9-19-2008

Christian v. Mason Respondent's Brief Dckt. 35331

IN THE SUPREME COURT OF THE STATE OF IDAHO

JERRY CHRISTIAN and JOY CHRISTIAN, husband and wife,

Plaintiffs-Appellants,

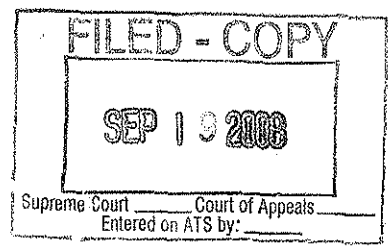
v.

DAVID MASON,

Defendant-Respondent.

DOCKET NO. 35331

District Court Case No. CV-06-4122



RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for

Bonneville County

Honorable Jon J. Shindurling, District Judge

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASE LAW:

UNITED STATES CODE ANNOTATED:

IDAHO STATUTES:

STATEMENT OF THE CASE

The following statements are to clarify or modify the Statement of the Case as stated by Appellant Jerry Christian and Joy Christian (Christians):

1. Between February 2001 and December 2001, Mason invested various sums of money with Robert McClung (McClung). Over this time period, Mason withdrew his entire investment at various times.. At other times he withdrew only the stated earnings. (R. p. 68.)
2. In July 2001, Mason's father, Monte Mason, sold his house and invested $79,042.06 of the proceeds from the sale with McClung, using Mason's account. Some various statements (RRLM) from McClung were sent in Monte Mason's name. (R. pp. 69-71.)
3. In December 2001, Mason withdrew all of the funds he had personally invested with McClung, together with all reported earnings related to his investment.
4. In 2002 and thereafter, all of the funds in Mason's account with McClung belonged to Mason's father and no additional funds were invested. Reported earnings for Mason's account were paid out each and every month. In some months, some of the principal was also withdrawn. A comparison between McClung's statements and checks written, distinctly traces and shows to what each withdrawal was related (i.e. e reported earnings or principal). (R. pp. 68, 80-87 and 106-111).
5. On September 2, 2002, the remaining balance of $30,905.06 was withdrawn.

6. Mason disagrees with Christians' assertion that Mason failed to substantiate any excess in his account belonged to his father. (Br. Appellant 5.) Mason laid a sufficient foundation. Mason had the ability to know from whom he received funds from and to where he disbursed such funds.

7. Mason also disagrees with Christians' assertion that "Mason also asserted without substantiation that the last payments McClung made to him were "returns of principal," and that earlier payments to him were "earnings" on his "investment."" (Br. Appellant 6.) The documents in this case show that the exact amount of withdrawals coincide with the reported earnings, such as in the summary found on page 68 of the Clerk's Record on Appeal.

8. Mason had no knowledge of McClung's illegal activity prior to the withdrawal of all investments and reported earnings from his account with McClung.

9. After McClung filed for bankruptcy protection in 2004, an unsecured creditor's committee was formed and Plaintiff Jerry Christian (Christian) was appointed chairman of the committee.

10. The bankruptcy trustee took no steps to recover any of the money Mason received from McClung. Christian, acting in his individual capacity or on behalf of the unsecured creditor's committee, did not seek any action through the bankruptcy court to obtain funds from Mason.

11. Neither party requested a jury trial.

ATTORNEY FEES OF APPEAL

Mason requests the Court award him attorney fees and costs on appeal. The basis for requesting attorney fees on appeal is found in Idaho Code §§ 12-121 and 12-123.

STANDARD OF REVIEW

Because neither party requested a jury trial, the District Court could have drawn reasonable inferences from the uncontroverted facts, despite the possibility of conflicting inferences. *Chapin v. Linden*, 144 Idaho 393, 397, 162 P.3d 772, 775 (2007). *See also Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). The Appellate Court has free review over the findings of the District Court. *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 366, 109 P.3d 1104, 1108 (2005).

ISSUES ON APPEAL

1. **Did the District Court err in granting summary judgment to Mason?**
2. **Did the District Court err in denying Christians' Motion for Summary Judgment?**
3. **Is Mason entitled to an award of attorney fees and costs of appeal?**

ARGUMENT

1. The Court Did Not Err in Granting Summary Judgment to Mason.

a. Christians lacked standing to pursue the claims.

Christians assert that the standing issue was raised *sua sponte* by the Court. This is not true. The Answer filed by Mason affirmatively states (Sixth Affirmative Defense) that Christians were not the real party in interest. (R. p. 23.) Further, Christians did not have any

portion of the oral arguments transcribed. (R. p.153.) In its decision, the District Court, obviously referenced the arguments made. (R. p. 149.) Even if the issue was raised solely by the District Court, Christians cite no authority supporting the proposition that to do so was error.

The decision by the District Court was based upon a relatively simple basis – Federal bankruptcy law preempts State law. Because Christians did not sue in any capacity related to the bankruptcy, they are barred from asserting this independent action.

Section 544(b) of the Bankruptcy Code authorizes the trustee to pursue any fraudulent conveyance claim that might have been pursued by a creditor or debtor and, in doing so, may use either federal or state law. Section 544(b) provides that "[t]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . ." 11 U.S.C.A. §544(b)(1). This includes the authority to proceed under Idaho's Uniform Fraudulent Transfer Act (UFTA). Cases in the Ninth Circuit (and around the country) have consistently held that a trustee can pursue fraudulent conveyances under state law. *See Donell v. Kowell*, No. 06-55544, 2008 U.S. App. LEXIS 13843 (9th Cir. July 1, 2008); *In re United Energy*, 944 F.2d 589 (9th Cir. 1991); *Von Gunten v. Neilson (In re Slatkin)*, 243 F. App'x 255 (2007).

Christians cited case law, such as Klingman v. Levinson, 158 BR 109 (N.D. Ill. 1993), which holds that the bankruptcy trustee's exclusive right to maintain a fraudulent conveyance action expires, and creditors may step in, when the bankruptcy trustee no longer has a viable cause of action, such as when an estate closing. (Br. Appellant 10.) Christians advocate that

this Court take judicial notice of McClung's bankruptcy case in the United States Bankruptcy Court for the District of Idaho, Case Number 03-40682. Mason has no objection to this Court taking judicial notice. McClung's bankruptcy estate was not closed and the trustee was not discharged until May 10, 2007, eight months after both the federal and state statute of limitations had expired for fraudulent conveyances. Because, under §544(b), the bankruptcy trustee had the authority to proceed under Idaho's UFTA, the bankruptcy trustee possessed the exclusive authority to recover fraudulently conveyed funds for the four years after the conveyance.

During the years the bankruptcy case was proceeding, Christians were very active in the bankruptcy case. While the bankruptcy case was proceeding, Christians: (a) filed a Motion to Lift Stay, (b) filed an Amended Motion to Lift Stay, (c) obtained a judgment, and (d) filed a 50 page affidavit (Document 47) advocating, because of their belief that the bankruptcy trustee was failing to do so, that McClung be denied any relief under the bankruptcy laws because of his wrongdoing. The Christian affidavit, prepared in October 2003, shows that Christian had a very substantial knowledge of McClung's receipt and distribution of funds (*see* Bankr. D. Idaho Case No. 03-40682, Doc. 47 ¶ 18), which Christian obviously reviewed as chairman of the unsecured creditor's committee. Under 11 U.S.C.A. §1102(a), the powers and duties of an unsecured creditor's committee is to investigate the financial condition of the debtor and the committee may ask the court to appoint an examiner to further investigate the matter, including fraud. The bankruptcy record is void of Christian informing the trustee or the Bankruptcy Court of the possibility of bringing a fraudulent conveyance action against Mason. Christians filed this

lawsuit in July 2006, while the bankruptcy case was still open, but did not effect service until six months later, apparently waiting until the time for service was about to expire. (IRCP 4(a)(2)) (R. p. 1.) There is no evidence to support either the proposition that the bankruptcy trustee had abandoned its rights to the cause of action, or that the case was not viable. Christians' claims under Idaho's UFTA expired at the same time as did the trustee's claim to the same. Under Idaho's UFTA laws, Idaho Code § 55-918, a creditor has four years to pursue a claim. Because the bankruptcy trustee has the authority to pursue recovery of assets as a cause of action under Idaho's UFTA, it also has the ability to use Idaho's longer statute of limitation. The bankruptcy trustee has the ability to use different causes of action which in turn allows for different statutes of limitation, which are considered substantive in nature. *In re Avi, Inc.*, 389 B.R. 721 (9th Cir. June 13, 2008); *Heaper v. Brown*, 214 B.R. 576 (8th Cir. B.A.P. 2007).

Christians argue that the bankruptcy trustee abandoned his claim. (Br. Appellant 14.) No supporting document was cited showing that the bankruptcy trustee had abandoned any claim within the statute of limitation time period. Christians' arguments are against prudent policy. The purpose of the bankruptcy trustee, as correctly indicated by the District Court, is to represent all creditors and for the "orderly administration of the bankruptcy estate by providing judicial supervision over the litigation to be undertaken." (R. p. 149.) If Christians feel the bankruptcy trustee failed in its duty to pursue this claim, they could have petitioned the Bankruptcy Court, as was their course of action in opposing McClung's discharge. Instead, Christians took intentional steps to appropriate the cause of action for themselves, instead of all

creditors. *See In re Monsour Medical Center*, 5 B.R. 715, 718 (Bkrtcy.Pa. 1980). The District Court was correct in ruling that allowing Christians to pursue this state action frustrated the Bankruptcy Court's function. (R. pp. 149-150.)

2. The District Court did not err in denying Christians' Motion for Summary Judgment.

Christians assert that there is no genuine issue and material fact and that the District Court should have granted summary judgment to the Christians. Apparently, Christians are attempting to appeal a summary judgment decision that has not been made. Implicitly, dismissing Christians' lawsuit is a denial of their Motion for Summary Judgment. However, such decision is not reviewable. There is no provision for appeal of a summary judgment decision under IAR 11. An order denying a motion for summary judgment is neither appealable, nor reviewable on appeal from a final judgment. *Hunter v. Dep't of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002). Therefore, the Court should not consider the Christians' arguments that it was error for the District Court to deny their motion for summary judgment.

Going to the merits of Christians arguments, Mason recognizes that, under the Idaho UFTA, one can be totally innocent, like himself, and still be subject to return of net gains. An extensive discussion, as Christians has done, is not necessary. Mason has two defenses to the fraudulent transfer allegations. Both defenses respond to Christians' arguments on appeal, but also serve as an additional support for granting summary judgment to Mason, even though the District Court did not expressly rule on the same. The first defense is that Mason only received reasonably equivalent

value. The second defense is that the funds Mason received from McClung in 2002 belonged to his father, not himself.

a. Reasonably equivalent value was given.

Pursuant to Idaho Code § 55-918, Christians had four years to bring the fraudulent conveyance related to disputed distribution from McClung. Christians were aware of this particular statute because, in paragraph 9 of their Complaint, they refer only to the three transfers to Mason, which took place less than four years earlier.

Each transfer is considered independently to determine whether or not the transfer was fraudulent. The entire statutory scheme (Idaho Code, Chapter 9 of Title 55), regarding fraudulent conveyances, is in the singular. In addition, there is a clear limitation on what is recoverable in a case like the present case, wherein the action against the transferee is procrastinated. In *Donell,* the United States Court of Appeals for the Ninth Circuit stated:

> Moreover, pursuant to UFTA, the Receiver is only entitled to recovery of the amounts above Kowell's initial investment transferred within the limitations period. Thus, the statute protects Kowell in two ways. It allows him to keep the full amount of his original investment, see Scholes, 56 F.3d at 757, and it shields those "profits" paid to Kowell for which the statute of limitations has run.

Donell v. Kowell, No. 06-55544, 2008 U.S. App. LEXIS 13843, at *30 (9th Cir. July 1, 2008).

The evidence shows that each and every month Mason received the exact amount of withdrawal as the reported earning, with the exception of a couple of months where principal was withdrawn. Even in such months, a clear break down between principal and reported earnings can be

made for each disbursement. Contrary to this distinct evidence, Christians make the argument, without supporting authority, that all of the last disbursements where reported earnings, not principal. As *Donnell* recently held, "gains" paid outside of the statute of limitation period are not subject to recovery. Because of Mason's investment practices, accounting can readily be done. Of the $45,615.19 received after July 20, 2002, $44,042.06 is the return of principal. The remaining $1,572.13 is reported earnings, which has been acknowledged from the beginning of this case. However, such amount would be *de minimis* to the present proceeding.

The basis of a defense to a fraudulent conveyance allegation cited by Christians (Idaho Code § 55-913(1)(a) and (b), and § 55-914(1)) is if the transfer was in exchange for "reasonable equivalent value." Pursuant to Idaho Code § 55-913(1)(a), the defense has the additional element of "good faith." "Reasonable equivalent value" is not defined in Idaho statute or law. Federal and state courts look at determining reasonable equivalent value on a case-by-case basis. Obviously, the main factors include the difference between the amount paid and amount received. In addition, other factors considered include good faith of the recipient and whether or not the transaction was made at arms length. *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc.*, 92 F.3d 139, 151-54 (3d Cir. 1996). Mason's withdrawals or payments correspond to a complete and exact accounting of the distributions. There is no evidence that Mason was in collusion with McClung or that he was an insider. Mason and Christians were equal in their respective relationships and knowledge as to McClung.

For the reasons and facts stated above and with the exception of the *de minimis* amount, the disputed funds received by Mason were the return of principal.

b. Mason is not liable for the funds he received which belonged to his father.

Idaho law allows recovery against the "the first transferee of the asset or the person for whose benefit the transfer was made. . . ." Idaho Code §55-917(2)(a). Although Mason handled his father's money by allowing it to be invested in Mason's name and Mason was the payee on the checks, nevertheless, the funds belonged to his father and Mason received no benefit from the funds.

Christians attack Mason's affidavit (R. pp. 65-88), wherein Mason establishes that the funds remaining in the account in 2002 were solely his fathers' funds, by asserting that such statements are conclusory. Mason was the person with factual knowledge as to the funds he personally handled as well as being knowledgeable of his own financial affairs. A sufficient foundation exists. Noteworthy is the fact that some of the McClung (RRLM) statements indicate "Monte Mason" as the client (R. pp. 69-71) and that Christians provided no contradictory evidence. The Idaho Supreme Court has stated:

> Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show that a genuine issue of material fact does exist. (Citation omitted). A non-moving party must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact. (Citation omitted); *Zehm v. Assoc. Logging Contractors, Inc.*, 116 Idaho 349, 350, 775 P.2d 1191, 1192 (1988).

Kiebert v. Goss, 144 Idaho, 225, 228, 159 P.3d 862, 865 (2007).

The evidence is undisputed that the 2002 funds were Mason's fathers, that Mason received no benefit from his father's funds, and that Mason is entitled to summary judgment in his favor.

3. Mason Is Entitled to His Attorney Fees and Costs on Appeal.

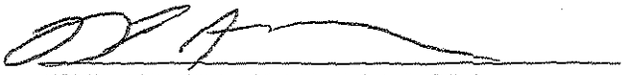
"Attorney fees are awardable if an appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence." *Nelson v. Nelson*, 144 Idaho 710, 719, 170 P.3d 375, 383 (2007) (citing *Anderson v. Larsen*, 136 Idaho 402, 408, 34 P.3d 1085, 1091(2001)). In the present case, Christians are simply requesting the appellate court to second-guess the District Court. It is appropriate to award attorney fees and costs to Mason.

CONCLUSION

The decision of the District Court granting Mason summary judgment should be affirmed and Mason should be awarded his attorney fees and costs.

DATED: September 18, 2008

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and accurate copies of the foregoing was served by hand delivering the copies on September 18, 2008, addressed to the following:

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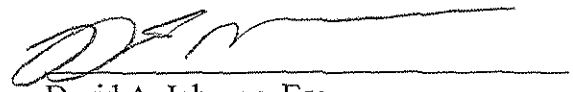

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