12-5-2011

AED, Inc. v. KDC Investments, LLC Appellant's Brief Dckt. 38603

IN THE SUPREME COURT OF THE STATE OF IDAHO

AED, INC., an Idaho corporation,

Appellant/Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSTAL CHAKLOS, individually,

Respondent/Defendants.

DOCKET NO: 38603-2011

KOOTENAI COUNTY CASE NO: CV10-7217

Appeal from the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Kootenai

Honorable John T. Mitchell, Presiding

APPELLANT'S BRIEF ON APPEAL

Arthur M. Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

ATTORNEYS FOR APPELLANT

Randy L Schmitz
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
Boise, ID 83701

ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF IDAHO

AED, INC., an Idaho corporation,

Appellant/Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSTAL CHAKLOS, individually,

Respondent/Defendants.

DOCKET NO: 38603-2011

KOOTENAI COUNTY CASE NO: CV10-7217

Appeal from the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Kootenai

Honorable John T. Mitchell, Presiding

APPELLANT'S BRIEF ON APPEAL

Arthur M. Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

ATTORNEYS FOR APPELLANT

Randy L Schmitz
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
Boise, ID 83701

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff/Appellant Advanced Explosives Demolition, Inc., ("AED") and Defendant/Respondent KDC Investments, LLC, ("KDC") entered into an agreement for KDC to purchase a bridge from AED (the "Sales Agreement") and for AED to perform part of the demolition work to remove the bridge (the "Blasting Agreement"). The parties reduced their agreement to two separate writings. KDC paid the purchase price for the bridge, but refused to honor the Blasting Agreement.

AED filed suit seeking to rescind the Sales Agreement on the grounds that KDC fraudulently induced AED into selling KDC the bridge by contracting AED to do the blasting work when KDC had no intention of honoring that commitment. AED also filed suit for breach of the Blasting Agreement. KDC denied the parties had entered into the Blasting Agreement and, alleged, amongst other things, that the Blasting Agreement was illegal because AED did not have a contractor's license.

B. Proceedings Below

KDC brought a motion for preliminary injunction seeking to preliminarily enforce the Sales Agreement. The District Court denied the motion and in the process ruled the AED was not entitled to rescission because it had not made a proper tender of consideration to KDC.

KDC brought a motion for summary judgment on various grounds. The District Court ruled that 1) that the Blasting Agreement was illegal 2) and because it was illegal, AED could not rely on it in its fraud claim and 3) AED had provided no proof that KDC did not intend to perform the Blasting Agreement when it signed the Blasting Agreement. The District Court then quieted title of the bridge to KDC and dismissed AED's breach of contract claims.

On reconsideration, AED pointed out that AED's allegation is that the Blasting Agreement was material to the Sales Agreement and if the Blasting Agreement was illegal, the Sales Agreement was not enforceable or at least a question of fact existed in that regard. The District Court resolved the factual question in favor of KDC and denied the motion to reconsider.

C. Facts

In 2009, AED purchased the Bellaire Bridge. The Bellaire Bridge was the subject of a Court Order for its removal (R.468 ¶3). While AED was finalizing its purchase of the bridge, Eric Kelly on behalf of AED was simultaneously negotiating the sale of the bridge to KDC, who was acting through Lee and Krystal Chaklos (R.469 ¶¶8-10). Lee Chaklos owned Delta Demolition. KDC was going to hire Delta Demolition to remove the bridge, and Delta was going to hire AED to perform the blasting pursuant to the terms of the Blasting Agreement.

AED had reservations about selling the bridge due to the fact that AED was ultimately responsible for the removal of the bridge to both the seller of the bridge and the Court which had Ordered its removal (R.469 ¶9). However, AED believed that KDC could properly accomplish the removal of the bridge provided AED was involved in the project (R.469 ¶10).

On January 14, 2010, Eric Kelly on behalf of AED and Lee Chaklos on behalf of KDC exchanged an e-mail where the parties agreed to all the material terms of the agreements. AED, the parties agreed, would purchase the bridge, and then sell it to Delta Group (referring to Lee Chaklos' company Delta Demolition) for $25,000 who would then hire AED to blast the steel superstructure for $175,000 (R. 470 ¶11, R.476 – 478).

On May 19, 2010, Eric Kelly sent Krystal Chaklos an e-mail which set forth the terms for the Blasting Agreement between AED and Delta Demolition (R.470 ¶12, R.479- 481). The following day, Krystal Chaklos returned the Sales Agreement for the bridge accompanied by a

fax cover sheet indicating that she looked forward to working with AED on the blasting work (R. 470 ¶13, R.482- 483).

The Sales Agreement required KDC to pay $25,000 upon execution of the agreement. On May 20, 2010, the parties executed a document entitled "Letter of Contingency", which provided:

> To all, bear witness this 20th day of May 2010, that the parties identified as Advanced Explosives, Inc., (AED) and KDC Investments, LLC, hereby agree, in whole and part, that the purchase money will be conveyed to AED no later than the 25th day of May, 2010, via wire transfer.
>
> It is also agreed that if such money is not recorded by the 26th day of May, 2010, any and all previous agreements are null and void (R.225).

The purchase money for the bridge was not paid on May 25th (R.471 ¶15). On May 27th, AED informed KDC the agreement was terminated because the purchase money was not paid (R.471 ¶16), R.484- 486).

Notwithstanding the fact that the Sales Agreement was null and void, AED and KDC continued to negotiate regarding the sale and demolition of the bridge. On June 1, 2010, via e-mail, AED again reiterated the requirement that KDC hire AED to blast the bridge and proposed to sell the bridge to KDC under the same terms and conditions as the prior now void Sales Agreement. AED specifically required the execution of the Blasting Contract. Krystal Chaklos responded, "You have my word that AED will do the blast as long as you are still receptive to doing...Krystal." (R.471 ¶18, R.487- 489). The same day, KDC and AED executed a contract for AED to blast the bridge (R.471 – 472 ¶19, R.490 – 499). The purchase money of $25,000 for the sale of the bridge was paid on June 3, 2010.

The Blasting Agreement required KDC to pay $30,000 to AED on or before June 9, 2010, which KDC did not pay (R.472 ¶20). After June 9th, AED continued in good faith to fulfill its obligations pursuant to the parties' bargain, notwithstanding the fact that KDC had for the second time breached the agreement. AED incurred time and expenses, including the purchase of the explosives for the job which had been custom cut for the project (R.472 ¶22).

On June 14th, AED inquired regarding payment and informed KDC that AED would not be going any further unless AED received payment pursuant to the parties' written agreement (R.472 ¶23, R.502 – 503). In that same e-mail, Kelly informed KDC that it would take about two days to obtain a West Virginia contractor's license in response to KDC's continued mentioning that AED needed that license. It took three days to obtain said contractor's license (R.518 ¶5) and it was obtained on October 17, 2010. (R.699)

On June 16th, Kelly and Lee Chaklos had another discussion about the failure of KDC to pay the $30,000 as required by the Blasting Agreement (R.472 ¶24). During that exchange, Lee Chaklos offered to sell the bridge back to AED for $25,000. Later that day, Krystal Chaklos sent Kelly an e-mail stating that the price to buy the bridge back was the amount of the Blast Agreement -- $175,000 (R.473 ¶25). Then later, Krystal Chaklos sent Eric Kelly an e-mail that AED would be paid when Delta had received the City of Benwood's permit to proceed (R.473 ¶26, R.504 – 508). This e-mail also emphasized that AED would need a West Virginia contractor's license.

On June 18th, AED responded in writing to Krystal Chaklos' e-mail regarding KDC's failure to pay based on permitting and informed her that permitting was not a condition precedent to payment. AED further stated through Eric Kelly, "according to US Federal and State of West Virginia law, there is no requirement for a WESTE VIGRINIA CONTRACTORS

LICENCE (Sic in order to enter into a contractual agreement between two parties." AED further informed her necessary permitting would be in place by the time AED had to perform under the parties' agreement (R.473 ¶27, R.509 – 511). On June 29th, AED informed Krystal Chaklos that AED stood ready, willing, and able to perform (R.473 ¶28, R.512 – 514).

On July 7th, AED involved its counsel who wrote to Krystal Chaklos and demanded either that the deposit be wired or suit would be filed (R.453 – 455). The response to that demand was that KDC had discussed the proposal with its counsel and that KDC was not in breach of the proposal because AED was not qualified to do the job. Counsel for AED then demanded that KDC identify in what respect AED was not qualified to do the job, and the response was that AED had not, "...conveyed the proper paperwork for qualification," and that AED and Kelly were well aware of the required paperwork, but the "required paperwork" was still left undefined (R.456 – 459). KDC also repudiated its obligation to go forward with the Blasting Agreement.

On July 13th, counsel for KDC wrote a letter to counsel for AED taking the position that the Blasting Agreement was not a contract, and alleged KDC had not signed it and that even if it was a contract, AED had breached it because AED did not have a West Virginia contractor's license and, "...did not meet other various licensing and permit requirements," but again the requirements were left unidentified. Furthermore, KDC now took the position that AED did not have proper insurance. (R.543 ¶2, R.547). Additionally, on July 13th, AED offered to return KDC's purchase money for the bridge (R.473 ¶29, R.515 – 516).

On July 21st, counsel for AED spoke with counsel for KDC and asked him to identify what licensing requirements were missing and still no additional information was provided. (R.544 ¶3-5). Thereafter, AED commenced this action.

ISSUES ON APPEAL

I. **Did the District Court error in determining that the Blasting Agreement was illegal and void because AED did not have a West Virginia Contractor's License at the time of the making of the agreement?**

II. **Did the District Court error by enforcing the Sales Agreement even though a material question of fact existed as to whether the Blasting Agreement could be severed from the Sales Agreement?**

III. **Did the District Court error by holding that AED could not seek rescission because AED had not made a proper tender of KDC's consideration?**

IV. **Did the District Court error by dismissing AED's claim of fraudulent inducement on summary judgment based on a lack of evidence?**

V. **Did the District Court error by striking certain portions of AED's affidavits filed in opposition to summary Judgment.**

VI. **Is AED entitled to attorneys fees on appeal?**

ARGUMENT

I. THE FAILURE TO HAVE A CONTRACTOR'S LICENSE AT THE TIME OF CONTRACTING DOES NOT RENDER AN EXECUTORY AGREEMENT TO PERFORM CONSTRUCTION WORK UNENFORCEABLE BECAUSE THE CONTRACTOR CAN RECOVER FOR WORK PERFORMED AFTER OBTAINING PROPER LICENSING.

The District Court allowed KDC to avoid its obligation under the Blasting Agreement because AED had not obtained a West Virginia Contractor's license at the time of entering into the agreement. This was in error because under Idaho or West Virginia Law[1], an executory contract for construction work cannot be avoided on the grounds that the contract lacks the proper licensing in Idaho or West Virginia.

Even if this Court determines that the failure to have a license is a defense to enforcement of an executory contract for construction work, as soon as the contractor obtains the proper licensing, then the contract can no longer be avoided. AED had the proper licensing at the time the Court declared the contract to be illegal and that fact rendered the Blasting Agreement enforceable.

KDC argued and the District Court agreed the contract was illegal on the basis that AED did not have a West Virginia contractor's license at the time it entered into the Blasting Agreement. (R.914). The District Court determined the facts of this case to be similar to Barry v. Pacific West Const., Inc., 140 Idaho 827, 103 P.3d 440 (2004), where the Idaho Supreme Court determined that the agreement in question was illegal. (R.700). The agreement in *Barry* which was deemed illegal was the agreement to intentionally avoid the requirements of the Idaho Public Works Contractor Licensing Act. "On March 8, Jack asked Barry if Quality had a public works license. Barry acknowledged that it did not. **Jack stated that Quality would have to**

[1] West Virginia's Supreme Court has specially held that the failure of the contractor to have proper licensing is not a defense to action for payment by the contractor. *Timber Ridge, Inc. v. Hunt Country Asphalt & Paving, LLC* 222W.Va. 784, 789, 671 S.E.2d. 789, 794 (W.Va 2008)

continue its work as Pac–West employees. Barry agreed and advised his employees of the arrangement. Quality continued its work under the umbrella of Pac–West's public works license." Barry v. Pacific West Const., Inc., 140 Idaho 827, 830, 103 P.3d 440, 443 (2004) (emphasis supplied). Quality/Barry was a subcontractor and was required to have a public works contractor's license. The agreement in that case was that Quality would continue to work on the project without the required license. That is an agreement to intentionally violate the public works contractor registration requirements, an illegal act, and was properly declared to be an unenforceable agreement.

Unlike Barry, the agreement here does not contemplate AED perform any illegal act and specifically requires AED to obtain proper licensing. The District Court acknowledged that, "At the time of actual *performance* of this executory contract, it is likely that AED could have had, or perhaps even would have had, any necessary licensing/registration to perform the contract as agreed upon by the parties," but then invalidated the contract because AED did not have a license at the time it entered into the agreement. (R.914). This is in error because in neither West Virginia nor Idaho, the failure of the contractor to have a license at contract formation does not render an executory contract illegal and unenforceable. In Idaho, the contractor can collect for work performed only while the contractor was properly licensed, even if the contractor was not licensed at the time of contract formation.

In general, the fact that a license might have to be obtained before the work is performed does not render a contract illegal.

> Many contracts cannot lawfully be performed without securing a permit, license, or approval from some governmental officer or board, and yet the contracts are not deemed illegal.
>
> Professor Williston says, 'The fact that a party bargains to do an act which will be illegal unless governmental permission is

> obtained does not make such bargain illegal, and if he does not obtain such permission he is responsible in damages for failure to perform.'
>
> *Magruder v. Hagen-Ratcliff & Co.* 131 W.Va. 679, 685-686, 50 S.E.2d 488, 492 - 493 (W.Va.1948) citing *Nusenbaum v. Chambers & Chambers,* 322 Mass. 419, 77 N.E.2d 780, 782 (Mass. 1948) citing Williston on Contracts (Rev.Ed.) § 1767, note 3.

Consistent with the foregoing, the Idaho Supreme Court has held that licensing obtained after the construction agreement was entered into validates an otherwise unenforceable agreement.

In ParkWest Homes LLC v. Barnson, 149 Idaho 603, 238 P.3d 203 (2010), the District Court determined the contract to be "void" because the contractor was not registered at the time the contractor signed the contract. The contractor in that case did not challenge this finding on appeal so the Supreme Court did not address that issue. (Id. at 608, 208). However, the District Court also invalidated the contractor's lien. Idaho Code 54-5208 provides that a contractor shall be allowed a lien if not registered, but the Supreme Court determined that the statute only prevented a lien for work performed while the contractor was unlicensed, and the contractor could collect for work performed after the contractor had obtained proper licensing. The Supreme Court found this interpretation consistent with Idaho Code 54-5217(2) which provides that a contractor must prove proper licensing "...at all times during the performance of such act or contract" in order to maintain an action for payment. (ParkWest at 608, 208). The Supreme Court specifically found that the work performed by *Parkwest* while unregistered illegal, but work done while registered was legal. (Id.) Therefore, the failure of the contractor to be licensed at the time of contracting does not invalidate the entire agreement on the grounds of illegality.

Idaho's Contractor Registration Act does not invalidate an executory contractor to perform construction work if the contractor was unlicensed at the time of contracting, it just prevents the collection of money earned for work performed without the proper license. If the failure of the contractor to be licensed at the time of contracting voided the entire transaction, the Supreme Court in Parkwest could have made that determination *sue sponte* in that case. Taylor v. AIA Services Corp., 151 Idaho 552, 261 P.3d 829, 841 (2011), but specifically found that work performed after licensing was obtained was not illegal. Implicit in this finding is that the failure of the contractor to be licensed at the time of contracting does not render the agreement void and unenforceable.

Even if the failure to have a contractor's license is a bar to bringing suit to enforce and executory contract for construction work, that bar disappeared when AED obtained the West Virginia Contractor's license which occurred prior to the District Court's declaration that the Blasting Agreement was illegal.

The Blasting Agreement is not illegal, but if it is, the Sales Agreement is also illegal and the District Court should not have enforced it by quieting title to the bridge in KDC.

II. THE DISTRICT COURT ERRED BY ENFORCING THE SALES AGREEMENT BECAUSE A QUESTION OF FACT EXISTS AS TO WHETHER THE BLASTING AGREEMENT WAS MATERIAL TO THE SALES AGREEMENT AND THE DISTRICT COURT SHOULD HAVE SUBMITTED THAT ISSUE TO THE JURY.

The District Court ruled that the promise by KDC to hire AED is illegal, but then enforced the remainder of the parties' agreement to sell the bridge. If the blasting agreement is illegal, then the remainder of the agreement is illegal because the blast portion was material to AED and cannot be separated from the agreement to sell the bridge, or at least a question of fact exists as to whether the Blast Agreement was material to the Sales Agreement. The District

Court should not have provided KDC any relief as it is providing affirmative relief to a party to an illegal agreement.

First, the District Court seemed to take offense to AED's suggestion that if the Blasting Agreement was illegal, so was the Sales Agreement. The District Court referred to AED's argument as "creative" and taking "some nerve," (R.911), because AED was suggesting the Blast Agreement was illegal. AED does not now nor has it ever taken the position that the Blast Agreement is illegal. As set forth above, the District Court's ruling in this regard in error. AED was only pointing out to the District Court, as it is to the Appellate Court, that if the Blasting Agreement is illegal, the holding had ramifications for the enforceability of the Sales Agreement because the agreement to sell the bridge was entirely depending on the agreement that AED would blast the bridge. The District Court should not have enforced the agreement to sell the bridge because it cannot be severed from the agreement that AED blast the bridge.

> If less than all of an agreement is unenforceable under the rule stated in §178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.
>
> Restatement Second of Contracts
> § 184

> Primarily the criterion would appear to be whether the parties would have entered into the agreement irrespective of the offending provisions of the contract. This can usually be determined by weighing equality of the agreed exchange before and after the proposed severance.
>
> Calamari and Perillo on Contracts, Third Edition 1987 at 893, citing Marsh, the Severance of Illegality in Contracts (pts 1 & 2) 64 L.Q.Rev. 230, 347 (1948) and Restatement

> Second of Contracts, Section 184, Comment a.

Whether the Blasting Agreement was an "essential part of the agreed exchange" is a question of materiality and a question of fact for the jury. "It is well established that materiality is a question of fact for the trial court,..." Mountain Restaurant Corp. v. ParkCenter Mall Associates, 122 Idaho 261, 267, 833 P.2d 119, 125 (Ct. App.1992).

In this case, the District Court improperly choose to resolve this question of fact in favor of KDC based on the District Court's construing the evidence in the light most favorable to KDC. This was error and the evidence before the District Court clearly establishes that AED would not have sold the bridge to KDC but for the fact that KDC hired AED to blast the bridge.

The District Court's factual determination that the Blasting Agreement was not material to the agreement to sell the bridge rests heavily on the District Court's factual finding that the Blast Agreement and Sales Agreement were entered into at different times.

> Had the illegal demolition agreement been entered into *before* the purchase agreement, then there might be more to AED's argument. But here, the demolition agreement did not even exist at the time the purchase agreement was entered into. (R.910-911)
>
> Nonetheless, because the two agreements in the instant matter are dated over three weeks apart, and the two agreements in *Quiring* occurred simultaneously, *Quiring* is simply not instructive. (R.917)
>
> The purchase agreement was entered into eleven days before the demolition agreement... (R.907)
>
> This Court has not determined the purchase agreement to be illegal, and there is simply nothing before the Court (other than Eric Kelly's arguably self-serving affidavit) to indicate that the demolition agreement was to form a portion of the consideration supporting the purchase agreement, which was entered into more than one week prior to the demolition agreement and makes no reference to it. (R.919)

> This Court would have to ignore the fact that the purchase agreement was entered into before the demolition agreement,...(R.910)

The District Court's finding that the Sales Agreement was entered into before the Blasting Agreement is contradicted by the evidence. The Sale Agreement was entered into on May 20, 2010, and then rendered void by the fact that KDC did not pay the $25,000 by May 26, 2010. (R.471). AED proposed to again sell the bridge under the same terms and conditions as the May 20, 2010, agreement, if and only if KDC executed the Blasting Agreement. In the face of this conflicting evidence, it was error for the District Court to resolve the question of fact as to when the Blasting Agreement was entered into in favor of KDC. The Sales Agreement signed May 20, 2010, had no life at the time the Blasting Agreement was signed and only came into existence because that Blasting Agreement was signed. It was in error for the District Court to conclude otherwise, and when the Sales Agreement and Blasting Agreement came into existence is at least a question of fact for the jury.

Other evidence proves that AED would not have sold the bridge but for the promise that it be allowed to blast the bridge. AED was ultimately responsible for the demolition and removal of the bridge and it wished to be involved to be sure it was properly handled. (R.467-470 ¶9-10). To sell the bridge for $25,000, and no other consideration would have been "stupid." (R.821, p.121, ln.3-12). KDC did in fact execute a document for AED to perform the blasting work and has clearly stated that it had a present intent to perform that obligation incident to the agreement to buy the bridge. (R.402).

Furthermore, the consideration for the Sales Agreement to purchase the bridge was only $25,000. (R.299). AED expected to make approximately $80,0000 from the Blasting

Agreement. (R.493, and 671).[2] The majority of the consideration which KDC provided to AED for this transaction was to come from the Basting Agreement.

The evidence before the District Court was more than sufficient to show that the Blasting Agreement was an essential part of the agreed upon consideration for the exchange of the bridge. It was error, therefore, for the District Court to resolve that factual issue in favor of KDC and enforce the sale, even though the Blasting Agreement was "illegal."

In the event this Court does not reverse the District Court's determination that the Blast Agreement was illegal, then this Court should remand this matter to the District Court with instructions to submit the jury the issue of whether the Blast Agreement can be separated from the Sales Agreement – i.e., if the Blast Agreement was essential to Sales Agreement rending one unenforceable without the other.

III. AED WAS NOT REQUIRED TO TENDER THE $25,000 TO KDC PRIOR TO FILING SUIT IN ORDER TO SEEK RESCISSION BECAUSE THE LACK OF A PROPER TENDER DOES NOTHING TO DIMINISH THE EQUITABLE POWER OF THE DISTRICT COURT TO GRANT RESCISSION.

The District Court ruled that AED could not seek rescission of the parties' agreement because AED failed to tender the $25,000 to KDC it had been paid. This is in error because AED was not seeking rescission based on an agreement to rescind, but was seeking an equitable rescission based on KDC's breach of the parties' agreement. The former requires a proper tender and the later does not.

O'Connor v. Harger Construction Inc., 145 Idaho 904, 188 P.3rd 846 (2008) is the most recent case to discuss the distinction between an action to enforce an agreement to rescind and an action for an equitable rescission. In that case, Harger, the contractor, was granted rescission by the Trial Court. O'Connor, the home owner, argued that Harger was not entitled to rescission

[2] $175,000 blast contract amount less the $95,000 for estimated costs from Eric Kelly's Affidavit.

because Harger had not tendered O'Connor's deposit to her prior to suit. The Supreme Court stated,

> Whether Harger's April 2005 letter constitutes a valid tender of O'Connor's deposit, and whether rescission as an equitable remedy is available are two separate issues. Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order.
>
> Whether Harger completed a valid tender, making rescission outside of court proper does nothing to reduce the equitable powers of the trial court. The district court, in this case was free to fashion an equitable remedy as it saw fit. Therefore it is not necessary for this Court to determine the sufficiency of Harger's tender in this case.
>
> O'Connor v. Harger Const., Inc. 145 Idaho 904, 912, 188 P.3d 846, 854 (2008)

The Supreme Court was pointing out that an agreement to rescind is a separate legal action and that to enforce the agreement to rescind, a proper tender must me shown. A legal rescission, which requires a showing of actual tender, is accomplished by a meeting of the minds of the parties to a contract to terminate their agreement.

> Mutual assent may be by offer to rescind and acceptance by the other party, but the offer on the one side must be accepted on the other, before its withdrawal, and one party to a contract cannot abrogate or rescind it by merely giving notice to the other of its intention so to do. However, where a party, even without right, claims to rescind a contract, if the other party agrees to the rescission or does not object thereto and permits it to be rescinded, the rescission is by mutual consent."
>
> Lowe v. Lyrn, 103 Idaho 259,262,646 P.2d 1030, 1033 (Ct.App.1982) citing 17 A C.J.S. Contracts s 389, at 466 (1963).

If an agreement to rescind is not reached and one of the parties goes to Court seeking rescission, tender is not required. An offer of tender is required, and that occurred in this case.

"A party seeking to rescind a transaction on the ground of fraud must restore or **offer to restore the other party** to the status quo before the contract was formed." Watson v. Weick, 141 Idaho 500, 507, 112 P.3d 788, 795 (2005) citing White v. Mock, 140 Idaho 882, 104 P.3d 356 (2004); Haener v. Albro, 73 Idaho 250, 249 P.2d 919 (1952). Also see Lithocraft, Inc. v. Rocky Mountain Marketing, 108 Idaho 247, 248, 697 P.2d 1261, 1262 (Ct.App.1985) – "It is well-established that he who seeks equity must first do equity; he who seeks equitable rescission must first tender **or offer to tender** that which he has received" (emphasis supplied).

When a party is seeking a judgment for rescission, an offer to tender is all that is required and such was made in this case. On July 13, 2010, AED informed KDC it was their last chance to accept the return of their money. (R.516). That is an offer to return the consideration provided and sufficient to allow AED to seek rescission.

Also see Stefanac v. Cranbrook Educational Community, 435 Mich. 155, 208, 458 N.W.2d 56, 80 (Mich.1990).

> The chancellor had the power to cancel or rescind a contract. A person could, therefore, bring an action *seeking cancellation* of a contract or release, as distinguished from an action claiming that the contract or release *had been rescinded.* This Court said:
>
> > "It is said that plaintiff neither restored nor offered to restore to defendant the property received before seeking rescission. Neither was necessary. *A bill in equity praying rescission proceeds on a theory that there has been no rescission, not on the theory that rescission has already been accomplished.*" Witte v.

Hobolth, 224 Mich. 286, 290, 195 N.W. 82 (1923). (Emphasis added.)

IV. WHETHER KDC ENTERED INTO THE BLAST AGREEMENT WITH AED WITH NO INTENT OF PERFORMING THAT AGREEMENT AND SOLELY FOR THE PURPOSE OF INDUCING AED TO SELL KDC THE BRIDGE IS A QUESTION OF FACT. IT WAS ERROR FOR THE TRIAL COURT TO DISMISS ON SUMMARY AED'S CLAIM THAT IT WAS FRAUDULENTLY INDUCED INTO SELLING THE BRIDGE.

The Trial Court dismissed AED's claim that it was fraudulently induced into selling the bridge to KDC because AED had, "...shown nothing that demonstrates KDC never intended to permit AED to demolish the bridge on the date the demolition agreement was entered into." The question of fraudulent inducement is a question of fact and the facts and circumstances surrounding KDC's breach of the blasting agreement strongly suggest that KDC never intended to honor that agreement.

Generally, the mere failure to perform an agreement cannot support a finding of fraud. Gillespie v. Mountain Park Estates, L.L.C., 142 Idaho 671, 673-674, 132 P.3d 428, 430 - 431 (2006). "One exception is if the speaker made the promise without any intent to keep it, but to induce action on the part of the promisee." Id citing Pocatello Sec. Trust Co. v. Henry, 35 Idaho 321, 206 P. 175 (1922). "False representations as to future events will constitute fraud, where these events depend upon the acts of the party making the representations, and form the inducement whereby the other party is led into the transaction." Pocatello Security Trust Co. v. Henry, 206 P. 175, 177 (1922) citing Henderson v. San Antonio, etc. R. Co., 17 Tex. 560, 67 Am. Dec. 675.

Fraudulent inducement is a question of fact. "Thus, even assuming the district court concluded that these actions amount to fraud in the inducement, there are factual disagreements about the understanding and intent of each party to the deed of trust and promissory note, precluding summary judgment. Losee v. Idaho Co., 148 Idaho 219, 223-224, 220 P.3d 575, 579

- 580 (2009). Fraudulent inducement by definition can only be proved by circumstantial evidence because the only direct evidence can come from the person accused of making a promise with no intent to keep it, who is unlikely to admit the same.

Evidence of fraudulent inducement is can be proved by circumstantial evidence. Progressive Ins. Co. v. Wasoka, 178 Vt. 337, 372, 885 A.2d 1166, 1192 (Vt.2005); The party accused of fraud is almost always going to say that it had the present intent to fulfill the contract, but the circumstances surrounding that party's breach or repudiation of the agreement create the question of fact as to whether the party ever intended to fulfill that promise. "But while breach alone is no evidence of fraudulent intent, breach combined with "slight circumstantial evidence" of fraud is enough to support a verdict for fraudulent inducement." Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 305 (Tex.2006).

As should be expected, Krystal Chaklos maintains that KDC company had the present intention to perform the parties blasting work at the time she signed the proposed blasting proposal. (R.402 ¶¶7). KDC's conduct belies that assertion.

KDC signed the blasting proposal on June 1, 2010. (R.493). KDC was to pay AED $30,000 on June 9, 2010. (Id). On June 14, 2010, AED wrote Krystal Chaklos and informed her that AED was obtaining the necessary licenses to be a sub-contractor in the State of West Virginia. AED also requested the June 9, 2010, installment be paid. (R.503). Then on June 16, Eric Kelly of AED spoke with Lee Chaklos, Krystal's husband, about the late $30,000 installment, (R.427, pp24), and later that evening Krystal Chaklos offered to sell the bridge back to AED for $175,000, (R.505), the amount of the Blasting Contract, a profit of $150,000 for KDC.

The same day of the $175,000 offer, Krystal Chaklos tells AED it will need a West Virginia Contractors license, but does not state that is why KDC is withholding payment. (R.507). KDC says that AED will get paid when Delta, a different company, obtains the City of Benwoods permit to proceed. (Id). The blasting agreement contains no condition precedent to the payment of the $30,000 deposit and no reasonable person could interpret it in that way.

AED continued to work with KDC to get paid to no avail and on July 7th, later in the day, counsel for AED writes to KDC and informed KDC that, "The contract to demolish the bridge provides, **without condition**, that you were to pay $30,000 by June 9, 2010, which you have not done." (R.454). The response from KDC was that Mr. Kelly was not qualified to do the job at the time and that no funds would be conveyed until Mr. Kelly was qualified and a contract is drafted and notarized for blasting. (R.450).

AED requested that KDC, "...provide your explanation as to why he is not qualified, or provide the name of your attorney so I may contact him or her directly." (R.458). In response, KDC was to neither provide an explanation nor to provide the name of counsel, but to just terminate the Blasting Agreement. (Id).

KDC immediately and without any justification contained in the Blasting Agreement breached the Blasting Agreement, and then attempted to sell the bridge back to AED at a $150,000 profit. This was sufficient evidence, "... upon which a jury could reasonably return a verdict..." that KDC had no present intention of honoring the Blasting Agreement contract when it signed it and only did so to indicate AED to go forward with the Sales Agreement. Brown v. City of Pocatello, 148 Idaho 802, 806, 229 P.3d 1164, 1168 (2010) citing Harpole v. State, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998). It was error for the District Court to resolve this disputed issue of fact in favor of KDC on summary judgment.

V. THE DISTRICT COURT IMPROPERLY STRUCK PORTION OF AED'S AFFIDAVIT'S SUBMITTED IN SUPPORT OF SUMMARY JUDGMENT.

The District Court improperly struck portions of AED's affidavits submitted in opposition to summary judgment. The decision to admit evidence at summary judgment is within the discretion of the trial court. J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford 146 Idaho 311, 314-15, 193 P.3d 858, 861-62 (2008). The District Court abused its discretion in excluding certain portions of AED's affidavits filed in opposition to summary judgment.

a. Eric Kelly's Affidavit in Opposition to Summary Judgment.

1. Paragraph 10.

The District Court without any explanation struck this paragraph on the grounds that it was speculative, not based upon personal knowledge and lack of foundation.

> I believed, and still do believe, that with AED's assistance, the Chaklos can properly demolish the bridge which is why I agreed to go forward with the Chaklos. This would provide for a quicker return to AED and would keep AED in the loop during the demolition process to make sure it was aware of the status of the contingent liability of AED to Barrack to assure proper removal of the bridge. In addition, it would bring all my years of experience, and the attendant business and agency contact I have developed, to the demolition project. The Chaklos recognized this fact and requested that I attend a meeting with the Benwood City Counsel to assist Delta in obtaining the permits Delta needed to obtain. I complied and drove all the way to Ohio to this meeting two days before KDC's first installment on the blasting contract was due.

This paragraph is not speculative as it is describing why it was material to AED that AED perform the blasting work if it was going to sell the bridge and can only be based on the personal knowledge of Eric Kelly. What foundation would be required for an explanation as to why something was or was not material is unknown. It was error to strike this paragraph.

2. Paragraph 9.

The District Court struck paragraph 9 on the grounds that it stated a legal conclusion. The only thing that could be considered a legal conclusion is the statement that AED was ultimately responsible for removal of the bridge.

> AED was reluctant to sell the bridge to the Chaklos, or to any party for that matter, because of AED's ultimate responsibility to assure the removal of the bridge. I also did not know the Chaklos and was unaware of their competence at demolition or the financial ability of them to properly demolish the bridge.

The statement was offered not as a legal conclusion, but as a statement of AED's belief that I was legally responsible to remove the bridge and is relevant to why AED blasting the bridge was material to AED's agreement to sell the bridge.

3. Paragraph 20.

The District Court without any explanation struck this paragraph on the grounds that it was speculative, not based upon personal knowledge and lack of foundation

The paragraphs states:

> The demolition agreement required KDC to pay $30,000 on or before June 9, 2010. The PSA also required that KDC substitute itself as the real party in interest into the federal court case. KDC did not deposit payment on the 9th as required by the purchase and sale agreement and refused to take the steps necessary to substitute itself into the federal court lawsuit when I told them they needed to get that accomplished. (See Exhibit "G" attached hereto and incorporated herein.)

Eric Kelly's affidavit recites that it is based on personal knowledge so the statement what KDC was to pay and did not pay the $30,000 deposit is supported by foundation. It is likewise not speculative as it is a fact that that Blasting Agreement requires it and KDC has not denied that it was not paid.

4. Paragraph 30, 31, and 33.

> 30. In light of the business practices of KDC and the Chaklos, I am very concerned that if this Court should continue to rule that AED cannot rescind the agreement, that the Chaklos will cause KDC or Delta to borrow money and secure it with the scrap steel from the bridge. Lee Chaklos asked me directly to assist him with this process in the past.
>
> 31. Given that KDC has no independent financial ability to demolish the bridge, if AED is left to just seek an award of damages, any judgment AED obtains will be second in time to any loan the Chaklos have received against the steel in the bridge. This will make AED's judgment difficult to collect and will further create the risk that KDC will obtain the only value in the bridge - the steel spans - and leave the main cost of the bridge - the removal of the piers - for AED to deal with.
>
> 33. I have serious concerns about any plan to demolish the bridge without blasting the spans. As my engineer expert's report states, such a plan would creates additional expense as well as risk associated with the demolition and removal of the bridge.

These paragraphs further explain why AED is concerned about not being involved in the demolition process. The information is based on the personal knowledge of Eric Kelly and no further foundation is required to admit AED's explanation for why the Blasting Agreement was material to the Sales Agreement.

b. Mark Wilburn Affidavit in Opposition to Summary Judgment.

The District Court struck the Affidavit of Mark Wilburn on the grounds of a lack of foundation because it did not mention a date. (R.696) This was error because the District Court relied on the affidavit in ruling on summary judgment and the affidavit does set forth the date the application for the West Virginia Contractor's License was received by AED.

Wilburn's affidavit establishes that took three days to obtain a West Virginia Contractors License. Since the District Court determined that the license was likely obtained on October 17,

2010, then the date upon which the application was received was established as October 14, 2010 and it was error to strike that affidavit on the grounds that it did not set forth a date.

The District Court determined all the information in the affidavits for be relevant to the motion for summary judgment. (R.694). It was an abuse of discretion to exclude the portions of the affidavits on the grounds above recited and, on appeal, this Court should consider those portions of the affidavits which the District Court should not have excluded.

VI. AED IS ENTITLED TO ATTORNEYS FEES ON APPEAL.

AED is entitled to an award of attorneys fees on appeal pursuant to Idaho Code 12-120(3). The parties' agreement pertains to the sale and demolition of a bridge and is, therefore, a commercial transaction because it is not for personal or household purposes. Garner v. Povey, 259 P.3d 608, 615 (2011).

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

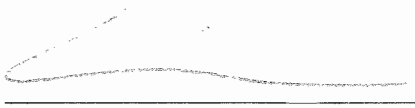
CONCLUSION

The Blasting Contract is not illegal and unenforceable because AED did not have a valid contractor's license at the time of contracting with KDC to perform that work. If it was illegal, that illegality was remedied by AED obtaining the license on October 17, 2010, well before the District Court ruled the contract illegal. The Blasting Agreement was legal, but if it was not, it was a question of fact as to whether the Sales Agreement was enforceable, as the evidence clearly shows that the Sales Agreement would not exist without the Blasting Agreement.

AED requests that this Court reverse the District Court's ruling that the Blasting Agreement is illegal and the dismissal of AED claims for fraudulent inducement and the Order quieting title to the bridge in KDC, and remand the matter to the District Court for proceedings consistent herewith.

Alternatively, and in the event this Court determines the Blasting Agreement to be illegal, AED requests that this Court reverse the District Court's determination that that Blasting Agreement can be severed from the Sales Agreement and remand the matter with instruction to submit that issue to the jury.

Respectfully submitted this 2nd day of December, 2011.



Arthur M. Bistline
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2011, I caused to be served a true and correct copy of the foregoing Appellant's Brief by the method indicated below, and addressed to the following:

Randy L Schmitz	[ ]	Hand-delivered
Hall, Farley, Oberrecht & Blanton, P.A.	[x]	Regular mail
702 W. Idaho St. Suite 700	[ ]	Certified mail
P.O. Box 1271	[ ]	Overnight mail
Boise, ID 83701	[ ]	Facsimile to (208)395-8585
	[ ]	Interoffice Mail

BY: _____
JENNIFER JENKINS