6-4-2013

Frontier Development Group v. Caravella Appellant's Brief Dckt. 40581

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRONTIER DEVELOPMENT GROUP, LLC Respondent-Plaintiff, v. LOUIS CARAVELLA and PATRICIA CARAVELLA, Appellants-Defendants.	Docket No. 40581-2012 **APPELLANTS' OPENING BRIEF** Appeal from Teton County Case No. CV-09-068
LOUIS CARAVELLA and PATRICIA CARAVELLA, Appellants-Counterclaimants, v. FRONTIER DEVELOPMENT GROUP, LLC, and MICHAEL HORN, Respondents-Counterdefendants.	

Appeal from District Court of the Seventh Judicial District for Teton County
Honorable Gregory W. Moeller, presiding

Attorneys for Appellants:
Frederick J. Hahn, III (ISB No. 4258)
Brent L. Whiting (ISB No. 6601)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 50698
Idaho Falls, Idaho 83405
Telephone: (208) 528-6101
Fax: (208) 528-6109
fjh@racinelaw.net

Attorneys for Respondents:
Michael J. Elia
Craig D. Stacey
MOORE & ELIA, LLP
P.O. Box 6756
Boise, Idaho 83707

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal is taken from the order dismissing Appellants Louis and Patricia Caravella ("Caravellas") counterclaims for fraud and misrepresentation, as contained in the district court's Findings of Fact and Conclusions of Law and order of dismissal, and resulting judgment entered by the District Court for the Seventh Judicial District in Teton County following a full trial, with the court acting as finder of fact. This consolidated lawsuit originated as two separate actions seeking to foreclose mechanics liens filed by Respondent Frontier Development Group, LLC ("FDG") and Yellowstone Do It Center, LLC ("Yellowstone"). Yellowstone is not involved in this appeal. Both actions related to work and materials allegedly provided on the construction of a home (the "Home" or the "Property") for the Caravellas. The Caravellas counter-claimed against FDG and Yellowstone, and joined Respondent Michael Horn ("Horn"), the principal owner/manager of FDG, as a counter-defendant. The Caravellas sought damages for, *inter alia*, breach of contract, construction defects, consumer protection violations, slander of title and fraud. Following trial, the district court dismissed both FDG's and Yellowstone's lien claims, and awarded damages, fees and costs to the Caravellas against FDG in the total amount of $245,525, and against Yellowstone in the amount of $29,865. The district court did not, however, award any damages against Horn personally. (R. Vol. II P. 387.)

The primary issues on appeal address fraud and the personal liability of Horn. Appellants respectfully submit that the district court failed to properly apply its own findings of fact when it

concluded that Caravellas proved only eight of the nine elements of fraud, failing only to prove that Horn *knew* his statements were false. Appellants further assert that the district court also erred in failing to conclude that Horn is personally liable as an agent for an undisclosed principal because he failed to disclose that he was acting for FDG before or at the time he contracted with the Caravellas, and also that Horn is liable as the alter ego of FDG.

B. Course of Proceedings Below

1. FDG filed its Complaint for foreclosure on February 20, 2009. (R. Vol. I, P. 1.)

2. The Caravellas filed their Answer and Counterclaim to FDG's Complaint, and joined Horn as a counterdefendant on April 6, 2009, seeking damages for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the Consumer Protection Act, slander of title, and misrepresentation. (R. Vol. I, P. 5.)

3. Yellowstone filed its Complaint for foreclosure on June 1, 2009.

4. The cases were consolidated on December 1, 2009.

5. Caravellas filed their Answer to Yellowstone's Complaint on January 29, 2010.

6. Caravellas filed an Amended Counterclaim on October 19, 2010, seeking damages from Horn and FDG for breaches of contract, implied covenant of good faith and fair dealing, Consumer Protection Act, and the warranty of habitability, as well as slander of title, fraud and misrepresentation, and civil conspiracy; Caravellas sought damages from Yellowstone for slander of title, civil conspiracy and negligence. (R. Vol. I, P. 122.)

7. Horn/FDG and Yellowstone filed their Answer to the Amended Counterclaim on November 12, 2010, and an Amended Answer to Amended Counterclaim on November 18, 2010. (R. Vol. I, P. 136, 143.)

8. The trial was held December 13-16, 2011, with the court acting as finder of fact.

9. The Court entered Findings of Fact and Conclusions of Law on March 29, 2012. (R. Vol. II, P. 316.)[1]

10. On October 31, 2012, the Court entered an Order and Final Judgment awarding attorney fees, cost and prejudgment interest to the Caravellas against FDG in the total amount of $245,525, and against Yellowstone in the total amount of $29,865. Caravellas' claims against Horn personally were dismissed. (R. Vol. II, P. 368, 386.)

11. Caravellas filed a Notice of Appeal on December 12, 2012. (R. Vol. II, P. 389.)

C. Concise Statement of Facts

In its Findings of Fact and Conclusions of Law, the Court concluded that the Caravellas failed to prove Horn/FDG's knowledge of the falsity of various misrepresentations. However, the district court's own findings of fact and other evidence in the Record demonstrate that the Caravellas in fact proved the scienter element of fraud.

---

[1] Subsequent references to the Findings of Fact and Conclusions of Law will refer to either the "Findings #" or "Conclusions #", and the page number where it can be found in Volume II of the Clerk's Record.

1. Facts Regarding the "Condition, Quality and Value of the Home and Workmanship of the Construction Performed on the Home Before [Caravellas] Purchased It," and Demonstrating Horn's Overall Intent to Misrepresent Facts.

In March, 2008, the Caravellas resided in Ohio and were looking to purchase a home in Teton Valley for their retirement. The Caravellas' real estate agent, Mark Griese, told them about the partially constructed Home (the subject of this lawsuit), which was being listed by another agent in his office, Kathleen Horn. (Findings #26, p. 324-25.) The Home had been under construction by her husband, Michael Horn. The Home was about half completed before the original owner, Richard Myers ("Myers), encountered financial difficulty and declared bankruptcy. (Findings #6-8, p. 319.) Myers' lender, First Horizon Home Loans ("First Horizon"), had initiated foreclosure proceedings on the Property when the Caravellas became interested in purchasing it. (Findings #9, 26, p. 319.)

Horn's dealings with Myers and First Horizon demonstrate his overall fraudulent intent and disregard for the truth. During the time when Horn/FDG was constructing the Home for Myers, Horn/FDG submitted pay requests to First Horizon and was paid a total of $656,173. (Findings #12, p. 320.) With each pay request, Horn certified that the improvements for which payment was sought had been "completed as per the 'Plans and Specifications' . . . except for the 'Change Orders' listed below," and that all bills from the previous draw had been paid. (Findings #10-12, p. 320-21.)

Nevertheless, there were several substantial items of work for which Horn was paid in full after certifying that they were complete, but which were neither installed nor found on the Property when the Caravellas later purchased the Home, (Findings #13-25, p. 321-323), including the following:

a. $10,879 for siding materials, (Findings #13-18, p. 321-22);
b. $5,725 for staining 19,744 linear feet of siding and exterior trim, (*Id.*);
c. $15,000 for 100% of the required soffit and facia, (*Id.*);
d. $3,500 for a propane tank, certified as 100% completed, (Findings #19);
e. $5,000 for steel beams, certified as 100% completed, (Findings #20);
f. $5,000 for fireplace inserts, (Findings #21);
g. $24,000 for a septic tank and well, certified as 100% completed, (Findings #22);
h. $14,397.98 for cabinets, (Findings #23); and
i. $3,500 for roof flashing, certified as 100% completed, (Findings #24).

Thus, more than $87,000 worth of labor or materials were never performed or installed, despite Horn's multiple certifications under oath that the work was completed and his receipt of full payment for such actually incomplete work. Accordingly, the amount of work and materials that were actually completed on the Home was no more than $570,000, and perhaps less.

When construction was halted for Myers in March 2007, significant framing issues remained, including an incomplete roof, exposed door openings, exposed window openings and incomplete structural framing. Thus, the Home was left exposed to snow, rain, sun and wind for at least fourteen months. (Findings #8, p. 319.)

When the Caravellas later became interested in the Property, nearly all of the communications with Horn were conducted via email, all of which were admitted as evidence at trial. (Findings #27, p. 324; Horn testimony, Tr. Vol. I., p. 402, L. 12-21; Def's Exhibits A-E; Pl's Exhibits 9-18.) In their initial contacts, Horn advised the Caravellas that the Property had been "sitting untouched for over a year." (Findings #27.) Horn also advised the Caravellas that First Horizon would not sell the Property for less than $800,000. (*Id.*) Horn represented to the Caravellas "that the value of the property was $1.2 million dollars, with $800,000 worth of construction

completed and the lot having a value of $400,000." (Findings #28.) Caravellas submit that it was impossible for Horn not to have known he had truly performed at most $570,000 worth of construction on the Home, as explained above. Thus, Caravellas were led to believe a substantially greater proportion of construction had been completed towards finishing a $1.2 million project.

Horn also "represented his skills as a builder in 'superlative terms,'" and he told the Caravellas that he was "one of the best builders, if not the best," in Teton Valley. "He told them that regarding home interiors, 'many have tried' to match his interior work, 'but all have failed.'" (Findings #29, p. 324.) In an email sent to the Caravellas on March 21, 2008, Horn represented that "[m]y personal cabinet maker sets up shop in your garage . . . . NO other builder can touch my cabinets and my guy only works for me." (March 21 email, Ex. D, p. 6-7.) At trial, however, Horn admitted that other than two homes he built for himself, one of which was a in Utah, he had only been involved with building eight other homes, all of which were constructed between 2006 and 2009, and that Myers' house was only the third or fourth. (Findings #157-60, p. 346; Tr. Vol I, p. 373, 375-77, 411-12.) Moreover, "Horn testified that he has no actual hands-on construction skills. He has not performed concrete, framing, HVAC, electrical, or any other construction work." (Findings #30, p. 324.) All of the actual work on the homes he "built" was actually performed by subcontractors, (Findings #159, p. 346), which would necessarily include the interior work that "all have failed" to match. Certainly, Horn could not have believed that the best cabinet maker in the area worked solely for someone who only built 8 houses, nor that the subcontractors who actually performed such praiseworthy interior work could somehow not duplicate it in other homes.

Also during their early email correspondence, discussing the cost of construction, "Horn informed the Caravellas that 'Chase's' construction loan rates were the best, but not if the loan was for a 'second' home." (Findings #31, p. 325.) Horn recommended that the Caravellas make false representations to "Chase" bank to secure the best available financing. He advised that the Caravellas should "apply for the loan and initially represent that they were trying to sell their existing home, so that they could obtain the most favorable financing. They were then advised to 'change [their] mind' about selling their first home when the construction was completed." (*Id.*) This type of advice is indicative of Horn's character and general disregard for the truth.[2]

"Mr. Caravella testified that he relied upon Horn's statements concerning his skills as a builder. He testified that Horn's persuasive assurances and statements about his skills and experience caused them to trust him and to rely upon his representations." (Findings #32, p. 325.) In contrast to Horn's bold claims about his skills, the district court found that Horn was incompetent as a general contractor/builder. (Conclusions #47, p. 356, and #44, p. 355.)

The district court found that "[b]ased on the information the Caravellas received from Horn about the home," they offered to purchase the property from Myers in early April, 2008. (Findings #33-34, p. 325.) Less than two hours after the Caravellas accepted a counteroffer from Myers, whose real estate agent was Horn's wife, "Horn recorded a new mechanics lien for $23,000 against the property on behalf of FDG." (Findings #36, p. 325.) According to Horn's testimony, the basis for

---

[2] It should be noted that the Caravellas rejected Horn's advice. They proceeded with construction without a loan, on a cash-available basis.

the lien was a temporary handrail installed in the Home, as well as unpaid old work performed for Myers. (Findings #37, p. 325; Tr. Vol. I, p. 477.) Horn's self-serving assertions are wholly contradicted by his own representations to the Caravellas that the Home had sat untouched for over a year. (Findings #27, p. 324.) The obviously unfounded and wrongful lien[3] was paid in full when Caravellas closed on the Property. (Findings #37, p. 325.)

Pursuant to the purchase and sale agreement with Myers, the Caravellas had the opportunity to inspect the Property and terminate the agreement. (Pl's Exhibit 3, p. 2.) In late April 2008, the Caravellas traveled from Ohio to Teton Valley to meet with Horn and inspect the Property. They reviewed detailed drawings of the house plans with Horn, and met with him on two consecutive days to review and inspect the Property. (Findings #38, p 325-26.) "The Caravellas testified that Horn pointed out just two interior framing/structural issue during his inspection of the property: a missing support post and an inadequate structural beam. Horn told them that the beam would need to be enhanced." (Findings #41, p. 326.) "Horn advised the Caravellas that certain structural, framing and leaking issues needed to be remedied as soon as possible. Mrs. Caravella testified that while she had concerns about water intrusion into the house, Horn minimized the problems and told the Caravellas the Home was 'in good shape,' 'structurally sound' and a 'great house.'" (Findings #42, p. 326; *see also* Findings #69, p. 331.) Horn did not disclose any other deficiencies in the construction of the Home, (Findings #70, p.331), nor did he disclose the fact that he had "modified the written plans for

---

[3] Idaho Code § 45-507 requires filing a lien with 90 days of completion of the last work. Horn's last work was more than a year previous.

the roof without an architect or engineer's involvement." (Findings #108, p. 338.) The modification was ultimately found to be defective and required repair/correction to stop leaking. (*Id.*)

The district court ultimately concluded that in purchasing the Property "the Caravellas relied heavily upon Horn's representations as to the condition of the Home. In lieu of bringing in an outside inspector, Caravellas relied upon the builder [Horn] who would be completing the home to confirm its condition. . . . Horn knew that Caravellas were relying upon his assessment of the home's condition." (Conclusions #37, p. 354.)

2. Additional Facts Regarding Progress and Quality of the Work Performed By Horn/FDG Pursuant to the Contract

The Caravellas and Horn agreed "that the home would be constructed in accordance with the original written plans, subject to Caravellas' requested changes." They further agreed that the Home would be completed in phases, and that a new phase would not be approved until the previous phase was complete and the Caravellas confirmed that they had sufficient funds. The goal of the first phase was to shore up all structural defects and get the exterior enclosed before winter. (Findings #55 and 57, p. 328-29.)

The total contract price for the work authorized by the Caravellas on the Home for the first phase was $88,500, itemized as follows:

a. Exterior stone, structural framing and roof ridge vents: $50,000;
b. Exterior wrap, siding and stain: $35,000;
c. Exterior plumbing and electrical rough-ins: $2,500;
d. Two additional windows: $1,000; and
e. Additional stone on the utility room: no additional cost.

(Findings #61, p. 329; *see also* Findings # 58 and 60.)

At various times throughout the project for Caravellas, as he had done when building for Myers, Horn misrepresented to the Caravellas that major, critical portions of the work had been completed according to the plans when, in fact, such work was neither completed nor did it conform to the plans. Those items include the exterior stone work, (Findings #66, p. 330; #111-12, p. 338-39); the exterior siding, (Findings #72-73, p. 331); garage and "barn" doors, (Findings #82-83, p. 333); and ridge vents and flashing on the roof, (Findings #71, p. 331). Horn also had identified two specific structural framing issues, which he advised needed to be completed "ASAP," but he never had any work done on either structural issue. (Findings #69-70, p. 331.)

Not only did Horn fail to complete these items of contracted work, he billed the Caravellas far in excess of the full contract price for those items. (Findings #65 and 72.) Moreover, the work was found to be replete with serious, latent construction defects, (Findings #395-110, p. 335-38), including some that created "life safety issues," (Findings #103, p. 337).

3. Additional Facts Regarding "the Cost of Materials Used in the Construction"

The district court specifically found that "FDG and *Horn's* prior dealings with Myers and First Horizon also showed a pattern of billing for materials that were never used in constructing the home." (Findings #137, p. 343) (emphasis added). Horn/FDG continued this pattern in billing the Caravellas.

"Horn billed the Caravellas a total of $86,500 . . . for the exterior stonework, fixing the structural framing, and fixing the leaking roof/ridge vents, which are the tasks he had agreed to

complete for $50,000," despite the fact that he never actually completed the work. (Findings #65-71, p. 330-31.)

"Horn billed the Caravellas a total of $74,350 (labor, materials and contractor fee) for siding, which he had agreed to complete for $35,000," again, despite the fact that the work was not even completed, (Findings #72-73, p. 331; #146, p. 344). Horn and Yellowstone billed Caravellas for "nearly six times the amount of soffit material than was necessary to complete the job," (Findings #114 and 137-38, p. 339 and 343); between two and five times the amount necessary for various sizes of window trim, (Findings 116-17); twice as much Tyvek building wrap than was necessary, (Findings #119); and nearly double the amount of cedar siding required for the entire exterior of the Home, (Findings #121, p. 343.) Horn/FDG previously had been paid over $30,000 from First Horizon for these (uninstalled) items. (Findings #13-18, p. 321-22.)

"Horn billed the Caravellas a total of $29,040.89 for installed 'Garage & Barn Doors.' It is undisputed that only the three garage doors were ever installed—the barn doors were never installed. The Court finds that Horn's bill to the Caravellas erroneously included the uninstalled barn doors." (Findings #82, p. 333.) "FDG overbilled the Caravellas by $12,645.89 for the garage doors." (Findings #83, p. 333.)

Even though the agreed price for phase one of the work was only $88,500, (Findings #61, p. 329), the Caravellas ultimately paid Horn/FDG a total of $138,097.24 "for the work that Horn represented had been done on the property," but which was never actually completed. (Findings #126-27, p. 341.) This amount included payments for additional, unauthorized work, including

$19,900 for concrete work that was both defective and poured in the wrong location, (Conclusions #32, p. 353), and the garage and barn doors for which Caravellas were overbilled. The district court expressly found that "[i]n addition to the work that was not authorized, FDG also billed the Caravellas for completion of all the stonework, all the siding, and repair of the structural issues, none of which were actually completed." (Findings #147, p. 345.)

Unbeknownst to the Caravellas, Horn and Yellowstone had agreed that Yellowstone's bill would be paid last. After Caravellas stopped Horn's work—after having already overpaid the contract price— Yellowstone claimed an *additional* amount owed of over $75,000 and recorded a lien on the Property. (Findings #136 and 139, p. 343.) Horn also claimed the Caravellas still owed him about $30,000 in addition to what had already been paid. (Findings #141, p. 344.)

The district court expressly found that "Horn/FDG and Yellowstone should have known that they substantially overbilled the Caravellas for the work and materials actually provided," that they "displayed a cavalier indifference to accepted accounting and inventory control procedures," and that they "demonstrated a reckless disregard for the truth or falsity of their sworn statements" regarding the work and materials actually provided to the Caravellas. (Conclusions #55, p. 358.) The Court further concluded that Horn/FDG "should have known that it had already received full payment from the Caravellas pursuant to its contract with them. . . . Horn/FDG and Yellowstone's actions in recording their liens were clearly reckless, erroneous, and wrongful." (Conclusions #56, p. 358.)

4. Facts Regarding the Operation of FDG

FDG is owned by Horn and his realtor wife, Kathleen. According to Horn's testimony, Kathleen owns a small percentage of ownership in FDG, but has no specific duties and does not participate in the business of FDG. (Findings #156, p. 346.) Horn admitted that "FDG acts only through him, never hired any employees, did not own any assets at the time of trial, and that all of FDG's profits were taken by him as his personal income, although he does not receive any compensation as a manager or employee of FDG." (Findings #157, p. 346.) Horn testified that during the time FDG was involved with the Caravellas' construction, FDG owned two telescopic forklifts, (*id.*; Tr. Vol. II, P. 910, L. 24 through P. 911, L. 10.), but he did not produce any documentation to back up his claim. In his deposition, admitted into evidence as Exhibit DDDD, Horn testified that FDG owned only one forklift and no other assets. (Exhibit DDDD, Horn Deposition, P. 230, L. 11-19.)

Both before and after contracting with the Caravellas to complete the construction of the Home, Horn communicated with the Caravellas primarily by email. (Findings #161, p. 347.) None of the numerous emails make any overt reference to FDG or its assumed business name, Open Range Homes. (*See generally*, Defendants' Exhibits A through E, and H through N.) The only connection to FDG in the emails is in the domain portion of the email address, which was "builder@openrangehomes.com."

The district court believed Horn's testimony that there were signs at his job sites that referred to Open Range Homes. (Findings #45, p. 327.) The court found that "Caravellas should have seen

the signage at the job site" when they visited the Property. There was no evidence, however, regarding where the sign was placed, how big it was, or whether it was even legible after being out in the elements for nearly two years. (*See, generally*, Tr. Vol. I, P. 235-237.) The Caravellas testified that they did not see it. (Findings #45.) Horn did not present any evidence that he affirmatively disclosed his capacity as an agent for FDG or anyone other than himself.

Horn repeatedly represented to the Caravellas that he was the one who had built other homes in the area and that he was the one who would perform work or would hire subcontractors to perform work on their house. For example, he stated:

a. "[Myers] hired *me* to build the house . . .", (March 17 email, Ex. A, p. 3) (emphasis added);

b. "*I* have one 6000 SF house under construction for a Seattle guy . . .", (Id.) (emphasis added);

c. "*I* can fix just about anything with interior design. . . . *My personal cabinet maker* sets up shop in your garage . . . . NO other builder can touch *my* cabinets and *my guy only works for me*." (March 21 email, Ex. D, p. 6-7) (emphases added);

d. "Okay, *my* stone mason can start next week . . . . Once *I* get going, I will send you a drawing of where I think you might want to add more stone." (Ex. 22 p. 2) (emphasis added);

e. "*I* normally bill on or about the 15th of each month . . . ." (May 16 email, Ex. D, bottom paragraph) (emphasis added).

The first overt reference to FDG or Open Range Homes that was ever given to the Caravellas was an invoice from FDG dated May 19, 2008, for construction materials purchased for the Home.

(Ex. 89a). This obviously occurred after the contract was formed and work had begun on the Home. (*See* Ex. N (email regarding delivery of the materials on May 16, 2008).)

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court erred in Concluding that Michael Horn did not know his material representations to the Caravellas were false.

B. Whether the District Court erred in failing to conclude that Horn is personally liable as the agent of an undisclosed principal.

C. Whether the District Court erred in failing to conclude that Horn is personally liable for the judgment entered against FDG on the grounds of alter ego.

III. ATTORNEY FEES ON APPEAL

Caravellas request that this Court award them reasonable attorney fees and costs on appeal pursuant to Idaho Code § 12-120(3) and Idaho Appellate Rules 40 and 41, as it arises from a commercial transaction and contract for services. The Caravellas hired Horn/FDG in a "commercial transaction" to provide construction-related materials and services. Under section 12-120(3), the prevailing party is entitled to attorney fees in an action to recover on a contract "relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction." The Caravellas should be awarded their reasonable attorney fees on appeal because the gravamen of the fraud claims and the claims of Horn's personal liability arose from Horn's efforts to secure the contract to provide construction-related goods and services, his misrepresentations about such contract, and his performance of such contract. This matter is both a "commercial transaction," *Lee*

v. Nickerson, 146 Idaho 5, 189 P.3d 467 (2008), and a contract for services. *See Brian & Christie, Inc. v. Leishman Electric, LLC*, 150 Idaho 22, 244 P.3d 166 (2010) (holding that the economic loss rule does not apply to services contracts, and that electrician's work constitutes services, but fees were not sought on appeal under 12-120(3)). The construction contract is integral to the Caravellas' claims of fraud and to Horn's personal liability.

IV. ARGUMENT

A. STANDARD OF REVIEW

"The party alleging intentional misrepresentation or fraud has the burden of proving the elements of fraud by clear and convincing evidence." *Lindberg v. Roseth*, 137 Idaho 222, 225, 46 P.3d 518, 521 (2002), citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). "When reviewing the trial court's findings of fact in a case in which the facts must be established by clear and convincing evidence, the job of the reviewing court is simply to determine whether there is substantial and competent evidence to sustain the finding." *Sowards v. Rathbun*, 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000); *Lindberg*, 137 Idaho at 225, 46 P.3d at 521; *Carney v. Heinson*, 133 Idaho 275, 985 P.2d 1137 (1999). "This Court exercises free review over the district judge's conclusions of law." *Id.*, citing *Carney v. Heinson*, 133 Idaho 275, 278, 985 P.2d 1137, 1140 (1999), and *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997). "This Court's review of a trial court's decision is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law." *Sowards*, 134 Idaho at 706, 8 P.3d at 1249.

In this case, most of the Caravellas' contentions of error are based on the district court's application of its own findings of fact to the conclusions of law. Therefore, the standard of review is *de novo*. The Caravellas submit that the district court's findings of fact and the Record support conclusions of law that Horn committed fraud and is personally liable to the Caravellas.

B. THE DISTRICT COURT'S FINDINGS DEMONSTRATE THAT CARAVELLAS PROVED THE SCIENTER ELEMENT OF FRAUD

The Caravellas respectfully submit that the district court erred in failing to conclude that they proved all the elements of fraud. The prima facie case of fraud consists of:

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

Faw v. Greenwood, 101 Idaho 387, 389, 613 P.2d 1338, 1340 (1980) (emphasis added). *Accord, e.g., Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (2005); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89, 996 P.2d 303, 308 (2000); and *Zuhlke v. Anderson Buick, Inc.*, 94 Idaho 634, 635, 496 P.2d 95, 96 (1972).

The district court concluded that the Caravellas proved all but the fourth element of fraud, i.e., Horn/FDG's "knowledge of its falsity or ignorance of its truth," with regard to the following categories of misrepresentations:

a. the condition, quality and value of the Home and workmanship of the construction performed on the Home before they purchased it;
b. the progress and quality of work FDG performed on the project pursuant to his contract with them; and

c. the cost of materials used in the construction.

(R. Vol. II, P. 355, Conclusions #42) (emphases added).[4]

The district court's conclusion that the Caravellas failed to prove Horn's knowledge of the falsity of his statements with regard to the three described types of misrepresentations is wholly at odds with the district court's express findings of fact. In other instances, the only reasonable conclusions that can be drawn from the district court's aggregate findings are either that it was impossible for Horn not to have known his representations were false or that he made statements of affirmative fact when he was "ignorant of its truth." Therefore, Caravellas respectfully request that this Court review *de novo* the application of the "found" facts to the Caravellas' fraud claims, and conclude that they have proven the final element of fraud and are entitled to judgment against FDG and Horn personally for fraud.

1. Caravellas Proved that Horn/FDG Knew or Should Have Known that Horn's Statements Regarding the Value, Condition, Quality and Workmanship of the Home Prior to Purchase Were False.

The district court correctly concluded that the Caravellas proved eight elements of fraud arising from Horn/FDG's misrepresentations about "the condition, quality and value of the home and workmanship of the construction performed on the home before they purchased it." (R. Vol. II, P. 355, Conclusion #42(a)) (emphases added). The district court erred, however, in concluding that the

[4] There is no appeal or cross-appeal challenging the district court's conclusion that eight of the nine elements of fraud were proved. Therefore, the only issue on appeal with regard to fraud is whether the Caravellas also proved the scienter, or "speaker's knowledge," element.

Caravellas did not prove the fourth element of fraud, that misrepresentations were knowingly made, because such conclusion is belied by the court's findings of fact.

a. Value of Home

At the outset, Horn's prior dealings with Myers and First Horizon strongly demonstrate his general disregard for the truth and his intent to deceive those for whom he is working. (Findings #137, p. 343.) His early encouragement to the Caravellas that they defraud Chase bank is further evidence of his pattern of deceit. (Findings #31, p. 325.)

It is impossible for Horn not to have known that he had been paid only $656,173 for the initial construction for Myers. It is equally impossible for him not to have known that the numerous, substantial items of work he certified as complete to Myers and First Horizon were never in fact incorporated into the Home's construction, and thus that the actual amount of funds actually used in the Home's construction was *at least* $87,000 less than he was paid, thus no more than $570,000.

When the time came that the Caravellas were interested in the Property, Horn had a personal financial interest in the sale because his wife was the selling real estate agent. (Findings #26, p. 324-25.) Also, it appears that Horn also intended to record his untimely, unfounded lien for $23,000, which was paid out of the closing funds. (Findings #36-37, p. 325.) In furtherance of his financial interests, Horn knowingly mis-represented to the Caravellas numerous times that "$800,000 worth of construction had been completed," nearly one and one-half (1 ½) times the amount he knew had actually been completed. (Findings #28, p. 324.)

"[W]here actual value is known and false statements are knowingly made with intention to deceive, and do deceive the parties to whom they are made, such statements constitute actionable fraud. Such statements are not expressions of opinion but are statements of material facts." *Jordan v. Hunter*, 124 Idaho 899, 907 (Ct. App. 1993), citing *Fox v. Cosgrith*, 66 Idaho 371, 380, 159 P.2d 224, 227 (1945). "Thus, where a speaker gives an opinion when he is aware of facts incompatible with such opinion, the opinion may amount to a false statement of fact if made with the intention of deceiving or misleading." *Id.*, citing *Fox,* 66 Idaho at 380-81, 159 P.2d at 227-28; 37 Am. Jur. 2d *Fraud and Deceit* § 49.

Caravellas respectfully submit that a correct application of the district court's own findings of fact mandates a conclusion that Horn was fully aware that he had misrepresented the actual value of the Property. Therefore, the Caravellas proved the fourth element of fraud with regard to this issue, for which the district court concluded they had proved the other eight elements of fraud. Because the Caravellas relied on Horn's misrepresentations in their decision to purchase the Property, (R. Vol. I, p. 325, Findings #33-34), they should be entitled to a judgment for fraud against both Horn personally and FDG for all damages that flowed from such purchase. Those damages should include the eventual costs of repair, overbilling and attorney fees awarded by the district court against FDG, as well as the difference between Horn's representation of the amount of construction that had been completed and the actual amount of completed construction.

b. Condition & Quality of the Home, and Workmanship of Construction

The district court rightly found that Horn had no actual experience performing *any* aspect of construction work, and the evidence clearly shows that he had very little experience even as a "hands-off" general contractor or construction manager of residential construction. Nevertheless, Horn took it upon himself to inspect the partially-constructed home with the Caravellas, and "Horn knew that Caravellas were relying upon his assessment of the home's condition." (Conclusions #37, p. 354.) In doing so, Horn minimized the problems in the Home and affirmatively represent to the Caravellas that, other than two specific structural issues, the Home was "structurally sound" and "in great shape." (Findings #41-42, p. 326.) The district court concluded that "the Caravellas relied heavily upon Horn's representations as to the condition of the home. In lieu of bringing in an outside inspector, Caravellas relied upon the builder [Horn] who would be completing the home to confirm its condition." (Conclusions #37, p. 354.)

It is obvious from the nearly innumerable construction defects later found in the Home that Horn knew almost nothing about the workmanship, condition or quality of construction. Not having any actual experience or expertise, Horn had no business making affirmative representations to the Caravellas regarding any of those things. This is especially true in light of the fact that Horn had gone to great lengths to convince the Caravellas that he was actually a highly skilled, well respected builder. Of special concern is the fact that Horn, with his lack of training or experience, took it upon himself to redesign a portion of the roof without any architect or engineering input. (Findings #108, p. 338.) Certainly, Horn knew there was at least the potential of a structural issue, but he failed to

disclose this fact to the Caravellas. Rather, he affirmatively represented that the Home was "structurally sound."

The district court erroneously concluded that Horn did not intentionally deceive the Caravellas, but that he was merely incompetent. (Conclusions #44, p. 355.) To establish fraud, however, it is not necessary to show actual deceptive intent. "Circumstances inconsistent with an honest, reasonable belief in the truth of the statements, or indicating a reckless disregard for the truth" are sufficient to establish the scienter element of fraud. *Parker v. Herron*, 30 Idaho 327, 331, 164 P. 1013, 1014 (1917). *See also, e.g., General Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 854, 979 P.2d 1207, 1212 (1999) (in punitive damages context, describing "reckless indifference to the rights of the other party" as fraud).

Decisions from federal courts are in accord with Idaho case law. "[T]he scienter requirement in the tort of misrepresentation generally has been interpreted to include recklessness." *In re Houtman*, 568 F.2d 651, 656 (9th Cir. 1978), citing W. Prosser, Torts, § 701 (4th Ed. 1971). "[I]ntent to deceive may be inferred from the totality of the circumstances, including reckless disregard for the truth." *Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch)*, 237 B.R. 160, 167-68 (9th Cir. BAP 1999). *Accord, National Union Fire Ins. Co., Pa. v. Bonnanzio (In re Bonnanzio)*, 91 F.3d 296, 301 (2d Cir. 1996); *Norris v. First Nat'l Bank (In re Norris)*, 70 F.3d 27, 30 (5th Cir. 1996); *Insurance Co. of N. Am. v. Cohn (In re Cohn)*, 54 F.3d 1108, 1119 (3d Cir. 1995); *In re Miller*, 39 F.3d 301, 305 (11th Cir. 1994); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167 (6th Cir. 1985).

At 37 Am Jur 2d Fraud and Deceit § 120 (2012), it is explained that

> False statements that are made recklessly, without knowing or caring whether they are true or false, will support an action of fraud or deceit. Accordingly, the scienter or intent to deceive requirement, for purposes of a fraud claim, can be satisfied by a showing of recklessness. A representation is 'reckless' if it is made without any knowledge of the truth, or if the person making the representation knows that he or she does not have sufficient information or a basis to support it, or if the maker realizes that he or she does not know whether or not the statement is true.

Id. (footnotes omitted) (emphases added). The pertinent section of the Restatement is consistent, explaining that misrepresentation is fraudulent if the maker "knows that he does not have the basis for his representation that he states or implies." Restatement (Second) of Torts, § 526(c).

Case law from other states consistently hold that an unqualified assertion of a fact susceptible of defendant's knowledge is regarded as an assertion of that knowledge, and is fraudulent if the defendant does not actually have such knowledge. *Kirkpatrick v. Reeves*, 22 N.E. 139 (Ind. 1889); *Smart & Perry Ford Sales, Inc. v. Weaver*, 274 N.E.2d 718 (Ind.App. 1971); *Bullitt v. Farrar*, 43 N.W. 566 (Minn. 1889); *Providence State Bank v. Bohannon*, 426 F.Supp. 886 (E.D.Mo.1977); *Schlossman's v. Niewinski*, 79 A.2d 870 (N.J. 1951); *Manning v. Len Immke Buick, Inc.*, 276 N.E.2d 253 (Ohio App.1971); *Liner v. Armstrong Homes of Bremerton, Inc.*, 579 P.2d 367 (Wash.App. 1978); *First Nat. Bank of Tigerton v. Hackett*, 149 N.W. 703 (Wis. 1914).

37 Am Jur 2d Fraud and Deceit § 122 (2012), explains that matters of opinion, estimate, or judgment can support a finding of fraud. A person is guilty of fraud if the speaker

> makes such a positive and unqualified statement as implies knowledge on the speaker's part, when in fact the speaker has no

> knowledge on the subject . . . if the statement proves to be false . . . [and] where the assertion is in respect of a matter that is definitely ascertainable, as distinguished from a matter of opinion, estimate, or judgment. . . . [A]n opinion may constitute fraud if the speaker knows it is false.

Id. (footnotes omitted). "[A] representation recklessly made, without knowing whether or not it is true, cannot be a statement honestly believed but, on the contrary, is regarded as a false statement knowingly made." 37 Am Jur 2d Fraud and Deceit § 121 (2012).

Even if Horn was not fully aware of the actual poor condition, quality and workmanship of the Home, he knew or should have known that he had no reasonable basis to make any affirmations to the Caravellas regarding such condition, quality or workmanship of the Home. Again, Horn led the Caravellas to believe that he was highly skilled, garnered their trust in his expert opinion, and without any reasonable basis told them that the highly defective construction was in fact "sound" and "in good shape."

The Caravellas proved facts, found by the district court, which demonstrate that Horn either knew his statements were false or, if not, he was "ignoran[t] of its truth." *Faw v. Greenwood*, 101 Idaho at 389, 613 P.2d at 1340. Horn's indifference and reckless disregard for the actual truth requires a conclusion that he made misrepresentations to the Caravellas with "knowledge of its falsity or in ignorance of its truth." *Id.* Therefore, Caravellas should be entitled to a judgment for fraud against both Horn and FDG for all the damages that flowed from their purchase of the Property. Succinctly stated, the district court's findings of fact regarding Horn's representations

concerning his experience and competence as a builder, combined with his statements of fact regarding the quality and extent of construction establish the fourth element of fraud, i.e., scienter.

2. Caravellas Proved that Horn/FDG Knew or Should Have Known That Horn's Statements Regarding the Progress and Quality of the Work Performed Pursuant to the Contract with Them Were False.

The second type of misrepresentation for which the district court concluded the Caravellas had proved "eight out of nine elements of fraud" concerned "the progress and quality of work FDG performed on the project pursuant to *his* contract with them." (R. Vol. II, P. 355, Conclusion #42(b)) (emphasis added).

"Insofar as the element of knowledge is concerned, false representations may be ground for relief where the person making them ought to know . . . or the person has the means of knowing the truth. The rule applies even though the party making the statements does not know that they are false. . . . An innocent misrepresentation of fact may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth." 37 Am Jur 2d *Fraud and Deceit* § 119 (2012) (footnotes omitted).

The district court expressly found that Horn represented to the Caravellas that major, critical portions of the work had been completed according to the plans when, in fact, such work was neither completed nor did it conform to the plans. Those items include the exterior stone work, (Findings #66, p. 330; #111-12, p. 338-39); the exterior siding, (Findings #72-73, p. 331); garage and "barn" doors, (Findings #82-83, p. 333); and ridge vents and flashing on the roof, (Findings #71, p. 331). Horn billed the Caravellas for more than the full agreed contract price for those items, which he

knew, or ought to have known, were not actually even completed. Certainly, Horn had the means of knowing or learning the truth, as the general contractor. Unlike the Caravellas, who were in Ohio and relying on Horn to perform the contract honestly, Horn lived only a few miles away from the jobsite. Horn was obligated to confirm that the work was completed before affirmatively representing to the Caravellas that it was complete, and an equal or greater obligation to confirm its completion before billing the Caravellas for the work.

With regard to the slander of title claim, the district court expressly found that "Horn/FDG and Yellowstone should have known that they substantially overbilled the Caravellas for the work and materials actually provided," that they "displayed a cavalier indifference to accepted accounting and inventory control procedures," and that they "demonstrated a reckless disregard for the truth or falsity of their sworn statements" regarding the work and materials actually provided to the Caravellas. (Conclusions #55, p. 358.) Horn ought to have known that the work was actually incomplete, but misrepresented that fact to the Caravellas. As a result, the Caravellas continued to make payments to Horn, and even paid more than the contract price.

The Caravellas respectfully submit that they should be awarded damages for fraud against both Horn and FDG, which should include their costs to repair and complete the work contracted by Horn, as well as the amounts they paid in excess of the contract price.

3. Horn/FDG Knew or Should Have Known He Was Overbilling Caravellas for the Authorized Work Performed on the Home.

The third type of misrepresentation for which the district court concluded the Caravellas had proved "eight out of nine elements of fraud" concerned "the cost of materials used in the

construction." (R. Vol. II, P. 355, Conclusion #42(c).) This issue raises the same legal principals addressed above.

The total contract price was only $88,500, but the Caravellas were billed, and paid, $138,097.24. (Findings #131, p. 342.) Even if the unauthorized concrete ($19,900), garage doors ($16,395), and other allowed charges were added to the contract price, the very most the Caravellas possibly owed to Horn/FDG was $126,646.79. (*Id.*) Again, the Court expressly concluded that "Horn/FDG and Yellowstone should have known that they substantially overbilled the Caravellas for the work and materials actually provided," that they "displayed a cavalier indifference to accepted accounting and inventory control procedures," and that they "demonstrated a reckless disregard for the truth or falsity of their sworn statements" regarding the work and materials actually provided to the Caravellas. (Conclusions #55, p. 358.) The fact that Horn/FDG recorded a mechanics lien for an additional amount claimed due in excess of $105,000 further demonstrates Horn's utter disregard for the truth regarding his billing. Additionally, the district court specifically found that "FDG and Horn's prior dealings with Myers and First Horizon also showed a pattern of billing for materials that were never used in constructing the home." (Findings #137, p. 343.) It was impossible for Horn not to have known that Caravellas were being billed over $243,000 for work he had agreed to perform for $88,500, an increase of nearly three times the contract price.

The referenced findings of facts and related conclusions of law are wholly inconsistent with a conclusion that the Caravellas failed to prove the scienter element of fraud, i.e., Horn's "knowledge of its falsity or ignorance of its truth," with regard to overbilling. *Faw*, 101 Idaho at 389, 613 P.2d

at 1340. "Circumstances inconsistent with an honest, reasonable belief in the truth of the statements, *or indicating a reckless disregard for the truth*" are sufficient to establish the scienter element of fraud. *Parker*, 30 Idaho at 331, 164 P. at 1014 (emphasis added). *See also, e.g., General Auto Parts Co.*, 132 Idaho at 854, 979 P.2d at 1212 (in punitive damages context, describing "reckless indifference to the rights of the other party" as fraud). Certainly, Horn's prior conduct with respect to Myers and First Horizon, which the district court expressly found to show "a pattern of billing for materials that were never used," (Findings #137, p. 343), is evidence of motive and intent. *State v. Sanchez*, 94 Idaho 125, 128, 483 P.2d 173, 176 (1971).

Caravellas respectfully request that this Court reverse the district court's dismissal of the fraud claims and order entry of a judgment in favor of the Caravellas for all damages flowing from Horn's fraudulent conduct. Ultimately, Horn's fraudulent conduct gave rise to all of the Caravellas' damages incurred as a result of their purchase of the Home and hiring of Horn to complete the construction.

C. HORN IS PERSONALLY LIABLE BECAUSE HE ENTERED THE CONTRACT WITH CARAVELLAS AS THE AGENT FOR AN UNDISCLOSED PRINCIPAL

The district court believed that Horn's personal liability was "admittedly a close question" that the Court "wrestled with for some time." (Findings #163, p. 347.) Nevertheless, the district court concluded that Horn did not "actively [attempt] to conceal FDG's role" from the Caravellas, (Findings #163, p. 347; Conclusions #59, p. 359), and that "the e-mail address (used on all correspondence), the signage on the job site, and the letterhead on the invoices, adequately evidenced FDG's role in this transaction." (*Id.*)

"It is a basic principle that an agent who enters into a contract on behalf of a corporation, but who neither discloses his agency nor the existence of that corporation to the third party, is personally liable to the third party." *McCluskey Commissary, Inc. v. Sullivan*, 96 Idaho 91, 93, 524 P.2d 1063, 1065 (1974). "A principal is 'disclosed' if, at the time of making the contract in question, the other party to it has notice that the agent is acting for a principal and of the principal's identity." *General Motors Acceptance Corp. v. Turner Ins. Agency, Inc.*, 96 Idaho 691, 697, 535 P.2d 664, 670 (1975) (emphasis added). The Court of Appeals applied the holding from *General Motors* to conclude that "[a]n agent contracting with someone else is liable as a party to the contract unless he discloses, *at or before* the time of entering into the contract, the agency relationship and the identity of the principal." *Western Seeds v. Bartu*, 109 Idaho 70, 71, 704 P.2d 974, 975 (Ct. App. 1985) (emphasis added).[5]

According to the Restatement (Third) of Agency, both the agent and his principal are liable parties to the contract if the principal is not disclosed before the contract is made:

> When an agent acting with actual authority makes a contract on behalf of an undisclosed principal,
>
> > (1) unless excluded by the contract, the principal is a party to the contract;
> > (2) the agent and the third party are parties to the contract; and
> > (3) the principal, if a party to the contract, and the third party have the same rights, liabilities, and defenses against each

---

[5] "Similarly, a person contracting with another for a partially disclosed principal is liable as a party to the contract." *Western Seeds*, 109 Idaho at 71, 704 P.2d at 975, citing *Keller Lorenz Co. v. Insurance Assoc. Corp.*, 98 Idaho 678, 570 P.2d 1366 (1977).

> other as if the principal made the contract personally, subject to §§ 6.05-6.09.

Restatement (Third) Agency, § 6.03.

Importantly, the burden of showing that the principal was disclosed before the agreement was made is on the party asserting the existence of the agency, i.e., Horn. *Marco Distributing, Inc. v. Biehl*, 97 Idaho 853, 858, 555 P.2d 393, 398 (1976). *See Keller Lorenz Co. v. Ins. Assocs. Corp.*, 98 Idaho 678, 681, 570 P.2d 1366, 1369 (Idaho 1977) (a party's role as agent is an affirmative defense that must be proved by the party asserting the agency).

The Caravellas asserted in their counterclaim their understanding that they had contracted with Horn personally, and not with FDG or any other company. (R. Vol. I, P. 122-35.) Horn did not assert any affirmative defense that he had been acting as an agent for FDG. In Finding of Fact #45, the Court wrote:

> Caravellas testified that they believed they were dealing with Horn personally, not on behalf of an entity, such as FDG. However, Horn testified credibly that his e-mail address and signage at the home site provided notice from the start that they were dealing with "Frontier Development, LLC dba Open Range Homes." Later, Caravellas sent at least five payments to Horn via checks made payable to "Frontier Development Group, LLC."

(R. Vol. I, P. 327.) The district court also found that "even if Caravellas did not initially know, they essentially acquiesced to the arrangement by continuing to make payments directly to FDG, rather than to Horn." (Findings #162, p. 347; Conclusions #59, p. 359.) The district court further found that the Caravellas "could have terminated the relationship early on because the project was clearly

intended to be divided into separate and distinct phases." (Findings #162, p. 347.) In its corresponding Conclusions of Law #59, the district court wrote:

> The names of "Frontier Development Group" and/or "Open Range Homes" were present on every correspondence, invoice, and the signage at the job site. The Court concludes that there was no evidence that Horn attempted to conceal the LLC from Caravellas. When Caravellas began making payments, they did so by making checks directly payable to FDG or Open Range Homes without complaint, reservation, or objection. The Court must conclude that Caravellas acquiesced to the fact they were dealing with an entity, and not Horn personally.

(R. Vol. II, P. 359) (emphasis added).

The district court's findings and conclusions illustrate two related, fundamental errors in the its analysis. First, the court appears to have placed the burden of proof on the Caravellas with regard to Horn's un-plead affirmative defense. When a party asserts that he is not personally liable because he acted only as an agent for a principal, such as a corporation, he bears the burden to prove such facts as an affirmative defense. *Keller Lorenz Co. v. Ins. Assocs. Corp.*, 98 Idaho 678, 681, 570 P.2d 1366, 1369 (Idaho 1977). *Accord, Welch v. Laraway*, 2010 Bankr. LEXIS 3041, at 10 (Bankr. D. Idaho Sept. 13, 2010) (Attached hereto as Addendum 1) ("The party asserting agency as a defense to personal liability on a contract bears the burden of showing that the principal was adequately disclosed. "). Since the burden of proof was on Horn, not the Caravellas, the lack of evidence that Horn attempted to *conceal* the company's existence is not the evidentiary standard. Rather, Horn was required to prove that he made an affirmative effort to disclose the company's existence "*at or before* the time of entering into the contract." *Western Seeds*, 109 Idaho at 71, 704 P.2d at 975.

An official comment to Restatement (Third) Agency § 6.03 explains that it is incumbent on the agent to provide sufficient notice of his agency relationship, and it is not a third party's duty to discover the principal's existence:

> A principal is undisclosed if, at the time a contract is made, the third party with whom the agent deals has no notice that the agent is acting on behalf of a principal. It is a question of fact whether the third party has received sufficient notice that the contract is made with an agent who represents a principal and sufficient notice of that principal's identity. The third party is not subject to a duty to discover the principal's existence or identity; the responsibility is the agent's if the agent wishes to avoid personal liability on the contract. However, a third party may have sufficient notice of the principal's existence or identity from sources apart from the agent.

Id. at cmt. 3 (emphases added).

There was no evidence that Horn made any effort to inform the Caravellas that they were dealing with FDG, as opposed to him personally. "[T]he managing officer of a corporation, even though acting for the company, becomes liable as a principal where he deals with one ignorant of the company's existence and of his relation to it and fails to inform the latter of the facts." *Interlode Constructors v. Bryant*, 132 Idaho 443, 446-447, 974 P.2d 89, 93 (Ct. App. 1999), citing *Marco Distributing, Inc. v. Biehl*, 97 Idaho 853, 858, 555 P.2d 393, 398 (1976). "It is a basic principle that an agent who enters into a contract on behalf of a corporation, but who neither discloses his agency nor the existence of the corporation to the third party, becomes personally liable to that third party." *Id.*, citing *McCluskey Commisary, Inc.*, 96 Idaho at 93, 524 P.2d at 1065. Horn's failure to produce evidence of any affirmative disclosure to the Caravellas that he was acting as an agent for FDG, as well as the lack of any evidence that the Caravellas were actually aware of such fact, requires a

conclusion that Horn should be treated as a party to the construction contract, and is therefore liable for his and FDG's breach of the contract.

The second error in the court's findings and conclusions is that the identification of Frontier Development Group, LLC, on the invoices *after work had begun*, cured the prior non-disclosure and relieved Horn from all liability. The authorities are clear, however, that in order to avoid liability, an agent for a principal must disclose the identity of the principal "*at or before* the time of entering into the contract." *Western Seeds*, 109 Idaho at 71, 704 P.2d at 975. Since the invoices paid by the Caravellas obviously were delivered only after the fact, they cannot serve as a basis for relieving Horn from liability.

The Court's reference to the parties' intention that the construction be performed in "separate and distinct phases," thus allowing the Caravellas to terminate the relationship early in the project, (Findings #162, p. 347), fails to account for the fact that Horn never actually completed even the first phase of the construction. Even if the contract is divisible by phases, Horn would be personally liable for at least the first phase. In this particular instance, all of the Caravellas' damages flow from Horn's performance, or failure of performance, with regard to the first phase. Thus, even under the district court's reasoning, Horn should be found liable.

Horn admitted in his testimony that except for a single face-to-face meeting with the Caravellas at the Property before they purchased the Home, all of their communications prior to beginning work on the contract were done through email. (Tr. Vol. I, P. 402, L. 12-21.) None of the numerous emails make any reference to FDG. (*See generally*, Defendants' Exhibits A through

E, and H through N.) The only connection to FDG is the inclusion of its trade name in the domain portion of the email address: "builder@openrangehomes.com." The district court's reliance on the email domain name should not stand as sufficient evidence to establish notice that a person using such email address is acting as an agent. Otherwise, it could be presumed that anyone receiving an email from a person using an "msn.com" email address, or "cableone.net," "yahoo.com," or other common email domain names, is on notice that the person sending the email is an agent for Microsoft, Cable One, or Yahoo. Certainly, there are many, many domain names less familiar than those listed. Obviously, the vast majority of such users have no agency relationship with those companies. It is unreasonable and overly burdensome to charge an email recipient with knowledge or a duty to distinguish between actual agents and other users of an email domain name, and is inconsistent with the general principles cited above that place the burden of disclosure on the agent. It is unreasonable to.

Regarding the in-person visit, Horn did not present any evidence that he affirmatively disclosed that he was acting on behalf of any company rather than himself, although he testified that there were signs on the Property identifying "Open Range Homes" as the builder. (Tr. Vol. I, P. 235-237.) There was no evidence, however, regarding where the sign was placed, how big it was, or whether it was even legible after purportedly being in place for nearly two years. (*Id.*) The Caravellas testified that they did not see the sign. (Findings #45, p. 327.)

In *Welch*, the plaintiffs had contacted a general contractor, Laraway, about building a home for them. 2010 Bankr. LEXIS 3041, at 2. The written construction contract identified the

contracting builder as "Diamond Ridge Construction," Laraway's company. Attached to the contract were plans and specifications prepared by "Diamond Ridge Construction, Inc." *Id.* When both Diamond Ridge Construction, Inc., and Laraway, individually, filed bankruptcy, the plaintiff homeowners brought an action in bankruptcy court against Laraway for personal liability arising from alleged breaches of the construction contract. Judge Meyers concluded that the reference to Diamond Ridge Construction, Inc., in the plans and specifications was insufficient to establish adequate notice to the homeowners. *Id.* at 11-12. The court explained: "The burden was on Laraway to conspicuously inform the Welches that the contracting party was Diamond Ridge Construction, Inc. if he desired to invoke the liability protections afforded by the corporate structure." *Id.* at 12, citing *Interlode Constructors*, 132 Idaho 443, 974 P.2d at 92-93.

The court in *Welch* also considered evidence found outside the construction contract, including a "Client Introduction Packet," which referenced the company, given to the homeowners at their first meeting, and a contractors' license hanging on the wall of Laraway's office, but there was no evidence that the homeowners actually saw or understood those references to the company. The court concluded that the evidence was insufficient to establish notice that the contracting party was the corporation: "The onus was on Laraway to clearly indicate to the Welches, before or at the time of the Contract, that he was acting as the agent of Diamond Ridge Construction, Inc. . . . His failure to do so left him exposed to personal liability on the Contract. *Id.*at 12-13, citing *Interlode Constructors*, 132 Idaho 443, 974 P.2d at 92-93.

This case is strikingly similar to *Welch*. There is no evidence that Horn affirmatively informed the Caravellas that he was acting for FDG. The only evidence from which the Caravellas possibly could have inferred that Horn was acting for FDG was the purported sign and the last half of Horn's email address. The Caravellas testified that they did not see the sign, and there is no evidence that the email domain name was noticed by the Caravellas or that they comprehended Horn was acting on behalf of "Open Range Homes," before work began on the project. There is no material difference between the signs and references to the company in *Welch*, and the claimed sign and email address in this case. Parroting, Judge Meyers, "The onus was on [Horn] to clearly indicate to the [Caravellas], before or at the time of the Contract, that he was acting as the agent of "Frontier Development Group, LLC." Horn should therefore be held personally liable on the contract.

D. THE DISTRICT COURT SHOULD HAVE CONCLUDED THAT FDG WAS AN "ALTER EGO" OF HORN AND "PIERCED THE CORPORATE VEIL"

The district court found that Horn "may not have rigorously followed all formalities one working through an entity should generally follow," but concluded that "his conduct was sufficient to merit the protection afforded to the participants in a limited liability company." (Findings #163, p. 347; Conclusions #59, p. 359.) The district court reasoned that "[a]lthough Horn had complete control over the actions and finances of FDG, and treated its profits as his own personal income, this alone does not invalidate the LLC." (Conclusions #59, p. 359.) The only facts relied upon by the court in support of its conclusion that Horn should not be held personally liable were Horn's

unsupported testimony that FDG owned two forklifts[6] during the Caravella project and that the corporate or assumed business names were on signage, correspondence and invoices. (*Id.*)

"It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of each case." *Surety Life Ins. Co. v. Rose Chapel Mortuary*, 95 Idaho 599, 601, 514 P.2d 594, 596 (1973). In order for a corporation to be an alter ego of an individual, there must be (1) "a unity of interest and ownership to a degree that the separate personalities of the corporation and individual no longer exist" and (2) "if the acts are treated as acts of the corporation an inequitable result would follow" or would "sanction a fraud or promote injustice." *Vanderford Co., Inc. v. Primary Residential Mortgage, Inc.*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007); *Maroun v. Wyreless Sys.*, 141 Idaho 604, 616 (2005); *Sirius LC v. Erickson*, 150 Idaho 80, 85, 244 P.3d 224, 229 (2010).

The Idaho Uniform Limited Liability Company Act, enacted in 2008, is based on the Revised Uniform Limited Liability Company Act ("RULLCA"). Idaho Code § 30-6-101. The Caravellas recognize that Idaho § Code 30-6-304(2) specifically relieves LLCs from the requirement to "observe any particular formalities relating to the exercise of its powers or management of its activities" in order to avoid "imposing liability on the members or managers for the debts, obligations or other

---

[6] Horn did not identify any other FDG assets in his testimony at trial. (Tr. Vol. II, P. 910, L. 24 through P. 911, L. 10.) In Horn's deposition testimony, admitted into evidence as Exhibit DDDD, he claimed that FDG owned only one forklift, not two, and no other assets. (Exhibit DDDD, Horn Deposition, P. 230, L. 11-19.)

liabilities of the company." *Id.* However, the statute eliminates only *one* of the factors in the "piercing" analysis with regard to LLCs.

Even though *corporate formalities* are not required, the members of an LLC must still maintain the company's separate economic identity. The official comment for subsection (b) of the RULLCA— subsection (2) in Idaho Code § 30-6-304— explains that "[t]he doctrine of 'piercing the corporate veil' is well-established, and courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies." Idaho Code § 30-6-304(2), official cmt. to subsection (b) [(2)] (2008) (emphases added). "This subsection **does not preclude consideration of another key piercing factor** -- disregard by an entity's owners of the **entity's economic separateness** from the owners." *Id.* The official comment provided the following example:

> EXAMPLE: The sole owner of a limited liability company uses a car titled in the company's name for personal purposes and writes checks on the company's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not subsection (b) [(2)] formalities.

The district court expressly found, based on Horn's admissions at trial, that "FDG acts only through him, never hired any employees, did not own any assets at the time of trial, and that all of FDG's profits were taken by him as his personal income, although he does not receive any compensation as a manager or employee of FDG." (Findings #157, p. 346.) In his testimony, Horn explained:

> A- At the time of this project, Frontier Development Group was 50 percent to my wife, Kathleen Horn, and 50 percent to myself.
>
> Q- Did she have any involvement --

A- Absolutely none.

Q- Did you pay yourself as the managing member from Frontier Development?

A- I did not receive a salary per se. You'd have to clarify your question.

Q- How did you -- did you cut separate checks from Frontier Development to pay yourself or did you just take dividends or how did you accomplish it?

A- I didn't really take an income out of the company itself. It was just income coming in and then -- no, I didn't pay myself out of Frontier Development Group, no.

Q- So you didn't cut a separate managing member's salary or anything like that? It's just whatever money came in and was left over at the end you -- was your income?

A- Yes.

(Tr. Vol. II, P. 910, L. 1-23) (emphasis added). Horn further testified that the only way Frontier Development could act was through him. (Tr. Vol. II, P. 912, L. 16-18; P. 913, L. 1-3.)

The Caravellas submit that Horn's absolute control over FDG, combined with treating FDG's income as his own personal income demonstrates a unity of interest sufficient to satisfy the first element of the alter ego analysis. While he did not write checks from the business account to pay for personal expenses, he also admitted that FDG did not give him any paychecks or dividends. The money simply was his to use. There simply is no material difference between spending a company's money using its checkbook and spending the company's cash for personal uses. *See* Idaho Code § 30-6-304(2), official cmt. to subsection (b) [(2)] (2008) (quoted above).

Under-capitalization is another influencing factor in the "piercing" analysis. *Ross v. Coleman Co.*, 114 Idaho 817, 845, 761 P.2d 1169, 1197 (1988). Considering the fact that Horn/FDG was engaged in the business of building large, high-end homes worth well over a million dollars each, it cannot be reasonably concluded that ownership of one or, at most, two forklifts is adequate capitalization of the company. Indeed, there was no evidence regarding the age, type, size or value of the forklifts. Caravellas respectfully submit that there was insufficient evidence to support the district court's conclusion that FDG's assets were adequate capital under the circumstances to avoid piercing the corporate veil.

The district court concluded that "[t]he fact that Horn has now allegedly left FDG with no means of satisfying a judgment against it does create serious equitable concerns for the Court ...." (Conclusions #60, p. 359) (emphasis added). This appears to be a conclusion that the second prong of the alter ego analysis was satisfied. In addition, all of the acts for which FDG has been held liable to the Caravellas were undertaken by, or under the direction and control of Horn. Horn operated FDG in such a reckless manner that he wholly ignored the actual contracts he had made with the Caravellas, and earlier with Myers/First Horizon. Horn was the person who misrepresented material facts to the Caravellas about the quality, value and condition of the Home, about the progress of the work, and who overbilled the Caravellas well in excess of both the contract price and the work actually completed. Horn was the person who wrongfully filed the mechanics lien for which the Caravellas were awarded substantial damages. Horn took the company's profits as his own income, and it is only fitting that he should also take the company's losses and liabilities as his own as well.

Certainly, in inequitable result, which would "sanction a fraud or promote injustice," *Maroun*, 141 Idaho at 616, will follow if Horn is allowed to engage in such damaging behavior and be allowed to hide behind such a thin corporate veil.

As for the Caravellas' subsequent knowledge regarding their dealings with FDG, rather than Horn personally, such knowledge is immaterial to the "piercing" analysis. The case law certainly does not deny a "piercing" claim simply because the parties were aware that they were dealing with an LLC. Moreover, the Caravellas submit that the Court's finding that the Caravellas should have known they were dealing with an LLC is erroneous, as it is not supported by substantial evidence. The "piercing" analysis accounts for *Horn*'s actions or inactions in operating his company, not the extent of the Caravellas' knowledge of the company's existence.

In *Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc.*, 107 Idaho 286, 293-294, 688 P.2d 1191, 1198-99 (Ct. App. 1984), the Court of Appeals reviewed and remanded a district court's conclusion that a majority shareholder was not liable as an alter ego. The Court of Appeals' reasoning demonstrates that facts very similar to Horn's actions are sufficient to establish liability as an alter ego:

> As to the [unity of interest] requirement, we believe there is ample, undisputed evidence demonstrating unity of interest and ownership. For example, Ryan's own affidavit dated August 22, 1979 repeatedly refers to transactions entered into between himself and DCI as if Clarendon and he were one and the same personality. Also, the counterclaim of Clarendon and Walker, asserting Clarendon's right to recover from DCI on certain agreements, makes repeated references to agreements actually entered into by DCI and Ryan. It is in respect to these same agreements that DCI contends Clarendon was but the alter ego of Ryan. Ryan's deposition is part of the record here. In it,

> Ryan was asked about his ownership of Clarendon stock and when he became a director or officer. He stated, "I always had power of attorney on everyone and was the major shareholder and the managing director at all times of this project. So let's get it on the record, I was the boss." Throughout his deposition Ryan consistently takes the position that he owns the real estate standing in Clarendon's name. We are of the opinion that there is sufficient, undisputed evidence in the record showing a complete unity of interest and ownership between Ryan and Clarendon, eradicating their separate personalities so far as the transactions here are concerned. As to the [inequitable result] requirement, we further hold that to treat Ryan's promises and agreements in respect to the purchases here involved as if they were not binding on Clarendon would result in the injustice of forcing the district court to provide only partial, ineffectual relief and would greatly extend the litigation necessary to resolve the important issues in this dispute, exalting form over substance.

Deer Creek, Inc. v. Clarendon Hot Springs Ranch, Inc., 107 Idaho 286, 293-294, 688 P.2d 1191, 1198-99 (Ct. App. 1984).

Horn was in complete and sole control of FDG. Horn acted as though he personally owned all of FDG's income. In all of Horn's interactions with the Caravellas, particularly before they hired him to complete the construction of the Home, he referred to himself as the one who built the homes, hired cabinet makers, designed interiors and who would complete the work for them. Horn made no reference to FDG until he sent them a billing statement. As a practical matter, FDG the company did nothing for the Caravellas, and was incapable of doing anything for them, except send them a bill.

Caravellas respectfully ask this Court to conclude that FDG is the alter ego of Horn, and Horn is therefore liable for the judgment entered against FDG.

V. CONCLUSION

In this appeal, the Caravellas needed only to demonstrate that the district court's express findings of fact should have led to and support the conclusion that Horn knew his representations to the Caravellas were false or that he made such misrepresentations in ignorance of the actual truth. All the other elements of fraud were found by the district court, and such conclusions have not been challenged on appeal. The Caravellas submit that the express findings of fact, as well as additional supporting evidence, demonstrate Horn's knowledge of his misrepresentations and/or his ignorance of the actual truth. Therefore, the district court's conclusion that Horn is not liable for fraud should be reversed, and damages awarded to the Caravellas.

Further, the evidence demonstrates that Horn entered into the contract without making any effort to disclose to the Caravellas that he was acting on behalf of anyone but himself. As an agent for an undisclosed principal, Horn is liable for breach of contract to the same extent as the principal. Therefore, Horn is liable to the Caravellas for all their breach of contract damages, and consequently, for their attorney fees. Finally, the evidence clearly demonstrates that Horn treated FDG as his alter ego, and should be personally liable for all of FDG's debts and liabilities to the Caravellas. The district court's failure to find Horn personally liable should be reversed and a Judgment entered against Horn personally for all damages, attorney fees and costs awarded against FDG.

DATED this 31st day of May, 2013.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: Carol Tippi Volyn for:
FREDERICK J. HAHN, III

By: Carol Tippi Volyn for:
BRENT L. WHITING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of May, 2013, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Michael J. Elia
Craig D. Stacey
MOORE & ELIA, LLP
P.O. Box 6756
Boise, Idaho 83707

(✓) *First Class Mail*
( ) *Hand Delivery*
( ) *Facsimile (208) 336-7031*
( ) *Via Overnight Mail*

Carol Tippi Volyn for:
BRENT L. WHITING

ADDENDUM 1

WENDELL WELCH and LINDA WELCH, Plaintiffs, v. LAWRENCE CHRISTOPHER LARAWAY, JR., Defendant.

Case No. 09-01831-TLM, Chapter 7, Adv. No. 09-06079-TLM

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF IDAHO

2010 Bankr. LEXIS 3041

September 13, 2010, Decided
September 13, 2010, Filed

COUNSEL: [*1] For Wendell Welch, Linda Welch, Plaintiffs: Stephen T Sherer, LEAD ATTORNEY, Meridian, ID.

For Lawrence Christopher Laraway, Jr., Defendant: Bradley B Poole, Boise, ID.

JUDGES: TERRY L. MYERS, CHIEF U. S. BANKRUPTCY JUDGE.

OPINION BY: TERRY L. MYERS

OPINION

MEMORANDUM OF DECISION

INTRODUCTION

Wendell and Linda Welch (the "Welches") initiated this adversary proceeding against Lawrence Christopher Laraway, Jr. ("Laraway"), a chapter 7 debtor, to obtain a judgment rendering certain claims they allegedly hold against Laraway nondischargeable under *§ 523(a)(2)(A)*. [1] The matter was tried before the Court on July 21 and 22, 2010, at which time the parties presented evidence and offered argument. At the conclusion of the trial, the Court took the *§ 523(a)(2)(A)* issues under advisement. [2] Having considered the record, arguments, and applicable authorities, the Court issues this memorandum of decision setting forth its findings of fact and conclusions of law. *Fed. R. Bankr. P. 7052*.

1 Unless otherwise indicated, all statutory citations are to the Bankruptcy Code, Title *11 U.S. Code, §§ 101-1532*.

2 While both the Welches' Complaint, Doc. No. 1, and Adversary Proceeding Coversheet, Doc. No. 2, refer to both *§§ 523* and *727*, neither [*2] the facts alleged in the Complaint nor the evidence presented at trial support a denial of discharge claim under *§ 727*. Consequently, the Court treats the Welches' claims as arising solely under *§ 523(a)(2)(A)*.

FACTS

In 2006, the Welches decided to build a new home. They acquired a parcel of property in Boise, Idaho and contacted Laraway, a general contractor, to discuss construction. On September 18, 2006, the Welches entered into a construction contract with "Diamond Ridge Construction," Laraway's company, to build their new residence. Ex. 100 ("Contract"). Attached to the four-page Contract were plans and specifications prepared by "Diamond Ridge Construction, Inc." *See* Exs. 100 and 101. Contained within the construction plans and specifications were several "allowances" of varying amounts, including a "Fiberglass Pool & Spa" allowance of $30,000. Based on the plans and specifications, Laraway calculated, and the Welches agreed to pay, a total contract bid price of $484,500 for the project, subject to certain potential increases provided for in the Contract. [3]

3 These increases included increased material costs beyond the contractor's control as well as any increased costs associated [*3] with changes requested by the Welches. These increased costs became a source of dispute between Laraway and the Welches over the life of the project.

The Contract required the Welches to secure a loan commitment or show proof of financing shortly after

execution. *See* Ex. 100. On or about December 21, 2006, the Welches entered into a "one time closing" loan agreement with First Horizon Home Loan Corporation ("First Horizon"). The loan terms called for periodic disbursements or "draws," totaling $484,500, as stages of work were completed on the residence.

The Welches took six draws against the loan, totaling $454,500, between January 10 and July 20, 2007. For each draw made the Welches submitted a "Draw Request Form" ("Request Form") and an accompanying "All Bills Paid Affidavit" ("Affidavit") to First Horizon. *See* Ex. 108. The Request Forms specified the amount of funds to be drawn and were accompanied by an "Itemized Draw Form" ("Itemized Form") that identified the line item expenses (e.g., plumbing, electrical, roofing) to which the disbursed funds would be applied. The Request Forms, Itemized Forms, and Affidavits were all signed by Laraway, on behalf of Diamond Ridge Construction, [*4] and either Wendell or Linda Welch. [4] *See* Exs. 106, 107, and 218-223.

> 4 Where reference to only one of the Welches is required, the Court will refer to "Wendell" or "Linda."

Both the Request Form and the Affidavit contained certifications by Laraway and the Welches that disbursed funds were being applied to pay for labor and materials used in the construction of the Welches' home. The Request Form provided:

> General Contractor/Builder and Borrower state that all of the funds that are requested in this "Draw Request" *will be used* to pay for the labor and materials which created the improvements to the subject property. General Contractor/Builder and Borrower further state that all funds advanced before the date of this request (if any) *were also used* to pay for labor and materials for the improvements of the subject property.

Ex. 218 (emphasis added). The Affidavit contained a similar, yet slightly different, statement:

> Contractor and Owner state that all of the funds that Lender has advanced before the date of this Affidavit (if any), *have been used* to pay for labor and materials, which have created the improvements on the Property. Contractor and Owner state that there are no disputes with, [*5] or debts owed to, any mechanics, material men, or subcontractors for the labor or materials furnished. There are no security interests or liens encumbering the Property other than those created in favor of Lender. The only exceptions to this paragraph are . . . . [5]

> 5 No exceptions were listed in any of the Affidavits signed and submitted by Laraway and the Welches. *See* Ex 107.

Ex. 107 (emphasis added). When considered together with the other loan documents presented at trial, which indicated that funds would be disbursed only for completed work, *see* Ex. 108, these statements suggest a process whereby requested funds were to be used to pay outstanding invoices for completed work, as provided for in the Itemized Forms, and Laraway and the Welches were to certify through the Affidavits that all debts owed to subcontractors, except those to be paid with the draw being requested, had been paid. The testimony at trial supports this reading. In particular, the Welches testified that their understanding was that the line items identified in the Itemized Forms represented the outstanding expenses that would be paid with the disbursed funds. Similarly, Laraway testified that he signed the Affidavits [*6] to indicate that the subcontractors "would be" paid with the disbursed funds according to the cost breakdown in the Itemized Forms.

Work on the Welches' residence stopped in July 2007 after disagreements arose between Laraway and the Welches concerning responsibility for increased costs that had accumulated over the course of the project. These additional expenses stemmed from certain changes requested by the Welches as well as overages on previously budgeted items. At the time, the home was complete except for installation of the pool and spa, for which $30,000 was still available under the loan, and some landscaping and other minor work.

Amid this disagreement, the Welches discovered that some of the subcontractors had not been paid. In the fall of 2007, three of the unpaid subcontractors recorded claims of lien against the Welches' residence -- The Stucco Company, Inc. ("Stucco") for $31,420, 4 Seasons Heating and Cooling, Inc. ("4 Seasons") for $4,318.99, [6] and Myers Enterprises, Inc. ("Myers Enterprises") for $18,500. Exs. 112-114. [7] Another subcontractor, Advanced Marble and Granite ("Advanced Marble"), filed a small claims action against Laraway and the Welches for $9,924.50. Ultimately, [*7] the Welches paid Stucco $19,000 and 4 Seasons $3,810 to settle their liens. [8] Wendell Welch testified that the Myers Enterprises lien no longer encumbers their property, though he provided no further explanation concerning

resolution of the lien. He further testified that Advanced Marble dismissed their claim against the Welches after Wendell presented the Itemized Form showing Diamond Ridge Construction had received payment for Advanced Marble's materials and labor.

> 6 The 4 Seasons claim of lien included $3,810 for labor and materials plus $144.78 in interest, $14.21 in costs, and $350 in attorney's fees, for a total claim of $4,318.99.
>
> 7 The Welches testified that Diamond Ridge Construction also filed a claim of lien on their property.
>
> 8 The Welches were able to negotiate a lower payment to Stucco based on their assertion that Stucco's work on their home was substandard and had resulted in approximately $10,000 in damages.

On July 8, 2008, Laraway caused Diamond Ridge Construction, Inc. to file a voluntary petition for chapter 7 relief. Approximately one year later, on June 25, 2009, Laraway filed an individual chapter 7 petition. [9] The Welches initiated this adversary proceeding to have [*8] their claims against Laraway, personally, declared nondischargeable under *§ 523(a)(2)(A)*.

> 9 The Court takes judicial notice of the filings of record in both Diamond Ridge Construction's corporate bankruptcy, Case No. 08-01342-TLM, and Laraway's personal bankruptcy, Case No. 09-01831-TLM. *See Fed. R. Evid. 201.* Laraway's personal bankruptcy case remains open, although the chapter 7 trustee has filed a report of no distribution. Diamond Ridge Construction's bankruptcy case was closed as a no asset case on July, 6, 2009. Laraway did not schedule as an asset in either the corporate case or her personal case, any debt claimed to be owed by the Welches.

DISCUSSION AND DISPOSITION

A. Personal liability

Laraway asserts that even if the Court were to find his conduct fraudulent, he was acting at all times on behalf of Diamond Ridge Construction, Inc., a corporation, in his interactions with the Welches. Thus, he contends, any debt owed the Welches arising out of that relationship is a corporate, rather than personal, debt. The Welches argue that Laraway was doing business with them not through his corporation, but instead personally under his assumed business name of Diamond Ridge Construction.

To [*9] support their argument, the Welches point to a Certificate of Assumed Business Name of "Diamond Ridge Construction" for Laraway and his ex-wife, Jennifer Laraway, filed with the Idaho Secretary of State on April 30, 2001, Ex. 105, and emphasize that the Contract and loan documents identify only "Diamond Ridge Construction," not "Diamond Ridge Construction, *Inc.*," as the general contractor. In response, Laraway testified that shortly after obtaining the Certificate of Assumed Business Name he incorporated the business, but never took any action to cancel the Certificate as he was unaware that such action was necessary. [10] To corroborate his testimony, Laraway introduced a copy of the Articles of Incorporation for Diamond Ridge Construction, Inc., filed with the Idaho Secretary of State on June 28, 2001. Ex. 200.

> 10 A certificate of assumed business name filed with the Secretary of State remains in effect until the filing of a certificate of cancellation. *Idaho Code §§ 53-506(2), 53-508.*

It is well established that a person contracting with another as an agent is liable as a party to the contract unless he discloses, at or before the time of entering into the contract, the agency relationship [*10] and the identity of the principal. *See Triad Leasing & Fin., Inc. v. Rocky Mountain Rogues, Inc., 148 Idaho 503, 224 P.3d 1092, 1096 (Idaho 2009); W. Seeds, Inc. v. Bartu, 109 Idaho 70, 704 P.2d 974, 975 (Idaho App. 1985).* The party asserting agency as a defense to personal liability on a contract bears the burden of showing that the principal was adequately disclosed. *Keller Lorenz Co. v. Ins. Assocs. Corp., 98 Idaho 678, 570 P.2d 1366, 1369 (Idaho 1977)* (deeming agency as a defense to personal contract liability an affirmative defense for purposes of *Rule 8(c)* of the Idaho Rules of Civil Procedure).

The Court finds that the Contract itself did not adequately disclose that Laraway was acting as the agent of Diamond Ridge Construction, Inc. At best, the Contract is ambiguous as to the identity of the contractor. Had the Contract indicated Laraway was signing in a representative capacity on behalf of Diamond Ridge Construction, Inc., [11] there would be no ambiguity and Laraway would have no personal liability under the Contract. *See Triad Leasing, 224 P.3d at 1096.* However, the Contract was not so executed, and the description of the contracting party states "Diamond Ridge Construction" with no "Inc." or other indication of corporate [*11] structure. Though the Contract refers to "Diamond Ridge Construction, Inc." as the author of the attached building specifications, that single reference is insufficient to overcome the ambiguities from the manner of execution and the Contract provision identifying "Diamond Ridge Construction" as the general contractor. *See* Ex. 100.

> 11 Such an execution would in substance read:

"Diamond Ridge Construction, Inc., by Lawrence Christopher Laraway, Jr., President." The Contract here was executed: "Contractor's Signature," followed by Laraway's signature.

Laraway also contends that the footer on the building specifications, which provides "Registered Idaho Contractor RCE-3105," supports his position that Diamond Ridge Construction, Inc. was the contracting party because "RCE-3105" was the contractor registration number assigned to Diamond Ridge Construction, Inc. *See* Ex. 202. [12] The Court is unpersuaded. Wendell testified that when he signed the Contract he was unaware that the footer referred to the contract registration number of Diamond Ridge Construction, Inc. It was not the Welches' burden to inquire further as to the meaning of an abstruse footer in the building specifications attached [*12] to the Contract. The burden was on Laraway to conspicuously inform the Welches that the contracting party was Diamond Ridge Construction, Inc. if he desired to invoke the liability protections afforded by the corporate structure. *See Interlode Constructors, Inc. v. Bryant, 132 Idaho 443, 974 P.2d 89, 92-93 (Idaho App. 1999).*

12 Under Idaho law, any person engaged in the business of, or holding himself out to be, a contractor must be registered with the State of Idaho Contractors Board. *See Idaho Code § 54-5204.*

In sum, the Contract, on its face, did not adequately disclose that Laraway was acting as the agent of Diamond Ridge Construction, Inc.

Having found the Contract inadequate for purposes of disclosing Diamond Ridge Construction, Inc. as Laraway's principal, the Court looks to evidence outside the Contract to determine whether such a disclosure occurred. Laraway asserts that his initial meeting with the Welches should have made clear to them that they were dealing with Diamond Ridge Construction, Inc. Specifically, Laraway testified that at the initial meeting he would have given the Welches a "Client Introduction Packet," Ex. No. 212, which references Diamond Ridge Construction, Inc. Laraway further [*13] testified that there was a framed copy of Diamond Ridge Construction, Inc.'s contractor license, Ex. 202, hanging on the wall in the office where he met with the Welches.

The Court finds that the "Client Introduction Packet" and the presence of the contractor's license in Laraway's office did not sufficiently disclose to the Welches that Laraway was acting as the agent of Diamond Ridge Construction, Inc. At trial, Wendell did not recall receiving the "Client Introduction Packet," and even if the Welches had received such a packet, there was no evidence that they read it, or that they would have understood it to mean they were contracting with Diamond Ridge Construction, Inc., not Laraway. Wendell further testified that he never noticed the contractor's license on the wall of Laraway's office. The onus was on Laraway to clearly indicate to the Welches, before or at the time of the Contract, that he was acting as the agent of Diamond Ridge Construction, Inc. *See Interlode Constructors, 974 P.2d at 92-93.* His failure to do so left him exposed to personal liability on the Contract.

Laraway's personal liability under the Contract does not end the analysis. While the Court finds that Laraway [*14] was a party to the Contract for purposes of contract liability, liabilities excepted from discharge under *§ 523(a)(2)(A)*, such as those alleged here, sound in fraud, not contract.

Corporate directors and officers may not be held liable for fraud or other tortious wrongdoing committed by the corporation or its officers merely by virtue of their office. *L.B. Indus., Inc. v. Smith, 817 F.2d 69, 71 (9th Cir. 1987).* However, a corporate director or officer may be held liable if he specifically directs, actively participates in, or knowingly acquiesces in the fraud or other wrongdoing of the corporation or its officers. *Id.*; *see also See Bell v. Smith (In re Smith),* 98.4 I.B.C.R. 119, 120 (Bankr. D. Idaho 1998); *Nelson v. Post Falls Mazda (In re Nelson), 159 B.R. 924, 925-26 (Bankr. D. Idaho 1993); In re Hawkins, 144 B.R. 481, 484-85 (Bankr. D. Idaho 1992).*

The evidence establishes Laraway as an active participant in dealing with the Welches -- he negotiated the Contract, signed it and all the Itemized Forms and Affidavits, and was responsible for ensuring payment of the subcontractors from the disbursed funds. He was directly involved in every aspect of the project, and was the only corporate [*15] officer involved in ensuring Diamond Ridge Construction properly performed. Thus, Laraway may be held personally liable under *§ 523(a)(2)(A)* to the extent the Welches' allegations that they were defrauded are proven true. This conclusion will rest on evidence of Laraway's conduct, irrespective of any personal liability he had on the Contract. [13]

13 Because of this required focus on Laraway's conduct, the Court will refer to his acts in the following discussion.

B. *Section 523(a)(2)(A)*

This is not the first time the Court has been tasked with considering *§ 523(a)(2)(A)* claims in the context of a residential construction project. *See, e.g., Mire v. Ankersmit (In re Ankersmit),* 03.1 I.B.C.R. 71 (Bankr. D. Idaho 2003) (finding plaintiffs failed to prove all of *§ 523(a)(2)(A)* elements with respect to debtor contractor's failure to pay subcontractors who worked on plaintiffs' home); *Bell v. Smith (In re Smith), 232 B.R. 461 (Bankr.*

D. Idaho 1998) (concluding contractor's debts arising from claims of lien against plaintiffs' homes were nondischargeable under *§ 523(a)(2)(A)*); *Custer v. Dobbs (In re Dobbs), 115 B.R. 258 (Bankr. D. Idaho 1990)* (same).

Section 523(a)(2)(A) excepts from discharge any [*16] debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -- false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." To prevail on a claim under *§ 523(a)(2)(A)* a plaintiff must prove the following elements by a preponderance of the evidence: (1) misrepresentation, fraudulent omission, or deceptive conduct by the debtor in obtaining money, property, services or credit; (2) debtor's knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. *Fetty v. DL Carlson Enterprises, Inc. (In re Carlson), 426 B.R. 840, 854 (Bankr. D. Idaho 2010)* (citing Ninth Circuit authorities).

In applying exceptions to discharge, the Court must construe *§ 523(a)(2)(A)* strictly against the creditor and liberally in favor of the debtor so as to avoid reading the statute more broadly than necessary to effectuate the policy of preventing debtors from avoiding [*17] debts incurred by fraud or other culpable conduct. *Id.*

1. False representations

The Welches identify three representations or groups of representations made by Laraway that they allege constitute false representations.

a. The pool and spa allowance

The first is the provision in the building plans and specifications establishing a $30,000 "allowance" for the purchase and installation of a pool and spa. The Welches claim the pool and spa allowance provision was a promissory representation that the pool and spa they requested would be purchased and installed for $30,000. They further contend that at the time Laraway made this promise, he knew he could not obtain and install both the pool and spa for $30,000.

A promise made without a present intent to perform satisfies *§ 523(a)(2)(A)*, as does a representation which the debtor knew or should have known was outside of the debtor's prospective ability to perform. *Smith*, 98.4 I.B.C.R. at 121 (quoting *McCrary v. Barrack (In re Barrack), 217 B.R. 598, 606 (9th Cir. BAP 1998)).*

Laraway knew or should have known he would be unable to provide and install the pool and spa for $30,000. Laraway testified that the pool and spa allowance in the Contract was [*18] derived from a 2006 installation list he received from Viking Pools, Ex. 214. [14] Therein, installation of a "Carmel" pool (the type called for in the Welches' building plans) was listed between $29,020 and $38,552. [15] The least expensive spa was listed at $12,095. Consequently, the Viking Pools list would have dictated a minimum bid or estimate of $41,115 (i.e., $29,020 + $12,095), more than $11,000 above the $30,000 pool and spa allowance Laraway represented to the Welches. Although Laraway contends that the $30,000 figure was merely an estimate, the Court finds his conduct, given the information upon which he based his estimate, to be sufficiently deceptive to satisfy the first element of *§ 523(a)(2)(A)*. [16]

14 Laraway never provided the Welches the Viking Pools installation list or any other documentation to support the pool and spa allowance. It was only during this litigation, and more specifically when it was introduced by Laraway during the trial, that the list surfaced.

15 The price list offered four possible installation packages of varying cost, ranging from the least expensive, the "Bronze" package, to the most expensive, the "Platinum" package. *See* Ex. 214.

16 The Welches identified [*19] other provisions in the contract and building plans that they also believed to be false representations, including a plumbing allowance of $8,000 and a roofing estimate of $16,875.06. However, no evidence was introduced to show that Laraway did not intend to perform consistent with those estimates, nor is there sufficient evidence to infer such an intent. Indeed, the only evidence presented was Laraway's testimony that the estimates he gave the Welches were based on bids or estimates he had received from subcontractors.

b. The Affidavits

The second set of representations identified by the Welches are Laraway's serial assertions in the Affidavits that there were no disputes with, or debts owed to, any mechanics, materialmen, or subcontractors for the labor or materials furnished in the construction of the Welches' residence. Specifically, the Welches contend that these representations were false as to Stucco, 4 Seasons, Myers Enterprises, and Advanced Marble, as evidenced by the claims they eventually asserted against the Welches or their property. [17]

17 The Court recognizes that in their Complaint, the Welches did not assert the 4 Seasons claim of

lien as a basis for nondischargeability. [*20] Having been full tried by the parties, the Court treats the issue of the 4 Seasons claim as if raised in the pleadings. *See Fed. R. Bankr. P. 7015* (making applicable *Fed. R. Civ. P. 15(b)*) The same analysis and conclusion apply to the Welches' claim regarding the $3,000 for appliances, which was also not pleaded in their Complaint.

The evidence demonstrates that Laraway's representations with respect to payment of these subcontractors were false. The claims filed by the four subcontractors for unpaid invoices belie Laraway's assertions in the Affidavits regarding prior payment and lack of dispute. In fact, Laraway testified that he did not know whether all the subcontractors had been paid when he signed the Affidavits and that, even at the time of trial, he was unsure of who had been paid. Even absent direct evidence of knowing misrepresentation, such reckless disregard for the truth of a representation satisfies the element that the debtor has made an intentionally false representation. *See, e.g., Arm v. Morrison (In re Arm), 175 B.R. 349, 354 (9th Cir. BAP 1994).*

c. Appliances

The final representation identified by the Welches is the July 20, 2007 Itemized Form which allocated $3,000 [*21] of yet to be disbursed funds to the purchase of appliances for the Welches' new home. The Welches testified that no appliances were ever purchased by Laraway, and that they were later required to purchase the appliances on their own. [18]

18 As evidence of the appliance purchases the Welches presented an invoice and receipt from Home Depot for $9,449.06. *See* Exs. 110 and 111.

The July 20 Itemized Form does not qualify as an intentionally false representation. As previously noted, the understanding between Laraway and the Welches was that the disbursed funds would be used to pay the expenses identified in the Itemized Forms. Thus, at most, listing the $3,000 for appliances constituted a promise by Laraway to use $3,000 of the yet to be disbursed funds to buy appliances. [19] While the evidence indicates no appliances were ever purchased by Laraway, there is no proof that Laraway did not intend to use $3,000 of the funds to buy appliances when he filled out and signed the Itemized Form. Because the Welches failed to show that Laraway did not intend to perform on his promise, their *§ 523(a)(2)(A)* claim as to the appliances representation will be dismissed.

19 Laraway did not sign an Affidavit [*22] subsequent to the July 20 draw request, as that draw was the last made against the loan. Consequently, the only representation made by Laraway concerning the appliances was the $3,000 allocation in the Itemized Form portion of the July 20 draw request.

2. Intent to Deceive

Not only must there be a representation of material fact which is false, the representation must be made with the intention and purpose to deceive. *Ankersmit*, 03.1 I.B.C.R. at 73. Intent to deceive is a question of fact that may be inferred from circumstantial evidence. *Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997).*

The Court finds Laraway intended to deceive the Welches regarding the $30,000 pool and spa allowance. Laraway knew at the time he executed the contract that he lacked the ability to provide and install a pool and spa to specifications for the amount of $30,000. It is reasonable to infer from the whole of this record that his purpose in presenting an infeasible allowance was to deceive the Welches as to the true cost for the pool and spa in order to induce them into signing the contract.

The Court finds Laraway also intended to deceive the Welches when he signed the Affidavits. Laraway [*23] testified that he intended to pay the subcontractors and suppliers, that all of the funds advanced to him were spent on labor and materials used in the Welches' home, that he made no profit on construction of the Welches' home, and that any unpaid invoices were solely the result of unexpected overages or upgrades the Welches requested after construction had begun. He further testified that he signed the Affidavits to keep the project moving forward, and planned to pay any unpaid subcontractors with the additional funds he expected the Welches to contribute for extra costs (those not contemplated by the original plans and budget) that had been paid as construction progressed.

Several pieces of evidence presented at trial impeach Laraway's testimony. First, the Itemized Forms submitted with each of the Welches' six draw requests, Ex. 106, indicate that $44,215.88 of the funds disbursed under the loan were allocated to "Builder Overhead and Profit," contradicting Laraway's testimony that he realized no profit on the project. [20]

20 The reliability of the Itemized Forms, standing alone, is equivocal. Indeed, the Welches' case is largely premised on the allegation that the disbursed funds were [*24] not used in the manner prescribed by the Itemized Forms, and the evidence, which includes the subcontractor claims against the Welches as well as Laraway's testimony, supports this view. Still, Laraway never reconciled the documentary evidence with

his assertions that no profit was taken. Nor did he establish where the money did go if not to himself or to the unpaid suppliers and subcontractors.

Second, the "Job Cost Detail" for the Welches' residence produced from Diamond Ridge Construction's business records, Ex. 225 ("Detail"), when considered together with the liens and other claims filed against the Welches, further contradicts Laraway's testimony. The Detail, generated August 16, 2007, shows the draws and invoices received by Diamond Ridge Construction for the Welches' residence. [21] According to the Detail, Diamond Ridge Construction received draws totaling $454,500, and invoices totaling $450,724.80, resulting in a difference of $3,775.20. The Detail included invoice amounts consistent with the claims asserted by the *unpaid* subcontractors -- i.e., Stucco for $31,420, 4 Seasons for $3,810, [22] Myers Enterprises for $18,500, and Advanced Marble for $9,924.50. Together, the Detail, [*25] showing total invoices $3,775.20 less than total draws, and the unpaid subcontractors' claims, totaling $63,654.50, suggest that at least $67,429.70 of the disbursed funds were not used in labor and materials on the Welch job.

21 The Detail does not indicate whether the invoices were actually paid.

22 *See supra* note 6.

The liens and related claims asserted against the Welches, together with the Itemized Forms and the Detail, support the inference that some of the disbursements were diverted to purposes other than payment for labor and materials used in the Welches' home. No other rational explanation, consistent with the documentary evidence, was suggested. Based on this evidence and these circumstances, the Court concludes that Laraway's statements in the Affidavits that no debts were owed to subcontractors were knowingly false and made with an intent to deceive the Welches and induce them into authorizing further disbursements.

3. Reliance

Section 523(a)(2)(A) requires justifiable reliance. *Smith*, 03.1 I.B.C.R. at 121 (citing *Field v. Mans, 516 U.S. 59, 70-71, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995)).* Justifiable reliance is a subjective standard which requires the Court to consider the qualities and characteristics of [*26] the particular plaintiff, the knowledge and relationship of the parties, and all of the circumstances surrounding the particular transaction. *Field, 516 U.S. at 71*; *Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (In re Kirsh), 973 F.2d 1454, 1458-60 (9th Cir. 1992).* While justifiable reliance does not require that a creditor investigate the truth of the representation in each case, an investigation is required "where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived." *Smith*, 03.1 I.B.C.R. at 122 (quoting *Field, 516 U.S. at 71*).

The Welches justifiably relied on the $30,000 pool and spa allowance in the Contract. They specifically requested that the pool and spa be included in the building plans before signing the contract, and testified that it was a material term.

The Welches also justifiably relied on Laraway's representations in the Affidavits that all the subcontractors had been paid. They relied on the fact that outstanding costs were being paid from monies disbursed to Diamond Ridge Construction. It was only [*27] after all six draws had been made against the loan that the Welches discovered Laraway had not paid some of the subcontractors. There were no circumstances which would have served as a warning to the Welches that they were being deceived and the subcontractors were going unpaid. It is also reasonable for the Court to accept the Welches' assertions that, had they known the subcontractors were not being paid, further disbursements would have been conditioned or suspended pending resolution of any unpaid subcontractor bills.

4. Loss suffered

The Welches have not shown they were damaged by their reliance on the $30,000 pool and spa allowance. The $30,000 earmarked for the pool and spa was never drawn out from the available loan proceeds, and the Welches presented no evidence to show that they incurred any additional cost by carrying that amount on the loan. Nor did they present evidence of legal fees or other costs resulting from reliance on the pool and spa allowance. The Welches bear the burden of proving that they were damaged by their reliance on Laraway's representation, which they have failed to do. Because the Welches have not proven they were damaged by their reliance, they cannot [*28] prevail on their *§ 523(a)(2)(A)* claim as to the pool and spa allowance.

The Welches did suffer a financial loss as a direct result of their reliance on Laraway's statements in the Affidavits. They were forced to pay $22,810 to settle claims of lien -- $19,000 to Stucco and $3,810 to 4 Seasons. While Wendell testified that the Welches also incurred attorney's fees and costs in conjunction with the Stucco lien, no evidence was presented regarding the amounts of those fees and costs. In the absence of such evidence, the Court lacks the specificity required to include attorney's fees and costs incurred by the Welches as part of the damage caused by Laraway's representations. *See Carlson, 426 B.R. at 858* ("A

plaintiff must prove the specific amount of the damage caused by the fraudulent representation."). Consequently, the Court finds that the Welches were damaged in the amount of $22,810.

C. Setoff

At trial, Laraway argued that any liability the Court found on his part should be reduced by the $30,000 of the $484,500 contract price the Welches never disbursed to Diamond Ridge Construction. Laraway's argument is in essence one for setoff -- the adjustment of mutual debts arising out of separate [*29] transactions between the parties. *See SAIF Corp. v. Harmon (In re Harmon), 188 B.R. 421, 425 (9th Cir. BAP 1995).* [23] To invoke a right to setoff there must be mutuality. "Mutuality is satisfied when the 'parties have concurrent rights against each other.'" *In re Lifestyle Furnishings, LLC, 418 B.R. 382, 386 (Bankr. D. Idaho 2009)* (quoting *In re Hipwell, 97.1 I.B.C.R. 25, 27, 1997 Bankr. LEXIS 2430, 1997 WL 34584333, at *3 (Bankr. D. Idaho 1997)*).

23 The transactions at issue here would be "separate" because the $30,000 claim alluded to by Laraway is a contract liability, while his debt to the Welches sounds in fraud.

Here, there is no mutuality because Laraway holds no right against the Welches. As noted previously, the Contract and loan documents contemplated payment in stages upon the completion of work. The pool and spa were never installed. Accordingly, Laraway had no right to the $30,000 to be paid out for that work.

Moreover, even if Laraway had such a right under the Contract, that right became part of Laraway's bankruptcy estate when he filed his chapter 7 petition. *See Kaler v. Craig (In re Craig), 144 F.3d 593, 596 (8th Cir. 1998)* ("A debtor's right to setoff is property of the bankruptcy estate.") [*30] (citing 5 *Collier on Bankruptcy P 553.03[7][b]* (Lawrence P. King ed., 15th ed. 1998)). [24] Therefore, the Court concludes that Laraway has no right to the remaining $30,000, and those funds are unavailable to Laraway as a means to reduce or offset his liability under *§ 523(a)(2)(A)*.

24 Laraway did not schedule a contract claim against the Welches in either Diamond Ridge Construction, Inc's bankruptcy case, Case No. 08-01342-TLM, or his own personal bankruptcy case, Case No. 09-01831-TLM.

D. Attorney's Fees

In their Complaint, the Welches request an award for attorney's fees incurred in prosecuting this action. To recover attorney's fees incurred in pursuing a *§ 523(a)(2)(A)* action, a creditor must be able to recover the fees outside the bankruptcy court under state or federal law. *Kilborn v. Haun (In re Haun), 396 B.R. 522, 526-27 (Bankr. D. Idaho 2008)* (quoting *Levitt v. Cook (In re Levitt), BAP No. AZ-07-1166, 2008 Bankr. LEXIS 4683 (9th Cir. BAP July 22, 2008)*).

The Welches request attorney's fees "pursuant to an applicable section of the bankruptcy code, common law, or to the extent not exempted, state law." First, there is no general right to recover attorney's fees under the Bankruptcy Code. *Id. at 526.* Second, [*31] under Idaho law, to recover on a claim for attorney's fees a party must assert in its pleadings the *specific* statute, rule or case authority supporting its claim. *Id. at 528* (citing *Hopkins v. Saratoga Holdings, LLC (In re Colvin), 08.2 I.B.C.R. 63, 65 2008 WL 1957855, at *4 (Bankr. D. Idaho 2008)*). The Welches failed to so identify specific authority that would entitle them to attorney's fees. Therefore, their request for fees is denied.

CONCLUSION

Based upon the reasons set forth above, the Court finds that the Welches' have proven the requirements necessary under *§ 523(a)(2)(A)* to support a judgment by this Court that debts arising from the settlement of claims of lien against the Welches' home in the amount of $22,810 should be excepted from discharge.

Counsel for the Welches shall submit an appropriate order and form of judgment.

DATED: September 13, 2010

/s/ Terry L. Myers

TERRY L. MYERS

CHIEF U. S. BANKRUPTCY JUDGE