6-26-2009

Apple's Mobile Catering, LLC v. O'Dell Appellant's Brief Dckt. 36128

IN THE SUPREME COURT OF THE STATE OF IDAHO

APPLE'S MOBILE CATERING, LLC An Idaho Limited Liability Company, Plaintiffs/Respondent.	Supreme Court No.: 36128
v.	Custer County Case No. CV-2007-181
THOMAS O'DELL and SHEILA O'DELL, Husband and Wife.	
Defendants/Appellants.	

APPELLANTS' BRIEF

Appeal from the Seventh Judicial District Court of the State of Idaho in and for the County of Custer

The Honorable Brent J. Moss, District Judge

APPEARANCES:

For the Plaintiffs/Respondents:

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STATEMENT OF THE CASE

This case gravitates around an undisputed Contract wherein Apple's agreed to buy O'Dell's catering equipment in July, 2001, with the purchase price of $340,000.00 secured by the equipment. See Verified Complaint, Clerk's Record on Appeal, [CRA], CRA p.1 and p. 65, section 9, Plaintiff's Affidavit of David Orr; CRA p.224, District Court's Memorandum Decision]. Then, claiming a "Modification" to the original agreement occurred, Respondent's Complaint purports that the acceptance and cashing of check no. 469 marked "final payment" on June 10, 2003, perfected an Accord And Satisfaction, CRA Verified Complaint 14, reducing the purchase price some $165,000.00, at Respondent's verified Complaint at CRA 3, line 11.

However, the facts in this case developed to show that Respondent failed to provide any competent evidence that the Appellant actually received the check, necessary for notice of an Accord and Satisfaction; instead, it is clear itself from the examination of the check, that the check itself was presented at the Respondent's bank in Ketchum, Id, for a direct bank transfer. See Affidavit of Appellant Thomas O'Dell, p. 180, CRA, denying receipt of the check. There in fact was no Accord and Satisfaction, as Appellant had no proper notice of the check served nor delivered upon him.

See also Appellant's Exhibit A, p. 41, showing on the back of the check a stamp from the Ketchum Branch, Ketchum Idaho, and scrawlings, yet to be identified as to signator "For Deposit

Only" showing patently from the back of the check that the check was not mailed to Appellant, but that an attempt was made at an Accord through the writing on the face. See also a document at p. 155, CRA, entitled Plaintiff's/[Respondent's] Exhibit C, purporting to be mailed to Mr. Thomas O'Dell, Arco, Idaho", no zip code.

To support it's decision the District court relied exclusively upon the affidavit of Respondent David Orr for Apple's Mobile Catering, "that he had problems with the equipment, and to resolve the issue, he and Mr O'Dell made an **oral modification** to their original agreement". Emphasis added. CRA Memorandum Decision, p. 225. See affidavit of Tom O'Dell, p. 1, flatly denying that he had ever seen nor personally received check No. 469 from David W. Orr, listing a purported "Final Payment" designation for that $15,000.00 check, CRA, 180, and that he never actually saw the check until sometime in 2006. This denial should have created a genuine issue of material fact as to the existence of any "oral Modification" so that O'Dell's sales price would be reduced by $165,000.00. Instead, the Court summarily, but improperly, finds the Modification through some Course of Performance.

COURSE OF PROCEEDINGS

The Respondent originally filed this Case in Bingham County and asserted some elements of an Accord and Satisfaction as his main theory he had satisfied Apple's Mobile Catering's contractual obligations to Appellant, but a change of Venue Stipulation properly removed the case to Custer County, where the Appellant has always lived and done business. It is noteworthy that the assertion of an Accord and Satisfaction by Respondent procedurally places a Defense of an Accord and Satisfaction as a method of discharging contract or cause of action defense as the gravamen of their case in chief. This position anticipates Appellant's assertion of the contract and the Statute of Frauds requirement for a writing, placing it squarely in Respondent's case in chief, and subjecting his case to those defenses affirmatively.

The Appellant's Answer of January 4th, 2008, was followed by a period of delays caused by Appellant's two Bankruptcy filings and the Automatic Stay Granted thereon, the first of January 30th, 2008[when Appellant filed his first Bankruptcy Petition through the office of this attorney, and the second pro se filing by Mr. O'Dell on June 23rd, 2008, after dismissal of the first case. See p. 166, Appellant's Objection To Notice of Admissions Deemed Admitted, line 4.]

The Appellant, not aware of the pro se Bankruptcy filing of his client, filed his first Motion and Memorandum for Summary Judgment on June 30, 2008, and the Court got the case back on

track following the August 20, 2008 dismissal of the second Bankruptcy, and called up the case for calendaring On August 27th, 2008, with the court Ordering the parties to complete filing Summary Judgment by October 15th, 2008.

The Respondent filed its motion for Summary Judgment on September 12, 2008, and Appellant stood upon his June 30th, 2008, filing of Summary Judgment. Respondent filed it's reply Memorandum is Support of It's Motion for Summary Judgment on October 9th, 2008, CRA 169-173, and Appellant Filed it's Responsive Memorandum on October 28, 2008. On November 18th, 2008 court issued its Decision Re: Pending Summary Judgment Motions. On December 2nd, 2008, Appellant filed it's Motion to Set Aside the Court's Ruling On Summary Judgment, and on December 16, 2008, the Court filed it's Order Denying Defendant's Motion to Consider, from which this Notice of Appeal issued on January 28, 2009.

ISSUES PRESENTED ON APPEAL

I. DID THE DISTRICT COURT PROPERLY GRANT SUMMARY JUDGMENT TO THE PLAINTIFF, WHEN IN FACT FROM THE FACE OF THE DECISION, THE COURT DENIED THE PLAINTIFF'S THEORY OF AN ACCORD AND SATISFACTION, APPEARING TO GRANT APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

II. DO SUFFICIENT FACTS EXIST FOR WHICH A REASONABLE JURY COULD FIND BY A PREPONDERANCE OF THE EVIDENCE, THAT THERE WAS A COURSE OF PERFORMANCE EXCEPTION TO THE STATUTE OF FRAUDS?

POINTS AND AUTHORITIES

I.

A Motion for Summary Judgment may be granted "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 a judgment as a matter of law."

Idaho Rule of Civil Procedure 56 (c).

II.

Idaho Code Section 28-2-201. FORMAL REQUIREMENTS- STATUTE OF FRAUDS. Except as otherwise provided in this section a contract for the sale of goods for the price of $500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

III.

Idaho Code Section 28-2-202. FINAL WRITTEN EXPRESSION.-- PAROL OR EXTRINSIC EVIDENCE. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) By course of performance, course of dealing, or usage of trade (section 28-1-303); and

(b) By evidence of additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

IV.

Idaho Code, Section 28-2-209. MODIFICATION, RESCISSION, AND WAIVER. (2) A signed agreement which excludes modification or rescission except by a signed writing, cannot be otherwise modified or rescinded, but except as between merchants, such a requirement on a form supplied by the merchant must be signed by the other party. (3) The requirements of the Statute of Frauds section of this chapter (section 28-2-201) must be satisfied if the contract as modified is within it's provisions.

ARGUMENT

I.

I. DID THE DISTRICT COURT PROPERLY GRANT SUMMARY JUDGMENT TO THE RESPONDENT, WHEN IN FACT FROM THE FACE OF THE DECISION, THE COURT DENIED THE PLAINTIFF'S THEORY OF AN ACCORD AND SATISFACTION, APPEARING TO GRANT APPELLANT'S MOTION FOR SUMMARY JUDGMENT?.

Pursuant to Rule 56 (c) of the Idaho Rules of Civil Procedure, a Motion for Summary Judgment may be granted "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 a judgment as a matter of law."

The party opposing the motion for summary judgment has the burden of presenting sufficient evidence to establish whether a triable issue of fact exists; however, the Court must construe all facts in favor of the party opposing the motion, together with all reasonable inferences derived from the evidence. Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1986); Bunker Hill Co. v. United Steelworkers, 107 Idaho 155, 686 P.2d 835 (1984); Mitchell v. Siguieros, 99 Idaho 396, 582 P.2d 1074 (1978). Based upon the failure of Respondent to prevail upon his main theory of Accord and Satisfaction, the Court should have granted Summary Judgment to the Appellant, declaring the Respondent owed the unpaid balance of the contract.

However, in it's Memorandum Decision of November 18, 2008, the court relies exclusively upon the Affidavit of David Orr for it's decision, and completely fails to address the Affidavit of Thomas O'Dell, flatly denying he personally received check No. 469 from David W. Orr, listing a "Final Payment" See p. 180, Affidavit of Thomas O'Dell, and any awareness of and contract modification.

Appellant in it's motion for Summary Judgment of June 30th, 2008 mainly focused on Respondent's theory of Accord and Satisfaction, as no alternative theory had yet emerged from Respondent's pleadings. Then the Statute of Frauds Issue was argued again in the Appellant's Responsive Memorandum Supporting Motion for Summary Judgment Opposing Plaintiff's Motion for Summary Judgment. CRA, p. 185.

II. DO SUFFICIENT FACTS EXIST FOR WHICH A REASONABLE JURY COULD FIND BY A PREPONDERANCE OF THE EVIDENCE, THAT THERE WAS A COURSE *OF PERFORMANCE EXCEPTION TO THE STATUTE OF FRAUDS?*

The district Court, however, has never properly address the Statute of Frauds. It is clear, however, this case is governed by the Statute of Frauds, as a $130,000 modification has been asserted by the Respondent. The statute merely requires that a Contract for the Sale of Goods over $500.00 must be in writing to be enforceable, by way of action or defense, unless signed by the party against whom enforcement is sought.

Idaho Code Section 28-2-201. FORMAL REQUIREMENTS- STATUTE OF FRAUDS. Except as otherwise provided in this section a contract for the sale of goods for the price of $500.00 or more is not

enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

It is apparent from the early development in this case that Respondent was aware of this requirement, and sought to remedy it with an Accord and Satisfaction, that they knowingly attempted this as a remedy. See Respondent's Plaintiff's Memorandum in Support of Its Motions For Summary Judgment, CRA 105, footnote one. On this point, there is an obvious factual dispute, as the Respondent argues and admits he made some payments by "direct deposit to the Defendant's bank account...gave Apples his account number and Mr. Orr would at times go to a branch of Defendant's bank and deposit the finds in Defendant's Account", and that his habit was to mail to Defendant by first class mail a copy of the check that Mr. Orr deposited. See CRA p. 112. citing David W. Orr Affidavit, paragraph 15.

Compare this directly with the Affidavit of Appellant Thomas O'Dell "[t]hat I am the Defendant in this matter, but that Plaintiff's assertion in section (7) of the complaint is totally false and without merit, in that I never saw, nor personally received check No. 469 from David W. Orr, listing a purported "Final Payment" designation for that $15,000 check". CRA, p. 180 No summary Judgment is proper, if there is a genuine issue of material fact, so the court found an alternative theory and based it's decision upon oral modification of a written contract. But if a contract is within the statute of Frauds, there is still a

writing requirement for it's modification. See especially:

Note that the following code section should have routed the Court's inquiry into whether or not the contract, as modified, is within the provisions of 28-2-201. It is.

Idaho Code, Section 28-2-209. MODIFICATION, RESCISSION, AND WAIVER. (2) A signed agreement which excludes modification or rescission except by a signed writing, cannot be otherwise modified or rescinded, but except as between merchants, such a requirement on a form supplied by the merchant must be signed by the other party. (3) **The requirements of the Statute of Frauds section of this chapter (section 28-2-201) must be satisfied if the contract as modified is within it's provisions**. Emphasis added.

In the Court's Memorandum decision the Court also argues that Respondent's affidavit is not evidence, declining to see Respondent's "legal assertion that the written contract could not be modified orally" CRA 226, and disregards Respondent's view of the terms. The court failed to recognize there were conflicting inferences to be made from the reading and comparison of the affidavits of the parties, and left this decision to the jury. This is supported by the case law on this point at *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991) and *Aid Ins. Co. (Mut. Aid Ins. Co. V. Armstrong)*, 119 Idaho 897, 811, P.2d 507 (Ct. App. 1991).

Respondents denial of any oral modification and denial of an Accord and Satisfaction is a matter of record ignored by the District Court. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary

judgment must be denied. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), supra.

This clearly means that the court may not just rely upon the affidavit of one party as Respondent's affidavit has been totally ignored by the court, especially when the lower court tried to then show a "mutual assent...implied from the parties' actions." "Even if a contract has a clause requiring modifications to be in writing, such a clause can be waived, either expressly or based upon the conduct of the parties." MEMORANDUM DECISION, CRA, 225. But this is not permitted by the law and a literal violation of the Parol Evidence Rule, below.

> Idaho Code Section 28-2-202. FINAL WRITTEN EXPRESSION.--PAROLE OR EXTRINSIC EVIDENCE. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (a) By course of performance, course of dealing, or usage of trade (section 28-1-303); and
>
> (b) By evidence of additional terms, **unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement**. Emphasis added.

It must be argued the court did find the writing to have been intended also as a complete and exclusive statement of the terms of the agreement, and improperly then went on to find this section somehow waived; from the courts own language, again "Even if a contract has a clause requiring modifications must be in writing, such a clause can be waived, either expressly or based

upon the conduct of the parties," and the Court looks to the Course of Performance exception to the Statue of Frauds. CRA p. 225 See also Affidavit of Thomas O'Dell, notifying the court of such a clause and referencing Defendant's Exhibit B, Orr Security Agreement.

At this point the Court should have seen it was looking to "evidence of additional terms by course of performance, prohibited by this section because the writing was intended by the parties as a complete and exclusive statement of the terms of the agreement," absolutely prohibited by Idaho Code 22-2-202 (b) [somehow neither this agreement nor the original contract has appeared in the Clerks Record on Appeal].

This argument was presented to the court again in Respondent's Motion to set aside Court's Ruling on Summary Judgment. CRA p. 230. Appellant there argued unsuccessfully that where there is conflicting evidence the court may not enter summary Judgment; in addition, the where the burden of proving the doctrine of part performance to provide an exception to the Statute of Frauds, Idaho Courts require proof by Clear and Convincing evidence. See *Boesiger v. Frier*, 85 Idaho 551, 381 P.2d 802 (1963).

At the very least the District Court should have retained the case on for Jury trial until this material fact had been decided, as this code section appears to make it mandatory the court so find, in construing the related statutes to the basic Statute of Frauds. The court completely overlooked this further

analysis, instead focusing on the course of performance exception at section (a). The District court should on remand clearly address this issue. It is blatantly apparent from Mr. O'Dell's affidavit that this was his intent, and to then see the lower court use the unilateral assent of merely one of the parties to show a course of performance to improperly modify a contract otherwise subject to the Statute of Fraud's requirement for a writing is unconscionable and illegal.

Note in the construction of the Statute how it compels the court to make such an inquiry, as that whole two part section may be read "[t]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing **intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:**

(a) By course of performance, course of dealing, or usage of trade (section 28-1-303); and

(b) By evidence of additional terms, **unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.** Emphasis added.

Idaho Code 28-2-202, the Parol Evidence Rule. If in fact the court is arguing, as it appears to, that such a clause can be waived, either expressly or based upon the conduct of the parties at CRA 225 in it's Memorandum Decision, the requirements of

section b, supra, appear to prevent that here, as if... "unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement".

Finally, the court should have considered all these code sections related to this issues in making it's decision, and this one was also completely omitted from the District Court's analysis at Idaho Code Idaho Code, Section 28-2-209.

Idaho Code, Section 28-2-209.

MODIFICATION, RESCISSION, AND WAIVER. (2) **A signed agreement which excludes modification or rescission except by a signed writing, cannot be otherwise modified or rescinded, but except as between merchants, such a requirement on a form supplied by the merchant must be signed by the other party. (3) The requirements of the Statute of Frauds section of this chapter (section 28-2-201) must be satisfied if the contract as modified is within it's provisions.** Emphasis added.

Again and again and again all the related code sections of the Uniform Commercial Code, from the Statute of Frauds at 28-2-201, to the Parol Evidence Rule at 28-2-202, to the section at 28-2-209 on Modification, Rescission and Waiver. As the stated purpose and policy of the code is to simplify, clarify, and modernize the law governing commercial transactions, Idaho Code 28-1-103, and as the combined effect of these three or four prohibitions against a modification all appear to require a writing on the part of the Appellant not extant in this case, and a fatal defect in the Respondents case overlooked by the District Court below.

The Court of Appeals of Idaho agrees. In *Breeden v. Edmunson*, 689 P.2d 211, 107 Idaho 319,(Court of Appeals 1984), holding that

the section on Modification at Idaho Code 28-2-209 requires that any modification of the parties written agreement be in writing, quoting the operative language from section 28-2-209 which provides "The requirements of the statute of frauds section of this chapter (section 28-2-201) must be satisfied if the contract as modified is within its provisions.

This appears to be, again, back to the basic Statute of Frauds argued here from Idaho Code 28-2-201, a contract over $500.00. Most interesting in the Court's analysis is also the presentation of the situation here, that although "[i]t was not addressed by the court below...[b]ecause of the way the issue was presented to us, both sides have not had the same opportunity to brief and argue the issue to us. For these reasons, we will allow the parties to present the issue to the trial court hearing this case on remand. It is a critical issue which may be dispositive. It should be decided before any retrial is held." Id, supra, p. 324. It is also most noteworthy this decision deprived Breeden to the earlier award of attorney's fees, as "the court did not reach that issue because of the need to remand. When the other issues are decided below, the court can determine entitlement to attorney fees under the provisions of the note. Id, 324.

There can be no more material fact than this blatant dispute, one party asserting the Notice requirement for an Accord and Satisfaction had been met by his habit and practice to mail the check, and the other flatly denying that fact. See

especially on the credibility of the Respondent when he conveniently writes: "Dear Tom: Please find enclosed a copy of my final payment check #469 for $15,00 for all equipment contained within Apples Mobile Catering." The letter is addressed to Mr. O'Dell In Arco, Idaho; this court should take Judicial Notice that this is not proper service or notice, as there is not even a proper address as might have been done through a General Delivery. Not having a trial deprives all opportunities at cross examination to Appellant, besides being inconsistent with the rules cited.

The Appellant, also, is in Custer County and at all times relevant to these issues, and as evinced by Respondent's own "affidavit" at page 47 CRA, from the Bankruptcy filing, showing the Appellant's residences for the past 8 years, all in Custer County, Mackay, Idaho, and that at the time of the filing of the has resided at 501 South Main, Mackay Idaho 83251. This clearly contradict his own exhibit C, p. 155 CRA, which purports to show attempts at notice; this is not even a Good Faith Attempt at that, as Appellant has always been in Custer County, and the letter in this exhibit is mailed to an address only reading Arco, Idaho; but this red flag warning is completely ignored by the trial court.

CONCLUSION

For the foregoing reasons, Appellant's Motion for Summary Judgment should properly have been granted against Respondent's complaint for delivery of the titles and for the Respondent to

pay Appellant the balance due on the contract; Respondent's Motion for summary Judgment should have been denied, and the decision by the lower Court granting summary judgment should be reversed, and the matter remanded for further proceedings consistent with the arguments set forth herein.

DATED this 25 day of June, 2009.

David E. Gabert, Esq.
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of June, 2009, I served a true and correct copy of the foregoing APPELLANTS' BRIEF ON APPEAL, by United States Mail, postage prepaid, or by hand delivery, and by e-mail to comply with AR 34.1, to the following:

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