STATE OF IDAHO)
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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

SHARON VAN HORN et al.,	
Plaintiffs,	**Case No. CV 2001 6317**
vs.	**MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN FULL AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IN PART**
THERON D. NELSEN et al.,	
Defendants.	

Plaintiffs seek relief from Defendants' fraudulent misrepresentations to enter into a contract. Both Plaintiffs and Defendants have moved for summary judgment on the various causes of action.

Scott W. Reed for Plaintiffs.

Stephen M. Ayers for Defendants.

I. INTRODUCTION

At the outset it should be noted that because defendant Joe Chapman filed Chapter 7 bankruptcy in August of 2002, this lawsuit is now only between plaintiff Sharon Van Horn and her daughter, plaintiff Victoria Van Horn ("Van Horns"), and the defendant Nelsens and the Nelsen Family LLC ("Nelsens"). Victoria Van Horn is a disabled person having suffered severe injuries in an automobile accident in 1995. Sharon Van Horn was appointed guardian of Victoria Van Horn and a trust was created for the funds received in settlement of the automobile accident for $150,000. In the late summer of 1997, defendant Joe Chapman borrowed $150,000 from the Van Horns to refinance his rental dwelling at 1210-1215 East Lakeshore Drive in Coeur d'Alene and executed a deed of trust to the Van Horns as security. The deed of trust only attached to 35.1% of the property, the other 64.9% being owned by Chapman's brother. One half of the promissory note for $150,000 was to be paid on April 1, 1998, with the balance paid on October 1, 1998. No payments were made.

In June of 1999, defendant Theron Nelsen and Joe Chapman entered into negotiations to construct a three-unit condominium upon the property in which Van Horns held a deed of trust. Both Theron Nelsen and Joe Chapman came to Sharon Van Horn and presented the investment agreement ("Agreement"). They promised that if she released her deed of trust, she would be paid back when the development of the property was completed. Nelsens had their attorney draft the Agreement, but the Van Horns did not have counsel represent them in this agreement. The Agreement provided the following order of payments to come from disbursement of proceeds from the sale of the three condominium units: (1) repayment of bank loan for $560,000 plus interest; (2) return to Nelsen of $220,000 purchase price of house and lot; (3) payment to Nelsen of $100,000; (4) payment to the Van Horns of $150,000; (5) payment to Chapman of

$100,000 and; (6) dividing of balance between Nelsen and Chapman. Plaintiffs' Brief in Support of Motion for Summary Judgment Ex. 4. The Agreement lacked any stated reason or justification for the $100,000 payment to Nelsen ahead of the Van Horns. As required by the Agreement, the Van Horns' deed of trust was released and reconveyed on September 9, 1999, leaving the Van Horns with no security interest. As part of the Agreement prepared on behalf of the Nelsens, a provision allowed the Nelsens to claim an additional offset for the secured construction loan of $47,500 and charge this against the project ahead of the Van Horns' repayment position. *Id*. at ¶ 10. The Van Horns are now seeking interest on the original $150,000 loan from October 1, 1997 to October 1, 2002, which totals $52,500 with interest accruing at $875 per month minus the $40,000 already received. This comes to a net remaining of $84, 896.79. The Van Horns have brought the following causes of action: (1) Fraud and Misrepresentation; (2) Unjust Enrichment; (3) Equitable Subordination; (4) Negligence; (5) Breach of the Covenant of Good Faith and Fair Dealing; (6) Intentional Interference with Contractual Relations; and (7) Violation of the Idaho Consumer Protection Act. The Nelsens have counterclaimed against the Van Horns for a portion of the funds already paid to the Van Horns.

At the October 7, 2002 hearing, on the Van Horns' and Nelsens' Motions for Summary Judgment, the Court took under advisement the Van Horns' claims of: (1) Fraud and Misrepresentation; (2) Unjust Enrichment; (3) Equitable Subordination; (4) Negligence; (5) Breach of the Covenant of Good Faith and Fair Dealing; (6) Intentional Interference with Contractual Relations; and (7) Violation of Idaho Consumer Protection Act.

This case is scheduled for a jury trial to begin on November 18, 2002.

II. FRAUD AND MISREPRESENTATION

The first claim brought by the Van Horns is a claim of fraud and misrepresentation. The Van Horns allege that Nelsen withheld material facts about the Agreement. Specifically, neither the Nelsens nor Chapman ever mentioned the fact that any extra expenses or cost overruns would take precedence over the Van Horns' repayment. This was not appended to the original Agreement and was only known by the Nelsens and Chapman. Affidavit of Sharon Van Horn, p. 3. This withholding of a material fact was compounded by Theron Nelsen's affirmation that, "I feel that this is going to be great because everybody is going to get their money. And I think this is just a great project." *See* Chapman deposition I, p. 134, Ll. 19-25. The Van Horns did not read the Agreement nor did they have more than fifteen minutes to sign the agreement. *Id.* at p. 135 Ll. 20-25. Nelsens argue that there cannot be any fraud because the Van Horns had the opportunity to read the Agreement before signing and the Nelsens never made any false representations.

A prima facie case for fraud requires the claimant to prove nine elements: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury. *Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999). However, in this case we are dealing with a nondisclosure of a material fact that was fraudulent. The Idaho Supreme Court has stated that to establish fraud plaintiff must prove, by clear and convincing evidence, that there was nondisclosure, that plaintiff relied upon this nondisclosure, that plaintiff's reliance was material to the transaction, and that plaintiff was damaged as a proximate result of the nondisclosure. *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 518, 808 P.2d

851, 855 (1991). The Van Horns have raised material facts in dispute that would prevent Nelsens' motion for summary judgment. The Van Horns have raised the issue of nondisclosure of the Van Horns' subordination to additional costs, that this nondisclosure was material to the Van Horns' signing the Agreement, and that the nondisclosure was the proximate result of the Van Horns' damages. Although defendants cite *Rogers v. Murphy,* 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992), there is nothing in the case law that supports Nelsens' position that there cannot be fraud because the Van Horns had the opportunity to read the Agreement before signing. In *Watts v. Krebs,* 131 Idaho 616, 962 P.2d 387 (1988), the Idaho Supreme Court held that an ex-husband committed fraud when he did not disclose to his ex-wife the fact he had harvested timber from jointly owned property before the ex-wife signed the property settlement agreement, even though the ex-wife could have discovered the fact of timber harvesting by conducting a survey of the property. Likewise in this case the Van Horns may still allege fraud even though they could have read the Agreement, as Van Horns claim they relied upon the representations of Theron Nelsen because Theron Nelsen did not disclose the fact that the repayment of the Van Horns would be subordinated to extra costs and expenses incurred in the project. For the same reasons as discussed above, Nelsens' argument that because Theron Nelsen did not make a verbal fraudulent misrepresentation to the Van Horns he did not commit fraud, fails. A nondisclosure can be fraudulent in Idaho. Nondisclosure is what distinguishes this case from *Rogers. Rogers* was a case where a party's signature on a note was obtained by concealing the identity of the note, and those are not the facts in the present case.

The closer question is whether the Van Horns are entitled to a motion for summary judgment on the issue of fraud. The facts show that Theron Nelsen struck a hard bargain with Chapman and extracted a deal that was extremely favorable. This is not fraudulent behavior as it

relates to Chapman. But, it does show that Theron Nelsen did not disclose to the Van Horns that they would be subordinate in the repayment schedule to extra costs and expenses associated with the property. This has added meaning because Theron Nelsen had final say on whether the job was done to a satisfactory level. Any extra costs arising from Nelsen's dissatisfaction would come out of the Van Horns' return. Theron Nelsen is a sophisticated businessman; Sharon Van Horn is not. Also, the Nelsens were represented by counsel; the Van Horns were not. Even though there is much evidence that points to Theron Nelsen's nondisclosure of the Van Horns' repayment subordination, a jury should decide whether there is clear and convincing evidence that this occurred. Van Horns are correct that *Hines v. Hines*, 129 Idaho 847, 852, 934 P.2d 20 (1997) allows the court to apply the preponderance of the evidence (instead of clear and convincing evidence) standard on summary judgment for fraud, but that only applies in viewing the *non-moving parties' burden*, so that case is not beneficial to them on their motion for summary judgment.

Both parties' motions for partial summary judgment on the issue of fraudulent misrepresentation are denied.

III. UNJUST ENRICHMENT & EQUITABLE AND/OR QUASI ESTOPPEL

The Van Horns' next claim is for unjust enrichment and/or equitable or quasi estoppel. The doctrine of unjust enrichment sounds in quasi-contract or implied-in-law contract. *Beco Constr. Co., Inc. v. Bannock Paving Co., Inc.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990). The theory is based upon the defendant having received a benefit which would be inequitable to retain at least without compensating the plaintiff to the extent that retention of the benefit is unjust. *Id.* In order to establish the prima facie case for unjust enrichment, the plaintiff must show that there was: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 745, 710 P.2d 647, 655 (Ct.App. 1985). Nelsens argue that the doctrine of unjust enrichment cannot be had where there is an enforceable express contract covering the same subject matter. That argument is without merit because the Idaho Supreme Court has held that even though an agreement exists, unjust enrichment may be imposed. *Hixon v. Allphin*, 76 Idaho 327, 281 P.2d 1042 (1955). The existence of an express agreement does not in and of itself signify that an action for unjust enrichment cannot be brought. Rather, only when the express agreement is found to be enforceable is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract. *Chandler v. Washington Toll Bridge Authority*, 17 Wash.2d 591, 137 P.2d 97 (1943); *see Hixon, supra.* If Theron Nelsen is found to have acted fraudulently in securing the Van Horns' signatures for the Agreement, the Agreement can be rescinded. If the Agreement is rescinded, then the doctrine of unjust enrichment may be used to disgorge the excess profits the Nelsens took and return this disgorgement to the Van Horns. If

the Van Horns are able to establish fraud at trial, then the Court will revisit the issue of unjust enrichment at that time. Until then, both parties' motions for summary judgment are denied on the issue of unjust enrichment.

The Van Horns have also requested equitable relief under the doctrines of quasi and equitable estoppel. The requirements for the proper application of quasi estoppel are that the person against whom it is sought to be applied has previously taken an inconsistent position, with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine. *KTVB, Inc., v. Boise City*, 94 Idaho 279, 486 P.2d 992 (1971). The Van Horns argue that Joe Chapman and Theron Nelsen represented that the condo would be built in seven months for the loan amount, that the units would be sold for substantially more than the cost and that the Van Horns would be paid. The Van Horns allege that both Joe Chapman and Theron Nelsen have long experience in building and knew or could have been reasonably expected to know that the costs would be higher. The Van Horns did not know or could not have been expected to have this particular knowledge. Joe Chapman and Theron Nelsen intended that the Van Horns rely upon the representations and the Van Horns did so giving up their secured $150,000 plus interest. Nelsens have raised questions of fact about the Van Horns' knowledge and expectations concerning the success of the condominium project. Affidavit of Theron D. Nelsen pp. 3-4. In particular, the Nelsens allege that Sharon Van Horn released her deed of trust because of her personal involvement with Chapman and her desire to help him out of a financial problem. Due to this material fact in dispute, the Court declines to exercise quasi estoppel at this summary judgment juncture.

The doctrine of equitable estoppel is based upon the broad equitable principle which courts recognize, that a person, with full knowledge of the facts, shall not be permitted to act in a

manner inconsistent with his former position or conduct to the injury of another. To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position, or by reason thereof the rights of other parties must have intervened. *Id.* (Quoting from *Yen v. London Guar. & Acc. Co. et al.,* 40 Haw 213, 229-230 (Hawaii Ter. 1953)). Nelsens' first position expressed to the Van Horns was that they would receive their money after (1) the loan amount (2) return to the Nelsens of $220,000 purchase price of house and lot; and (3) payment to Nelsen of $100,000. Nelsens have raised questions of fact about the Van Horns' knowledge and expectations concerning the success of the condominium project. Affidavit of Theron D. Nelsen pp. 3-4. Because there are material facts in dispute, the Court declines to exercise equitable estoppel against the Nelsens at this summary judgment juncture.

Both parties' motions for partial summary judgment are denied as to quasi and/or equitable estoppel.

IV. EQUITABLE SUBORDINATION

The Van Horns pray for a constructive trust to apply only to Unit 3 owned by Nelsens on Parcel II. Subrogation is an equitable principle based on the general theory that one compelled to pay for damages caused by another should be able to seek recovery from that party. *May Trucking v. International Harvester Co.,* 97 Idaho 319, 543 P.2d 1159 (1975). As stated by the Court in *Houghtelin v. Diehl,* 47 Idaho 636, 639-640, 277 P. 699, 700 (1929):

> Subrogation, in its broadest sense, is the substitution of one person for another, so that he may succeed to the rights of the creditor in relation to the debt or claim and its rights, remedies and securities. The doctrine is derived from the civil law from which it has been adopted by courts of equity. It is considered a creature of equity, and is so administered as to secure real and essential justice without regard to form, and it will not be allowed where it would work an injustice to others, as where it would disturb the priorities of liens or defeat any rights of others...
> The doctrine of subrogation is not administered as a legal right, but the principle is applied to subserve the ends of justice and to do equity. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application, and whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.

47 Idaho at 639-620, 277 P. at 700. Because the Van Horns' motion for summary judgment has been denied in full, it is premature to discuss equitable subordination at this point. If the appropriate moment arises, the Court will return to this issue. Both parties' motions for partial summary judgment on the issue of equitable subordination are denied.

V. NEGLIGENCE (Or in the Alternative Negligent Performance of the Agreement)

The Van Horns allege that the Nelsens were negligent in their performance of the Agreement. Specifically, Nelsens were negligent in their performance by incurring excessive expenditures and by undertaking unwarranted changes in the building plans. Paragraph 14 of the Agreement states that Joe Chapman is to do construction in a workmanlike manner and Theron

Nelsen reserves the right to review that construction. Plaintiffs' Brief in Support of Motion for Summary Judgment Ex. 4. Theron Nelsen eventually took over the project, retained his own contractor and took 15 months to complete Unit 3. T. Nelsen Affidavit, §§22-27, pp. 7-8. The issue of whether the Nelsens were negligent in their performance of the contract is primarily one of fact. Neither party is entitled to summary judgment on the issue of negligence and both parties' motions for summary judgment on the issue of negligence is denied.

VI. GOOD FAITH AND FAIR DEALING

The Van Horns allege that the Nelsens breached the covenant of good faith and fair dealing in building and supervising the construction of the condominiums. The implied covenant of good faith and fair dealing is a covenant implied by law in the parties' contract. No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. *First Security Bank of Idaho v. Gaige,* 115 Idaho 172, 765 P.2d 683 (1988); *Clement v. Farmers Ins. Exchange,* 115 Idaho 298, 766 P.2d 768 (1988) (an implied covenant of good faith and fair dealing cannot override an express provision in a contract). The covenant requires "that the parties perform in good faith the obligations imposed by their agreement," (*Badgett v. Security State Bank,* 116 Wash.2d 563, 807 P.2d 356 (1991), and a violation of the covenant occurs only when "either party ... violates, nullifies or significantly impairs any benefit of the ... contract....". *Sorenson v. Comm Tek, Inc.,* 118 Idaho 664, 669, 799 P.2d 70, 75 (1990); *Metcalf v. Intermountain Gas Co.,* 116 Idaho 622, 778 P.2d 744 (1989). The Van Horns argue that the Nelsens breached the implied covenant of good faith and fair dealing because (1) the Agreement contained the implied covenant that the Van Horns would be paid in full as a condition of their releasing their security interest under the deed of trust on the real property; (2)

Theron Nelsen breached the covenant in his performance of the Agreement when building the condos; and (3) the Van Horns were not paid in the order as agreed to in the Agreement. There is a material dispute of fact as to each of the Van Horns' arguments that prevents the Court from granting summary judgment. Nelsens have disputed whether there was an implied covenant that the Van Horns would be paid and argue that they knew the risks associated with the condominium project. Whether Theron Nelsen breached the covenant in his performance as the building supervisor, and later as the general contractor, is a question of fact. The issue of whether the Nelsens breached a duty owed to the Van Horns in following the payment order as outlined in the Agreement is also a question for the trier of fact. Both parties' motions for summary judgment on Nelsens' alleged breach of the covenant of good faith and fair dealing are denied.

VII. INTERFERNECE WITH CONTRACTUAL RELATIONS

The Van Horns allege that the Nelsens interfered with the deed of trust the Van Horns had on Chapman's parents' property, which secured the $150,000 promissory note. This is because the Nelsens knew that the Van Horns were giving up a secured interest that they would most likely not recover. Four elements must be proven in order to establish a prima facie case of tortious interference with a contract. The plaintiff must show that 1) there was a contract in existence; 2) the defendant knew of the contract; 3) the defendant intentionally interfered with the contract, causing a breach; and 4) injury to the plaintiff resulted from the breach. *Ostrander v. Farm Bureau Mut. Ins. Co.*, 123 Idaho 650, 654, 851 P.2d 946, 950 (1993); *Barlow v. International Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1114 (1974). Malice in the sense of ill will is not a required element. *Id.* Once the prima facie case has been made, the

burden of proving justification is upon the defendant. *Id.*. The Van Horns have not met their burden on this issue to preclude the granting of Nelsens' motion for summary judgment on this issue. The reason is simple: the Van Horns voluntarily consented to the Agreement and voluntarily released the deed of trust on the condominium property, and the Nelsens did not cause a breach of contract to occur. Even if the Nelsens had ulterior or fraudulent motives, there was no interference with the Van Horns' contractual relationship. The Van Horns have brought other claims that address the fraud behavior. Therefore, Nelsens' motion for partial summary judgment is granted on the issue of intentional interference with contractual relations.

VIII. VIOLATION OF IDAHO CONSUMER PROTECTION ACT

Van Horns conceded at the hearing, that no claim lies against the Nelsens under the Idaho Consumer Protection Act. Nelsens' motion for summary judgment on this issue is granted.

IX. BREACH OF CONTRACT

At the summary judgment hearing the Van Horns argued their theory of breach of contract and the idea that the Agreement is an investment as apposed to construction agreement. Van Horns then filed a "Plaintiffs Points and Authorities Breach of Contract" dated October 8, 2002, the day after the hearing.

Van Horns first briefed the issue of breach of contract in their "Brief in Support of Plaintiffs' Motion for Summary Judgment", pp. 16-20, filed on September 13, 2002, and again on September 24, 2002 in their "Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment", pp. 11-14. On September 30, 2002, claiming plaintiffs had not pled "Breach of Contract" in the Complaint or the Amended Complaint, in violation of I.R.C.P. 15,

defendants simply wrote: "Accordingly, the Defendants Nelsen decline to respond to a cause of action which has not been pleaded." Defendants Nelsens' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 13. That position by Nelsens is foolhardy, as this Court finds the plaintiffs have alleged breach of contract, for the reasons set forth in Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment", pp. 11-12. The arguments of plaintiffs as to breach of contract appear to have merit. Unless defendants present responsive briefing addressing the merits of breach of contract, and notice their response for hearing in advance of trial, summary judgment will be granted in favor of plaintiffs on their breach of contract theory.

X. CONCLUSION AND ORDER

IT IS HEREBY ORDERED Van Horns' and Nelsens' motions for summary judgment are **DENIED** as to: (1) Fraud and Misrepresentation; (2) Unjust Enrichment and Equitable Estoppel; (3) Equitable Subordination; (4) Negligence and; (5) Breach of Implied Covenant of Good Faith and Fair Dealing.

Van Horns' motion for summary judgment on the Breach of Contract theory, it is **DENIED** at the present time, but will be revisited if Nelsens respond and file a notice of hearing on this issue prior to trial. Absent such a response and hearing by Nelsens prior to trial, Van Horns' motion for summary judgment on the Breach of Contract theory will be granted prior to trial.

Nelsens' motions for summary judgment are **GRANTED** and Van Horns' motions for summary judgment are **DENIED** on the issues of (1) Interference with contractual relations and (2) Violation of the Idaho Consumer Protection Act.

nd day of October 2002.

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John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2002, a true copy of the foregoing was faxed to each of the following:

Scott W. Reed	Stephen M. Ayers
Fax: 765-5117	Fax: 667-9576

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Deputy Clerk