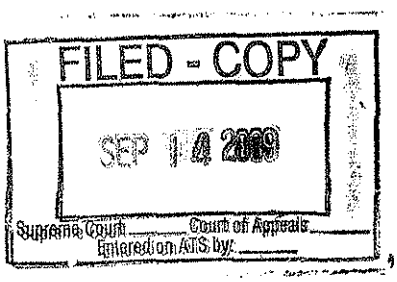
9-14-2009

Apple's Mobile Catering, LLC v. O'Dell Appellant's Reply 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' REPLY 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:

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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.

V.

Idaho Code Section 28-3-310. ACCORD AND SATISFACTION BY USE OF INSTRUMENT. (1) If a person against whom a claim is asserted proves that (I) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim,... the amount of the claim was unliquidated or subject to a bona fide dispute, and ...the claimant obtained payment of the instrument the following subsections apply.
(2) Unless subsection (3) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
(3) Subject to subsection (4) of this section, a claim is not discharged under subsection (2) of this section of either of the following applies.

(a) the claimant, if an organization, proves that (I) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office or place, and (ii) the instrument or accompanying communication was not received by that designated person, office or place.
[b] The claimant, whether or not an organization, proves that within ninety (90) days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (a) (I) of this subsection.
(4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

RESTATEMENT OF THE CASE

Respondent's argument that appellant's brief should be stricken for noncompliance with the Idaho Appellate Rules should be disregarded by this court as Appellant has substantially complied with I.A.R. 35(a) setting forth as required a statement of the case indicating briefly the nature of the case, the course of proceedings below and its disposition, and a concise statements of the facts. But as Appellant continues to deny any facts asserted by Respondent showing a valid modified agreement by the mere unilateral conduct of the Respondents themselves, this argument appears to go to a comparison of the quantity of evidence on one side or the other, not the quality of that evidence.

Argument

IDAHO CODE 28-2-209 APPLIES HERE TO PREVENT MODIFICATION

Idaho Code 28-2-209 does apply here; but Respondent's assertion that the Court in it's decision made a determination somewhere in the record that Idaho Code 9-505 applies, and not the Uniform Commercial Code is disingenuous. Again and again Respondent argues Appellant "waived" any contractual clause prohibiting oral modifications, but points to no articulable fact or behavior by the Appellant, only repeatedly to his own behavior; noteworthy on this point is his admission in his

affidavit he "wrote "final Payment" on a check the evidence clearly shows he deposited himself in his own bank account, and never actually delivered to Appellant...asserting he mailed a letter to Mr. O'Dell." See generally R., p. 35-42, 180-182.

It is a matter of record this is a Custer County Case; Mackay, where Appellant resides, is in Custer County; Arco, where Plaintiff's own Exhibit C referenced the above purported "mailing" to Appellant, is not, is in Butte County. This court can take judicial notice of this distinction, as this factual inconsistency alone might compel a judicious mind to question the truth fullness and veracity of it's affiant, David Orr, Respondent at Apples's Mobile Catering. See especially again as referenced in Appellant's opening brief, p. 4, the document of Respondent at p.155, R. This fact alone ought to have been considered sufficient basis to question the affiant, Respondent David Orr; but more importantly, Appellant is entitled to a construction of the facts from the existing record in favor of the party opposing the motion, and to draw all reasonable inferences from the record from the nonmoving party. 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).

I believe that this fact alone, that the Respondent David Orr, clearly from the facts, was not entitled to prove any Accord and Satisfaction, as his direct deposit into his own personal account did not properly present the check to Appellant for his

critical "notice" of the written words final payment. The mere unilateral action of one party is not sufficient. The only action notable by Appellant is his "non action", but that alone is insufficient to support the Court's conclusion that the action of the parties acted in conformance with and performed according to the oral modification. Hence, Respondent's assertion on p. 16 of their brief is without merit, therefore, when they argue "the parties knowingly and intentionally accept new obligations or a different contractual relationship", citing *Hoglan v. First Security Bank of Idaho,* N.A., 120 Idaho 135 Idaho 685, 689, 23 P. 3d 147, 151 (2001).

First it is revealing to Appellant that the very code section cited by Respondent is entitled Commercial Transactions, at Chapter 3, Uniform Commercial Code. That this was pled in the complaint by Respondent in his case in chief, then argued above, not to be applicable, and to instead apply Idaho Code 9-505, is consistent with Respondents duplicity and refusal throughout this case to apply all the rules governing this contract evenly; the Uniform Commercial Code applies here throughout.

Respondent then again, returns to the contract for his basis for arguing for attorney's fees, the asset purchase agreement; but, as Respondent has unilaterally breached this agreement, he is not so entitled.

CONCLUSION

RESPONDENT MAY NOT ARGUE FOR AN AD HOC APPLICATION OF THE UNIFORM COMMERCIAL CODE

Respondent, not Appellant, has waived his entire argument for an oral modification by his bad faith attempt at an Accord and Satisfaction under Idaho Code; they may not argue on page 16 and 17 of their brief that they have on the one hand proved an Accord and Satisfaction under Idaho Code 28-3-310, a Uniform Commercial Code Doctrine, and in the same breath argue the common law, Idaho Code 9-505 Statute of Frauds applies. Clearly Respondent is mistaken that the Uniform Commercial Code may not apply, when they have so argued and pled it in asserting an Accord and Satisfaction in their case in Chief. Then, Respondent claims on page 19, footnote four, that Appellant failed to address the letter Respondent claims he mailed to Appellant; that claim is patently false, and presumptively entitled to no weight, but clearly shows a pattern of deception continually argued by Appellant in this case. See Appellant's Plaintiff's Memorandum Supporting Motion for Summary Judgment, R. p.35-39, directing the court's attention to the check the Respondent wrote final payment upon; note on this fact the Respondent has presented no articulable fact denying in any affidavit that the check was

presented by him personally at his own bank, and it is patently clear from the Affidavit of Appellant, Thomas O'Dell that "I never saw, nor personally received check No. 469 from David W. Orr, listing a purported "Final Payment" designation for that $15,000.00. Check. R. p. 180. See again Respondent's exhibit C, p. 155.

Thus, Appellant has and did raise the issue down below, as he denied receiving it. See also Affidavit of Thomas O'Dell. Appellant at least deserves the right to cross examine Respondent at a hearing in this matter, it is a material fact, precluding Respondent from receiving summary judgment. The combined protections of his contract and the Uniform Commercial Code have been bandied about by Respondent, asked to apply when convenient, as when arguing for an Accord and Satisfaction, and in their claim for attorney's fees, but asked to be ignored when referencing the original agreement not disputed by any party. See especially *Breeden v. Edmunson, 689 P. 2d 211, 107 Idaho 319,* 689 P. 2d 211, 107 Idaho 319, (Court of Appeals 1984).

Only the combined and not the unilateral behavior of one of the parties would otherwise support an oral modification or waiver in this case. The two unilateral and patently bad faith efforts of Respondent at a failed Accord and Satisfaction, sending a letter to Arco, not where Appellant lives in Mackay, and depositing a check for electronic transfer with the words "Final Payment" ought to preclude him from getting any otherwise improper "waiver or modification"; these are imperfect attempts,

if not bad faith, and a jury never gets to determine this important fact in assessing the credibility of the parties. The court failed entirely to notice these portions of the record, the facts overlooked by the lower court which otherwise entitle the Defendant/Appellant Thomas O'Dell to a Judgment, as a matter of Law, that the Plaintiff/Respondent owes the balance on the contract, plus costs and attorneys fees.

DATED this 31st day of August, 2009.

David E. Gabert, Esq.
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2009, I served a true and correct copy of the foregoing APPELLANTS' REPLY 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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