9-27-2011

GMAC v. Bach Appellant's Reply Brief Dckt. 38647

IN THE SUPREME COURT OF THE STATE OF IDAHO

GMAC,

Plaintiff-Respondent,

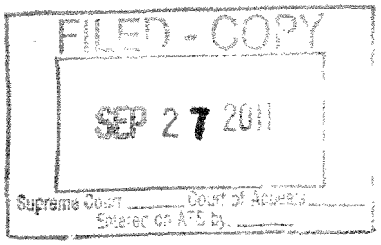
v.

CINDY LEE BACH (DECEASED) an individual and JOHN NICHOLAS BACH, an individual,

Defendants-Appellants.

Docket No. 38647-2011

Teton County Case No. 2009-172



APPEAL FROM THE JUDGMENT AND ORDERS, OF

THE HONORABLE GREGORY W. MOELLER, Dist. Judge

APPELLANT'S CLOSING BRIEF

APPELLANTS PRO SE

JOHN N. BACH, P.O. #101
Driggs, ID 83422

TEL: (208) 354-8303

RESPONDENT Laura Burri, ESq.
Box 2773, Boise, ID 83701
TEL: (208) 34204657

IN THE SUPREME COURT OF THE STATE OF IDAHO

GMAC,

Plaintiff-Respondent,

v.

CINDY LEE BACH (DECEASED) an individual and JOHN NICHOLAS BACH, an individual,

Defendants-Appellants.

Docket No. 38647-2011

Teton County Case No. 2009-172

APPEAL FROM THE JUDGMENT AND ORDERS, OF

THE HONORABLE GREGORY W. MOELLER, Dist. Judge

APPELLANT'S CLOSING BRIEF

APPELLANTS PRO SE

JOHN N. BACH, P.O. #101
Driggs, ID 83422

TEl: (208) 354-8303

RESPONDENT Laura Burri, ESq.
Box 2773, Boise, ID 83701
TEL: (208) 34204657

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES OFCOURT:

APPELLANT'S CLOSING BRIEF

I. RESPONDENT'S BRIEF VIOLATES I.A.R. , IS GLARINGLY AVOIDING OF RESPONDING TO APPELLANT'S CITED AUTHORITIES, CONTROVERTED FACTS AND ISSUES; AND MISSTATES GROSSLY THE ERRONEOUS RULINGS OF SUMMARY JUDGMENT.

Respondent GMAC's ten (10) page brief does not address, refutate or deny the cited case authorities or law in APPELLANT'S BRIEF nor does it address directly and with supported authorities the issues raised by Appellant.

Respondent does cite two cases, to wit: Featherston v. Allstate Ins. Co., 125 Idaho 840, 875 P.2d 937 (1994) at P3, for the most preliminary, but nowhere complete rules, of Summary Judgment; and Parkwest Homes, LLC v. Barson (misspelling Homes, as Hones), 149 Idaho 603, 238 P.3d 203 (2010) at page 8, for the proposition: the district court, may fix interpretation of the Decree of Summary Administration, I.C. 15-3-1205,"sua sponte." But these aren't the significant findings and legal principles that appy here from Parkwest , which void in entirety GMAC's complaint and most flagrantly its contrived and presented misuse and abuse of process by a defunct and WITHOUT STANDING-DISENFRANCHISED CORPORATION VIA A PURPORTED NONDISCRIPT AGENT-KATHLEEN FITZGERALD. The use of Fitz-Gerald's nonverification & lack of standing/capacity, was to avoid GMAC's counsel committing perjury or subornation thereof. But such use was still fraudulaent, deceptive by GMAC and its counsel.

Two conclusions are to be derived from GMAC's uncited with no legal supported statements — to wit: 1) Any such purported statements by GMAC are deemed waived and will not be considered, but deemed unopposed, Bolen v. Baker, 69 Idaho 93, 203 P.2d 375 (1949); and 2) GMAC's sole claim for claim and delivery based upon false testimony or falsely contrived verification, beside being perjurious, is frivolous, unreasonable and without foundation. Mikesell v. Newsworld Dev. Corp, 122 Idaho 868, 840 P.2d 1090 (Ct. App. 1992) SANCTIONS WERE/ARE IN ORDER.

(Appellant refers to and incorporates herein his arguments, statements and cited legal case and other law authorities from his APPELLANT'S OPENING BRIEF, PG 1-3, 5-7, and 10-15, in further support of his above requsted conclusions.)

2. THE PARKWEST DECISION, 149 Idaho 840, SUPPORTS ALL APPELLANT'S APPEAL POINTS, ARGUMENTS AND CALLS FOR THE GRANTING OF THIS APPEAL ON ALL POINTS ISSUE RAISED.

GMAC's in raising the question "Did GMAC Mislead or Abuse the Process and Fail to State a Cause of Action", (Respdt's Brief, P. 9) then falsely advances (page 9, its middle paragraph thereof)that "All of these facts are undisputed by Mr. Bach", when in point of fact and per Rule 56(a) through (f) all and each of the advanced facts by GMAC were not only disputed but also, legally by Appellant's cited authorities, unsustainable.

Parkwest Homes, LLC v. Barson, 149 Idaho, 238 P.3d 203 did not involve any determinations of any Degree of Summary administration. It factually deal with an unlicensed building contractor verified claim under I.C. section 54-5208 This Court held "the contractor must alleged and prove that he was a duly registered (licensed) contractor, or exempt from registration 'at all times during the performance of such or contract.' " (149 Idaho 603, 608-609)

Parkwest specifically held that the required verification required the express statement that having read "the mechanic's lien and know the contents thereof, the same is true of my own knowledge. The district court held that the construction contract was VOID since Parkwest was not registered at the time it signed the contract. (149 Idaho @ 608)

This Idaho Supreme Court, citing Barry v. Pacific West Const'n, Inc. 140 Idaho 827, 832, further held it as well as the district court had the same duty to raise the issue of illegality of the construction contract in question. (149 Idaho @ 608) PARKWEST's application establishes lack of jurisdiction & fail-to state a claim.

Moreover, the purpose of the required verification is "a desire to frustrate the filing of frivolous claims." (@ 606), and to avoid the mandatory pleading requirements of IRCP Rule 9(a), 9(c) and 9(d).

GMAC's complaint's failure to allege the required prefiling conditions of it, via either Semperian, Inc. or it's own corporate, authorized to do business in Idaho branches, of perfecting per Idaho statutes, within the first four (4) months the vehicle was licensed/registered in Idaho, failed to allege the required foundational conditions of a claim and delivery action, Parkwest v. Barnson , 149 Idaho @ 608. GMAC has failed to state an action for claim and delivery. It has stated no other claims nor any other cause of action. GMAC's summary judgment should have been dismissed with prejudice and Appellant should have been granted a summary judgment against GMAC.

See Fitzgerald v. American Gen. Fin. Inc. (Bkrptcy D. Idaho 1998) (In re Psalto) 225 Bankr. 753. (Also, pages 10-22, A.O.B., incorporated herein and reassertd in full as to all arguments and authorities cited/raised.)

Moreover, for GMAC to have within f our (4) months of said vehicle being brought in Idaho and to be registered here, it was additionally required, beyond the statutes and legal authorities cited in Appellant's Opening Brief, to comply with I.C. 49-502 and 49-504(2)(3)(4), which statutes were never alleged in the unverified complaint nor raised as part of GMAC's motion initially nor by any timely, relevantly, admiisble showing with certified documents per verified properly affidavits. See also I.C. 49-506)

Various pertient questions and actions were not pursued nor taken, to wit:

1. How was an undocumented employee of Semperian Inc., no longer authorized to do business in Idaho but claiming to work for Semperian in Arizona have personal knowledge of what exact contract of purchase was entered into by Cindy L. Bach on Jan. 6, 2007 in Bozeman, Montana when no representative nor duly authorized agent was empowered to act for, sign for and agree for both Semperian, Inc. and GMAC?

2. What were the speific foundational facts of how, what and when did Kathleen FitzGerald acquire as her knowledge of the facts, when she was unwilling to verify, under oath of the truth of said facts of her own personal knowledge but instead on claimed "and believed the facts therein." ?

3. How did she purportedly sign her one page verification two (2) days before the complaint was prepared and signed April 22, 2009? (One can't incorporate by reference a document non existent!)

(Appellant's Opening Brief's pages 1 through 14 are incorporated herein in further support.)

4. If Kathleen FitzGerald was so knowleable of an Idaho Claim and delivery action per I.C. [illegible]. why did she fail to comply with Idaho's statute re within 4 months of the vehicle's registeration in Idaho, a new security lien was to be perected but neither alleged, nor addressed in the complaint and was not proven by any of its averments??

GMAC and its counsel, have, an employee of said non franchised and withdrawn corporation, Semperian, Inc. made without capacity or standing misrepresentations and misstatments, to deprive Appellant of the title, use and full value of said Equinox, Itis patently clear that such deception and subtrafuge is per GMAC's consent, permission and its authority extended to its attorney of record herein. Such deception and abuse of process is therefore admitted by GMAC and its attorney in pursuing a complaint on a single count, claim and delivery per I.C. 8-301 and as stated supra herein and in Appellant's Opening Brief, it is admitting relevant and materail evidence agaisnt GMAC on Appellant's counterclaim issues. Callahan v. Wolfe 88 Idaho 440, 400 P.2d 1938 (1965).

Rather than address Appellant's No. 3, issue, Whether the district court judgment could personally and without notice, apply his undisclosed, untestified and without authority or qualffications of his expert testimony, applying such undisclosed and subjectively involved facts to grant summary judgment, in dismissing all issues of Appellant's counterclaims. (AOB, Pg 10 -34)

Respondent convolutes, and avoids the issue raised by the district court's void and without jurisdiction actions,

3. IT WASN'T PERSONAL HEARSAY TESTIMONY WHICH THE DISTRICT COURT JUDGE ON HIS OWN, SUA SPONTE, APPLIED AND USED TO GRANT SUMMARY JUDGMENT VIA THE RUSE OF JUDICIAL NOTICE: IT WAS UNAUTHORIZED AND UNPROVEN EXPERT TESTIMONY APPLIED TO GRANT FULL SUMMARY JUDGMENT TO RESPONDENT

Respondent's Brief, pages 7-8, asks the question: "Did the District Courtinsert( ) personal comments into its decisions that were hearsay. . . .Mr. Bach asserts this issue on the basis of the Court's comments pertaining to the weather conditions in Teon County, Idaho as contained in its Memorandum Decision. R. pgs 0090-0098. . . . .The Memorandum Decision was withdrawn and replaced by the Amended Memorandum Decision dated September 3, 2010. R.p. 0141 The Court address these issues in its Amended Memorandum Decision. R. 0149-0151."

Respondent's statements are grossly incorrect, incomplete and further misleading compoiundingly further deceptive. Under Part 2, of the initial referened MEMORANDUM DECISION, R. 0096 this is what the district court ruled and found as "evidence" via "taking judical notice":

> "2. Mr. Bach's counterclaim is dismissed in its entirety.
>
> Mr. Bach's counterclaim alleges various torts, breaches of contract, fraud, and violations of consumer protection laws by GMAC. In particular, he alleges that GMAC slandered title to the Equinox, that GMAC was fraudulent in its actions pertaining to the making of the contract and enforcing the contract, andthat the vehicle is defective becuase the car's braking system and four-whell drive did not operate safely in Teton County in the winter.
>
> First, the Court takes judical notice that it is dangerous to drive in many places in Idaho during the winter, including Teton County. This is true whether one is driving in an Equinox or a Snowcat. Mr. Bach's mere assertion that there are braking and four-wheel-drive problems with his vehicle in Teton County

is insufficient to allow GMAC to form an answer or put notice as to complaint. Such claims do not meet even the liberalpleading requirements of Rule 8(a)(1) and 9(f) of the Idaho Rules of Civil Procedure.

These bare allegtatons, unsubstantiated by any admissible expert testimony are also an inadequate response to GMAC's judgment motions. Rather than provide the Court with some expert testimony or other evidence of his claims, Mr. Bach has rest on the conclusory allegations in his counterclaim. These allegations are insufficent to surviv summary judgment." (R. 0096)

FIRST, The statements by the district court of what Appellant pled in his counterclaims is grossly inaccurate and contrived. This Honorable Court is referred to AOB, pages 5 through 7, which are incorporated herein. The district court aforesaid three (3) paragraphs are not just inapplicable, confusing and misstating of Affiant's Counterclaim, which was never the subject matter, nor addressed by GMAC's summary judgment motion.

SECOND, in the second quoted paragraph of the district court's referring what is true ("This is true whether one is driving in an Equinox or a Snowcat," such jddicial notice is unsupported and irrelevantly inadmissi ble, add immaterial. Besides what section of I.R.E., 201 does such no discript and unproven judical notice statment is it based. If the district court deems such judicial notice information mandatory under I.R.E., Rule 201(d) it required:

"When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicialn noticeis requested or shall prooffer to the court and serve on parties copies of such documents or itesm. A court shall take judicial notice of requested by a party and supplied with the necessary inofrmation."

Neither Respondent nor the Court complied with such mandates.

Nor did the district court comply with the requirements of I.R.E, Rule 201(e) give the right to Appellant at any time "to an opportunity to be heard as to the propriety of taking judical notice and the tenor of the matter noticed."

Under this second quoted paragraph from the district court's reasoning basis of including "a SNOWCAT", where, what and why did such irrelevant and nonlicensed vehicle become a fixation and focus by the district court. There is no statement/averment in the counterclaim of Appellant of any aspect of a defense, affirmative defense nor issuein any of his counterclaims which raises anywhere theoperational characteristics, good bad or indifferent of a SNOW-CAT!

THIRD, as Respondent's summary judgment motion was solely based and limited to only issue of his complaint per I.C. 8-301, for claim and delivery, the subjects within said third and concluing paragraph, (R. 0096) by the district courtare way out of line, nonsequitor and reveals that the district court per the second above paragraph which starts with the words, "First the Court takes judicial notice that it is dangerous to drive in many places in Idaho during the winter, including Teton County" is the district court's void and precluded testimony and what every unstated and unpresented expert claims without foundationsl showing, etc. A court judge presiding may not testify. No objection need be made to preserve this or any evidence he thinkis he is competent as a witness. I.R.E. Rule 605, A judge cannot sewar himself in and then proceed to give expert opinions in violation of Rule 703; moreover, an oath or affirmation "shall be required to declare he will testify truthfully. I.R.E, Rule 603. Lastly, when was given such notices and an opportunity to impeach said testimony?

FOURTH, Appellant's counterclaims weremandatory under IRCP, 13(a), a pleading under Rule 7(a) and per Rule 8(f) was required "shall be so construed as to do substantial justice."

REspondent never filed and there was not before the distric court, at any time, nor when he was presented with respondent's summary judgment motion, any motion for a more definite statement as to Appellant's mandatory counterclaim per IRCP, Rule 12(e). Nor did Respondent at any time raise either formally or otherwise a Rule 12(b)(6) motion nor argue or present any memorandum tosupport a Rule 12(b)(6) motion with a set noticed date for hearing. No hearing ever focused on any of such TIMELY AND PROPERLY SERVED FURTHER MOTION FOR A MORE DEFINITE STATEMENT WHICH IF MADE, HEARD AND GRANTED WOULD HAVE GRANTED LEAVE TO APPELLANT TO FILE AMENDED COUNTERCLAIMS.

At Respondent's Brief, page 8, it is snidely stated:

" . . . In addition, the court noted that 'there is no reason why such a statement would indicate any bias against Bac by the Court. Nevertheless, in order to clear the record unnecessary issues, the Court hs removed the statement from this amendedorder.' R.p. 0150."

But even this staeement and qaote of the district court is accurate and deceptively deficient to correct any void effects of what the district court did without authority, jurisdiction and in violation of any testimony being pre'luded by the I.R.E., Rules, quoted under PART THIRD, SUPRA, page 9, hereof. In the district court's AMENDED MEMORANDUM DECISION, filed Sept 3,

2010 (R 0141-155) , it convolutedly and obfuscatingly attempted to justify and somewhat ameliorate his statements in his said first Memorandum Decision (supra, pages 6-8).

Starting at page 9, of his AMENDED MEMORANDUM DECISION, (R. 149) under paragraph "(7) Bach's claims that he has been denied a fair and impartial judge." (See and reference for incorporation the four (4) motions Appellant filedMay 17, 2010, R 0099-0109; especially starting with R102-0109).

> "(7) Bach's claims that he has been denied a fair and impartila judge.
>
> Bach argues that his due process rights have been violated because he hasbeen denied a fair and impartial judge. Although itis difficulat to discern the reasons for this, during oral argument Bach focused on two actions by the trial judge: (1) the Court 'taking judicial notice that it is is dangerous to drive in many places in Idaho during the winter, including Teton County, '[21] and (2) the Court assisting GMAC by opining during the July 7, 2009 hearing that by taking the vehicle through a decree of summary administration, Bach assumed all liability connected to the vehicle.
>
> The Idaho Rules of Evidence recognize that a trial court can take judicial notice of the following adjudicated facts;
>
> A judicially noticed fact must be one not subject to reasonable dispute in that it is (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and determination by reason of sources whose accuracy cannot be reasonably questioned.
> I.R.E. 201(b) (Emphasis added).
>
> The Court's recognition that Teton County, Idaho is an area with severe winter weather is neither surpirsing nor a reach. Located only miles from the Grand Teton Mountains and the Grand Targhee Ski resort, such information is generally known throughout the Seventh Judicial District. The admission of such gen-general knowledge hardly breaks any new legal ground.[22] More

importantly, there is no reason why such a statement would indicate any bias against Bach by the Court. Nevertheless, in order to clear the record of unnecessary issues, the Court has removed that statement from this amended order.

Likewise, the Court's reference to the legal impact of Bach's summary administration is niether inappropirate nor indicative of bias. The Court is not requied to base its legal analysis of an issue solely on the issues raised by the attorneys. In the recent case of Parkwest Homes LLC v. Barnson, ---P.3d ---, (2010 WL 2541022, June 25, 2010), the appellant argued that the trial courtin sua sponte raising the issue of illegality. The Idaho Supreme Court held:

> The district court did not err in sua sponte raising that issue. In Barry we held that "this Court has a duty to raise the issue of illegality." id., and the district court had the same duty.

2010 WL 2541022*5, (citing Barry v. Pacific West Construction Inc., 140 Idaho 827, 832., 103 P.3d 440, 445 (2004).

While the Court concedes it may not have been a duty to raise the issue, such as in the case of legality or mootness, it was certainly not error for it to do so. A trial court judge is not required to disregard his knowledge of the in-APPLICABLE LAW IN DECIDING AN ISSUE . ." (R. 0149-0150)

The district court, then on page 11 (R. 0154) under "II. Bach's Counterclaims are Dismissed." , repeated the first 3 paragraphs as set forth UNDER part "2. (pages 7-8 supra herein) BUT deleting the very FIRST sentence of the second paragraph, and starting said paragraph " . .Bach's mere assertion that there are braking and four-wheel-drive problems with his vehicle in Teton County is insufficient to allow GMAC to form an answer or put them on notice as to complaint. . ."(R. 0151)

(The district court judge then went on/continued to deny all of Appellant's motionsincluding his motion to amend his counterclaims pursuant to IRCP 15(a) and (b). (r. 0153-0;54) BUT the district court added somewhat accusatorially: "The timing of Bach's request for leave to amend is also troubling. It was only after the Courtgranted GMAC's motion for summary judgment that he brought this motion. Itis not fair to GMAC to win on summary judgment, only to have the pleadings completely rewritten so that Bach has new surviving claims. . . ." (R. 0154)

Appellant contends and argues that it is not fair for the district court on its own, without notice to appellant, to expand, include and sua sponte expand and add to Respondent's motion for summary judgment which was noticed and limited only Respondent's to such motion to the unverified complaint for summary judgment on the claim and delivery single action per I.C. 8-301 and did not notice nor raise summary judgment on Appellant's numerous cunterclaism. The district court's sua sponte expansion of such unmade, timely and procedurally of its motion for summary judgment on Appellant's counterclaism and its above quoted reasons were above and beyond the issues of Rule 56. Fuller v. Dave Callister (Idaho 2011) 252 P.3d 1266, 1269 ("The party against whom the (summary judgment will be entered must be given adequate notice and an opportunity to demonstrate why summary judgment should not be entered. It is also true that a district may notdecide an issue not raised in the moving party's motion for SUmmary judgment." (Emphasis added); Posey v. Ford Motor Credit Co., 141 Idaho 477, 11 P3d 162 (Ct. App. 2005)

Moreover, the district court judge exhibited morethan a continuing patent bias and prejudice against Appellant's arguements and deliberately sought to restate such arguments inaccurately in his concern for what the record, oral and written may otherwise reveal and contain. The district court judge had further exhibited patent and obvious prejudice and biase against Appellant that he was deprived of his rights, procedurally and substantively to due process and equal protettions under the U.S. Constiution's Fourteenth Amendment. Litkey v. U.S. 1994 (1994) 510 U.S. 551; Owlsey v.I.A.C. (2005) 141 Idaho 125, Ct App.

Respondent's briefcontinues to compound and confirm that it indeed has abuse the process of the Court and failed to state a cause of action claim and delivery; that is used, advanced and misrepresented a clearly VOID and unverified claim to bbtain illegally via a further issued VOID WRIT OF POSSESSION OF Equinox, and proceed in a wholly unreasonably commercial manner,never selling it at any noticed or properly held public auction--neither giving appellant credit nor proof of

full and complete monetary value was paid for it. Respondent Brief admits that the district court and it more than misapplied and abused the process of the void and criminal actions per aits lack of jurisdiction claim and delivery action to deprive Appellant's constitutional rights to due process and equal protection, ignoring the decision of this Idaho Supreme Court of Parkwest Homes, LLC v. Barnson, 149 Idaho 603, 608. Appellant refers to and incorporates specifically all statements and arguments, pages 2-7, supra.

For allthe foregoing reasons, statements and arguments set forth, supra, Respondent GMAC was not entitled nor with standing or capacity to obtain any judgment, nor damages, nor attorney's fees before the district court nor per this appeal..

CONCLUSION: Appellant's appeal should be granted herein, with remand to the district court to dismiss with prejudice Respondent's void and without jurisdiction claim and delivery sole action count and reinstating and proceeding with the counterclaims to a jury trial before a newly assigned impartial and unbiased judge.

DATED: September 23, 2011

JOHN N. BACH, Appellant
Pro Per

CERTIFICATE OF SERVICE BY OVERNIGHT
MAIL TO THE CLERK, IDAHO SUPREME COURT

I, the undersigned, certify that on September, 23, 2010, I, did service via overnight U.S. Mail, an original, plus seven (7 cop ies and one additional unbound copy for computer filing to the CLERK, IDAHO SUPREME COURT, P.O. Box 83720, Boise, Idaho 83720-0101; and further, served two (2) bound copies to opposing counsel via the U.S. first class postage affixed thereto, to: Laura E. Burri, P.O. Box 2773, Boise, ID 83701.

DATED: September 23, 2010