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

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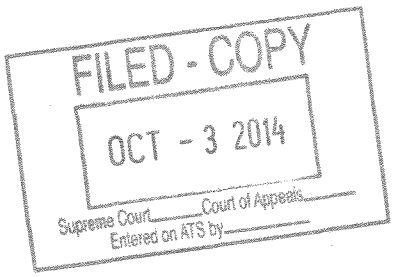

IN THE SUPREME COURT OF THE STATE OF IDAHO

EGP INVESTMENTS, LLC A Washington Limited Liability Company Plaintiff-Respondent, v. LORI SKINNER, Defendant-Appellant.	Docket No. 41957 Case Number: CV-2012-426 APPELLANT'S REPLY BRIEF

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

Honorable John T. Mitchell

District Judge

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ARGUMENT

a. Jurisdiction

Respondent admitted that they had no standing to bring this suit by their failure to argue affirmatively that they had standing in their Brief which is jurisdictional. Standing being jurisdictional can be raised upon appeal. "Courts have the power to inquire into their own jurisdiction; they are obligated to ensure their own subject matter jurisdiction and must raise the issue sua sponte if necessary." *In re City of Shelly*, 151 Idaho 289, 255 P.3d 1175 (2011); *Laughy v. Idaho Department of Transp.*, 149 Idaho 867, 233 P.3d 1055 (2010). "A court has a sua sponte duty to ensure that it has subject matter jurisdiction over a case." *State v. Urrabazo*, 150 Idaho 158, 244 P.3d 1244 (2010). "The a court lacks jurisdiction to hear a case is a question of law, and maybe raised at any time." *Dunlap v. State*, 146 Idaho 197, 192 P.3d 1021 (2008). "The question of jurisdiction is fundamental and cannot be ignored; even if jurisdictional questions are not raised by the parties, the Supreme Court must address them on its own initiative." *State v. Hartwig*, 150 Idaho 326, 246 P.3d 979 (2011). "A question of jurisdiction is fundamental; it cannot be ignored when brought to the attention of the court and should be addressed prior to considering the merits of an appeal." *State v. Kavajecz*, 139 Idaho 482, 80 P.3d 1083 (2003). A real party in interest is jurisdictional as stated in IRCP Rule 17(a).

Respondent never placed upon the record a "contract" that was alleged to be breached. Respondent's never placed into the record a contract of assignment, proof that a notice of assignment was never sent to the appellant, or any "contract between Appellant and Respondent that was breached to create standing for this litigation. In fact, because there was no "chain of

standing" in this case it was error for the Court to have accepted this case for hearing and was required to have dismissed this case for lack of subject matter jurisdiction, irrespective that the district court is a court of general jurisdiction. Showing standing in the complaint is still a prerequisite to subject matter jurisdiction. See IRCP Rule 17(a).

b. Insufficiency of Service

In Respondent's Statement of the Case on page 4, lines 7 & 8 quote, "The appellant alleged and maintains that service was improper; which the Respondent has not disputed." It is uncontested that Appellant was not properly served by Respondent.

c. No General Appearance

In Respondent's Statement of the Case on page 4, lines 9 & 10 Respondent admits that Appellant filed a Notice of Special Appearance and later a Motion to Dismiss based upon insufficient service. Going back to the preceding sentence in Respondent's Brief, the issue of insufficient service "the Respondent has not disputed." Further, Respondent states "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."

Throughout Respondent's Statement of the Case Respondent shows that Appellant **never** has made an in court appearance before the court or has filed any pleadings. For the exception of sending a letter to assigned Judge – Judge Buchanan letting her know that Appellant was not going to show up, which such letter is not either an appearance nor a pleading as described in IRCP Rule 7(a).

IRCP Rule 7(a) describes what limited documents are considered to be pleadings to wit:

> **"There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14 and there shall be a third-party answer, if a third-party complaint is served.** *No other pleading shall be allowed*, except that the court may order a reply to an answer or a third-party answer." [Emphasis Added] IRCP Rule 7(a)

IRCP Rule 4(i) states to wit:

> "(1) General Appearance. The voluntary appearance of a party or service of any pleading by the party, except as provided in subsection (2) hereof, constitutes voluntary submission to the personal jurisdiction of the court."
>
> "(2) Motion or Special Appearance to Contest Personal Jurisdiction. A motion under Rule 12(b)(2), (4) or (5), whether raised before or after judgment, a motion under Rule 40(d)(1) or (2), or a motion for an extension of time to answer or otherwise appear does not constitute a voluntary appearance by the party under this rule. The joinder of other defenses in a motion under Rule 12(b)(2), (4) or (5) does not constitute a voluntary appearance by the party under this rule. After a party files a motion under Rule 12(b)(2), (4) or (5), action taken by that party in responding to discovery or to a motion filed by another party does not constitute a voluntary appearance. If, after a motion under Rule 12(b)(2), (4), or (5) is denied, the party pleads further and defends the action, such further appearance and defense of the action will not constitute a voluntary appearance under this rule. The filing of a document entitled ìspecial appearance,î which does not seek any relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, does not constitute a voluntary appearance by the party under this rule if the party files a motion under Rule 12(b)(2), (4), or (5) within fourteen (14) days after filing such document, or within such later time as the court permits." IRCP Rule 4(i)

Please Take Judicial Notice that IRCP Rule 4(i) DOES NOT mention discovery in any portion of this rule. Discovery is not a motion nor is discovery a pleading. Discovery does not require an appearance to use it, but does require an appearance to enforce its provisions.

Appellant has not made any (general) appearances in this case either by being in court or by filing any pleading as described in IRCP Rule 7(a). See ROA and is incorporated herein by its

reference.

d. Discovery does not constitute an Appearance.

Idaho Rules of Civil Procedure Rule 26(a). Discovery Methods.

> "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, **the frequency of use of these methods is not limited**." IRCP Rule 26(a)

The Supreme Court of this State has stated in IRCP Rule 26(a) that the frequency of using Discovery methods is not limited. Nowhere in the Court Rules does the Supreme Court state that using the Discovery provisions submits you to the personal jurisdiction of the Court. This failure has two consequences: 1) You can use discovery at any time without submitting to the personal jurisdiction of the court; or 2) Failing to give notice that by using discovery submits a party to the personal jurisdiction of the court without due notice of this fact is a violation of due process which requires Notice of such a consequence. Appellant asserts that since there is no case law on point and there is no rule which discloses such a limitation on using discovery, if one exists then, the use of discovery does not submit a party to the personal jurisdiction of the court due to the lack of an appearance or until the court provides such notice that using discovery would submit a party to the personal jurisdiction of the court..

Also IRCP Rule 1(c) which states in part "No district court or magistrates division of the state shall make rules of procedure except as expressly authorized by these rules." By the Court

stating that discovery is an appearance, they have made a rule of procedure that is not recognized by the Idaho Supreme Court nor instituted by the Idaho Supreme Court. Judge Verby's decision to deny Appellant's Motion to Dismiss in which he had no authority to preside on this case is an act outside of the duties of a Senior District Court Judge in violation of the Appellant's due process rights.

It is equally improper to use other states Rules of Court as if they are the guidelines for this State, especially when the State of California procedural rules on this issue is different from that of the State of Idaho Rules of Court and procedure. However, as I pointed out Senior Judge Verby own case citations as cited in the decision to deny Appellant's Motion to Dismiss points out that this concept that discovery does not constitute a general appearance is clearly stated in *Roy v. Superior Court*, 25 Cal.Rptr.3d 488, 127 Cal.App.4th 377, at n9 (2005), a case he cites in his illegitimate ruling on the Motion to Dismiss, wherein it states to wit: "If a defendant does need to engage in discovery, he may do so without being deemed to have made a general appearance. (See *Harding v. Harding*, (2002) 99 Cal.App.4th 626, 636, 121 Cal/Rptr.2d 450.)" Clearly the Appellant has not made a general appearance in this case. See Appellant's Brief on page 17.

e. Not objecting to Court Notices

As for not objecting to the Notices of Hearing, the Idaho Supreme Court has stated numerous times in case decisions quote, "'If 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)). ... Rule 4(i) of the Idaho Rules of Civil Procedure mitigates to some extent the rule that the party must keep out for all purposes except to object that he is not in court." *c.f. Rhino Metals, Inc., v. Craft*, 146 Idaho 319, 193 P.3d 866 (2008). See Page 14 of Appellant's Brief. If I had objected, then, Respondent would be stating in their brief that Appellant submitted to the jurisdiction of the Court due to the objection to the Notice of hearings.

In addition, Respondent's assertion of IRCP Rule 40(d)(1) as the court's excuse for providing a bogus notice of alternate judges not prescribed by statute or court rule is without merit. Nobody in this case disqualified a judge using IRCP Rule 40(d)(1). No one had because Judge Verby quit his post as a District Court Judge and was replaced with Judge Buchanan by appointment by the Governor, as prescribed by law. This fact also makes Judge Verby's participation even more unlawful, as he was not assigned to the case by Order of the Supreme Court or by the Administrative District Court Judge for the First Judicial District as required by law.

f. Assignment of Judge on Case.

The assigned Judge on this case at the beginning of this case was Judge Verby. He decided to "retire" and become a Senior Judge. However, the Governor of this State replaced him with Judge Buchanan. Judge took over his case load which included this case. See ROA and is incorporated herein by its reference. Judge Buchanan was not disqualified by Motion by either

party. Improperly so, the First Judicial District believes that even though a judge has been assigned to the case, they the Clerk's of the District Court and other Court personal has the power to change that assignment at-will. There is no Court Rule or statute which permits this action. In fact, that if such a thing could happen it would literally moot out IRCP Rule 40(d)(1) which only allows for one mandatory disqualification and would hard press each litigant to have in his pocket at every hearing a Motion to Disqualify if he/she opposed who was sitting as the "presiding judge" on their case that day. Both parties were obviously happy with the fact that Judge Buchanan replaced Judge Verby on this case as NOBODY filed for her disqualification. Since there was no disqualification and there being no rule or statute which permits another judge to interfere with an established assignment of a judge to case, all other judges who has appeared on this case were not acting within the judicial power of the State. As a result any determinations made by Judge Verby or by Judge Mitchell are void, as they are/were not the assigned judge to this case and could not be.

Appellant also believes that there is a rule in which additional judges could be assigned , but I believe that is in some sort of an appellate capacity. Criminal matters are a little different in that a magistrate (which could be a justice, district court judge, or magistrate) can determine probable cause and then, an assigned judge handles the rest of the proceedings, unless disqualified timely for no cause or any time for cause. If good cause if found then, a new judge is appointed the assignment.

Also there are provisions for replacement of a judge, if the judge was found to be incompetent or suffers from some sort of disability which would prevent him/her from doing the job. Also if a judge died while in office that judge's case load would automatically be re-assigned to another judge.

However, none of these occurrences exists in this case, and Judge Buchanan is the assigned judge. All other judges appearing on this case, did so outside of the laws of the state of Idaho. As a result any determinations made by Judge Verby or by Judge Mitchell are void, as they are/were not the assigned judge to this case and could not be. Such participation by Judges Verby and Judge Mitchell violated the due process rights of the Appellant of having a properly assigned judge to the case under the judicial power of the State and under laws of the state.

One more point, IF it is determined that Judge Verby some how had authority to preside over this case, he was required to do so in Boundary County. Idaho Law has provisions for holding court outside of the county in which the action was filed. See I.C. § 1-704 and is incorporated herein by its reference, which states to wit:

> 1-704. District judge -- Power to hold court in another district. A district judge may hold a court in any county in this state upon the request of the judge of the district in which such court is to be held; and when by reason of sickness or absence from the state, or from any other cause a court cannot be held in any county in a district by the judge thereof, a certificate of that fact must be transmitted by the clerk to the governor or chief justice of the Supreme Court, who may thereupon direct some other district judge to hold such court.

None of these procedures were done and therefore any determinations are void for lack of compliance with the laws of the state of Idaho. As a result of this, then, of course any judgment

from the "trial" would also be void as there are still would be a pending Motion to Dismiss.

In addition, to that because discovery is not a pleading and does not constitute an appearance. Then, with the admission that service was not done by the Respondent and six (6) months for service to have been completed have long since passed, then, under IRCP Rule 4(a)(2) the matter was required to have been dismissed as the Court no longer had jurisdiction over the case. See Appellant's Brief pages 9 & 10.

It is worthy to note that Respondent had plenty of time to re-serve Appellant from the date in which Appellant had filed the Motion to Dismiss claiming improper service, which the Respondent has admitted was done. Pursuant to IRCP Rule 4(i) the Motion to Dismiss under IRCP Rule 12(b)(2), (4) or (5) does not constitute an appearance. "The service of the summons confers the court with personal jurisdiction over a party. *Engleman v. Milanez*, 137 Idaho 83, 84, 44 P.3d 1138, 1139 (2002). The filing of a notice of appearance by a party is equivalent to the service of process upon that party. *Id.* Idaho Rule of Civil Procedure 4(i) provides that the voluntary appearance or service of any pleading by a party constitutes submission to the personal jurisdiction of the court. *Id.* Thus, the voluntary appearance by a party is equivalent to service of the summons upon that party. *Id.*

> Rule 4(i) further 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." It then lists 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).

Id. at 84-85, 44 P.3d at 1139-1140." cited from *Lohman v. Flynn*, 139 Idaho 312, 78 P.3d 379 (2003), a case also cited by Respondent.

CONCLUSION

There are multiple issues concerning jurisdiction. First is whether the Respondent's even has standing and if so, whether their complaint withstanding the issue of illegality to even be in Court. Second, the matter of service not being timely and the Court being mandated to have dismissed it out pursuant to IRCP Rule 4(a)(2). Third although not address in this response is the issue of the case going stale and was required to dismissed under IRCP Rule 40(c).

If jurisdiction can be found, then Appellant asserts that Appellant made no general appearance and discovery does not qualify under the laws of state of Idaho (maybe it does under California law, but were not in California nor is this venue) and therefore any decision to deny Appellant's Motion was improper.

Also asserted as error was the fact that other judges were on the case that was not assigned to the case and could not be because Judge Buchanan was properly assigned to the case and was not disqualified. Based upon the argument and the laws of this state and the Court Rules Judges Verby and Mitchell had no business being on the case, irrespective of how many defective notices were provided. In addition, under Idaho case decision the Appellant could not object to these Notices as she was required not to respond to any other issue other than jurisdiction which Respondent recognized.

Based upon the foregoing the Appellant is entitled to reversal and remand for the caser to be dismissed with prejudice and court costs award both by the trial court filing a frivolous complaint and an award for costs on appeal.

Dated this 1st day of October, 2014.

Lori Skinner

Lori Skinner, In Propria Persona

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2014, I caused to be served and delivered the original and Six (6) true and correct copies of the Appellant's Reply Brief on Appeal and One (1) unbound, unstapled copy to the Supreme Court and Two (2) true and correct copies of the Appellant's Brief on Appeal to each party; and Certificate of Service; by the method as indicated below, and addressed to the following:

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