

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**

**WINDERMERE/COEUR D'ALENE REALTY,)
INC.,)
)
)
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Plaintiff,)
)
vs.)
)
)
JENNIFER MCCARVER, ET AL,)
)
)
Defendant.)
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)**

Case No. **CV 2012 2798**

**MEMORANDUM DECISION AND
ORDER ON DEFENDANTS' THIRD
PARTY PLAINTIFFS' (McCARVER
AND JACKSON) MEMORANDUM OF
ATTORNEY FEES AND COSTS AND
WINDERMERE'S "MOTION FOR
RULING ON ITS MEMO OF ATTYS
FEES AND COSTS PRUSUANT TO
I.R.C.P. 54(d)(7)"**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on "Defendants'/Third Party Plaintiffs' Memorandum of Attorney Fees and Costs", filed on January 22, 2013. That Memorandum was supported by an "Affidavit of Henry Madsen in Support of Defendants'/Third Party Plaintiffs' Memorandum of Attorney Fees and Costs Against Windermere", filed on that same date. On January 28, 2013, plaintiff Windermere filed a "Motion for Reconsideration Pursuant to I.R.C.P. 11(a)(2)(B), and Objection to McCarver/Jackson's Memo of Attys Fees and Costs Pursuant to I.R.C.P. 54(d)(6)" and an "Affidavit of Arthur B. Macomber in Support of Motion for Reconsideration and Objection to Memo of Attys Fees and Costs". Also on January 28, 2013, plaintiff Windermere also filed a "Notice of Hearing on Motion for Reconsideration and Objection to Memo of Attys Fees and Costs", noticing a hearing at an unscheduled time

“...during the week of February 18, or thereafter...” to be determined by the Deputy Clerk of Court. Notice of Hearing on Motion for Reconsideration and Objection to Memo of Attys Fees and Costs, p. 2. Filing a Notice of Hearing for an undetermined time is not authorized by the Idaho Rules of Civil Procedure. I.R.C.P. 7(b)(1), 7(b)(3), 7(b)(4). Counsel for Plaintiff Windermere on February 6, 2013, corrected that deficit by filing an “Amended Notice of Hearing on Motion for Reconsideration and Objection to Memo of Attys Fees and Costs”, scheduling the matter for hearing on April 10, 2012 [sic 2013]. On March 27, 2013, plaintiff Windermere filed a “Notice of Plaintiff’s Withdrawal of the Hearing on Motion for Reconsideration and Objection to Memo of Attys Fees and Costs”, purporting to “withdraw” the hour long hearing scheduled for April 10, 2013. At no time prior to that hearing did counsel for Windermere ever contact the Deputy Clerk to vacate the hour-long hearing. On April 10, 2013, at 3:00 p.m., at the time set for the hearing, neither attorney appeared.

On April 3, 2013, counsel for Windermere filed “Plaintiff Windermere/Coeur d’Alene Realty, Inc.’s Motion for Ruling on its Memo of Attys Fees and Costs Pursuant to I.R.C.P. 54(d)(7).” In that motion, Windermere is asking this Court to rule on Windermere’s Memorandum of Costs and Request for Discharge filed November 30, 2012, because defendant Rathbone never objected, and “...Defendants McCarver and Jackson objected but then withdrew their hearing on their objection through a Stipulation for Dismissal of Counterclaims and Third Party Claims, which dismissal this Court ordered January 29, 2013.” Plaintiff Windermere/Coeur d’Alene Realty, Inc.’s Motion for Ruling on its Memo of Attys Fees and Costs Pursuant to I.R.C.P. 54(d)(7), p. 2. The “Stipulation for Dismissal of Counterclaims and Third Party Claims” was filed on January 17, 2013.

II. ANALYSIS

A. Defendants'/Third Party Plaintiffs' Memorandum of Attorney Fees and Costs.

McCarver and Jackson claim no costs. Memorandum in Support of Award of Attorney Fees and Costs Against Windermere, p. 4. McCarver and Jackson claim \$5,082.00 in fees. *Id.* Apparently, McCarver and Jackson seek that amount only against Windermere, due to its "improperly filed lis pendens." *Id.*, p. 1. On January 11, 2013, this Court entered its Memorandum Decision and Order on Ex Parte Motion for Order to Release Lis Pendens, or in the Alternative, Emergency Motion for Order to Release Lis Pendens, and such was filed on January 14, 2013. That awarded attorney fees and costs in favor of McCarver/Jackson against Windermere under I.C. 12-123 and I.R.C.P. 11.

On March 27, 2013, plaintiff Windermere filed a "Notice of Plaintiff's Withdrawal of the Hearing on Motion for Reconsideration and Objection to Memo of Attys Fees and Costs". While Windermere apparently has no objection to the amount of fees sought, the Court must still make its determination. "This does not mean the trial court automatically must award the full amount specified in the memorandum; but it does mean that the party who fails to object has waived its right to contest any award within the amount sought. *Fearless Farris Wholesale, Inc. v. Howell*, 105 Idaho 699, 704, 672 P.2d 577, 582 (Ct.App. 1983). The Court specifically finds the \$210.00 per hour hourly rate too high given counsel's experience and expertise. The Court finds \$150.00 per hour commensurate with counsel's experience and expertise, and reduces such amounts requested to an hourly rate of \$150.00 per hour. At 19.4 hours, that equates to \$2,910.00. The Court also finds paralegal costs at \$90.00 per hour to be high, and reduces those to a more reasonable \$50.00 per hour. At 11.2 hours, this amounts to

\$560.00. The total allowed is \$3,470.00, in favor of McCarver/Jackson, against Windermere.

B. Plaintiff Windermere/Coeur d'Alene Realty, Inc.'s Motion for Ruling on its Memo of Attys Fees and Costs Pursuant to I.R.C.P. 54(d)(7).

Plaintiff Windermere filed this "Petition and Motion for Interpleader" on April 10, 2012, asking the Court to determine who was the "proper and lawful owner of the \$2,500 submitted to the Court today." Petition for Interpleader, p. 3. Windermere also asked for costs and fees incurred in bringing this action "...as detailed in the Macomber Affidavit." *Id.* The Petition states I.C. § 5-321 as the basis for costs and fees. *Id.*, p. 1. The "Affidavit of Arthur B. Macomber in Support of Petition and Motion for Interpleader" filed April 10, 2012, mentions the amount of attorney fees (\$1,902.40 at the time) and costs of the filing fee in the amount of \$88.00. However, counsel's affidavit fails to state any *basis* for an award of costs and fees.

On November 30, 2012, Windermere filed a "Memorandum of Costs and Request for Discharge" and an "Affidavit of Arthur B. Macomber in Support of Memorandum of Costs and Request for Discharge." Windermere claims "This Memorandum of Costs is submitted pursuant to I.R.C.P. 54(d)(1) [which simply states costs are allowed to the "prevailing party"] and 54(d)(5) [which simply sets forth the requirements in a memorandum of costs], I.R.C.P. 54(e)(3) [the factors to be considered by the court when awarding attorney fees] and I.C. § 5-321. Memorandum of Costs and Request for Discharge, p. 1. Of these, only I.C. § 5-321 sets forth any *basis* for costs and fees. In its Memorandum of Costs filed November 30, 2012, Windermere claims to be the prevailing party, or one of the prevailing parties. Memorandum of Costs and Request for Discharge, p. 2. In Macomber's affidavit filed November 30, 2012, Windermere now claims attorney fees of \$4,919.85, and an additional \$92.25 in costs for service of the

complaint and summons upon Rathbone. First of all, any amounts of attorney fees incurred by Windermere after the filing of its Petition are not allowed. An interpleader action, by definition, is one where the party holding funds belonging to two or more people, turns those funds over to the court to let the court decide who gets the funds. See I.C. § 5-321. Windermere has set forth no reasonable explanation as to why its requested attorneys fees increased by more than three thousand dollars *after* the petition was filed. Windermere's request for fees after the filing of the petition is more inappropriate, given the fact that Windermere has waived any right it might have had to seek costs and fees against McCarver/Jackson, and only chooses now to seek costs and fees against Rathbone. But Rathbone, as pointed out earlier by this Court, had no objection to the payment of the \$7,500.00 interplead to McCarver/Jackson. Response to Motion for Summary Judgment, p. 1, ¶ 1; September 12, 2012, Memorandum Decision and Order on Motion for Summary Judgment, p. 4. Why should Rathbone have to pay an additional \$3,000 in attorney fees when Rathbone conceded McCarver/Jackson were entitled to the amounts interplead. The fees requested by Macomber are at \$200 per hour. The Court finds a reduction to \$150 per hour is appropriate. Thus, of the initial fees sought of \$1,902.40, at the time of the filing of the Petition, those are reduced by 25%, and amount to \$1,426.80. Costs in the amount of \$88.00 and \$92.25, for a total of \$180.25 are allowed. Allowed costs and fees total \$1,607.05, in favor of Windermere against Rathbone.

III. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED defendants/Third Party Plaintiffs McCarver and Jackson' attorney fees (including paralegal) against Windermere are allowed in the amount of \$3,470.00.

IT IS FURTHER ORDERED plaintiff's attorney fees in the amount of \$1,426.80, and costs totaling \$180.25 are awarded in favor of Windermere and against defendant Rathbone.

IT IS FURTHER ORDERED counsel for McCarver and Jackson are ordered to prepare a judgment consistent with this decision and order, and counsel for Windermere is ordered to prepare a judgment consistent with this decision and order

Entered this 10th day of April, 2013.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2013, 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>		<u>Lawyer</u>	<u>Fax #</u>
Douglas S. Marfice	664-5884		Douglas S. Marfice	664-5884
William M. Rathbone, pro se			Henry D. Madsen	664-6258
Henry D. madsen	664-8080			

Jeanne Clausen, Deputy Clerk