8-29-2008

Gray v. Tri-Way Constr. Servs. Appellant's Reply Brief Dckt. 34666

IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT GRAY,

Plaintiff/Appellant,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington corporation; RAY ALLARD, an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

the Tri-Way Parties/Respondents.

Docket No. 34666

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the county of Ada.

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I. *Introduction*

In April and May of 2004, Robert Gray ("Gray") negotiated with Ray Allard ("Allard"), Gary Peterson, and Kathy Peterson (the "Tri-Way Parties"), the owners of Tri-Way Construction Services Inc. ("Tri-Way"). During those negotiations, the Tri-Way Parties represented to Gray that he would be paid a small monthly salary and, at the end of the calendar year, 50% of net profits, before taxes, for the work he brought to Tri-Way. Based on that representation, Gray began working at Tri-Way in June of 2004. Within a few months, Gray generated gross revenues in excess of $1.2 million and net profits of approximately $275,000 for Tri-Way. During those initial months, the parties worked on finalizing a comprehensive written employment agreement but were not able to get one signed.

Months after Gray began working at Tri-Way, Gary Peterson indicated that Tri-Way was not going to live up to the existing agreement to pay 50% of net profits before taxes. For a period of time, Gray and Gary Peterson discussed modifications to the profit sharing agreement. But when it became clear to Gray that Tri-Way was simply refusing to live up to the agreement and was seeking to renegotiate better terms, Gray left Tri-Way. After Gray left, Tri-Way offered, and then retracted, a payment of $60,000 to Gray for the value of his services. The offered and then retracted $60,000 was considerably less than the 50% net profits that Gray was entitled to under the profit sharing agreement.

Here, the Court erred when granting summary judgment. First, there is evidence in the record that the Tri-Way Parties agreed to the profit sharing. Second, there is evidence in the record relating to the value of Gray's services and the benefits to the Tri-Way Parties which

would be unjust to retain. As a result, Gray's quantum meriut claim and unjust enrichment claim are proper. Third, there is evidence in the record to support Gray's justifiable reliance on Tri-Way's promises of profit sharing. Fourth, the record contains facts which support the existence of the type of relationship that gives rise to a constructive fraud claim.

A. Gray Has Produced Sufficient Evidence To Support His Claim

In Respondents Brief, the Tri-Way Parties wrongly assert that certain facts are undisputed. In contrast to those assertions, Gray has introduced evidence regarding representations by the Tri-Way Parties regarding the profit sharing agreement. For example, Gray has introduced evidence supporting the following facts:

- After several months of negotiations, in late April or early May of 2004, Gray, Allard, and Gary Peterson agreed upon the terms of Gray's compensation. (Exhibit 2, Ex. A (76:4-15; 81:4-24; 93:7-96:16; 179:19-180:6); Exhibit 4 ¶¶ 13, 14, 18).)
- On May 21, 2004, Gray met Allard, Gary Peterson and Kathy Peterson to confirm the terms of Gray's employment and to sign necessary paperwork relating to his employment ("May 21 Meeting"). The Tri-Way Parties again represented and reconfirmed Gray would be paid 50% of net profits before taxes. (Exhibit 4, (¶¶ 11-15); Exhibit 2, Ex. A (84:24-86:9; 86:1-12; 98:14-99:23; 100:25-104:11; 106:1-11; 187:19-188:7; 216:25-217:18))
- After starting up the Arizona Division of Tri-Way in June of 2004, Gray obtained and managed two significant projects which promptly generated $1.2 million in

revenue and more than $275,000 in net profits. (Exhibit 2, Ex. B (62 ;10-63 ;7; 81:5-11; 286:14-23); Exhibit 8, Ex. F (Deposition Ex. 2 to Kathy Peterson)).

- In September of 2004, three months into Gray's employment, Gary Peterson, acting on behalf of Tri-Way, sought to modify the agreed terms of Gray's profit sharing. Peterson's proposed modification called for Gray's share to be calculated after taxes and called for a portion of Gray's share to stay with Tri-Way as retained earnings. (*See e.g.,* Exhibit 2, Ex. A (86:1-12; 124:12-126:24; 216:1-3; 216:15-217:18; 229:9-231:1; Exhibit 4 (¶ 16)). After a period of discussion and after an attempt by Gray to buy out the Petersons' share of Tri-Way, Gray left Tri-Way in October of 2004. (*Id.*)
- After Gray's departure, Tri-Way initially offered, but then withdrew, a $60,000 payment to Gray. The $60,000 was described by Tri-Way as a fair assessment of Gray's value to the company during his tenure at Tri-Way. *See* Respondents' Brief

II. Argument

A. The District Court Failed To Construe Facts Relating To The Profit Sharing Agreement In Gray's Favor

All controverted facts are liberally construed in favor of the party opposing the summary judgment. *Tusch Enterprises v. Cofin*, 113 Idaho 37, 740 P.2d 1022 (1987). Whether a sufficient meeting of minds has occurred to form a contract is an issue of fact to be decided by the jury. *See Johnson v. Allied Stores Corp.*, 106 Idaho 363, 368, 679 P.2d 640, 645 (1984);

G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 808, P.2d 851 (1991) (recognizing that "[w]hen the issue of a contract is in issue and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists," and that "[t]he determination of the existence of a sufficient meeting of the minds to form a contract is a question of fact to be determined by the trier of facts") (internal citations omitted). Further, the law does not impose a standard of absolute certainty relative to every detail of a contract before the contract will be enforced. Instead, the standard for enforceability is one of reasonable certainty. *Genuine Auto Parts Co. v. Genuine Parts Co.*; 132 Idaho 849, 979 P.2d 1207, 1215 (1999).

Here, the Court disregarded evidence that the Tri-Way Parties represented to Gray that he would receive 50% of the net profits from the Arizona Division. Further, the District Court wrongly construed the facts against Gray.

1. Gray Introduced Evidence That There Was An Agreement As To The 50% Profit Sharing

As explained in greater detail in Appellant's opening brief, evidence indicates that Allard, Gary Peterson, and Kathy Peterson (1) represented to Gray that he would receive 50% of the net profits from projects that he managed and (2) Gary Peterson, Allard, and Kathy Peterson acted in a manner that indicated that they agreed that Gray was to receive 50% of the net profits. (*See, e.g.*, Ex. 4 (¶¶ 12, 13, 14, and 18) [1]; s*ee also* Statement of Facts ("SOF") pp. 6-9.) For example,

[1] Clerk's Record on Appeal ("R"). An "Exhibit" is a document identified in the Certificate of Exhibits at R 179-180. "Ex." refers to an exhibit attached to an "Exhibit" identified in the Certificate of Exhibits.

in an Affidavit filed on August 3, 2006, Gray declared, "[d]uring discussions, including but not limited to discussions taking place in March of 2004, on or about April 17, 2004, on or about June 9, 2004, and in subsequent phone conversations, Tri-Way, through Ray Allard, Kathy Peterson, and Gary Peterson, represented that I would receive 50% of certain profits . . ." (Ex. 4 (¶ 18). Likewise, Gray repeatedly testified during his deposition and in affidavits that representations were made to him that he would be paid 50% of the net profits. (SOF pp. 6-10)

The District Court failed to consider this evidence. Without any explanation, the District Court only referenced two paragraphs of Gray's Affidavit dated August 30, 2006 in its written ruling. (R at 83). In short, the District Court failed to consider other evidence in the record, including Gray's deposition testimony, that Allard, Gary Peterson, and Kathy Peterson affirmatively represented to Gray that they agreed that he would receive 50% of net profits before taxes.

2. The District Court Wrongly Construed Renegotiation Efforts By Tri-Way And Language From An October 2004 Email Against Gray.

The District Court improperly construed facts and made inferences in favor of the Tri-Way Parties. (R 86-87.) For example, Gray's October 26, 2004 email to Peterson should not be construed an admission that there was never an agreement to pay Gray 50% of the net profits. (*Id.*) Rather, when construed in a light favorable to Gray, the email reflects the fact that Gray was not going to negotiate with Peterson as had been suggested by Allard—Gray's position was that the terms simply needed to be applied. (Exhibit 2, Ex. A (278:3-19)) ("Gary had the money in his pocket and negotiation wasn't going to help the situation. Either Gary was going to be fair

with me or he wasn't"); (R at 111-2). Likewise, the District Court improperly construes discussions related to Tri-Way's failure to honor the profit sharing agreement. The fact that, *months after he was working for Tri-Way*, Gray initially participated in discussions related to Tri-Way's effort to modify the profit sharing agreement, does not provide a proper basis to rule as a matter of law that there was never any agreement regarding profit sharing.

Had the District Court considered the evidence regarding the Tri-Way Parties direct representations of acceptance and had the District Court not improperly construed the facts against Gray, the District Court would have found that there was an issue of fact as to whether the parties agreed to the 50% profit sharing. Based on this error, the District Court wrongly dismissed Gray's claims. In turn, the dismissal of the breach of those claims should be overturned.

B. The District Court Improperly Construed Case Law.

The District Court wrongly relied on *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 31 P.3d 921 (2001) for the proposition that the agreements reached between Gray and the Tri-Way Parties did not constitute a meeting of minds. (R 91). The *Intermountain Forest Management* case does apply here. Contrary to the facts in the *Intermountain Forest Management* case, the evidence in this case supports Gray's claim that the parties did reach an agreement as to the profit sharing. Moreover, evidence in this case, including part performance, supports the conclusion that the parties intended to be bound by the profit sharing terms regardless of whether or not they could reach consensus on other issues. Unlike the plaintiff in the *Intermountain* case, Gray had no reason to question whether Gary

Peterson and Allard had the authority to contract with him on behalf of themselves and Tri-Way. Indeed, based upon Gray's understanding that an enforceable agreement had been reached, Gray left Albertsons and joined Tri-Way. (Exhibit 2, Ex. A (93:7-13); (Exhibit 4 (¶¶ 12, 14, 19)). Viewed in the light most favorable to Gray, there is sufficient evidence that the parties intended to be bound by the promised compensation terms prior to memorializing a comprehensive employment agreement. *See* (Exhibit 2, Ex. C (123:17-23); Exhibit 2, Ex. A (108:6-15)). Adding further support, each of the draft agreements prepared after June 1, 2004, was written to apply retroactively to when Gray started working on June 1, 2004. (Exhibit 2, Ex. A (Gray Depos. Ex. 8, 9)).

C. The Statute Of Frauds Does Not Bar Enforcement Of The Agreement To Pay 50% Of Profits At End Of Calendar Year.

1. Statute of Frauds Does Not Apply.

By its express terms, I.C. § 9-505 does not apply to contracts that can be completed within one year. In this case, Gray is seeking to enforce an oral agreement that the net profits would be paid to Gray on a calendar year basis, which given that Gray was starting his employment in June would necessarily have meant that the net profits would have been distributed within a year. Throughout the litigation and on the record, Gray made clear that he is only seeking to recover under the agreed upon bonus structure for profits that he brought to Tri-Way. In short, Gray should be entitled to pursue his breach of contract claim for his share of the $1.2 million that he brought to Tri-Way as the conditions of Gray's profit share bonus were to be completed within one year.

2. Even If the Statute of Frauds Applied, Equitable Estoppel Bars Application of the Statute of Frauds

Even if the statute of frauds did apply to the case at hand, Idaho Courts recognize that, in cases in which there has been part performance, the doctrine of equitable estoppel may bar the statute of frauds defense. *Tew v. Manwaring*, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971); *Frantz v. Parke*, 111 Idaho 1005, 1007-8, 729 P.2d 1068, 1070-1 (Ct. App 1986).

In the case at hand, there has been part performance by both Gray and Tri-Way. Here the contract at issue is the agreement for Gray's employment. Pursuant to Gray's employment agreement, he relocated to Phoenix, brought $1.2 million in net revenue to Tri-Way, and took actions to establish Tri-Way's Phoenix division. Tri-Way performed pursuant Gray's employment contract. Tri-Way paid Gray's relocation expenses. Tri-Way paid Gray the agreed upon base salary. Tri-Way calculated the profits for the Phoenix division separately. Tri-Way even tried to pay Gray a bonus (albeit one that was substantially less than what he was entitled to under the agreement). Also, in line with Gray's evidence relating to the agreed upon compensation arrangement, the Tri-Way Parties admit that Gray was to get an increase in his base pay after one year.

3. The Statute Of Frauds Is Not Plead As An Affirmative Defense And Was Not Raised By Tri-Way In Its Summary Judgment

Tri-Way admits that it did not plead the statue of frauds as an affirmative defense and did not raise it in the motion for summary judgment. (R at 71) Gray objected to the District Courts application of the statute of frauds. (*Id.*) In turn, it is improper for the statute of frauds to be applied here.

D. Sufficient Evidence Was Introduced Supporting The Quantum Meriut Claim

The measure of recovery in a quantum meriut claim is the reasonable value of the services rendered or of goods received, regardless of whether the defendant was enriched. *Erickson v. Flynn*, 138 Idaho 434-435, 64 P.3d 959, 963-964 (Ct. App. 2002); *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 103 P.3d 440 (Idaho 2004); *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 191, 108 P.3d 332, 338 (2005). Any evidence tending to show the reasonable value of services is generally admissible. *See Peavey v. Pellandini*, 97 Idaho 655, 551 P.2d 610, 616 (1976) (finding evidence of costs is relevant); 66 Am.Jur.2d, Restitution and Implied Contracts, § 89 at 1031 (1973)). In short, "[t]he majority rule in quantum meriut recovery is that absent an agreement fixing compensation, any evidence tending to show the reasonable value of services is generally admissible." *Fairbanks North Star Borough v. Tundra Tours*, 719 P.2d 1020, 1029 (Alaska 1986) (citing *Peavey v. Pellandini*, 97 Idaho 655, 551 P.2d 610, 616 (1976) and 77 Am Jur. 2d, Restitution and Implied Contracts, § 89 at 1031 (1973)).

In the face of evidence that was presented, the District Court wrongly asserted that there was "no evidence that the customary rate of pay for his work in the community at the time the work was performed included such a bonus." (R 115). First, the District Court applied the rule too narrowly. There is no requirement under the case law interpreting quantum meriut that mandates that there must be evidence that Gray needed to establish that "bonus" of the type he sought to establish was a requirement of a quantum meriut claim. A plaintiff need only present evidence which tends to show the reasonable value of the services. Second, even if one were to apply the standard created by the District Court, there was evidence in record. Defendants

testified that they always thought Gray was to get a bonus, they negotiated terms of a bonus, and they "offered" him a bonus, and the value of Gray's services generated substantial net profits. All of this is admissible evidence which the District Court failed to acknowledge.

1. Gray Introduced Evidence Indicating the Value of His Services

Evidence of the value of Gray's services can be found with reference to the benefit achieved by Tri-Way. Here, Tri-Way obtained hundreds of thousands of dollars in net profits in a few months owing to Gray's efforts. Evidence as to a parties enrichment is sufficient to create an issue of fact as to the value of Gray's services. *See, Peavey*, 97 Idaho 655, 661 P.2d at 616. Also, the Tri-Way Parties' actions create factual issues as to the value of Gray's services. For example, Tri-Way testified that it always intended to share profits with Gray. The only dispute was regarding the formula to be used. Moreover, Tri-Way went so far as to offer (and then not pay) a $60,000 bonus to Gray. (Exhibit 2, Ex. B (237:20-238:3)). The offered but retracted $60,000 was, according to Gary Peterson, Tri-Way's effort to "make a fair assessment of the value and offered [Gray] that as a bonus for the two projects he ran." (*Id.*) As the Tri-Way Parties concede, they "endeavored to provide plaintiff with a reasonable value for services, in addition to the salary he had agreed to accept." (Respondents Brief at 30.) There is evidence in the record that Gray previously earned more than $100,000 plus bonus and benefits in his previous position. Also, the record indicates that employees filing lesser functions within Tri-Way received significantly more than $4,000 per month.

E. Gray's Unjust Enrichment Claim Should Not Have Been Dismissed; Gray Introduced Evidence of the Amount That Tri-Way Was Enriched

Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. *Barry v. Pacific West Const., Inc.,* 140 Idaho 827, 834, 103 P.3d 440,447 (Idaho 2004) (citing *Peavy*). Here, the District Court dismissed the unjust enrichment claim, wrongly holding "Gray introduced no evidence of the amount Tri-Way was enriched by bringing in two projects." (R 117).

Gray clearly introduced evidence that Tri-Way was enriched and was enriched unjustly. As indicated, it is undisputed that Gray brought two very profitable projects (with respective gross revenues of at least $960,000 and $215,000) to Tri-Way that by far outweighed the $4,000 per month salary he was paid by Tri-Way. (Exhibit 4 Ex. (¶ 14); (Exhibit 2, Ex. B (81:5-11)). Further, the evidence shows that Tri-Way only received this windfall because of promises made to Gray. The undisputed evidence that Gray's efforts had significantly enriched Tri-Way ($966,070 in revenue and $271,792.48 in net profit from June through September 30, 2004 for one project alone) and, evidence all of the parties (Tri-Way included) always intended that Gray would get 50% of the net profits but did not compensate him properly. Sufficient facts are in the record from which a jury should be allowed to determine whether the Tri-Way Parties were unjustly enriched.

F. Gray Presented Evidence Supporting His Justifiable Reliance On Tri-Way's Promises Of 50% Profit Sharing. In Turn, The District Court Should Not Have *Dismissed* Gray's *Claims* Based On Fraud, Promissory Estoppel, And Equitable Estoppel

There is evidence of justifiable reliance. Gray's evidence of reliance is based on affirmative misstatements of facts as well as fraudulent concealment with the intent to induce Gray to begin his employment with Tri-Way. Both are supported by facts in the record and provide a basis for denial of the Tri-Way Parties' Motion for Summary Judgment regarding fraud, promissory, and equitable estoppel.

As set forth above, the Tri-Way Parties' attempts to construe the parties' agreement regarding profit sharing as still in negotiation are not supported in the facts. Moreover, Gray did not, as the Tri-Way Parties contend, acknowledge that the terms "were never agreed upon by the parties." To the contrary, Gray testified that he reached an agreement on the compensation terms at the May 21, 2004 Meeting. To the extent that the Tri-Way Parties made representations of fact regarding Gray's salary and/or profit sharing compensation without disclosing to Gray that they had no intention of honoring that agreement, the Tri-Way Parties have acted fraudulently and have induced reliance. Similarly, to the extent the Tri-Way Parties fraudulently concealed their intention not to honor the agreement according to the terms that they had reached with Gray in order to induce him to begin working for Tri-Way, they have acted fraudulently. Both sets of facts are supported by the record in this case.

Further, Gray has introduced facts that support a claim for equitable estoppel and promissory estoppel on the basis that the Tri-Way Parties falsely represented or concealed

material facts from Gray regarding their intention to honor the terms of the parties' agreement regarding salary and profit sharing compensation. Gray had no way of knowing that the Tri-Way Parties had no intention of honoring their agreement with Gray until after Gray had already left Albertsons and started work at Tri-Way. Additionally, as indicated, the Tri-Way Parties made the representations affirming the compensation terms and concealed their true intentions with the intent that Gray rely on them. Gray did in fact rely on those representations and was damaged. Consequently, given the disputed and undisputed facts in the record, summary judgment on these claims is inappropriate. The evidence also supports the reasonableness of Gray's reliance on the Tri-Way Parties promises and his impression that the parties had reached a bargain on the terms of his employment, including the amount of his profit sharing compensation. (Exhibit 4 (¶¶12-14, 18)[2] One important such fact is that the Tri-Way Parties never told Gray that they had rejected the terms of his employment agreement. Also of importance is the fact that the Tri-Way Parties allowed Gray to begin working and only later attempted to renegotiate the terms of Gray's agreement with Tri-Way. (*See, e.g.*, Exhibit 4 (¶ 16)).

G. Constructive Fraud

The District Court did not expressly address Gray's claim for constructive fraud. (R 102-122). Accordingly, the District Court's intentions and basis for dismissal (assuming the dismissal was done knowingly) are unclear. The Tri-Way Parties contend that the record does not support the requisite relationship.

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[2] While disputing a specific agreement, Allard and Gary Peterson admit that they never told Gray that he would not receive any profit sharing for his efforts on behalf of Tri-Way. (Exhibit 8, Ex. 6 (152:1-12). Gary Peterson never told Gray "anything like" Tri-Way is "never going to give you 50% of the profits." (Exhibit 2, Ex. B (213:7-12)).

"An action in constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (Idaho 1997) (reversing District Court's denial of motion to amend to include constructive fraud claim, citing *McGhee v. McGhee,* 82 Idaho 367, 371, 353 P.2d 760, 762 (1960). "In its generic sense constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another. Constructive fraud usually arises from a breach of duty where a relationship of trust and confidence exists; such relationship may be said to exist whenever trust or confidence is reposed by one person in the integrity and fidelity of another." *McGhee*, 82 Idaho at 371, 353 P.2d at 762.

Gray had a longstanding friendship with Allard. Moreover, all parties agree, the arrangement at issue was one of profit sharing. Further, Gray began working at Tri-Way based upon representations that any subsequent written agreement would accord with the verbal agreements reached at the May 21 Meeting. Once the parties reached an agreement in May 2004 regarding the terms of Gray's employment, Gray placed Tri-Way in a position of trust, believing that they would carry out their obligations under those agreements and not take steps directly contrary to his interests. Given the nature of the relationship between the parties and the fact of Gray's trust in the Tri-Way Parties to protect his interests, a relationship of trust and confidence is appropriate in this case. Summary judgment should have been denied.

III. CONCLUSION

Based on the foregoing, Gray requests that this Court reverse the District Court's grant of summary judgment for the Tri-Way Parties and overturn the award of attorneys fees as the prevailing parties. Substantial issues of fact exist which compel allowing this dispute to proceed to trial.

DATED this 29th day of August, 2008.

HOLLAND & HART LLP

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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