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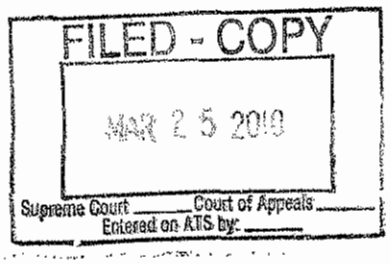
IN THE SUPREME COURT FOR THE STATE OF IDAHO

FRANK J. FAZZIO, JR. and CINDY ANN FAZZIO, husband and wife, and IDAHO LIVESTOCK COMPANY, LLC, an Idaho Limited Liability Company, Plaintiffs/Respondents, vs. EDWARD J. MASON, an individual, Defendant/Appellant.	)	Supreme Court Case No. 36068



RESPONDENTS' BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Kathryn A. Sticklen and Richard D. Greenwood, District Judges, Presiding

---

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STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This case arises out of a breach of real estate purchase and sale agreements by Defendant/Appellant, Edward J. Mason, hereinafter "Mason," and subsequent lawsuit filed by Plaintiffs/Respondents, Frank J. Fazzio, Jr. and Cindy Ann Fazzio, husband and wife, and Idaho Livestock Company, LLC, hereinafter collectively, "Fazzio," to enforce those agreements. Fazzio was awarded a Judgment against Mason on May 28, 2009 for specific performance. (A Corrected Judgment was filed on October 5, 2009 as a result of an erroneous legal description (Motion to Augment Record filed October 26, 2009, Exhibit "A")).

Mason has appealed the entry of Judgment granting Fazzio specific performance and the Supplemental Judgment for Attorney's Fees and Costs filed September 17, 2009 (Motion to Augment Record filed October 1, 2009, Exhibit "A.").

B.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

On January 22, 2008, Fazzio filed an Application for Entry of Arbitration Award, Or In the Alternative, Complaint for Breach of Contract. (R. pp. 6 – 68). On February 12, 2008, Mason filed his Answer. (R. pp. 69 – 75). On August 4, 2008, Fazzio filed a Motion for Summary Judgment. (R. pp. 76 – 77). On October 21, 2008, the District Court heard oral argument on Fazzio's Motion for Summary Judgment. (R. p. 5). On December 30, 2008, the District Court filed its Memorandum Decision and Order granting Fazzio's Motion for Summary Judgment. (R. pp. 78 – 85).

On January 20, 2009, Mason filed a Notice of Appeal. (R. pp. 85 – 88). On March 23, 2009, the Idaho Supreme Court filed an Order Conditionally Dismissing Appeal – Docket No. 36068-2009, conditionally dismissing Mason's appeal unless a separate judgment was filed in District Court or a permissive appeal was granted by the District Court.

On March 27, 2009, Mason filed a Request for Certification for Interlocutory Appeal. On April 3, 2009, Fazzio filed a Motion for Entry of Judgment. (Motion to Augment Record filed March 2, 2010, Exhibit "A"). On April 7, 2009, Mason filed a Motion for Reconsideration and Memorandum in Support. (Motion to Augment Record filed March 2, 2010, Exhibit "E"). On April 15, 2009, the District Court held a hearing on Mason's Motion for Reconsideration and Request for Certification for Interlocutory Appeal; and on Fazzio's Motion for Entry of Judgment. The Court denied Mason's Request for Certification and Motion for Reconsideration, but requested additional briefing as to appropriate safeguards to prevent Fazzio from having a judgment for specific performance award Fazzio both the real property and a monetary judgment. (Motion to Augment filed March 2, 2010, Exhibit "J", p. 2).

On May 28, 2009, the District Court filed its Memorandum Re: Motion to Reconsider and Entry of Judgment and Judgment. (Motion to Augment filed March 2, 2010, Exhibits "J" and "K"). On October 13, 2009, Mason filed his Amended Notice of Appeal.

On June 4, 2009, Fazzio filed an Amended Memorandum of Costs and Amended Affidavit of Attorney Fees Pursuant to Rule 54(e)(5) of the Idaho Rules of Civil Procedure. (Motion to Augment filed October 26, 2009, Exhibits "E" and "F"). On

September 17, 2009, the District Court filed a Supplemental Judgment for Attorney's Fees and Costs. (Motion to Augment Record filed October 1, 2009, Exhibit "A.").

C.

STATEMENT OF FACTS

On April 12, 2006, Mason entered into a Real Estate Purchase and Sale Agreement to purchase from Plaintiffs/Respondents, Frank J. Fazzio, Jr. and Cindy Ann Fazzio, a certain parcel of real property consisting of approximately 3.08 acres with a residence thereon for the purchase price of $1,530,000.00. (R. p. 00007; pp. 00048 – 00057). On April 12, 2006, Mason entered into a Real Estate Purchase and Sale Agreement to purchase from Plaintiff / Respondent, Idaho Livestock Company, LLC, two (2) parcels of real property consisting of approximately 2.9 acres and 28.85 acres, respectively, for the purchase price of $2,000,000.00. (R. p. 00007; pp. 00022 – 00031). The closing date for both transactions was February 26, 2007.

After entering into the Real Estate Purchase and Sale Agreements on April 12, 2006, but prior to the closing date of February 26, 2007, Mason caused Fazzio's real property to be annexed into the city of Kuna. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, p. 2). Mason also caused Fazzio's real property to be joined into the Kuna sewer LID causing an encumbrance in the approximate amount of $425,000.00. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr., filed August 4, 2008, p. 2) (On February 18, 2010, the City of Kuna issued a final assessment in the amount of $339,543.75).

Mason failed to close on his purchase of the Fazzio real property on February 26, 2007. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, p. 2). As a result of Mason's breach of the Real Estate Purchase and Sale Agreements Mason had

entered into with Fazzio, Fazzio, pursuant to the terms of those Real Estate Purchase and Sale Agreements, filed for arbitration with the American Arbitration Association seeking specific performance. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, p. 2).

On September 12, 2007, Mason entered into an Agreement to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 So As to Avoid Arbitration with Plaintiffs/Respondents, Frank J. Fazzio, Jr. and Cindy Ann Fazzio. On that same date, Mason also entered in to Agreement to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 So As to Avoid Arbitration with Plaintiff/Respondent, Idaho Livestock Company, LLC. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, Exhibits A and B). The terms of the Agreements to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 So As to Avoid Arbitration, hereinafter "Arbitration Agreements" that Mason entered into with Fazzio provided that Mason would close on his purchase of Fazzio's land on December 21, 2007 if the city of Kuna approved Mason's preliminary plat. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, p. 3). On November 26, 2007, Mason sent Fazzio a letter stating that he would be closing on his purchase of Fazzio's real property on December 21, 2007. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, p. 3, Exhibit "C"). Mason failed to close on December 21, 2007 and to date, has continued to fail to close on his purchase. On January 22, 2008, Fazzio filed an action to enforce the Arbitration Agreements. (R. pp. 00006 – 00068).

Both Arbitration Agreements specifically provide as follows:

9. (10) SPECIFIC PERFORMANCE: Should either party breach or violate this Settlement Agreement, the non-offending party shall have a remedy of specific performance and may apply to the district court of the county of Ada, state of Idaho to have this Settlement Agreement enforced by a judgment for specific performance. (Emphasis added).

(R. p. 91, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, Exhibits A and B).

ADDITIONAL ISSUES ON APPEAL

1. Whether Mason and Fazzio contractually agreed that the remedy of specific performance was a legal right.

2. Whether Fazzio is entitled to attorney's fees on appeal.

ARGUMENT

I.

STANDARD OF REVIEW

A. Standard of review on Summary Judgment.

In Infanger v. City of Salmon, 137 Idaho 45, 44 P.3d 1100 (2002), the Idaho Supreme Court held:

> In an appeal from an order of summary judgment, the Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Eagle Water Company, Inc. v. Roundy Pole Fence Company, Inc.*, 134 Idaho 626, 7 P.3d 1103 (2000). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id.* Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review. *Post v. Idaho Farmway, Inc.*, 135 Idaho 475, 20 P.3d 11 (2001). (Emphasis added).

137 Idaho at 47. In this action, there are no genuine issues of fact that would affect summary judgment. Even if Mason's representations that he does not have the financial ability to close on the purchase of Fazzio's real property are deemed true, that financial inability is irrelevant as to the district court's determination that a judgment for specific performance should have been entered in favor of Fazzio.

B. Standard of review for determining whether a judgment for specific performance should be granted.

In P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust, 144 Idaho 233, 159 P.3d 870 (2007), the Idaho Supreme Court held:

> Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. *Fullerton v. Griswold*, 142 Idaho 820, 823, 136 P.3d 291, 294 (2006). The inadequacy of remedies at law is presumed in an action for breach of a real estate purchase and sale agreement due to the perceived uniqueness of land. *Id.* The decision to grant specific performance is a matter within the district court's discretion. *Id.* When making its decision the court must balance the equities between the parties to determine whether specific performance is appropriate. *Id.* (Emphasis added).

144 Idaho at 237. In Johannsen v. Utterbeck, 146 Idaho 423, 196 P.3d 341 (2008), the Idaho Supreme Court held:

> A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason. *In re Jane Doe, I,* 145 Idaho 650, 651, 182 P.3d 707, 708 (2008) (*citing Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

196 P.3d at 347.

In this action, the district court clearly acted within its discretion in granting a judgment of specific performance given the fact that Fazzio's real property is inherently unique and Mason caused Fazzio's real property to be significantly and materially altered by causing it to be annexed into the city of Kuna and subjected to the Kuna LID. In fact, Mason had the benefit of two (2) very able district judges deciding that a judgment for specific performance was appropriate.

II.

THE DISTRICT COURT ACTED CORRECTLY WITHIN THE BOUNDARIES OF ITS DISCRETION WHEN IT DECIDED THAT FAZZIO WAS ENTITLED TO A JUDGMENT OF SPECIFIC PERFORMANCE

A. The district court clearly recognized the issue of whether a judgment for specific performance should be entered was one of discretion.

In ruling that the contracts Mason entered into with Fazzio be enforced by specific performance, the district court found as follows:

> The Court finds that there is good reason to enforce the contract by specific performance, rather than the legal remedy of contract damages ordinarily available. Not only is the real property itself inherently unique, the real property was significantly and materially altered by Mason in anticipation of the sale by causing it to be annexed into the City of Kuna. Furthermore, the contract was for a cash sale, as in *Perron*. The Court cannot find that the present case presents a situation where performance is so unlikely and impossible that it would render the order futile. Rather, the Court in its discretion, finds that the appropriate remedy is to order specific performance, and if performance is not completed, judgment can be entered for the purchase price. (Emphasis added).

(R. p. 00083). Clearly the district court recognized the issue of whether to grant specific performance was one of discretion. As such, the district court satisfied the first prong of the three part analysis of whether it properly exercised its discretion. Johannsen v. Utterbeck, 146 Idaho 423, 196 P.3d 341 (2008).

B. The district court acted within the boundaries of its discretion and applied the applicable legal standards.

The second prong of the test as to whether the district court acted within its discretion is whether the district court acted within the boundaries of its discretion and applied the appropriate legal standards. Johannsen v. Utterbeck, 146 Idaho 423, 196 P.3d 341 (2008). Clearly the district court met this standard. In Perron v. Hale, 108 Idaho 578, 701 P.2d 198 (1985), the Idaho Supreme Court held:

> The general rules of the common law are that: (1) a party is entitled to the equitable remedy of specific performance when damages, the legal remedy, are inadequate; (2) because of the perceived uniqueness of land, it is presumed that damages are inadequate in an action for breach of a land sale contract, and the non-breaching party need not make a separate showing of the inadequacy of damages; (3) the remedy is equally available to both vendors and purchasers; and (4) additionally, the appropriateness of specific performance as relief in a particular case lies within the

> discretion of the trial court. *E.g.* Cribbet, Principles of the Law of Property, p. 144 (2d ed. 1975); 71 Am.Jur.2d Specific Performance, § 112 (1973); *Scogings v. Andreason*, 91 Idaho 176, 180, 418 P.2d 273, 277 (1966). (Emphasis added).

108 Idaho at 582. In its Memorandum Decision and Order the district court cited the following holding in Perron v. Hale, 108 Idaho 578, 701 P.2d 198 (1985):

> The overwhelming weight of authority states that specific performance is as freely available to vendors as it is to purchasers. *E.g., Tombari v. Griepp*, 55 Wash.2d 771, 350 P.2d 452, 454-455 (1960) (string cite of treatises and cases); 71 Am.Jur.2d Specific Performance, § 112 (1973); Cribbet, Principles of the Law of Property, p. 144 (2d ed. 1975).

108 Idaho at 582. (R. p. 00082). In Perron v. Hale, 108 Idaho 578, 701 P.2d 198 (1985), the Idaho Supreme Court affirmed a judgment for specific performance against buyers of real property where the buyers had altered the real property and the agreement was for a cash sale and could be easily enforced. 108 Idaho 583. Both of these factors exist in the case at bar.

The district court also analyzed the legal principal of impossibility. Mason argues in his Appellant's Brief as follows:

> The rule that equity should not order the impossible is an equitable rule, not a substantive defense. Rather than apply the equitable rule, the [district court] applied and rejected the substantive contract defense of impossibility of performance, as if the two rules were one and the same.

(Appellant's Brief, p. 11) In fact, the district court clearly understood Mason's argument stating as follows:

> Mason does not argue any excuse for breaching the settlement agreement, most notably declining to plead impossibility as a defense. Rather, the parties focus on whether the Fazzios are entitled to an award of specific performance. In Mason's memorandum in opposition, as well as in his accompanying affidavit, he explains in detail the specific efforts he has undertaken to obtain financing. He also provides some explanation as to why it would not be prudent for him to liquidate his assets to comply with the contractual terms, as the Fazzios have suggested.

> Mason argues that specific performance is not appropriate in this case. Specific performance "is an extraordinary remedy that can provide relief when legal remedies are inadequate." *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000). Further, Idaho courts reason that "[e]quity will not enter a decree for specific performance the enforcement of which is not practicable or feasible." *Anderson v. Whipple*, 71 Idaho 112, 125, 227 P.2d 351, 359 (1951), overruled on other grounds by *David Steed and Associates, Inc. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988). Mason argues that under the above case law, the Court should decline to order Mason to close the contract because Mason is not financially able to do so at this time. Mason argues that because specific performance is impossible in his current financial position, the Court cannot order such performance because doing so would be futile.

(R. p. 00081). The district court rejected Mason's "equitable impossibility" argument based upon the fact that Mason's inability to close was subjective to him. In so ruling, the district court cited Christy v. Pilkington, 224 Ark. 407, 273 S.W.2d 533 (1954) where the Supreme Court of Arkansas held:

> This is a suit for specific performance, brought by the appellee as vendor in a contract for the sale of real property. In appealing from a decree for the plaintiff the defendants contend only that the court erred in ordering them to perform a promise which the proof shows to be beyond their financial resources.
>
> It is conceded that the parties executed a valid written contract by which the Christys agreed to buy an apartment house from Mrs. Pilkington for $30,000. The vendor's title is admittedly good. When the time came for performance the purchasers, although not insolvent, were unable to raise enough money to carry out their contract. Mrs. Pilkington, after having tendered a deed to the property, brought this suit. At the trial the defendants' evidence tended to show that, as a result of the decline in Christy's used car business, they do not possess and cannot borrow the unpaid balance of $29,900.
>
> Proof of this kind does not establish the type of impossibility that constitutes a defense. There is a familiar distinction between objective impossibility, which amounts to saying, 'The thing cannot be done,' and subjective impossibility – 'I cannot do it.' Rest., Contracts § 455; Willston on Contracts, § 1932. The latter, which is well illustrated by a promisor's financial inability to pay, does not discharge the contractual duty and is therefore not a bar to a decree for specific performance. (Emphasis added).

273 S.W.2d at 533. (R. p. 00082). The district court also cited State v. Chacon, 146 Idaho 520, 198 P.3d 749 (App. 2008) as persuasive that Idaho law is consistent with the Arkansas Supreme Court ruling in Christy v. Pilkington that the impossibility must be objective (e.g. nobody could do it) v. subjective (Mason can't do it).

Black's Law Dictionary defines impossibility in part as follows:

> **Impossibility**. That which, in the constitution and course of nature or the law, no man can do or perform.

Black's Law Dictionary 385 (5th ed. 1983). Mason presented no evidence that no person could have closed on the purchase of Fazzio's real property, only that Mason himself was unable to do so at that time.

In fact, the cases cited by Mason in support of his "equitable impossibility" argument do not create a defense to the entry of a judgment for specific performance. In Paloukos v. Intermountain Chevrolet Company, 99 Idaho 740, 588 P.2d 930 (1978), the facts revolved around a buyer's attempt to purchase a certain pickup truck from a car dealer that the car dealer did not have in stock and had to be ordered from a third party (presumably a manufacturer). The car dealer was unable to deliver the pickup truck to the buyer because the car dealer was unable to obtain the pickup truck due to a "product shortage." 99 Idaho at 742. The Idaho Supreme Court upheld the district court's denial of specific performance under the Uniform Commercial Code holding:

> The final issue presented is whether the district court properly dismissed that portion of Paloukos' complaint which sought specific performance of the alleged contract. Under the UCC specific performance is available to a purchaser where "the goods are unique or in other proper circumstances."
>
> * * *

> In his pleadings Paloukos alleged no facts suggesting anything unique about the pickup involved. The market value of such a vehicle is readily ascertainable and Paloukos' pleadings indicate no reason why damages would not be adequate relief.

99 Idaho at 745. The district court further held that the defendant was a dealer, not a manufacturer, and could not order the impossible where the dealer did not have a conforming pickup in its possession that it could sell to the Plaintiff (e.g. objective impossibility). The Idaho Supreme Court in Paloukos v. Intermountain Chevrolet Company, 99 Idaho 740, 588 P.2d 939 (1978) did not discuss objective impossibility v. subjective impossibility (e.g. State of Idaho v. Chacon, 146 Idaho 520, 198 P.3d 749 (App. 2008)).

In Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951), the issue involved the enforcement of an oral lease of real property with yearly rent based upon a customary crop rental for the life of the lessee. The lease agreement did not set forth a yearly lease rate. 71 Idaho at 124. The Idaho Supreme Court reversed the district court holding:

> An agreement, which leaves any of the material terms or conditions for future determination, cannot be enforced. (Cites omitted).
>
> * * *
>
> Equity will not enter a decree for specific performance the enforcement of which is not practicable or feasible. These parties have had many disagreements as to what the rent should be and since 1946 have been entirely unable to reach any agreement at all. Under such circumstances, to enforce the decree entered, the court must, necessarily, either retain jurisdiction for the purpose of determining the reasonable rental each year during the life of the plaintiff, or the parties would be required to have the rental determined by jury each year, so long as they remain unable to agree. Such a result is abhorrent to equity. 49 Am.Jur., Specific Performance, secs. 70 and 72. It would impose upon the plaintiff a contract which she refuses to enter into voluntarily. Machold v. Farnan, 14 Idaho 258, 94 P. 170. Further as to this aspect of the case, the contract lacks the necessary mutuality of remedy. It is apparent that the part that remains executory on the part of the defendants, that is, the occupation of

> the premises, and the diligent, faithful, husbandlike farming thereof by the defendants in the years to come, cannot be enforced. (Emphasis added).

71 Idaho at 125. The "practicability" and feasibility in Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951) revolved around the fact that the alleged lease contract left material terms for future determination and therefore, the lease contract could not be enforced. As such, Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951) has no applicability to the case at bar as the contracts between Mason and Fazzio are complete in their terms and easily enforceable.

In Childs v. Reed, 34 Idaho 450, 202 P. 685 (1921), the Idaho Supreme Court reversed the district court and held specific performance was not available in an action brought by a vendee against a vendor (husband) for the conveyance of real property where the vendor's (husband's) wife refused to convey her community interest in the real property, thereby making specific performance impossible. The Idaho Supreme Court stated:

> The first assignment of error raises the question whether specific performance lies to enforce a contract by which the husband agrees to sell community property.
>
> C.S. § 4666, provides that:
>
> "The husband has the management and control of the community property. * * * But he cannot sell, convey or incumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or incumbered."
>
> The court having found the property which appellant contracted to sell to be community property, it necessarily follows under our statute that the husband has no power to sell, convey, or incumber it unless the wife join with him therein.

202 P. at 686. Based on vendor's (husband's) wife's refusal to convey the subject real property, the Idaho Supreme Court held:

> Appellant's ability to perform his contract, so fart as the conveyance of their community property was concerned, depended upon securing his wife to join with him in executing and acknowledging the deed. It was formerly the practice in England in such a case for the court to order the husband to procure his wife's consent, and to imprison him until he succeeded. It is now held that performance is impossible, and therefore will not be decreed (Pomeroy on Specific Performance, § 295, note; 2 Pomeroy on Equitable Remedies, § 756, p. 1272), and that the husband ought not to be put in a position by a court of equity to tempt him to coerce his wife to join him in a deed (Barbour v. Hickey, 2 App. D.C. 207, 24 L.R.A. 763). (Emphasis added).

202 P. at 686. Childs v. Reed, 34 Idaho 450, 202 P. 685 (1921) is a classic "doctrine of impossibility" case (e.g. it is impossible for a husband in the state of Idaho to convey community real property less his wife agrees to also convey that same real property based upon Idaho community property statutes).

The district court in the case at bar, analyzing the facts and applying the appropriate legal standards, ruled as follows:

> The Court cannot find that the present case presents a situation where performance is so unlikely and impossible that it would render the order futile.

(R. p. 00083). In so ruling, the district court satisfied the second prong of the three part analysis by acting within the boundaries of its discretion and applying the appropriate legal standards. Johannsen v. Utterbeck, 146 Idaho 423, 196 P.3d 341 (2008).

C. The district court reached its decision to grant Fazzio specific performance through an exercise of reason.

The district court determined that Fazzio should be granted specific performance ruling as follows:

> The Court finds that there is good reason to enforce the contract by specific performance, rather than the legal remedy of contract damages ordinarily available. Not only is the real property itself inherently unique, the real property was significantly and materially altered by Mason in anticipation of the sale by causing it to be annexed into the City of Kuna. Furthermore, the contract was for a cash sale, as in *Perron*.

(R. p. 00083). In so ruling, the district court was presented with the following facts that are undisputed by Mason:

1. Mason entered into Purchase and Sale Agreements with Fazzio to purchase certain real property in Kuna, Idaho with a closing date of February 26, 2007.

2. While the Purchase and Sale Agreements were pending, Mason caused the real property owned by Fazzio to be annexed into the city of Kuna.

3. While the Purchase and Sale Agreements were pending, Mason caused the real property owned by Fazzio to be encumbered by the Kuna sewer LID (Local Improvement District) thereby causing an obligation to the city of Kuna in the amount of approximately $340,000.00.

4. Mason failed to close on the Purchase and Sale Agreements on or before February 26, 2007.

5. To avoid arbitration, Mason and Fazzio entered into a Settlement Agreement whereby the parties would close on December 21, 2007 and Mason would pay twelve percent on the entire purchase price through the closing date.

6. Mason and Fazzio agreed that upon either parties' breach of the Settlement Agreement, the remedy would be specific performance.

7. Neither the original Purchase and Sale Agreements nor the Settlement Agreement was contingent upon Mason obtaining financing for his purchase of Fazzio's real property.

8. Mason admitted he breached the Settlement Agreements for which he gave no excuse, including declining to plead the doctrine of impossibility as a defense.

9. Fazzio's real property is inherently unique and Mason offered no evidence to rebut its uniqueness.

10. There is a presumption as to the inadequacy of remedies at law in an action for breach of a real estate purchase and sale agreement because of the uniqueness of land that Mason offered no evidence to rebut.

11. Mason significantly and materially altered the real property which was farmground by causing it to be annexed into the city of Kuna in anticipation of closing.

12. The Settlement Agreements called for a cash sale at closing making the Settlement Agreements enforceable by entering a Judgment for the purchase price. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008). In response to all of the above undisputed facts, Mason's sole defense is that he cannot finance the purchase of Fazzio's real property. In his brief, Mason states:

> Mr. Mason continues to look for a way to finance the purchase of the Subject Property. Indeed, he would still like to close on the purchase of the Subject Property.

(Appellant's Brief, p. 6) Mason is not arguing the purchase of Fazzio's real property is impossible, nor is he arguing the purchase is not feasible. Mason is arguing he just can't accomplish the task at this time. Therefore, Mason argues that he should be not be required to purchase Fazzio's real property and that Fazzio should keep the real property and be awarded contract damages for the difference between the value of Fazzio's real property at the date of Mason's breach and the contractually agreed purchase price. However, this legal remedy will not make Fazzio whole. Mason fails to mention

anywhere in his Appellant's Brief that he caused Fazzio's real property to be annexed into the city of Kuna, which subjected Fazzio's real property to the ordinances of the city of Kuna, thereby significantly, materially and permanently altering Fazzio's use and enjoyment of the real property. A simple damage award will not remedy the consequences of Mason's actions in causing the annexation. Further, Mason caused Fazzio's real property to be subject to the city of Kuna sewer local improvement district. Mason argues his subjecting Fazzio's real property to the Kuna LID can also be remedied by a damage award. However, by causing Fazzio's real property to be subject to the Kuna LID, Mason has caused Fazzio not only to have to pay for the Kuna LID, but also to be bound by the Kuna LID in the future when Fazzio's real property is developed, including future sewer hookup costs. A damage award will not remedy the consequences of Fazzio's real property being subject to the Kuna LID.

The district court weighed the facts and by a clear exercise of reason entered a judgment for specific performance. In so doing, the district court satisfied the third prong of the three part analysis. Johannsen v. Utterbeck, 146 Idaho 423, 196 P.3d 341 (2008). Based upon the fact that the district court did not abuse its discretion when entering a judgment of specific performance, the district court's ruling must be affirmed.

III.

FAZZIO AND MASON CONTRACTUALLY AGREED THAT THE REMEDY FOR BREACH OF THE ARBITRATION AGREEMENTS WAS SPECIFIC PERFORMANCE THEREBY MAKING SPECIFIC PERFORMANCE A CONTRACTUALLY ENFORCEABLE LEGAL RIGHT

Mason ignores the fact that both the Arbitration Agreements that he signed and his attorney approved provide as follows:

> SPECIFIC PERFORMANCE: Should either party breach or violate this Settlement Agreement, the non-offending party shall have a remedy of specific performance and may apply to the district court of the county of Ada, state of Idaho to have this Settlement Agreement enforced by a judgment for specific performance. (Emphasis added).

(R. p. 91, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, Exhibits A and B).

Mason and Fazzio contractually agreed that specific performance was a legal right if either breached the terms of the Arbitration Agreements.

Black's Law Dictionary defines equity in part as follows:

> **Equity**. Justice administered according to fairness as contrasted with the strictly formulated rules of common law.

Black's Law Dictionary 280 (5th ed. 1983). Black's Law Dictionary defines "equitable right" in part as follows:

> **Equitable right.** Right cognizable within court of equity as contrasted with legal right enforced in a court of law; ... (Emphasis added).

Black's Law Dictionary 280 (5th ed. 1983). Black's Law Dictionary defines "legal right" as follows:

> **Legal right**. Natural rights, rights existing as result of contract, and rights created or recognized by law. (Emphasis added).

Black's Law Dictionary 467 (5th ed. 1983).

In Jorgensen v. Coppedye, 145 Idaho 524, 181 P.3d 450 (2008), the Idaho Supreme Court held:

> "When construing a contract, a court must first decide whether it is ambiguous, which is a question of law. A contractual provision will be found ambiguous if it is reasonably subject to conflicting interpretations ... Interpretation of an unambiguous documents is a question of law." *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 46, 72 P.3d 877, 886 (2003) (citations omitted).

181 P.3d at 453. The Arbitration Agreements entered into by Mason and Fazzio are unambiguous. They are legal and binding. Equity will not intervene. In Smith v. Idaho State University Federal Credit Union, 114 Idaho 680, 760 P.2d 19 (1988), the Idaho Supreme Court held:

> Generally, a court will not permit a party to avoid his, her or its contractual obligations. "The courts possess no roving commission to rewrite contracts. Equity will not intervene to change the terms of a contract unless it produces unconscionable harm, is unlawful or violates public policy." *Quintana v. Anthony*, 109 Idaho 977, 981, 712 P.2d 678, 682 (Ct.App. 1985). (Emphasis added).

114 Idaho at 684.

Based on the explicit terms of the Arbitration Agreements Mason entered into with Fazzio, a remedy specific performance was a contractual legal right that entitled Fazzio to a judgment for specific performance. While the district court did not specifically address this issue in its Memorandum Decision and Order, the district court's decision to enter a judgment for specific performance should also be affirmed on the basis that the remedy of specific performance was contractually agreed to by Mason and Fazzio as a legal right.

IV.

FAZZIO IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL

The Arbitration Agreements specifically provide as follows:

> ATTORNEY FEES AND COSTS TO ENFORCE THIS SETTLEMENT AGREEMENT: Should either party be required to bring an action or apply to the district court to obtain a judgment to enforce this Settlement Agreement, that party shall be entitled to reasonable attorney fees and costs associated with that action or application.

(R. pp. 00019 and 00044). Based upon the explicit contractual right, Fazzio is entitled to attorney's fees and costs on appeal. Further, Fazzio is also entitled to attorney's fees and

costs on appeal pursuant to Idaho Code § 12-120(3) and I.A.R. 41. Idaho Code § 12-120(3) provides in part:

> **12-120. Attorney's fees in civil actions. –**
> (3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

Fazzio clearly was required to bring action against Mason for breach of contract. The contracts were commercial in nature. Fazzio has prevailed on that claim. Even on appeal, Mason concedes he breached the contracts. Therefore, Fazzio is entitled to his attorney's fees and costs both below and on appeal.

Attorney's fees awarded on appeal should also include $12,015.00 in attorney's fees incurred by Fazzio in defending Mason's premature appeal which was conditionally dismissed by the Idaho Supreme Court. The district court declined to award the $12,015.00 incurred by Fazzio stating:

> The fees on the appeal, the reason that I asked for whether we were dealing with the original appeal or a new appeal is because I think that's determinative of whether or not those fees are recoverable.
> If the Supreme Court had followed through and the original appeal dismissed and a new appeal filed following the entry of judgment, then I believe those fees would be recoverable, because they would be litigation that maybe took place in the Supreme Court but really a premature issue. And I'm not sure that they could be raised in the Supreme Court in a second appeal.
> The Supreme Court – I don't know, on motion or what – but simply suspended this and renewed the appeal. So I think those fees are properly addressed by the Supreme Court.
> Mr. Pica, I invite you and I certainly won't have my feelings hurt if you want to cross appeal that issue and get it decided. Because I don't think we have a case – at least I did not find one – that clearly delineates the answer.

> But my – I don't want to call it intuitive, but my reading of the rules, I guess, and the statutes would be that those fees are properly addressed in the Supreme Court.
>
> And I don't have – for some reason, I didn't make a note of the amount.
>
> MR. PICA: 12,015.

(T. p. 16, L. 22 – p. 17, L. 25). Because the $12,015.00 in attorney's fees was incurred in this appellate matter, that amount should be awarded on appeal in addition to attorney's fees incurred by Fazzio on appeal since the entry of the final judgment in district court.

CONCLUSION

The real property that is the subject matter of this action has been materially altered by Mason. Prior to agreeing to sell the real property that is the subject matter of this action, the real property was farm ground located in rural Ada County. Upon agreeing to sell the real property, Fazzio liquidated almost all of his farm equipment and sold all of his cows. (R. p. 00091, Affidavit of Frank J. Fazzio, Jr. filed August 4, 2008, p. 3). Now, as a result of Mason's actions in preparing to develop Fazzio's real property for his own purpose, Fazzio's real property has been annexed into the city of Kuna and encumbered by the city of Kuna sewer LID. The result is that the use of Fazzio's real property has been forever changed from rural farmground to development property that is part of a municipality. No damage award can compensate Fazzio for Mason's actions.

In Kessler v. Tortoise Development, Inc., 134 Idaho 264, 1 P.3d 292 (2000), the Idaho Supreme Court held:

> Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. *Hancock v. Dusenberry,* 110 Idaho 147, 152, 715 P.2d 360, 365 (Ct.App. 1986) (citing J. CALAMARI & J. PERILLO, CONTRACTS § 16-I (2d ed. 1977)). The inadequacy of remedies at law is presumed in an action for breach of a real estate

> purchase and sale agreement due to the perceived uniqueness of land. *Perron v. Hale,* 108 Idaho 578, 701 P.2d 198 (1985).
>
> * * *
>
> The decision to grant specific performance is a matter within the district court's discretion. *Suchan* (citing *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923)). When making its decision the court must balance the equities between the parties to determine whether specific performance is appropriate. (Cites omitted) (Emphasis added).

134 Idaho at 270. In this action, Fazzio has done nothing wrong. It would be completely inequitable for Fazzio to be required to accept the return of the subject real property where the use and enjoyment of that property has been completely changed by Mason. Even Mason does not argue that it was inequitable for the district court to enter a judgment of specific performance. Mason simply argues that he shouldn't have to perform because he is unable to do so "at this time."

The district court's judgment of specific performance should be affirmed and Fazzio should be awarded attorney's fees and costs on appeal.

DATED this 25th day of March, 2010.

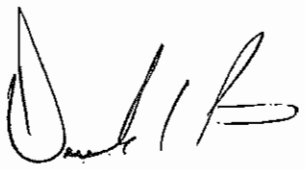
DEREK A. PICA
Attorney for Plaintiffs / Respondents

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 25th day of March, 2010, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver	✓
U.S. Mail	
Facsimile	
Overnight Mail	



Derek A. Pica