12-20-2011

Kugler v. Nelson Appellant's Brief Dckt. 39060

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN B. KUGLER,	)	
Plaintiff-Appellant,	)	**Supreme Court No.**
	)	**39060-2011**
vs.	)	
	)	
RON NELSON,	)	
Defendant-Respondent,	)	
	)	

APPELLANT'S BRIEF

An Appeal from the District Court of the Fifth Judicial District

Of the State of Idaho, in and for the County of Twin Falls

The Honorable Randy J. Stoker, presiding

John B. Kugler

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POINTS AND AUTHORITIES

I

The appellate court freely reviews issues involving statutes of limitation.

Necro Minerals Co. v. Morris Knudsen Corp. 140 Idaho 144, 90 P.3rd 894

Western Family v. Vanek, 144 Idaho 150, 158 P.3rd 313

II

A contract, when being reviewed as to it's meaning and effect, as well as applicable statutes, should be reviewed as to the whole instrument to discern the parties' intentions, rights and obligations.

Farber v. Idaho State Ins. Fund, 147 Idaho 307, 208 P. 3rd 289

Henderson v. Henderson Investment 148 Idaho 638, 225 P.3rd 568

III

Where reasonable persons could easily reach a different conclusion than that of the trial court or draw different inferences from the evidence presented summary judgment is not appropriate The Court keeps in mind that conflicting evidentiary facts must be viewed in favor of the nonmoving party and uses the same standard as that which is required of the trial court.

Bonner Life Insurance . Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 206 P. 3d 481. .

Boise Tower LLC v. Hogland, 147 Idaho 774, 215 P.3rd 498

Edmunds v. Kramer, 142 Idaho 867, 136 P.3rd 338

IV

Summary judgment is not proper where the affidavits and record raise any question as to the credibility of a witness if that witness is material.

J. R. Simplot Co. v. Rosen, 144 Idaho 611, 167 P. 3rd 748

V.

A breech of the covenant of good faith and fair dealing occurs when either party violates, nullifies or significantly impairs any benefit of the contract.

Bushi v. Sage health Care PLLC, 146 Idaho 764, 203 P.3rd 694

VI

Great liberality should be exercised in permitting amendments to pleadings in furtherance of justice between the parties and in construing pleadings the focus is on insuring that a just result is accomplished.

Villa Highlands LLC v. Western Community Insurance Co., 148 Idaho 598, 226 P.3rd 540

Markstaller v. Markstaller, 326 P. 2nd 994

VII

An implied covenant of good faith and fair dealing is implied in all employment contracts and an action by one party that significantly impairs any benefit or right of the other party violates the covenant.

Jensen v. Sidney Stevens Implement Co., 36 Idaho 348, 210 P. 1003

Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 243 P.3rd 1069

VIII

Whether the strictures of I.R.C.P. 11(b)(3) are satisfied is a question of law over which the appellate court has free review.

Reinweld v. Eveland, 119 Idaho 111, 803 P.2nd 1017

IX

If the requirements of I.R.C.P. 11(b)(3) are not strictly followed any judgment rendered thereafter is void and must be set aside as a matter of law rather than as a matter of discretion.

Wright v. Wright, 130 Idaho 918, 950 P. 2nd 1257

X

An attorney fee is not warranted every time a commercial transaction is connected to the case as the term "commercial transaction' does not include transactions for personal or household purposes and the test is whether the gravamen of the offense.

Brower v. E.I. DuPont 17 Idaho 780, 792 P, 2nd 315

Kelly v. Silverwood Estates, i27 Idaho624, 903 P. 3rd 1321

ISSUES PRESENTED ON APPEAL

I

Are there disputed issues of fact in the record precluding the entry of summary judgment?

II

Did the District Judge err by his failure to consider the concealment of a breach of contract by defendants', including the respondent?

III

Does the concealment of an intentional breach of contract by a participant toll the statute of limitations until discovery by the injured party?

IV

Was the acquisition by H & M, Inc.., in redemption of some selected shares of it's issued stock, a valid transaction?

V

Was there a continuing duty of disclosure by the respondent to appellant of the disassociation and complete retirement by Ed Prater from H & M, Inc. and in a personal performance contract does a statute of limitation arise at the initial breech or is the statute tolled until damage is incurred by virtue of the breech.

VI

Is there a repeated breach of contract on each separate occasion that additional damage is incurred by appellant by virtue of respondent's nondisclosure and the opportunity to acquire shares of stock coming from Ed Prater that respondent, as successor manager, obtained?

VII

Is the stock purchase agreement a personal performance contract with mutual continuing obligations, as well as rights, that precludes the commencement of the statute of limitations until the date on which appellant is damaged?

VIII

Did the magistrate err in determining to award attorney fees to respondent?

IX

Did the District Judge err in not providing a hearing on appellant's request for reconsideration of his court order granting summary judgment?

X

Did the District Court err in failing to consider appellant's motion for an order granting leave to amend appellant's complaint?

XI

Did the District Judge abuse his discretion on matters that may be considered discretionary?

XII

Did the Notice of Withdrawal meet the clear and informative standard required by the procedural rules?

XIII

Did the District Judge abuse his discretion in his determination that it was appropriate to enter a "final order" without considering the effect upon other defendants and the appellant as a result of the delay created by the required appeal.

STATEMENT OF THE CASE

In 1985 the defendants, other than the respondent Nelson, your appellant and one other individual formulated an Idaho corporation, H & M Distributing, Inc. as a vehicle with which to acquire a wholesale business in Twin Falls, Idaho. Mr. Prater was the local manager of a wholesale company when it came up for sale. The company was involved in the sale of beverages, cigarettes, candy, grocery items and sundries. At the time of the formulation of the corporation each individual

subscribed to the purchase of some of the shares to be issued and at the same time each corporate member executed a Stock Subscription and Cross Purchase Agreement. After purchase of the business Mr. Prater continued as general manager of the business. Subsequently the respondent became an employee of the company. Eventually he became the head of the beverage division. In April of 2002 Ed Prater elected to reduce his job requirements and semi retired, resigning as general manager and maintaining responsibility on a part time basis only for the heading and ordering of products other than beverages. At that time the respondent, Ron Nelson, was promoted to the position of general manager and was issued twenty two shares of corporate stock.

At some unknown time in 2005, now documented as in February of 2005, Ed Prater elected to fully retire and disassociate himself from the company. To whom and when notice of his withdrawal was given is not known. No notice of this event was given to appellant by the respondent general manager, by Mr. Prater or by any one of the other officers and directors. Two or three years after that event, on inquiry as to the health of Mr. Prater, your appellant learned of Mr. Prayer's retirement. Your appellant went to Twin Falls, Idaho to inspect corporate records and was advised that the same were in Pocatello, Idaho. Appellant then went to Pocatello to review the corporate records. The corporate records failed to have any notice or record of Mr. Prater's retirement. Mr. Prater was still listed as a stock-holder of record. There was no notice of any corporate meeting involving Mr. Prater or Mr. Prater's corporate stock. There were no minute entries reflecting any purchase or sale of Mr. Prater's stock by the corporation. At some point thereafter, in conversation with Mr. Nelson, he stated that he "had purchased some of Ed Prater's stock" and that he would like to acquire appellant's stock as he desired to own the company. Your appellant then advised Mr. Nelson of appellant's desire to purchase some of Mr. Prater's stock if it all had not been sold. At the same time your appellant advised Mr. Nelson that should appellant choose to sell that he could not sell his shares of stock without offering it to each of the other stockholders as well. The respondent continued to inquire intermittently as to whether or not appellant was willing to sell his stock at the price he had paid for Ed Prater's stock. In early

2010 , late January or early February this was repeated. At an unknown date thereafter appellant received a notice of a corporate meeting to be held in Pocatello, Idaho on March 5, 2010. On March 4, 2010 the respondent, Ron Nelson, called appellant again stating that he " ... would increase his offer to Two Thousand Two Hundred Dollars per share which is more than they are worth ...." if appellant would consider selling now. Appellant replied that he would attend the company meeting on the next day and that a response would be given after the conclusion of the meeting. On arrival in Pocatello appellant learned that the meeting had been canceled by Dave Powers. No meeting was held. Mr. Nelson quit his job effective on March 31, 2010.

On May 6, 2010 appellant filed the complaint in this proceeding. After service of process on each of the defendants appellant learned that the defendants were asserting that a sale of stock was made by Ed Prater to the company. The respondent asserts that he agreed to purchase twenty shares of stock on February 2, 2005 and that the respondent acquired such stock on May 2, 2005. Appellant never received a notice of sale or proposed offer of sale from Mr. Prater, from H & M Distributing, from the respondent or from any of the other defendants. The respondent did not give notice of his proposed sale of his stock as required by the stock agreement.

H & M Distributing, Inc. is a Sub S corporation with a fiscal year ending on September 30th of each year. Notice of the corporate records and the annual fiscal effect as to each shareholder is received in December and the notice for the year end 2009 was received by appellant at that time. Damages have occurred to appellant as of the end of each fiscal year either by the lack of an opportunity to share in a greater pro rata ratio of profits or losses as determined as of the close of each fiscal year.

ARGUMENT

This appeal is taken from the decision of the trial judge in the entering of summary judgment in favor of one of the defendants, Ron Nelson, denying the plaintiff, affiant herein, the right to proceed on a claim arising out of actions or lack of actions of the defendants both individually and jointly. The focus of the case

involves the Stock Purchase Agreement and the actions or lack of actions of the respondent, Ron Nelson, and the granting of a summary judgment in favor of the respondent at a time after the Order permitting the withdrawal of appellant's counsel and prior to the time set for an appearance by plaintiff or a successor attorney.

Each member of the appellate Court is now sitting and considering the issues as if he or she were sitting as the trial judge. It continues to be the burden of the moving party, the respondent, to justify and establish that there were no issues of fact precluding summary judgment. Additionally the trial judge is not permitted to weigh the evidence and any questions must be ruled in favor of the nonmoving party. Referring to appellant's second affidavit appellant would direct this Courts' attention to the factual statement that in two or three years after May 5, 2005 the company record still showed that Ed Prater was a stockholder of record. As set forth in appellant's affidavit Mr. Nelson had stated to appellant that he had purchased twenty shares of Ed Prater's stock that almost doubled his claim of profits to appellant's detriment. The statement regarding Prater stock is not refuted or explained. Mr. Nelson is a material witness and his conflicting statement is not sufficient to support summary judgment.

Another conflict arises from the record that precludes summary judgment is the stock purchase agreement that Mr. Nelson signed as well as what he knew and learned as general manager of the company. It can be reasonably implied that Mr. Prater's decision to fully retire was conveyed to Mr.Nelson. He also would know that the corporate records did not reflect any sale of stock to him and that as a stockholder Mr. Prater was required to give notice of his intention to sell to each other stockholder and that such had not been accomplished. If in fact Mr. Prater sold his stock to the company the same would be a void transaction as the same had not been authorized by the board of directors. No notice of intended redemption of stock, special or general had ever been issued. Again facts precluding summary judgment exist of record.

With respect to the asserted statute of limitations the trial judge appears to have determined that a five year statute applied without setting forth the specific

statute relied upon. It is appellant's recollection that one time Idaho law provided that the failure to specifically plead the statute relied upon as a defense precluded the claim and constituted a waiver. Regardless the fabricated date of February 2, 2005 did not exist of record in 2007 or 2008 when appellant reviewed corporate records. Regardless the statute of limitations could not begin as knowledge of the void sale to the company had been concealed from appellant and as such any statute of limitations would be tolled until such time as appellant learned of the breach. The trial judge erred in failing to consider the effect of concealment upon a start date for a statute of limitations. Another basis for tolling was also not considered by the trial judge in that no damage to appellant had occurred as of February 2, 2005. The first date on which appellant suffered damage was on September 30, 2005. That was the closing of the fiscal year for the Sub S corporation at which time each stockholders' distributional interest is determined by the number of shares held on that date. At that time Mr. Nelson received almost twice the percentage that he had received on September 30, 2004 and appellant suffered a proportional reduction in has pro rata share. Appellant also contends that the obligation of disclosure of purchase by the respondent was a continuing duty of the general manager. The failure to disclose and provide an opportunity to acquire unsold stock or a portion of each purchaser's if none is available was a breach of Mr. Nelson's covenant of good faith that he owed to appellant. Mr. Nelson was well aware that notice of Mr. Prater's sale should have been provided to appellant and he could have reduced plaintiff's damages by disclosure instead of joining the others in concealment of the breach. On September 30, 2006 appellant again incurred damages as a result of an unknown breach and a similar damage was incurred on September 30th of each year thereafter. Appellant contends that the dismissal of all claims by the trial judge was error as the claim for 2010 did not arise until after the filing of appellant' complaint and the same applies to the 2011 claim that just was incurred a couple of months ago.

For some unknown reason appellant's copy of the trial court's record does not contain a copy of the trial court's Order allowing Mr. Gadd to withdraw as attorney of record for appellant. Mr. Gadd's Motion To Withdraw did not disclose a

need for appellant to be present at the hearing on the motion to avoid being prejudiced by his total lack of conception of appellant's claims. The order advised appellant to appear in person or by counselor there could be consequences and appellant complied with that Order. Whether the notice and order meet with the requirement of I.R.C.P, Rule 11 or not cannot be determined from the record. In any event it is appellant's contention that it was error and an abuse of discretion to refuse to set aside his summary judgment decision. Appellant also contends it was error to refuse to enter an order for leave to amend as none such exists in the record although contended by both counsel for the respondent and the trial judge that it had been entered. Good cause existed for such leave to be obtained as new information was obtained subsequent to the filing of the complaint including the failure of the respondent to comply with the stock agreement in respect to both his initial stock and the Prater stock he acquired. He failed to give a sixty notice to the stockholders as individuals that is a very material personal requirement of each corporate member.

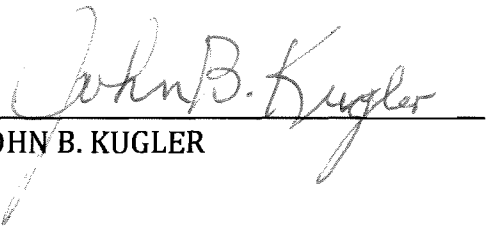
As a final point it is appellant's contention that it was error of the trial court to enter a judgment for attorney fees against appellant. The requirement of a sixty day personal notice gives each party an opportunity to explore and determine what range of value might be involved with respect to the stock. His affidavit reflects hat he made an agreement for sale without any notice that is the gravamen of the offense for which damages are sought. If the Court determines that the summary judgment cannot stand then the attorney fee issue will be resolved without consideration as to the nature of the breech. In any event the decision of the magistrate should be reversed.

CONCLUSION

Appellant recalls having seen an Idaho case in which the appellate court determined that the issuance of a Rule 54 (b) order was inappropriate and as recalled the Court set that order aside and remanded the matter to the trial court for further proceedings. Appellant could not locate authority for this but does believe that this would be a good solution as appellant can foresee cross claims between the defendants.

In summary it can be simply stated that appellant believes the facts and the law justify the reversal of the granting of summary Judgment in favor of the respondent.

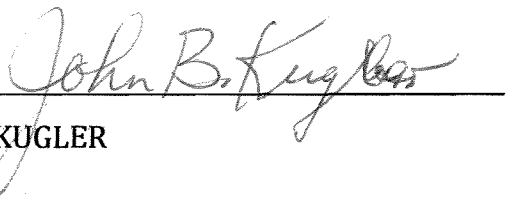
Respectfully Submitted,



JOHN B. KUGLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING APPELLANT'S BRIEF WAS SERVED ON THE RESPONDENTS BY MAILING TWO COPIES OF THE SAME , postage prepaid, TO BROOKE BALDWIN REDMOND, P.O. BOX 226, TWIN FALLS, IDAHO, 83303 THIS 14th DAY OF DECEMBER, 2011.



JOHN B. KUGLER