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Clayson v. Zebe Appellant's Reply Brief Dckt. 38471

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GAYLEN CLAYSON, Plaintiff-Counterdefendant-Respondent, vs. DON ZEBE, RICK LAWSON, AND LAZE, LLC., Defendants-Counterclaimants-Appellants.	Supreme Court Docket No. 38471-2011 Bannock County Case No. 2009-2212

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Sixth Judicial District in and for the County of Bannock

Honorable Stephen S. Dunn, District Judge, Presiding

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Clayson devotes many pages of his Brief to establish that he put time, money and effort into refurbishing the cheese plant. That is not disputed by Zebe and Lawson. Zebe and Lawson did not argue in Appellants' Brief on Appeal that Clayson did not put time, money and effort into refurbishing the cheese plant. Zebe's and Lawson's argument is that they are not liable to Clayson for that time, money and effort because, among other things, Zebe and Lawson did not own the cheese plant and restaurant when the improvements were made to it and when they bought the cheese plant and restaurant from a third party they paid for the improvements.

CLAYSON REFURBISHED THE CHEESE PLANT BECAUSE OF PROMISES BY FARINELLA, NOT BECAUSE OF PROMISES BY ZEBE AND LAWSON

Farinella owned the cheese plant when Clayson made the improvements for which he now seeks payment. In fact, Clayson makes it clear in his Brief that what he did, he did because of promises made by Farinella, not because of promises made by Zebe and Lawson:

1. The owner [Farinella] told Mr. Clayson that he could do whatever he wanted to get the plant ready to reopen as long as it didn't cost the owner or bankruptcy court anything. (Appellee's Brief, p. 17)
2. He [Farinella] promised Mr. Clayson he would clear title to the plant and make it possible for Mr. Clayson to buy the plant. (Appellee's Brief, p. 17)
3. Mr. Clayson, relying on the promise of the owner [Farinella] worked all summer and fall and spent substantial funds to refurbish the plant and get it ready to reopen. (Appellee's Brief, p. 17)

THE TRIAL COURT FOUND THERE WAS NO EXPRESS CONTRACT TO REIMBURSE CLAYSON

The trial court determined on motion for summary judgment that there was no partnership agreement between the parties and there was no express contract between the parties which would support a legal obligation on the part of Zebe and Lawson to reimburse Clayson for refurbishment expenses he incurred because of promises from Farinella. (R. Vol. 2, pp. 251 - 258) Therefore, in order to recover against Zebe and Lawson, Clayson had to prove either a contract implied-in-fact or a contract implied-in-law. Contracts implied-in-fact and implied-in-law are two different and distinct concepts.

EQUITY DOES NOT INTERVENE WITH AN IMPLIED-IN-FACT CONTRACT WHEN AN EXPRESS CONTRACT COVERS THE SAME SUBJECT MATTER

Clayson agrees[1] that an implied-in-fact contract requires evidence which supports the ***dual*** inferences that one performed at the other's request and that the requesting party promised payment. The trial court and Clayson agree that Clayson did not refurbish the cheese plant at the request of Zebe or Lawson or in reliance on a promise that Zebe and Lawson would pay for it. (R. Vol. 4, p. 738; Appellee's Brief, pp. 17 - 18) Instead, the trial court concluded, and Clayson argues in Appellee's Brief, that the obligation to pay Clayson arose as follows:

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[1]Clayson actually misquotes the decision in *Fox v. Mt. W. Elec.*, 137 Idaho 703, 708 (Idaho 2002), but the substance of Clayson's argument makes it clear that he agrees that both elements of the dual inference must be present.

> The Court finds that an implied-in-fact contract exists because Defendants conduct and statements create an implied agreement to pay Clayson's refurbishment expenses when he transferred operation of the Plant and restaurant to Defendants on October 8, 2008.

(R. Vol. 4, p. 739; Appellee's Brief, p. 18)

The trial court should not have imposed an implied agreement because there was an enforceable written agreement covering the same subject matter, i.e. the assignment which Clayson executed on November 4, 2008. (Exhibit N) The sequence of events which occurred beginning on October 8, 2008, is important. On October 8, 2009, Clayson relinquished his continued participation in the business. (R. Vol. 4, p. 732; Tr. Vol. 248, LL 11 - 24) From October 8 forward Clayson left the premises, had no further involvement in SVC, and did not do any further work on the Plant. (R. Vol. 4, p. 732) The SVC articles were amended shortly thereafter to delete Clayson as a member. (R. Vol. 4, p. 732) On October 17, 2008, Clayson and Randall signed a written offer to purchase the Plant from Star Valley Cheese, Inc. [Farinella] for $800,000. (R. Vol. 4, p. 732; Exhibit D) The offer included all of the work that Clayson had contracted others to do, all of the materials that Clayson had requested others to supply, all of the buildings, all of the improvements, all of the property and all of the personal property Farinella, or his company, owned, in its then condition for a purchase price of $800,000. (Tr. Vol. I, p. 249, L 4 - p. 251, L 10) On November 4, 2008, Clayson assigned all his right, title and interest in the purchase and sale agreement to SVC, LLC. Zebe and Lawson were the only members of SVC at the time of the assignment. (Tr. Vol. I, p. 253, LL 11 - 25; Exhibit N) Clayson tried to get Zebe and

Lawson to agree to reimburse him for the refurbishment expenses before he would sign the assignment. Zebe and Lawson refused, but Clayson signed the assignment "without any agreement on that day that he would be reimbursed." (R. Vol. 4, p. 734; Tr. Vol. II, p. 481, L 4 - p. 482, L 14)

"Equity does not intervene when an express contract prescribes the right to compensation." *Vanderford Co. v. Knudson*, 144 Idaho 547, 558 (Idaho 2007); *Shacocass, Inc. v. Arrington Constr. Co.*, 116 Idaho 460, 464 (Idaho Ct. App. 1989); *Wolford v. Tankersley*, 107 Idaho 1062, 1064 (Idaho 1984) (when the express agreement is found to be enforceable a court is precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract) Clayson argues that it makes no sense that he would relinquish his interest in the LLC **and** assign his interest in the purchase and sale agreement unless some promise had been made to him. (Appellee's Brief, pp. 17 - 18) However, under the circumstances in this case equity should not have intervened to alter the poor bargain Clayson made for himself.

Both Clayson and the trial court ignore the assignment by which Clayson assigned his interest in the purchase and sale agreement to an LLC in which he was not a member:

> Gaylen W. Clayson and Jeff Randall hereby assign all rights of said Contract to buy and Sell Real Estate to SVC, LLC a Wyoming LLC.

Exhibit N

By the assignment, Clayson relinquished any rights he had in the improvements. He had made those improvements for Farinella and after Clayson assigned the purchase and sale

agreement to Zebe and Lawson, Farinella was free to sell and Zebe and Lawson were free to buy the improvements without any further contractual obligation to pay Clayson. Courts do not possess the roving power to rewrite contracts in order to make them more equitable. *Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 41 (Idaho 2003) That, however, is precisely what the trial court did when it decided that in consideration for Clayson assigning his interest in the purchase and sale agreement he was entitled to be paid for refurbishing the property. (R. Vol. 2, p. 255) Clayson relinquished that entitlement when he signed the assignment.

ZEBE AND LAWSON WERE NOT UNJUSTLY ENRICHED BECAUSE THEY PAID $800,000 FOR THE PROPERTY WHICH INCLUDED CLAYSON'S IMPROVEMENTS

Clayson argues on appeal that he conferred value on Zebe and Lawson by introducing them to the "opportunity" and that the "value" of the "opportunity" was Clayson's cost of performing the refurbishments. (Appellee's Brief, p. 19)

The trial court did **not** find that the benefit was the "opportunity" nor did it value the "opportunity" that Clayson now claims he bestowed on Zebe and Lawson. Clayson had the burden of proving that Zebe and Lawson received a benefit and of proving the amount of the benefit which Zebe and Lawson unjustly retained. *Gray v. Tri-Way Constr. Servs.*, 147 Idaho 378, 389 (Idaho 2009) The trial court found the "benefit" was the improvements Clayson made to the restaurant and plant. The trial court found that on October 8 , 2008, Zebe and Lawson "took over a Plant and restaurant that was better than it had been before

Clayson's efforts and expenses." (R. Vol. 4, pp. 739 - 740) However, on October 8, 2008, Zebe and Lawson did not own anything so they did not and could not receive or accept the improvements. Zebe and Lawson had to purchase the improvements.

Zebe and Lawson did not own anything until the October 17, 2008 purchase and sale agreement was assigned to them on November 4, 2008, **and** closed by them on February 24, 2009, when Zebe and Lawson paid $800,000. The trial court and Clayson ignore that Zebe and Lawson **paid** for the improvements – they did not **receive** or **accept** anything without paying for it. Logically, one can assume that if Clayson had not improved the property it would have sold for less than $800,000. It is equally logical that the only person or entity which benefitted was Farinella or his business entity. That, however, does not give rise to an implied-in-law contract requiring Zebe and Lawson to reimburse Clayson for unjust enrichment.

ZEBE'S POST-ASSIGNMENT STATEMENTS DO NOT GIVE RISE TO AN OBLIGATION TO PAY CLAYSON

To the extent that Clayson and the trial court rely on Zebe's statements that he would pay Clayson something for his efforts **before** the assignment was signed on November 4, 2008, any legal or equitable liability to pay Clayson was extinguished by the terms of the assignment. Clayson assigned all right, title and interest in the contract to buy the property where he made the improvements. The trial court did not find the terms of the assignment to be unconscionable. In the absence of unconscionability, the trial court cannot rewrite the contract to make it more equitable just because the contractual provisions appear unwise or

their enforcement may seem harsh. *Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 42 (Idaho 2003)

However, Zebe made statements **after** November 4, 2009, to persons and entities other than Clayson on which the trial court and Clayson rely to support an equitable remedy against Zebe and Lawson. None of these statements is an unequivocal affirmation that Zebe and Lawson agreed to pay Clayson. None of these statements establish how much or for what specific expenditures Clayson was to be reimbursed. None of the post November 4, 2009 statements were made to Clayson. (R. Vol. 4, pp. 735 - 736)

These statements do not create an equity obligation to reimburse Clayson. The only way that these statements could give rise to an obligation to pay Clayson is if the statements corroborate or confirm a contract to reimburse Clayson. A distinct understanding common to both parties is necessary in order for a contract to exist. *Thompson v. Pike*, 122 Idaho 690, 696 (Idaho 1992) The basic elements of a contract are subject matter, consideration, mutual assent by all the parties to all the terms, and an agreement that is expressed plainly and explicitly enough to show what the parties have agreed. *State v. Korn*, 224 P.3d 480, 482 (Idaho 2009)

There was never a mutual agreement about how much Clayson was to be paid so no contract to do so came into existence. Clayson claims Zebe and Lawson agreed to reimburse him approximately $130,000 for bills he paid. (Tr. Vol. I, pp. 201 - 204) The bills listed on the first page of Exhibit "F" do not total anything close to $130,000. Exhibit F totals

$69,600. (Tr. Vol. I, pp. 205 - 209) The bills Clayson could actually substantiate with a check or credit card are a different amount, i.e. $97,310,24 which includes the $50,000 check to Dairy Systems[2]. This is what the trial court determined that Zebe and Lawson owed Clayson. (R. Vol. 4, p. 740) None of the post-November 4, 2008 statements by Zebe even mention a dollar amount. What was the contract? Was it $130,000? Was it $69,600? Was it $97,310.24? Clayson never testified that there was a verbal agreement to pay him a specific amount. Zebe and Lawson denied the existence of any such agreement. No enforceable contract comes into being when parties leave a material term for future negotiations, creating a mere agreement to agree. *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 621 (Idaho 2010)

Zebe's post-assignment statements did not corroborate or confirm a contract and give rise to no legal or equitable obligation to reimburse Clayson.

ATTORNEY FEES ON APPEAL

Clayson is absolutely correct that the prevailing party on this appeal should be entitled to attorney fees pursuant to I. C. 12-120(3) because the gravaman of these claims involves a commercial transaction. Zebe and Lawson have taken that position in their Appellant's Brief on Appeal.

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[2]Clayson claimed more, but the trial court did not allow all the claimed expenses.

However, Clayson is incorrect that this appeal is being pursued unreasonably and without foundation. The issues presented by this appeal are not being pursued frivolously, unreasonably and without foundation. An implied in fact contract requires performance at another's request and nobody disputes that the refurbishment was not done at Zebe's or Lawson's request. The trial court instead imposed an implied in fact contract to reimburse Clayson from the circumstances surrounding his relinquishment of an interest in the purchase agreement. Because that relinquishment was covered by the assignment, no equitable remedy was appropriate. Furthermore, because Zebe and Lawson bought the property from a third party after the improvements were made they paid for the improvements. They were not unjustly enriched at Clayson's expense. This appeal presents valid and legitimate issues for resolution on appeal.

CONCLUSION

Zebe and Lawson request this Court to reverse the judgment in favor of Clayson and remand this matter for entry of judgment in favor of Zebe and Lawson finding that Clayson failed to prove an implied-in-fact or implied-in-law contract for reimbursement. Zebe and Lawson request their reasonable attorney fees and costs incurred in prosecuting this appeal.

DATED this 29th day of July, 2011.

COOPER & LARSEN

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2011, I served two copies of the foregoing Appellants' Reply Brief to:

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