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AT 3:30 O'Clock P M
CLERK OF DISTRICT COURT

Debrae Clausen
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LAWRENCE SPENCER, THOMAS R.)
MACY, and WILLIAM McCRORY,,)
)
) *Plaintiffs,*)
vs.)
)
)
NORTH IDAHO COLLEGE, and NORTH)
IDAHO COLLEGE FOUNDATION, an Idaho)
non-profit corporation,,)
)
)
) *Defendants.*)

Case No. **CV 2009 8934**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT
NORTH IDAHO COLLEGE'S
MOTION FOR SUMMARY
JUDGMENT**

I. PRODEDURAL HISTORY AND BACKGROUND.

This matter is before the Court on defendants' motion for summary judgment. Defendant North Idaho College (NIC) is a community college district organized pursuant to I.C. § 33-2101, *et seq.* Defendant North Idaho College Foundation (Foundation) is an Idaho non-profit corporation incorporated pursuant to I.C. § 30-3-1, *et seq.* Plaintiffs are three individuals who own property in Kootenai County, and thus, electors and taxpayers within the district boundaries of that community college. Complaint, p. 2, ¶¶ 3-5, 8.

On July 23, 2009, the Foundation purchased property in Kootenai County known as the "Mill Site." At an open public meeting on July 21, 2009, NIC, acting through its Board of Trustees (Board), authorized NIC to enter into a lease agreement with the Foundation for the Mill Site. Resolution 2009-01 was approved by the Board on that date; it was determined the lease was "in the best interests of the students, residents

and taxpayers of Kootenai County...” Complaint, Exhibit 3, Resolution No. 2009-01, p. 1. On July 23, 2009, NIC executed the lease agreement which provided for NIC to lease the Mill Site from the Foundation on a yearly basis; renewal of the lease would require affirmative action by the Board each year through. Complaint, Exhibit 3, Lease Agreement, p. 2.

On October 27, 2009, plaintiffs filed their *pro se* Complaint, alleging a violation of Article VIII, Section 3 of the Idaho Constitution. Plaintiffs claim the lease agreement is a *de facto* installment land sale contract for which NIC did not obtain the required 2/3 assent of the qualified elector’s in the district. Complaint, p. 5, ¶¶ 32-33. Plaintiffs also claim NIC did not obtain judicial validation of the lease agreement pursuant to I.C. § 7-1304, as an alternative to the assent of 2/3 of qualified electors in the district. *Id.*, ¶ 34. Plaintiffs seek: declaratory judgment that the lease agreement violates Article VIII, Section 3 of the Idaho Constitution; permanent injunctive relief prohibiting NIC from making further expenditures under the lease agreement until the lease is approved by 2/3 of qualified electors in the district, should that occur; and an entry of judgment compelling the Foundation to return all monies received from NIC under the lease. Complaint, pp. 6-7. On November 25, 2009, NIC and the Foundation filed their separate Answers to the Complaint.

On January 22, 2010, NIC filed its motion for summary judgment, “Memorandum in Support of Motion for Summary Judgment on Behalf of North Idaho College”, and the “Affidavit of Tom Komberec (Vice-President of NIC Foundation) in Support of Motion for Summary Judgment”. Also on January 22, 2010, the Foundation filed “North Idaho College Foundation’s Joinder in North Idaho College’s Motion for Summary Judgment.” In its motion for summary judgment NIC requests this Court grant summary judgment in NIC’s favor as to the validity of the lease. “If the Lease Agreement does not violate

Article VIII, Section 3, all other claims or remedies sought by the Plaintiffs are moot and this lawsuit must be dismissed.” Defendants’ Memorandum in Support of Motion for Summary Judgment, p. 13. On February 8, 2010, the plaintiffs filed “Plaintiff’s Answering Brief in Response to defendant’s Motion for Summary Judgment”, an “Affidavit of Lawrence Spencer Supplementing Plaintiffs’ Answering Brief in Response to Defendants’ Motion for Summary Judgment” and the “Affidavit of William McCrory Supplementing Plaintiffs’ Answering Brief in Response to Defendants’ Motion for Summary Judgment”. On February 16, 2010, the Foundation filed the “Foundation Reply Brief in Support of Motion for Summary Judgment.” Also on February 16, 2010, NIC filed its “Reply Memorandum in Support of Motion for Summary Judgment.” On February 22, 2010, the “Affidavit of William McCrory in Opposition to Motion for Summary Judgment” was filed. Oral argument was held on February 22, 2010. At the conclusion of oral argument, this Court took the motion for summary judgment under advisement.

II. STANDARD OF REVIEW.

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). Standards applicable to summary judgment require the district court to liberally construe facts in the existing record in favor of the party opposing the motion, and to draw all reasonable inferences in favor of the non-moving party. *Loomis*, 119 Idaho at 436. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* The moving party is entitled to judgment when the nonmoving party fails 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. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988).

III. ANALYSIS.

NIC argues Article VIII, Section 3 of the Idaho Constitution only prohibits NIC from incurring debt or liability exceeding the income or revenue provided in the current year for that debt or liability. Defendants' Memorandum in Support of Motion for Summary Judgment, pp. 8-9. NIC states the lease agreement does not contemplate future aggregate rents and "the only obligation being incurred by NIC was the current yearly rent under the lease." *Id.*, at p. 9. Therefore, NIC argues, there is no requirement for the assent of two-thirds of the qualified electors; nor does any obligation to seek judicial confirmation exist as this is merely an available discretionary statutory process. *Id.*, pp. 8-9. NIC argues the lease agreement does not violate the Idaho Constitution for several reasons: rents are only due and owing for years beyond the 2009-2010 fiscal year if the lease term is extended, and nothing in the lease agreement obligates NIC to renew for any of the four consecutive one-year terms available under the lease; the lease itself does not create any debt or liability as those terms are defined by Idaho case law; NIC has not pledged or encumbered any of its own property beyond the 2009-2010 term; and the lease agreement is a typical ground lease, therefore NIC's agreement to pay assessments, provide insurance, etc. are common and limited to the current year and no liability for taxes or insurance would be incurred if the lease agreement is not renewed. Defendants' Memorandum in Support of Motion for Summary Judgment, pp. 9-12.

In response, the *pro se* plaintiffs disagree with the assertion that the lease agreement does not create or involve a debt or liability extending beyond one year. Answering Brief in Response to Defendants' Motion for Summary Judgment, p. 2.

Specifically, plaintiffs point to public documents (including the lease agreement itself), and claim such evince the Board's intent to acquire title to the Mill Site, and not merely lease the property on an annual basis. *Id.*, pp. 3-6. Plaintiffs write:

Plaintiffs contend that while the Lease Agreement takes the form of a lease, it is in fact a disguised installment purchase agreement that contravenes the Idaho Constitution, Article 8, Section 3.

Id., p. 5. Plaintiffs continue:

The Lease Agreement, ¶ 3, obligates Defendant College to pay Defendant Foundation \$4,000,000 in "prepaid rent" upon execution of the Agreement. As explained earlier, it appears that \$500,000 of that is "good faith deposit." The Lease Agreement does not explain for what period of time the remaining \$3,500,000 of "prepaid rent" pays the rent. Thereafter, Defendant is obligated to make six semi-annual payments of exactly \$1,074, 134.02 for three years, contingent on appropriating the annual amount due by the Defendant College in its annual budget. The total of those six semi-annual payments is \$6,444,804.12. Adding the \$4,000,000 in "prepaid rent" to the sum of the six equal semi-annual payments results in a total amount of \$10,444,804.12 to be paid by Defendant College to Foundation.

Id., pp. 6-7. Plaintiffs note \$444,804.12 in payments "must be interest or fees", but they are unable to further explain the amount pending receipt of discovery responses. *Id.*, p.

7. Additionally, plaintiffs point to the Tax Agreement Regarding Revenue Ruling (attached to plaintiffs' Complaint) conferring tax exempt status, for support of their argument that:

...Defendants had to know and agree when the Lease Agreement was signed that it is, in fact, a sales contract and not a lease-option agreement. It is this Tax Agreement Regarding Revenue Ruling that binds Defendants together was a single unit in this action.

Id., p. 8. Finally, plaintiffs argue NIC's exercise of the non-appropriation option in the lease agreement may result in actual or possible losses including the good faith deposit and any buildings or improvements placed on the Mill Site by NIC, *inter alia*. *Id.*, p. 10.

The Foundation, in its reply brief, argues no long-term obligation was necessary

in this transaction, nor was any long-term obligation the intent of defendants. Foundation Reply Brief in Support of Summary Judgment, p. 2. The Foundation notes the requirements of the Tax Code “obscure some of the language typically used in this type of transaction but do not change the nature of the transaction.” *Id.* That is: the Foundation incurred a debt to purchase property, it leased the property to NIC on a year-to-year basis, the debt is secured by the property- not by the lease, only the Foundation is obligated to pay the debt, the Foundation intends to use the lease proceeds to make payments on the debt but is not required to do so, NIC did not enter into a long-term lease, and NIC did not incur the debt. *Id.* The Foundation discusses cases cited by plaintiffs as being inapposite and notes the Tax Agreement Revenue Ruling does not require the lease to be a long-term obligation. *Id.*, pp. 4-5. NIC, in its reply brief, argues the only issue before the Court is whether NIC incurred a debt or obligation violative of Article VIII, Section 3, of the Idaho Constitution; whether or not NIC's ultimate intent is to own the Mill Site is of no import. Reply Memorandum in Support of Motion for Summary Judgment, p. 2. NIC then discusses in detail the Wisconsin case *Dieck v. Unifies School District of Antigo*, 165 Wis.2d 458, 477 N.W.2d 613 (Wisc. 1991), and argues the non-appropriation provision of the Lease Agreement protects NIC's future incomes and revenues. *Id.*, p. 5.

If the College decides that a successive year's revenue is insufficient to make such [rent] payments, then the College may elect not to budget rent payments and not renew the Lease for an additional one-year period. There are no penalties associated with failing to renew. Paragraph 2.1 of the Lease Agreement prohibits the College from pledging future years' income to make rent payments.

Id. At issue here is Article VIII, Section 3 of the Idaho Constitution, which states:

SECTION 3. LIMITATIONS ON COUNTY AND MUNICIPAL INDEBTEDNESS. No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability,

in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state...

The issue for this Court then, is whether ¶ 2.1 of the Lease Agreement sufficiently ensures that renewal of the lease agreement beyond the *current* year is *solely* at NIC's option, and whether such renewal may only be had where funds are duly budgeted and appropriated therefore. Paragraph 2.1 reads:

COLLEGE may, solely at its own option, and when it duly budgets and appropriates funds therefore from revenues legally available to it for the ensuing fiscal year, renew this Lease for an additional annual renewal term. Each annual renewal of this Lease shall be deemed to be exercised by the COLLEGE upon the adoption on or before June 30 of each year, of a budget for the ensuing fiscal year, duly budgeting and appropriating the amount of money required to make the Lease payments during such year. Within ten (10) days following the adoption of a budget duly budgeting and appropriating said funds for the ensuing year, COLLEGE shall deliver to the FOUNDATION a written statement certifying that it has duly budgeted and appropriated said funds for the ensuing year, which written statement shall be accompanied by a copy of the budget so adopted. Each renewal term shall commence on July 23 of the fiscal year following adoption of the budget as provided hereinabove and shall terminate on July 22 of the following calendar year.

Complaint, Exhibit 3, Lease Agreement, p. 2, ¶ 2.1. As argued by the Foundation, there are two steps NIC must take in order to renew the Lease Agreement: (1) budget and appropriate funds from the ensuing year's revenues for renewal of the lease term for an additional year, and (2) delivery to the Foundation, within ten days of adoption of the budget, a written statement certifying NIC has duly budgeted and appropriated funds for the ensuing year, accompanied by a copy of the budget itself. Foundation Reply Brief in Support of Summary Judgment, p. 3. And, as argued by NIC, the only

issue raised at the summary judgment stage by NIC and the Foundation, is whether the lease agreement violates Article VIII, Section 3, of the Idaho Constitution so as to make the lease agreement void. Reply Memorandum in Support of Motion for Summary Judgment, p. 2.

Article VIII, Section 3 of the Idaho Constitution prohibits state subdivisions from incurring indebtedness or liability exceeding the income or revenue of that year unless the indebtedness or liability is approved by two-thirds of qualified electors, but ordinary and necessary expenses are excepted from the provision. *Loomis v. City of Hailey*, 119 Idaho 434, 440, 807 P.2d 1272, 1278 (1991). Thus, the *intent* of NIC to ultimately purchase the Mill Site from the Foundation is simply not relevant to the instant motion. Likewise, the issue of any rental surplus resulting from the initial pre-payment of \$4,000,000 in rent, and the possibility that this “surplus” may not be returned to NIC, should NIC opt to not renew the lease agreement, is also not an issue before the Court on the instant motion. See Lease Agreement, p. 4, ¶ C. See also, Complaint, p. 4, ¶¶ 19-20. In *In Re University Place/Idaho Water Center Project*, 146 Idaho 527, 547, 199 P.3d 102, 122 (2008) (J. Jones, concurring), Justice Jones stated:

The district court apparently held the view that the performance under the allegedly novated contract was automatically disqualified as being comparable to the performance under the Foundation’s contract because the Parking Access Agreement provided the University’s parking lease was renewable each year and was subject to termination by the University in the event funds were not available. The fact of the matter is that all state contracts contain those same provisions because Article VIII § 1 of the Idaho Constitution prohibits the State from incurring multi-year indebtedness without submitting the matter to the public for a vote. Article VIII § 3 imposes a similar limitation on public indebtedness with respect to subdivision of state government. It is virtually impossible the present every multi-year governmental contract or lease to the public for a vote. Thus, leases and other contracts that are intended to extend beyond one year always contain provisions (1) making the government’s performance subject to the availability of appropriated funds and (2) making the agreement renewable on an annual basis for the contemplated term.