12-22-2011

Buku Properties v. Clark Respondent's Brief Dckt. 38561

IN THE SUPREME COURT OF THE STATE OF IDAHO

BUKU PROPERTIES, LLC, an Idaho limited liability company,

Plaintiff/Respondent,

v.

RAOEL H. CLARK and JANET C. CLARK, husband and wife; ANGUS JERRY PETERSON and BETTY JEAN PETERSON, husband and wife,

Defendants/Appellants.

Supreme Court Docket No. 38561-2011

Jefferson County Docket No. 2008-941

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Jefferson County

Honorable Dane H. Watkins, Jr. Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF THE CASE

A. SUMMARY

This matter arises out of two purchase and sale agreements for the purchase of adjacent real properties located in Jefferson County, Idaho. Both agreements failed to close as a result of zoning concerns and associated financing issues due to dramatic decrease in the value of the properties if re-zoned. In late August of 2007, Respondent Buku Properties, LLC ("Buku" or "Respondent") entered into two separate purchase and sale agreements with Appellants Raoel H. and Janet C. Clark ("Clarks") and Angus Jerry and Betty Jean Peterson ("Petersons") (collectively "Appellants"), ("Clark Agreement"), ("Peterson Agreement") (collectively "Agreements"). Buku intended to develop the property, subdividing it into one-acre residential lots. Pursuant to the Clark Agreement, Buku paid a $25,000.00 earnest money deposit to Clarks, all of which was fully refundable until closing. Additionally, pursuant to the Peterson Agreement, Buku paid a $327,000.00 earnest money deposit to Petersons, all of which but $10,000.00 was fully refundable until closing. The problems with the zoning and resulting financing of the Clark and Peterson Properties arose during the four-month due diligence period provided for in the Agreements. Due to the problems, Buku requested that Appellants modify the Agreements in writing so that the parties could resolve the concerns. Appellants refused to do so. Consequently, Buku refused to close based on the property failing to satisfy its due diligence concerns.

Buku demanded return of the refundable earnest monies from Clarks and Petersons, but Clarks and Petersons refused to return the earnest monies. Buku filed an action in District Court

to demand the return of its earnest monies. Clarks and Petersons filed several counterclaims against Buku. Ultimately, the District Court awarded summary judgment to Buku on all claims in this matter for the unreturned earnest money, and awarded Buku prejudgment interest, attorney's fees and costs. Appellants now appeal the District Court's grant of summary judgment and award of prejudgment interest, attorney's fees and costs to Buku.

B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Buku is a real estate development company that planned to develop a residential subdivision in Jefferson County in an area zoned for a minimum density of one-acre lots. (R. Vol. I, p. 148-49). The properties intended to be purchased for the development were owned by Clarks and Petersons. On August 30, 2007, Plaintiff entered into the Clark Agreement for the purchase of approximately 80.17 acres of property located in Jefferson County, Idaho, owned by the Clarks ("Clark Property"). (R. Vol. I, p. 89-94). Pursuant to the Clark Agreement, the purchase price for the Clark Property was $1,044,075.18. (R. Vol. I, p. 89). Buku agreed to pay Clarks $25,000 as an earnest money deposit, all of which was refundable until closing. (R. Vol. I, p. 89). The Clark Agreement established that Buku's obligation to purchase the property was subject to a four-month due diligence inspection period and Buku's satisfaction with the condition of the property and any requirements necessary to satisfy Buku's "interests and concerns." (R. Vol. I, p. 89-90).

On or about August 30, 2007, Buku also entered into the Agreement with Petersons for the purchase of approximately 73 acres adjacent to the Clark Property ("Peterson Property"). (R. Vol. I, p. 95-100). The purchase price for the Peterson Property, as established in the Peterson Agreement, was $980,000.00. (R. Vol. I, p. 95). The Peterson Agreement established that Buku

provide $327,00.00 in earnest money and that all but $10,000.00 of the earnest money was fully refundable until closing. (R. Vol. I, p. 96). Like the Clark Agreement, the Peterson Agreement established that Buku's obligation to purchase the property was subject to a four-month due diligence inspection period and Buku's satisfaction with the condition of the property. (R. Vol. I, p. 96).

At the time the parties entered into the Agreements, both the Clark Property and the Peterson Property were zoned Residential-1 ("R-1"), which would allow a minimum density of one-acre lots. (R. Vol. I, p. 84). Further, all parties understood at the time of entering into the Agreements that the sale of both properties was contingent upon Buku being able to develop the properties with the density of development accorded to an R-1 zone. (R. Vol. I, p. 84). The Agreements specifically stated that Buku intended to develop the Properties. (R. Vol. I, p. 93; 99).

Between August 30, 2007 and December 18, 2007, the Jefferson County Planning and Zoning Commission[1] began plans to change the zoning categorization of the Clark Property and Peterson Property to Residential-5 ("R-5"), which would allow a minimum density of five-acre lots. (R. Vol. I, p. 101). Jefferson County adopted a new county wide zoning map on March 24, 2008, which changed the zoning of the properties to a minimum density of five-acre lots. (R. Vol. I, p. 153). Upon performing its due diligence investigation concerning the properties, Buku discovered Jefferson County Planning and Zoning Commission's plans to change the zoning categorization of the two properties. (R. Vol. I, p. 85). Clarks and Petersons also knew of the problem because Buku, Clarks and Petersons all attended the County zoning meetings. (R. Vol. I, p. 85). The appraiser and

[1]Counsel for the Clarks and Petersons was at all times pertinent to this matter counsel for Jefferson County. (R. Vol. I, p. 208).

bank providing Buku with financing for the purchase of the properties became concerned about financing the purchase upon notice of the potential zoning change because the value of the properties was significantly less if the zoning was changed. The bank would not agree to fund the purchase if the zoning changed. (R. Vol. I, p. 102). Consequently, Buku understood the development as contemplated could not occur unless Jefferson County "grandfathered" and approved the development to exempt it from the zoning ordinances. (R. Vol. I, p. 85).

On December 18, 2007, Buku sent a memorandum to Clarks and Petersons giving notice of its objection to the condition of the properties due to the potential of the properties being zoned R-5. (R. Vol. I, p. 103; 104). The memorandum also contained an offer to modify the Agreements to provide Clarks and Petersons with an opportunity to resolve the unacceptable condition. (R. Vol. I, p. 103; 104). Clarks and Petersons responded to the memorandum via a letter from their counsel rejecting the offer to extend the closing date in order to cure and demanding Buku close. (R. Vol. I, p. 105). As a result of the conditions of the property related to its zoning and associated value, closing did not occur. On or about March 26, 2008, approximately three months *after* Buku was supposed to close the Agreements, Jefferson County notified Buku that *if* Jefferson County approved the proposed development of the properties, it would grandfather the development as R-1. (R. Vol. I, p. 153).

Buku made demand upon Clarks and Petersons for the return of Buku's earnest monies in the amount of $342,000.00 on June 17, 2008. (R. Vol. I, p. 106-107). Clarks and Petersons did not satisfy the demand. (R. Vol. I, p. 25). Consequently, Buku was forced to file suit for return of the earnest monies, and Clarks and Petersons filed several counterclaims against Buku.

C. PROCEDURAL HISTORY

Buku filed its Verified Complaint in this action on November 6, 2008. (R. Vol. I, p. 12-22). Buku brought causes of action against Clarks and Petersons for 1) refund of earnest money under the contract; 2) conversion and 3) unjust enrichment. (R. Vol. I, p. 12-22). Buku also asserted entitlement to prejudgment interest on the earnest money and attorney's fees and costs. (R. Vol. I, p. 12-22). Clarks and Petersons filed their Answer and Counterclaim on December 10, 2008. (R. Vol. I, p. 33-46). As counterclaims against Buku, Clarks and Petersons asserted 1) specific performance of the Agreements; 2) breach of contract; 3) unjust enrichment; 4) estoppel; 5) promissory estoppel/detrimental reliance; and 6) consumer protection violations. (R. Vol. I, p. 33-46). Buku conducted some limited discovery and subsequently moved for summary judgment on all of its causes of action and those brought by Clarks and Petersons. Clarks and Petersons filed their own "Request for Summary Judgment." (R. Vol. I, p. 116-18). The District Court issued its Memorandum Decision regarding the first motions for summary judgment in this matter on January 28, 2010. In such decision, the District Court denied Buku's Motion for Summary Judgment, noting that it believed there were material issues of fact which made summary judgment in favor of Buku premature at that point in time. (R. Vol. I, p. 207). However, the District Court dismissed Clarks and Petersons's cause of action against Buku under the Idaho Consumer Protection Act. (R. Vol. I, p. 207-08). Additionally, the District Court found the terms of the Agreements to be unambiguous and definite. (R. Vol. I, p. 203-205).

After the District Court issued its Memorandum Decision on the first motions for summary judgment, Buku conducted further discovery. Buku then filed its Second Motion for Summary

Judgment, this time including in its supporting documentation excerpts of the depositions of Raoel Clark and Jerry Peterson. (R. Vol. II, p. 274-277; 278-283). On February 3, 2011, the District Court granted Buku's Motion for Summary Judgment, finding that Buku was entitled to a return of its earnest monies pursuant to the Agreements and dismissing the remainder of Clarks and Petersons's counterclaims. (R. Vol. II, p. 392-394; 395-408).

Clarks and Petersons filed their Notice of Appeal on February 17, 2011. (R. Vol. II, p. 409-412). Buku filed its Memorandum of Attorney's Fees and Costs on February 22, 2011. (R. Vol. II, p. 413-417). On March 3, 2011, the Idaho Supreme Court filed an Order Suspending Appeal to allow for the entry of an appealable final judgment in this matter. (R. Vol. II, p. 434).

Clarks and Petersons submitted an objection to Buku's request for attorney's fees, asserting the request was untimely despite the fact that the Idaho Supreme Court had filed an Order suspending the appeal because no final judgment had yet been entered. (R. Vol. II, p. 435-440). Clarks and Petersons also argued Buku was not entitled to attorney's fees because the District Court had rescinded the Agreements, eliminating any contractual or statutory basis to award attorney's fees, even though the District Court ordered return of the earnest monies pursuant to contract. (R. Vol. II, p. 435-440). Clarks and Petersons also filed briefing in opposition to Buku's proposed final judgment, which included prejudgment interest, on the grounds that Buku was not entitled to prejudgment interest because, among other things, it would be "inequitable and totally unfair." (R. Vol. II, p. 449). Ultimately, the District Court awarded Buku its attorney's fees and costs, and entered Buku's proposed final judgment, which included prejudgment interest. (R. Vol. II, p. 480-490; 473-474).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Respondent includes the following additional issues on appeal:

(1) Whether Appellants's claims for specific performance of the Agreements are moot because they transferred ownership of the property; and

(2) Whether Respondent is entitled to attorney's fees and costs on appeal.

III. REQUEST FOR ATTORNEY'S FEES AND COSTS ON APPEAL

Respondent requests an award of attorney's fees and costs on appeal, pursuant to Rules 40 and 41 of the Idaho Appellate Rules, and pursuant to the Agreements at issue in this matter, and Idaho Code § 12-120(3), as further explained and supported in Respondent's Argument section below.

IV. ARGUMENT

A. APPELLANTS'S CLAIMS ON APPEAL RELATED TO SPECIFIC PERFORMANCE ARE MOOT AND SHOULD BE DISMISSED

Appellants appear to argue that the District Court erred by failing to grant their claims for specific performance which is the first item listed in their prayer for relief. (R. Vol. I, p. 45). Appellants's arguments are moot and should be dismissed because the District Court could no longer impose specific performance, even if the case were remanded. Unbeknownst to Buku, on January 18, 2011, just six days before the hearing on Buku's Second Motion for Summary Judgment, Petersons transferred by quit claim deeds both their home in Bonneville County and the Jefferson County property at issue in the litigation to an entity named JBP Holdings, LLC ("JBP Holdings"). (Affidavit of DeAnne Casperson in Support of Motion for Leave to Take Depositions Duces Tecum

of Jerry Peterson and Betty Jean Peterson Pursuant to Idaho R. Civ. P. 27(b), with attachments, file stamped June 3, 2011 ("Casperson Aff."), ¶ 9-15, Order Granting Motion to Augment the Record dated November 2, 2011 ("Aug. Order")). The Certificate of Organization for JBP Holdings was filed on January 3, 2011. (Casperson Aff., ¶ 9, Ex. C, Aug. Order). The quit claim deeds purportedly transferring ownership of Petersons's real property to JBP Holdings were executed on January 18, 2011. (Casperson Aff., ¶ 10-15, Ex. D, F, Aug. Order). On February 16, 2011, additional quit claim deeds were executed, allegedly to correct an error in the deed's legal description. (Casperson Aff., ¶¶ 14-15, Ex. G; ¶ 13, Ex. H, Aug. Order). Petersons's counsel, Robin Dunn, notarized the quit claim deeds transferring Petersons's real property to JBP Holdings and had the documents recorded. (*See* Casperson Aff., Ex. D, E, F, G & H, Aug. Order).

Appellants Petersons's actions have now made any potential arguments related to specific performance of the Agreements moot. Idaho has long recognized the doctrine of mootness. *See Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281, 912 P.2d 644, 649 (1996). This Court has previously held that a case becomes moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* (citing *Bradshaw v. State*, 120 Idaho 429, 432, 816 P.2d 986, 989 (1991)). The Court also has noted that "an issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Id.* (citing *Idaho County Property Owners Ass'n, Inc. v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 315, 805 P.2d 1233, 1239 (1991)). Petersons can no longer deliver title to the Peterson Property because they transferred title to JBP Holdings, LLC.

Consequently, any cause of action raised by the Petersons related to specific performance of the Peterson Agreement against Buku is moot because there is no longer a justiciable controversy.

Further, Petersons's actions have made Clarks's claim for specific performance moot as well. The Clark Agreement contains a clause which states:

> **25. Contingencies**. Buyer and Seller agree that Buyer intends to develop the property sold under this agreement. Seller's property cannot be developed without an adjacent property known as the Peterson property. Buyer and Seller agree that the purchase and sale herein are contingent upon Peterson selling to Buyer. If Peterson does not sell to Buyer, then Buyer has no obligation to close with Seller, and the earnest money will be returned to Buyer. The closing date between Buyer and Peterson will be scheduled at the same time as the closing date herein.

(R. Vol. I, p. 93).[2] Because the Petersons can no longer deliver the Peterson Property to Buku, the contingency in paragraph 25 of the Clark Agreement can no longer be met. Therefore, Clarks's causes of action for specific performance arising out of the Clark Agreement are also moot because, due to the Petersons's actions, the Clarks no longer have a justiciable controversy.

Because both Petersons and Clarks's claims for specific performance are moot, Appellants's appeal, as it relates to that issue, should be dismissed.

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[2] The Peterson Agreement contains an analogous provision which provides that the purchase of the Peterson Property is contingent upon the Clarks selling the Clark Property to Buku. (R. Vol. I, p. 99).

B. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO BUKU BASED ON THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE PURCHASE AND SALE AGREEMENTS

1. Standard of Review

In an appeal from an order for summary judgment, this Court's standard of review is identical to the standard used by the trial court in ruling on a motion for summary judgment. *See Infanger v. City of Salmon,* 137 Idaho 45, 46-47, 44 P.3d 1100, 1101-02 (2002). All disputed facts are to be construed liberally in favor of the non-moving party. All reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *See 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.* Only a question of law remains, over which this Court exercises free review, if the evidence reveals no disputed issues of material fact. *Id.* Interpretation of an unambiguous contract is a question of law which is reviewed *de novo. DeLancey v. DeLancey,* 110 Idaho 63, 65, 714 P. 2d 32, 34 (1986). The determination of whether a contract is ambiguous is itself a question of law, reviewed *de novo. Id.* All issues related to the grant of summary judgment presented to this Court are reviewed *de novo* in that the issues present questions of law.

2. The District Court Correctly Determined that the Purchase and Sale Agreements Were Unambiguous and the District Court Did Not Consider Extrinsic Evidence.

The District Court carefully examined the language of the Agreements and correctly ruled that they were unambiguous and excluded any extrinsic evidence. In both the Memorandum Decision dated January 28, 2010, and the Memorandum Decision Re: Summary Judgment dated

February 3, 2011, the District Court found that the Agreements at issue in this matter were clear and unambiguous. (R. Vol. I, p. 203-205; Vol. II, p. 401-402).

"For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term, or it must be nonsensical." *Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (internal citations omitted). "If the language of a contract is unambiguous, then its meaning and legal effect must be determined from its words." *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). "If a written contract is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract." *Howard v. Perry,* 141 Idaho 139, 141-42, 106 P.3d 465, 467-68 (2005) (citing *Kimbrough v. Reed,* 130 Idaho 512, 943 P.2d 1232 (1997)). In the case at hand, the Clark Agreement and the Peterson Agreement are clear and unambiguous. Therefore, the Agreements must be enforced according to their plain terms.

Based on the straight forward language of the Agreements, Buku was entitled to make sure its interests and concerns regarding the Clark and Peterson Properties were satisfied. Paragraph 2(a) of the Clark Agreement specifically states that "all of such earnest Money shall be refundable until closing." (R. Vol. I, p. 89). Paragraph 2(a) of the Peterson Agreement likewise states "$10,000.00 of the earnest money shall be non-refundable, the balance fully refundable until closing." (R. Vol. I, p. 96). Furthermore, pursuant to paragraph 3 of each of the Agreements, Buku had four months to perform its due diligence inspections on the properties as follows:

> Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase. Thus, closing will be on or before December 21, 2007.
>
> (R. Vol. I, p. 89; 96).
>
> In addition, paragraph 25 of the Peterson Agreement states:
>
> Buyer and Seller agree that Buyer intends to develop the property sold under this agreement. Seller's property cannot be developed without an adjacent property known as the Clark property. Buyer and Seller agree that the purchase and sale herein are contingent upon Clark selling to Buyer. If Clark does not sell to Buyer, then Buyer has no obligation to close with Seller, and the earnest money will be returned to Buyer. . .

(R. Vol. I, p. 99). Paragraph 25 of the Clark Agreement contains similar language, making sale of the Clark Property contingent upon sale of the Peterson Property to Plaintiff. (R. Vol. I, p. 93).

In its Memorandum Decision on the first Motion for Summary Judgment, the District Court carefully analyzed the issue as follows considering both whether the due diligence provisions had either a patent or latent ambiguity:

> Both Buku and Defendants cite Paragraph 3 of the respective Agreements. Both Agreements contain the same language.
>
> > Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase.
>
> It is the last phrase that Defendants claim is ambiguous or indefinite - Buku had four months to perform due diligence inspections "to satisfy [Buku's] interests and

concerns regarding the purchase." According to Defendants, Buku's "interests and concerns" could be so broad as to include anything. According to the Defendants, such open language makes the clause so ambiguous or indefinite as to be unenforceable.

[. . .]"Idaho courts look solely to the fact of a written agreement to determine whether it is [patently] ambiguous." [citing *Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 175 P.3d 748 (2007)]. "A latent ambiguity is not evident on the fact of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." [citing *id.*]

To determine whether a contract is patently ambiguous, the court reads the contract's words or phrases given their established definition in common use or settled legal meanings. For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term, or it must be nonsensical. The Idaho Supreme Court clarified,

> A party's subjective, undisclosed interpretation of a word or phrase cannot make the contract ambiguous. If it could, then all contracts would be rendered ambiguous merely by a party asserting a misunderstanding of the meaning of one or more of the words used. The voluntary failure to read a contract does not excuse a party's performance.

[citing *id.*]. After applying the law as stated by the Supreme Court, this Court finds that neither the Clark nor the Peterson Agreement is so ambiguous or indefinite as to render the Agreement unenforceable.

The Contracts are not patently ambiguous. The language at issue - "[Buku] will have four months to perform due diligence inspections to satisfy the Buyer's interests and concerns regarding the purchase" - is straightforward and clear. That Buku's "interests and concerns" could potentially be quite broad is true, but Defendants do not claim the terms have "at least two different reasonable interpretations." Nor do Defendants claim the terms are "nonsensical." The Court finds no patent ambiguity.

The Court further finds that the terms have no latent ambiguity. When applying the Agreements "to the facts as they exist," the Court finds the Agreements unambiguous. Buku was given four months to conduct due diligence concerning the properties. *Potential zoning changes and their impact on financing are precisely the type of issues typically dealt with during the due diligence phase of a real estate*

> *transaction.* In short, under the facts of this case, it is reasonable that Buku would look into potential zoning problems, and that uncertainty regarding the properties' zoning would affect its "interests and concerns." There is no latent ambiguity in the contract.

(R. Vol. I, p. 204-05) (emphasis added). The District Court clearly addressed the ambiguity issue and correctly determined, *applying the Agreements to the facts as they exist*, as is required under Idaho case law, that the due diligence provisions of the Agreements were unambiguous. While the District Court considered the zoning issues in order to determine whether a latent ambiguity existed, it did not consider extrinsic evidence to interpret the terms of the Agreements. The District Court correctly determined that the due diligence provisions were unambiguous.

3. The District Court Correctly Determined that Buku did not Breach the Agreement When it Failed to Close and was Entitled to Return of its Earnest Monies.

The District Court correctly determined based on the undisputed facts that Buku did not breach the Agreements. Based on the clear language of the due diligence period, Buku was entitled to ensure the condition of the properties satisfied its "interests and concerns." During its due diligence period, Buku learned that Jefferson County was considering changing the zoning of both the Clark Property and Peterson Property. (R. Vol. I, p. 84; 101). Because the purchase price for the properties was based upon the value of the properties as being zoned R-1, this potential change created serious problems for Buku. (R. Vol. I, p. 84; 85). More specifically, the bank providing Buku with financing for the purchase informed Buku that the zoning had to remain R-1 in order for the Bank of Commerce to fund the loan. (R. Vol. I, p. 85; 102).

Buku notified both the Clarks and the Petersons of its concern with the rezoning of the property on December 18, 2007, via a memorandum. The memorandum to the Petersons stated:

> Buku Properties, LLC, and A. Jerry Peterson agree that with the recent county zone change, both parties need additional time to review the contract. Because of the County Commissioner's recent proposed county-wide zone change, resulting in this property potentially being zoned R-5. The appraiser and the bank dealing with Buku Properties, LLC have legitimate concerns with financing. We agree to move our closing date back from December 21, 2007, to March 1, 2008. We will continue to talk and cooperate with each other.

(R. Vol. I, p. 104). The memorandum to the Clarks contained identical language. (R. Vol. I, p. 103).

In a letter from their counsel dated December 19, 2007, Petersons and Clarks refused to cure the zoning defect and rejected Buku's offer to extend the time for Buku to review the Agreements. (R. Vol. I, p. 105). Consequently, Buku refused to close.

Regarding the District Court's consideration of the zoning issues in determining whether Buku breached the Purchase and Sale Agreements, the District Court analyzed the issue as follows:

> In its First Memorandum Decision, the Court previously stated:
>
> > Buku was given four months to conduct due diligence concerning the properties. Potential zoning changes and their impact on financing are precisely the type of issues typically dealt with during the due diligence phase of a real estate transaction. In short, under the facts of this case, it is reasonable that Buku would look into potential zoning problems, and that uncertainty regarding the properties' zoning would affect its "interests and concerns."
> >
> > First Memorandum Decision at 8.
>
> The language of the Agreements clearly allowed Buku to ensure it was "fully satisfied" with the condition of the Property and "all the requirements" it needed to satisfy its "interests and concerns."
>
> While the provisions, "fully satisfied" and "buyer's interests and concerns" are potentially broad, they are not ambiguous. During the four month due diligence

> period, Buku was authorized to satisfy *its interests and concerns* regarding purchasing the Properties. Thus, the Agreements permitted Buku to look into potential zoning changes that would affect its "interests and concerns." Buku's efforts to fully satisfy its interests and concerns were expressly permitted under the contract.

(R. Vol. II, p. 401-402)(emphasis in original).

The District Court correctly found that Buku had legitimate concerns about zoning issues at the time it notified Appellants that it could not close, and that the zoning issues fell under the umbrella of "Buyer's issues and concerns" with the property under the due diligence clauses. Consequently, the District Court properly concluded, based upon the undisputed evidence presented, that Buku did not breach the Agreements pursuant to the clear and unambiguous language of the Agreements. Consequently, Buku is entitled to a return of its earnest monies.

4. The District Court Correctly Excluded Extrinsic Evidence That Would Alter or Revise the Earnest Money Provisions in the Peterson Agreement.

Appellants repeatedly argue that the District Court accepted extrinsic evidence to interpret the due diligence clauses of the Agreements, and that, therefore, the District Court erred in not considering "outside evidence on the issue of the earnest money provided to Peterson for the town home." (*See, i.e.,* Appellants's Brief, p. 17). As explained above, the District Court did not accept extrinsic evidence in interpreting the terms of the Agreements. However, even if the District Court had accepted extrinsic evidence regarding the meaning of the due diligence clause, Appellants seem to misunderstand the law regarding the use of extrinsic evidence in contract interpretation. The Idaho Court of Appeals has explained the following regarding extrinsic evidence:

> The parol evidence rule prohibits using extrinsic evidence of prior or contemporaneous negotiations to contradict an integrated written contract. J.

> CALAMARI, J. PERILLO, THE LAW OF CONTRACTS § 3–2 (2d ed. 1977). Accordingly, "where preliminary negotiations are consummated by written agreement, the writing supersedes all previous understandings and the intent of the parties must be ascertained from the writing." *Katseanes v. Yamagata*, 103 Idaho 773, 775, 653 P.2d 1185, 1187 (Ct.App.1982), quoting *Nuquist v. Bauscher*, 71 Idaho 89, 94, 227 P.2d 83, 86 (1951). So long as the language of the contract is unambiguous, extrinsic evidence is not admissible to prove the intent of the parties. *Jones v. Mountain States Telephone and Telegraph Co.*, 105 Idaho 520, 670 P.2d 1305 (Ct.App.1983).

Johnson Cattle Co., Inc. v. Idaho First Nat. Bank, 110 Idaho 604, 606-07, 716 P.2d 1376, 1378-79 (Ct. App. 1986). There is no support for Appellants's position that where extrinsic evidence is necessary to determine the meaning of one provision of a contract that extrinsic evidence pertaining to every other provision of the contract is admissible as well. Again, Appellants seems to miss the point that in order for extrinsic evidence to be admissible to interpret the provisions of a contract, the particular provision in question must be ambiguous. *See id.* Not only did Appellants fail to raise any issue about ambiguity as to the provision regarding the earnest money deposits either at the District Court or appellate level, there is no question that such provision is unambiguous. The earnest money provision of the Clark Agreement provides as follows:

> 2. **Purchase Price.** In consideration of the sale of the property and assets under this agreement, Buyer shall pay Seller the sum of One Million Forty Four Thousand Seventy Five Dollars and Eighteen Cents, payable as follows:
>
> (a) $25,000.00 upon execution of this agreement as earnest money, all of such earnest Money shall be refundable until closing. The earnest money shall be paid to Seller.

(R. Vol. I, p. 89). The earnest money provision of the Peterson Agreement likewise provides:

> 2. **Purchase Price.** In consideration of the sale of the property and assets under this agreement, Buyer shall pay Seller the sum of Nine Hundred Eighty Thousand Dollars ($980,000.00), payable as follows:

> (a) $327,000.00 upon execution of this agreement as earnest money. $10,000 of the earnest money shall be non-refundable, the balance fully refundable until closing. The earnest money shall be paid to Seller.

(R. Vol. I, p. 95-96). The language in the earnest money provisions is not reasonably subject to two or more interpretations, nor is it nonsensical. *See Swanson,* 145 Idaho at 62, 175 P.3d at 751. "If the language of a contract is unambiguous, then its meaning and legal effect must be determined from its words." *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). Furthermore, extrinsic evidence cannot contradict or alter the plain language of the Agreements. *See Howard v. Perry,* 141 Idaho 139, 141-42, 106 P.3d 465, 467-68 (2005). The language of the Agreements is very clear. In the case of the Clark Agreement, if the sale failed to close, all $25,000.00 of the earnest money was refundable until closing. Closing did not occur due to Buku's identification and written notice to Appellants of its concerns during its due diligence period. Therefore, Buku is entitled to the return of the entire $25,000.00 of earnest money from the Clarks. Likewise, in the case of the Peterson Agreement, if the sale failed to close, all but $10,000.00 of the $327,000.00 of earnest money was refundable to Buku. Again, closing did not occur because of Buku's expressed concerns. Consequently, Buku is entitled to the return of $317,000.00 in earnest money from the Petersons. While it is unfortunate that the Petersons chose to spend the earnest money deposited by Buku, the terms of the Agreement made it very clear that if the sale did not close, all but $10,000.00 of the earnest money would have to be returned to Buku. The Agreements do not discuss, acknowledge, or address Petersons receiving the earnest money to buy a townhome and any such extrinsic evidence would contradict the plain language of the Agreement. In other words, Petersons seek now to use extrinsic evidence to change the terms to the

Agreement. Pursuant to the unambiguous terms of the Agreements, Appellants are required to return the earnest money to Buku, and no extrinsic evidence regarding the earnest money provisions is admissible to contradict the written Agreement.

5. The District Court Correctly Found that Jefferson County Did Not Resolve the Zoning Concerns Identified During Buku's Due Diligence Period until March 2008.

Appellants assert that the District Court committed major error by stating "while the court acknowledges the above facts, the record reflects that the 'grandfathering' issue was not addressed by Jefferson County until March 2008, three months after the December 21, 2007 closing date." (Appellants's Brief, p. 17). Appellants assert that such statement by the District Court is "totally untrue." (Appellants's Brief, p. 17). Appellants then provide that "[t]he pre-application subdivision meeting with Buku occurred on December 10, 2007 and specifically stated: "Lot Size: 1 acre building lots." (Appellants's Brief, p. 17). Appellants go on to state that "Buku absolutely knew beyond any doubt that the real property in question was 1 acre lots (R-1). This knowledge was eleven (11) days before the scheduled closing and within the four month time period for due diligence." (Appellants's Brief, p. 17). The record directly contradicts Appellants's assertion. The document referred to by Appellants which stated "Lot Size: 1 acre building lots" was nothing more than the cover page of Jefferson County's file on Buku's proposed plat. It is identified as such in the Affidavit of Naysha Foster, Jefferson County's Planning and Zoning Coordinator. (R. Vol. I, p. 145). Nowhere in Ms. Foster's affidavit does it state that Jefferson County had made a final decision on the zoning of the property on December 10, 2007. In fact, correspondence from Jefferson County

sent to Buku dated March 26, 2008, approximately three months *subsequent* to the closing date, states:

> This letter is to inform you that the proposed development was presented to the Jefferson County Planning and Zoning Administrator on December 10, 2008 and to the Jefferson County Planning & Zoning Commission on March 6, 2008 as a sketch plan. This is the second step to the County's subdivision procedure. The County Commissioners adopted the new county wide zoning map on March 24, 2008. Prior to the adoption of the new zoning map the above mentioned property was located in a Residential-one zone. The area in question is now zoned Residential-five. The density of the development that was proposed March 6, 2008, **if approved**, would be grandfathered.

(R. Vol. I, p. 153)(emphasis in original). This correspondence indicates that the zoning of the property in question continued to be an issue long after closing occurred and would not have been fully and finally resolved until the development itself was approved by Jefferson County. Looking at the language pointed to by Appellants in context, it is clear that "Lot Size: 1 acre building lots" does not in any way make reference to Jefferson County's decision to grandfather the property as "R-1," but instead is part of the description of the proposed subdivision plat which Buku submitted to Jefferson County. (R. Vol. I, p. 148-49). The District Court correctly found Buku's concern over zoning and associated financing identified during its due diligence period was not addressed by Jefferson County until well after closing was to occur. Consequently, Buku had identified in writing a legitimate concern that remained unresolved at the time set for closing.

6. The District Court Correctly Determined that Appellants Were Not Entitled to Equitable Remedies.

The District Court properly dismissed Appellants's equitable claims on the basis that the Agreements precluded application of equitable remedies. Appellants argue that "if the contract were

held to be void or illusory, the appellants have no remedy at law for the use of their property by Buku, for the declarations made concerning earnest money, for the dominion and control exercised by Buku over the property of appellants and for the damages and lost revenue caused by Buku." (Appellants's Brief, p. 19). Appellants did not raise the issue of the Agreements being void or illusory at the lower court level, nor did Appellants raise such an issue on appeal. (*See, i.e.,* R. Vol. II, p. 409-12). An issue cannot be raised for the first time on appeal. *See Garner v. Bartschi,* 139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003).

Furthermore, there is no basis for Appellants's apparent assertion that the Agreements are void or illusory. The terms of the Agreements are clear and straight forward. The Agreements are enforceable, and therefore, any equitable claims raised by Appellants are barred. "Equitable claims will not be considered when an adequate legal remedy is available. When parties enter into an express contract, a claim based in equity is not allowed because the express contract precludes enforcement of equitable claims." *Iron Eagle Dev., LLC v. Quality Design Systems, Inc.,* 138 Idaho 487, 492, 65 P.3d 509, 514 (2003) (citing *Thomas v. Campbell,* 107 Idaho 398, 404-05, 690 P.2d 333, 339-40 (1984)). "Only when the express agreement is enforceable is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract." *Bates v. Seldin,* 146 Idaho 772, 776-77, 203 P.3d 702, 706-07 (2009).

The purpose of a written contract is to ensure that the obligation and expectations are known to all parties. As a result of the written Agreements, Clarks and Petersons were both put on notice that any revisions to the Agreements had to be in writing. (R. Vol. I, p. 92; 99). Both refused to amend the Agreements in writing as requested by Buku so the zoning and financing issues identified

as part of Buku's due diligence efforts could be potentially resolved before closing. (R. Vol. I, p. 105). As a result, Clarks and Petersons cannot bring claims of unjust enrichment, estoppel, and promissory estoppel to defeat the clear language of the Agreements. The unambiguous Agreements govern the dispute. The District Court correctly recognized this principle, stating "[b]ecause this Court has found the Agreements enforceable, Clarks and Petersons cannot rely on their equitable claims. Therefore, Buku's motion for summary judgment as to Clarks' and Petersons' equitable claims is granted." (R. Vol. II, p. 407). The District Court properly dismissed Appellants's equitable claims against Buku.

7. The District Court Properly Excluded the Equitable Remedy of Part Performance as Modifying the Agreements.

Appellants appear to argue that the doctrine of part performance somehow saves Appellants's equitable claims and/or allows them to modify the terms of the Agreements. (Appellants's Brief p. 21-25). Appellants's arguments regarding part performance are nonsensical. Part performance is an exception to the statute of frauds which would otherwise bar an oral agreement. *See International Bus. Machines v. Lawhorn,* 106 Idaho 194, 198-99, 677 P.2d 507, 511-12 (Ct. App. 1984). Part performance has no application to a written contract. *See Chapin v. Linden*, 144 Idaho 393, 396, 162 P.3d 772, 775 (2007); *Bob Daniels and Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (1984) ("[S]uch performance must relate to the oral agreement and may not be referable to another cause, such as the rights and duties provide by a separate written contract.") Defendants have pled no cause of action for an oral agreement. (R. Vol. I, p. 33-46). To the extent Appellants are alleging part performance somehow alters the plain language of the Agreements, Appellants's arguments fail.

In spite of their failure to plead an oral agreement, Appellants appear to be arguing that later negotiations between the parties somehow created new oral agreements and/or modified terms between the parties and that Appellants partially performed on those new oral agreements or terms. The reality is that, although the parties engaged in negotiations to potentially enter into a later written agreement regarding the purchase and sale of the Properties, the parties never actually came to an agreement. (R. Vol. I, p. 86). By the very terms of the Agreements, such an alleged additional, unwritten agreement is not valid and would not have affected the terms of the Agreements. Further, Appellants have alleged in the Counterclaim only the written Agreements enter into by the parties. (R. Vol. I, p. 38-45).

Paragraph 21 of the Clark and Peterson Agreements states as follows:

> **21. Amendments and Waivers.** No amendment of any provisions of this agreement will be valid unless the same shall be in writing and signed by the parties. No waiver by any party of any default, misrepresentation or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or effect in anyway [sic] any rights arising by virtue of any prior or subsequent such occurrence.

(R. Vol. I, p. 83; 89-94; 95-100). This paragraph specifically states that no amendments to the Agreements will be valid unless "in writing and signed by the parties." Clarks and Petersons knew the only way to amend their Agreements with Buku was to have a writing signed by the parties. Even if Appellants could prove the parties had a new oral agreement or the parties' course of conduct suggested an orally revised agreement, such agreements are invalid according to the clear and unambiguous terms of the Agreements. Further, it is the written Agreements that govern the return of the earnest monies. Pursuant to paragraph 2(a) of the Agreements, Buku is entitled to a full refund

of the earnest money it paid to Clarks and a refund of all earnest money but $10,000.00 it paid to Petersons.

C. THE DISTRICT COURT PROPERLY AWARDED BUKU PREJUDGMENT INTEREST, ATTORNEY'S FEES, AND COSTS AGAINST APPELLANTS

1. Standard of Review

This Court has set forth the standard of review regarding the prevailing party analysis and determination of attorney's fees as follows:

> The determination of who is a prevailing party, for the purpose of receiving an award of attorney fees, is committed to the sound discretion of the trial court. *Decker v. Homeguard Systems,* 105 Idaho 158, 666 P.2d 1169 (Ct.App.1983). That determination will be disturbed only upon a showing of an abuse of discretion. *McCann v. McCann,* 138 Idaho 228, 61 P.3d 585 (2002). To review an exercise of discretion, this Court applies a three-factor test. The three factors are: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Baxter v. Craney,* 135 Idaho 166, 169, 16 P.3d 263, 266 (2000) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

Israel v. Leachman, 139 Idaho 24, 26, 72 P.3d 864, 866 (2003). Based on the District Court's careful analysis, Appellants cannot establish the District Court abused its discretion.

2. Respondent's Request for Attorney's Fees to the District Court was Timely

Appellants assert that the District Court erred in awarding prejudgment interest and attorney's fees and costs to Buku against Appellants. In support of this position, Appellants assert that Buku failed to timely submit a request for fees and costs pursuant to Rule 54 of the Idaho Rules of Civil Procedure after the District Court issued its Memorandum Decision Re: Motion for Summary Judgment and Judgment Re: Motions for Summary Judgment. (Appellants's Brief, p. 25).

However, later in their briefing, Appellants acknowledge that this Court held that neither the District Court's Memorandum Decision nor the Judgment Re: Motions for Summary Judgment were a "final judgment" for the purposes of Rule 58(a) and that such a ruling made Appellants's argument on the timeliness issue moot. (Appellants's Brief, p. 26). Consequently, pursuant to Appellants's own admission, this Court should disregard Appellants's assertion that Buku's request for fees and costs was untimely.

Further, even if this Court's suspension of the appeal pending entry of a "final judgment" were not dispositive of the issue of whether a final judgment had been entered, neither the District Court's Memorandum Decision nor the Judgment Re: Motions for Summary Judgment disposed of all of the issues of the case. Therefore, they could not be "final judgments" for the purposes of a request for attorney's fees and costs. The Idaho Supreme Court has defined a "final judgment" as "an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document that on its face states the relief granted or denied." *T.J.T., Inc. v. Mori,* 148 Idaho 823, 203 P. 3d 4325, 436 (2010) (quoting *Camp v. East Fork Ditch Co.,* 137 Idaho 850, 867, 55 P. 3d 304, 327 (2002)). The judgment relating only to the summary judgment does not match that definition. The granting of a summary judgment is not a "final judgment" because it does not address the relief requested:

> Rule 54(c) states that "every final judgment shall grant the *relief* to which the party in whose favor it is rendered is entitled. (Emphasis added). The relief to which a party is entitled is not the granting of a motion for summary judgment. The Rule refers to the relief to which the party is ultimately entitled in the lawsuit, or with respect to a claim in the lawsuit. The granting of a motion for summary judgment is simply procedural step towards the party obtaining that relief.

Spokane Structures, Inc. v. Equitable Inc., LLC, 148 Idaho 616, 619, 226 P. 3d 1263, 1266 (2010). In other words, Buku did not plead for the grant of summary judgment. Buku pled the return of the earnest monies and requested prejudgment interest. Summary judgment was simply a procedural step towards obtaining the relief. In *Spokane Structures, Inc. v. Equitable Investment, LLC,* the Idaho Supreme Court explained the information necessary in a final judgment based on the relief requested:

> The "relief to which the party ... is entitled" must be read in connection with other rules. Rule 8(a)(1) provides, "A pleading which sets forth a claim for relief ... shall contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, (3) a demand for judgment for the relief to which he deems himself entitled." The "demand for judgment for the relief to which he deems himself entitled" obviously refers to the relief that the party seeks in the lawsuit.

148 Idaho at 619, 226 P. 3d at 1266.

In order to determine what relief was requested, the Court must look to Buku's Complaint. *See id.* Buku specifically requested the following relief:

> WHEREFORE, Plaintiff prays for Judgment against the above-named Defendants as follows:
>
> a. For a money judgment in the principal amount of $317,000.00 against Petersons and $25,000.00 against Clarks based on Plaintiffs' claim for refund of earnest money under contract or in any additional amount to be determined at the trial of this matter;
>
> b. For an award of prejudgment interest in an amount to be determined upon judgment;
>
> c. For an award of reasonable attorney's fees in the amount of $3,000.00 if this matter is concluded by default, and a greater amount should be awarded if this matter is contested;

d. For an award of costs incurred in the prosecution of this matter; and

e. For such other and further relief as the Court deems just and equitable in the premises.

(R. Vol. I, p. 20-21). Consequently, a "final judgment" in this matter must set forth the relief granted or denied based on the Court's ruling. This is exactly what the Final Judgment entered by the District Court on April 25, 2011, *nunc pro tunc,* did. Buku's request for attorney's fees and costs was timely.

3. Buku Did Not Request Rescission of the Agreements and the District Court Did Not Rescind the Agreements

Additionally, in support of their argument that Buku is not entitled to an award of attorney's fees, costs, and prejudgment interest, Appellants assert that the District Court's decision to award attorney's fees and costs to Buku should be reversed because "Buku requested a rescission of the contracts. The lower court believed that Buku could rescind the contract based upon a due diligence period contained in the contract notwithstanding the lack of evidence associated with any zoning issues on the real property. In any event, the court granted summary judgment and the contract became a nullity." (Appellants's Brief, p. 26-27). This argument is nonsensical and again it appears that Appellants are confused as to both what Buku pled and the basis upon which the District Court awarded Buku summary judgment. Buku never pled for rescission of the contracts — rather Buku specifically pled for the return of the earnest monies *pursuant to the terms of the Agreements.* (R. Vol. I, p. 12-22). The District Court did not rule the Agreements were rescinded. The District Court found the Agreements clear and unambiguous and interpreted the plain language to require the return of the earnest monies. (R. Vol. II, p. 395-408).

In support of their position, Appellants rely on case law where no contractual relationship existed to support an award of attorney's fees. Appellants specifically cite to *Management Catalysts v. Turbo West Corpac, Inc.*, 809 P.2d 487, 119 Idaho 626 (1991), which Appellants cite as follows:

> [h]aving dismissed the contract claims, the action could not have been one "to recover on a contract." We affirmed the action of the trial court in Day, stating that "to recover attorney fees under the statute, the action must be one to recover on the contract, not merely an action arising from a transaction relating to the purchase or sale of goods." 115 Idaho at 1018, 772 P.2d at 224. Based upon the interpretation of the statute in Day, the trial court's grant of attorney fees against appellants must be reversed; there being no contract between appellants.

(Appellants's Brief, p. 27). Appellants's reliance upon *Management Catalysts* is misplaced. Here, in no way did the District Court dismiss Buku's contract claims. In fact, the entire basis of the District Court's decision was that Buku was entitled a return of its earnest monies pursuant to the terms of the Agreements.

The attorney's fees provisions of both the Clark Agreement and the Peterson Agreement state as follows:

> **23. Attorney's fees.** The prevailing party in any action to enforce this agreement shall be entitled to recover its reasonable attorney's fees and costs.

(R. Vol. I, p. 93-99). Nowhere in those provisions is there any exception for a scenario where the sale does not close. It applies to "any action to enforce this agreement." Appellants's argument that the Agreements are a nullity because the sale of Appellants's property did not close completely contradicts the District Court's decisions, the terms of the contract itself, and the actual claims pled in this case. Based on the Agreements, Buku is entitled to attorney's fees pursuant to contract.

Appellants also argue that Buku is not entitled to attorney's fees and costs because there was "no transaction" and that therefore Idaho Code § 12-120 cannot apply. Again, Appellants's arguments seem to either misunderstand or ignore the District Court's order granting summary judgment in favor of Buku based upon the plain and unambiguous language of the Agreements. Appellants cite *Edwards v. Edwards*, 122 Idaho 971, 842 P.2d 307 (Ct. App. 1992) in support of their argument. However, that case did not deal with a contract for the purchase and sale of property to be developed. *Edwards* involved an action for a declaratory judgment, in which the plaintiff requested a ruling as to the validity and enforceability of two written agreements to develop and sell property owned by the plaintiff's children and his mother's estate. *Id.*, 842 P.2d at 307, 122 Idaho at 971. The agreements themselves were between plaintiff and his parents, and plaintiff's mother and the trust plaintiff managed on behalf of his mother and four of his children. *Id.* Both agreements provided that the plaintiff would develop and promote certain tracts of land owned by his parents and his children, and that he would receive 50% of the net profit. *Id.* Ultimately, the court found in favor of the children, and the children requested attorney's fees, in part, under § 12-120(3). *Id.*, 842 P.2d at 308, 122 Idaho at 972. The court denied the request made under § 12-120(3), concluding that the statute did not authorize attorney's fees because the action sought declaratory relief, rather than a monetary award. *Id.* The Court of Appeals affirmed the lower court's decision, on the basis that neither party was attempting to recover against the other on the basis of any "integral" commercial transaction and that the purpose of the declaratory judgment action was to ascertain whether there existed a binding, contractual relationship between the parties under each of the two disputed agreements. 842 P.2d at 308-09, 122 Idaho at 972-73. There was no money or

transaction involved in the agreements at issue in *Edwards*. Rather, they simply involved a promise between two parties to eventually develop some property. *See generally, id.*

The situation in *Edwards* is entirely different from the scenario in the current case, in which the contract involved a transaction for the sale of property, which, pursuant to the terms of the Agreements themselves, was to potentially be purchased for the purpose of developing the property. No party sought a declaratory judgment. Idaho courts have, on numerous occasions, recognized the applicability of Idaho Code § 12-120(3) to commercial real estate transactions such as the one at issue in the Agreements here. *See, i.e., Dennett v. Kuenzli*, 130 Idaho 21, 31-32, 936 P.2d 219, 230 (Ct. App. 1997); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 274-75, 869 P.2d 1365, 1369-70 (1994); *Herrick v. Leuzinger*, 127 Idaho 293, 306, 900 P.2d 201, 214 (Ct. App. 1995). Consequently, Buku is entitled to attorney's fees pursuant to Idaho Code § 12-120(3), and the District Court properly concluded as such.

4. The District Court Properly Awarded Prejudgment Interest to Buku

Even though Appellants assert Buku is not entitled to prejudgment interest, Appellants never actually provide any argument on this issue. Therefore, Buku will not address this issue, except to note that the District Court correctly recognized that Buku was entitled to prejudgment interest pursuant to statute. Idaho Code § 28-22-104 specifically provides for the award of prejudgment interest in instances where the amount is readily ascertainable, as it is here. Although unnecessary pursuant to Idaho case law (*see, i.e, Rosecrans v. Intermountain Soap & Chemical Co., Inc.*, 100 Idaho 785, 788, 605 P.2d 963, 966 (1980)), Buku specifically pled prejudgment interest on the amounts specifically required to be returned to Buku pursuant to the Agreements. (R. Vol. I, p. 19-

21). Pursuant to Idaho Code § 28-22-104, a party is entitled to prejudgment interest at a rate of twelve percent per year in cases of money due on an express contract. I.C. § 28-22-104; *see also Dillon v. Montgomery*, 138 Idaho 614, 617, 67 P.3d 93, 96 (2003). The District Court did not err in awarding Buku prejudgment interest on the earnest money.

5. The District Court Did Not Abuse Its Discretion in Awarding a Reasonable Amount of Attorney's Fees to Buku

Appellants argue that, even if Buku is entitled to an award of attorney's fees, Appellants "successfully defended the first summary judgment motion and all allegations until the second sitting judge made a ruling. Thus, all fees prior to the briefing on the latest summary judgment motion (second motion for summary judgment) should be denied." (Appellants's Brief, p. 29). Appellants seem to misunderstand case law and the Idaho Rules of Civil Procedure regarding the award of attorney's fees using the prevailing party analysis. The District Court provided a very thorough explanation for its determination that Buku was the prevailing party and Appellants cannot demonstrate the Court abused its discretion. The District Court stated:

Rule 54(d)(1)(B) of the Idaho Rules of Civil Procedure provides:

> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or the result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

The Idaho Supreme Court has identified three areas of inquiry that a court should consider when deciding whether a party "prevailed."

> (a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) *the extent to which each of the parties prevailed on each of the issues or claims.* If the court determines that a party prevailed only in part, *it may apportion the costs and attorney fees among the parties in a fair and equitable manner* after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Chadderdon v. King, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983)(emphasis added by District Court).

In determining which party has prevailed, the Supreme Court of Idaho provided the following guidance:

> In determining which party prevailed in an action where there are claims and counterclaims between opposing parties the court determines who prevailed "in the action." That is, the prevailing party question is examined and determined from the overall view, not a claim-by-claim analysis.

Eighteen Mile Ranch, LLC, v. Nord Excavating & Paving, Inc., 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

In this case, Buku prevailed on its claim of entitlement to reimbursement of the earnest money. All of Clarks' and Petersons' counterclaims were denied. This Court concludes Buku was the prevailing party when looking at the outcome of the case from an overall view.

(R. Vol. II, p. 484-85).

In performing the prevailing party analysis, the District Court also examined at length Appellants's claim that it prevailed in part because it survived Buku's first motion for summary judgment. (*See* R. Vol. II, p. 486-88). Regarding this issue, the District Court concluded, "[t]he fact

that Clarks and Petersons survived [the first] motion [for summary judgment], however, does not equate to them having prevailed on any issue or claim. Even if Clarks and Petersons had prevailed on some claim or issue, this Court would not be obligated to apportion fees between the parties . . . Buku prevailed on its first cause of action seeking return of the earnest money, and all of Clarks' and Petersons' counterclaims were denied. This Court cannot conclude Clarks or Petersons prevailed 'in the action' in any sense." (R. Vol. II, p. 488).

The District Court engaged in the required prevailing party analysis and determined that, because Buku prevailed on its claim for return of the earnest money pursuant to contract, and because all of Appellants's counterclaims were denied, Buku was the prevailing party. The District Court explicitly followed Idaho case law and the Idaho Rules of Civil Procedure when engaging in its analysis. Consequently, the District Court correctly determined that Buku was the prevailing party in this matter and that it was therefore entitled to its reasonable attorney's fees.

D. BUKU IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS ON APPEAL

Pursuant to Rules 40 and 41 of the Idaho Appellate Rules, Buku requests its attorney's fees and costs on appeal. In support of its request for attorney's fees on appeal, Buku relies upon paragraph 23 of the Purchase and Sale Agreements at issue in this matter, which states: "[t]he prevailing party in any action to enforce this agreement shall be entitled to recover its reasonable attorney's fees and costs." (R. Vol. I, p. 93; 99). Buku also relies upon Idaho Code § 12-120(3), which provides for the award of attorney's fees to the prevailing party in a "commercial transaction." I.C. § 12-120(3). As was pointed out by the District Court and as is noted above (*see, i.e.,* R. Vol.

II, p. 482-84 *and infra.*, Section IV.C.3.), this matter concerns a commercial transaction, and therefore, an award of attorney's fees pursuant to Idaho Code § 12-120(3) is appropriate.

V. CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court find the following: (1) that Appellants's appeal concerning specific performance is moot due to Petersons' transfer of the Peterson Property to JBP Holdings, LLC; (2) that the District Court correctly determined that the Purchase and Sale Agreements were unambiguous and require the return of the earnest monies as stated; (3) that the District Court correctly dismissed Appellants's equitable claims, including part performance; (4) that the District Court correctly awarded Buku its attorney's fees and costs, plus prejudgment interest; and (6) that Respondent is entitled to attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 20th day of December, 2011.

DeAnne Casperson
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
Plaintiff/Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below in the manner indicated on this 20th day of December, 2011.

DOCUMENT SERVED: **RESPONDENT'S BRIEF**

ATTORNEYS SERVED:

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(√) *First Class Mail*
( ) *Hand Delivery*
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