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Gagnon v. Western Bldg. Maintenance, Inc. Appellant's Reply Brief Dckt. 39816

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY GAGNON AND JEFFREY GAGNON, :

Plaintiff/Appellants, :

vs. :

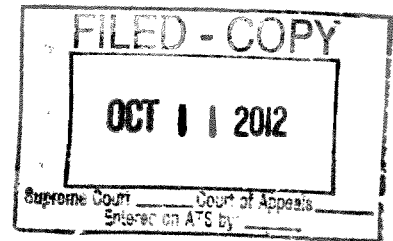
WESTERN BUILDING MAINTENANCE, INC., :

and :

JOHN AND JANE DOES A-H :

Defendants/Respondents. :

Docket No. 39816-2012



REPLY BRIEF OF APPELLANTS GAGNON

Appeal from the District Court of the First Judicial District

The Honorable John Patrick Luster Presiding

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INTRODUCTION

Appellants Gagnon respectfully submit this response to the argument presented by Respondent Western. The question presented boils down to a question of what duties of the property owner, Wells Fargo Bank, Western assumed under the property maintenance contract. If Western assumed the duty to ensure the bank's parking lot was cleared of ice in a timely fashion, or if the contract is ambiguous as to Western's duty to ensure the bank's parking lot was cleared in a timely fashion, the decision of the district court should be reversed.

ARGUMENT

Whether Western owed a duty to Gagnon under its property maintenance contract with Wells Fargo Bank?

Wells Fargo's property manager Heather Gamble's affidavit identifies and attaches a copy of the property maintenance contract that Wells Fargo and Western operated under. She stated that:

"Wells Fargo and Western Building Maintenance have agreed to a continuation of their relationship on the same terms as set forth in the written agreement."
Affidavit of Heather Gable, R. p. 116.

Western conceded that its performance agreement with Wells Fargo, at the time of Gagnon's slip on the ice and fall on the ice in the parking lot, was the same as the terms of the 2004 written contract.

"Western had an unwritten agreement with Wells Fargo in December 2007... That agreement included the same terms as set forth in a 2004 written contract that had expired in 2006." Respondent's Br. pp. 1-2.

The written property maintenance agreement provides:

"22. ...No modification, amendment, or addition to this Agreement shall be binding upon either party unless it is reduced to writing and signed by both Contractor and Bank."
R. p. 123.

Western premised its issue on appeal on its assertion that “it is undisputed that Western did not assume a duty to manage ice in the Wells Fargo parking lot.” Respondent’s Brief p. 5.

In short, Western argues:

1. It is ‘undisputed’ that Western had no duty to manage ice in the parking lot. Respondent’s Br. p. 5.
2. Western did not contractually assume any obligation to deal with ice in the parking lot. *Id.* p. 9.
3. Wells Fargo affirmatively retained control over winter maintenance of its entire premises. *Id.* p. 8.
4. Western was only required to apply ice melt to on the sidewalks and the area around the ATM machine. *Id.* p. 1.

In short, the Gagnons argue that:

1. Western and Wells Fargo’s property maintenance contract was a comprehensive and exclusive property maintenance contract. Appellants’ Br. p. 6-7.
2. Western is a large property maintenance company that contracted with the property owner, Wells Fargo Bank, under a comprehensive and exclusive maintenance contract to assume the duty of the property owner clear its parking lot of ice for the safety of the Bank’s invitees. *Id.* p. 7.
3. Western contractually assumed Wells Fargo’s duty to Gagnon to ensure the ice was timely cleared from Wells Fargo’s parking lot. *Id.* p. 6.
4. Western was contractually obligated to ensure that all parking lots...are cleared of ...ice in a timely manner. *Id.* p. 18.
5. Western was contractually obligated to maintain bodily injury insurance, with a minimum coverage limit of \$2,000,000, for injuries caused to third parties by Western’s performance of, or failure to perform, its duties under the property maintenance contract. *Id.* p. 2.
6. Tracy Gagnon was an invitee entitled to assume that the parking lot had been cleared of ice and had been made safe for her to utilize and she suffered serious injuries as a result of Western’s failure to perform its duty to clear ice from the parking lot. *Id.* p. 7.

In order to determine the intent of the property maintenance contract between Wells Fargo and Western the Court may consider the contract's object and purpose. The object to be attained should be given prime consideration. See, Clarke v. Blackfoot Water Works, 39 Idaho 304, 311, 228 P. 326 (1924); Glover v. Spraker, 50 Idaho 16, 17, 292 P. 613, 616 (1930). When a property maintenance company undertakes a property owner's duties to safely maintain its property for the protection of third persons and fails to perform its duties it is liable to the injured third party. The Restatement (Second) of Torts § 324A.

Western is a large professional full-service property maintenance company that contracted with Wells Fargo to perform property maintenance at over one-hundred locations across Idaho and in Spokane, Washington. Wells Fargo is in the business of operating a bank and not the business of property maintenance. Western is in the business of property maintenance. The Wells Fargo-Western contract was "a guide for, rather than a limitation to, the services required to effectively maintain the premises." R. p. 126. The property maintenance contract required that the "standards of maintenance be the highest at all times." R. p. 126, ¶ 1. The object and purpose of the property maintenance contract was to assign, for consideration, all of Wells Fargo's property maintenance duties to Western.

Western's contractual ice removal duties distinguished between its duties in the area around the ATM from its duty to remove ice from Wells Fargo's parking lot. The contract provided that ice removal from the ATM area was to be 'bid' out to subcontractors. R. p. 135, ¶ 2 and ¶ 2 (f). Western's duty to clear ice around the ATM was "7 days per week, 24 hours a day." R. p. 135, ¶ 2 (f). Western's duty around the ATM, 24 hours a day and 7 days a week, was no doubt required because they are commonly utilized at all hours of the day, 7 days a week.

Western's duty to clear ice from the parking lot, barring an emergency situation, was not around-the-clock. It required that Western, through its "competent supervisory personnel" and its "qualified foreman," supervise all work for quality control. R. p. 135, ¶ 3. It was the plain contractual duty of Western, through its competent supervisory personnel and its qualified foreman, to "ensure that all parking lots... are cleared of...ice in a timely manner." R. p. 135, ¶ 4. A timely manner, subject to an emergency condition, would require ice to be cleared from the parking lot before employees begin arriving at the bank in the morning to work and parking in it; during business hours when Wells Fargo customers would be expected to use the parking lot; and for a reasonable time after business hours when it would be reasonably anticipated that employees and customers would be leaving the bank after having completed their business. Wells Fargo's employees typically arrived one-half hour before the bank opened. R. p. 69 at pp. 14-15. On the morning of her slip and fall, Wednesday December 5, 2007, Gagnon arrived at the bank premises and parked in Wells Fargo's designated parking area. R. p. 69, at p. 16. She had just arrived to work and other employees were in the process of arriving. R. pp. 69-70.

Western's assertion that it had no contractual responsibility to clear ice from the Wells Fargo's parking lot is directly contrary to the terms of the written contract, which plainly states:

"3. CONTRACTOR shall communicate effectively with subcontractors [Western's] and other employees [Western's] to ensure that all parking lots, sidewalks and other areas designated by this contract are cleared of snow and ice in a timely manner." R. p. 135, ¶ 4. (emphasis added).

The contract provides that Western is to protect Wells Fargo from liability in the event that it fails to perform its duties under the contract and resultant harm is suffered by third parties. It requires Western to carry insurance for bodily injury to third persons.

"7. Insurance. Without limiting Contractor's liability to...third parties, Contractor shall, at Contractor's sole cost and expense, continuously maintain throughout the term of this Agreement, the following insurance coverage...

C. Commercial General Liability Insurance...with a minimum Combined Bodily Injury and Property Damage Coverage Limit of \$2,000,000 per occurrence...

E ...Such insurance shall be primary to and noncontributory with any insurance obtained by Bank. R. p. 121.

Where the terms of a contract are clear and unambiguous its interpretation is a matter of law for the court. Werry v. Phillips Petroleum Company, 97 Idaho 130, 135, 540 P.2d 792, 707 (1975). The contract's terms plainly provide that it was Western's duty:

1. To ensure that the parking lot was cleared of ice in a timely manner; and
2. Western was required to maintain bodily injury insurance in an amount no less than \$2,000,000 in the event it failed to perform its duty to ensure that the parking lot was cleared of ice resulting in injury to a third party.

Western conceded its contractual duties at the time of Gagnon's accident on December 5, 2007, was identical to the terms set forth in a 2004 written contract.¹ Respondent's Br. pp. 1-2. The Answer filed by Western affirmatively asserts that it "performed its work for Wells Fargo in accordance with the specifications set forth by Wells Fargo [under the 2004 written contract]." R. p. 36, ¶ 4. There is no question that the extent of Western's assumption of Wells Fargo's property maintenance duties is governed by the terms of the 2004 written contract.

Despite the express terms of the contract, Western argues that it "did not contractually assume an obligation to deal with ice in the parking lot." Respondent's Br. p. 9. This assertion is contrary to the plain terms of the written contract which require Western to "ensure that all parking lots...are cleared of...ice in a timely manner. R. p. 135 ¶ 3. Apparently as a basis for this assertion, Western submitted an affidavit of Vaterlaus that, even though Western admitted that it performed its work for Wells Fargo "in accordance with the specifications" set forth in the 2004

¹ The Opening Brief mistakenly referenced December 7th as the date of the accident and counsel apologizes for any confusion in that regard. Br. p. 17.

written contract, claims that the specific written terms of the contract had been modified “in accordance with the past practices and understandings previously developed with Wells Fargo.” R. p. 59, ¶ 4. This assertion provides no basis upon which to hold as a matter of law that Western’s duties under the contract were different than those in the written contract. While proof of a subsequent oral modification of a written contract may be appropriate at the trial of this matter, at the summary judgment stage the trial court is not to weigh the evidence or to try factual issues. The trial court’s duty is to determine whether or not there exists any genuine issue of material fact as adduced from the entire record. *See Simpson v. Mountain Home School Dist. No. 193*, 99 Idaho 845, 590 P.2d 101 (1979); *In re Killgore’s Estate*, 84 Idaho 226, 370 P.2d 512 (1962); *Clement v. Farmers Insurance Exchange*, 115 Idaho 298, 301, 766 P. 2d 768, 771 (1988).

In construing a written contract to determine what is intended by it, the Court is to examine the whole instrument. A contract must be enforced according to the plain import of its terms. *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.2d 651 (1934); *Bratton v. Morris*, 54 Idaho 743, 37 P.2d 1097 (1934).

Western attempts to avoid liability for its failure to perform its plainly expressed contractual duty to “ensure that all parking lots...are cleared of snow and ice in a timely manner” by arguing:

“This contract provision which deals with timely and effective communication between Western and its subcontractors [and Western’s employees], is not germane because it does not specify **which** areas are to be cleared of ice.” Respondent’s Br. p. 11.
(emphasis in Respondent’s brief)

The ‘**which**’ areas’ that are to be cleared of ice in a timely manner are specifically identified in the contract. The contract specifically states that “**all** parking lots” are to be cleared of ice in a timely manner. (emphasis added). R. p. 135 ¶ 4. The contract specifically states:

“3. CONTRACTOR shall ...ensure that all parking lots, sidewalks and other areas designated by this contract are cleared of snow and ice in a timely manner.” R. p. 135 ¶ 4. (emphasis added).

Western’s argument is contrary to the plain wording of the contract and without basis in the contract and without merit. Western’s argument that it “never contracted or otherwise agreed to assume responsibility for the safety of persons using the Hayden branch parking lot” is likewise without basis and merit. Respondent’s Br. p. 2. Ensuring that the Bank’s parking lot is cleared of ice in a timely manner can only be understood as assuming the Bank’s responsibility to keep invitees using it safe from injurious falls caused by ice in the parking lot. In light of Western’s admission that its agreement with Wells Fargo in December 2007 included the same terms as set forth in a 2004 written contract [the contract attached to Heather Gamble’s affidavit], and the plainly expressed contractual duty requiring Western to ensure that the parking lot was cleared of ice in a timely manner, Western’s assertion that it did not assume responsibility for the safety of persons using the Hayden branch parking lot is without basis and without merit.

The district court agreed, contrary to Western’s blanket assertion of no duty, that Western’s did have the duty to clear the parking lot of ice, on some days.

“the defendant [Western] did not undertake an absolute duty to remove snow and distribute ice melt in the Wells Fargo Bank parking lot on days where less than two (2) inches of snow falls.” (emphasis added) R. p. 220.

The district court erroneously interpreted the contract to provide that Western’s ice removal duty only arose on days where two (2) or more inches of snow fell. This interpretation is not supported by the plain terms of the contract that required Western to ensure that all parking lots were cleared of ice in a timely manner. R. p. 135 ¶ 4.

The district court failed to take into consideration all of the terms of the contract in interpreting the duty of Western. The district court erroneously misconstrued the contract. It failed to recognize that Western's duty was to "clear all parking areas...when two (2) inches of snow has accumulated" and keep areas around the ATM clear of snow and ice "7 days per week, 24 hours a day" is separate from, and different than, Western's duties under the paragraphs of the contract that required Western to "ensure that all parking lots...are cleared of...ice in a timely manner." R. p. 135, ¶ 2 (c), (d) and R. p. 135, ¶¶ 3,4. It certainly is common knowledge that ice forms and may well be hazardous to the safety of invitees, regardless of whether or not snow has fallen. The duty to ensure that the parking lot was clear of ice, in a timely manner, was different than a duty to plow snow when two inches had fallen.

Western's duty to clear ice from the parking lot was not limited to days when two (2) inches of snow accumulated. Western's duty was to ensure that ice was cleared from the parking lot in a timely manner. It was Western's duty to employ competent supervisory personnel and assign a qualified foreman to oversee the Bank's premises and to provide quality control. R. p. 135, ¶ 3. It was Western's duty, through competent supervisory personnel, and an assigned foreman, was to ensure that Wells Fargo's parking lot was cleared of ice, in a timely manner. The duty to ensure that the parking lot was cleared of ice in a timely fashion was not a something Western was permitted to "bid" out. It was Western's responsibility. It was the direct obligation of Western to ensure the parking lot was cleared of ice on a timely manner and ensure that ice in the parking lot was timely cleared regardless of whether or not snow had fallen. R. p. 136 ¶ 7.

Western argues that Wells Fargo "affirmatively retained control over winter maintenance of the premises." Respondent's Br. p. 8. There is no basis for such an argument in the contract.

If a contract is ambiguous, its interpretation and meaning is a fact question to be determined by the jury as the finder of fact. Werry, 97 Idaho at 135, 540 P.2d at 797. Three interpretations of Western's contractual duties to ensure that ice was timely cleared from the parking lot have been postulated. Gagnon asserts that under the plain language of the contract it was Western's duty to ensure that the parking lot was cleared of ice in a timely manner, regardless of snow fall. Western asserts that it had no duty to ensure that the parking lot was cleared of ice because of subsequent oral modification of the written contract by "past practices and understandings." The district court's interpretation is that Western only had the duty to clear ice from the parking lot after two inches of snow had fallen. The district court's interpretation is inconsistent with the contract terms and Western's position.

Under the plain terms of its comprehensive and exclusive property maintenance agreement, Western had the duty to clear ice from Wells Fargo's parking lot. The Vaterlaus affidavit and the official weather reports submitted by Western document that Western applied ice melt before Gagnon's slip and fall on at least two days when there was no recorded snow fall, December 2nd and 3rd; on at least two days after Gagnon's slip and fall when there was no recorded snow fall, December 8th and 10th; and on one day where there was only one (1) inch of snow fall, December 9th, after Gagnon's slip and fall. R. p. 63; pp. 73-74.


The existence of a question of fact precludes the entry of summary judgment. I.R.C.P. 56 (c); Taylor v. AIA Services Corp., 151 Idaho 552, 261 P.3d 829 (2011).

CONCLUSION

The contract's plain wording required Western to ensure that the parking lot was cleared of ice in a timely manner. Western assumed Wells Fargo's duty to invitees to ensure their safety from ice in its parking lot. The contract required Western to maintain liability insurance

coverage for bodily injury to persons, such as Gagnon, who are injured as a result of Western's failure to perform any of its duties under the contract. Western failed to ensure that the parking lot was cleared of ice on the morning of December 5, 2007, and, as a direct and proximate result, Gagnon slipped and fell suffering serious injuries. The judgment should be reversed, and this matter should be remanded for trial. In the event that the Court determines that the contract is ambiguous, its interpretation is a question of fact to be determined by the jury and the judgment should be reversed and this matter should be remanded for trial.

Dated this 9th day of October, 2012.



Starr Kelso
Attorney for Appellants Gagnon

CERTIFICATE OF SERVICE: I hereby certify that two true and correct copies of the foregoing Reply Brief of Appellants was mailed by regular U.S. Mail, with postage prepaid thereon, to Edward G. Johnson, attorney for Respondent Western Building Maintenance, Inc., on the 9th day of October, 2012 at:

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