSIS OF MOTION TO STRIKE.

On November 27, 2009, Voorhies filed a motion to strike portions of Bennett's affidavit on November 27, 2009. This motion was never noticed up for hearing, but the Court heard argument from both counsel for ARWC/Bennett and Voorhies at the hearing on July 26, 2010. Voorhies filed a motion to strike paragraph 7 and 10 of Bennett's affidavit on the ground that they were hearsay. Counsel for ARWC/Bennett argued the business record exception of I.R.E. 804(6) business record exception applied. The Court ruled no foundation had been presented for that exception or for any other exception to the hearsay rule. Voorhies seek to have Bennett's statement that Hill directed all notices and billings be mailed to him c/o Creative Management in Sandpoint, Idaho, stricken. Motion to Strike Portions of Michael D. Bennett's Affidavit, p. 2. Defendants reply Hill, through his estate, is a party to this action and therefore his hearsay statements are admissible. Reply Memorandum in Support of Renewed Motion for Summary Judgment, p. 7. While ARWC/Bennett's argument in briefing is apparently that the statement is not hearsay pursuant to I.R.E. 801(d)(2), but is an admission by a party-opponent, that argument was not made at the July 26, 2010, hearing. Perhaps the reason it was not made is the realization that a nonjudicial statement is admissible under I.R.E. 801(d)(2) only as against the party who made the statement or on whose behalf it was made. *State v. Gerardo,* 147 Idaho 22, 25, 205 P.3d 671, 674 (Ct.App. 2009).

In any event, the probate having been filed in October 2007 and the Estate of Hill arguably not having received notice of the arrears and termination are not considerations in this Court's analysis. As argued by ARWC/Bennett, Voorhies do not deny they were unaware of the water service agreement at the time it was rescinded through non-payment and Bennett was likewise unaware of the Voorhies' purchase.

Thus, the termination of the agreement occurred *before* Voorhies made any claim under the contract *and,* as discussed *supra,* Voorhies have not demonstrated the agreement had been made expressly for their benefit. Even taking all facts and inferences in the light most favorable to the non-moving party, ARWC/Bennett have sufficiently shown their entitlement to judgment as a matter of law, along with an absence of disputed material facts on this issue.

V. CONCLUSION AND ORDER.

For the reasons stated above, this Court grants plaintiffs' Motion to Strike and grants in part and denies in part defendant ARWC/Bennett's motion for summary judgment.

IT IS HEREBY ORDERED plaintiffs' Motion to Strike is GRANTED.

IT IS FURTHER ORDERED defendant ARWC/Bennett's Motion for Summary Judgment is DENIED as pertains to the alleged violation of the Consumer Protection Act.

IT IS FURTHER ORDERED defendant ARWC/Bennett's Motion for Summary Judgment is GRANTED as pertains to all other theories.

Entered this 26th day of July, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 2010, 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 #
Todd M. Reed	208-263-4438	Susan Weeks/Cynthia K. C. Meyer	664-1684

_____
Jeanne Clausen, Deputy Clerk