STATE OF IDAHO)
County of Kootenai)ss

FILED_____

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

VOYO (JOE) JOVANOVICH AND JANET JOVANOVICH, his wife,	)	Case No. **CV 2001-4790**
Plaintiffs,	)	**MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' SUMMARY JUDGMENT**
vs.	)	
A TRACT OF LAND HEREIN KNOWN AS TRACT NO. 3, et. al,	)	
Defendants.	)	

I. INTRODUCTION

Plaintiffs (Jovanovich) and the predecessor (Wiks) of defendants Fred B. Jerrell and Estelle Wiks Duggan (hereafter referred to as Wiks) entered into a real estate agreement on January 30, 1980, for the sale and purchase of the piece of property in dispute. That real estate contract included an addendum that required the Jovanoviches to offer Wiks a right of first refusal to repurchase the property at issue. Under the agreement, the Wiks had thirty days to purchase the property if it was offered for sale by either paying the market value of the property or $25,000, whichever is less. The real estate contract was recorded in Kootenai County as Instrument Number 832625. After Jovanovich made all payments in full for the property, Wiks wrote out a warranty deed recorded as Instrument Number 951959 on October 3, 1983. In

contrast to the real estate contract, the warranty deed did not contain the repurchase agreement. The crux of this case is whether the repurchase agreement in the real estate contract is still in effect, or whether through the doctrine of merger, the repurchase agreement was replaced by the subsequent warranty deed. Jovanoviches have moved for summary judgment claiming that the doctrine of merger causes the contractual right of first refusal to purchase the Jovanoviches' property to be negated by the warranty deed, that because Wiks wrote the warranty deed, they cannot now bring in evidence of their intent when the warranty deed is unambiguous on its face and that, because there is no issue of material fact in dispute, this Court may rule as a matter of law that Wiks' contractual right has been negated by the warranty deed. Wiks argue the exception to the merger doctrine (which states that the contract of conveyance is not merged upon execution of a deed where under the contract the rights are conferred collaterally and independent of the deed; there being no presumption that the party in conveying the deed intends to give up the covenants of which the deed is not a performance or satisfaction), causes Wiks' contractual rights to still be in force. Wiks also argue that a material fact exists as to whether the parties intended the warranty deed to serve as the exclusive embodiment of their agreement, so summary judgment should not be granted, and that the contractual right of repurchase still exists because the Jovanoviches have not provided any consideration to Wiks for the term to be excluded.

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). 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) (citation omitted). In ruling on a motion for summary judgment, the trial court is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak***,** 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983). Should the evidence reveal no disputed issues of material fact, then summary judgment should be granted. *Smith***,** 128 Idaho at 718, 918 P.2d at 587 (citation omitted).

The moving party has the burden, at all times, to establish the absence of a genuine issue of material fact. *Id.* (citing *Tingley v. Harrison***,** 125 Idaho 86, 89, 867 P.2d 960, 963 (1994)). To meet this burden, the moving party "must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case." *Smith***,** 128 Idaho at 719, 918 P.2d at 588 (citing *Thompson v. Idaho Ins. Agency, Inc.,* 126 Idaho 527, 530, 887 P.2d 1034, 1038 (1994)). Should the moving party fail to meet this burden, the non-moving party is not required to respond with supporting evidence. *Smith***,** 128 Idaho at 719, 918 P.2d at 588. However, should the moving party meet this burden, the burden shifts to the non-moving party to come forward with sufficient evidence to create a material issue of fact. *Id.* (citation omitted). The non-moving party "'may not rest upon the mere allegations or denials of that party's pleadings, but his party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.'" *Id.* (citing I.R.C.P. 56(e)). If the non-moving party fails to meet its burden, then summary judgment is appropriate. *Smith,* 128 Idaho at 719, 918 P.2d at 588.

III. DISCUSSION

This case turns on whether or not the doctrine of merger extinguishes Wiks' contractual rights that were in effect prior to the conveyance of the warranty deed, in which there was no mention of the right of repurchase that was contained in the real estate contract. Idaho courts have addressed similar nuances associated with the doctrine of merger. However, none have addressed whether or not a contractual right of repurchase is a collateral conveyance. If a contractual right of repurchase is a collateral conveyance, then the contract provision may still be in effect. Even though Wiks have not moved for summary judgment, they would be entitled to summary judgment because there would be no material issues of fact about the existence of the contract provision. Likewise, if Jovanoviches prevail on the issue of collateral conveyance and the doctrine of merger, they should be granted summary judgment.

Both parties have cited case law that begins with the Idaho case *Christiansen v. Intermountain Ass'n of Credit Men.*, 46 Idaho 394, 267 P. 1074 (1928). In *Christiansen*, the Idaho Supreme Court heard a case in which two parties had contracted to sell real property. The warranty deed and real estate contract were executed at the same time. The real estate contract contained a provision requiring the seller to convey to the buyer an abstract of title to the property, showing the property free of all liens. Nothing was said about the abstract of title in the warranty deed. The abstract was never produced and the buyer brought suit when he found out that there was a lien on the property. The Court framed the issue as whether the covenant to provide an abstract was merged in the deed. In other words, was the contract right to have an abstract cut-off due to the subsequent warranty deed which was silent as to an abstract? The Court held that the contract right was not cut-off. The Court reasoned that:

> An abstract does not relate to the title, possession, quantity, or emblements of the land. It is a graphic history of the title, but has nothing to do with the title itself. In a real estate transfer, the validity or invalidity of the title to the premises is not affected by the giving or withholding of an abstract.

Id. at 1075. From *Christiansen*, we learn that if the covenants in the contract relate to the conveyance, or inhere in the very subject-matter with which the deed deals, they are merged in the deed, and any reference to them in the deed will be considered as final, even though the deed contradicts the contract.

The next Idaho case in the doctrine of merger timeline deals with the same subject matter as *Christiansen*: whether or not a covenant to provide an abstract of title in the real estate contract is extinguished by a subsequent warranty deed that does not contain the abstract provision. In *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 414 P.2d 879 (1966), the plaintiffs had entered an agreement with the defendants to exchange real property with the condition, contained in the sales contract, that defendants provide plaintiffs with an abstract of title, showing no extra liens except for the agreed upon mortgage. This did not happen, and plaintiffs found out that there were outstanding liens on the property, which defendants had promised did not exist. The Court recited the general rule that the acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed, and any claim for relief must be based on the covenants or agreements contained in the deed, not the covenants or agreements as contained in the prior agreement. *Id.* The Court further explained that there is a generally recognized exception to the rule:

> The contract of conveyance is not merged upon execution of a deed where under the contract the rights are conferred collaterally and independent of the deed; there being no presumption that the party in conveying the deed intends to give up the covenants of which the deed is not a performance or satisfaction. Where the right claimed under the contract would vary, change, or alter the agreement in the deed itself, or inheres in the

> very subject matter with which the deed deals, a prior contract covering the same subject matter cannot be shown as against the provision of the deed.

Id. at 383 (quoting *Continental Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1946). The Court then held that the agreement to furnish the abstract was not merged by the doctrine of merger into the warranty deed. *Id.*

More recently the Idaho Supreme Court has addressed whether or not a contract provision limiting assumption of debt was valid against a warranty deed that had inconsistent terms. *Estes v. Barry,* 132 Idaho 82, 967 P.2d 284 (1998). In *Estes*, the plaintiff had purchased a home from defendants. During the process of negotiation, defendants told plaintiff that she would not be liable for recapture obligations due to FHA §235. This representation was written out in the sales contract agreement. However, the warranty deed had contradictory language that said plaintiff would be liable for any recapture obligation due to FHA §235. The Court recited the rule of law which states that, "Where the right claimed under the contract would vary, change, or alter the agreement in the deed itself, *or inheres in the very subject-matter with which the deed deals, a prior contract covering the same subject matter cannot be shown as against the provisions of the deed.*" *Id.* at 383, 414 P.2d at 884 (emphasis in the original) (quoting *Continental Life Ins. Co. v. Smith,* 41 N.M. 82, 64 P.2d 377, 380 (1936)). The Court then held that the purchaser's (plaintiff's) limitation on assumption of debt was inconsistent with the warranty deed, and thus, such limitation was extinguished by the doctrine of merger. *Id.*

A reading of these three Idaho cases convinces the Court that in the present case, the doctrine of merger applies, the language in the real estate contract (giving Wiks a right of first refusal if Jovanoviches offered the property for sale) is *merged* into the warranty deed, which is silent on the issue, and the deed controls. *Christiansen* tells us that "An abstract does not relate

to the title, possession, quantity, or emblements of the land." 267 P. at 1075. In the present case, the language in the real estate contract essentially creates a non-transferable life estate, as Jovanoviches cannot sell nor can they devise the real estate under the terms of the contract. That is **significantly** different than the warranty deed. The language in the contract in this case does go to the issue of "title", as again it essentially creates a non-transferable life estate. The language in the contract certainly effects "possession", as it completely changes what Jovanoviches may do with the property during their lives and after. The contract language doesn't effect "quantity" (but certainly effects quality), and does not effect "emblements" which are annual crops on the land. Black's Law Dictionary, 7th Ed., West Publishing (1999).

Wicks cite *Bull v. Willard,* 9 Barb. (N.Y.) 641, 645, which has essentially the same language as stated above in *Christiansen*, and argues that: "Referring to the criterion laid down in Bull v. Willard, supra, it would seem that there was no merger." Defendants' Response, pp. 8-9. For the reasons stated immediately above in the Court's analysis of *Christiansen,* just the opposite should occur.

Jolley tells us the general rule is that the acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed.

Estes tells us that "Where the right claimed under the contract would vary, change, or alter the agreement in the deed itself, or inheres in the very subject-matter with which the deed deals, a prior contract covering the same subject matter cannot be shown as against the provisions of the deed." 132 Idaho at 383, 414 P.2d at 884. Certainly, in this case, the "right claimed under the contract would vary, change, or alter the agreement in the deed itself." Also, in the present case, the right claimed in the contract "inheres in the very subject-matter with which the deed deals", that is title to the property. Property rights are frequently referred to as a

"bundle of sticks". With a warranty deed, Jovanoviches got all the bundle of sticks their grantor (Wiks) could give them. In the real estate contract, Jovanovich got hardly any sticks, let alone the entire bundle.

Although case law from foreign jurisdictions is not binding on this Court, the cases cited will be discussed. Wiks cite a case from the Court of Appeals of Minnesota, *Bruggeman v. Jerry's Enterprises, Inc.,* 583 N.W.2d 299 (Ct. App. Minn. 1998), where plaintiffs sold real property to defendant with a contracted option that would allow plaintiffs to repurchase the property if within two years defendant did not improve the property. A deed was made out to defendant that did not reference the option agreement or any rights arising thereunder. After two years, plaintiffs notified defendant that they intended to repurchase the property pursuant to the repurchase option provision in the original option agreement. Defendant countered that plaintiffs had failed to preserve any post-closing rights. Plaintiffs argued that the merger doctrine did not apply to a repurchase agreement that was both a condition subsequent and collateral to the executed deed.

The Minnesota Appeals Court first analyzed whether the defendant's development obligation was a condition precedent or a condition subsequent to its right to a conveyance. A condition precedent to an obligation to perform calls for the performance of some act or the happening of some event after a contract is entered into, upon the performance or happening of which the obligation to perform immediately is made to depend. Provisions of a contract which are not to be performed until after a partial performance of the contract are held not to be conditions precedent. AMJ 2d 17(a). A condition subsequent in a contact is one which follows liability upon the contract and operates to defeat or annul such liability upon the subsequent failure of either party to comply with the condition. AMJ 2d 17(a). The Minnesota Appeals

Court held that because the development was to occur in the future, the obligation was in the nature of a charge on the estate conveyed. *Bruggeman,* 583 N.W.2d 299 (1998). This was important because a previous Minnesota Supreme Court case had held that the doctrine of merger does not necessarily apply to acts not made conditions precedent, and are to be performed in the future, and continue as a charge upon the estate granted. *In re Brown's Estate,* 126 Minn. 359, 148 N.W. 121 (1914). The Minnesota Appeals Court then adopted the condition subsequent exception to the doctrine of merger. *Bruggeman,* 583 N.W.2d 299 (1998).

The Minnesota Appeals Court then addressed the issue of collateral agreements in relation to the doctrine of merger. The Court recognized a distinction between conditions subsequent and collateral agreements. A condition subsequent refers to a future event. A collateral agreement is "one requiring the performance of a collateral act having no necessary relation to the main subject of the agreement." *Id.* (citing Henry Campbell Black, et al., *Black's Law Dictionary* 294 (6th ed.1990)). In *Bruggeman*, the parties stated an agreement that could not be performed prior to the conveyance and may have been separate from and without necessary relation to the delivery of a deed. *Id.* The Court then held that **it was not necessary to decide whether the merger doctrine applies to singularly collateral agreements**, because "we are presented with an agreement that was both collateral and a condition subsequent." *See id.* at 302. However, the merger doctrine does not apply when an agreement is both a condition subsequent and collateral.

This Court finds that under Idaho law, the agreement in this case is not collateral, and thus, the doctrine of merger applies.

Bruggeman cited case law from other jurisdictions which have addressed the issue of whether repurchase options merge with the deed. One case is *Peterson v. Peterson,* 431 So.2d

672, 673 (Fla.Dist.Ct.App.1983), which held that an agreement providing for reconveyance of property upon stated conditions did not merge with a contemporaneously executed deed. In the present case, the deed was not issued **contemporaneously** with the contract. In *Land Reclamation, Inc. v. Riverside Corp.,* 261 Or. 180, 492 P.2d 263, 264-65 (Or. 1972) the Oregon Supreme Court held there is no legal requirement that precludes parties from using two instruments rather than one to effectuate an agreement and holding that contract that included provision that grantor could repurchase property at the end of ten years did not merge with a **subsequent** deed that was vehicle for passing title. However, the deed in that case was written only four days "subsequent" to the land sale contract, where in the present case there were three years that passed between the execution of the land sale contract and the execution of the warranty deed. It is important to note that in the present case, that the only fact that caused the warranty deed to be issued, was the final payment of the contract price. It is entirely understandable why a seller in an incompleted land sale contract would require a right to repurchase during the contract term, but those same concerns do not exist once the contract price has been paid off.

In *Gerald Elbin, Inc. v. Seegren,* 62 Ill.App.3d 20, 19 Ill.Dec. 125, 378 N.E.2d 626, 628 (Ill.App. 1978), the Illinois Court of Appeal held that although the executed deed did not include a provision included in contract for the purchase of real estate that provided the purchaser would have an option to resell property at the end of three years, the doctrine of merger did not apply because repurchase agreement could only be executed after the original sale. This case dealt with a purchaser's option to resell after three years. Those are obviously not the facts of the present case which deals with a sellers option to repurchase.

The Court does not find the case law from other jurisdictions all that helpful in resolving this matter, given the Idaho law that is controlling. The present case involves a real estate contract that was recorded more than three years before the warranty deed was issued by Wiks and recorded. The warranty deed makes no mention of the repurchase agreement contained in the real estate contract. Where the language of a deed is plain and unambiguous, the intention of the parties must be determined from the deed itself, and parole evidence is not admissible to show intent. *Hall v. Hall*, 116 Idaho 483, 777 P.2d 255 (1989). In the present case the deed is unambiguous on its face. Therefore, there is not an issue of material fact surrounding the intent of the parties as to the deed. Additionally, defendants were the ones who drafted the deed. In the case of an ambiguous contract, the contract is to be construed in favor of the non-drafting party. *Haener v. Ada County Highway Dist.,* 697 P.2d 1184 (1985). Although the instrument at issue is a deed, the same logic would follow.

The crux of the case is whether or not the doctrine of merger extinguishes defendants' contractual rights that were in effect prior to the conveyance of the warranty deed, in which there was no mention of the right of repurchase that was contained in the real estate contract. The following stipulations in contracts for the sale of real estate are conclusively presumed to be merged in a subsequently delivered and accepted deed made in pursuance of such contract: (1) Those that inhere in the very subject matter of the deed, such as title, possession, emblements, etc; (2) Those carried into the deed and of the same effect; (3) Those of which the subject matter conflicts with the same subject matter in the deed. *Jolley*, 90 Idaho 373, 414 P.2d 879 (1966). As stated above, this Court finds as a matter of fact and law that the language in the contract in this case does go to the issue of "title", as again it essentially creates a non-transferable life estate. The language in the contract certainly effects "possession", as it completely changes what

Jovanoviches may do with the property during their lives and after. The subject matter in the contract (essentially an non-transferable life estate) conflicts with the subject matter in the deed (a warranty deed).

Finally, Wicks argue that there is a lack of consideration that would have warranted the change from the real estate contract to the warranty deed. Wiks argue: "At present, plaintiffs did nothing more than perform their obligation to satisfy the purchase price set forth in the Contract." Defendants' Response, p. 11. The Court finds that full payment of the contract price is consideration sufficient to support the execution of a warranty deed which omitted the right of first refusal to repurchase language.

IT IS HEREBY ORDERED summary judgment is GRANTED on behalf of plaintiffs and against defendants.

Entered this _____22nd_____ day of November, 2002.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Charles M. Dodson	**Thomas M. Vasseur**	**Robert E. Kovacevich**
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_____
Deputy Clerk