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Bremer v. East Greenacres Irrigation Dist. Appellant's Reply Brief Dckt. 39942

IN THE SUPREME COURT OF THE STATE OF IDAHO

BREMER, LLC., an Idaho limited liability company, and KGG PARTNERSHIP, Appellant/Plaintiff, vs. EAST GREENACRES IRRIGATION DISTRICT, Respondent/Defendants.	Supreme Court Docket: 39942-2012 Kootenai County Case No. CV11-1921

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

Honorable Lansing L. Haynes, Presiding

APPELLANT'S REPLY BRIEF ON APPEAL

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1. **Greenacres conditioned Bremer's use of its system on Bremer's agreement to construct the challenged mainline extensions. A material question of fact exists whether Greenacres lawfully could require this of Bremer.**

Greenacres attempts to make it look like the challenged line extension was Bremer's idea by pointing out that all the submissions from Bremer had the challenged mainline extension. "Bremer's engineer provided an engineered proposal to achieve Bremer's objective, and therefor it presented a plan for the proper distribution of water." (Respondent's Brief at 20). Greenacres even goes as far as to argue that this case falls within *KMST, LLC v. County of Ada,* 138 Idaho 577, 67 P3.rd 56 (2003). *KMST* holds that, "...voluntary actions by developers do not constitute a taking." *State ex rel. Winder v. Canyon Vista Family Ltd. P'ship*, 148 Idaho 718, 729, 228 P.3d 985, 996 (2010). Bremer did agree to construct the challenged line extensions, but the reason his submissions contained the challenged mainline extensions was because Greenacres required it. Greenacres could only lawfully require such a thing if it was necessary for the proper distribution of water to Bremer's property. If the challenged mainline extensions were not necessary for that purpose, then Bremer's agreement to install them was the product of economic coercion.[1]

The record is clear that Bremer could either shut down his operation or accede to Greenacres demand that Bremer construct the challenged line improvement. Greenacres makes this point in its response to Bremer's motion for summary judgment; "The District set forth its conditions for provision of water to Bremer's parcel, **which included the requirement that the extension be built to District standards *at the owners cost.*** [..] **Bremer could have chosen not to move forward with the project**." (R. 182). In addition, Gary Bremer testified that his

[1] Greenacres makes the point that Bremer didn't pay it anything to the voluntary payment rule is inapplicable. The voluntary payment rule does not require the payment be cash. The "payment" would have been infrastructure improvements Greenacres received for free. In any event, the voluntary payment rule is just the flip side of economic coercion. If it is a voluntary payment, it was not coerced, if it was coerced it was not voluntary.

hook-up was conditioned on the mainline extensions, (R. 25), Scott Jones testified that various representatives of Greenacres informed him that Greenacres was requiring the mainline to be extended all the way across the property, (R. 239), and Greenacres moves for summary judgment on the grounds that, "...the provisions of I.C. §43-330A through 43-330G that the legislature intended that the District would have the **power to require** landowners who subdivided agricultural lands for residential, commercial, industrial or municipal use to pay for the cost of extension of a pressurized system." (R. 52). The logic of *KMST* is not applicable here since the challenged mainline extensions were not voluntarily put forth by Bremer, but were a requirement of Greenacres in order for Bremer to utilize its water system for his commercial business. There is at least a material question of fact as to whether Bremer's agreement to do so was the product of economic coercion.

Greenacres threatened to withhold water if Bremer did not construct the mainline extensions. Greenacres could only lawfully impose this requirement if those extensions were necessary "...for the proper distribution of irrigation water to the parcel or to the designated tracts within the parcel," Idaho Code §43-330A.[2] There is at least a material question of fact as to whether the challenged mainline extensions were required for the proper distribution of water to the subject parcel as no evidence is in the record to support such a conclusion. The only evidence in the record is to the contrary.

Greenacres argues that, "Although Bremer advances the untenable position that a water main extension was not necessary to serve its new building, all the facts in the record are to the contrary." (Respondent's Brief at 1). Bremer is not advancing the position that no mainline extensions were necessary, just that the mainline extensions Greenacres exacted from Bremer

[2] Contrary to Greenacres assertion, Bremer does not argue that the failure to comply with Idaho Code §43-330A, et seq, invalidates an agreement. Bremer only argues that Greenacres backed into Idaho Code §43-330A after Greenacres was sued as is evidenced by a complete lack of compliance with those code sections.

were not necessary for Bremer's project. Greenacres acknowledges that the subject parcel could have been served by an existing main line in its Response Brief. "Bremer notes in its appeal brief that Sappington's testimony reveals that the water main serving Bremer's property adjacent to McGuire Road could have been extended east across and through Bremer's property to serve the new manufacturing building." (Response Brief at 29). Greenacres does not deny the fact that a mainline already serving Bremer could have been extended to serve Bremer's new building. Greenacres only argues that Bremer was required to prove that extending the existing mainlines was "better" to serve his needs than forcing him to install the challenged mainline extensions. The issue was not whether one mainline extension was "better" for serving Bremer's needs and Bremer was not required to prove anything in that regard. The issue was and is whether the challenged mainline extensions were necessary for the proper distribution of water to Bremer's parcel. Idaho Code §43-330A.

No evidence exists that the challenged mainlines were necessary for the proper distribution of water to Bremer's parcel. The only evidence is that the Greenacres wanted the challenged mainline extension completed because it saved Greenacres money, and thus, benefitted all users of the system.[3] Greenacres prefers to have mainline extension in the public right of way whenever possible because it facilitates future distribution system additions and extensions **by eliminating the need to acquire easements across drive land for extensions of the water main and reduces the cost of operation and maintenance...**" (R. 146). Requiring Bremer to place the mainline extensions where it did was unrelated to Bremer's use of the system. Greenacres provided a benefit for all in the reduction of future costs. No statutory authority exists which would allow Greenacres to impose the cost of this infrastructure

[3] This is the hallmark of a "tax". "...a tax is forced contribution by the public at large to meet public needs Potts Const. Co. v. N. Kootenai Water Dist., 141 Idaho 678, 681, 116 P.3d 8, 11 (2005) citing Brewster v. City of Pocatello, 15 Idaho 502, 768 P.2d 765 (1988).

improvement on Bremer because it was for the benefit of all users and not required for the proper distribution of water to Bremer's parcel.

Greenacres required Bremer to install the challenged mainline extension, and at least a material question of fact exists as to whether that extension was required to provide the proper distribution to Bremer's parcel. Therefore, a material question of fact exits as to whether Bremer's agreement to install those extensions was the product of economic coercion as it is undisputed Bremer would suffer severe economic consequences if he did not accede to Greenacres demand.

Bremer was faced with the prospect of losing $6,000 per day or acceding to Greenacres demands. Greenacres seems to hint that this $6,000 is not supported in the evidence. Gary Bremer, the owner of the company, testified to this detail and if he had submitted a prospective profit and loss, as opposed to his summary, Greenacres would be in no better position to challenge the evidence than it is now. Losing the productivity capacity of real property based on the denial of access to water has already been found to be economic coercion in the case of *Green v. Byers*, 16 Idaho 178, 101 P. 79, 80 (1909):

> In the case at bar the respondent avers that the irrigation company refused to deliver him any water until he signed said contract, and through fear that he would be unable to raise any crops whatever on said land if he did not secure the water, and being in immediate need of water for the irrigation of said lands, and defendant solemnly protesting to the officers and agents of said company against signing said contract, he signed it.
>
> We think that allegation is sufficient to present an issue as to whether the defendant was under such fear or duress as would void the contract. It clearly indicates that the irrigation company was in a position to and did dictate and threaten not to let defendant have any water, and that the parties were not at arms' length in the making of the contract, and in such cases, where a person is influenced to enter into a contract by threats of injury, the courts

> will determine whether the contract was entered into by or through wrongful compulsion.
>
> *Green v. Byers*, 16 Idaho 178, 101 P. 79, 80-81 (1909)

Furthermore, Bremer was required to mitigate his damages caused by Greenacres wrongful conduct. This suit was filed March 4, 2011. If Bremer had chosen to let his building sit idle and then pursue damages at $6,000 per day, there is no question that Bremer would be guilty of failing to mitigate its damages. The costs of the challenged mainline extensions was over $80,000, or roughly thirteen (13) days of not operating. "The duty to mitigate, also known as the 'doctrine of avoidable consequences,' provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts...." *U.S. Bank Nat. Ass'n v. Kuenzli*, 134 Idaho 222, 228, 999 P.2d 877, 883 (2000) citing *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d 904, 912 (1993). Given that Bremer had the ability to construct the challenged mainline extensions, the only reasonable course for him to take would be to construct them and then seek to recoup the cost, rather than incur $6,000 in losses per day.

Greenacres conditioned Bremer's use of its system on Bremer's agreement to construct the challenged mainline extensions. This coerced agreement is only legal if it was required for the proper distribution of water to Bremer's parcel. A material question of fact exists as to whether the challenged mainline extensions were required for the proper distribution of water to Bremer's property, and thus, a material question of fact exists as to whether Bremer's agreement to construct those extensions was the produce of economic coercion. It was error to grant Greenacres summary judgment.

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DATED this 6th day of February, 2013.

ARTHUR M. BISTLINE
Attorney for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2013, I served a true and correct copy of the following APPELLANT'S REPLY BRIEF by the method indicated below, and addressed to the following:

Susan P. Weeks	[X]	Regular mail
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