

STATE OF IDAHO)
County of KOOTENAI)^{ss}

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**

RAYMOND KOLTS and Kathlene Landgraf)
Kolts, husband and wife, and Dean L. Ledger,)

Plaintiffs,

vs.

McCORMACK PROPERTIES OF IDAHO,)
INC., an Idaho corporation; Michael)
McCormack; Peter Forsch; McCormack)
Properties, LTD, a limited partnership,)

Defendants.

Case No. CV 1999 7436

**MEMORANDUM OPINION
AND ORDER ON
RE: PARTIAL SUMMARY
JUDGMENT ON LEDGER'S
CLAIMS OF FRAUD**

PROCEDURAL AND FACTUAL BACKGROUND

This is an action for breach of contract, specific performance, and fraud arising from the defendants' alleged failure and/or refusal to provide an adequate water supply for real property sold as residential lots in the Cougar Bay Estates subdivision southwest of Coeur d'Alene. The plaintiffs allege that without the water supply allegedly promised by the defendants, this property is not suitable for the building of a residence. They have also accused each of the defendants of fraudulently representing the quality and flow rate of the water well system that was to deliver water to the lots. Defendant McCormack Properties of Idaho, Inc. (hereinafter "MPI") has admitted that it breached its contract with plaintiffs Raymond and Kathlene Kolts (collectively,

“the Kolts”) to timely provide a water system that would be adequate for domestic and irrigation use.

The defendants had previously moved for partial summary judgment, and a hearing was held August 29, 2001 on this motion. McCormack Limited was dismissed as a party, as well as any breach of contract claim against Forsch personally. Partial summary judgment was denied as to the fraud claims against McCormack Properties of Idaho, Forsch, and McCormack individually. The defendants, Forsch and McCormack, then moved for a Renewed Motion for Partial Summary Judgment as to all claims against Forsch (all that remains is fraud) and as to all but the breach of contract claims against McCormick (ie. fraud). Defendants’ motion for partial summary judgment was once again denied at a February 4, 2002 hearing as it relates to the fraud charge against McCormack and Forsch. The order denying partial summary judgment included Ledger’s claims of fraud as well, but the Court gave both parties two weeks from the date of that order to submit simultaneous briefs on the issue summary judgment of Ledgers’ fraud claims. The Court has reviewed those briefs.

STANDARD OF REVIEW

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted 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 must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Since this Court has raised this issue *sua sponte*, there is no “moving party, but Ledge would be considered a “non-moving” party. Summary judgment must be

denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. **Smith v. Meridian Joint School District No. 2**, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (citation omitted). In ruling on a motion for summary judgment, the trial court is not to weigh evidence or resolve controverted factual issues. **American Land Title Co. v. Isaak**, 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983). Should the evidence reveal no disputed issues of material fact, then summary judgment should be granted. **Smith**, 128 Idaho at 718, 918 P.2d at 587 (citation omitted).

DISCUSSION

The issue before this Court is whether or not the plaintiff Ledger has raised an issue of material fact that would support a claim of fraud against defendants. Ledger argues that there is a genuine issue of material fact as to whether the defendants committed fraud because no one told him that there were any problems with the water supply to his property before escrow closed on July 29, 1996. To prove fraud, Ledger needs to show that defendants knew of the problems prior to closing. On a motion for summary judgment the Court is to look to both the plaintiff's pleadings and the affidavits submitted in opposition to the motion to determine whether there is a genuine issue for trial. *First Security Bank v. Webster*, 119 Idaho 262, 267, 805 P.2d 468, 473 (1991). The nine elements of fraud are:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 518, 808 P.2d 851 (1991). At trial, each of these elements must be proven by clear and convincing evidence. *Faw v. Greenwood*, 101 Idaho 387, 389, 613 P.2d 1338, 1340 (1980); *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 680, 851

P.2d 972, 976 (1993). However, this is not necessary on a motion for summary judgment. *Large*, 123 Idaho at 680, 851 P.2d at 976. Instead, the normal standard applies: whether there is a genuine issue of material fact that would make summary judgment improper. *Id.*; I.R.C.P. 56(c).

Initially, without having the matter briefed, this Court was predisposed toward the view that Ledger could not meet his burden on partial summary judgment. In fairness to the parties, simultaneous briefing was ordered. After reviewing the briefs, this Court is persuaded by case law provided by plaintiff which supports his claim of fraud, sufficient to get past summary judgment. In *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (1984), the Idaho Court of Appeals was faced with an appeal from an order granting summary judgment to the grantors of a mineral deed. The grantors argued that because they had signed the mineral deed without a description of the mineral deed attached, the deed failed for lack of specificity. A description of the property was attached by tape to the deed, and the initials of the notary public were affixed to the deed. However, the notary public had died and one of the grantors (the other being deceased) claimed that the description was absent when he signed and delivered the deed. The Court held that, “This conflict could not have been resolved without implicitly considering Mr. Argyle’s (grantor’s) credibility. Such a determination should not be made on summary judgment if credibility can be tested by testimony in court before the trier of fact.” *Id.* at 670. The trial court’s order of summary judgment was reversed and remanded.

In *Lowery v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (1989), the Court of Appeals once again faced a situation in which the trial court had granted summary judgment on an issue that implicated the moving party’s credibility. Plaintiff had sued the defendant bank to redeem life insurance that her deceased husband had purchased. The bank countered that the life insurance was never purchased because the decedent husband had never signed the required documents.

The trial court decided that there was no genuine issue of material fact as to the bank's negligence because the bank manager had telephoned Mr. Lowery (plaintiff's deceased husband) and had told him that new loan documents were required for the life insurance. Plaintiff claimed that no such telephone conversation ever took place, and furthermore, the bank manager had falsely notarized her signature. The Appeals Court noted that "the bank manager admitted falsely notarizing Mrs. Lowry's (plaintiff's) signature on the deed of trust." *Id.* at 25. The Appeals Court then held that this fact, taken together with the denial of the telephone call, framed an issue of the bank manager's credibility that would preclude the issuance of summary judgment. *Id.* "A determination of credibility should not be made on summary judgment if credibility can be tested in court before the trier of fact." *Id.* at 25 (citing *Argyle v. Slemaker*, 107 Idaho 688, 691 P.2d 1283 (Ct.App.1984)).

The claim by plaintiff Ledger that defendants defrauded him must be evaluated in a context larger than the isolated facts surrounding his purchase. Viewing the evidence most favorably toward Ledge, the defendants, by their own behavior, have established their capability of misrepresenting facts, or at the least of not revealing pertinent information. Richard Agueros' deposition makes clear that McCormack Properties of Idaho, Inc. contacted Mr. Agueros, through its employee Ray Demming, in response to a problem with the well in August or early September of 1996. This is evidence that defendants knew something was wrong with the well at least one month after the sale to Mr. Ledger, and if the jury does not find defendants credible, they could infer the defendants knew something was wrong at an earlier date. Because Mr. McCormick and/or Peter Forsch will be available to testify at trial, it is best to let the jury decide whether or not these witnesses are credible, in light of the other evidence showing misstatements and/or withheld information.

CONCLUSION

There is an issue of material fact as to whether defendants had knowledge that the well was not producing the requisite amount of water. Defendants' previous behavior regarding other false statements about the well's capability and capacity create a question of credibility that is left for a jury to decide. Partial summary judgment against Ledger on his fraud claims is denied.

ORDER

NOW THEREFORE, partial summary judgment against Ledger on his fraud claims, is hereby **DENIED**.

Entered this 28th day of November, 2002.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer **Fax #**
Charles Dean, Jr. 664-9844

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Secretary