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Stapleton v. Jack Cushman Drilling and Pump Co Appellant's Reply Brief Dckt. 39198

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL STAPLETON

Plaintiff/Appellant,

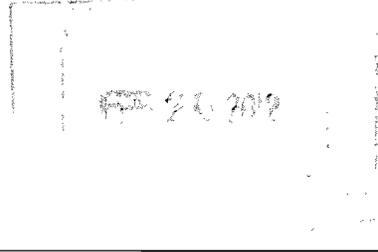
v.

JACK CUSHMAN DRILLING AND PUMP
COMPANY INCORPORATED, AND BOB
CUSHMAN,

Defendant/Respondent.

Trial Court Case No.: CV 2011-744

Appeal Docket No.: 39198-2011



REPLY BRIEF

On appeal from the District of the Seventh Judicial District of the State of Idaho, in
and for the County of Bingham

Honorable Darren B. Simpson, District Judge Presiding.

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ARGUMENT

1. In this case there are genuine, material issues of fact in the record regarding Cushman Drilling's statute of limitations defense.

In ruling on an appeal from summary judgment, this Court determines whether there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). The standard of review for this Court is the same standard used by the district court in ruling on the motion. *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). The facts in the record, together with all reasonable inferences from the evidence on file, must be construed in the light most favorable to the party opposing the motion for summary judgment. *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 913, 655 P.2d 119, 120 (Ct. App. 1982). In this case there are genuine, material issues of fact regarding Cushman Drilling's statute of limitations defense.

There are factual issues regarding the parties' oral contract. For example, there are factual issues about the scope of the project; there are factual issues about when the project would be final. There are factual issues about when Cushman Drilling breached the contract.

There are also genuine material issues of fact regarding Mr. Stapleton's tort claims against Cushman Drilling. In particular, there are factual issues regarding when Mr. Stapleton's property was injured by Cushman Drilling's negligence. Additionally, there are factual issues regarding the nature and amount of the damages.

2. There are genuine, material issues of fact as to when Cushman Drilling finally completed construction on the well.

In its Response, Cushman Drilling cited Idaho Code § 5-241, Idaho's Statute of Repose for causes of action that arise out of improvements to real property. According to Section 5-241, actions are "deemed" to have accrued on contract actions involving improvements to real property "at the time of *final* completion of construction of such an improvement." I.C. § 5-241 (Emphasis added). In this case, there are genuine issues of material fact as to when the construction of the well was *finally* completed.

The oral contract between the parties governs the terms of when Cushman Drilling began the project and when projected was finally completed. Mr. Stapleton has consistently asserted that the oral contract involved more than drilling the hole in August 2006; the oral contract was for the provision of water for a future home and landscaping finally completed in August 2007.

Even though the well was drilled on unimproved land in August 2006, Bob Cushman understood at the time he drilled the well that it was intended for a residence and landscaping. In Cushman's affidavit he stated, "in or about August 2006 Jack Cushman Drilling and Plaintiff orally contracted for the drilling of a well for a residential property in Mackay, Idaho."¹ Mr. Stapleton similarly stated that the well, though drilled on undeveloped land, was intended for a home. "In the summer of 2006, I called Bob Cushman and told him I needed water for my property and asked

¹ Aff. of Bob Cushman, ¶ 6, R. p.35.

him to drill a well and to provide the water for my property in MacKay.”² Stapleton also stated. “I am not a geologist or a well driller. I needed water for my property, and I asked Bob Cushman to do everything necessary to have water on the property.”³ And, “When Bob Cushman constructed a well, there was nothing else on the property but an empty land [sic]. I did intend, however, to build a house on the property.”⁴

In approximately August 2007, Mr. Stapleton built a home on the property and water was connected to the home. Mr. Stapleton’s affidavit states, “About a year later [after the well’s construction], I finally built a house on my property and water from the well was connected to my house in Mackay.”⁵

Count Two of the Complaint alleged that Mr. Stapleton and Cushman Drilling entered into an oral contract that Cushman Drilling would provide water to Mr. Stapleton’s residence and that Cushman Drilling breached that contract when Bob Cushman failed to provide the Plaintiff’s residence with a reliable source of water.⁶

Plaintiff entered into a contract with Cushman Drilling and Bob Cushman for the drilling of the water well and installing all the necessary components to have the water in the Residence. The water well and all its components were supposed to be free from defects and the plaintiff’s Residence was supposed to have a reliable source of water.⁷

The record establishes that there were factual issues regarding the oral contract between the parties and when that contract was finally completed.

² Aff. of Michael Stapleton, ¶5, R. p.63.

³ Aff. of Stapleton, ¶6, R. p.63.

⁴ Aff. of Stapleton, ¶7, R. p.63.

⁵ Aff. of Stapleton, ¶ 8, R. p.63.

⁶ Complaint, ¶¶ 15-18, R. pp. 6-7.

⁷ Complaint ¶ 16, R., p.7.

Section 5-241(b) states that the statute of limitations begins to run “at the time of *final* completion of construction of such an improvement.” (Emphasis added). Under the facts of this case, the final completion of construction was when the oral contract was completed and water was connected to the home and landscaping in August 2007.

Cushman Drilling cited the Idaho Court of Appeal’s case *Barab v. Plumleigh*, 123 Idaho 890, 893, 853 P.2d 635, 638 (Ct. App., 1993). In that case, the Court of Appeals addressed the issue of when construction was “finally” completed for purposes of Section 5-241(a). The “improvement” that gave rise to the plaintiffs’ complaint was a log-lighter device and a propane system that exploded.

The Court of Appeals considered when the “improvement” was finally completed to determine when Section 5-241(a) began to run. The Court named the “improvement” as follows:

The wood stove, the propane line running to it, and the log-lighting device, all were installed by February, 1982, when the home received a final inspection and certification for occupancy. Later, in July, 1982, a propane tank was brought to the site, filled, and put on line with the propane system.

Barab v. Plumleigh, 123 Idaho 890, 892, 853 P.2d 635, 637 (Ct. App., 1993).

Importantly, in *Barab* the propane tank was not included as part of the “improvement.” Though the opinion does not mention it, presumably the propane tank installed several months later was not part of the parties’ agreement.

After the Court determined that the propane tank was not included as part of the “improvement,” the Court reasoned that plaintiffs’ complaint was untimely. The Court reasoned as follows:

Obviously, the fueling of the propane system was essential for the stove's log-lighter device to actually function. However, the statute is triggered by the completion of the improvement's *construction*, not its readiness for actual use as urged by Barab. The record unequivocally demonstrates that the construction of the stove, including the log-lighter device, was completed by early February, 1982, more than eight years before Barab filed her complaint. Accordingly, her claim seeking to hold the Plumleights liable for the negligent design and construction of the stove is time-barred and properly was dismissed.

Barab v. Plumleigh 123 Idaho 890, 893, 853 P.2d 635, 638 (Ct. App., 1993)

(emphasis in original).

This case is distinguished from *Barab*. In *Barab* the “improvement” at issue was a log-ignition system. The propane tank was not part of the system because the propane tank was not part of the “improvement.” Accordingly, Section 5-241 began to run from the date the lighter system was installed and the home received final inspection and certification.

In this case, the contract between the parties—the “improvement” at issue—was for provision of water to a future home and future landscaping. Mr. Stapleton did not hire Cushman Drilling to dig a very deep hole on his land. Mr. Stapleton hired Cushman Drilling to construct a well to provide water for a very specific purpose—water for a home and landscaping.

Additionally, unlike in *Barab* where the “improvement” was the log-ignition system, the contract in this case involved a well and component parts to connect the

well to the home and landscaping. These component parts were not instituted until completion of the home and landscaping in approximately August 2007. Accordingly, Mr. Stapleton's April 2011 complaint was timely filed within the four years provided by Section 5-241.

The statute of limitation is an affirmative defense for which the defendants bear the burden of proof, and as the parties moving for summary judgment, the defendants, bear the burden of demonstrating the absence of a genuine issue of fact material to their statute of limitation defense. *Mason v. Tucker & Associates*, 125 Idaho 429, 437, 871 P.2d 846, 854 (Ct. App. 1994) (citations omitted). In this case, Cushman Drilling did not meet its burden as to Stapleton's contract claims. There are genuine issues of material fact regarding Cushman Drilling's statute of limitations defense.

3. There are genuine, material issues of fact as to when Mr. Stapleton and his property suffered "injury" and the extent of those injuries.

In its Response, Cushman Drilling failed to address injury and instead argued about the application of the economic-loss rule to the facts of this case. Cushman Drilling essentially argued that Stapleton's tort claims are completely barred because all of the damages are allegedly economic damages. That is not the decision the trial court reached, and that is not the issue Stapleton appealed.

On appeal, the issues are as follows: (1) Stapleton's property was injured when Cushman Drilling's well collapsed in fall 2010; (2) there are genuine, material issues of fact as to the nature and extent of the damages resulting from that injury; and (3)

the economic-loss rule may apply to some Stapleton's damages, but there are genuine issues of material fact that preclude summary judgment on the issue.

First, Mr. Stapleton's property suffered injury when Cushman Drilling's well collapsed in fall 2010. Mr. Stapleton alleged in his Complaint that Cushman Drilling breached a duty of reasonable care "including, but not limited to, drilling, the casing, and the pump."⁸ That breach of duty resulted in an injury that occurred several years after the well was connected to Stapleton's home in August 2007.

Mr. Stapleton's Affidavit submitted in opposition to summary judgment stated,

[I]n the Fall of 2010, the water stopped coming from the well altogether. I contacted Mr. Cushman again, but he refused to do anything about it. I needed water for the house and to water the lawn, so I contacted Rod Hendricks from Independent Drilling. Mr. Hendricks came over, inspected the well, and determined that the walls of the well caved in and the well was beyond repair.⁹

Attached to Stapleton's Complaint as Exhibit C is a report by an expert, Clearwater Geosciences, LLP, hired by Mr. Stapleton to determine the cause of the well's collapse. Clearwater determined that Bob Cushman's actions in drilling the well caused the well's collapse. Clearwater's reported stated as follows:

In summary, the Stapleton Well #1 [Cushman's well]:

- Should had [sic] a slotted well liner installed to hold back the soft geologic formation to prevent caving into the well thereby reducing flow;
- Was constructed in a manner that allowed inter-connecting of three water bearing aquifers in a single well, which is not allowed under Idaho Well Drilling Standards; and

⁸ Complaint. ¶13, R. p.6.

⁹ Aff. of Michael Stapleton, ¶¶ 13, 14; R. pp. 63-64.

- Was probably not properly developed to remove debris in the casing perforations.”

It is my opinion that this well was not constructed properly and in fact may have been illegal under Idaho State Well Drilling Standards.”¹⁰

It is undisputed that the collapsed well was an injury to Stapleton’s property. It is also established in the record that this collapse occurred in approximately fall 2010.

Second, the resultant damages, including classification of the damages and the extent of the damages, are factual determinations that will be more fully developed as this case proceeds through discovery. Mr. Stapleton was denied the opportunity to conduct discovery in this action. The suit was filed in April 2011. Cushman Drilling moved for summary judgment in May 2011, and the trial court granted summary judgment in August 2011. Mr. Stapleton now petitions this Court to reverse the trial court’s summary judgment decision and remand this case so that he may conduct discovery. These damages may include diminution in the value of property. *Farr West Investments v. Topaz Marketing L.P.*, 148 Idaho 272, 276, 220 P.3d 1091, 1095 (2009).

Third, as to the application of the economic-loss rule in this case, there are genuine, material issues of fact as to the subject of the transaction of the parties’ oral contract. Again, Mr. Stapleton alleges that the contract was for provision of water to a home and landscaping; he did not hire Cushman Drilling to merely dig a very deep hole on his land. The subject of the transaction was the well itself—*as well as the*

¹⁰ Complaint, Ex.C, R. p.16.

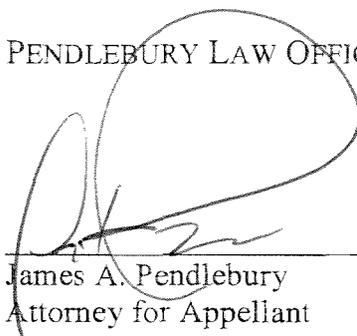
provision of water to the home and landscaping. Additionally, the trial court never determined whether a special relationship or unique circumstances applied in this case: "In addition, any claim Stapleton might have for a special relationship or unique circumstances shall not be considered."¹¹ Contrary to Cushman Drilling's Response Brief, Stapleton's tort claim is not completely barred by the economic-loss rule, the trial court did not find that Stapleton's claim was completely barred, and there are genuine issues of material fact as to whether the economic-loss rule applies at all under the facts of this case.

CONCLUSION

For the reasons stated above, Mr. Stapleton petitions this Court to reverse and remand this case to the trial court.

DATED this 28 day of February, 2012.

PENDLEBURY LAW OFFICE, P.A.



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Attorney for Appellant

¹¹ Order Granting Defendant's Motion for Summary Judgment, p. 13, R. p.84.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2012, a true and correct copy of the foregoing document was served to the following individual(s) via the indicated method:

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