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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**

FRANK L. CHAPIN and SYDNEY L. CHAPIN, husband and wife, a/k/a SYDNEY L. GUTIERREZ-CHAPIN, and FINANCIAL MANAGEMENT SERVICES INC., an Idaho Corporation; and S and F. LLC., an Idaho Limited Liability Company,

Plaintiffs,

vs.

ROBERT M. LINDEN, JR., and PATRICIA A. LINDEN, husband and wife.

Defendants.

Case No. **S CV 2004 1280**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

I. BACKGROUND.

In September 1994, Financial Management Services, Inc., entered into an installment promissory note with defendants, Robert M. Linden, Jr., and Patricia A. Linden, husband and wife, to purchase 40 acres of real property owned by Lindens, located in Bonner County, Idaho. Financial Management Services, Inc., executed a real estate mortgage to secure payment of the installment note. Affidavit of Brian T. McGinn, Exhibit A and B. A mortgage is the only permissible security instrument for the large parcel.

On April 17, 2000, Financial Management Services, Inc., conveyed and assigned its interest in the property to S and F, LLC, an Idaho limited liability company wholly

owned by Chapins, in which plaintiffs Chapins are each individually managers. The Warranty Deed, Assignment and Assumption were recorded in Bonner County and provided that Financial Management Services, Inc., assign and S & F, LLC, assume all of the obligations and rights under the September 1994 installment note and mortgage. *Id.*, Exhibit C.

Some years later, plaintiffs Frank L. Chapin and Sydney L. Chapin individually filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. As a result of Chapins' financial circumstances, they were unable to meet the obligations under the installment note with the Lindens, and default was declared in 2002. In April 2003 a Judgment was entered by default against S and F LLC, and Financial Management Services in favor of the Lindens (*Id.*, Exhibit F) and a sheriff's sale was conducted. Lindens purchased the property at the sheriff's sale subject to a one year right of redemption. *Id.*, Exhibit G. The right of redemption expired May 28, 2004.

By May 2004 the Chapins' personal bankruptcy proceeding presented a cloud on title if S & F, LLC, or FMS, Inc., exercised its right of redemption. Chapins sought leave from bankruptcy court and bankruptcy trustee to exercise the right of redemption and obtain a court order abandoning any interest in the right of redemption. The May 28, 2004, redemption deadline was extended to June 7, 2004, as a result of Chapins' attorney demanding an accounting of rents and profits.

Lindens claim that around 10:00 a.m. on June 7, 2004, the last day for S and F, LLC, to redeem the Linden property, the Chapins' attorney, John Finney, and Frank Chapin briefly discussed S and F's ability and intention to redeem the property, although the majority of the conversation centered on Chapins' decision to try and personally purchase the property from Lindens. John Finney deposition, p. 39, L. 16 – p. 40, L. 2,

attached to the Affidavit of Brian T. McGinn, Exhibit H. The Lindens claim no further action was taken on behalf of S and F, LLC, to redeem the Linden property. *Id.*, p. 42, LI. 10-15, Exhibit I. At approximately 1:05 pm on June 7, 2004, Lindens contend their attorney, Frank King, returned John Finney's telephone call from earlier in the day. *Id.*, p. 41, L. 8, Exhibit J. During this conversation it is Lindens' position that Finney relayed to King the Chapins' desire to purchase the property from the Lindens personally for \$90,000.00, rather than authorizing S and F, LLC to exercise its right of redemption. *Id.*, p. 41, LI. 12-14, Exhibit J.

Lindens claim King relayed Chapins' offer to purchase the property personally for \$90,000.00 to Lindens, who rejected it, and that the Lindens counter offered with a price of \$125,000.00, requiring \$30,000.00 down, plus interest at eight percent amortized over 30 years but all payable in five years. Lindens argue that King conveyed Lindens' counter-offer to Finney at approximately 1:20 p.m. on June 7, 2004. *Id.*, p. 43, LI. 1-14, Exhibit L.

It is the *characterization* of what occurred after 1:20 p.m. on June 7, 2004, the last day for redemption, that is somewhat in dispute. The facts do not seem to be in dispute since both parties point to the deposition testimony of John A. Finney. The *characterization* is as follows: Lindens claim that what happened after 1:20 p.m. were ongoing negotiation, and "counter-offer", and Chapins claim "The testimony of John A. Finney together with contemporaneous notes and correspondence within his file clearly indicate an agreement was reached when Mr. and Mrs. Chapin accepted the term offered by Mr. and Mrs. Linden in lieu of redeeming the property. (Affidavit of John A. Finney)." Memorandum of Points and Authorities in Response to Defendants' Motion for Summary Judgment, p. 4.

Lindens contend that after hearing the Lindens' counter-offer, Sydney Chapin added an additional term which would allow the Chapins to pay a third of the remaining balance and receive a deed release of a third of the property when necessary. This was an important term to both Frank and Sydney Chapin because they desired to divide and sell the property in thirds. Frank Chapin deposition, p. 52, LI.2-4, Affidavit of Brian T. McGinn, Exhibit M; Sydney Chapin deposition, p. 63, LI. 1-3, Affidavit of Brian T. McGinn, Exhibit N. Lindens claim that after speaking to Sydney Chapin, Finney again called King at about 3:40 p.m. and Finney conveyed the Chapins' counter-offer, which included the additional term of "some prepayment without a penalty and a release for clause for parcels upon a one-third payment of the total purchase price." John Finney deposition, p. 52, LI. 20-25, Affidavit of Brian T. McGinn, Exhibit O; Exhibit K.

Lindens claim King notified Finney at approximately 3:55 p.m. that King had not been able to reach the Lindens to propose the Chapins' counter-offer and would not likely be able to reach them before 5:00 p.m. that day. *Id.* Exhibit K, ¶ 5. Lindens argue that this did not worry Finney at the time because he thought that there was an "understanding" and that the "finer points" could be worked out later. *Id.*, Exhibit O. S and F, LLC, did not exercise its right to redeem the Linden property before 5:00 p.m. on June 7, 2004.

The Lindens never accepted the Chapins' offer to personally purchase the Linden property, and Lindens claim no further communication was made between the attorneys until two days later on June 10, 2004, at 11:35 a.m. *Id.*, Exhibit K; Exhibit P. By this time the Lindens had listed their property for sale with a realtor. *Id.*, Exhibit Q.

Lindens claim the conversations between Finney and King on June 9, 2004, consisted of King notifying Finney that King's clients, the Lindens, had rejected the

Chapins' counter-offer made on June 7, 2004, and that thereafter, Finney apparently conferred with the Chapins who then attempted to revive the Lindens' prior offer which they had previously rejected. Lindens claim that thereafter they listed the property for sale with a realtor and were no longer interested, or capable, of independently negotiating a sale with the Chapins. Lindens argue there is no evidence of a writing which would establish an enforceable agreement for the purchase and sale of the Linden property. Lindens claim the June 10, 2004, letter from King does nothing more than assert that the Lindens are, in fact, uninterested in further negotiating a sale to the Chapins and that the letter further denies the existence of any agreement. Lindens argue that the letter does not contain any of the material terms for the alleged agreement, nor does it contain Lindens' signatures or a description of the property. Memorandum in Support of Defendants' Motion for Summary Judgment, p. 6.

Lindens' legal argument is that Chapins' claims for purchase of the Lindens' property is barred by the Statute of Frauds and that the Chapins do not fall within an exception to the Statute of Frauds. *Id.*, pp. 7-9.

Chapins characterize what happened on June 7, 2004, differently. Chapins claim they had obtained financing from Floyd McGhee for the repurchase of this property or to redeem the property from Lindens. Memorandum of Points and Authorities in Response to Defendants' Motion for Summary Judgment, p. 3. This of course begs the question, "Why didn't they redeem the property if no agreement occurred before the redemption deadline?"

Chapins claim that on June 7, 2004, Chapins' then attorney, John Finney, contacted Lindens then attorney, Frank King, and offered to purchase the property directly for \$90,000.00 rather than redeeming the property for a total of approximately

\$85,000.00. This would allow the redemption period to run and clear the bankruptcy cloud on title.

Chapins claim that at 1:20 p.m. on June 7, 2004, Lindens offered to sell the property to Chapins in lieu of them exercising their right of redemption. The offer was for purchase at \$125,000.00, \$30,000 down payment, eight percent interest on the remaining balance authorized at 30 years with a balloon payment in five years. So far, both sides recall the same facts.

Chapins argue that such offer was extended by attorney Frank King on behalf of the Lindens in a telephone conversation with Chapins' attorney John Finney at 1:20 pm.

Chapins argue that both attorneys were cognizant of the alternative that Chapin could and would exercise their right of redemption at approximately \$85,000.00.

Chapins argue that the terms offered by Lindens were favorable to the Lindens in that it avoided certain tax ramifications of receiving a lump sum for the property through the right of redemption and would permit a stream of income over the following five years. Chapins argue: "The testimony of John A. Finney together with contemporaneous notes and correspondence within his file, clearly indicate an agreement was reached when Chapins accepted the term offered by Lindens in lieu of redeeming the property." Memorandum of Points and Authorities in Response to Defendants' Motion for Summary Judgment, p. 4. Lindens argue that no such agreement was reached on that date and time as there was only ongoing negotiations and that Lindens' attorney described the Chapins' request regarding payment penalty and deed release language as a "counter-offer."

Chapins believe Lindens seek summary judgment by asking this Court to weigh the credibility of the witnesses and draw inferences in favor of the defendants such as

the conclusory description of a counter-offer rather than Mr. Finney's assertion of an acceptance of the Lindens' offer. Chapins argue there are genuine and material issues of fact and, therefore, summary judgment should be denied.

II. ANALYSIS.

Chapins are attempting to specifically enforce an oral contract for the sale of real property. The Statute of Frauds prohibits the enforcement of an oral contract to convey real property, with a narrow exception for the doctrine of part performance. *Bear Island Ass'n., Inc. v. Brown*, 125 Idaho 717, 874, P.2d 528 (1994). Chapins rely solely on the concept of part performance to take the alleged oral contract out of prohibition of the statute of frauds, yet they fall short of meeting their burden in proving by clear and convincing evidence that an issue of fact exists that the contract was partially performed. Chapins argue that the part performance was their forbearance on their right to redeem.

First, proof of an oral contract sufficient to apply part performance requires evidence that the contract is complete, definite and certain in all its material terms; the material terms which must be indented in a contract to convey land include the parties to the contract, the subject matter of the contract, the price and consideration and description of the property. *Bear Island*, 874 P.2d at 533.

Lindens contend that taking the facts Chapins claim are true, those facts establish the parties were still negotiating a significant term of the price. Defendants' Reply in Support of Motion for Summary Judgment, p. 4. Chapins wanted the option to pay portions of the total purchase price and get deeds for specific parcels as they paid those parcels off. Affidavit of John A. Finney to Opposition to Motion for Summary

Judgment, p. 4; letter from John Finney, attached as Exhibit K to the Affidavit of Brian McGinn in Support of Motion for Summary Judgment. Lindens argue that this is a significant price term, because if parcels are released as a portion of the total purchase price is paid, then the seller/Lindens lose any security on those parcels if the buyers/Chapins ever stopped paying (which they did in the past under the contract at issue). Defendant's Reply in Support of Motion for Summary Judgment, p. 4.

Lindens argue, and rightfully so, that Chapins fail to establish an oral contract sufficient to apply the part performance doctrine. This Court agrees. At 3:30 p.m., an hour and a half before the right to redeem was to expire, Sydney Chapin was still introducing new terms into a purchase agreement. There was no unconditional acceptance by Chapins to the Lindens' last offer. The Chapins claim they were ready to redeem but did not. Instead of redeeming, Chapins tried to introduce additional terms to the purchase which was in the process of being negotiated. Chapins essentially made a counter-offer an hour and a half before their right to redeem ended, and that counter-offer was not accepted by Lindens. The facts, as best viewed in light of the Chapins, are as set forth in the Affidavit of John A. Finney in Opposition to Defendants' Motion for Summary Judgment, at page 4:

At 3:30 p.m. on June 7, 2004, I [John A. Finney] received a telephone call from Sydney Chapin after she had called and left messages at 1:30 and 2:18 p.m., while I was otherwise busy. Sydney directed me to accept the Lindens' terms for the purchase of the property in lieu of redeeming it that day. **She asked me to ask if we could include a no prepayment penalty clause in the contract as well as provision permitting three (3) deed releases upon reduction of the principal owed.**

At 3:38 p.m. I called attorney Frank King and told him my clients accepted the Linden's terms previously conveyed. I indicated Mrs. Chapin's request that we include a no prepayment penalty clause and deed release provisions in the contract. He stated he would speak to his clients about those terms. We discussed possibly

conducting a conference call with our clients to simply confirm the agreement.

At 3:56 p.m. I received a phone message from attorney Frank King simply indicating that he could not get a hold of his client but would get back to me by 5:00 as he was heading to a doctor appointment. That phone message is attached hereto and incorporated herein by reference as Exhibit "D".

Mr. King made no indication that we had no agreement and I specifically indicated in our earlier conversation at 3:38 p.m. that we were accepting the terms offered by Mr. and Mrs. Linden. My notes further reflect that I noted we were accepting those terms with knowledge that June 7th was the deadline to exercise the right of redemption if there was no agreement.

(bold and italics added). The bold portions indicate that there was still a material term that was not decided. There was no meeting of the minds on that significant issue. The italicized portion indicates there was an acceptance by Chapins of Lindens' terms, but the bold portions indicate otherwise. There was no unequivocal acceptance of all of Lindens' terms, let alone the payment of the \$30,000.00 down or any other action showing acceptance. While John A. Finney states: "Mr. King made no indication that we had no agreement and I specifically indicated in our earlier conversation at 3:38 p.m. that we were accepting the terms offered by Mr. and Mrs. Linden", that in essence turns offer and acceptance on its head. The bold portions indicate there was no agreement as to all terms.

Had Chapins, directly or through John A. Finney, unequivocally accepted Lindens' most recent offer before 5:00 p.m. and then forfeited the right to redeem, there probably would lie a contract, with the doctrine of promissory estoppel (the detrimental reliance missing the redemption opportunity) substituting for consideration in lieu of the \$30,000.00 down payment. But that is not what happened. Chapins continued negotiating until it was too late. The doctrines of part performance and equitable

estoppel on one hand and the doctrine of promissory estoppel on the other, do not apply. For the first time at oral argument, Chapins' attorney cited *Lettunich v. Key Bank National Association*, 141 Idaho 362, 109 P.3d 1104 (2005), for the proposition that the factors in *Roundy v. Waner*, 98 Idaho 625, 570 P.2d 862 (1977) (actual possession and permanent valuable improvements) are not exclusive factors in determining if part performance and, thus, equitable estoppel will apply. This Court has read *Roundy* and *Lettunich*. Certainly no possession or actual improvements occurred by Chapins in this case in June 2004. Also at oral argument, Chapins' attorney for the first time cited *Gillespie v. Mountain Park Estates, L.L.C.* 138 Idaho 27, 56 P.3d 1277 (2002). That is a promissory estoppel case and is not on point. Its principles are set forth in *Lettunich*. The following analysis by the Idaho Supreme Court in *Lettunich* is instructive to the facts of the present case:

B. Part Performance and Equitable Estoppel

Lettunich argues the doctrine of part performance takes the oral agreement outside the requirements of the statute of frauds and that KeyBank is equitably estopped from raising the statute of frauds as a defense. "The doctrines of equitable estoppel and part performance are viewed together. Under Idaho law, part performance per se does not remove a contract from the operation of the statute of frauds. Rather, '[t]he doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel.'" *Sword v. Sweet*, 140 Idaho 242, 92 P.3d 492, 499 (2004) (quoting *Frantz v. Parke*, 111 Idaho 1005, 1007-08, 729 P.2d 1068, 1070-71 (Ct.App.1986)). To be specifically enforced by operation of the doctrine of part performance, an oral agreement "must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty." *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 723, 874 P.2d 528, 534 (1994).

Even though it could be inferred that Lettunich partially performed by purchasing cattle at the sale, there is no evidence in the record of a complete and enforceable agreement. For example, there is no indication of the amount of the loan, the interest rate, the disbursement schedule, the terms of repayment, the security for the loan, or the parties' rights after default. While none of these terms individually may be determinative, the lack of all of them in this case makes the oral agreement to lend money vague, incomplete and unenforceable. Consequently, the doctrine of part

performance does not apply to this case.

For the same reason, the doctrine of equitable estoppel does not apply. Equitable estoppel assumes the existence of a complete agreement, which is lacking here. Therefore, we need not address the issue of whether equitable estoppel even applies as an exception to I.C. § 9-505(5). The district court's holding that part performance and equitable estoppel do not apply is affirmed.

C. Promissory Estoppel

Lettunich argues promissory estoppel should be used in this case to prevent KeyBank from denying the enforceability of an oral promise. Again, there was no complete promise here to be enforced. Promissory estoppel is simply a substitute for consideration, not a substitute for an agreement between parties. *Smith v. Boise Kenworth Sales, Inc.*, 102 Idaho 63, 68, 625 P.2d 417, 422 (1981). Consideration includes "action by the promisee which is bargained for and given in exchange for the promise." *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 607, 428 P.2d 524, 526 (1967). It may also consist of a "detriment to the promisee or a benefit to the promisor." *Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc.*, 95 Idaho 599, 603, 514 P.2d 594, 598 (1973) (citations omitted). In this case, Lettunich clearly suffered a detriment when he purchased cattle without a way to pay for them. The doctrine of promissory estoppel is of no consequence in this case because there is evidence of adequate consideration. What is lacking is a sufficiently definite agreement. *Black Canyon Racquetball v. First Nat'l*, 119 Idaho 171, 178, 804 P.2d 900, 907 (1991).

109 P.3d at 1109-1110. While more terms were present in the present case, there was still a material term (prepayment clause and deed release) that was left undecided and no unconditional acceptance without that material term. Given the fact that Chapins had defaulted before, this term can hardly be said to be not material. As the Idaho Supreme Court stated in *Lettunich*: "Equitable estoppel assumes the existence of a complete agreement, which is lacking here." This Court finds the same situation occurred in the present case on June 7, 2004. There was no complete agreement.

Finally, at oral argument, Chapins' counsel for the first time cited *Lawrence v. Jones*, 124 Idaho 748, 864 P.2d 194 (Ct.App. 1993), for the proposition that in a real property contract, the parties need only agree on the parties, price and description of the property. A review of that case shows there is much more required at a minimum

than was stated to the Court in oral argument. The exact quote from *Lawrence* is:

For land sale contracts, the minimum requirements are typically the parties involved, the subject matter thereof, the price or consideration, a description of the property **and all the essential terms of the agreement.**
Hoffman v. SV Co., Inc., 102 Idaho 187, 190, 628 P.2d 218, 221 (1981).

124 Idaho at 751, 864 P.2d at 197. (emphasis added). Here, the prepayment clause and deed release was left undecided, and was an essential term of the agreement.

Lawrence actually cuts against Chapins' arguments. In *Lawrence* the Idaho Court of Appeals found that the issue of a deed release was too vague as to render the contract unenforceable. The Court of Appeals went on to show the importance of a deed release (or any other security issue) in a land sale contract, when they wrote: "Although a real estate contract need not contain a security provision if none is contemplated, **once parties attempt to provide for security it becomes an essential term of the contract.**" *Id.* (emphasis added). Here, Chapins at the last minute were trying to vary the Lindens security by allowing deed releases based upon partial payment. That is an essential term of the contract, and it was not agreed upon as of 5:00 p.m. on June 7, 2004.

As a matter of law, the Chapins proof simply fails to establish any part performance, equitable estoppel or promissory estoppel (promissory estoppel is not pled in the Chapins' complaint). Chapins' sole assertion of part performance is that they failed to exercise their rights of redemption in a foreclosure action. Idaho recognizes that the affirmative acts which constitute a sufficient part performance of an oral contract to sell real property are actual possession of the property and permanent and valuable improvements. *Roundy v. Waner*, 98 Idaho 625, 570 P.2d 862 (1977). Idaho requires that some affirmative act of performing an actual term of the contract exists before the Statute of Frauds will be disregarded. Other courts have specially refused to find that

the purported act of refraining from redeeming real property after a foreclosure is “partial performance” of an alleged oral contract to sell the real property, and such an allegation does not remove the contract from the operation of the statute of frauds. *Hazime v. Martin Oil of Indiana, Inc.*, 792 F.Supp. 1067 (E.D. Mich. 1992).

In this case, there was no affirmative act of possession, no payment of the purchase price or the down payment, nor was there any improvement of the real property by Chapins. Chapins rest solely on their failure to exercise redemption rights, which is not an act constituting part performance as it pertains to equitable estoppel. Had there been a meeting of the minds, forbearance on their redemption rights may have sufficed for consideration (in lieu of the \$30,000.00 down payment), so as to apply the doctrine of promissory estoppel. As a matter of law, Chapins have not met their burden to establish any issue of fact regarding part performance, equitable estoppel or promissory estoppel. Accordingly, summary judgment dismissing their claims is proper.

III. ORDER.

IT IS HEREBY ORDERED summary judgment is **GRANTED** in favor of the defendants against the plaintiffs. Plaintiffs’ claims are **DISMISSED**.

Entered this _____ day of March, 2006.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2006, 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>Lawyer</u>	<u>Fax #</u>
Brent C. Featherston	(208 263-0400	Brian T. McGinn	(208) 765-2121

Secretary