3-15-2012

Boise Mode, LLC v. Donahoe Pace & Partners Respondent's Brief Dckt. 39229

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOISE MODE, LLC, an Illinois limited liability company, successor-in-interest to Mode Building Limited Partnership, an Idaho limited partnership, Plaintiff-Respondent, vs. DONAHOE PACE & PARTNERS LTD, an Idaho corporation; and TIMOTHY PACE, Defendants-Appellants,	Supreme Court Case No. 39229-2011

RESPONDENT'S BRIEF

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

Honorable Ronald J. Wilper, District Judge, Presiding

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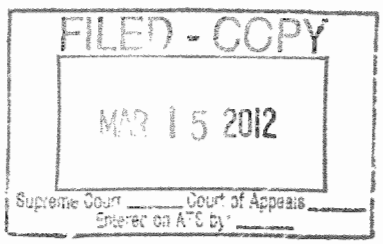

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Other Authorities

I.

STATEMENT OF THE CASE

A. Nature of the Case

This dispute between Respondent Boise Mode LLC ("Boise Mode") and Appellants Donahoe Pace & Partners Ltd. ("Donahoe Pace") and Timothy Pace (Appellants are, where appropriate, collectively referred to "DPP")[1] arises out of a commercial lease for office space in downtown Boise executed by Boise Mode as landlord and Donahoe Pace as tenant and personally guaranteed by Appellant Timothy Pace. At some point during its tenancy, Donahoe Pace raised concerns about inconveniences caused by construction in the building and, of its own initiative, stopped paying rent in full. Boise Mode apologized for any inconvenience caused and, as a gesture of goodwill, granted Donahoe Pace a one-time rent abatement.

Several months after the construction had completed, and despite numerous attempts by Boise Mode to negotiate a resolution to the unpaid rent, Donahoe Pace vacated the office space six months prior to the termination of the lease and ceased paying rent altogether. After additional demands for repayment to both Donahoe Pace and Timothy Pace were unsuccessful, Boise Mode sued Donahoe Pace for unpaid rent and Timothy Pace for breach of his guarantee. Donahoe Pace counterclaimed, alleging that it had been constructively evicted from the office space, even though it remained there long after the construction had ceased. When Boise Mode

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[1] Boise Mode uses the term "DPP" where appropriate for the convenience of the Court because Appellants used that term. As discussed further *infra* in the main text, however, Appellants' wholesale use of "DPP" is inconsistent with the record and erroneously implies that the Appellant Donahoe Pace and Appellant Timothy Pace are similarly situated in this case. For example, only Donahoe Pace -- not Timothy Pace -- entered into the commercial lease at issue here, and only Donahoe Pace filed a counterclaim. R 14, 84.

moved for summary judgment on all claims and counterclaims, DPP chose to seek a continuance pursuant to I.R.C.P. 56(f) rather than oppose the motion on the merits. The district court ultimately granted Boise Mode's motions for summary judgment on its claims and on Donahoe Pace's counterclaims. DPP now appeals.

B. Prior Proceedings

Boise Mode concurs for the most part with DPP's description of the prior proceedings in this case. The following additional information and clarifications are, however, necessary for an accurate understanding of those proceedings.

Although both Donahoe Pace and Timothy Pace filed the Answer to Boise Mode's Complaint, only Donahoe Pace -- not Timothy Pace -- filed the Counterclaim. R 80, 84. In that Answer, DPP alleged several affirmative defenses but did not allege as an affirmative defense that Boise Mode had breached the lease agreement between the parties. R 80-90.

On March 23, 2010, Boise Mode and DPP jointly filed a Stipulation for Scheduling and Planning wherein the parties jointly requested trial dates in December 2010, or January 2011. R 103-106. Pursuant to that Stipulation, the district court entered an Order setting trial for December 8, 2010 and, among other things, establishing a deadline of 60 days prior to trial for hearings on all motions, including motions for summary judgment. R 107-111. On July 29, 2010, Boise Mode and DPP filed a stipulation to vacate and reschedule the trial date from December 8, 2010 to February 23, 2011 on grounds that both counsel had scheduling conflicts with the original trial date. R 132-133. On August 10, 2010, the district court entered an Order granting the stipulation and vacating and rescheduling the trial as requested by the parties. R 140-143. By moving the trial date, the district court also moved the deadline for hearings on all

motions, including motions for summary judgment, to December 25, 2010 (60 days before the rescheduled trial date of February 23, 2011). R 140-143.

Between May 10, 2010, the date on which Boise Mode served its Answers and Responses to DPP's discovery requests, and the filing of DPP's Rule 56(f) Motion on December 8, 2010, counsel for DPP raised no concerns or issues with Boise Mode's Answers and Responses. R 471.

On November 24, 2010, Boise Mode timely filed its Motion for Summary Judgment and supporting papers, and, in compliance with the district court's revised Scheduling Order, noticed the hearing for 28 days later, December 22, 2010. R 152-154, 181-186. [2] In support, Boise Mode argued that, as a threshold matter, Donahoe Pace lacked standing to pursue its counterclaims because it had not complied with the requirements of Idaho Code § 6-320. Boise Mode also argued, in the alternative, that even if Donahoe Pace had standing, summary judgment in Boise Mode's favor was proper on the merits. R 168-178.

Rather than oppose Boise Mode's Motion for Summary Judgment on the merits, DPP chose to merely file a Rule 56(f) Motion for a continuance. R 363.

On December 27, 2010, the district court entered an Order granting Boise Mode's Motion for Summary Judgment ("Summary Judgment Order"). R 451-460. In that Summary Judgment Order, the district court found, among other things, that Boise Mode met its burden of proving the existence of the Lease and the Guarantee and the fact of the breaches of each by,

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[2] Boise Mode actually filed two motions for summary judgment, one on its claims and one on Donahoe Pace's counterclaims. R 152-154, 184-186. For simplicity, Boise Mode refers to both motions, collectively, as the "Motion for Summary Judgment."

respectively, Donahoe Pace and Timothy Pace. R 454. The district court also concluded that because Donahoe Pace had not complied with the notice requirement of Idaho Code § 6-320(d), it lacked standing to bring its counterclaim for constructive eviction and, because the other counterclaims were premised upon the claim for constructive eviction, the court granted summary judgment on all counterclaims based upon the lack of standing. R 458.[3]

On January 5, 2011, the district court entered a judgment in favor of Boise Mode on its claims against Donahoe Pace and Timothy Pace, awarding it damages in the amount of $95,975.96, plus post-judgment interest, and ordered Donahoe Pace's counterclaims dismissed ("First Judgment"). R. 461-462.

On January 19, 2011, fourteen days after the entry of the First Judgment, DPP filed its self-styled Motion to Amend Judgment Pursuant to I.R.C.P. 59(e) ("Motion to Amend"). R 481.

On March 2, 2011, the district court issued an order granting the Motion to Amend ("Order Granting Motion to Amend"). In that order, the district court reversed its ruling that Donahoe Pace's counterclaims fell under the purview of Idaho Code § 6-320. Because the Summary Judgment Order "was predicated on the Court's finding that I.C. § 6-320 applied to the Defendants' constructive eviction and breach claims," the court reversed the Summary Judgment Order and voided its First Judgment. R 517-524.

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[3] The district court also granted Boise Mode's motion for summary judgment as to Donahoe Pace's counterclaims for tortious interference with contract and negligent supervision. R 456-457. Donahoe Pace did not move the district court to reconsider that portion of its Summary Judgment Order, nor has it raised that issue to this Court.

On April 27, 2011, Boise Mode filed a Motion for Reconsideration and Further Reconsideration in which it sought a ruling on the substantive arguments it had made in support of its motion for summary judgment. R 581-583, 560-579.

On May 17, 2011, Boise Mode filed supplemental answers to DPP's discovery requests, wherein Boise Mode identified the one other tenant in the same building as Donahoe Pace who had lodged complaints about "noise, disturbance, disruption, or interference of any type" and explained the nature of those complaints and how they were resolved. Boise Mode also made clear that there was no agreement between itself and The North Face specifying that Boise Mode would be penalized if improvements were not completed by a specified date. R 615-618.

On June 22, 2011, the district court entered an Order in which it addressed, for the first time, Boise Mode's substantive arguments, and, finding them to have merit, granted Boise Mode's Motion for Reconsideration and Further Consideration. R 642-646.

On August 17, 2011, the district court entered an Order awarding Boise Mode costs as a matter of right in the amount of $219.00 and attorney fees in the amount of $25,875 pursuant to Idaho Code § 12-120(3) and I.R.C.P. 54(e)(3) and 54(d)(1)(C). R 679-684.

On August 26, 2011, the district court entered a Judgment awarding Boise Mode damages against Donahoe Pace and Timothy Pace, jointly and severally, in the amount of $95,975.96, and it awarded requested attorneys' fees and costs against Donahoe Pace and Timothy Pace, jointly and severally, and dismissed, with prejudice, Donahoe Pace's counterclaims. R 686-687 ("Second Judgment").

C. Counterstatement of Facts

Boise Mode cannot concur in DPP's Statement of Facts and, instead, offers the following counterstatement of facts.

1. The Relevant Contracts.

a) The Lease.

On or about November 3, 2006, Boise Mode and Donahoe Pace (not DPP) entered into an Office Lease Agreement ("Lease") for the premises located at 800 Idaho Street, Suite 350, Boise, Idaho ("Premises"), together with lower level storage space in the same building (the building at 800 Idaho Street will be referred to hereinafter as the "Facility"). R 14-45.

Among other things, the Lease contains the following provisions:

- **Landlord reserves the right to affect such other tenancies in the Facility as Landlord, in its sole discretion, deems appropriate**; and Tenant does not rely on Landlord's leasing to any specific tenant, or to any number of tenants, any space in the Facility. (R 22, Article 2.1.) (Bold emphasis added.)

- BASE RENT. Tenant shall pay to Landlord as monthly Base Rent for the Premises the amount specified in Article 1.11, which amount shall be paid in advance on the first day of each calendar month from March 1, 2007 and thereafter throughout the term of the Lease;.... **Except as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord**. (R 24, Article 4.1.) (Bold emphasis added.)

- QUIET ENJOYMENT. Landlord agrees that Tenant, **upon paying the rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease** and upon recognizing purchaser as Landlord, may quietly have, hold and enjoy the Premises during the term hereof; **subject, however, to loss by casualty and all restrictions and covenants contained or referred to in this Lease**. (R 41, Article 19.3.) (Bold emphases added.)

- DEFAULT. The occurrence of any of the following shall constitute a material default and breach of this Lease by Tenant:

  (a) **Any failure of the Tenant to pay the Base Rent, additional rent, or any other monetary sums required to be paid hereunder**. If tenant fails to cure said default within five (5) days after written notice by Landlord to Tenant, Landlord shall be entitled to exercise its rights and remedies as provided in Article 20.3 herein, without further notice to Tenant.

  (b) **The abandonment of the Premises by Tenant without Tenant continuing to pay Base Rent in a timely manner**. (R 41, Article 20.1.) (Bold emphases added.)

- REMEDIES. In the event of any such material default or breach by Tenant, Landlord may at any time thereafter without limiting Landlord in the exercise of any right or remedy at law or in equity which Landlord may have by reason of such default or breach:

  (a) Maintain this Lease in full force and effect and recover the rent and other monetary charges as they become due, irrespective of whether Tenant shall have abandoned the Premises. (R 42, Article 20.3.)

The term of the Lease was from December 1, 2006 through May 31, 2010. R 21, Article 1.9.

b) The Personal Guarantee.

On or about November 3, 2006, in connection with the Lease, Timothy Pace executed a Personal Guarantee of Lease ("Personal Guarantee") whereby he personally guaranteed all obligations owed Boise Mode by Donahoe Pace arising under or relating to the Lease. R 64-65. Among other things, the Personal Guarantee provides:

> 1. GUARANTEE: The Undersigned jointly, severally, personally, and individually guarantee(s) payment when due, or upon demand after the due date, all obligations and the full amount of money that Tenant now or in the future owes Landlord arising under or relating to the Lease . . . plus interest, attorney fees, costs, penalties

> and expenses of collection incurred because of Tenant default, including post-judgment collection costs ("Liabilities"). The Liabilities shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned, loss of contribution from any of the Undersigned, or any settlement or compromise between Tenant and Landlord.
>
> 2. PAYMENT: If Tenant shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, the Undersigned, immediately upon written demand by the Landlord, will pay to the Landlord the full amount of the Liabilities as if the Liabilities constituted the direct and primary obligation of each of the Undersigned.
>
> ....
>
> 5. LEGAL ACTION AND ATTORNEY FEES: Landlord may proceed against one of the Undersigned before or after proceeding against any tenant, any co-guarantor, or other party, or any security.

R 64-65.

2. Donahoe Pace Fails to Pay Rent and Boise Mode Makes a Demand.

At some point -- the record is unclear when -- Donahoe Pace voiced some concerns about inconveniences related to construction in the Facility. Despite the provision in Article 4.1 of the Lease, Donahoe Pace then failed and refused to make the required rent, operating costs and charges due and owing to Boise Mode under the terms of the Lease beginning as early as October -- and no later than December -- 2008. R 301.

On May 13, 2009, Angela Aeschliman, the Director of Property Management for Boise Mode's property manager, Watermark Property Management ("Watermark"), sent a written demand to Donahoe Pace and to Timothy Pace, as guarantor, noting that despite a previous notice of delinquency for delinquent rent payments from December 2008 through May 2009,

Donahoe Pace had failed to make the required rent payments. The letter made demand for payment of delinquent rent payments totaling $22,958.80 for the months December 2008 through May 2009. R 292.

3. Boise Mode Grants Donahoe Pace an Abatement for Goodwill.

Also on May 13, 2009, Ms. Aeschliman sent an additional letter to Donahoe Pace to "clear up misunderstandings." In that letter, Ms. Aeschliman explained that Boise Mode had previously granted Defendant a one-time $1,000 rent abatement "[f]or "goodwill" in connection with the inconveniences caused by the construction in the Facility even though, pursuant to the terms of the Lease, Boise Mode was within its rights to improve the building without offset of Donahoe Pace's rent. R 294.

4. Boise Mode Responds Promptly to Complaint from Timothy Pace.

On May 21, 2009, at 8:19 P.M., Timothy Pace sent an e-mail to Ms. Aeschliman and "Sid" at Mountain Top Maintenance, thanking Sid "for all your time this week on the elevator front, as well as the new elevator keys." Mr. Pace also informed Ms. Aeschliman and Sid that the elevator in the Facility was not working and requested that they address the problem as soon as possible. One half-hour later, at 8:49 P.M., Ms. Aeschliman responded, "Tim we will get someone out asap. Thanks for informing us." At 7:37 A.M. the next morning, Ms. Aeschliman sent an e-mail to Tim Pace informing him that "The elevator is working at this time" and requesting that he let her know if he experienced additional problems. R 297-298.

5. Construction Completes Prior to June, 2009.

On June 3, 2009, Ms. Aeschliman sent another letter to Donahoe Pace, informing it, among other things, that "the construction has ended and has been complete now for almost 2

months." The letter further directed Donahoe Pace to immediately report any issues with "noise, the elevator, the hallways, et cetera." The letter concluded by again demanding payment of the outstanding rent due by June 5, 2009. R 300.

6. Donahoe Pace Seeks to Extend the Term of the Lease.

On June 8, 2009, Timothy Pace sent an e-mail to David Baum stating that "we think now may be a time to consider rewriting the balance of our lease and **extending into the end of next year**. Is that an option you might consider?" R 259 (emphasis added).

7. Boise Mode Attempts to Reach a Resolution and Continues to Demand Payment of Back Rent.

On July 30, 2009, after a number of communications between himself and Timothy Pace regarding Mr. Pace's concerns about past inconveniences related to construction, David Baum offered a potential resolution. Mr. Baum explained that a number of the improvements Boise Mode had made to the building would result in increased energy efficiency and lower energy costs for Donahoe Pace. Mr. Baum offered to Donahoe Pace a rent reduction from August through June as well as an agreement to purchase consulting work each month from Donahoe Pace. In return, he asked only that all past due balances be paid by August 3rd. R 285.

On August 13, 2009, Boise Mode, by and through its counsel, sent a written demand to Donahoe Pace and to Timothy Pace, as guarantor, for payment by August 24, 2009, of the delinquent rent and charges owed by Defendant under the terms of the Lease, which sums totaled $19,967.99 as of that date. R 314-316.

On August 14, 2009, Timothy Pace made a counter-proposal to David Baum, seeking a 10% rent reduction for August through June "as an acceptable resolution for the past limitations

placed on our ability to conduct business due to construction problems," as well as other concessions. R 280 (emphasis added).

On October 5, 2009, Boise Mode, by and through its counsel, sent a letter entitled THREE (3) DAYS' NOTICE TO PAY RENT AND/OR TO QUIT AND VACATE THE PREMISES (Three Days' Notice) to Donahoe Pace and Timothy Pace notifying both that Donahoe Pace was in default under the terms of the Lease and demanding, pursuant to Idaho Code § 6-303(2), payment of the past due amount of $29,242.49 to Boise Mode within three days of service of the notice. R 331-333.

On October 8, 2009, Boise Mode, by and through its counsel, made another attempt to reach a resolution by sending an e-mail to Timothy Pace referencing the Three Days' Notice and offering, as a compromise and settlement, a $13,000 credit against the $22,017.99 outstanding rent in exchange for entering into an amendment to the Lease. R 335.

On October 26, 2009, after receiving a counteroffer from Timothy Pace, Boise Mode, by and through its counsel, sent a letter to Donahoe Pace and to Timothy Pace, as guarantor, advising that Boise Mode has considered and rejected the counteroffer. The letter specified that Boise Mode's offer would remain open until October 30, 2009. The letter also reminded Donahoe Pace that, should it vacate the premises on November 1, 2009, it "will remain obligated to make timely payments of the rent through the duration of the term of the Lease." R 339-340.

8. Donahoe Pace Vacates and Fails to Pay Any Additional Rent.

Donahoe Pace vacated the Premises on or around November 3, 2009. On November 9, 2009, Boise Mode, by and through its counsel, sent a letter to Defendant confirming that Defendant had abandoned the Premises and notifying Defendant that pursuant to Article 20.3 of

the Lease, the Lease remained in effect and Defendant remained obligated to pay all rent and other charges due under the Lease until Boise Mode re-leased the Premises. R 67-68.

After vacating, neither Donahoe Pace nor Timothy Pace made any further payments to Boise Mode and, as a result, owed Boise Mode $95,975.96 for unpaid rent, other fees and costs, and interest as of November 23, 2010. R 188-194.

II.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Boise Mode notes that the following issues are not contested by DPP: (1) DPP does not contend that it breached the Lease by failing to fully pay rent beginning in December, 2008, nor does it contest the amount of rent it owes Boise Mode; (2) DPP does not dispute that it vacated the Premises on or about November 3, 2009 or that it failed to pay any rent after that point in time even though the term of the Lease extended through May, 2010; (3) DPP does not dispute that Boise Mode attempted to mitigate its damages by locating a new tenant for the Premises; and (4) DPP does not contest the dismissal of its counterclaims for tortious interference with contract and for negligent supervision.

Boise Mode also clarifies that DPP's arguments on appeal relate solely to alleged inconveniences caused by construction in the Facility and that DPP does not dispute that the construction ceased prior to June, 2009.

III.

ATTORNEY FEES ON APPEAL

Boise Mode seeks its attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and Idaho Code §§ 12-120(3) and 12-121.

IV.

ARGUMENT

A. Standard of Review

1. Motion to Continue Pursuant to Rule 56(f).

This Court reviews a denial of a Rule 56(f) motion for an abuse of discretion and thus analyzes "if the trial court knew it had the discretion, acted within the parameters provided to it and demonstrated an exercise of reason." *Jenkins v. Boise Cascade Corp.,* 141 Idaho 233, 238, 108 P.3d 380, 385 (2005) (quoting *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997)).

2. Consideration of Motion for Reconsideration and Further Consideration.

This Court likewise reviews a grant of a motion for reconsideration for abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001) ("The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court.").

3. Summary Judgment Standard.

This Court's standard of review of a summary judgment ruling is the same standard the district court was required to apply in deciding Boise Mode's motion for summary judgment. *See Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 249, 108 P.3d 392, 396 (2005). Under that standard, Boise Mode bears the initial burden of showing that there is no genuine issue of material fact as to some element of its claims. *Id.* at 250, 108 P.3d at 397. If Boise Mode succeeds, "the burden shifts to [DPP] to show that a genuine issue of material fact on the challenged element of the claim does exist." *Id.* To satisfy that ultimate burden, DPP "may not

rest upon the mere allegations or denials of [its] pleadings, but...must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting I.R.C.P. 56(e)). A "mere scintilla of evidence" that creates only "slight doubt as to the facts" is not enough to avoid summary judgment. *NW. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002).

As for Donahoe Pace's counterclaims, "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Jenkins*, 141 Idaho at 239, 108 P.3d at 386.

B. The District Court Correctly Denied DPP's Rule 56(f) Motion.

Rather than oppose Boise Mode's motion for summary judgment on its merits, DPP chose to merely file a motion for continuance under Rule 56(f) of the Idaho Rules of Civil Procedure. The district court correctly denied that motion.

Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

I.R.C.P. 56(f).

This Court has explained the nature of the burden that a party moving under Rule 56(f) must meet:

> It has been noted that a party who invokes the protection of Rule 56(f) must 'do so in good faith by affirmatively demonstrating why

> he cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797 (8th Cir. 1996). Further, in order to grant a motion for additional discovery before hearing a motion on summary judgment, the plaintiff has the burden of setting out "what further discovery would reveal that is essential to justify their opposition," making clear "what information is sought and how it would preclude summary judgment." *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001).

Jenkins, 141 Idaho at 239, 108 P.3d at 386. In other words, a party seeking relief under Rule 56(f) "**must** articulate what additional discovery is necessary **and** how it is relevant to responding to the pending motion." *Id.* (emphases added).

In *Jenkins*, the plaintiffs' attorney filed an affidavit in support of the Rule 56(f) motion stating that additional written discovery and depositions were pending and that he "believed the discovery would provide additional documents and testimony supporting the [plaintiffs'] theories, and that he required the opportunity to use the responses and testimony in additional discovery in order to thoroughly respond to summary judgment." *Id.* at 238, 108 P.3d at 385. This Court upheld the district court's denial of the Rule 56(f) motion because although the plaintiffs' attorney's affidavit stated that "additional written discovery and depositions were pending . . . he did not specify what discovery was needed to respond to [defendant's] motion and did not set forth how the evidence he expected to gather through further discovery would be relevant to preclude summary judgment." *Id.* at 239, 108 P.3d at 386. The Court also noted that the case had been pending for more than a year. *Id.* For those reasons, and because the district court "recognized it had the discretion to deny the motion, articulated the reasons for doing so,

and exercised reason in making the decision," the Court concluded that there was no abuse of discretion in the denial of plaintiffs' motion to vacate. *Id.*

In this case, DPP likewise failed to satisfy its burden to establish what information it sought and, in particular, how such information would preclude summary judgment. Rather, the papers filed in support of DPP's Rule 56(f) motion were as conclusory as the attorney's affidavit at issue in *Jenkins* and, like that affidavit, similarly failed to specifically state "what further discovery would reveal that is essential to justify their opposition"; failed to make clear "what information is sought and how it would preclude summary judgment"; and failed to "set forth how the evidence he expected to gather through further discovery would be relevant to preclude summary judgment." 141 Idaho at 239, 108 P.3d at 386.

In particular, the Affidavit of John Browder filed in support of DPP's Rule 56(f) Motion merely discusses what information was sought via written discovery requests (which requests Boise Mode had answered on May 10, 2011, nearly six months earlier) and then asserts that DPP attempted to obtain information from third parties Colliers and the North Face without explaining how any information from those third parties would be relevant to preclude summary judgment. R 364-365, ¶¶ 4-5.[4]

DPP does not even argue to this Court that its submissions in support of its Rule 56(f) Motion met the burden established by *Jenkins*. Rather, DPP merely argues that the district court erred because there were "discovery requests outstanding at the time of Boise Mode's Motion for

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[4] Notably, despite receiving Boise Mode's written responses nearly six months earlier, and despite asserting, in support of its Rule 56(f) Motion, that Boise Mode had "raised a number of

Summary Judgment" and "Boise Mode had sole possession of some of the materials DPP was seeking." App. Brief at 13. In support of that argument, DPP relies solely on several cases from outside Idaho. DPP's reliance on those cases is misplaced, because it relies only on those cases while ignoring the on-point authority from this Court, *Jenkins*.[5]

Indeed, *Jenkins* belies the central tenet of DPP's argument, that a court abuses its wide discretion where it denies a Rule 56(f) motion "when there is an outstanding discovery request and the information sought is in the control of the opposing party." App. Brief at 14.[6] As described above, the *Jenkins* court actually held just the opposite, namely that it was *not* an abuse of discretion for the district court to deny a Rule 56(f) motion where there were outstanding discovery requests seeking information that was, presumably, in the control of the opposing party. 141 Idaho at 238-39, 108 P.3d at 385-86.[7]

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specious objections," counsel for DPP had not once contacted counsel for Boise Mode to voice any concerns with those answers. R 471.

[5] Boise Mode recognizes, of course, that federal courts' interpretations of those Federal Rules of Civil Procedure that are substantively similar to Idaho's Rules are persuasive. But where this Court has spoken on the Idaho Rule – and particularly where, as here, this Court has decided a case under the applicable Idaho Rule, reliance on federal authority alone is unwarranted. *See Herrera v. Estay*, 146 Idaho 674, 678, 201 P.3d 647, 651 (2009) ("Given the virtual identity between these rules and their counterparts in the Federal Rules of Civil Procedure, *and the lack of case law in Idaho*, it is appropriate for this Court to turn to federal authority to address the standard of review.") (Emphasis added.)

[6] The text of DPP's brief on this point refers to a "motion for summary judgment" (App. Brief, p. 14, L. 5-7), but given the context in which the language appears, it seems readily apparent that it is intended to refer to a motion for a continuance pursuant to Rule 56(f).

[7] Although the *Jenkins* decision does not expressly specify whether the information sought by the plaintiffs was in the control of the opposing party, given the nature of the plaintiffs' main argument (that the defendant had dual processes and procedures in place to discharge personnel)

In any event, the foreign authority on which DPP relies is readily distinguishable on numerous grounds. Moreover, the rule of law announced in those cases actually supports the district court's decision in this case. For example, in *Doe v. Abington Friends School,* 480 F.3d 252 (3d Cir. 2007), the primary case relied upon by DPP, the plaintiffs' Rule 56(f) motion identified six specific areas of inquiry that were relevant to the central issue in the case -- whether the defendant qualified for a religious exemption. Moreover, the defendant there had filed a motion for summary judgment less than two months after the plaintiffs filed their complaint, and district court granted such motion "before allowing the Does any discovery into the factual basis for applying the religious exemption." *Id.* at 254-58. In addition, the rule of law endorsed by the *Doe* court undermines, rather than supports, DPP's argument: the court noted that a party seeking relief under Rule 56(f) must detail "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." *Id.* at 255, n. 3 (quoting *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d Cir. 1988)) (emphasis added). *See Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 1996) ("Rule 56(f) motions may be denied...if the 'additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment.'") (quoting *Strag v. Bd. Of Trustees*, 55 F.3d 943, 954 (4th Cir. 1995)).

This case differs in at least three significant respects from *Doe*.

First, DPP failed to explain how the information it sought from third parties was relevant, let alone how it would preclude summary judgment.

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it can be fairly inferred that the plaintiffs were seeking information controlled by the defendant. 141 Idaho at 238, 108 P.3d at 385.

Second, the timing here is completely, and materially, different: rather than seek summary judgment at the outset of the case, Boise Mode did not move for summary judgment until the end of the period of time allotted for doing so (a period of time to which the parties had stipulated). In contrast to the motion filed in *Doe*, Boise Mode's motion did not deprive DPP of its opportunity for discovery.

Third, DPP failed to offer a satisfactory explanation for why the information it sought had not been previously obtained, despite the nearly six months that had elapsed from DPP's receipt of Boise Mode's answers to written discovery. Indeed, under the *Doe* test, the mere fact that DPP could articulate no good reason as to why the information it sought had not "previously been obtained," despite ample opportunity, is alone sufficient to uphold the district court's denial of DPP's Rule 56(f) motion, which was based upon that specific reason. R 452. 480 F.3d at 255 n.3. *See Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260, 1267 (3d Cir. 1991) (evaluation of a Rule 56(f) motion "requires an inquiry into why the party seeking more time has not previously obtained the information").

Similar factual differences render other cases cited by DPP distinguishable. *See, e.g., Ingle*, 439 F.3d at 194-196 (in excessive force action, plaintiff sought videotape evidence that was necessary for a "thorough assessment" of officers' self-serving statements, and plaintiff presented a plausible argument that the evidence she sought may actually exist); *Ward v. United States*, 471 F.2d 667, 679-70 (3d Cir. 1977) (plaintiff alleged negligence and sought evidence regarding operational negligence; government's evidence was relevant only to the issue of

negligence at the planning level, not at the operational negligence; district court erred in disregarding the distinction between the two).[8]

In any event, the district court's decision on DPP's Rule 56(f) motion clearly evidences that the court acted within the bounds of its wide discretion in denying the motion. *Jenkins*, 141 Idaho at 239, 108 P.3d at 386. In its Summary Judgment Order, the district court stated, "a Rule 56(f) motion is committed to the discretion of the court" before then declaring a reasoned basis for denying the motion -- namely, DPP's inability to articulate a reason for seeking discovery of information that it could have attempted to discover much earlier. Tr 6, p. 21, L. 1-11; R 452, L. 6-12. In other words, the court "recognized it had the discretion to deny the motion, articulated the reasons for doing so and exercised reason in making the decision." *Jenkins*, 141 Idaho at 239, 108 P.3d at 386. There was no abuse of discretion.[9]

C. The District Court Correctly Considered and Ruled on Boise Mode's Motion for Reconsideration and Further Consideration.

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[8] As for *XRT, Inc. v. Krellenstein*, 448 F.2d 772 (5th Cir. 1971), that per curiam opinion is a mere four paragraphs long and is, as a result, necessarily bereft of much detail or analysis. Nevertheless, the terse description of the facts reveals that the documents sought in that case, work papers from an audit claimed to be false, was directly relevant to the underlying claim, for fraud in the sale of a business, and to the motion for summary judgment, unlike the information sought by DPP here.

[9] DPP's contention that "considerations of prejudice and delay of proceedings were irrelevant," is belied by the record and, in particular, by DPP's own admissions. When questioned by the district court at the hearing on Boise Mode's motion for summary judgment, counsel for DPP admitted that a grant of the Rule 56(f) Motion would necessarily result in changes to the scheduling order. Tr 3, p. 11, L. 23 - p. 12, L. 6. And DPP's contention that the deadline for opposing motions for summary judgment was almost two months away when it served its subpoenas is plainly wrong. The latest date for hearing motions for summary judgment was December 25, 2010, so the deadline for filing response briefs was, at the latest, December 11, 2010.

DPP argues that the district court erred in considering and ruling upon Boise Mode's Motion for Reconsideration and Further Consideration. In support, DPP asserts that, because it styled its Motion to Amend as a Rule 59(e) motion, the district court was precluded from reconsideration of its Order Granting the Motion to Amend and from further consideration of the arguments Boise Mode presented in support of its motion for summary judgment. DPP's argument is contrary to the law and illogical, for three reasons.

First, although DPP's argument is predicated on the text of Rule 11(a)(2)(B), its reading of that text does not withstand scrutiny. The first sentence of that Rule applies to interlocutory orders, and it provides that a party may move the court to reconsider "*any* interlocutory orders[.]" (Emphasis added.) It is beyond dispute that the district court's March Order granting DPP's Motion to Amend was an interlocutory order. The second sentence of Rule 11(a)(2)(B), which DPP relies upon in support of its argument, plainly applies only to orders "made after entry of final judgment[.]" The purpose of that sentence's prohibition on reconsideration of certain orders made after entry of final judgment is to provide a degree of finality. That purpose is not applicable where, as here, the order entered by the district court pursuant to DPP's self-styled Motion to Amend had the effect of reinstating the case rather than ending it.

Second, even if DPP's interpretation of Rule 11(a)(2)(B) is correct, the district court properly considered DPP's Motion to Amend as both a motion to amend the First Judgment pursuant to Rule 59(e) and as a motion for reconsideration and further consideration of its Summary Judgment Order pursuant to Rule 11(a)(2)(B). Although DPP calls such a decision "inexplicabl[e]," it fails to articulate how or why the court erred in making that determination.

In any event, the district court correctly understood the dual nature of DPP's Motion to Amend. It is undisputed that the Motion to Amend sought a reconsideration of the interlocutory Summary Judgment Order, not merely an amendment or alteration of the First Judgment, and the court's understanding was consistent with the relief sought by DPP: in its Motion to Amend, DPP stated that it "respectfully contends herein that the Court committed legal errors in granting the Plaintiff's motion for summary judgment." R 484. The district court thus correctly looked to the substance of DPP's Motion to Amend and correctly determined that DPP sought reconsideration of the court's interlocutory Summary Judgment Order. *See Ade v. Batten*, 126 Idaho 114, 116, 878 P.2d 813, 815 (Ct. App. 1994) ("Substance controls in determining whether a post-judgment motion is a Rule 59(e) or a Rule 60 motion.") (quoting *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111, n. 3 (7th Cir. 1985)). Indeed, without a reconsideration of the Summary Judgment Order, there would have been no basis on which to alter or amend the First Judgment. Accordingly, Rule 11(a)(2)(B) was the proper vehicle for reconsideration of that interlocutory order. *See Shelton v. Shelton*, 148 Idaho 560, 564 n.4, 225 P.2d 693, 697 (2009) (noting that a motion for reconsideration under Rule 11(a)(2)(B) "applies to orders made before and after the entry of a final judgment, not to the final judgment itself"); *PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) ("Because the order granting summary judgment was filed before the final judgment, it was an interlocutory order.")

The dual nature of the relief sought by DPP in its Motion is further demonstrated by the district court's Order Granting the Motion to Amend, in which the court granted two separate requests: it reversed the interlocutory Summary Judgment Order (which the district court had entered December 27, 2010) and it vacated the First Judgment (which it had entered on January

5, 2011). It was the first ruling, the reversal of the interlocutory Summary Judgment Order, that Boise Mode moved the court to reconsider. R 563.

Third, DPP's argument does not square with the procedural posture of the case or with logic. In its Motion for Reconsideration and/or Further Consideration, Boise Mode moved the district court to address the issues that the court had not yet addressed in its prior rulings. Indeed, Boise Mode stated, in that motion, that it was "not requesting that this Court revisit the legal issues upon which it has already ruled; rather, it requests that this Court rule on the arguments that Boise Mode raised earlier but which the Court has not yet addressed." R 563.

When Boise Mode initially moved for summary judgment, it argued both that Donahoe Pace lacked standing and, in the alternative, that Boise Mode was entitled to summary judgment because, as a matter of law, Donahoe Pace was precluded from asserting a claim for constructive eviction and was not entitled to withhold rent. R 166-178. The district court's Summary Judgment Order addressed only the threshold standing arguments, as did the court's Order Granting Motion to Amend. As a result, at the time Boise Mode filed its Motion for Reconsideration and/or Further Consideration, the district court had neither considered nor ruled upon Boise Mode's alternative substantive arguments.

Indeed, in granting DPP's Motion for Reconsideration, the district court noted that its initial grant of Boise Mode's Motion for Summary Judgment "was predicated on the Court's finding that I.C. § 6-320 applied to the Defendants' constructive eviction and breach claims." R 523, L. 13-15. In other words, the district court had addressed only the threshold issue (the application of Section 6-320), and therefore never considered or ruled upon the other arguments pressed by Boise Mode in support of its motion for summary judgment. In particular, the district

court had not considered or ruled on Boise Mode's arguments: (1) that Donahoe Pace was precluded from asserting a claim for constructive eviction as a matter of law; and (2) that, irrespective of whether Boise Mode breached the Lease as contended, Donahoe Pace was not entitled to withhold rent, as a matter of contract and as a matter of law. It was these substantive arguments on which Boise Mode sought a ruling in the Motion for Reconsideration and/or Further Consideration. The district court properly recognized that those issues remained outstanding and properly considered them upon motion by Boise Mode.

The application of the result DPP urges to the facts of this case illustrate its absurdity. DPP argues, in essence, that the district court was precluded from ruling on the substantive issues raised in Boise Mode's Motion for Summary Judgment because the court initially granted summary judgment based upon a threshold issue. For this reason, even if DPP's interpretation of Rule 11(a)(2)(B) was otherwise convincing -- and it is not -- this demonstrates that DPP's reading of Rule 11(a)(2)(B) is illogical and would lead to the absurd result that, simply by characterizing a motion for reconsideration as a Rule 59(e) motion, a party could avoid any further consideration by the district court of issues raised in a summary judgment motion, even where, as here, the initial judgment was entered based solely upon a threshold issue -- standing.

In short, DPP's argument is illogical and impractical and would lead to an absurd result. The district court did not err, let alone abuse its discretion, in considering and ruling upon a motion from Boise Mode that sought consideration of issues that the court had not previously addressed.

D. The District Court Properly Entered Summary Judgment for Boise Mode on Donahoe Pace's Counterclaims.

Donahoe Pace asserts that the district court abused its discretion in granting Boise Mode's motion for summary judgment on the counterclaims. Donahoe Pace's argument in support is misplaced because it ignores both the Lease and the law.

Donahoe Pace asserted three counterclaims, for: (1) constructive eviction; (2) breach of contract; and (3) breach of the covenant of good faith and fair dealing. For two independent reasons, the district court correctly dismissed these counterclaims.

1. Donahoe Pace Cannot Maintain a Counterclaim for Constructive Eviction as a Matter of Law Because it was Behind on its Rent and Because it Waited Until Long After the Construction had Ceased to Abandon the Premises.

First, Donahoe Pace's counterclaim for constructive eviction fails as a matter of law because a tenant cannot maintain an action for constructive eviction if the tenant has not kept current on rent payments. *See Richard Barton Enterprises, Inc. v. Tsern*, 928 P. 2d 368, 374 (Utah 1996) ("To establish a constructive eviction, however, the lessee had to vacate the entire lease-hold, *and only then* could the lessee withhold rent.") (Emphasis added.)

It is undisputed that Donahoe Pace was behind rent at the time it vacated the premises in November 2009. In fact, Donahoe Pace owed Boise Mode more than $30,000 in back rent and other charges as of November 9, 2009. R 335. Boise Mode had notified Donahoe Pace multiple times that it was substantially in arrears on its rent payments. *E.g.,* R 292, 294, 300, 314-316, 331-333. Defendant cannot, therefore, maintain an action for constructive eviction.

For similar reasons, Defendant's counterclaims for breach of contract and breach of the covenant of good faith and fair dealing, both of which are premised upon an alleged breach of

the covenant of quiet enjoyment and are therefore tied to the defective counterclaim for constructive eviction, also fail as a matter of law. *See* 49 Am. Jur. 2d *Landlord and Tenant* § 492 (2006) ("The payment of all required rent is a condition precedent to the maintenance of an action for breach of the covenant [of quiet enjoyment]."). Notably, this legal principle is consistent with the Lease, which expressly conditions the right of quiet enjoyment upon payment of "rent and other monetary sums due under this Lease and performing the covenants and conditions of this Lease." R 41.

Moreover, a tenant cannot sue for constructive eviction if it waits to abandon the leased premises until after a problem ceases. 49 Am. Jur. 2d *Landlord and Tenant* § 517 (2006) ("However much the tenant may be disturbed in the beneficial enjoyment of the premises by the landlord's wrongful act, there is no constructive eviction if the tenant continues in possession of the premises."); *id.* at § 518 ("The tenant loses the right to abandon the premises if, before carrying out the intention to abandon, the cause for abandonment ceases to exist.").

Here, Defendant based its constructive eviction claim upon the construction activity occurring in the Facility. It is undisputed, however, that the construction ceased more than 5 months before Donahoe Pace vacated the Premises. R 300. For this additional reason, Donahoe Pace's constructive eviction claim is precluded as a matter of law.

Indeed, the entire basis of the counterclaim for constructive eviction -- that Donahoe Pace "was forced to vacate the Premises and obtain alternate suitable space in which to conduct its business" -- is belied by the evidence. Rather than being "forced to vacate" in November, 2009, because the space was unsuitable, Donahoe Pace actually sought to extend the term of its Lease

at least as recently as June 8, 2009, and was actively negotiating rent concessions up through late October, 2009. R 259.[10]

In short, Donahoe Pace was not "forced to vacate." It chose to leave rather than pay its contractual obligations under the Lease, despite substantial financial concessions offered by Boise Mode. It was only when Donahoe Pace's attempts to extract additional concessions from Boise Mode were rejected -- long after construction had ceased -- that it vacated the Premises.

2. Donahoe Pace's Counterclaims Based Upon an Alleged Breach of Contract Fail Because Donahoe Pace Failed to Demonstrate an Essential Element of Those Claims.

Second, even if Donahoe Pace's counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing were not tied to its counterclaim for constructive eviction, they cannot survive summary judgment because Donahoe Pace failed, both at the district court level and on appeal, to demonstrate how any breach by Boise Mode caused it any damage.

It is well-settled that "a failure of proof on an essential element of the opposing party's case makes all other facts immaterial." *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 126 (1988). Likewise, it is beyond cavil that an essential element of a claim for a breach of contract is a showing of damages. For these reasons, even if the inconveniences related to construction actually constituted a breach by Boise Mode, Donahoe Pace's counterclaims fail as a matter of law because it has not pointed in the record to any damages.

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[10] Notably, Donahoe Pace's suggestion to extend the lease came *after* construction had ceased. R 259, 300.

"It is a fundamental premise of contract law that, although a plaintiff may have been legally wronged, the plaintiff cannot recover damages unless he was economically injured." *Fin. Fed. Credit Inc. v. Walter B. Scott & Sons, Inc. (In re Walter B. Scott & Sons, Inc.),* 436 B.R. 582, 594 (Bankr. D. Idaho 2010) (quoting *Hancock v. Idaho Falls Sch. Dist. No. 91*, 2006 U.S. Dist. LEXIS 28755, 2006 WL 1207629 at *4 (D. Idaho May 2, 2006). *See Bergkamp v. Martin*, 114 Idaho 650, 653, 759 P.2d 941, 944 (Ct. App. 1988) (plaintiff legally wronged by breach of contract may not recover damages unless economically injured by the breach).

Donahoe Pace's counterclaim for breach of contract seeks only damages, not injunctive relief or specific performance. R 86-87. Donahoe Pace does not, however, even specify what, if any, economic damages it allegedly suffered as a result of the alleged breach, let alone point to any evidence in the record of such damage. This failure dooms that counterclaim. *Bergkamp*, 114 Idaho at 653, 759 P.2d at 944 ("If he wishes to protect some noneconomic interest in a contract, then he may pursue another remedy such as injunctive relief or specific performance. In this case, however, the tenants have sought only damages.") As a result, Boise Mode is entitled to summary judgment on Donahoe Pace's counterclaim for breach of contract. *Fin. Fed. Credit Inc.*, 436 B.R. at 594 (granting summary judgment on Debtor's counterclaim for breach of contract because "Debtor has not produced evidence that may be considered on summary judgment to show it has been damaged"); *Hancock*, 2006 WL 1207629 at *4 (granting summary judgment to Defendant on plaintiff's breach of contract claim because plaintiff "does not claim, and apparently cannot establish, any economic damages for his breach of contract claims").

Because Donahoe Pace's counterclaim for breach of contract cannot survive summary judgment, neither can its counterclaim for a breach of the implied covenant of good faith and fair

dealing, which also seeks only damages. *See First Security Bank of Idaho v. Gage*, 115 Idaho 172, 176, 765 P.2d 683, 687 (1988) (a breach of the implied covenant of good faith and fair dealing must be based upon an underlying breach of contract). Here, because there is no valid claim for breach of contract by Boise Mode, there is likewise no breach of the covenant of good faith and fair dealing.

In short, each of Donahoe Pace's counterclaims was correctly dismissed by the district court. Based upon the undisputed facts, none is viable as a matter of law.

E. The District Court Properly Entered Summary Judgment for Boise Mode on its Affirmative Claims.

DPP argues that the district court erred in granting summary judgment in favor of Boise Mode on its affirmative claims because "material questions of fact existed as to whether Boise Mode's breaches excused DPP's non-payment of rent." App. Brief at 22. DPP is wrong. The undisputed facts establish that DPP and Timothy Pace breached, respectively, the Lease and the Personal Guarantee, and that, as a matter of law, DPP was not entitled to withhold rent.

The material facts related to Boise Mode's claims against DPP and Timothy Pace are undisputed. In particular, it is undisputed that DPP failed to pay rent and other charges totaling $95,975.96. Indeed, DPP has conceded that it withheld rent. R 588, L. 2; App. Brief at 23. It is undisputed that DPP withheld rent payments beginning no later than December, 2008, and that it ceased paying rent altogether no later than November, 2009, even though the Lease extended through the end of May, 2010. DPP's decision to withhold rent was directly contrary to its obligations under the Lease, and nothing in the Lease or in Idaho law gave DPP any right to withhold rent.

1. Boise Mode Established the Existence of the Lease and Personal Guarantee and the Fact of Breaches of Each by Donahoe Pace and Timothy Pace, Respectively.

"The burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and once those facts are established, the defendant has the burden of pleading and proving affirmative defenses, which legally excuse performance." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 746-47, 9 P.3d 1204, 1212-13 (2000).

It is undisputed that Boise Mode and Donahoe Pace executed the Lease and that Donahoe Pace breached the Lease when it failed to timely pay the rent due in full beginning no later than December, 2008, when it abandoned the premises in November, 2009, and when it subsequently failed to pay any rent through the remaining term of the Lease. It is also undisputed that Boise Mode neither terminated the Lease nor released Donahoe Pace of its continuing obligation to pay rent under the terms of the Lease.

It is undisputed that Timothy Pace executed the Guarantee, pursuant to which he personally guaranteed all of Donahoe Pace's obligations under the Lease, including all monies owed to Boise Mode. It is undisputed that Timothy Pace has failed to pay to Boise Mode the monies owed by Donahoe Pace.

Neither Donahoe Pace nor Timothy Pace can prove any affirmative defense that legally excuses their respective duties of performance under the Lease and the Guarantee. In fact, neither even pled the defense that they argue here -- that their respective breaches were excused by a prior breach by Boise Mode. R 81-84. As a result, the district court properly entered summary judgment on Boise Mode's breach of contract claim.

Under Idaho law, a breach of the implied covenant of good faith and fair dealing must be based upon an underlying breach of contract. *Gage*, 115 Idaho at 176, 765 P.2d at 687.

> The implied covenant of good faith and fair dealing is a covenant implied by law in a party's contract. ... The covenant requires the parties to perform, in good faith, the obligations required by their agreement, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract.

Fox v. Mountain West Elec., Inc., 137 Idaho 703, 52 P.3d 848, 855-56 (2002) (citation omitted).

It is undisputed that Donahoe Pace breached the express terms of the Lease by its failure to timely pay the full amount of rent due and by its abandonment of the premises and failure to continue to pay rent to Boise Mode. By reason of these breaches, Donahoe Pace has deprived Boise Mode of the rights and benefits that arise under the specific terms of the Lease. As a result, for the same reasons that the district court's grant of summary judgment on Boise Mode's claim for breach of contract was correct, so too was its ruling on the implied covenant of good faith and fair dealing. *See id.*

2. DPP's Argument About Boise Mode's Alleged Prior Breach is a Red Herring.

Although DPP acknowledges that it failed to pay the rent due under the Lease and fails to point to any affirmative defense actually pled that could excuse such payment, DPP nonetheless argues that there are material questions of fact as to whether Boise Mode's alleged breaches "excused DPP's non-payment of rent." App. Brief at 22. But even assuming, solely for the sake of argument, that Boise Mode breached the terms of the Lease, and that any such breach was material, it still would not have excused DPP's payment of rent, as a matter of contract and as a matter of law. Put simply, the material question is simply whether DPP was entitled to withhold

rent based upon Boise Mode's alleged breach. That is a question of law. Moreover, it is clear as a matter of law that DPP was not entitled to withhold rent.

In other words, the relevant question for purposes of Boise Mode's claims is whether there exists any genuine issue of material fact about whether DPP was entitled to withhold rent. The undisputed facts in this case establish that the answer to this question is clearly "no," under both the terms of the Lease and Idaho law.

a) DPP's Argument is Foreclosed by the Unambiguous Terms of the Lease, Which Provide that DPP was not Entitled to Withhold Rent Payments.

As a matter of contract, DPP was not entitled to withhold rent. In fact, the Lease clearly and unambiguously provides that DPP could not withhold rent. In particular, Article 4.1 provides:

> Except as specifically provided herein,[11] there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord.

R 42.

DPP does not contend -- nor could it -- that Article 4.1 is unclear or ambiguous. As a result, the application of the Lease, and of Article 4.1, in particular, to these facts is, as the district court properly recognized, a question of law. "When a contract is clear and unambiguous, the interpretation of that contract is a question of law to be decided by the trial court." *Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.* 132 Idaho 295, 303, 971 P.2d 1119, 1127 (1998).

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[11] DPP does not contend -- and there is no basis for doing so -- that any of the specific Lease provisions referred to in Article 4.1 apply here.

As with other contracts, "in deciding the rights of parties under a lease, a court is required to give effect to the unambiguously expressed intent of the parties." 49 Am. Jur. 2d *Landlord and Tenant* § 39 (2006).

The unambiguously expressed intent of the parties here, as evidenced by Article 4.1 of the Lease, is that Donahoe Pace could not deduct, offset, or abate the rent due to Boise Mode under the Lease except as specifically provided therein. DPP does not argue that any specific provision in the Lease excuses DPP's nonpayment of rent, and it could not, because there is no such provision. Under the clear and unambiguous terms of the Lease, therefore, DPP was not entitled to withhold rent. *See American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 402, 94 P.3d 699, 707 (2004) ("the offset provision is unambiguous. When there is no ambiguity, there is no occasion for construction and coverage must be determined using the plain meaning of the words employed."); 49 Am. Jur. 2d *Landlord and Tenant* § 49 (2006) ("In instances where the terms of a lease are unambiguous, they must be enforced as written, and no court can rewrite a lease to provide a better bargain to suit one of the parties.").

As a result, Boise Mode is entitled to summary judgment on its claims against DPP for failure to pay rent and other monies due under the Lease. There is no question of material fact as to whether DPP withheld rent payments, and the Lease must be enforced as written.

b) DPP's Argument is Foreclosed by Idaho Law, Which Permits a Tenant to Withhold Rent Only in Very Limited Circumstances, None of Which Apply Here.

Although the clear terms of the Lease are alone sufficient to reject DPP's argument regarding Boise Mode's claims, those terms are also consistent with Idaho law. A tenant is entitled to withhold rent upon a breach by the landlord only in very limited circumstances. As a

result, even if Article 4.1 of the Lease was not clear or did not otherwise settle the matter in Boise Mode's favor, Idaho law would.

The *only* provision in Idaho law enabling a tenant to withhold rent is a single subsection of Idaho Code § 6-320, which specifies that a tenant may deduct from its rent monies spent on a smoke detector. I.C. § 6-320(a)(6) ("If the landlord or the landlord's assignee fails to install working smoke detectors, the tenant may send written notice by certified mail, return receipt requested, to the landlord or the landlord's assignee that if working smoke detectors are not installed within seventy-two (72) hours of receipt of the letter, the tenant may install smoke detectors and deduct the cost from the tenant's next month's rent.") (Emphasis added.) Of course, that provision has no application here.

Although it could be argued that a breach of the implied warranty of habitability would justify the withholding of rent, there is no allegation of such a breach in this case. Authority from other jurisdictions indicates that a tenant may withhold rent if the landlord breaches the implied warranty of habitability. *See, e.g.,* 49 Am. Jur. 2d *Landlord and Tenant* § 613 (2006) (noting that some jurisdictions "recognize that the landlord warrants that there are no conditions that materially affect the health and safety of tenants" and in such jurisdictions, "where conditions exist that adversely affect the health or safety of tenants . . . abatement of rent is appropriate"). Whether that is the law in Idaho is unclear, but it is immaterial because it is undisputed that Boise Mode did not violate Idaho's implied warranty of habitability.

Indeed, the basis of DPP's argument in support of its Motion to Amend was that it was not required to provide notice under Idaho Code § 6-320 because Boise Mode did not breach the implied warranty of habitability. R 485-487. The district court agreed with that argument. As

the court noted in its March Order, Idaho Code § 6-320 is Idaho's statutory version of the implied warranty of habitability. Even if a landlord's violations of subsections 1-5 of Idaho Code § 6-320(a) did permit a tenant to withhold rent, DPP has argued, and the district court ultimately agreed, that the alleged breaches by Boise Mode in this case are not the kind of breaches that implicate Idaho Code § 6-320. As a result, there was no basis under Idaho law for Donahoe Pace to withhold rent.

This conclusion is consistent with the generally-recognized rule of law that, "[i]n the absence of an eviction, actual or constructive, or a complete destruction of the leasehold, a tenant is bound to discharge the covenant to pay rent unless the tenant is released therefrom by the happening of some event which by the covenants of the lease terminates it." 49 Am. Jur. 2d *Landlord and Tenant* § 593 (2006) (emphasis added). Here, no lease covenant released Donahoe Pace from its obligation to pay rent; in fact, as discussed above, Article 4.1 of the Lease provides just the opposite.

DPP's argument about an alleged breach by Boise Mode thus misses the point, and is, ultimately, a red herring whereby DPP seeks to shift the focus from its conduct in breaching the Lease by failing to pay rent to Boise Mode's alleged breach of the Lease. If DPP argued that Boise Mode had breached the Lease by failing to install a smoke detector, its argument would have some merit. Its argument might also have some traction if DPP were asserting some other breach of Idaho Code § 6-320. However, that is not DPP's argument; in fact, just the opposite. Consequently, the breach alleged by DPP has no impact on DPP's obligation to pay rent, both as a matter of contract and as a matter of law.

For all of these reasons, DPP's argument is misguided. Because it is undisputed that Boise Mode did not violate Idaho Code § 6-320, the issue is not whether Boise Mode was in breach but rather whether DPP was entitled to withhold rent. Under the clear terms of the Lease, as well as Idaho law, DPP had no such right. As a result, the district court correctly concluded that there is no triable issue of fact regarding the merits of Boise Mode's claims against Donahoe Pace, and the court property entered summary judgment for Boise Mode for breach of contract and breach of the implied covenant of good faith and fair dealing.

3. The District Court Correctly Granted Summary Judgment to Boise Mode on its Claim for Breach of Personal Guaranty Against Timothy Pace.

The terms of Defendant Timothy Pace's Personal Guarantee expressly provide that the liabilities owed under the Personal Guarantee "shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned." It is undisputed that DPP withheld rent from Boise Mode, that the monies owed Boise Mode by DPP are liabilities that Timothy Pace guaranteed, and that, despite his Personal Guarantee and demands made upon him by Boise Mode, Timothy Pace has not paid DPP's debts to Boise Mode. Timothy Pace's guarantee obligates him to make good on DPP's obligations to Boise Mode. As a result, Boise Mode is likewise entitled to summary judgment on its claim against Timothy Pace for breach of guarantee.

Where a contract for guaranty is at issue, the rights of the parties are determined strictly from the terms of their agreement. "[W]here the language in the guaranty agreement is unequivocal, the agreement must be interpreted as a matter of law according to the language employed therein." *Valley Bank v. Larson*, 104 Idaho 772, 775-776, 663 P.2d 653, 656-657 (1983) (quoting *McGill v. Idaho Bank & Trust*, 102 Idaho 494, 498, 632 P.2d 683, 687 (1981)).

"Plain and unambiguous terms dictate the intent of the parties and the obligations guaranteed." *CIT Financial Servs. v. Herb's Indoor RV Ctr., Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990). For this reason, as with other contracts, the intent of the parties to a guaranty must be gleaned from the unambiguous language of the guaranty, without recourse to extrinsic evidence of the parties' intent. *Valley Bank*, 104 Idaho at 775, 663 P.2d at 656; *Johnson Equip. v. Nielson*, 108 Idaho 867, 871, 702 P.2d 905, 909 (Ct. App. 1985).

There is no dispute that Donahoe Pace owes Boise Mode money "arising under or relating to the Lease," nor that Donahoe Pace has failed to pay such sums. There is no dispute that the plain and unambiguous terms of the Personal Guarantee provide that Timothy Pace is liable for such debt. As a result, the district court properly entered summary judgment for Boise Mode on its claim against Timothy Pace.

4. Donahoe Pace's Counterclaims Cannot Prevent Summary Judgment Entering in Boise Mode's Favor on its Claims.

Donahoe Pace's counterclaims cannot prevent summary judgment in Boise Mode's favor on its claims, for two reasons. First, as discussed above, those counterclaims lack merit. Second, pursuant to the express terms of both the Lease and the Personal Guarantee, neither Donahoe Pace nor Timothy Pace has the right to offset the amount owed to Boise Mode. The Lease provides, in Article 4.1, that "[e]xcept as specifically provided herein, there shall be no deduction, offset or abatement for any reason of the rent or any money payable by Tenant to Landlord." R 42. The terms of the Personal Guarantee likewise provide that "[t]he Liabilities shall not be reduced by any claim of setoff or counterclaim of Tenant or Undersigned." R 64-65.

DPP relies upon cases addressing general contract principles that establish that a material breach by one party to a contract excuses performance by the other. But DPP missteps in its application of those general contract principles to the specific contract at issue herein, the Lease. Even if a landlord's breach was material, it would not permit the tenant to remain in the premises and withhold rent. DPP essentially argues that a breach by a landlord allows a tenant to "have his cake and eat it too," by occupying the leased premises rent-free. That is not the law. Rather, as set forth above, Idaho law clearly establishes only one situation in which a tenant may continue to occupy the demised premises and withhold any rent, and that situation is indisputably inapplicable here. *See* I.C. § 6-320(a)(6).

F. Boise Mode is Entitled to An Award of Attorney Fees and Costs on Appeal.

Boise Mode is entitled to an award of Attorney Fees on Appeal pursuant to Idaho Code §§ 12-120(3) and 12-121; I.AR. 40; I.A.R. 41; and pursuant to the terms of the Lease and the Personal Guarantee.

Idaho Code § 12-120(3) applies on appeal just as it applies in the district court. *Erickson v. Flynn*, 138 Idaho 430, 438, 64 P.3d 959, 967 (Ct. App. 2003) The district court correctly awarded Boise Mode attorney fees under Idaho Code § 12-120(3) because it was undisputed that Boise Mode filed suit to recover for breach of a commercial contract. *Id.*, 138 Idaho at 436, 64 P.3d at 965. Accordingly, section 12-120(3) entitles Boise Mode to attorney fees on appeal. *See, e.g., Blimka v. My Web Wholesaler, LLC,* 143 Idaho 723, 728-29, 152 P.3d 594, 599-600 (2007).

Boise Mode is also entitled to attorney fees and costs pursuant to the terms of the Lease and the Personal Guarantee. R 46, Article 22.7; R 64-65.

In addition, Boise Mode is entitled to attorney fees on appeal pursuant to Idaho Code § 12-121. A court may award attorney fees under I.C. § 12-121 "when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(1). "An award of attorney fees is appropriate if the law is well-settled and the appellants have made no substantial showing that the district court misapplied the law." *Bowles v. Pro Indiviso, Inc.,* 132 Idaho 371, 377, 973 P.2d 142, 148 (1999) (internal citations omitted). Boise Mode is entitled to attorney fees because, as set forth above, the law in this case is well-settled, and DPP has made no showing that the district court misapplied the law.

V.

CONCLUSION

For each of the foregoing reasons, Boise Mode respectfully submits that the district court did not abuse its discretion in denying DPP's Rule 56(f) motion, it properly considered Boise Mode's Motion for Reconsideration and Further Consideration, and it correctly granted summary judgment in favor of Boise Mode on its claims and on Donahoe Pace's counterclaims. Boise Mode requests that this Court affirm the district court's Second Judgment in all respects and, further, award Boise Mode its attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this _____ day of March, 2012.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of March, 2012, I caused to be served a true copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

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