9-19-2014

EGP Investments, LLC v. Skinner Respondent's Brief Dckt. 41957

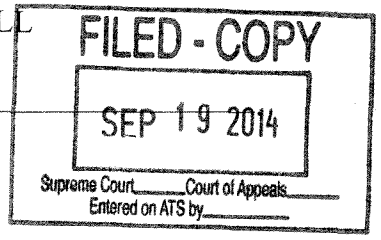
IN THE SUPREME COURT OF THE STATE OF IDAHO

EGP INVESTMENTS, LLC, A WASHIGNTON LIMITED LIABILITY COMPANY, Plaintiff/Respondent, vs. LORI SKINNER, Defendant/Appellant.	Supreme Court No. 41957 Case No. CV-2012-426 **RESPONDENT'S BRIEF**

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Boundary

THE HONORABLE JOHN T. MITCHELL
District Judge



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STATEMENT OF CASE

This action involves the collection of a defaulted credit card account. The Respondent in this case is a business entity specializing in the collections of defaulted accounts. The large-scale assignment of defaulted accounts is a common business practice nationally, allowing entities like the Plaintiff to utilize economies-of-scale in efficiently collecting outstanding debts. See *Beal Bank, SSB v Eurich*, 444 Mass 813, 831 N.E.2d 909 (2005); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003).

From a procedural standpoint, the case was filed on December 3, 2012. (R. 12-14). The Appellant alleged and maintains that service was improper; which the Respondent has not disputed. On or about February 8, 2012, the Appellant filed a Notice of Special Appearance, Motion to Dismiss (based upon insufficient service), and a Notice of Discovery. (R. 16-30). In accordance with the Notice of Discovery, Requests for Admissions, Interrogatories, and Requests for Production of Documents were served on the Plaintiff/Respondent.

The Appellant's Motion to Dismiss was scheduled for hearing on May 7, 2013; however, the Motion was vacated after the Appellant's request to appear telephonically was denied. (R. 47, 51). On July 31, 2013, the Court sent a Notice of Trial, which apprised the parties of several additional judges potential involvement in the case. (R. 57). Trial was set for January 27, 2014. Neither party objected to this Notice. On January 9, 2014, the Court sent Notice of a pre-trial, status hearing set for January 22, 2014; which also contained notice of potential presiding judges and pre-approval and instructions for telephonic participation. (R. 65). Both Judges Verby and Mitchell were included in the notices of potential presiding judges. (R. 57, 65).

On or about January 13, 2014, the Appellant, in a letter to the Court, informed it would not be participating in any further in the proceedings. On January 22, 2014, with Judge Verby presiding, the Respondent appeared through counsel as the hearing, and the matter remained set for trial. The Court (Judge Verby) also filed a memorandum decision Order Denying Defendant's Motion to Dismiss; wherein the Court found the Appellant's engagement in the discovery process constituted a general appearance. (R. 73)

On January 27, 2014, with Judge Mitchell presiding, a trial was held in this matter and the Plaintiff/Respondent presented evidence. The Defendant/Appellant was not present and no objections were raised. Judgment was found in favor of the Plaintiff/Respondent, which was filed on February 10, 2014.

ISSUES PRESENTED

I. Did the Court correctly determine that an appearance had been made by the Defendant/Appellant in this case?

II. Did the Court err by allowing the participation of alternate judges in this case?

ATTORNEY'S FEES

While the Plaintiff chose not to follow through with an award of attorney's fees in the proceedings below, if found to be the prevailing party, Appellant requests an award of attorney's fees on appeal pursuant to I.C. §§ 12–120(1), 12–120(3) (account stated), 12-121; and IAR 11.2. The Idaho Supreme Court has interpreted I.C. § 12-120(3) to mandate the award of attorney fees on appeal as well as at trial. *Hummer v. Evans*, 132 Idaho 830, 833, 979 P.2d 1188, 1191 (1999).

ARGUMENT

a. Standard of Review

Whether a court lacks jurisdiction is a question of law, over which this Court exercises free review. *State v. L'Abbe*, 156 Idaho 317, 324 P.3d 1016, 1020 (Ct. App. 2014); *Clements Farms, Inc. v. Ben Fish & Son*, 120 Idaho 185, 814 P.2d 917 (1991). This appeal is based upon an interpretation of the Idaho Rules of Civil Procedure, specifically I.R.C.P. 4(i). The construction and application of I.R.C.P. 4(i) presents a pure question of law and is subject to free review on appeal. *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 422, 942 P.2d 544, 546 (1997); *Hutchinson v. State*, 995 P.2d 363, 366 (Idaho App. 1999). The reviewing court also exercises free review of the issue as to whether the lower court has properly applied the legal theory to the facts presented by the evidence in the case. *Schiewe v. Farwell*, 125 Idaho 70, 867 P.2d 944, *review granted, appeal decided*, 125 Idaho 46, 867 P.2d 920, *rehearing denied* (Ct.App. 1992).

When reviewing a motion to dismiss based on lack of personal jurisdiction, this Court applies the same standard as when reviewing appeals from summary judgment orders; "we construe the evidence presented to the district court in favor of the party opposing the order and accord that party the benefit of all inferences which might be reasonably drawn. *Profits Plus Capital Mgmt., LLC v. Podesta*, 39964, 2014 WL 3057303 (Idaho July 8, 2014).

b. The Court Correctly Found the Appellant had Appeared in the Case by Engaging in the Discovery Process and Availing itself of the Court's Jurisdiction.

The Court, in Judge Verby's Order (R. 73), held that the Appellant voluntarily made a general appearance in this matter by engaging in discovery. The service of a summons confers a trial court with personal jurisdiction over a party. *Lohman v. Flynn*, 139 Idaho 312, 318, 78 P.3d 379, 385

(2003). However, a voluntary general appearance is equivalent to service of summons upon a defendant and will cure any defects in service. *Hutchinson v. State*, 134 Idaho 18, 21, 995 P.2d 363, 366 (Ct.App.1999), (citing 4 Am.Jur.2d, Appearance # 2 (1995)); *Idaho Dep't of Health & Welfare v. Doe*, 154 Idaho 175, 179, 296 P.3d 381, 385 (2013). It is undisputed in this matter that the Appellant filed and served Discovery upon the Plaintiff/Respondent approximately two months after the case was filed.

Respondent references Judge Verby's Order Denying Defendants' Motion to Dismiss, finds no fault with the reasoning and cases cited therein, and incorporates that Order in this Response. After review, it appears the Court has referenced the correct law and applied the law correctly to the facts in this matter.

Rule 4(i) provides that the voluntary appearance or service of any pleading by a party constitutes voluntary submission to the personal jurisdiction of the court "except as provided herein." The Rule then gives three exceptions. "First, filing a motion under Rule 12(b)(2), (4), or (5) does not constitute a voluntary appearance. Second, filing a motion asserting any other defense does not constitute a voluntary appearance if it is joined with a motion under Rule 12(b)(2), (4), or (5). Finally, filing a pleading and defending the lawsuit does not constitute a voluntary appearance if it is done after the trial court has denied the party's motion under Rule 12(b)(2), (4), or (5)." *Engleman v. Milanez*, 44 P.3d 1138, 1140 (2002).

In *Engleman*, the defendant filed a simple Notice of Appearance along with its attempt to contest jurisdiction and service. The Supreme Court found that to be a voluntary appearance and did not fall within the exceptions listed in Rule 4(i). *Id.* In another case, a party was found to have inadvertently made an appearance by filing a motion for change of venue without joining the motion

to dismiss for lack of personal jurisdiction. *Ponderosa Paint Mfg., Inc. v. Yack*, 870 P.2d 663, 666 (Ct. App. 1994). It should further be noted that the Appellant likely became aware of the possibility that her participation in certain aspects of the litigation would be considered availing herself of the jurisdiction of the Court. Indeed, in her January 13th letter to the Court, the Appellant informed the Court of her intent to forgo participation in the upcoming hearing and trial for this very reason.

As the Court in this case noted, "[i]f a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection." *Pingree Cattle Loan Co. v. Charles J. Webb & Co.*, 36 Idaho 442, 446, 211 P. 556, 557 (1922) (quoting from *Lowe v. Stringham*, 14 Wis. 222 (1861)). The Trial Court was well aware of the applicable law and the facts of this case and it came to the proper conclusion.

c. The Court Gave Proper Notice of the of Alternate Judges' Potential participation, and no Objection Or Motion to Disqualify was Made by the Appellant

The Appellant appears to have made the claim that the involvement of alternate judges in the pre-trial and trial proceedings constitutes reversible error. The Appellant claims that she would have disqualified or otherwise objected to this participation, and was deprived of the opportunity to do so. However, the record indicates otherwise. On July 31, 2013 the Court gave all parties to this action a Notice, which included the potential that Judges Mitchell and Verby would preside over this matter. The Notice was again given on January 9, 2014. At no time did the Appellant object to the Notice, though the Appellant did note her objection to attending a hearing.

A motion to disqualify is governed by IRCP 40(d)(1), which contemplates the use of alternate judges and allows 10 days for a party to object to the use of a particular judge and disqualify a particular judge without cause. The Appellant did not object to the notice of alternate judges in the

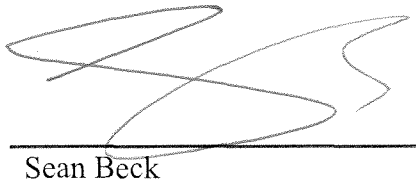
proceedings below. Accordingly, there are no due process, constitutional, or administrative legal issues to debate. See generally *Aeschliman v. State,* 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct.App.1999).

The use of alternative judges, as well as many other issues mentioned in the Appellant's brief, were not raised in the proceedings below. A proper and timely objection must be made in the trial court before an issue is preserved for appeal. If not raised below, the objection may not be considered for the first time on appeal. *State v. Johnson*, 126 Idaho 892, 896, 894 P.2d 125, 129 (1995); *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct.App.1997). After the Appellant's Motion to Dismiss was denied and her appearance in the case recognized, the case remained set for trial. The Appellant made no further objections or Motions. The Respondent appeared on the day of trial and presented its case without objection to the satisfaction of the finder of fact and law. The Appellant's procedural errors, misunderstanding of the law, and/or reasonable omissions do not create any exception to the rules and legal consequences that followed. See generally *Nelson v. Nelson,* 144 Idaho 710, 718, 170 P.3d 375, 383 (S. Ct. 2007); *Michalk v. Michalk*, 148 Idaho 224, 229, 220 P.3d 580, 585 (S. Ct. 2009) (re pro se litigant's litigation standards). Accordingly, the various other allegations of impropriety, conspiracy, or errors of law and fact mentioned by the Appellant are not properly before the court on appeal.

CONCLUSION

In accordance with the reasoning set forth above, the Respondent requests the decisions of the Trial Court be affirmed.

RESPECTFULLY SUBMITTED: September 17, 2014

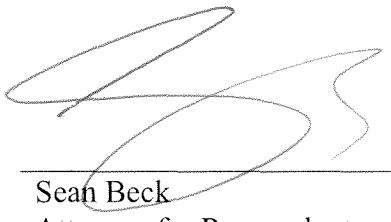


Sean Beck
Attorney for Respondent

CERTIFICATE OF SERVICE

On this September 17, 2014,Plaintiff/Respondent in this action caused to be sent a true and correct copy of its RESPONDENT'S REPLY BRIEF, with a copy of this certificate of service to the following by U.S. Mail:

Lori Skinner
PO Box 143
Naples ID 83847



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