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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**

**WINDERMERE/COEUR D'ALENE REALTY, )  
INC., )**

*Plaintiff,* )

vs. )

**JENNIFER MCCARVER, ET AL, )**

*Defendant.* )

Case No. **CV 2012 2798**

**MEMORANDUM DECISION AND  
ORDER ON MOTION FOR  
SUMMARY JUDGMENT**

**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.**

This matter is before the Court on Third Party Plaintiffs Jennifer McCarver's and William Jackson's (McCarver/Jackson) Motion for Summary Judgment, filed July 18, 2012, seeking a declaration that they are the rightful owners of the \$7,500 earnest money submitted to the court by Third Party Defendant Rathbone (Rathbone). Third Party Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment, p. 3.

This lawsuit started with Plaintiff Windermere/Coeur d'Alene Realty filing its Petition and Motion for Interpleader on April 10, 2012. Windermere asked the Court to determine who should get the funds Windermere had deposited. In their April 23, 2012, Verified Response, Counterclaim, and Third Party Claim, McCarver/Jackson allege Rathbone signed a "Real Estate Purchase and Sale Agreement" (Purchase Agreement) for the sale of land owned by McCarver/Jackson sometime between July 30, 2010, and August 3, 2010. Verified Response, Counterclaim, and Third Party Claim, p. 6, ¶ 15.

McCarver/Jackson further allege that the closing date of the sale was extended twice. *Id.*, pp. 6-7. The first was in consideration of Rathbone depositing non-refundable earnest money in the amount of \$2,500 with Windermere Realty, memorialized in Addendum #1, signed by both parties. *Id.* That \$2,500 was deposited pursuant to Addendum #1. *Id.*, p. 7. The closing date was extended a second time in consideration of Rathbone depositing an additional \$7,500 non-refundable earnest money with Windemere, memorialized in Addendum #2, signed by both parties. *Id.*, p. 7, ¶ 22. At the time of the Third Party Complaint, the additional \$7,500 earnest money had not been deposited. *Id.*, p. 8.

Rathbone appeared *pro se*, and in his “Verified Response to Petition and Motion for Interpleader” filed on June 11, 2012, denied McCarver/Jackson’s allegations, and set forth affirmative defenses in his Answer, filed. Verified Response to Petition and Motion for Interpleader, pp. 2-3.

In their Motion for Summary Judgment, McCarver/Jackson state that they are entitled to summary judgment because Rathbone has submitted the \$7,500 earnest money to the Court. Motion for Summary Judgment, p. 2. Furthermore, McCarver/Jackson request attorney fees and costs incurred in bringing the action. *Id.*, p. 3. McCarver/Jackson did not state the basis for their claim of attorney fees in their motion for summary judgment.

In his Response, Rathbone admits to the submission of the \$7,500 to the Court and states that he has no objection to the payment of that money. Response to Motion for Summary Judgment, p. 1, ¶ 1. However, Rathbone objects to payment of attorney fees and costs and states that he attempted to provide the \$7,500 at the onset but that

McCarver/Jackson demanded attorney fees above and beyond the amount requested and thus he was forced to submit the funds to the Court. *Id.*, pp. 1-2, ¶ 2.

## II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment 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 construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id.* In passing on motions for summary judgment, unsworn statements are entitled to no probative weight; mere denials unaccompanied by facts admissible in evidence are insufficient to raise

genuine issues of fact. *Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct. App. 1984).

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Id.* at 88. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

### **III. ANALYSIS.**

With its Motion for Summary Judgment, McCarver/Jackson submit the Affidavit of Jennifer McCarver. McCarver has set forth unchallenged testimony that Rathbone executed a Real Estate Purchase Sale Agreement and two Addendums with McCarver/Jackson. Affidavit of Jennifer McCarver in Support of Defendants/Third Party Plaintiffs' Motion for Summary Judgment, p. 2. In her Affidavit, McCarver also submits the relevant documents, including the Real Estate Purchase Sale Agreement and the two Addendums. *Id.* In his Response, Rathbone admits submitting the requested \$7,500 and has no objection of payment of that amount. Response to Motion for Summary Judgment, p. 1, ¶ 1. McCarver/Jackson request an order for summary judgment as there is no dispute as to material facts in this matter and states it is entitled to judgment as a matter of law under I.R.C.P. 56. Motion for Summary Judgment, p. 2.

Because Rathbone has not set forth any objections or assertions of disputed, material facts for this Court regarding the outstanding amount owed, and indeed has admitted the funds should be paid to McCarver/Jackson, the Court must grant summary judgment in favor of McCarver/Jackson on the issue of the payment of the \$7,500.00. There are no conflicting inferences regarding the debt to be drawn from the evidence

before the Court, because both sides admit to the same. McCarver/Jackson are entitled to judgment as a matter of law.

The only contested matter in the Motion for Summary Judgment is the award of attorney fees to McCarver/Jackson. Counsel for McCarver/Jackson has failed to state a basis for attorney fees in their motion for summary judgment. The Idaho Supreme Court has stated: “And of course, a party must specify in its [Rule 54(e)(5)] fee request, the code sections or contract provisions pursuant to which it makes the fee request.”

*Eighteen Mile Ranch v. Nord Excavating & Paving*, 141 Idaho 716, 721, 117 P.3d 130, 135 (2005). Idaho Rule of Civil Procedure 54(e)(5) requires an affidavit by the attorney setting forth the basis for an award of attorney fees and the method of computation of those fees. There has been no affidavit by attorney Henry Madsen filed on behalf of McCarver/Jackson. There was no basis given by Madsen to the Court at this summary judgment juncture. At this point, because McCarver/Jackson have not followed the Idaho Rules of Civil Procedure regarding a claim of attorney fees, the Court would have to guess at whether attorney fees are sought based on contract, based upon commercial dispute, based upon prevailing party, or based upon a claim or defense brought, pursued or defended frivolously, unreasonably or without foundation. The Court is not allowed to make such a guess.

In Idaho, it is well established that the award of attorney fees is within the discretion of the district court and absent an abuse of discretion, such will not be disturbed on appeal. I.R.C.P. 54(e)(1); *Alpert v. Boise Water Corp.*, 118 Idaho 136, 145, 795 P.2d 298, 308 (1990). Attorney fees under I.C. § 12-121, may be awarded only when the court finds, from the facts presented, that the case was brought, pursued or defended frivolously, unreasonably or without foundation. I.R.C.P. 54(e)(1). The district court has discretion in determining whether a claim has been defended

frivolously or unreasonably. *U.S. Nat. Bank of Oregon v. Cox*, 126 Idaho 733, 736, 889 P.2d 1123, 1126 (Ct. App. 1995). If there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded under I.C. § 12-121. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 866 (2007). This is true even if the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Thomas v. Madsen*, 142 Idaho 635, 639, 132 P.3d 392, 396 (2006).

It appears from Rambone's Response that his defense to not paying the \$7,500 earnest money at the onset is that McCarver/Jackson, in addition to the earnest money demanded excessive attorney's fees "over and above the amounts requested." Response to Motion for Summary Judgment, p. 1, ¶ 2. That issue will have to be tried at a later point in time, if either McCarver/Jackson on one hand, or Rathbone on the other, choose to follow the Idaho Rules of Civil Procedure.

### **III. CONCLUSION AND ORDER.**

For the reasons stated above, this Court must grant summary judgment in favor of McCarver/Jackson as against Rathbone, on the interpleaded funds. Upon presentation of an appropriate judgment, the Court will order those funds released to McCarver/Jackson. The request for an award of attorney fees at summary judgment must be denied.

IT IS HEREBY ORDERED summary judgment in favor of McCarver/Jackson as against Rathbone, on the interpleaded funds is GRANTED. Upon presentation of an appropriate judgment, the Court will order those funds released to McCarver/Jackson.

IT IS FURTHER ORDERED the request for an award of attorney fees at summary judgment is DENIED.

Entered this 12<sup>th</sup> day of September, 2012.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of September, 2012, 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>	
Douglas S. Marfice	664-5884	
William M. Rathbone, pro se		
Henry D. madsen	664-8080	

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Jeanne Clausen, Deputy Clerk