8-25-2014

Ellmaker v. Tabor Respondent's Brief Dckt. 41846

IN THE IDAHO SUPREME COURT OF THE STATE OF IDAHO

MARJORIE LOIS ELLMAKER, a single woman, Appellant, v. CALVIN TABOR, KEITH TURNER and A1 REAL ESTATE, an Idaho Limited Liability Company, Respondents.	)	SUPREME COURT NO. 41846 CANYON COUNTY CASE NO. CV2010-4399C

RESPONDENT'S BRIEF

Appeal from the District Court of the Third Judicial District
of the State of Idaho, in and for the County of Canyon
Honorable George A. Southworth, Presiding

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STATEMENT OF THE CASE

On or about May 9, 2005, Sarah Martha Chitwood ("Martha") sold real property to A1 Real Estate, LLC for the sum of $927,000.00. As a portion of the sale price, Martha agreed to accept two Notes from A1 Real Estate, LLC. See closing statement and purchase agreement, (R., Vol. 2 p 179 and Vol. 1 pp 122-130) attached for convenience. Martha signed the Closing Statement at Pioneer Title Company before closing officer Vicki Hunsperger. Calvin Tabor ("Tabor") was not present at the time Martha signed the documents to close the sale of her real property.

In 2006, the Promissory Note for $77,000.00 was paid. The remaining Note was extended from a 2006 due date to a 2007 due date. See Note (R., Vol. 1 pp 133-132) attached for convenience. In 2007, a replacement Note was given by A1 Real Estate, LLC to Martha with a due date of on or before December 24, 2007. See replacement Note (R., Vol. 1 pp 133-134) attached for convenience.

All of these transactions were in writing and were between Martha and A1 Real Estate, LLC and not between Marjorie Lois Ellmaker ("Ellmaker") and Tabor.

During that time period, there was an abrupt down turn in the real estate market and real estate prices plummeted. A1 Real Estate, LLC had at least two real properties in inventory that rapidly became worth less than the mortgages and were ultimately deeded back to lenders in lieu of foreclosure. The other member of A1 Real Estate, LLC, Keith Turner, filed personal bankruptcy on November 15, 2012. (R., Vol. 2 pp 248-249)

Tabor lost everything in the real estate down turn and as a contractor has had a very difficult and slow time starting over again. (R., Vol. 2 pp 248-249)

On April 21, 2010, Ellmaker filed a Complaint asserting a myriad of contentions, including the contention that she was the cousin and a friend of Martha and was "the heir of Martha", (see Plaintiff's Complaint at paragraph 2), and that Tabor was personally obligated to pay Ellmaker $150,000.00 on a theory of breach of oral agreement and the breach of implied covenant of good faith and fair dealing.

Ellmaker never filed Martha's Will for probate and has yet to identify who Martha's actual heirs at law would be.

On May 20, 2011, Ellmaker filed an Amended Complaint which added an additional count for "unjust enrichment", asserting that "Defendants appear to have made distributions to themselves without complying with Idaho law". Yet to this day, Tabor has not received adequate compensation for the labor and services he provided to A1 Real Estate, LLC. (R., Vol. 2 pp 247-250)

A1 Real Estate, LLC is indebted under the terms of the replacement note attached to Plaintiff's First Amended Complaint as Exhibit B. The payee on the note attached as Exhibit A to the Complaint is "Sarah Martha Chitwood" and the payee on the note attached as Exhibit B is "Martha Chitwood". Martha died on July 25, 2007 at the age of 89 years. No probate was ever initiated for Martha, nor a personal representative ever appointed.

Tabor brought a Motion to Dismiss and a Motion for Summary Judgment on the grounds that Ellmaker did not own the cause of action and that A1 Real Estate, LLC, and not Tabor personally, was responsible for payment of the Promissory Note in the amount of $150,000.00. The trial court granted the motions and dismissed Ellmaker's claims against Tabor.

ATTORNEY FEES ON APPEAL

This being an action on a note, Idaho Code § 12-120(3) provides that the prevailing party shall be allowed a reasonable attorney's fee to be taxed and collected as costs.

ARGUMENT

I. ELLMAKER DOES NOT HAVE LEGAL AUTHORITY TO PURSUE THIS ACTION.

Ellmaker has no legal authority to pursue this action. Although she was listed as a "friend" and primary beneficiary in Martha's will, that will was never probated, nor were any intestate proceedings ever filed. Idaho Code provisions provide as follows:

> **§ 15-3-102. Necessity of order of probate of will**
>
> Except as provided in section 15-3-1201 of this code, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if (1) no court proceeding concerning the succession or administration of the estate has occurred, and (2) either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

§ 15-3-108. Probate–Testacy and appointment proceedings–Ultimate time limit

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment or proceedings under section 15-3-1201, Idaho Code, or section 15-3-1205, Idaho Code, may be commenced more than three (3) years after the decedent's death, except: (1) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding; (2) Appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three (3) years after the conservator becomes able to establish the death of the protected person; and (3) A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve (12) months from the informal probate or three (3) years from the decedent's death. These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate or to proceedings under section 15-3-1201, Idaho Code, or section 15-3-1205, Idaho Code. In cases under subsection (1) or (2) of this section, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this code which relate to the date of death.

The provisions of 15-3-102 above indicate that a court "may" admit a will as evidence of a devise under certain conditions. The use of the term "may" is permissive rather than mandatory. It indicates that such a determination is vested in the sound discretion of the court. The COMMENT TO OFFICIAL TEXT of Idaho's version of the Uniform Probate Code provides as follows:

> "It is noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late

> probate and late appointment of a personal representative. Still the exceptions should serve to prevent two 'hard' cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will, giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered."

While the two exceptions noted are not necessarily exclusive, they do describe instances when a will should be admitted as evidence to prove a devise. In this case, Ellmaker has offered no explanation as to why the will was not probated. It cannot be determined if the will submitted is in fact the last will of Martha or that the will submitted has not been revoked or replaced by a more recent will. As a result, there is no evidence in the record that Ellmaker has any legal basis to assert ownership of the promissory note and a right to pursue a claim in her own name under that promissory note. The trial court was correct in concluding that it would not recognize the purposed devise to Ellmaker as proof that she now owns the promissory note. Ellmaker has no legal basis upon which to seek enforcement of the note.

II. THE PROMISSORY NOTE WAS CLEARLY BETWEEN A1 REAL ESTATE, LLC AND MARTHA.

The plain language of a contract, if unambiguous, is controlling. *Cont'l Nat'l Am. Group v. Allied Mut. Ins. Co.,* 95 Idaho 251, 253, 506 P.2d 478, 480 (1973). A court must look to the contract as a whole and give effect to every part thereof. *Wright v. Village of Wilder,* 63 Idaho 122, 125, 117 P.2d 1002, 1003 (1941). "For a contract term to be ambiguous, there must be at least two

different reasonable interpretations of the term, or it must be nonsensical." *Swanson v. Beco Const. Co.,* 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (*citing Armstrong v. Farmers Ins. Co. of Idaho,* 143 Idaho 135, 138, 139 P.3d 737, 740 (2006) and *Purdy v. Farmers Ins. Co. of Idaho,* 138 Idaho 443, 446-47, 65 P.3d 184, 187-88 (2003)). "Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists." *In re Estate of Kirk,* 127 Idaho 817, 824, 907 P.2d 794, 801 (1995) (citing *Hall v. Hall,* 116 Idaho 483, 484, 777 P.2d 255, 256 (1989)). *Steel Farms, Inc. v. Croft & Reed, Inc.,* 154 Idaho 259, 297 P.3d 222, 229 (2012).

Where a written agreement is integrated, questions of the parties' intent regarding the subject matter of the agreement may only be resolved by reference to the agreement's language. *Valley Bank v. Christensen,* 119 Idaho 496, 498, 808 P.2d 415, 417 (1991). "[E]vidence of prior or contemporaneous oral agreements relating to the same subject matter is inadmissible to vary, contradict, or enlarge the terms of the written agreement." *Valley Bank,* 119 Idaho at 499, at 808. Parol evidence is inadmissible to vary the plain terms and conditions of a promissory note. *Craven v. Bos,* 38 Idaho 722, 225 P. 136, 137 (1924).

The Agreement for Sale of Real Property was entered into between Martha and Al Real Estate, LLC. Tabor was not a party to that agreement. Likewise, the Promissory Note which constituted partial payment for the property was issued by A1 Real Estate, LLC. The documents are unambiguous. Martha's closing statement clearly indicates the sale was from her to A1 Real Estate, LLC. It further indicates that the promissory note was unsecured. There is no evidence that Martha

was misled in any way. She voluntarily agreed to the sale and received substantial compensation from the sale of the property. Tabor is not a party to the promissory note.

III. THE DEBTS OF A1 REAL ESTATE, LLC ARE NOT DEBTS OF ITS MEMBERS OR MANAGERS

As to Tabor's liability for the debts of A1 Real Estate, the Idaho Code is clear:

> The debts...of a limited liability company...[a]re solely the debts...of the company... and [d]o not become the debts...of a member or manager solely by reason of the member acting as a member or manager acting as a manager.

Idaho Code § 30-6-304(1). Furthermore,

> The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts...of the company.

Id. at section (2).

IV. THE PAROL EVIDENCE RULE PREVENTS ELLMAKER FROM ASSERTING THAT TABOR ORALLY AGREED AS AN INDIVIDUAL TO BE RESPONSIBLE FOR THE NOTE.

Parol evidence prevents Ellmaker from claiming that the original agreement between Martha and A1 Real Estate, LLC was between Martha and Tabor, the individual. The case law on this point is unchanged since the 1920's. The promissory note is clear and unambiguous on its face and evidence of contrary oral agreements or negotiations that took place before or contemporaneously with the signing of the note are inadmissible.

In *Taylor v. Fluharty*, 35 Idaho 705, 208 P. 866, 867 (1922), the court noted that the intention of the parties was the most important rule of construction, and that:

> [I]f from the whole instrument it can be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts should adopt that construction of it, however informally it may be expressed.

Id. at 868.

A year later, in *International Harvester Co. of America v. Beverland*, 37 Idaho 782, 219 P. 201, 202 (1923), Beverland, whose name appeared on a promissory note next to that of his alleged co-maker, tried to claim that contrary to how it appeared in the body of the note, he was actually signing as a witness to the note, not as a co-maker. Beverland tried to argue that there was an oral agreement prior to signing in which he agreed to witness the note. *Id.* Ultimately, the court rejected this argument on the grounds that nothing in the body of the note indicated Beverland was a witness. *Id.*

The court emphasized that:

> When a contract is reduced to writing and signed, it constitutes the final agreement of the parties as to its subject-matter, and prior or contemporaneous oral agreements or statements, varying its terms, are not admissible.

Id.

It further clarified its holding in *Fluharty* by stating:

> In determining whether or not one who has signed a written instrument may show by parol evidence that he signed it as an officer of a corporation, and not in his individual capacity, this court has held that he may do so **only when some ambiguity appears in the body of the instrument or in the signature.** (emphasis added)

Id.

Ultimately, Ellmaker has tried to argue that she and Martha were under the impression that they were loaning money to Tabor as an individual. However, the borrower listed on the body of the note is A1 Real Estate and Tabor signed each note as "Calvin Tabor as member of A1 Real Estate." Nothing in the body of the instrument or the signature gives rise to an ambiguity that would admit parol evidence of Martha and Ellmaker's contrary understanding prior to signing the note.

V. TABOR NEVER GUARANTEED THE LLC'S PROMISSORY NOTE SUBSEQUENT TO SIGNING IT, NOR IS THERE ANY CONSIDERATION FOR SUCH A NEW AGREEMENT.

Idaho Code § 9-505 requires that a promise to answer for the debt, default, or miscarriage of another must be in writing. Ellmaker argues that later Tabor orally agreed to personally guarantee the LLC's loan or to become the principal debtor on the LLC's loan. The case law is clear that parties must allege one or the other of these two exceptions. One cannot argue that a promisor has become the guarantor *and* the principal debtor. *Mickelsen Construction, Inc. v. Horrocks*, 154 Idaho 396, 299 P. 3d 203, 211 (2013).

While common law contract principles state that, "any gain to the promisor, or loss to the promisee, however trifling, ought to be sufficient consideration to support an express promise," nevertheless, Idaho Code § 9-506 has changed the common law. *Id.* at 210.

Thus, promises to answer for the obligations of another do not need to be evidenced by a writing if the creditor "parts with value... in consideration of the obligations in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the

principal debtor..." or "where the promise, being for an antecedent obligation of another, is made upon consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefore..." or "upon a consideration beneficial to the promisor..." Idaho Code § 9-506(2)-(3).

There is no consideration for Tabor guaranteeing the loan nor is there a guarantee in writing as required by the Statute of Frauds.

VI. A1 REAL ESTATE, LLC HAS NEVER BEEN DISSOLVED.

Plaintiff argues that since A1 Real Estate, LLC has been dissolved on administrative grounds that this somehow makes the LLC's limited liability disappear. This assertion is false and misleading. Idaho Code § 30-6-705(1)(a) provides the grounds for an administrative dissolution:

> The secretary of state may administratively dissolve a limited liability company if... [t]he limited liability company does not deliver its annual report to the secretary of state by the date on which it is due.

A1 Real Estate, LLC never filed Articles of Dissolution with the Secretary of State. Thus, Idaho Code § 30-6-705(4) would apply:

> A limited liability company administratively dissolved continues its legal existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs...

However, the code also addresses the effects of an administrative dissolution. If the LLC is able to show that they have eliminated the grounds on which the administrative dissolution was based and the secretary of state determines that the statutory requirements are met, then "the

secretary of state shall prepare a certificate of reinstatement that states this determination [and] file the original of the certificate of reinstatement." Idaho Code § 30-6-706(1)-(2). Such a reinstatement "relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company may resume its activities as if the dissolution had not occurred." *Id.* at subsection (3). The LLC has ten years in which to apply for reinstatement. *Id.* at subsection (1).

A1 Real Estate, LLC is insolvent and incapable of paying its creditors and winding up. Also it is under no obligation to wind up the LLC at this time. The LLC could be reinstated but for what purpose? There are no assets to distribute for dissolution.

VII. ELLMAKER'S CLAIM THAT TABOR WAS UNJUSTLY ENRICHED IS TIME BARRED AND GROUNDLESS.

Idaho Code § 30-6-406, Liability for Improper Distributions, provides that a member or manager of an LLC is personally liable to the company for the payment of a distribution that violates Idaho Code § 30-6-406 but such an action is barred if not commenced within two (2) years after the distribution. Idaho Code § 30-6-406(5).

Ellmaker's counsel submitted an affidavit in November, 2013 alleging that improper distributions were made during 2007 and 2008. Ellmaker had filed an amended complaint on May 20, 2011 alleging unjust enrichment more than two (2) years after 2008.

Idaho Code § 30-6-405, Limitations on Distribution, provides that certain distributions cannot be made. However, the term "distribution" does not include amounts constituting reasonable compensation for present and past services. Idaho Code § 30-6-405(7).

Tabor remains unpaid for much of the labor and services he provided to A1 Real Estate, LLC due to lack of profits. (R., Vol. 2 p 250)

CONCLUSION

A1 Real Estate, LLC suffered financial reverses when the real estate market crashed. The properties owned by the company dropped in value far below the mortgages on them. The properties were foreclosed or taken back by creditors. Tabor is also owed money by A1 Real Estate. It is unfortunate for all concerned, but A1 Real Estate is insolvent and there is nothing for unsecured creditors such as Martha and Tabor.

Ellmaker has no cause of action against Tabor and the trial court properly dismissed her claims.

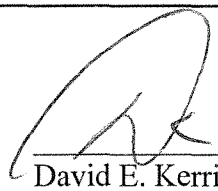
DATED this 22nd day of August, 2014.

DAVID E. KERRICK
Attorney for Respondent Calvin Tabor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2014, I caused a true and correct copy of the above and foregoing instrument to be served upon the following individuals in the manner indicated below:

Kenneth F. Stringfield P.O. Box 777 213 S. 10th Avenue Caldwell, ID 83606 *Attorney for Appellant*	[ ] U.S. Mail [X] Hand Delivery [ ] Federal Express [ ] Via Facsimile 442-7915



David E. Kerrick

610 South Kimball * Caldwell, ID 83605
(208) 459-1651

ESCROW NUMBER: PC64347
PROPERTY: NNA Bareground
McCall, ID 83638
Parcel I: prt of SW1/4 SW1/4 9-18N-3E B.M.; Parcel II: prt SW1/4 SW1/4 9-18N-3E B.M.

TODAY'S DATE: 05/09/2005
CLOSING DATE: 05/10/2005

ESCROW CLOSING STATEMENT OF:
Sarah Martha Chitwood

OTHER PARTY:
A1 Real Estate, LLC

SELLER'S CLOSING STATEMENT

DESCRIPTION	DEBITS	CREDITS
Sales Price		927,000.00
Earnest money deposit	65,000.00	
Unsecured Note to Sarah Martha Chitwood	77,000.00	
Unsecured Note	150,000.00	
Pay 2002-2004 taxes to Valley County Treasurer	4,186.31	
Prorate Taxes from 1/1/2005 to 5/10/2005 @ $1,367.36 / 12 months	483.26	
Pay 2002-2004 taxes to Valley County Treasurer	1,096.24	
Escrow Closing Fee (1/2) to Pioneer Title Company	500.00	
Standard Owners Title Ins. to First American-Valley County	2,615.75	
Balance Due To Seller	626,118.44	
TOTALS	927,000.00	927,000.00

Pioneer Title Company of Canyon County hereby certifies that the foregoing is a true and correct statement of funds received and disburs by us in the above closing statement.

I/We, the undersigned seller(s), have read and approved the above closing statement.

Sarah Martha Chitwood

Sarah Martha Chitwood

Pioneer Title Company of Canyon County

Vicki Hunsperger

EXHIBIT A

AGREEMENT FOR PURCHASE AND SALE OF REAL ESTATE

THIS AGREEMENT is entered into this 4th day of May, 2005, by and between SARA CHITWOOD (hereinafter referred to as "Seller"), whose address is * 517 N. 1st St. McCall Id 83638 and A1 REAL ESTATE LLC AND/OR AS ASSIGNED (hereinafter referred to as "Buyer"), whose address is P.O. Box 3943, Nampa Idaho 83653.

The parties hereby agree that Seller shall sell to Buyer or Buyer's Assigns and Buyer or Buyer's Assigns shall buy the following described real property upon the following terms and conditions:

1. Description.

(a) Legal description of real estate (hereinafter referred to as "Property"), located in the County of VALLEY, State of Idaho.

SEE ATTACHED EXHIBIT(S) "A" and "B"

(b) Street address of the property: commonly known as —

(c) Personal property included: NONE

2. Purchase Price. $927,000.00 (NINE HUNDRED TWENTY SEVEN THOUSAND DOLLARS AND 00/100'S)

(a) Non-refundable deposit to be given to seller $65,000.00 (SIXTY FIVE THOUSAND DOLLARS AND 00/100'S

(b) Balance required to close, subject to prorations and adjustments:

$862,000.00 (EIGHT HUNDRED SIXTY TWO THOUSAND DOLLARS AND 00/100'S

3. Title Evidence. Within three (3) days from the date of closing, Seller shall deliver to Buyer or his attorney,

(a) A title insurance commitment, with fee owner's title policy premium to be paid by the Seller at closing, issued by a qualified title insurer agreeing to issue to Buyer, upon recording of the deed to Buyer, an Owner's policy of title insurance in the amount of the purchase price, insuring the title to the Buyer of the property, subject only to liens, encumbrances, exceptions or qualifications set forth in this Agreement and those which shall be discharged by Seller at or before closing.

(b) Buyer shall have three (3) days from date of receiving evidence of title to examine same. If title is found defective, Buyer shall, within three (3) days thereafter, notify Seller in writing specifying the defects. If said defects render title unmarketable, Seller shall have fifteen (15) days from receipt of notice within which to remove said defects, and if Seller is unsuccessful in removing same within said time, Buyer shall have the option of either accepting the title as it then is, or demanding a refund of all monies paid hereunder which shall forthwith be returned to Buyer and thereupon Buyer and Seller shall be released, as to one another, of all further obligations under this Agreement; however, Seller agrees that he will, if title is found to be unmarketable, use diligent efforts to correct the defects in title within the time provided therefor, including the bringing of necessary suits.

(c) Seller shall, both as to the property and personalty being sold hereunder, furnish to Buyer at time of closing an affidavit attesting to the absence, unless otherwise provided for herein, of any financing statements, claims of lien or potential lien or known to Seller and further attesting that there have been no improvements to the property for ninety (90) days immediately preceding date of closing. If the property has been improved with said time, Seller shall deliver releases or waivers of all mechanics' liens executed by general contractors, subcontractors, suppliers, and material men, in addition to Seller's lien affidavit setting forth the names of all such general contractors, subcontractors and material men and further reciting that in fact all bills for work to the property which could serve as a basis for a mechanic's lien have been paid or will be paid at closing.

4. Time for Acceptance and Effective Date. If this offer is not executed by both parties hereto on or before the 4th day of May, 2005, the aforesaid deposit shall be, at the option of the Buyer, returned to him and this offer shall thereafter be null and void. The date of Agreement ("Effective Date") shall be the date when the last one of the Seller and Buyer has signed this offer.

5. Closing Date. This transaction shall be closed at Pioneer Title Co, Caldwell, Idaho, and the deed and other closing papers delivered by midnight on the _____ day of May, 2005, unless extended by other provisions of this Agreement.

6. Restrictions, Easements, Limitations. The Buyer shall take title subject to: zoning, restrictions, reservations, prohibitions and other requirements imposed by governmental authorities; covenants, restrictions and matters appearing on the plat or otherwise common to the subdivision; public utility easements of record, taxes for year of closing and subsequent year; assumed mortgages and purchase money mortgages, if any; however, that none of the foregoing shall prevent use of the property for the purpose of it's intended use.

7. Occupancy and Leases. Seller warrants that there are no parties in occupancy other than Seller; but if property is intended to be rented or occupied beyond closing, the fact and terms thereof shall be stated herein, the tenants shall be disclosed by Seller to Buyer and Seller shall, not less than _____ (___) days prior to closing, furnish to Buyer copies of all written leases and estoppel letters from each tenant specifying the nature

and duration of said tenant's occupancy, rental rates and advanced rent and security deposits paid by tenant. In the event Seller is unable to obtain such letter from each tenant, the same information shall be furnished by Seller to Buyer within said period in the form of a Seller's affidavit, and Buyer may thereafter contact tenants to confirm such information. Seller shall deliver and assign all original leases to Buyer at closing. Seller agrees to deliver occupancy of property at time of closing unless otherwise specified below. If occupancy is to be delivered prior to closing, Buyer assumes all risk of loss to property from date of occupancy, shall be responsible and liable for maintenance thereof from said date, and shall be deemed to have accepted the property, real and personal, in its existing condition as of time of taking occupancy unless otherwise noted in writing.

8. Survey. The Buyer, within time allowed for delivery of evidence of title and examination thereof, may have the property surveyed at his expense. If the survey, certified by a property registered surveyor, shows any encroachment of said property or that improvements intended to be located on the property in fact encroach on lands of others, or violate any of the covenants of this Agreement, the same shall be treated as a title defect.

9. Ingress and Egress. Seller warrants that there is ingress and egress to the property sufficient for the intended use as set out herein, the title to which is in accordance with Paragraph 3 thereof.

10. Time of Essence. Time is of the essence of this Agreement. Any reference herein to time periods of less than three (3) days shall in the computation thereof exclude Saturdays, Sundays and legal holidays, and any time period provided for herein which shall end on a Saturday, Sunday or legal holiday shall extend on to the next full business day.

11. Documents for closing. Seller shall furnish the deed of mechanic's lien affidavit, assignments of leases and any corrective instruments that may be required in connection with perfecting title. Buyer shall furnish the closing statement, mortgage, security agreement, and financing statements.

12. Expenses. State documentary stamps which are required to be affixed to the instrument of conveyance, escrow fee, and cost of recording any corrective instruments shall be paid by Seller.

13. Proration of Taxes (Real and Personal). Taxes shall be prorated based on the current year's tax with due allowance made for maximum allowable discount and homestead or other exemptions, if allowed for said year. If closing occurs at a date when the current year's millage is not fixed and current year's assessment is available taxes will be prorated based upon such assessment is not available, then taxes will be prorated on the prior year's tax; provided, however, if there are completed improvements on the property by January 1st of the year of closing, which improvements were not in existence on January 1st of the prior year's millage and at an equitable assessment to be agreed upon between the parties, failing

which, request will be made to the County Property Appraiser for an informal assessment taking into consideration homestead exemption, if any. However, any tax proration based on an estimate may upon request of either party to the transaction be subsequently readjusted upon receipt of tax bill on condition that a statement to that effect is set forth in the closing statement.

14. Special Assessment Liens. Certified, confirmed and ratified special assessment liens as of date of closing, and not as of Effective Date, are to be paid by Seller. Pending liens as of date of closing shall be assumed by Buyer; provided, however, that where the improvement has been substantially completed as of the Effective Date, such pending lien shall be considered as certified, confirmed or ratified and Seller shall, at closing, be charged an amount equal to the last estimate by the public body, of the assessment of the improvement.

15. Personal Property Inspection and Repair. Seller warrants that all major appliances, heating, cooling, electrical, plumbing systems, and machinery are in working condition as of closing date. Buyer may, at his expense, have inspections made of said items by licensed persons dealing in the repair and maintenance thereof, and shall report in writing to Seller such items as found not in working condition prior to taking possession thereof, or as of the closing date, whichever is first. Unless Buyer reports failures within said period, he shall be deemed to have waived Seller's warranty as to failures not reported. Valid reported failures shall be corrected at Seller's cost with funds escrowed at closing. Seller agrees to provide access for inspection upon reasonable notice.

16. Risk of Loss. If the improvements are damaged by fire or other casualty prior to closing and costs of restoring same do not exceed 3% of the assessed valuation of the improvements so damaged, cost of restoration shall be an obligation of the Seller and closing shall proceed pursuant to the terms of this Agreement with cost therefor escrowed at closing. In the event the cost of repair or restoration exceeds 3% of the assessed valuation of the improvements so damaged, Buyer shall have the option of either taking the property as is, together with either the said 3% or any insurance proceeds payable by virtue of such loss or damage, or of canceling this Agreement and receiving return of deposits made hereunder.

17. Maintenance. Notwithstanding the provisions of Paragraph 15, between Effective Date and closing date, personal property referred to in Paragraph 15 and real property, including lawn, shrubbery and pool, if any, shall be maintained by Seller in the condition they existed as of Effective Date, ordinary wear and tear excepted, and Buyer or Buyer's designated agent will be permitted access for inspection prior to closing to confirm compliance with this Paragraph.

18. Proceeds of Sale and Closing Procedures. The deed shall be recorded upon clearance of funds and evidence of title, to show title in Buyer, without any encumbrances or change which would render Seller's title unmarketable from the date of the last evidence, and the cash proceeds of sale shall be held in escrow by an escrow agent as may be mutually agreed

upon for a period of not longer than five (5) days from and after closing date. If Seller's title is rendered unmarketable, Buyer shall within a three (3) day period, notify Seller in writing of the defect and Seller shall have fifteen (15) days from date of receipt to such notification to cure said defect. In the event Seller fails to timely cure said defect, all monies paid hereunder shall, upon written demand therefor and within three (3) days thereafter, be returned to Buyer and simultaneously with such repayment, Buyer shall vacate the property and reconvey same to Seller by special warranty deed. In the event Buyer fails to make timely demand for refund, he shall take title as is, waiving all rights against Seller as to such intervening defect except as may be available to Buyer by virtue of warranties, if any, contained in the deed. In the event a portion of the purchase price is to be derived from institutional financing or refinancing, the requirements of the lending institution as to place, time of day and procedures for closing, and for disbursement of mortgage proceeds, shall control, anything in the Agreement to the contrary notwithstanding; provided, however, that the Seller shall have the right to require from such lending institution at closing a commitment that it will not withhold disbursement of mortgage proceeds as a result of any title defect attributable to Buyer-mortgagor. The escrow and closing procedure required by this Paragraph may be waived in the event the attorney, title agent or closing agent insures against adverse matters pursuant to applicable laws of this state.

19. Escrow. Any escrow agent receiving funds is authorized and agrees by acceptance thereof to promptly deposit and to hold same in escrow and to disburse the same subject to clearance thereof in accordance with terms and conditions of this Agreement. Failure of clearance of funds shall not excuse performance by Buyer. In the event of doubts as to his duties or liabilities under the provisions of this Agreement, the escrow agent may in his sole discretion, continue to hold the monies which are the subject of this escrow until the parties mutually agree to the disbursement thereof, or until a judgment of a court of competent jurisdiction shall determine the rights of the parties thereto, or he may deposit all the monies then held pursuant to this Agreement with the Clerk of the Court of the County having jurisdiction of the dispute, and upon notifying all parties concerned of such action, all liability on the part of the escrow agent shall fully terminate, except to the extent of an accounting for any monies theretofore delivered out of escrow. In the event of any suit between Buyer and Seller wherein the escrow agent is made a party by virtue of acting as such escrow agent hereunder, or in the event of any suit wherein escrow agent interpleads the subject matter of this escrow, the escrow agent shall be entitled to recover a reasonable attorney's fee and costs incurred, said fees and costs to be charged and assessed as court costs in favor of the prevailing party. All parties agree that the escrow agent shall not be liable to any party or person whomsoever for miss-delivery to Buyer or Seller of monies subject to this escrow, unless such miss-delivery shall be due to willful breach of this Agreement or negligence on the part of the escrow agent.

20. Attorney Fees and Costs. All matters pertaining to this Agreement (including its interpretation, application, validity, performance and breach), shall be governed by, construed and enforced in accordance with the laws of the State of Idaho. The parties herein

waive trial by jury and agree to submit to the personal jurisdiction and venue of a court of subject matter jurisdiction located in Valley County, State of Idaho. In the event that litigation results from or arises out of this Agreement or the performance thereof, the parties agree to reimburse the prevailing party's reasonable attorney's fees, court costs, and all other expenses, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled. In such event, no action shall be entertained by said court or any court of competent jurisdiction if filed more than one year subsequent to the date the cause(s) of action actually accrued regardless of whether damages were otherwise as of said time calculable.

21. Default. If Buyer fails to perform this Agreement within the time specified, the deposits paid by the Buyer aforesaid may be retained by or for the account of Seller as liquidated damages, consideration for the execution of this Agreement and in full settlement of any claims; whereupon all parties shall be relieved of all obligations under this Agreement. If, for any reason other than failure of Seller to render his title marketable after diligent effort, Seller fails, neglects or refuses to perform this Agreement, the Buyer may seek specific performance or elect to receive the return of his deposits without thereby waiving any action for damages resulting from Seller's breach.

22. Contract Not Recordable, Persons Bound and Notice. This Agreement shall not be recorded in any public records. This Agreement shall bind and inure to the benefit of the parties hereto and their successors in interest. Whenever the context permits, singular shall include plural and on gender shall include all. Notice given by or to the attorney for either party shall be as effective as if given by or to said party.

23. Promtions and Insurance. Taxes, assessments, rent, interest, insurance and other expenses and revenues of the property shall be prorated as of date of closing. Buyer shall have the option of taking over any existing policies of insurance on the property, if assumable, in which event premiums shall be prorated. The cash at closing shall be increased or decreased as may be required by said prorations. All references in this Agreement to prorations as of date of closing will be deemed "date of occupancy" if occupancy occurs prior to closing, unless otherwise provided for herein.

24. Notice on Radon Gas. Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in this state. Additional information regarding radon and radon testing may be obtained from your county public health unit.

25. Conveyance. Seller shall convey title to the property by statutory warranty deed subject only to matters contained in Paragraph 6 hereof and those otherwise accepted by Buyer. Personal property shall, at the request of the Buyer, he conveyed by an absolute bill of sale with warranty of title, subject to such liens as may be otherwise provided for herein.

26. Other Agreements. No prior agreements or representations shall be binding upon any of the parties hereto unless incorporated in this Agreement. No modifications or changes in this Agreement shall be valid or binding upon the parties hereto unless in writing, executed by the parties to be bound thereby.

27. Typewritten or Handwritten Provision. Typewritten or handwritten provisions inserted herein or attached hereto as Addenda shall control all provisions in conflict therewith.

28. Contractual Procedures. Unless specifically disallowed by law, should litigation arise hereunder, service of process therefor may be obtained through certified mail, return receipt requested; the parties hereto waiving any and all rights they may have to object to the method by which service was perfected.

29. Special Clauses. See "Addendum 1" attached hereto.

Executed by Buyer on this 4th day of May, 2005.

Witness

Calvin Tabor as member of AI Real Estate

"BUYER"

Executed by Seller on this 4th day of May, 2005.

Maynie L. Ellsworth

Witness

Sarah M. Chitwood

"SELLER"

ADDENDUM #1
SPECIAL CLAUSES

Addendum to Agreement for Sale and Purchase dated the 4th day of May, 2005 by and between SARA CHITWOOD (hereinafter referred to as "Seller"), whose address is

*

and A1 REAL ESTATE LLC AND/OR AS ASSIGNED (hereinafter referred to as "Buyer"), whose address is P.O. Box 3943, Nampa, Idaho 83653.

1. By their signatures hereto, Buyer and Seller agree to be bound to the terms of this Addendum as part and parcel of the above described Agreement for Sale and Purchase, as if the terms hereof were specifically set out therein.

2. This Addendum is executed contemporaneously with the above described Agreement for Sale and Purchase.

3. All escrow deposits shall be, pursuant to this contract, the property of the Buyer.

4. Buyer to construct a berm on the property line between sellers remaining property and sold portion. This shall serve as a screen between sellers existing residence and new development.

5. Buyer will pay for all costs associated to split sellers existing residence from portion of property to be sold.

6. If at any future date, seller decides to sell, transfer, or convey, personal residence commonly known as 517 N. 1st. St. McCall Id 83638, it is hereby agreed that Calvin Tabor (a member of A1 Real Estate LLC) shall have first right of refusal.

7. Seller agrees to allow right of way and/or easement to connect sewer line for new development to existing sewer line on sellers remaining property.

8. Seller agrees to finance $150,000.00 (one hundred and fifty thousand dollars) of the purchase price through a promissory note with A1 Real Estate LLC at an annual interest rate of 6% due and payable on or before May 1st, 2006. This note shall be secured by A1 Real Estate LLC and if ever in default, liens may be placed on the assets of A1 Real Estate LLC.

9. Seller agrees to finance $77,000.00 (seventy seven thousand dollars and 00/100's) of the purchase price through a promissory note with A1 Real Estate LLC at an annual interest rate of 6% due and payable on or before May 1st, 2007. This note shall be secured by A1 Real Estate LLC and if ever in default, liens may be placed on the assets of A1 Real Estate LLC.

[6001]

10. The closing shall take place at Pioneer Title Co, located in Caldwell, Idaho who shall handle the closing and prepare title insurance for the Seller, with all standard closing costs apportioned according to this contract.

Executed by Buyer on this 4th day of May, 2005.

Witness
Cedric Fabor as member of QZ Real Estate
"BUYER"

Executed by Seller on this 4th day of May, 2005.

Witness

"SELLER"

Promissory Note

RECITATIONS:

Date: May 9, 2005

Borrower: A1 Real Estate LLC

Borrower's Address: P.O. Box 3843, Nampa, ID 83653

Payee: Sarah Martha Chitwood

Place for Payment: 517 N 1st McCall ID 83638

PAYMENT TERMS. FOR VALUE RECEIVED, the undersigned Borrower does hereby promise to pay this Note as follows:

Principal Amount: $150,000.00 (one hundred and fifty thousand dollars)

Interest: 6% per annum

Term: Due in full on or before May 1, 2006 Amend to extend contract to be due on or before MAY 1, 2007 under the same terms

Number of Payments: 1

Calvin Tate as mgr of A1 Real Estate LLC 4-28-06
Marjorie L. Ellsmaker, POA for Martha (Sara M.) Chitwood
4/28/06

BORROWER'S PRE-PAYMENT RIGHT. Borrower reserves the right to prepay this Note in whole or in part, prior to maturity, without penalty.

BINDING EFFECT. The covenants, obligations and conditions herein contained shall be binding on and inure to the benefit of the heirs, legal representatives, and assigns of the parties hereto.

DEFAULT AND ACCELERATION CLAUSE. If Borrower defaults in the payment of this Note or in the performance of any obligation, and the default continues after Payee gives Borrower notice of the default and the time within which it must be cured, as may be required by law or written agreement, then Payee may declare the unpaid principal balance and earned interest on this Note immediately due. Borrower and each surety, endorser, and guarantor waive all demands for payment, presentation for payment, notices of intentions to accelerate maturity, notices of acceleration of maturity, protests, and notices of protest, to the extent permitted by law.

FORM OF PAYMENT. Any check, draft, Money Order, or other instrument given in payment of all or any portion hereof may be accepted by the holder and handled in collection in the customary manner, but the same shall not constitute payment hereunder or diminish any rights of the holder hereof except to the extent that actual cash proceeds of such instruments are unconditionally received by the payee and applied first to interest, and the balance to principle.

ATTORNEY'S FEES. If this Note is given to an attorney for collection or enforcement, or if suit is brought for collection or enforcement, or if it is collected or enforced through probate, bankruptcy, or other judicial proceeding, then Borrower shall pay Payee all costs of collection and enforcement, including reasonable attorney's fees and court costs in addition to other amounts due.

SEVERABILITY. If any provision of this Note or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Note nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.

CONSTRUCTION. The pronouns used herein shall include, where appropriate, either gender or both, singular and plural.

GOVERNING LAW. The undersigned and all other parties to this note, whether as endorsers, guarantors or sureties, agree to remain fully bound until this note shall be fully paid and waive demand, presentment and protest and all notices hereto and further agree to remain bound notwithstanding any extension, modification, waiver, or other indulgence or discharge or release of any obligor hereunder or exchange, substitution, or release of any collateral granted as security for this note. No modification or indulgence by any holder hereof shall be binding unless in writing; and any indulgence on any one occasion shall not be an indulgence for any other or future occasion. Any modification or change in terms, hereunder granted by any holder hereof, shall be valid and binding upon each of the undersigned, notwithstanding the acknowledgement of any of the undersigned, and each of the undersigned does hereby irrevocably grant to each of the others a power of attorney to enter into any such modification on their behalf. The rights of any holder hereof shall be cumulative and not necessarily successive. This note shall take effect as a sealed instrument and shall be construed, governed and enforced in accordance with the laws of the State of Idaho.

DESCRIPTIVE HEADINGS. The descriptive headings used herein are for convenience of reference only and they are not intended to have any effect whatsoever in determining the rights or obligations under this Note.

EXECUTED on (Date) _____

Calvin Tolon as member of AJ Real Estate
Borrower Signature

AJ Real Estate
Borrower Print

Sarah Martha Chitwood
Witness Signature

_____
Witness Print

 Borrower Initials C.T. Date 5-9-05

Promissory Note

RECITATIONS:

Date: **6/6/2007**

Borrower: **A1 Real Estate LLC**

Borrower's Address: **1924 E. Walnut Street, Caldwell, ID 83605**

Payee: **Martha Chitwood**

PAYMENT TERMS. FOR VALUE RECEIVED, the undersigned Borrower does hereby promise to pay this Note as follows:

Principal Amount: **$150,000 (one hundred fifty thousand dollars & 00/100's)**

Interest Rate: **6% (six percent) per annum**

Term: **Due in full on or before 12/25/2007**

BORROWER'S PRE-PAYMENT RIGHT. Borrower reserves the right to prepay this Note in whole or in part, prior to maturity, without penalty.

BINDING EFFECT. The covenants, obligations and conditions herein contained shall be binding on and inure to the benefit of the heirs, legal representatives, and assigns of the parties hereto.

DEFAULT AND ACCELERATION CLAUSE. If Borrower defaults in the payment of this Note or in the performance of any obligation, and the default continues after Payee gives Borrower notice of the default and the time within which it must be cured, as may be required by law or written agreement, then Payee may declare the unpaid principal balance and earned interest on this Note immediately due. Borrower and each surety, endorser, and guarantor waive all demands for payment, presentation for payment, notices of intentions to accelerate maturity, notices of acceleration of maturity, protests, and notices of protest, to the extent permitted by law.

FORM OF PAYMENT. Any check, draft, Money Order, or other instrument given in payment of all or any portion hereof may be accepted by the holder and handled in collection in the customary manner, but the same shall not constitute payment hereunder or diminish any rights of the holder hereof except to the extent that actual cash proceeds of such instruments are unconditionally received by the payee and applied first to interest, and the balance to principle.

ATTORNEY'S FEES. If this Note is given to an attorney for collection or enforcement, or if suit is brought for collection or enforcement, or if it is collected or enforced through probate, bankruptcy, or other judicial proceeding, then Borrower shall pay Payee all costs of collection and enforcement, including reasonable attorney's fees and court costs in addition to other amounts due.

SEVERABILITY. If any provision of this Note or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Note nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.

CONSTRUCTION. The pronouns used herein shall include, where appropriate, either gender or both, singular and plural.

GOVERNING LAW. The undersigned and all other parties to this note, whether as endorsers, guarantors or sureties, agree to remain fully bound until this note shall be fully paid and waive demand, presentment and protest and all notices hereto and further agree to remain bound notwithstanding any extension, modification, waiver, or other indulgence or discharge or release of any obligor hereunder or exchange, substitution, or release of any collateral granted as security for this note. No modification or indulgence by any holder hereof shall be binding unless in writing; and any indulgence on any one occasion shall not be an indulgence for any other or future occasion. Any modification or change in terms, hereunder granted by any holder hereof, shall be valid and binding upon each of the undersigned, notwithstanding the acknowledgement of any of the undersigned, and each of the undersigned does hereby irrevocably grant to each of the others a power of attorney to enter into any such modification on their behalf. The rights of any holder hereof shall be cumulative and not necessarily successive. This note shall take effect as a sealed instrument and shall be construed, governed and enforced in accordance with the laws of the State of Idaho.

DESCRIPTIVE HEADINGS. The descriptive headings used herein are for convenience of reference only and they are not intended to have any effect whatsoever in determining the rights or obligations under this Note.

EXECUTED on (Date) June 6th 2007

Calvin Tabor as member of A1 Real Estate

A1 Real Estate, LLC. By Member, Calvin Tabor

Grantor: Sarah Martha Chitwood

Sarah Martha Chitwood by
Marjorie L. Gilmore, POA

 Borrower Initials C.T. Date 6-6-07

Paid $9863.00 Lgr. int. + 35 days int. penalty - MG 6/6/07