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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRIS DRAKOS and CHRIS DRAKOS ENTERPRISES, Plaintiffs/Appellants, vs. GARRETT H. SANDOW AND DOREA ENTERPRISES, INC., Defendants/Respondents.	)	Docket Number: 47363-2019 Case No. CV6-2018-1345 I.A.R. 11, 20, 34.1

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Bingham County
Honorable Stevan H. Thompson, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……3

STATEMENT OF THE CASE AND RELATED PROCEEDINGS……5

STANDARD OF REVIEW……7

ARGUMENT……10

OVERVIEW AND STATUS

THE COURT'S RULING(S)

1. **The court erred in the interpretation of the promissory note that was the evidence of the money loaned to the respondent…**……11
2. **A debt may be renewed by partial payment…**……12

CONCLUSION……14

CERTIFICATE OF SERVICE……14

TABLE OF AUTHORITIES

RULES:

I.A.R. RULES, 11; 20; 34.1. (Cover)

I.R.C.P., Rule 56(c). P. 7

CASES:

***Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1986). P. 8**

***Barlows, Inc. v. Bannock Cleaning Corp.,* 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982). P.8**

***Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 266 (2000). P.7**

***Celotex Corp. v Catrett*, 477 U.S. 317; 106 S.Ct. 2548 (1986). P.7**

***Friel v. Boise City Hous. Auth.,* 126 Idaho 484, 887 P.2d 29 (1994). P.8**

***Frontier Federal Savings and Loan Assn. v. Douglas,* 123 Idaho 808, 853 P.2d 553 (1993). P.12.**

***Herrold v. Idaho State School for the Deaf and Blind,* 112 Idaho 410,412 (Ct. App. 1987). P.8.**

***Hilbert v. Hough,* 132 Idaho 203, 969 P.2d 836 (Ct. App. 1998). P.**

***Kaufman v. Fairchild,* 119 Idaho 859, 810 P.2d 1145 (Ct. App. 1991). P. 9**

***McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003). P. 7**

***Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.,* 97 Idaho 348, 544 P.2d 306 (1975). P.8.**

***Selkirk-Priest Basin Ass"n*. v. *State ex. rel. Batt,* 128 Idaho 831, 919 P.2d 1032 (1996). P.8**

***Sewell v. Neilsen, Monroe, Inc.* 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985). P.8**

***Smith v. Idaho State Federal Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).**

P.8

***Thompson v. City of Idaho Falls*, 126 Idaho 527, 887 P.2d 1094 (Ct. App. 1994). P.8**

***Thompson v. Sunny Ridge Village Partnership,* 118 Idaho 330 (Ct. App. 1990). P.13**

STATUTES:

Idaho Code §5-216. P. 11

Idaho Code §5-238. Pp. 11, 13, 14

OTHER:

Black's Law Dictionary P.11

STATEMENT OF THE CASE AND RELATED PROCEEDINGS

The appellants, via Chris Drakos, loaned two hundred thousand ($200,000.00) dollars to the respondents for the construction and/or operation of a car wash.1 The initial documents secured the money loaned by security in the car wash. The collateral was later released. Thus, the promissory note, the document in question, became unsecured. 2 Garrett Sandow had personally guaranteed payment on the note with accrued interest.3

The appellants had frequent talks with the respondents over morning coffee and the payment of the debt. The respondent, Garrett Sandow, performed legal services for the appellants which the appellants considered as compensation for some of the interest that accrued on the note.4

Ultimately, the appellants requested payment on the note and hired an attorney to send a demand letter and prosecute the action. The respondents did not pay and tendered two related defenses, to-wit: the note was non-renewing and the statute of limitations barred collection on the note. The two issues are intertwined. Both parties filed motions for summary judgment. The court granted summary judgment in favor of the defendants/respondents indicating the note was time barred by the statute of limitations.5

On reconsideration, the court declined to accept the legal services provided by

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1 Record, pp. 1-5; 12-14, Defendant's Exhibit A to Answer (Promissory Note).
2 Id., Exhibit A.
3 See, Record, 12-14, Exhibit A to Answer
4 Record, pp. 60-66.
5 Record, Decision and Order, pp. 53-59.

Sandow as partial payment on the note to renew the debt.6

Respondents requested attorney fees which were denied.7

This appeal ensued.

6 Record, Decision and Order, pp.73-77.
7 Record, pp. 83-84, Judgment.

STANDARD OF REVIEW

The U.S. Supreme Court case of *Celotex Corp. v Catrett*, 477 U.S. 317; 106 S.Ct. 2548 (1986) has guided courts throughout all jurisdictions on the standard to be used. This case is well known and is the master guide for all jurisdictions. The standard set in *Celotex* for summary judgment is cited in most proceedings including those in Idaho.

The summary judgment standard of review is well-known by most, if not all, practicing attorneys in the State of Idaho. I.R.C.P., Rule 56(c) states: Summary judgment is only appropriate if "the pleadings, depositions, and admissions on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If reasonable minds might come to different conclusions summary judgment is inappropriate. *McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003).

Idaho has numerous cases on the standard for summary judgment.

> **Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in the light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. The burden of proving the absence of material facts is upon the moving party. The adverse party, however, "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." In other words, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.**

***Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 266 (2000).**

The Court should "liberally construe the record in favor of the party opposing the motion for summary judgment, drawing all reasonable inferences and conclusions supported by the record in favor of that party."

On appeal, the same standard is used as was set forth before the lower court. See, *Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1986); *Friel v. Boise City Hous. Auth.,* 126 Idaho 484, 887 P.2d 29 (1994); *Hilbert v. Hough,* 132 Idaho 203, 969 P.2d 836 (Ct. App. 1998); *Selkirk-Priest Basin Ass"n.* v. *State ex. rel. Batt,* 128 Idaho 831, 919 P.2d 1032 (1996).

Idaho law is very clear on the standard used in summary judgment proceedings that have been cited in numerous cases. That initial standard is as follows:

> **Summary judgment should be granted if no genuine issue as to any material fact is found to exist after the pleadings, depositions, admissions, and affidavits have been construed in a light most favorable to the party opposing the summary judgment motion. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.,* 97 Idaho 348, 544 P.2d 306 (1975).**

Thereafter, the court follows often cited points, as follows:

-If the court determines, after a hearing on a motion for summary judgment, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. *Barlows, Inc. v. Bannock Cleaning Corp.,* 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

-In summary judgment proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonable drawn from the evidence. *Smith v. Idaho State Federal Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).

-When a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material fact rests with that party. *Thompson v. City of Idaho Falls*, 126 Idaho 527, 887 P.2d 1094 (Ct. App. 1994).

- If a genuine issue of material fact remains unresolved, or if the record

contains conflicting inferences and if reasonable minds might reach different conclusions from the facts and inferences presented, summary judgment should not be granted. *Sewell v. Neilsen, Monroe, Inc.* 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

-If an action will be tried by a court without a jury, a judge is not required to draw inferences in favor of a party opposing a motion for summary judgment. *Kaufman v. Fairchild,* 119 Idaho 859, 810 P.2d 1145 (Ct. App. 1991).

In the instant case a jury has been requested.

Thus, the court has at least two tasks concerning a summary judgment motion. First, the court must determine that no material facts are in dispute. Second, the court must draw reasonable inferences from those non-contested facts to determine which party should be granted summary judgment/partial summary judgment by applying the correct rules of law.

ARGUMENT

OVERVIEW AND STATUS

This dispute involves the lending of money to the respondent from the appellant. On the cross-motions for summary judgment the material facts are mainly undisputed between the parties. No dispute exists as to the factual issue that $200,000 were transferred from appellant/plaintiff to the defendant/respondent and that said sum was not paid by the respondent. No dispute exists that the parties had multiple discussions regarding the payment of the money. No dispute exists that Garrett Sandow personally guaranteed the repayment. There is also no dispute that Sandow did not hire an attorney to represent himself in this proceeding; and, that he represented himself before the district court.

Also, the parties agree that Sandow performed legal services for the appellant. The parties may disagree whether those services were in partial payment on the debt due and owing. The motion to reconsider, to be discussed herein, is the essence of the services performed by Sandow.

Sandow alleged that the money was not due and payable because the statute of limitations barred recovery by the appellant. The promissory note had language wherein the appellant alleges and does believe that the promissory note was self-renewing.

The district court granted summary judgment to the respondent indicating that the limitations period was in force and barred recovery notwithstanding the language of the promissory note.

On reconsideration, the district court declined to accept that the services of Sandow were partial payment on the debt and did not renew the debt. The court denied the motion to reconsider.

The final judgment of the court was entered and the appellant appealed said judgment and filed an amended notice of appeal to comply with appellate rules.

THE COURT'S RULING(S)

1. **The court erred in the interpretation of the promissory note that was the evidence of the money loaned to the respondent.**

The promissory note8 states, in part, as follows:

The makers, sureties, guarantors and endorsers of this Note jointly and severally waive any presentment for payment, notice of protest, and notice of non-payment, and consent that this Note or any payment due under this Note may be extended or renewed without prior demand or notice, and further consent to the release of any collateral or part thereof, with or without substitution.

"Waive" and "consent" are key words. Blacks Law Dictionary defines waive as "to abandon, throw away, renounce, repudiate, or surrender a claim. . .to give up right or claim voluntarily." Likewise, consent is defined as "voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. . . Consent is an act of reason, accompanied with deliberation."

Thus, this language appears very clear. It would seem that the clear language is not susceptible of multiple meanings. This language clearly states that there does not need to be notice given of non-payment. More important, the clear language states that the Note may be extended or renewed without prior demand or notice. That language is very clear.

The Note was not paid within five (5) years. That fact is not disputed by either party. The district court ruled that the Note was not enforceable because it was not paid within the five-year period of Idaho Code §5-216. The court then relies on Idaho Code §5-

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8 Record, pp. 12-12, Exhibit A.

238 to indicate that a separate writing must exist to renew the debt. The plain language of this statute clearly states "unless the same is contained in *some writing*, signed by the party to be charged thereby". The promissory note is a writing and was signed by Garrett Sandow. The language of the statute is very clear. The language contained in the Note is very clear. The respondent waived non-payment AND the Note may be extended or renewed without prior demand or notice.

The appellant cannot be any plainer and simpler on this argument.

Somewhat bothersome, the district court states in its decision the following: "Plaintiffs have cited to no case law to demonstrate that the kind of language found in the Note can extend the statute of limitations for an action on the Note." 9 Clearly, the district court is incorrect on this statement as the plaintiff clearly stated in supporting briefing the following: "A plethora of cases exist that the courts should follow the clear meaning of a statement or statute. See, e.g. *Frontier Federal Savings and Loan Assn. v. Douglas,* 123 Idaho 808, 853 P.2d 553 (1993)."10

2. **A debt may be renewed by partial payment.**

Subsequent to the district court's ruling on summary judgment, the appellants filed a Motion to Reconsider.11 The motion was to indicate that the respondent, Garrett Sandow performed legal services for the appellant with credit being given on the Note which would renew the debt in addition to the language of the Note itself.

The legal services were remuneration and clearly set forth in the affidavit of Chris Drakos.12 Drakos indicated that the collection of a delinquent debt, unrelated to the case

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9 Record, pp. 57-58.
10 Record, p. 44.
11 Record, pp. 60-61
12 Record, pp. 62-65.

at bar, that were performed via the services of Sandow were applied to the Note. As stated by the district court in its earlier ruling on summary judgment, "but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt." (I.C. §5-238)13

The district court denied the motion to reconsider. The affidavit of Sandow indicates he did perform services for the appellant. The affidavits of both Drakos and Sandow indicate that services were performed. That material fact is not disputed.

The district court denied the motion to reconsider indicating "in this case, no payments were made at all". Payments of time and skills are still a form of remuneration that benefitted the appellant. The district court, apparently, believed that only monetary payments would make applicable the renewal of the Note. The court indicated that *Thompson v. Sunny Ridge Village Partnership,* 118 Idaho 330 (Ct. App. 1990) did not apply. Appellant would recommend to this court that *Thompson, supra,* does apply and the district court is incorrect.

The district court is correct that an amount was not stated in the affidavit of Drakos. The amount is irrelevant. However, the district court cannot suggest that remuneration did not occur. Sandow tries to minimize the legal services rendered to Drakos but never refutes the affidavit of Drakos. Quite simply and in addition to the language of the promissory note, the remuneration to the Appellant renewed the debt. The lower court attempts to make inferences on the type and amount of remuneration when that task is for the fact-finder, to-wit: the jury. It is alleged that the analysis of the lower court is misplaced.

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13 Record, p. 6, Decision and Order.

CONCLUSION

The relief requested by the appellants is that this court reverse the summary judgment decision issued by the district court and grant summary judgment to the appellant. The language of the promissory note is clear and unequivocal. The language of Idaho Code §5-238 is clear and unequivocal. The language of the note and of the statute is very clear. Summary judgment should be granted to the appellant.

Dated this 25th day of November, 2019.

/s/ Robin D. Dunn
Robin D. Dunn
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of November, 2019, a true and correct copy of the foregoing was delivered, via the E-filing system of I-court as set forth in the Idaho Appellate Rules to the following:

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