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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

AED, INC., an Idaho corporation,

Appellant/Plaintiff,

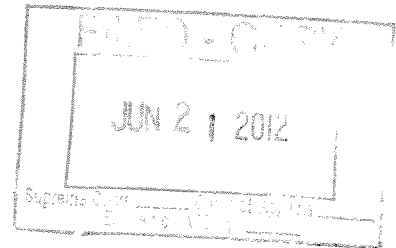
vs.

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

Respondent/Defendants.

DOCKET NO: 38603-2011

Kootenai County District Court#2010-7217



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 REPLY BRIEF ON APPEAL

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AED, INC., an Idaho corporation,

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I. This case is a Jury Trial and the District Court was Not Free to Weigh Conflicting Evidence and Draw Inferences Therefrom in Favor of KDC, the Moving Party.

This is a jury trial case. Throughout its brief, KDC repeatedly refers to the conflicting evidence and argues that the District Court was correct to resolve those conflicts in KDC's favor.

“Most important to the issues on appeal, Appellant’s statement of facts fails to acknowledge that the district court found there was no competent evidence supporting Appellant’s conclusory allegation that the demolition agreement was consideration for the purchase agreement and, rather, found the claim was directly contrary to the evidence in the case.” (Response at 1-2)

“Next the fact issues raised by the statements of Eric Kelly are not genuine.” (Response at 32)

“As to Eric Kelly’s claim that he had terminated the purchase agreement and then proposed to make the blasting agreement a condition of selling the bridge, this, as the district court rules, is contrary to the evidence, including his email that said he did not terminate the purchase agreement (although he says he meant to say he did) and the depositions of him and his wife where they stated KDC was instead given an extension to pay. Further it is significant that the previously signed purchase agreement was not re-signed on the later day which Appellant claims it came into existence.” (Response at 33)

“In short these fact issues are not genuine because they are unsupported or contradicted by Eric Kelly himself.” (Response at 34)

“Likewise, “[a]n award of attorney fees is appropriate if the appellant simply invites the appellate court to second-guess the trial court on conflicting evidence.” *Downey v. Vavold*, 144 Idaho 592, 596 (2007).”

KDC cites to the District Court’s opinion:

In this case, the agreement to sell the bridge was contingent upon clearly stated that it had a present intent to perform that obligation incident to the agreement to buy the bridge. This consideration for the sale of the N0/1 00 CENTS (\$25,000.00) recited in the contract, as well as the illegal agreement to perform the blasting work.

It is important to note that there is no citation given to the record for these three sentences written by counsel for AED.

Perhaps the reason for a lack of citation is the fact that there is nothing in the record which supports any of these three sentences. The purchase agreement does not reference the demolition agreement in any way and the purchase agreement contains a merger clause. The purchase agreement was entered into eleven days before the demolition agreement, if the demolition agreement was even entered into. (R.907) (emphasis supplied)

This statement from the District Court is incorrect and demonstrative of the entire manner in which the District Court approached this summary judgment – as the trier of fact. This case is a jury trial. There was a purchase contract that did not mention demolition agreement, but there was a statement from Eric Kelly that the purchase contract would not have been entered into without the promise of the demolition contract. (R. 471, ¶18, R.474 ¶32) There are also e-mails and faxes which supported this statement from Eric Kelly, such as Krystal Chaklos giving her word that AED would do the demolition work the day that AED again agreed to sell KDC the bridge. (R.471 ¶18, R.487-489)

The District Court acknowledged that Eric Kelly's statements were in conflict with the written documents and then resolved that conflict in favor of the moving party, KDC, for purposes of dismissing the fraudulent inducement claim and to avoid having to address the fact that the demolition contract was material to the agreement to the purchase agreement. That is error.

II. Miscellaneous Points

a. KDC argues that the demolition contract and purchase contract can exist independent of each other because one is for the sale of a bridge and the other for its destruction. (Response at 30) First, the question of severability is one of fact. Mountain Restaurant Corp. v. ParkCenter Mall Associates, 122 Idaho 261, 267, 833 P.2d 119, 125 (Ct. App.1992). Second, that is not the test for severability. The test is whether the legal part ever would have existed if

the parties had known that the illegal part was illegal and unenforceable. *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.

b. KDC argues that Eric Kelly's statements which establish that the demolition contract was material to the sales contract are inadmissible parol evidence. (Response at 29) Parol evidence is always admissible to show fraudulent inducement. *Thomas v. Campbell*, 107 Idaho 398, 402, 690 P.2d 333, 337 (1984).

c. KDC argues then argues that even if Eric Kelly's statements are admissible, then an oral contract would have to be found -- that the demotion contract and sales contract were one big contract and that such a finding violates the statute of frauds. (Response at 30). No explanation is provided as to why such an agreement would violate the statute of frauds and the statement is incorrect and should be disregarded. Furthermore, the very nature of a claim of fraudulent inducement was that there was a separate agreement, the existence of which was a pre-requisite to the agreement in question.

d. KDC argues that AED had to challenge the District Court's ruling that AED could not rely on KDC's representations because the demolition agreement was illegal. (Response at 35) KDC also argues that AED was required to appeal the District Court's ruling that AED was not entitled to rescission because it had unclean hands because of the illegality. (Response at 38). Both of the grounds were not independent basis for the District Court's ruling as both of those grounds were based on the same determination of the District Court -- that the demolition contract was illegal. Since that determination has been appealed, the other grounds recited by the District Court have also been appealed. See *State v. Kinser*, 141 Idaho 557, 559, 112 P.3d

845, 847 (Ct. App. 2005) – “However, the two bases for the district court's ruling were premised on the same findings of fact. Because *Kinser* asserts that those findings were clearly erroneous, her appeal incorporates both grounds upon which the district court based its order.”

AED challenged the District Court’s finding of illegality. If that finding is reversed, then the “no right to rely” ruling has no basis.

e. KDC argues that AED has misrepresented the record because AED has relied on stricken affidavits and portions of stricken affidavits. AED has appealed the stricken portions of the affidavits and had no mechanism by which to obtain a ruling on the correctness of the District Court in excluding the proffered evidence prior to writing its appellate brief. In addition, KDC has provided no argument in opposition to AED’s arguments that the evidence should not have been excluded. No basis exists to exclude the subject evidence and it should be considered.

III. Conclusion

AED would not have sold the subject bridge to KDC unless KDC promised to hire AED to the blasting demolition work on the subject bridge. The fact that this promise did not find its way into the written agreement to sell the bridge is the product of home grown legal work and nothing else. Parol evidence is allowed for purposes of showing a fraudulent inducement and it is clear that KDC promised to use AED to blow the bridge in order to induce AED to sell KDC the bridge. A representative of KDC gave her word that AED would do the blasting work in writing. The facts show that the promise to hire for the blasting work was material to the agreement to sell the bridge and are more than sufficient to create a material issue of fact on both the issue of fraudulent inducement and the ability to sever the demolition agreement from the sales agreement. It was error for the District Court to resolve the material issue of fact on summary judgment.

Respectfully submitted this 19th day of June, 2012.



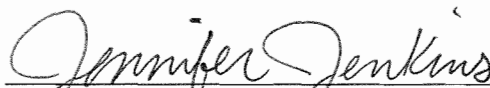
Arthur M. Bistline
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2012, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief by the method indicated below, and addressed to the following:

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- Hand-delivered
- Regular mail
- Certified mail
- Overnight mail
- Facsimile

BY: 
JENNIFER JENKINS