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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 KOOTENAI**

BRUCE MCGOVERN,

Plaintiff,

vs.

KERRY ROBINSON,

Defendant.

Case No. **CV 2017 3989**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Kerry Robinson's (Robinson) Motion for Summary Judgment, filed September 26, 2017. Also filed that date was a Memorandum in Support of Summary Judgment, Defendant's Statement of Material Facts in Support of Defendant's Motion for Summary Judgment, Affidavit of Jason S. Wing in Support of Defendant's Motion for Summary Judgment, and an Affidavit of Kerry Robinson in Support of Defendant's Motion for Summary Judgment. Robinson claims plaintiff Bruce McGovern (McGovern) cannot prevail on his claims for breach of oral contract, breach of implied-in-fact contract, constructive trust, or unjust enrichment. Def.'s Mem. Supp. Def.'s Mot. Summ. J. 1. On October 18, 2017, McGovern filed Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Declaration of Bruce McGovern in Support of Opposition to Defendant's Motion for Summary Judgment, and Declaration of Daniel Keyes in Support of Opposition to Defendant's Motion for Summary Judgment. On October 25, 2017, Robinson filed

Defendant's Reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment and Motion to Strike. On October 25, 2017, Robinson also filed the Supplemental Affidavit of Kerry Robinson in Support of Defendant's Motion for Summary Judgment. This supplemental affidavit is untimely under I.R.C.P. 56(b)(2). No request was made by Robinson to alter the timelines under I.R.C.P. 56(b)(2).

Oral argument on Robinson's Motion for Summary Judgment was held on November 1, 2017. At that hearing, counsel for Robinson handed the Court copies of two cases Robinson wanted the Court to consider. The Court asked Robinson's attorney if these two cases had been cited by Robinson or by McGovern, and was informed that they had not. The Court informed counsel that the Court would not consider such unless counsel for McGovern agreed, and the Court notified counsel for McGovern that he would be afforded opportunity to respond to those cases. Counsel for McGovern did not agree to have those cases considered by the Court. Accordingly, they are not considered at this time.

II. STANDARD OF REVIEW.

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;

- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). “Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party” to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). To do so, the non-moving party “must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). “Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea*, 156 Idaho at 545, 328 P.3d at 525 (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep’t of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

III. ANALYSIS

According to McGovern's Complaint, filed May 19, 2017, during the first half of 2011, Robinson lived in a trailer owned by McGovern. Compl. 2, ¶ 5. McGovern alleges that in August 2011, Robinson was required to leave the trailer and find a new residence. *Id.* at ¶ 6. That same month, McGovern claims he offered to loan Robinson the money to purchase a trailer so that Robinson did not have to find a place to rent. *Id.* at ¶ 7. McGovern claims he offered to lend Robinson the purchase money for the trailer, with the time of repayment of the loan to be determined at another time. *Id.* McGovern claims Robinson accepted McGovern's offer to lend her the money to purchase a trailer, with the time of repayment to be decided at a later date. *Id.* at ¶ 8. McGovern alleges that from August 2011 to October 2011, he paid \$31,242.61 toward the purchase price and fire insurance premium for the West Bengal Court trailer. *Id.* at ¶ 9. McGovern alleges the trailer was titled in Robinson's name (or her former last name of Schwalls) *Id.* at ¶ 10. McGovern claims that in June 2012, McGovern and Robinson agreed that Robinson would repay McGovern for the loan at the time the West Bengal Court trailer was sold. *Id.* at ¶ 11. McGovern claims that in May 2015, McGovern and Robinson again discussed repayment of the loan upon sale of the trailer and Robinson acknowledged her debt and promised to pay upon the sale of the trailer. *Id.* at ¶ 12. McGovern claims Robinson listed the trailer for sale in July 2016 and sold it in December 2016. *Id.* at ¶ 13. McGovern claims Robinson acknowledged the debt in communications with him, but that she failed to make any payment. *Id.* at ¶ 14. McGovern claims he served Robinson with a demand letter, and claims that Robinson failed to repay him for any portion of the loan since she sold the trailer. *Id.* at ¶¶ 15-16.

McGovern alleges four causes of action against Robinson, breach of oral contract, breach of implied-in-fact contract, constructive trust and unjust enrichment. *Id.* 3-5.

Robinson filed her Answer on June 6, 2017, and admits she titled the trailer in her name and sold the trailer, but denies all other allegations. Answer, Affirmative Defenses and Countercl. 1-5. Robinson counterclaimed against McGovern, alleging defamation due to McGovern allegedly communicating false information to others, exposing her to public hatred, contempt and ridicule, in a text message. *Id.* at 8.

As mentioned above, Robinson claims plaintiff, Bruce McGovern (McGovern) cannot prevail on his claims for breach of oral contract, breach of implied-in-fact contract, constructive trust, or unjust enrichment. Def.'s Mem. Supp. Def.'s Mot. Summ. J. 1. Robinson claims McGovern's causes of action for breach of oral contract and breach of implied-in-fact contract is barred by the statute of frauds. *Id.* at 2-4. Robinson claims McGovern's equitable causes of action for unjust enrichment and implied-in-fact contract are precluded where a legal remedy is available such as the express contract in this case, and where McGovern has unclean hands. *Id.* at 4-9.

McGovern claims "[e]ach of Defendant's arguments raise genuine issues of material fact that preclude the Court from granting summary judgment in the Defendant's favor." Pl.'s Mem. Opp'n Summ. J. 2. McGovern claims Robinson is equitably estopped from asserting the statute of frauds as an affirmative defense due to McGovern's part performance of the contract. *Id.* at 7-10. McGovern claims his action for legal remedies and equitable remedies are alternative. *Id.* at 10-14. McGovern claims there are questions of material fact concerning his claim of breach of implied-in-fact contract. *Id.* at 14-18. McGovern claims questions of material fact exist as to Robinson's claim of unclean hands. *Id.* at 18-21. McGovern claims Robinson is only

moving for partial summary judgment as Robinson has not moved for summary judgment on McGovern's claim of constructive trust. *Id.* at 5-7. Robinson contends constructive trust is a remedy, not a cause of action. Def.'s Reply Pl.'s Resp. Opp'n Def.'s Mot. Summ. J. and Mot. Strike 1-3.

A. Robinson is Correct that the Statute of Frauds applies to McGovern's cause of action for breach of oral contract and breach of implied-in-fact contract; however, there is a genuine issue of material fact as to whether Robinson is equitably estopped from asserting the Statute of Frauds as an affirmative defense.

There can be no doubt that the statute of frauds applies to McGovern's claims of breach of oral contract and breach of implied-in-fact contract. The statute of frauds is found in I.C. § 9-505(1), and provides that an oral agreement, which is by its terms not to be performed within a year from its making, is invalid. The listing and the sale of this trailer occurred nearly five years after the agreement was made in the fall of 2011. McGovern claims the doctrine of part performance applies as an exception to the statute of frauds in this case. The Court finds that at this point, there is a dispute of material fact as to whether or not there was a complete agreement, as defined in *Lettunich v. Key Bank Nat. Ass'n*, 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005).

Robinson responds:

Second, the reason Plaintiff purchased the subject trailer for Defendant was because of Plaintiff's own misconduct. Specifically, Plaintiff Bruce McGovern lied to his son's probation officer. *Supp. Aff. Of Robinson*, ¶¶ 2-4. This lie set in motion events that required his son to move out of his residence, and move into his former residence where the Defendant was living. Because Plaintiff's lie displaced the Defendant, Plaintiff, on his own initiative, purchased the subject trailer for the Defendant. *Id.* Therefore, Plaintiff's conduct is not "solely referable" to an alleged oral agreement, but rather to Plaintiff's own misconduct.

Def.'s Reply Pl.'s Resp. Opp'n Def.'s Mot. Summ. J. and Mot. Strike 3. The problem with Robinson's argument is there is no admissible evidence to support such. As mentioned above, the Supplemental Affidavit of Kerry Robinson in Support of

Defendant's Motion for Summary Judgment filed on October 25, 2017, is untimely under I.R.C.P. 56(b)(2). Again, no request was made by Robinson to alter the timelines under I.R.C.P. 56(b)(2). Even if Robinson's supplemental affidavit could be considered, it contains no admissible evidence. In pertinent part, Robinson's affidavit reads:

2. Bruce McGovern lied to his son Jason McGovern's probation officer, Marla Howard, about a photo album of little girls in Jason McGovern's room, located in Bruce McGovern's house, as evidenced by the email I received from Marla Howard attached hereto as Exhibit A.
3. Bruce McGovern's lie to probation officer Marla Howard was the reason Jason McGovern was required to leave Bruce McGovern's house and find a new residence as alleged in Paragraph 6 of the Declaration of Bruce McGovern, and therefore the reason I was asked to leave 132 Walrose Loop so Jason could move in, and thus the reason Bruce McGovern purchased the home for me located at 1331 West Bengal Court.
4. Bruce McGovern's lie led him, on his own initiative, to purchase the home for me located at 1331 West Bengal Court.

Suppl. Aff. Kerry Robinson Supp. Def.'s Mot. Summ. J. 1-2, ¶¶ 2-4. It is difficult to imagine an affidavit submitted with more disregard to the Idaho Rules of Evidence. Each paragraph reaches impermissible legal and factual conclusions not supported by any foundation. Each paragraph is speculative. Paragraph 2 and 3 are rife with hearsay not covered by any exception to the Idaho Rules of Evidence.

The Court finds there is a dispute of material fact as to whether the doctrine of part performance applies to this case. If McGovern *lent* Robinson the money to buy the trailer (as opposed to McGovern *paying* Robinson money to assuage himself of guilt due to a situation he created), there would be no unclean hands by McGovern.

B. The Court is unable to determine on summary judgment whether McGovern's allegation of an express oral contract (even though barred by the statute of frauds), precludes him from alleging equitable remedies of unjust enrichment and implied-in-fact contract.

Robinson claims that because McGovern has a legal remedy, breach of an oral contract, McGovern cannot bring an equitable claim such as unjust enrichment or

breach of an implied-in-fact contract, even though McGovern's legal remedy, breach of contract, is barred by the statute of frauds. Def.'s Mem. Supp. Def.'s Mot. Summ. J. 4-9. None of the cases cited by Robinson in her opening brief or her reply brief discuss that concept. Another way of stating that argument is, "Can a party through their own inaction (in this case not having the agreement reduced to writing to avoid the statute of frauds problem) cause there to be a lack of legal remedy?"

McGovern first argues that Robinson is equitably estopped from asserting the statute of frauds as an affirmative defense because she is guilty of having unclean hands as she falsely represented to McGovern that she would repay him for the purchase of the trailer. Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. 7-10. The Court finds there is a dispute of material fact as to whether the doctrine of unclean hands applies to either McGovern or Robinson.

McGovern next argues that a party can plead inconsistent claims. *Id.* 10-13. Certainly, I.R.C.P. 8(d)(3) allows pleading inconsistent claims.

Finally, because the Court did not review the two cases submitted by counsel for Robinson at oral argument, the Court is unable to determine at the present time if there is a legal answer to the question as to whether a party through their own inaction (not having the agreement reduced to writing to avoid the statute of frauds problem) can cause there to be a lack of legal remedy.

C. Had Robinson followed I.R.C.P. 56(b)(2), she would be entitled to summary judgment as to McGovern's claim of unjust enrichment as a cause of action; however, unjust enrichment may be a remedy for McGovern's other claims.

Robinson is correct that constructive trust is a "remedy", attached to an established cause of action, and not its own separate "cause of action." Def.'s Reply Pl.'s Resp. Opp'n Def.'s Mot. Summ. J. and Mot. Strike 1-3. McGovern alleges

“constructive trust” as a separate cause of action in his Complaint. Compl. 4-5, ¶¶ 25-30. Robinson is entitled to summary judgment that constructive trust is not a separate cause of action. However, a constructive trust may still be a remedy which applies to one of McGovern’s remaining claims.

The problem is Robinson raised this issue for the first time in her Defendant’s Reply to Plaintiff’s Response in Opposition to Defendant’s Motion for Summary Judgment and Motion to Strike. Thus, Robinson has not followed I.R.C.P. 56(b)(2), and as a result, has not at the present time properly made a motion for summary judgment on this issue.

IV. CONCLUSION AND ORDER.

For the reasons stated above, defendant Robinson’s Motion for Summary Judgment must be denied.

IT IS HEREBY ORDERED defendant Robinson’s Motion for Summary Judgment is DENIED.

Entered this 7th day of November, 2017.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2017, 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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