

6-17-2010

Fazzio v. Mason Appellant's Reply Brief Dckt. 36068

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IN THE SUPREME COURT OF THE STATE OF IDAHO

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an Idaho)
Limited Liability Company,)

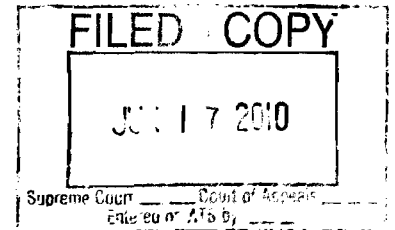
Plaintiffs/Respondents,)

vs.)

EDWARD J. MASON, an individual,)

Defendant/Appellant.)

Supreme Court Case No. 36068



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County

Honorable Kathryn A. Sticklen and Richard D. Greenwood, District Judges, Presiding

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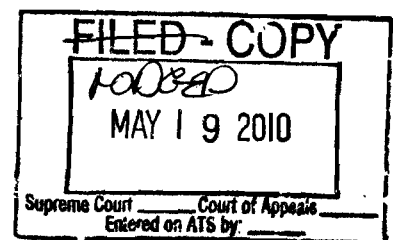


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I.

INTRODUCTION

Despite Respondents' assertions to the contrary, it is clear that the District Court abused its discretion in entering an order of specific performance that requires Appellant, Edward J. Mason, to close on the purchase of the Subject Properties. In ordering specific performance, the District Court abused its discretion by applying the wrong legal standard. The District Court erroneously applied the substantive impossibility of performance standard, which is different from the equitable rule against a specific performance order that is not practicable or feasible. The District Court's order also violates the rule against specific performance where the plaintiff has an adequate remedy at law.

II.

ARGUMENT

A. The District Court Erred In Ordering Specific Performance

1. Specific Performance Is Not Appropriate Because It Would Not Be Practicable or Feasible For Mr. Mason To Comply With The Order Of Specific Performance

Idaho law is very clear that a court should not order an equitable remedy, including specific performance, which is not feasible. *See, e.g., Anderson v. Whipple*, 71 Idaho 112, 125, 227 P.2d 351, 359 (1951), overruled on other grounds by *David Steed and Associates, Inc. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988) (“Equity will not enter a decree for specific performance the enforcement of which is not practicable or feasible.”); *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 745-46, 588 P.2d 939, 944-45 (1978) (dismissing claim for specific performance because “[i]t is well established that the courts will not order the

impossible”); *Childs v. Reed*, 34 Idaho 450, 202 P. 685, 686 (1921) (“Where the contract is of such a nature that obedience to the decree cannot be obtained by the ordinary processes of the court, equity will decline to interfere.”).

In opposing Respondents’ motion for summary judgment, Mr. Mason relied on this equitable rule. Mr. Mason submitted affidavits with financial information and a detailed explanation of his attempts to find any way possible to close on the purchase of the Subject Properties. Mr. Mason’s inability to close on the Subject Properties is clear and uncontested. Under the well-settled equitable rule, an order of specific performance is not appropriate.

2. The District Court Abused Its Discretion By Applying The Wrong Legal Standard

Respondents correctly point out the applicable standard for determining whether the District Court abused its discretion in ordering specific performance:

A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason.

Respondent’s Brief, p. 2 (quoting *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347) (2008) (emphasis added).

The District Court abused its discretion in that it did not apply the “applicable legal standard.” Instead, the District Court applied and rejected the wrong legal test. Mr. Mason conceded that he was in breach of the Agreements to Purchase the Subject Properties. Mr. Mason did not assert any substantive defenses to the breach of contract action. Rather, he objected only to the specific performance remedy sought by Respondents. He relied exclusively on the equitable rule against a specific performance order that is not practicable or feasible,

citing the multiple Idaho Supreme Court decisions explaining the applicable equitable rule. Even though the issue was not raised by the parties, the District Court asked for supplemental briefing on the substantive “impossibility of performance” defense. Mr. Mason explained that the “impossibility of performance” defense is a complete and substantive defense that excuses performance, as opposed to the equitable rule that precludes specific performance as a remedy, but allows for a damages remedy. *See* R., Exh. 4. Mr. Mason explained that the “impossibility of performance” defense does not apply “because the authorities generally hold that financial inability to perform does not excuse a breach.” *Id.* at p. 3. Mr. Mason expressly stated that he was not relying on the substantive “impossibility of performance” defense. *Id.*

Despite Mr. Mason’s citation to the applicable legal authorities and his disclaimer of any reliance on the substantive “impossibility of performance” defense, the District Court proceeded to grant summary judgment in favor of Respondents by analyzing the substantive “impossibility of performance” defense. For example, the District Court explained that the “impossibility of performance” defense applies only to objective, as opposed to subjective, impossibility. *See* R., pp. 82-83 (explaining that “it is the task itself which must be impossible – it is not enough that the particular promissor is unable to perform the task if it would be possible for a different promissor to perform” and explaining that the defense does not apply to a “subjective impossibility” of performing). The authorities cited by the District Court consisted of cases applying the substantive defense, not the equitable rule. The District Court did not address the equitable rule against an order of specific performance that is not practicable or feasible.

Notably, in their appellate briefing, Respondents make the same mistake the District Court made in confusing the two separate rules as one in the same. *See, e.g.,* Respondent’s

Brief, pp. 5-6 (arguing that the District Court properly “rejected Mason’s ‘equitable impossibility’ argument based upon the fact that Mason’s inability to close was subjective to him”; arguing that “Mason presented no evidence that no person could have closed on the purchase of Fazio’s real property, only that Mason himself was unable to do so. . . .”). These assertions confuse the substantive defense with the equitable rule. This Court has never drawn a distinction between objective and subjective impossibility with regard to the equitable rule. In fact, there is no requirement that a specific performance remedy be “impossible” to be excluded as an appropriate remedy. Rather, the rule broadly prohibits a specific performance remedy that “is not practicable or feasible.” *See, e.g., Anderson*, 71 Idaho at 125 (emphasis added).

The Restatement (First) of Contracts makes clear that the substantive impossibility of performance defense is different from the equitable rule and that the question of “subjective” or “objective” impossibility is inapplicable to the equitable rule. For example, the Restatement explains that the substantive impossibility of performance defense has the effect of “preventing a duty to perform a promise from arising, or as discharging such a duty after it has arisen, because the promise either is impossible of performance when made or subsequently becomes so.” *Id.* at § 454, Comment a. Section 455 explains that the substantive defense applies only to objective impossibility. *Id.* at § 455, Comment a (“It is the difference between ‘the thing cannot be done’ and ‘I cannot do it.’ The first is objective; the second subjective.”). The Restatement then goes on to compare the substantive defense set forth in Sections 454-455, which requires objective impossibility, with the equitable rule against specific performance, which applies where “performance by the defendant is impossible, either subjectively or objectively, and yet in which he is not discharged from duty.” *Id.* at § 368, Comment a (emphasis added).

In arguing that the District Court applied the correct legal standard, Respondents point to the following statement in the District Court’s Memorandum Decision and Order:

The Court cannot find that the present case presents a situation where performance is so unlikely and impossible that it would render the order futile.

See R., p. 00083. That statement, however, came immediately after the citations to the substantive “impossibility of performance” cases and the District Court’s explanation that “subjective impossibility” does not satisfy the test. Thus, it is clear that the District Court applied the wrong legal theory in granting summary judgment. Having failed to apply “the applicable legal standards,” the District Court abused its discretion in ordering specific performance.

3. Respondents Do Not Have A Contractual Right To Specific Performance

Respondents next argue that they have a contractual right to specific performance. Notably, the District Court did not adopt this argument, which has been squarely rejected by many other courts. For example, in *Black v. American Vending Co., Inc.*, 239 Ga. 632, 633, 238 S.E.2d 420, 421 (Ga. 1977), the plaintiff argued that it was contractually entitled to specific performance because “a provision in the contract itself authorized injunction and specific performance to either party ‘in the event of a breach or a threatened breach of any of the covenants, or provisions of the Lease . . .’”. The Court rejected the argument and held that, regardless of the contract provision for specific performance, the question of whether an order of specific performance is appropriate must be determined by applying the rules of equity:

The trial court correctly decided that the contract provision in question was void and unenforceable. Parties cannot by contract compel a court of equity to exercise its powers in what is really an ordinary case at law.

Id. (emphasis added).

Similarly, in *DiGiuseppe v. Lawler*, 269 S.W.3d 588 (Tex. 2008), a contract provided that specific performance would be available in the event of a breach. Nevertheless, the court rejected the plaintiff's argument that "the parties' contract alters the manner in which the law applies to this case." *Id.* at 596. The Court further held that a specific performance provision "does not entitle DiGiuseppe to obtain specific performance merely upon a showing of a breach or default." *Id.* at 597. Instead, specific performance would only be ordered if the requirements for specific performance were met. *Id.* (rejecting the plaintiff's contention that a contractual specific performance provision would "negate or waive the requirement under Texas law that he prove his readiness, willingness, and ability to perform as a condition to obtaining specific performance."); *see also Zannis v. Lake Shore Radiologists, Ltd.* 392 N.E.2d 126, 129 (Ill. App. 1979) ("[T]he mere fact that the parties to a personal services contract may have agreed therein to specific performance as a remedy cannot alter the necessity for imposing the general rule against compelling an employer to retain an employee.").

Even where a contract contemplates specific performance, specific performance remains an equitable remedy subject to the general rules of equity. *See generally, U.S. v. Stein*, 452 F. Supp.2d 276 (S.D.N.Y. 2006) ("Actions for specific performance and for injunctions always have been equitable in nature."); *Houghton v. Mammoth Ariz. G.M. Co.*, 68 P.2d 957, 50 Ariz. 44 (1937) ("The intervener is asking for specific performance, which is always regarded as an equitable action."); *Brooks v. Commissioner of Correction*, 105 Conn. App. 149 (Conn. App. 2007) ("[T]he primary purpose of a decree of specific performance, which is always an equitable remedy, is to place an injured [party] in a position that replicates, as nearly as possible, that

which [he or she] would have enjoyed but for the [other party's] unexcused breach.”) (citations omitted) (emphasis added).

Moreover, even the contract as issue here recognizes that an order of specific performance would not be automatic. Instead, the contract provides that “the non-offending party shall have a remedy of specific performance **and may apply to the district court** of the county of Ada, state of Idaho to have this Settlement Agreement enforced by a judgment for specific performance.” R., p. 91 (emphasis added). Thus, the parties recognized that a party would have to “apply to the district court” for an order of specific performance, leaving the actual entry of an award up to the court’s discretion consistent with the rules of equity.

4. The Appropriate Remedy Is An Award Of Damages

The well-settled rule in Idaho is that the “usual measure of actual damages for a purchaser's breach of contract for sale of realty is the difference between the contract price and the market value of the property at time of breach, plus rental value for any period of possession by the purchaser.” *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d 904, 912 (1993); *see also Lawrence v. Franklin*, 113 Idaho 895, 749 P.2d 1020 (Ct. App. 1988); *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979). The measure of damages is the “difference between the market value and the contract price on the date of breach or on the date at which he regains possession of the land.” *Id.* Moreover, the Plaintiff can obtain a damages award for “any appropriate consequential damages.” *Id.* Specific performance “is an extraordinary remedy that can provide relief when legal remedies are inadequate.” *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000).

Here, there is no reason Respondents cannot be fully compensated by an award of damages. Damages can be easily calculated by ascertaining the value of the Subject Properties as of the date of breach (December 21, 2007), and awarding Respondents the difference between that value and the contract price.

Plaintiff contends that he cannot be made whole because Mr. Mason caused the Subject Properties to be joined into the Kuna sewer LID. Damages arising out of this fact, however, are easily quantifiable, and Respondents can be made whole by a money judgment. In fact, Respondents have informed this Court of the exact dollar amount of his alleged damages. *See* Respondent's Brief, p. vi ("On February 18, 2010, the City of Kuna issued a final assessment in the amount of \$339,954.75").

Respondents similarly assert that they cannot be made whole because the Subject Properties have been annexed into the City of Kuna. As an initial matter, Respondents have not explained how the annexation has resulted in any harm to Respondents. If anything, it likely increases the value of the Subject Properties. More importantly, the order of specific performance does not remedy any harm to the respondents arising out of the annexation. Pursuant to the order of specific performance, Respondents have a valid, subsisting vendor's lien against the Subject Properties, which may be enforced through sale of the Subject Properties in the same manner and subject to the same restrictions as the execution sale of property subject to a decree of foreclosure as set forth in Chapter 1 of Title 6, Idaho Code. As they have already indicated, Respondents will satisfy the Judgment by foreclosing on their vendor's lien and having the properties sold at a foreclosure sale. When the Subject Properties are sold, Respondents may be entitled to a deficiency judgment. *See* Idaho Code § 6-108. Respondents

will almost certainly credit bid a portion of the Judgment and walk away with the Subject Property and a very large deficiency judgment. That deficiency judgment will result in a windfall to the Respondents in that it will be measured by the difference between the total judgment and the “reasonable value” of the Subject Property on the date of foreclosure (as opposed to the standard measure of damages of the difference between the contract price and the value of the property at the time of the breach.). Either way, Respondents will retain the Subject Property. The only practical difference is the amount of the final money judgment.

The standard measure of damages – the difference between the contract price and the value of the Subject Properties as of December 21, 2007 – is the appropriate measure of damages. Given the availability of an adequate remedy at law, it was an abuse of discretion for the District Court to order specific performance.

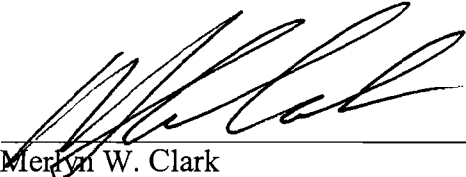
III.

CONCLUSION

The District Court abused its discretion in entering an order of specific performance, requiring Mr. Mason to close on the Subject Properties. First, the District Court abused its discretion by applying the wrong legal theory to the facts of this case. Second, the District Court’s order violates the equitable rule against specific performance where the Plaintiff has an adequate remedy at law.

RESPECTFULLY SUBMITTED this 19th day of May, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

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D. John Ashby

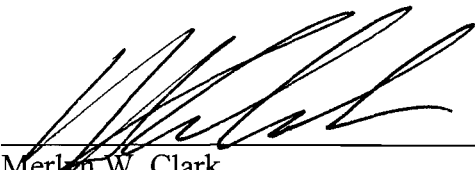
Attorneys for Defendant/Appellant Edward J. Mason

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of May, 2010, I caused to be served a true copy of the foregoing APPELLANT'S REPLY BRIEF by the method indicated below, and addressed to each of the following:

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