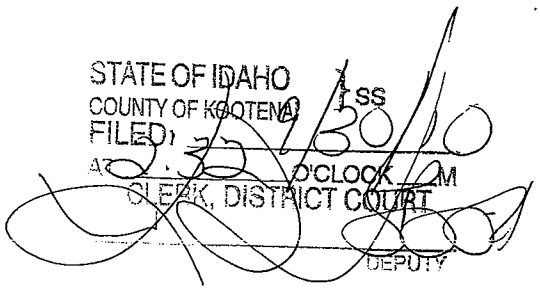

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

INDEMNITY COMPANY OF CALIFORNIA, a California Corporation, Plaintiffs, vs. BRYAN W. CHAMBERS, an individual d/b/a MOUNTAIN HOME CONSTRUCTION AND DEVELOPMENT, Defendants.	**CASE NO. CV – 09 – 3159** MEMORANDUM OPNION AND ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff and the Defendant entered into an indemnity agreement and the Plaintiff issued a bond and named the City of Rathdrum as the obligee. The Defendant and the City of Rathdrum entered into a construction contract to perform paving work. The City of Rathdrum later filed a claim against the bond because the Defendant did not complete the paving work. The Plaintiff paid the City of Rathdrum $20,000, and now seeks reimbursement from the Defendant.

Joe Meuleman, MEULEMAN & MOLLERUP, attorney for the Plaintiff.

Arthur M. Bistline, BISTLINE LAW, PLLC, attorney for the Defendant.

I. FACTUAL FINDINGS

On December 9, 2003, the City of Rathdrum ("City") issued a notice of plat approval conditionally approving a plat titled "Chambers Addition to State Addition to

Rathdrum Townsite." (Exhibit 1, Affidavit of Joe Meuleman in Support of Plaintiff's Motion for Summary Judgment, ¶2.) The City required the Defendant to meet two conditions: 1) enter into a development agreement with the City to upgrade a water line, and 2) construct and pave a hammer-head turn around at the end of Elmore Street. (Ex. 1, Aff. Meuleman, ¶ 2.) The Defendant signed the plat approval. (Id.)

As described in a letter from the City to the Defendant dated August 26, 2005, the City did not approve of the hammer-head turn around constructed by the Defendant because the paving work "does not follow the designs as per the approved plans and the City's standards for asphalt thickness and associate densities have not been met." (Ex. 2, Aff. Meuleman, ¶ 3.)

Before the Defendant began repairing the paving work to meet the City's standards, the Plaintiff issued a $20,000 "Subdivision Improvement Performance Bond" ("Bond") naming the Plaintiff as the surety, the Defendant as the principal, and the City as the obligee, on September 2, 2005. (Ex. 3, Aff. Meuleman, ¶ 3.) The Plaintiff and the Defendant also entered into an "Indemnity Agreement" ("Agreement") where the Defendant agreed to reimburse the Plaintiff for any claim made by the City against Plaintiff as a surety on the Bond. (Exhibit A, Affidavit of Mitchell T. Petras in Support of Plaintiff's Motion for Summary Judgment, ¶ 3.) Specifically, the Agreement states that the Defendant agrees:

> to reimburse Surety, upon demand for all payments made for and to indemnify and keep indemnified Surety from: all demands, loss, contingent loss, liability and contingent liability, claims, expense, including attorney's fees, for which Surety shall become liable or shall become contingently liable by reason of such suretyship, whether or not Surety shall have paid same at the time of demand.

(Ex. A, Aff. Petras, ¶ 3.) The Agreement further states that "Surety shall have the exclusive right to determine whether any claim or suit shall, on the basis of liability, expediency or otherwise, be denied, paid compromised, defended or appealed." (Id.)

The Defendant signed the Bond. (Id.) The Defendant states in his affidavit that he thought the amount of the Bond was too high because the amount was calculated based upon an original bid from his subcontractor for the original work to be performed, but "it was cheaper to just file it than to fight with the City about the amount and further delay my buyers from moving in." (Affidavit of Bryan Chambers in Opposition to Plaintiff's Motion for Summary Judgment, ¶¶ 5-7.) According to documents produced by the Defendant, the cost of paving from the Defendant's original subcontractor for the original work was $7737.00 and the professional engineering service was $2263.00, for a total of $10,000. (Exhibit D, Affidavit of Arthur M. Bistline in Opposition to Plaintiff's Motion for Summary Judgment, ¶ 5.) The City's ordinance required a 200% multiplier, bringing the Bond amount to $20,000. (Ex. D, Aff. Bistline, ¶ 5.)

On September 21, 2006, the City notified the Defendant by letter that the paving work on the hammer-head turn around was not complete and requested a construction schedule and plans for completion. (Ex. B, Aff. Petras, ¶ 5.) On October 23, 2006, the City's engineer sent a letter to the Defendant's engineer, agreeing to modify the scope of the originally required repair work if the Defendant could produce plans that were acceptable to the City. (Ex. A, Aff. Bistline, ¶ 2.) The Defendant states in his affidavit that in November of 2006, he submitted "a proposal pertaining to the paving issues," but the City never approved the proposal. (Ex. B, Aff. Chambers, ¶¶ 8-9.)

Three years later, the City sent a letter to the Plaintiff and made a claim on the Bond. (Ex. B, Aff. Petras, ¶ 5.) In the August 13, 2008, letter the City acknowledged that in September of 2006, because the Defendant had not performed the originally agreed upon repair work, the City and the Defendant renegotiated the scope of the repair work to be performed and required that the modified scope of the work be completed by the Spring of 2007. (Id.) The City then made a claim on the Bond, because:

> [t]he City has unsuccessfully attempted to get Mr. Chamber (sic) to complete the road work and paving in accordance with the approved plans so the bond can be released . . . . All attempts by the City to get Mr. Chambers to complete the subdivision work in accordance with the original approved plans, or subsequent modified plans, have failed, and the bond will expire in September.

(Ex. B, Aff. Petras, ¶ 5.) On August 19, 2008, the Plaintiff notified the Defendant of the claim by letter and requested that the Defendant provide information regarding the City's claim. (Ex. C, Aff. Petras, ¶ 6.)

On August 20, 2008, Defendant responded to both the City and the Plaintiff by letter, stating that he intended "to immediately take action to complete the bonded improvements (i.e., the 1.5" asphalt overlay and drainage issues) prior to September 2, 2008 . . . and to properly completed the amended scope of work." (Ex. D, Aff. Petras, ¶ 7.) The City's engineer sent a letter to the City public works department on September 9, 2008, and copied the Defendants' attorney and engineer. (Ex. C, Aff. Bistline, ¶ 4.) In this letter, the City's engineer listed the "items required for satisfactory completion of the improvements to the Chambers Addition in the City of Rathdrum." (Id.)

On September 15, 2008, the Plaintiff made a second attempt to obtain information from the Defendant by sending a letter to the Defendant's attorney. (Ex. E, Aff. Petras, ¶ 8.) According to the Plaintiff's letter,

> the City's attorney has contacted this surety to advise us that the principal has apparently taken no steps to complete the bonded work . . . Please have your client provide us with a schedule for the completion of the bonded work. Please be advised, should we not receive verification that your client intends to complete their bonded obligations, we shall have no alternative but to assume your client has abandoned the work and take all steps to comply with the obligations set forth in the bond.

(Id.) On September 25, 2008, through a new attorney, the Defendant sent a letter to the Plaintiff stating that the City "has not even decided what work they wish to have accomplished at this point," and enclosed a copy of the September 9, 2008, letter from the City listing the items to be completed. (Ex. C, Aff. Bistline, ¶ 3.)

On October 8, 2008, and November 6, 2008, the Plaintiff asked for an update on the Defendant's progress. (Exs. D and E, Aff. Bistline, ¶¶ 4-5.) On November 12, 2008, the Defendant notified Plaintiff that his "position is that he has completed all bonded work for the City of Rathdrum. If the City disagrees we will let you know immediately." (Ex. F, Aff. Bistline, ¶ 6.)

The Plaintiff notified the Defendant on December 10, 2008, of its intention to pay the City's claim due to lack of information regarding whether the City had accepted the work performed by the Defendant. (Ex. F, Aff. Petras, ¶ 9.) The Plaintiff then paid the City's claim on January 22, 2009. (Ex. G, Aff. Petras, ¶ 10.) The Plaintiff demanded reimbursement from the Defendant on January 23, 2009. (Ex. G, Aff. Bistline, ¶ 7.) It is undisputed that the Defendant has not paid the Plaintiff, and the Defendant states in his affidavit that "neither the improvements which I agreed to perform, nor the 2008

demands of the City have been performed." (Aff. Chambers, ¶ 13.) The Defendant further claims the Plaintiff never notified him of its intention to pay the City's claim on the Bond because he did not receive the December 10, 2010 letter from the Plaintiff. (Aff. Chambers, ¶¶ 14-15.)

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the "pleadings, depositions, and admissions on file, together with any affidavits." Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987). Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

III. DISCUSSION

The Plaintiff filed its Complaint on April 20, 2009, and set forth two claims: 1) breach of contract by the Defendant for "failing and/or refusing to reimburse [the Plaintiff] for the loss incurred as a result of [the Defendant's] failure and/or refusal to meet his obligations under the Bond"; and 2) "[the Defendant] has failed and/or refused to meet its obligation to indemnify [the Plaintiff] from the demands and losses resulting

from [the Defendant's] failure and/or refusal to meet his obligations under the Bond." In his Answer, the Defendant counters that the Plaintiff paid the City's claim on the Bond "when it was not obligated to do so according to the terms of the bond." The Plaintiff moved for summary judgment and this Court heard the arguments from the parties on September 2, 2010.

The Plaintiff argues that under the express terms of the Agreement it is entitled to reimbursement from the Defendant and that the Defendant breached the Agreement by failing to reimburse the Plaintiff. The Defendant does not dispute that the Plaintiff is entitled under the terms of the Agreement to reimbursement from the Defendant and admits that the Defendant has not reimbursed the Plaintiff. The Defendant argues that there is a genuine issue of material fact regarding whether the Plaintiff's payment to the City was made in bad faith such that summary judgment should be denied.

In Martin v. Lyons, the Idaho Supreme Court construed similar indemnity agreement language and held that even if the payment to the obligee is not legally required, as long as the surety makes the payments to the obligee in good faith, and the contract language requires reimbursement for "any and all" claims, then the surety is entitled to reimbursement.[1] 98 Idaho 102, 105 (1977). The Defendant asserts in his

[1] Notably, the Plaintiff presents persuasive authority that "the surety shall have the exclusive right for itself and for the undersigned to decide and determine whether any claim, demand, suit or judgment upon said bond or bonds shall, on the basis of liability, expediency or otherwise, be paid, settled, defended or appealed." United States v. United Pacific Insurance, 697 F. Supp. 378 (1988)." The Defendant relies on Atlantic Contracting & material Company, Inc., v Ulico Casualty Company, 844 A.2d 460, 380 Md. 285 (2004), but this case addresses attorneys fees in Maryland. The Defendant also cites to Curlee v. Kootenai County Fire and Rescue, 2008 WL 4595239 (2008), where the Idaho Supreme Court addressed employment claims. Lastly, the Defendant cites to Holiday Inns, Inc., v. Thirteen-Fifty Investment Co., 714 S.W. 2d 597, where the Missouri Court of Appeals addressed and issue of an improper tort settlement

argument that the Plaintiff's payment of the City's claim was made in bad faith because the Defendant and the City had agreed to modify the scope of work in September of 2006, and as a result, the Bond no longer applied to the project.

However, the record shows that the City agreed to extend the Bond to for the period of 2007 and 2008 for the Defendant to perform the modified work. (Ex. B, Aff. Petras, ¶ 5.) The Defendant has not produced any evidence under affidavit or otherwise that the Bond did not apply to the modified scope of repair work or that he ever informed the Plaintiff or the City that he did not believe that the Bond applied or had not been extended.

Alternatively, the Defendant focuses on his initial misgivings about the amount of the Bond when he signed it, and at oral argument claimed that at most the entirety of the work to be performed only amounted to $5,000, and therefore the amount that the Plaintiff should have paid to the City as per the City's multiplier ordinance was $10,000. The Defendant provides only argument on this point and has not produced any evidence under affidavit or otherwise that he could perform the work for $5,000, that the City would accept the work the Defendant could perform for $5,000, or that he ever disputed the amount of the Bond either initially or after he agreed to perform the modified scope of work.

Regardless of the unsubstantiated arguments made by the Defendant, the record is replete with requests from both the City and the Plaintiff for information regarding the Defendant's progress on the repair project. The only information the Plaintiff had

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that allowed for pass through damages. None of these cases assist in the analysis of the motion before this court.

available to it when it paid the City's claim is that after four years the Defendant had not preformed any of originally required repair work, or the modified repair work. This is supported by the Defendant's own affidavit wherein he states that the Defendant admits that "neither the improvements which I agreed to perform, nor the 2008 demands of the City have been performed." (Aff. Chambers, ¶ 13.)

Looking to the plain language of the Agreement and taking into consideration Martin v. Lyons, and based on the "pleadings, depositions, and admissions on file, together with any affidavits" (I.R.C.P. 56(c)), it appears that there is no genuine issue of material fact regarding whether the Plaintiff paid the Defendant's claim in bad faith. The Plaintiff's motion for summary judgment, then, must be granted.

IV. CONCLUSION

Based on the foregoing, it is hereby ORDERED that the Plaintiff's Motion for Summary Judgment be and the same is hereby GRANTED. It is further ORDERED that the Defendant reimburse the Plaintiff $20,000 as required in the Agreement.

DATED this 30 day of September, 2010

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 30 day of September, 2010, to the following:

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DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk