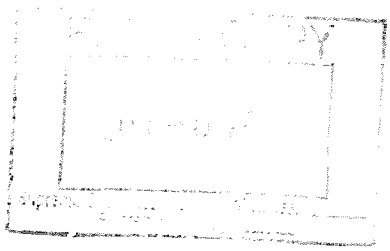
6-6-2012

Vanderwal v. Albar, Inc. Appellant's Reply Brief Dckt. 38085

IN THE SUPREME COURT OF THE
STATE OF IDAHO

ECHO VANDERWAL and JLZ ENTERPRISES, INC., an Ohio corporation registered in Idaho, Plaintiffs/Respondents, vs. ALBAR, INC., an Idaho corporation; Appellant, and ELMER B. SUDAU; T. OWEN MULLER and MARITA STEWART dba LAKE COUNTRY REAL ESTATE, Defendants. ALBAR, INC., an Idaho corporation, Plaintiff/Appellant, vs. JLZ ENTERPRISES, INC., an Ohio corporation, and JAMES O. STEAMBARGE, a single man, Defendants/Respondents.	DOCKET NO. 38085-2010 Bonner County Case No. CV-2007-1489 (No. CV-2007-1841 Consolidated) REPLY BRIEF



REPLY BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner

THE HONORABLE STEVE VERBY, DISTRICT JUDGE, PRESIDING

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REPLY STATEMENT OF THE CASE

The Respondents in their Respondents' Brief attempt to portray this action as a case of the medical missionaries doing good work in Africa being induced to buy a real estate development which was a pig in a poke that lead to "ruination," all at the hands of the evil doers, Mr. and Mrs. Sudau. Mr. and Mrs. Sudau owned and operated a small "mom and pop" convenience store with fuel sales and a marina business known as the Dock-N-Shop in Priest River, Idaho.

Echo VanderWal, the principal of JLZ Enterprises, Inc. at the time of the Albar to JLZ transaction was an established real estate developer, growing up in the construction business and doing development work in both Ohio and Idaho. Tr. Pgs. 457-460. In 2005, JLZ also pursued a large development parcel on Kelso Lake Road in Bonner County Idaho, and was represented by Marita Stewart and Owen Mullen of Lake Country Real Estate. Tr. Pgs. 628-632. The Dock-N-Shop property and Ms. VanderWal's project of acquiring and assembling all the various waterfront parcels were not her first rodeo.

JLZ through Echo VanderWal, prior to any contact with Albar or Mr. and Mrs. Sudau, purchased 3 parcels to the west of the Dock-N-Shop, which had been contaminated in the 2003 petroleum release and which was part of the ongoing remediation efforts. Tr. Pgs. 460-466. JLZ also acquired other parcels to the east of the Dock-N-Shop subsequent to the purchase from Albar, with her characteristic little investigation and taking on heavy encumbrances. Tr. Pgs. 627-637.

JLZ and VanderWal were represented in each transaction by her

long time trusted friend Marita Stewart of Lake Country Real Estate and one of its agents Owen Mullen. In fact, Ms. Stewart signed Ms. VanderWal's signatures to the various documents for the Dock-N-Shop purchase and sale agreement.

The petroleum release in 2003 and the remediation had been ongoing for several years by the time of the Albar to JLZ transaction. The Dock-N-Shop business had continuously operated during that time. The remediation was in existence through Albar's insurance coverage with PSTF and was pursued by the PSTF's contractor. A commercial remediation plan was in place and had IDEQ approval. The IDEQ was performing its regulatory oversight and there were no enforcement actions against Albar by the IDEQ.

The documents making up the purchase and sale agreement provided for the sale of the ongoing business and recognized what was termed a "recent" spill (over two years prior), recognized that the remediation process was ongoing, and provided for the remediation to continue. Albar was open in its understanding of the transaction, while JLZ was not forthright with its intentions.

- Albar had a long operating commercial convenience store, fuel sales, and marina business, known as the Dock-n-Shop. The 2003 fuel release was being remediated to commercial standards.
- All of the language of the PSA provides for CUP residential or hotel/rental development of the <u>adjoining</u> property, not the Dock-n-Shop.
- The PSA also provided for JLZ to accept the property in it's as is condition, and that JLZ chose to have inspections and investigations of that condition.

- Paragraph 3 of the Counter Offer in the PSA is the sole provision upon which JLZ asserts its breach of contract. It provides: "Seller has all responsibility and liability for recent gasoline spill on property and adjoining property."
- Prior to closing, JLZ continued its charade of intentions of operating the business, and Addendum #3 dated 8/29 provided for Albar to aid in the transfer of licenses prior to and after closing.
- Also, prior to closing, JLZ apparently had enough information to determine that institutional lending would not be available because of environmental concerns and she proposed that Albar carry part of the purchase price, with a pledge of the property, including the building and other improvements.
- Albar directed all inquiries as to the status of the fuel spill and remediation to the regulatory authorities IDEQ, the insurer PSTF, and the consultant handing the remediation Kleinfelder, and authorized release of all information.
- At closing, the intention of the parties as set forth in the documents must be the yard stick to measure the contractual provision of paragraph 3 in the counter offer. Albar sold a going commercial concern, with a remediation in place that allowed the ongoing operations, and took back a security interest in the property and buildings.
- JLZ had investigated the fuel spill and existing

remediation, and closed on its purchase. Also, it submitted a CUP application to the City of Priest River for a mixed use residential and retail.

In the Respondents' Brief, JLZ and VanderWal assert that "[t]o mitigate damages, JLZ stepped in and did what should have been done at the outset to remediate the site." Respondent's Brief, P. 2. JLZ did not contract for any specific site remediation effort or method. JLZ contracted for the existing established ongoing remediation. What JLZ failed to do at the time of contracting and closing, is not the measure of the parties' respective obligations under the contract.

In addition, JLZ was, following trial and the payment of monitoring by the IDEQ, reimbursed for remediation costs which were for sums awarded as part of the offset damages to the amounts due Albar.

REPLY ARGUMENT ON APPEAL

I. THERE WAS NOT A BREACH OF CONTRACT

The Respondents assert that the arguments regarding the District Court's findings and conclusions that a breach of contract occurred are "Incomprehensible." It is irrelevant if the Respondents comprehend the arguments. The District Court erred in imposing the clean up timeline and plan that it did (which just happened to align with those unilateral desires or directions asserted by the Buyer JLZ) to the contractual terms to find the ongoing and established remediation lacking.

This is a case first and foremost involving the interpretation of the contract, specifically the provision in Counter-offer #1, paragraph 3, which provides "Seller has all responsibility and liability for recent gasoline spill on property and adjoining property." (Plaintiff's Exhibit 2). The District Court erred in its interpretation of the contract as set forth in the Appellant's Brief. The contract gives rise to a duty of good faith, which Albar met. The District Court's findings of fact regarding the contract interpretation are not supported by substantial, competent evidence. The District Court's conclusions of law regarding breach of contract are erroneous.

This case is second about JLZ's enrollment in the voluntary cleanup program, the time it took to remediate, and the reimbursement which was in the process of being entitled to receive at trial and which it did ultimately receive. At trial, JLZ urged an interpretation of the contact contrary to the terms of the face of the contract. By the post-closing conduct by JLZ, the actual obligations of Albar under the contract could not be

met. The conduct of JLZ directly impaired and impeded Albar's contractual obligations to JLZ regarding the ongoing remediation.

The conduct and actions of JLZ cannot withstand the scrutiny of reasonableness, required by the law. Albar made several reasonable proposals to JLZ as the dispute arose and the issues went forward regarding remediation. In fact, it took JLZ several years to accomplish remediation of the property. The timeframe JLZ took was similar to the timeframes experienced by Albar, without the ongoing business operations on the premises or the fractured ownership of the parcels. JLZ did not accomplish any quicker what it complained of Albar not accomplishing.

II. THE DAMAGES AWARDED WERE IN ERROR

The Respondents assert that the arguments regarding the District Court's findings and conclusions in awarding damages for breach of contract are "Frivolous." It is irrelevant what the Respondents assert as to the arguments. The District Court erred in awarding JLZ damages for the sums JLZ asserted that were beyond the contemplation of the parties to the contract. In addition, the District Court failed to apply the doctrine of avoidable consequences to JLZ for it to mitigate its damages.

Albar sold a going concern business and going concern petroleum release clean up. JLZ apparently always planned on clearing the property and developing it. Albar was assessed damages for JLZ clearing the property, not just of the fuel release remediation. It was never in the parties aligned expectations that Albar would pay to remove the buildings, fuel tanks, etc. The District Court awarded as damages sums for items

that were beyond the contemplation of the parties to the contract.

In addition, JLZ had a duty to mitigate damages (also known as the doctrine of avoidable consequences) which the District Court failed to address whatsoever. The District Court failed to credit the clean up expenses which at the time of trial were unreimbursed, but which the record showed were available for reimbursement at the rate of 70% or $150,000, whichever is greater. The expenses were alleged to be greater than $150,000. Tr. Pgs. 616-619. At the time of trial $150,000 was the appropriate reduction in the offset trials.

Here, JLZ sued Albar for breach of contract for failing to clean up the petroleum release at the real property. The situation of the clean up can be removed from the contentious discord and dislike between Al Sudau and Echo VanderWal over Ms. VanderWal's real estate development not moving forward. If one looks at this situation as just a contract for clean up, it can be greatly simplified and boiled down. If the stage is viewed as JLZ being a property owner that contained a petroleum release. If JLZ could contract with a government insured to clean up the property or could contract with a government agency to enroll the property in a clean up program, JLZ could pursue either path and get a clean up without having to ultimately be out of pocket. In addition, if one path does not get the result (and gives rise to damages), the duty to mitigate (or the doctrine of avoidable consequences) would require to person to reasonably pursue the other path rather than passively setting back and allowing damages to be incurred. See O'Neil v. Vasseur, 118 Idaho 257, 262-63 (Ct. App. 1990) cited in the Appellant's Brief.

Whether limited as a measure of damage or based upon the doctrine of avoidable consequences, the law abhors duplicative recoveries. JLZ is not entitled to a windfall, that is offset damages to the amounts due to Albar and affirmative reimbursement from DEQ funds. JLZ cannot recover more than the actual loss suffered. The reimbursement from DEQ reduces the actual loss suffered by JLZ.

The District Court erred in its award of damages for breach of contract as set forth in the Appellant's Brief. The District Court's findings of fact regarding damages are not supported by substantial, competent evidence. The District Court's conclusions of law regarding damages are erroneous. JLZ cannot recover damages beyond the contemplated scope of the parties and damages awarded must be tempered by the duty to mitigate. At the time of trial, JLZ was entitled to reimbursement from the IDEQ pilot project, but had only failed to receive reimbursement by its own conduct. The District Court erred in not even considering the duty to mitigate.

III. THE REMEDIATION REIMBURSEMENT WAS NOT PROPERLY CONSIDERED AND APPLIED TO THE DAMAGES AWARDED

In addition to arguing the duty to mitigate at trial based upon the $150,000.00 cap on reimbursable expenses, following trial Albar sought relief for the actual funds then received from IDEQ by JLZ. Albar sought relief under I.R.C.P. 60(b) (2), (5), or (6). The decision of the District Court failing to address the duty to mitigate at trial was already on appeal. The Rule 60(b) motion was not an impermissible attempt at an untimely Rule 59

motion for a new trial or for reconsideration. The Rule 60(b) motion was not an attempt substitute for a timely appeal. A timely appeal had already been taken.

New evidence (not just newly discovered pre-existing evidence) is allowed on a Rule 60(b) motion. As set forth in Moffett v. Moffett, 151 Idaho 90, 96, 253 P.3d 764, 770 (Ct. App. 2011) "... I.R.C.P. 60(b) authorizes the presentation of new evidence, *see Lowe v. Lym,* 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct.App.1982), and subsection (b)(5) of the rule provides for relief from a final judgment if 'it is no longer equitable that the judgment should have prospective application.'"

If the District Court's actually considered the issue and just silently chose not to reduce the offset damages awarded on the basis that JLZ had not received the funds or could not afford to pay for the remaining monitoring, then the fact of actual completion of the monitoring and receipt of the funds may effect the District Court's decision. The new evidence presented was relevant and was timely presented.

The facts that subsequent to trial JLZ completed final monitoring, received clearance from the IDEQ for the property, applied for reimbursement from the IDEQ pursuant to the pilot rebate program, and received an actual rebate of $145,021.95 for much of the same sums ($198,742.62) as were awarded as offset damages ($228,044.72) against ALBAR for breach of contract, meets the requisite showings under IRCP 60(b)(2), (5), or (6).

ALBAR is entitled to relief from the amount of offset damages awarded to JLZ in the Judgment And Decree Of Sale entered July 27, 2010 for the sums received from the completion and reimbursement

to JLZ. The reimbursement makes it no longer equitable that the amount of net judgment in favor of ALBAR, INC. for foreclosure should be reduced to extent prior to reimbursement. The reimbursement also justifies relief from the operation of the original calculation of offset damages in the judgment. JLZ is only entitled to a single recovery for compensatory damages for breach of contract. JLZ received the sum of $145,021.95 from the IDEQ pilot program to reimburse it for clean up expenditures. Those same expenditures were the basis for the award of breach of contract damages. The net sum of damages after reimbursement is the only proper calculation if the District Court's findings and conclusions are otherwise upheld.

Alternatively, if the offset damages awarded against ALBAR are not reduced by the reimbursement received, ALBAR would be subrogated to the funds reimbursed and/or would be entitled to equitable reimbursement from the funds received by JLZ from the IDEQ. The Court should reduce the offset damages awarded in this action for the sake of judicial economy, rather that have ALBAR commence a separate action for subrogation and equitable reimbursement.

As set forth above, ALBAR is entitled to the relief sought, specifically a reduction of the offset damages by the sum received by JLZ from the IDEQ.

CONCLUSION

The District Court's findings and conclusions of a breach of contract should be reversed. If the findings and conclusions of breach are upheld, the damages awarded by the District Court should be reversed based upon the contemplated damages of the parties or reduced based upon the duty to mitigate. If the damages are upheld, Albar should receive relief from the damages awarded, for the sums received for reimbursement to JLZ from the IDEQ for remediation.

RESPECTFULLY SUBMITTED this 4th day of June, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2012, two (2) true and correct copies of the foregoing, were served by deposit in the U.S. Mail, postage prepaid, and were addressed to:

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