4-15-2009

Triad Leasing & Financial, Inc. v. Rocky Mountain Rogues, Inc. Appellant's Reply Brief 1 Dckt. 35659

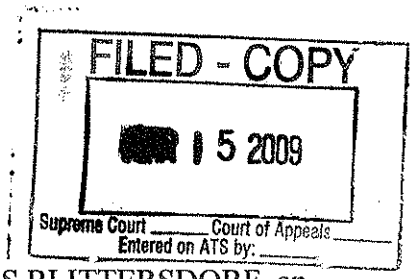
IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 35659-2008

TRIAD LEASING & FINANCIAL, INC.,

Plaintiff/Counterdefendant/Respondent

v.



ROCKY MOUNTAIN ROGUES, INC. a Wyoming corporation; JAMES BLITTERSDORF, an individual; and GLENNA BLITTTERSDORF-CHRITOFERSON, an individual,

Defendants/Counterclaimants/Appellants

ROCKY MOUNTAIN ROGUES, INC., a Wyoming corporation; JAMES BLITTERSDORF, an individual; and GLENNA BLITTERSDORF-CHRISTOFFERSON, an individual,

Third-Party Plaintiffs/Appellants

v.

G. ALAN MCRAE, individually, d/b/a LUND MACHINERY, an administratively dissolved Idaho and Utah corporation,

Third-Party Defendant/Respondent

THIRD-PARTY DEFENDANT/RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Kathryn A. Sticklen, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the case

This case began as a simple breach of contract action brought by Triad Leasing & Financing, Inc. ("Triad") against Rocky Mountain Rogues, Inc., James Blittersdorf and Glenna Blittersdorf-Christofferson (collectively "Rocky Mountain") due to Rocky Mountain's failure to make payments on a forklift it financed through Triad. Rocky Mountain then expanded the scope of the action to include claims of breach of contract, fraud and violations of the Idaho Consumer Protection Act against both Triad and the vendor of the forklift, Alan McRae, individually, d/b/a Lund Machinery ("Lund').

B. Course of proceedings

On August 8, 2006, Triad filed its breach of contract complaint against Rocky Mountain. (Clerk's Record at 9.) Rocky Mountain answered the complaint and filed claims against Triad and Lund alleging breach of contract, fraud and violation of the Idaho Consumer Protection Act, I.C. §48-601 et seq. (R. at 38). Upon Lund's summary judgment motion and after holding a hearing, the district court issued its Memorandum Decision and Order dismissing each of Rocky Mountain's claims, on November 7, 2007. (R. at 75.) The court entered its final judgment in favor of Lund on March 31, 2008. (R. at 97).

After a bench trial on all claims and counterclaims between Triad and Rocky Mountain, the court issued it Findings of Fact, Conclusions of Law and Order in favor of Triad and dismissing Rocky Mountain's counterclaims, on February 14, 2008. (R. at 88.) The court entered its judgment in favor of Triad on February 27, 2008. (R at. 94.)

Rocky Mountain filed a motion for mistrial and motions to reconsider both judgments. (R at 7). The court denied all of Rocky Mountain's post trial motions on July 31, 2008. (R. at 104.) Rocky Mountain then filed its appeal to the Idaho Supreme Court. (R. at 117.)

C. Statement of additional facts

In May 2003, Lund entered into a rental agreement with Rocky Mountain whereby Lund Machinery contracted to rent to Rocky Mountain a forklift for use on Rocky Mountain Rogues' property. (R. at 75.). This agreement continued into 2006. (Id.)

In 2006, Lund agreed to sell the previously rented forklift to Rocky Mountain. (Id.) Rocky Mountain financed the purchase by entering a lease agreement with Triad. (Id. at 75-76.) In addition to the forklift, a bucket and jib boom (attachments to the forklift) were included as collateral. (R. at 13).

The Equipment Lease Contract between Triad and Rocky Mountain Rogues was entered into on March 15, 2006. (Id.) James Blittersdorf agreed to pay $1406 per month for a period of sixty months (Id.). Blittersdorf and his wife guaranteed the payments. (Id.) An employee of Lund delivered the Triad contract to Rocky Mountain and collected a check as a deposit. (R. at 76)

The Lease Contract states:

> Lessee [Rocky Mountain Rogues] understands and agrees that Lessor [Triad] shall have no obligation to pay for the Equipment until Lessee has "accepted" the Equipment and Lessor has accepted the Lease at their office. By signing below, Lessee specifically authorizes Lessor to accept an Oral Acceptance from Lessee.

(R. at 13.) Below this paragraph, a line states, "Oral Acceptance taken by:" and is signed by a Triad agent on March 20, 2006. (Id.) In addition, Joseph Leslie with FCI Financial Services, Inc., an equipment financing brokerage used by Triad (R. at 78., n. 2) verified Blittersdorf's receipt of the equipment. (R. at 13).

Paragraph 4(b) of The Triad contract states:

> 4. NO RIGHT TO CANCEL AND OTHER IMPORTANT TERMS OF THE LEASE. You agree as follows:
>
> (b) THE LESSOR IS NOT RELATED TO MANUFACTURER(S) OR VENDOR(S)...WE ARE NOT RELATED IN ANY WAY TO THE VENDOR(S)...NEITHER THE VENDOR(S) NOR ANYONE ELSE IS AN AGENT OF OURS...

(R at 13). Rocky Mountain Rogues agreed to the above quoted terms when fact when it signed the Lease Contract on March 15, 2006. (R at 13.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Did the district court properly refuse to hear Rocky Mountain's motion to reconsider where Rocky Mountain failed to schedule the motion for hearing?

B. Did the district court properly determine, as a matter of law, neither the terms of the contract nor agency theory created liability for Lund?

C. Did the district court properly find that Rocky Mountain failed to establish a fraud claim against Lund?

D. Is Lund entitled to attorney fees on appeal?

III. ATTORNEY FEES ON APPEAL

Lund should be granted attorney fees on appeal. Idaho Appellate Rule 41 allows a party to affirmatively seek attorney fees on appeal. IDAHO APP. R. 41 (2009). A basis for attorney fees must be presented in the first appellate brief filed by the party in order to avoid waiving the claim

for attorney fees. IDAHO APP. R. 35(b)(5)(2009).

Idaho Code § 12-120(3) provides for the award of attorney fees to the prevailing party in a civil action relating to commercial transactions. IDAHO CODE ANN. §12-120(3)(2008). The statutory definition of a commercial transaction is defined as "all transactions except transactions for personal or household purposes." *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 470, 36 P.3d 218, 222 (2001). In order to be entitled to attorney fees pursuant to Idaho Code §120(3), two requirements must be met. *Id.* at 471, 36 P.3d at 223. First, there must be a commercial transaction that is integral to the claim. *Id.* Second, "the commercial transaction must be the basis upon which recovery is sought. *Id.* As such, "the commercial transaction must be integral to the claim and constitute a basis on which the party is attempting to recover." *Id.* Moreover, Idaho Code § 12-120 (3) "mandates an award of attorney fees on appeal as well as in the trial court." *Fox v. Mt. W. Elec.*, 137 Idaho 703, 712, 52 P.3d 848, 857 (2002).

In this case, Idaho Code §120(3) authorizes the award of attorney fees to Lund, in the event Lund is the prevailing party. First, Rocky Mountain's financing and purchase of the forklift for use in its business constitutes a commercial transaction. Second, all claims, counterclaims and third-party claims were based on the financing agreement that enabled Rocky Mountain to purchase the forklift.

Lund is also entitled to attorney fees under Idaho Code §12-121, which authorizes the award of attorney fees when an appeal is pursued "frivolously, unreasonably, and without foundation." *Electrical Wholesale Supply Co.* v. *Nielson*, 136 Idaho 814, 828, 41 P.3d 242, 256

(2001). When an appeal simply invites the appellate court to second-guess the trial court's factual findings which are supported by substantial evidence or presents no meaningful issues of law, the appeal is considered frivolous under Idaho Code §12-121. *Id.*

In this case, Rocky Mountain presented no material facts to support his claims against Lund. Nor has Rocky Mountain presented a novel legal issue or shown that the district court misapplied the law to the facts of the case. As such, attorney fees are warranted under Idaho Code §121.

For the above stated reasons, Lund is entitled to full, reasonable attorney fees, pursuant to Idaho Code §12-120(3), 12-121 and Idaho Appellate Rule 41, in the event Lund is deemed the prevailing party on appeal. Additionally, as the prevailing party, Lund would be entitled to costs as matter of course pursuant to Idaho Appellate Rule 40.

IV. ARGUMENT

A. Standard of Review

As this Court has recently stated:

> When reviewing an order for summary judgment, the standard of review for [the appellate court court] is the same standard used by the district court in ruling on the motion. Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. The nonmoving party must submit more than conclusory assertions that an issue of material fact exists to withstand summary judgment. However, [the appellate court] will construe all disputed facts and reasonable inferences in favor of the nonmoving party. If there is no genuine issue of material fact, "only a question of law remains, over which this Court exercises free review.

Mendenhall v. Aldous, ___Idaho ___, 196 P.3d 352, 354 (2008)(internal citations and quotations omitted).

B. The district properly refused to hear Rocky Mountain's motion to reconsider where Rocky Mountain failed to schedule the motion for hearing.

Counsel for Rocky Mountain asserts that the district court led him to believe that Rocky Mountain had pending claims against Lund at the time of trial and directs the Court's attention to a particular segment of the trial transcript. Appellate Brief at 19. However, if the referenced passage is put in context of the entire transcript, it becomes clear that the district court was addressing Rocky Mountain's oral motion, made on the day of trial, to have its motion for reconsideration heard that day. (Trial Transcript at 32:18 -33:34.)

Idaho Rule of Civil Procedure 11(2)(b) provides:

> A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order.

Rocky Mountain's motion to reconsider was subject to the general rules governing motions, affidavits and briefs, under Idaho Rule of Civil Procedure 7(b)(3). Rule 7(b)(3)(D) provides "If argument has been requested on any motion, the court may, in its discretion, deny oral argument by counsel ***by written or oral notice to all counsel before the day of the hearing,*** and the court may limit oral argument at any time." Idaho R. Civ. P. 7(b)(3)(D)(2009). Because Rocky Mountain had never requested a hearing on its motion, the district court did not set the matter for hearing. In turn, the district court properly declined to hear the motion without having

the motion properly scheduled and noticed. (Trial transcript at 63:19 -64:3.)[1]

Moreover, in reviewing the record it is clear that neither Lund's motion nor the district court's order limited the summary judgment proceedings to Lund's role as an agent of Triad. (*See e.g.* Reporter's Transcript on Appeal at 2:11 – 15 (MR SCHUSTER:... "We have filed this motion for summary judgment because we feel we are entitled to judgment as a matter of law on... the third-party plaintiff's claims that are before the court.); *see also* R. at 75-81. Memorandum Decision and Order (providing no indication that the grant of summary judgment is limited to Lund's role as an agent of Triad)).

C. The district court properly found Lund had no contractual liability to Rocky Mountain because Lund was neither a party to the contract nor an agent of Triad.

On appeal, Rocky Mountain appears to assert that its third-party complaint pled a breach of contract claim against Lund based on a separate contract that was entered "before Triad was involved." Appellant's Brief at 19. Rocky Mountain further claims that the district court never ruled on this claim in its summary judgment order. Appellant's Brief at 19. However, in reviewing Rocky Mountain's third-party claim against Lund it is clear that the breach of contract claim alleged against Lund was based on the contract between Rocky Mountain and Triad.

The complaint alleges that Lund arranged for Triad to finance the purchase of the equipment, made certain representations about the terms of the financing contract and therefore became a party to the contract with Triad (R. at 62, ¶54.) Rocky Mountain's complaint goes on to repeatedly allege "McRae/Lund individually and in concert with Plaintiffs caused the breach

[1] The district court also questioned Rocky Mountain's ability, and subsequent failure, to subpoena Lund employees to testify as fact witnesses in its case against Triad. (Trial Transcript at 36:18 -37:17).

of contract..." (R at 62, ¶¶54-56.) Accordingly, the parties and the district court addressed Lund's contractual liability to Rocky Mountain under the terms of the Triad contract, or alternatively, under agency theory. (R. at 79). The district court properly found that Lund was neither a party to the contract nor an agent of Triad. (R at.79).

Rocky Mountain based its claims on the Equipment Lease Contract and Purchase Equipment Agreement it entered with Triad. (R. at 10, 13-15.) Both of these documents identify the parties to the contract as Triad Leasing & Financial, Inc. as the Lessor, Rocky Mountain Rogues, Inc. as the lessees and Mr. and Mrs. Blittersdorf as the Guarantors (R. at 13-17.) Lund does not appear anywhere in the contract documents as a party to the contract. Accordingly, the district court properly found that Lund assumed no obligations under the contract. (R. at 79.)

Moreover, Lund cannot be made a party to the contract under agency theory. Paragraph 4(b) of the contract states in bold-faced type, "NEITHER THE VENDOR(S) NOR ANYONE ELSE IS AN AGENT OF OURS." (R at 13.) Just above Mr. Blittersdorf's signature on the contract, it states "[t]his is a binding contract. It cannot be cancelled. Read carefully before signing." (Id.)

The objective in interpreting contracts is to ascertain and give effect to the intent of the parties. *Twin Lakes Village Property v. Crowley*, 124 Idaho 132, 135, 859 P.2d 611, 614 (1993)(internal citation omitted). The intent of the parties should, if possible, be ascertained from the language of the documents. *Id.* (internal citation omitted). When a document is clear and unambiguous, the interpretation of its meaning is a question of law. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 873 993 P.2d 1197, 1204 (1999). The

determination of whether a document is ambiguous is itself, a question of law, which is resolved by "examining the document's relevant provisions to determine whether the contract is reasonably subject to conflicting interpretations "reasonably subject to conflicting interpretation." *Teterling v. Payne*, 131 Idaho 389, 392, 957 P.2d 1387, 1390 (1998).

The terms of the contract are not subject to conflicting interpretation. Instead, the contract unambiguously puts Rocky Mountain on notice that it was dealing with Triad exclusively and that Triad had no agency relationship with Lund.

Moreover, even if the Court were to consider evidence beyond the unambiguous language of the document, the agency claim still fails. Agency is a fiduciary relationship in which a principal confers authority upon an agent to act for the principal. *Gissel v. State*, 111 Idaho 725, 728, 727 P.2d 1153, 1156 (1986) (internal citations omitted). As the Court has stated in *Gissel*, agency can be established in three ways:

> First, real or express authority -- an expression by the principal, either written or oral, granting authority to the agent to act; Second, implied authority -- the principal acts in such a manner which leads the agent to believe that he has authority to act for the principal. Third, apparent authority -- acts by the principal involving third parties who are conversant with the business practices of the principal, whereby a reasonable person would be led to believe that the agent has authority to act for the principal. The party alleging the existence of an agency relationship carries the burden of proof.

Id.

Rocky Mountain has provided no evidence supporting that an agency relationship was ever created. To the contrary, Rocky Mountain admits that its agency claim is based on nothing more than Rocky Mountain's assumptions. At the summary judgment hearing, counsel for Rocky Mountain stated:

Essentially, Your Honor, its ***our belief*** that there was an agency relationship between Lund and Triad.... My client...***was under the impression*** that Lund and Triad were one and the same. (Reporter's Transcript on Appeal, 17:16 – 21.)(emphasis added).

***

[Rocky Mountain] ***assumed*** Lund and Triad were one and the same. He's simply a guy from Alpine, and he ***assumed*** they were one and the same entity. . . (Reporter's Transcript on Appeal, 20:2 – 5.) (emphasis added).

The assumptions and unsubstantiated impressions of Rocky Mountain do not create genuine issues of material fact that would preclude summary judgment. For all of the above stated reasons, the district court properly granted Lund's motion for summary judgment on the contract claims.

D. The district court properly dismissed Rocky Mountain's fraud claim against Lund on summary judgment because Rocky Mountain failed to present the elements of a *prima facie* case.

Rocky Mountain argues the district court erred by dismissing Rocky Mountain's fraud claim against Lund. Rocky Mountain specifically challenges the district's court's ruling that any alleged representation that a check would not be cashed constituted future promises rather than existing facts and therefore could not support a claim of fraud. (Appellant's Brief at 21.) However, the court's dismissal of Lund's claim was proper because Rocky Mountain failed as a matter of law to establish a *prima facie* case of fraud.

Fraud claims must be pled with particularity. I.R.C.P. 9(b). The *prima facie* case of fraud consists of: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of

its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (2005). A party alleging fraud "must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239 108 P.3d 380, 387 (2005)(emphasis added). Each element of fraud must be established by clear and convincing evidence; it will never be presumed. *Thomson v. Marks*, 86 Idaho 166, 177, 384 P.2d 69, 75-76 (1963).

Rocky Mountain argues that Lund committed fraud by representing that the $5,600 check made payable to Triad would not be cashed and that a bucket would be used as the security deposit instead. (Appellant's Brief at 21). Rocky Mountain further argues the alleged representations constituted an existing fact and not a future promise. (Id.)

The district court supported its dismissal of the fraud claim by finding any alleged statements regarding the status of the check would have constituted a promise of future events rather than a misrepresentation of existing facts. (R. at 80). The district court relied primarily on *First Security Bank of Idaho, N.A. v. Gaige,* 115 Idaho 172, 765 P.2d 683 (1988). In *Gaige*, the defendant argued that the express language of a personal guaranty allowing for unconditional recourse against the defendant should not have been enforced because it did not represent "the real deal," and that a loan officer fraudulently induced him to sign a personal guaranty by stating that the signature was a formality promising that the bank would seek recourse against the

company before enforcing the guaranty. *Gaige*, 115 Idaho at 175, 765 P.2d at 686. The Court found that the loan officer's representations "were at best promises of future performance and, as such, could not form the basis of a fraud claim to defeat First Security's right to enforce [the guaranty]." *Id.*

Rocky Mountain alleges Blittersdorf was told the check was needed merely to create "a paper trail," (Appellant's Brief at 23.) This alleged statement is indistinguishable from the type of representations made in *Gaige*. The alleged representation was essentially that the check was needed as a formality (a "paper trail") and would not be cashed in the future.

Rocky Mountain does not distinguish the facts in case at bar from *Gaige.* Instead, Rocky Mountain directs the Court to *Gillespie v. Mountain Park Estates, LLC,* 142 Idaho 671, 132 Idaho P.3d 428 (2006). (Appellant's Brief at 22.) In *Gillespie,* the court recognized two exceptions to "general rule that fraud cannot be based upon the mere failure to perform a promise." 142 Idaho at 431, 132 Idaho at 671. The exception cited by Rocky Mountain applies when "the promise was accompanied by statements of existing fact ***which show the promisor's ability to perform the promise*** and those statements were false." *Id.* (emphasis added).

Rocky Mountain argues that Lund's alleged promise not to cash the check is not only a statement of existing fact, but that it evidences Lund's ability to perform the promise and therefore may be the basis for fraud under the cited exception. (Appellant's Brief at 23). Rocky Mountain then argues Lund could perform in holding the disputed check "because it had done so in the past," under a 2003 rental agreement between Lund and Rock Mountain. (Id.)

This argument falls flat for two reasons. First, the terms of the earlier rental contract are irrelevant to the obligations created by the financing agreement between Triad and Rocky Mountain. They were two distinct transactions between two different parties. Second, there was no indication that Lund had any ability to prevent the check from being negotiated. The contract was between Triad and Rocky Mountain and the check was made payable to Triad only. Where Lund was not a payee, it was given no authority to negotiate or prevent the check from being negotiated.

Similarly, any alleged statement that the bucket would be used as security in lieu of cashing the check, even if assumed to be a statement of existing fact, does not establish Lund's ability to perform. Again, Lund was not a party to the contract and the contract gave Lund no authority to determine what would be used as a security deposit. (*see* R. at 13.) Moreover, the contract clearly states that the security deposit is to be $5,000. (Id.) It makes no reference to the bucket as security. (Id.) The express language of the contract put Rocky Mountain on notice that Lund could not perform on the alleged promises.

Rocky Mountain fails to establish that the exception set forth in *Gillespie* applies to the case at bar. Accordingly, the general rule that "fraud cannot be based upon statements promissory in nature that relate to future actions or upon mere failure to perform a promise or an agreement to do something in the future," (*Gillespie,* 142 Idaho at 674, 132 P.3d at 431) governs the disposition of this action. In turn, the district court properly found that the alleged promise to refrain from cashing check could not support Rocky Mountain's fraud claim against Lund.

Moreover, the district court correctly stated that the alleged statements cited by Rocky Mountain are inadmissible under the parole evidence rule. (R. at 80.) The parole evidence rule prohibits the "introduction of prior oral negotiations which contradict or vary the terms of a completely integrated writing." *Gaige*, 115 Idaho at 175-76, 765 P.2d at 686-87. As previously addressed under the express terms of the contract (1): Rocky Mountain and Triad are the only parties to the contract; (2) Lund as the Vendor was not an agent of Triad; (3) Rocky Mountain was obligated to provide a security deposit of $5,000 to Triad. (R. at 13). Any representation that the bucket would serve as security rather than the $5,000 deposit would contradict or vary the terms of the contract. Moreover, any suggestion that Lund had the authority to negotiate on behalf of Triad would also contradict the express terms of the contract. As such, the district court properly found that the alleged statements on which Rocky Mountain purportedly relied could not support its fraud claim.

CONCLUSION

For the foregoing reasons, the district court properly dismissed all of Rocky Mountain's clams against Lund. Accordingly, Lund respectfully requests that the Court affirm the district court's grant of summary judgment, affirm the district's denial of Rocky Mountain's motion to reconsider and award Lund's attorney fees and costs on appeal.

Dated: April 13, 2009.

BEARD ST. CLAIR GAFFNEY PA

By _____
Lance J. Schuster
Attorney for Third-party Defendant/Respondent

CERTIFICATE OF MAILING

I certify that two copies of the foregoing document, were mailed on April 13, 2009, to the following individuals via U.S. Mail.

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