STATE OF IDAHO)
County of KOOTENAI)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 KOOTENAI

JAMES ALEGRIA, et ux,

Plaintiffs,

vs.

ZELJKO SABO, et ux, et al,

Defendants.

Case No. **CV 2000 7257**

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Trial of James Alegria and Cherie Alegria v. Zeljko Sabo and Maria Sabo.

Fred Gabourie, Coeur d'Alene, lawyer for James and Cherie Alegria.

Carolyn Justh, Coeur d'Alene, lawyer for Zeljko and Maria Sabo.

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COURSE OF PROCEEDINGS

This action arose out of the sale of a restaurant by defendants (Sabos) to plaintiffs (Alegrias). Alegrias sued to reform the contract, brought a claim of unjust enrichment, a claim that the contract failed for lack of consideration and a claim for rescission. Kathy Pizzoloto and Alliance Title were also sued by Alegrias, but they were not served with service of process, and were dismissed upon motion by Sabos with a no objection filed by

Alegrias, pursuant to an order dated November 28, 2001. Sabos answered the complaint and counterclaimed for attorney fees, a remaining balance of $3,500 on a jeep and a plow, and $2,000 on a safe. On November 21, 2001, Sabos were allowed to amend their counterclaims, adding a counterclaim to determine the amount due under the promissory note for the sale of the restaurant, and adding a claim to permit repossession of the collateral. As of the first day of trial, it was pointed out that Alegrias had neglected to answer the amended counterclaims. After that deficiency was pointed out to Alegrias' counsel, Alegrias came forth with their amended answer to counterclaims on the second day of trial. Sabos motion for default was DENIED at trial. Trial was held April 1-5, 2002, in order to determine the obligations of the parties.

This matter was taken under advisement on April 5, 2001.

FINDINGS OF FACT

After considering all of the evidence submitted by the parties and having weighed the credibility of the witnesses, I make the following findings of fact.

1. Alegrias purchased from Sabos an operating restaurant called "Burger Heaven" in Rathdrum, Idaho. Alegrias purchased the restaurant, land and fixtures for $450,000.00. Alegrias paid $50,000.00 down, and executed two promissory notes, one for $50,000.00 (this has been paid off), and another for $350,000.00. Only the $350,000.00 note remains unpaid and is the subject of Sabos' counterclaim against the Alegrias. Sabos contend that the note balance on April 27, 2001, was $349,016.80. Defendants' Amended Counterclaims, p. 3. While not broken out in the sales price, this Court finds that the purchase price also included a period of training by the Sabos, and the "goodwill" of the operating restaurant.

2. The Court finds that before the sale there were oral representations made by Sabos (primarily Zeljko) regarding the business, age of the equipment and value of the equipment. There were additional written representations made by Zeljko Sabo at closing or shortly thereafter, and those representations are found in Plaintiffs' Exhibit 2. The Court specifically finds that the representations made prior to the sale as to the age of the equipment, quality of the equipment, were statements of opinion. Statements as to value of the property are generally not grounds for rescission. *Dolson Co. v. Imperial Cattle Co.,* 624 P.2d 993, 997 (Mont. 1981). As to the written representations made at closing or shortly thereafter, the Court also finds that Zeljko Sabo, given his expertise in the industry, knew these representations made in Exhibit 2, were false. However, there may be reasons (discussed below) for those knowing false misrepresentations. But most importantly, the Court finds those representations in Exhibit 2, were statements of opinion and not representations of fact. Thus, it is of no consequence if they were "false". Alegrias contend that the three page list of tangible items of personal property (Plaintiffs' Exhibit 2) contained false and fraudulent representations of fact. The Court finds it likely such document was given to Alegrias by Sabos after the sale. Even if the document was given to Alegrias before the sale closed, this Court specifically finds it was given to the Alegrias well after the $450,000.00 purchase price of the restaurant, real estate and personal property was agreed upon by Alegrias and Sabos. In other words, Exhibit 2 did not form an essential part of the representations which led to Sabos agreement to sell and Alegrias agreement to purchase the business for $450,000.00. The Court finds Exhibit 2 was prepared by Sabos in response to Kathy Pizzolato's (closing agent for Alliance Title) request to Zeljko Sabo that Sabos provide a breakdown which divided the price between the real estate on one hand, and the

tangible personal property on the other hand. It is noted that neither party had the advice of an attorney throughout the negotiation phase or at closing of this transaction. The Court finds some of the prices set forth in Exhibit 2 were exaggerated by Sabos, but there may have been tax reasons which inured to Alegrias benefit and against Sabos benefit in so doing (eg. possibly lowering real estate taxes to be paid annually by Alegrias, Curtis Clark testified the sale of personal property is taxed unfavorably compared to real estate…with real estate having capital gains treatment to be paid as installments are paid over time, where personal property gains are recaptured immediately all at once upon the sale). In any event, the Court finds that Exhibit 2 was not the basis of the bargain at the time Alegrias decided to purchase the business in its entirety from Sabos for $450,000.00. The Court finds that whether Alegrias later discovered some of the prices on Exhibit 2 and then tried to rescind or get monetary damages based on the perceived fraud of that document, or, whether Alegrias merely suffered from buyers remorse and then thought Exhibit 2 was their way out, is of no consequence. It is of no consequence because Exhibit 2 simply was not the basis of the bargain struck by the parties. However, the Court finds it much more likely that the second scenario (Alegrias after several months of operating the business suffered from buyers' remorse and thought Exhibit 2 may be their way out), is most likely what occurred, and most likely what has driven this lawsuit. This finding is bolstered by the fact that Alegrias counsel placed so much reliance upon the "fact" that there was no "goodwill" sold along with this business. While it is true that "goodwill" was not assigned a value at closing, Alegrias' argument that an ongoing, profitable business does not have goodwill, and thus, all Alegrias purchased was real estate and fixtures for their $450,000.00, is wholly without merit. The Court's finding that the Alegrias used Exhibit

2 to facilitate their buyer's remorse, is further bolstered by the fact that they apparently failed to catch the $67,670.00 math error between Kathy Pizzalato's computations at closing and the later computations of Curtis Clark, both of which were based the values arrived at by Zeljko Sabo in Exhibit 2.

3. The Court is not persuaded by a preponderance of the evidence, let alone clear and convincing evidence, that Sabos intended that Alegrias rely upon Exhibit 2, or that Alegrias in fact relied upon Exhibit 2, at the time of the agreement to purchase, or even at the time the sale closed on March 30, 2000. Finally, even if the Alegrias did rely on Exhibit 2 by the time of closing on March 30, 2000, they have not proved by clear and convincing evidence that such reliance was justified, since they performed little if any research on their own into the true value of the fixtures, or the realty. Jim Alegria testified that he worked in an appraisal business in California, though he is not an appraiser. Nonetheless, an ordinary person should reasonably conduct some independent valuation when they are about to purchase a $450,000.00 asset, and certainly one with even limited exposure in an appraisal business should be even more inclined to do so. Thus, any reliance by Alegrias on Exhibit 2 was unjustified. What is really important in an ongoing business is the "bottom line." Alegrias did review the sales data kept by Sabos, but did not prove by clear and convincing evidence that such sales data was inaccurate or in any way misrepresented or manipulated by Sabos.

4. The Court finds the price to be paid for Burger Heaven was negotiated through an arms length transaction. The Court finds the testimony of both parties as to the nature of their relationship (Alegrias contending they were long time good friends ever since they placed a vending machine in Burger Heaven in December 1994 and thus in a fiduciary relationship with Sabos, Sabos on the other hand denying virtually all non-

business interaction with Alegrias prior to the sale), to be not completely credible. While both Sabos testified that there was no friendship, and Zeljko Sabo testified that his relationship with Jim Alegria was “no different than any other salesman”, the Court finds on the whole, more credibility to Alegrias’ characterization of the relationship. However, the Court finds that even giving Alegrias the benefit of the disputed testimony, the parties were long standing business acquaintances. They were not close friends, and other than their business relationship, they did not socialize. The Court finds that this relationship did not in any way approach a fiduciary relationship. Because there was no fiduciary relationship, it is not relevant whether Zeljko Sabo had particular knowledge in the “industry”, as Jim Alegria, Dana Cunningham and Forrest Hammond testified. Zeljko Sabo denied having expertise in valuation of restaurant equipment. The Court finds that to be not credible, and finds Zeljko Sabo had knowledge about the value of restaurant equipment. But, this Court also finds such knowledge not to be relevant because there was no fiduciary relationship between Sabos and Alegrias, and because the values set forth in Exhibit 2 were statements of opinion, and were made after closing or at least after the $450,000.00 total sale price was agreed upon, and thus, was not the basis of the overall transaction.

5. After the lawsuit was filed, Sabos began foreclosing on their collateral, and they hired Lisa Holmes to proceed as successor trustee to foreclose on the $350,000.00 deed of trust. The foreclosure sale was completed December 11, 2001 when the trustee sold the property to the Sabos on a credit bid of $200,000.00. Maria Sabo testified that she did not receive a key to the premises until December 12, 2001. She testified she did not go inside the restaurant until December 14, 2001 as she claimed her husband told her to wait until the gas and electricity were turned on.

Regardless of when Sabos "entered" the premises, Sabos were responsible for the condition of the premises after the foreclosure sale. Maria Sabo testified that she went into the premises with her attorney Carolyn Justh on October 31, 2001, and noticed water dripping from the ceiling. Jim Alegria took a videotape on December 12, 2001, which showed the restaurant in substantially the same condition as when Norman Loftin took his photos on December 15, 2001 at Maria Sabo's request. When Sabos took possession of the premises on December 11, 2001, the property already had some water damage as a result of grease accumulation in the roof portion of the kitchen exhaust system. That grease accumulation was due to the system being improperly maintained by Alegrias. The Court finds Sabos failed in their burden of proof that some of the damage occurred deliberately. However, the Court finds that essentially all damage occurred while Alegrias were in possession of the premises. Thus, Alegrias are responsible for such damage, regardless of the nature of the cause.

6. As to the business (real property, fixtures, etc.), Sabos seek a deficiency judgment against Alegrias for the difference between what is owed to them on the promissory note, and the value of what they received back when they bought the real property at the December 11, 2001 foreclosure sale. Sabos concede the real estate which they received back likely had a value exceeding their credit bid of $200,000.00. Defendants' Pre-Trial Proposed Findings & Conclusions, pp. 9-10. This document was filed January 16, 2002, which was before Stanley Moe's January 23, 2002 appraisal (Exhibit AT). The document is unsigned, and is thus not binding pursuant to I.R.C.P. 11(a)(1), but it does indicate Sabos' counsel's opinion that Sabos' bid was well below the value of the property. This Court finds the testimony of Sabos' expert on valuation Stanley Moe (a real estate appraiser with 30 years experience), that the foreclosed

upon property had an “as is where is” value of $200,000.00, to be suspect, and wholly incredible when combined with Gary Bay’s opinion. Moe’s opinion that the land and building are worth $200,000.00 is incredible in light of Sabos own calculation that it was worth at least $276,670.00 [$450,000 less the correctly computed total of $173,330.00 from Exhibit 2 which Zeljko Sabo admits was high thus making the $276,670.00 on the land and building, correspondingly low]. Moe left out furniture, fixtures and equipment in assigning a value of $117,200.00 to the building and $82,800.00 to the land. The fixtures, furniture and equipment were valued by Gary Bay. The Court finds the valuation by Gary Bay of Smith & Greene (Exhibit AU), that the personal property was only worth an additional $64,445.00 to be wholly incredible. Sabos want it both ways, on the one hand the business was worth $490,000.00 when they tried to sell it through a realtor, later it was worth the reduced price of $450,000.00 when they sold it to Alegrias, and yet somehow, now it only is worth $264,445.00? That is an incredible claim. But that incredible disparity does not assist Alegrias in their claims, because that incredible disparity in valuation further exemplifies the reasoning that the legal rule that statements as to value of the property are generally not grounds for rescission. *Dolson Co. v. Imperial Cattle Co.,* 624 P.2d 993, 997 (Mont. 1981). Curtis Clark, testifying on behalf of Sabos, testified that before the sale to Alegrias, he had agreed with the realtor’s range of value of between $375,000 and $500,000. This is yet another reason Moe/Bay are incredible. Sabos obviously had no problem believing the personal property was worth $241,000.00, when they signed on closing, as that figure was allocated by Kathy Pizzalato at closing, and her numbers were based (with a $67,670.00 mathematical error) on Zeljko Sabo’s valuation. Exhibit 2, Exhibit 3. At closing, Zeljko Sabo felt the personal property was worth at least $173,330.00 (Exhibit

J, Curtis Clark's $171,530.00 addition of the amounts declared by Zeljko Sabo, plus Curtis Clark's $1,800 error about which he testified). Yet now, at trial, two years later, somehow that same personal property is only worth $64,445.00? Granted, the building sustained some damage, but even Sabos expert Norman Loftin testified the cost of repairing that damage was about $50 in material at most, and labor. Granted the Alegrias were not the "best housekeepers" according to Norman Loftin, but the cost of cleaning the premises to the level kept by Sabos before the sale to Alegrias, could not be prohibitive. Granted some of the personal property was missing when Sabos resumed possession, but Sabos failed in their burden of proving what fixtures and in what amounts. In closing, Sabos attorney stated the reason Sabos got appraisals of Moe and Bay, was to prove the decrease in the value of the premises due to the damage, missing items and poor maintenance. Sabos placed all their eggs in the Moe/Bay basket, and this court finds Moe's and Bay's opinions to be without basis. This Court finds the true value of the premises, on December 11, 2001, to be less than the $450,000.00 sale price (due to the water damage, some lack of maintenance, some missing items and due to the business being out of business since August 26, 2001 per Jim Alegria's testimony), but higher than the $264,445.00 estimate of Moe and Bay. When Sabos foreclosed on December 11, 2001, the business had been dormant for 3.5 months. While some reduction in goodwill would occur (Curtis Clark testified the longer the business is closed, the more it looses its goodwill value) during that 3.5 month period, since Sabos neither re-opened nor re-listed the property for sale, Alegrias are not responsible for any reduction in goodwill after December 11, 2001. Sabos have a duty to mitigate their damages. The Court finds the fair market value at

the time of the December 11, 2001 foreclosure, of the real estate, the building, fixtures, personal property remaining and goodwill, to be $385,000.00.

7. Idaho Code § 45-1512 provides that in an action for a deficiency judgment, the amount recoverable as a deficiency is not to exceed the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at the time of sale (or the amount for which the property sold at the foreclosure sale, whichever is less), with interest on that amount from the date of sale. Defendants' Trial Brief, pp. 12-13. The Court finds that the principal and interest owed at the time of foreclosure was $369,643.89 ($349,016.80 principal balance at time of default plus $20,627.09 interest accrued to date of foreclosure, per Exhibit AS). Compared to the fair market value of the business as found by the Court on the date of foreclosure ($385,000.00), the amount owed at the time of foreclosure was $15,356.11 less than the value of the business. There are additional amounts due by Alegrias to Sabos. There is a) $1,000.00 for ten unpaid late fees of $100 each; b) property taxes and penalties for 2000 in the amount of $1,732.57; pro-rated property taxes for 2001 in the amount of $2,479.51; c) foreclosure attorney fees and costs of $962.80; d) trustee sale guarantee fee of $1,054.00; e) foreclosure advertisement of $459.00 and e) pre-foreclosure repairs of $100.00 for hood cleaning. All these amounts are per Exhibit AS. These amounts total $7,787.88. Subtracted from the $15,356.11 excess of the value of the premises over the amount owed at time of foreclosure, there is still $7,568.23 excess of value over the amount owed. Thus, the Court disallows recovery of any deficiency on the deed of trust. *Evans v. Sawtooth Partners,* 111 Idaho 381, 383, 723 P.2d 925, 927 (Ct.App. 1986).

8. The Court finds Sabos are owed $3,500.00 by Alegrias for the sale of a jeep and plow. The Court finds that the sale price of such jeep and plow was $10,000.00, and Alegrias paid $6,500.00 on such debt.

9. The Court finds Sabos are owed $2,000.00 by Alegrias for the sale of a safe located in Burger Heaven. However, Sabos attorney said that since the safe was left on the premises, that debt need not be paid. Thus, the Court finds no money is owed by the Alegrias to the Sabos for the debt on the safe.

10. If any of the statements in the introduction, Course of Proceedings, discussion, or the Conclusions of Law are determined to be Findings of Fact, they are so deemed and to that extent, they are incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I make the following conclusions of law.

1. Each of the nine elements of fraud must be proven by clear and convincing evidence. *G & M Farms v. Funk Irrigation Co.,* 110 Idaho 514, 518, 808 P.2d 851 (1991). The Court finds that Sabos representations as to the value of the fixtures shown in Exhibit 2 were representations of opinion, not of fact. While those opinions were false in some instances, and this Court finds that Zeljko Sabo knew of the falsity, there may have been good reason (discussed above) for the higher values being placed on the fixtures. Element number 1 (a representation of fact) has not been proven by clear and convincing evidence. Element number 2 (its materiality) has not been proven because Alegrias bought an entire business for $450,000.00, not certain fixtures at certain prices. Element number 7 (the hearer's reliance on the truth of the representation) has not been proven by clear and convincing evidence, as Alegrias did

not have Exhibit 2 at the time the selling price was agreed upon or at the time of closing on March 30, 2000. Element number 8 (the hearer's right to rely on the speaker's representation) has not been proven by clear and convincing evidence, since Alegrias performed little if any research on their own into the true value of the fixtures, or the realty.

2. Statements as to value of the property are generally not grounds for rescission. *Dolson Co. v. Imperial Cattle Co.,* 624 P.2d 993, 997 (Mont. 1981).

3. Sabos argue that the parol evidence rule applies and that preliminary contract negotiations are merged in the written contract. Defendants' Trial Brief, pp. 8-10. Sabos reliance on the parol evidence rule is misplaced, as parol evidence is not admissible to vary the contract terms of a written contract, but certainly can be used to prove fraud. *Larsen v. Buys,* 292 P. 239, 49 Idaho 615 (1930); *Davis v. Idaho Minerals Co.,* 231 P. 712, 40 Idaho 64 (1924).

4. Since the underlying basis for rescission or restoration is absent, the Court need not address Sabos claims that Alegrias are not in any position to restore to Sabos the full consideration which they received. Alegrias attorney at trial conceded that "reformation is out the window", and that Alegrias were looking for a rescission remedy. Furthermore, since the real estate has been foreclosed upon, reformation is not possible. Even though the underlying basis for rescission is absent (since there is no fraud), the Court finds Alegrias did not act promptly upon ascertaining what they now contended are the falsehoods contained in Exhibit 2. *Haener et al v. Albro et al,* 73 Idaho 250, 249 P.2d 919 (1952). Thus, for that additional reason, there is no basis for rescission.

5. Alegrias have failed on all relief sought in their Complaint. As to Sabos counterclaims, Sabos have prevailed on Counterclaim II (the balance on the Jeep and

plow), and conceded Counterclaim III (the safe). As to Counterclaim I (attorney fees for defending on the relief sought by Alegrias), Sabos prevailed in that they successfully defended on all claims for relief sought by Alegrias. As to Counterclaim IV, which sought a determination of the amount owed on the promissory note, Sabos certainly did not "prevail" to the extent they claimed because no deficiency was found, yet Alegrias "caused" this Counterclaim to be brought by not paying on the note. As to Counterclaim V, which sought possession of the collateral on the UCC 1 (essentially the fixtures and the same property as on Exhibit 2), Sabos again did not prevail to the extent they claimed as no deficiency was found, yet again, Alegrias caused the Counterclaim to be brought by not paying on the note and by not allowing Sabos to repossess the collateral set forth on Exhibit C. Sabos are determined to be the I.R.C.P. 54 prevailing party only as to the defense of the Complaint, as to Counterclaim I and partially prevailing as to Counterclaim IV and V, and shall be entitled to recover their costs.

6. Alegrias signed a promissory note in which Alegrias "…agree to pay, in addition to the costs and disbursements as allowed by law, such additional sums as the court may adjudge reasonable on attorney's fees in such suit." Exhibit 3. However, attorney fees will not be allowed for any time spent by counsel on Norman Loftin as his testimony was simply not relevant. Attorney fees will not be allowed for any time spent on Moe or Bay, as their testimony was incredible. Furthermore, were it not for the incredible testimony of Moe or Bay, this matter may have come to resolution short of trial, and that factor will be considered in determining the amount of attorney fees owed by Alegrias to Sabos. Sabos are entitled to an award of attorney fees and costs, and shall within 14 days of the entry of judgment, submit a costs bill, setting forth their claim for fees and costs, and fees shall be analyzed under I.R.C.P. 54(e)(3).

7. If any of the statements in the introduction, Course of Proceedings, discussion, or

the Findings of Fact are determined to be Conclusions of Law, they are so deemed and to that extent, they are incorporated into these Conclusions of Law.

MISCELLANEOUS MATTERS

On December 26, 2001, Alegrias moved to enforce the mediation agreement, but failed to notice up the motion for hearing. Oral argument was requested in the motion, but never made by Alegrias attorney. This motion is DENIED. Idaho Rule of Civil Procedure 7(b)(3). Sabos moved to Bifurcate the trial, and likewise failed to notice the motion for hearing. It is assumed the reason it was not noticed for hearing was due to the fact that the trial had been moved from January, to April, 2002, thus giving Sabos more time to attempt to prove the value of the real estate when they came back into possession. This motion is likewise DENIED, pursuant to I.R.C.P. 7(b)(3).

IT IS ORDERED that Alegrias' Motion to Enforce the Mediation Agreement is DENIED, and Sabos' Motion to Bifurcate is DENIED.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED that:

1. Judgment should enter in favor of Sabos and against Alegrias as set forth in the Conclusions of Law.

2. Counsel for Sabos shall prepare a form of proposed judgment, circulate it to Alegrias counsel for his signature that the same is approved as to form, and present such form of judgment to the court for entry within 14 days.

Entered this _____8th_____ 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:

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_____
Deputy Clerk