6-7-2017

Douglas v. Zions Bank, N.A. Respondent's Brief 2 Dckt. 44645

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID DOUGLAS, TERRY KERR	)	
	)	
Plaintiffs/Appellants,	)	
	)	**Civil Case No. CV-2016-2713**
v.	)	
	)	**Docket No. 44645-2016**
ZIONS BANK, N.A., NATIONSTAR MORTGAGE LLC, PRINCE AND YEATES P.C.	)	
	)	
Defendants/Respondents	)	

RESPONDENT ZB, N.A. dba ZIONS FIRST NATIONAL BANK'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE JOEL E. TINGEY
District Judge

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STATEMENT OF THE CASE

The appeal before this Court is the third lawsuit brought by appellant Terry Kerr ("**Kerr**") against ZB, N.A., dba Zions First National Bank ("**Zions Bank**"),[1] and the second lawsuit brought by appellant David Douglas ("**Douglas**") against Zions Bank. Together, Douglas and Kerr have filed four lawsuits against Zions Bank. Each of the four complaints filed by Douglas and/or Kerr make bizarre and often unintelligible allegations concerning alleged wrongs Plaintiffs individually or collectively have suffered. All of the complaints contain the same claims for relief: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) unjust enrichment; (4) breach of fiduciary duty; (5) intentional interference with contractual relations; (6) violation of the Idaho Deceptive Trade Practices Act; (7) violation of the Truth in Lending Act ("TILA"); (8) violation of the Anti-Tying Provision of the Bank Holding Company Act ("BHCA"), and (9) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). R. 28.

The first complaint was filed by Douglas on February 20, 2015, in the United States District Court, Central District of Idaho ("**Case No. 1**").[2] R. 31. The Federal District Court dismissed all of Douglas's federal claims (i.e. claims based on TILA, BHCA, and RICO), and declined to assert jurisdiction over the pendent state claims. R. 31.

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[1] On or about December 31, 2015, Zions First National Bank changed its name to ZB, N.A. dba Zions First National Bank.

[2] *David Douglas v. Zions Bank N.A.[sic]and Nationstar Mortgage LLC*, Case No. 4:15-cv-00055, United States District Court-Idaho (dismissed, no appeal).

While Case No. 1 was still pending, the second lawsuit was filed by Kerr on May 4, 2015, with the Seventh Judicial District Court in Bonneville County, Idaho ("**Case No. 2**").[3] R. 30-31. After full briefing and a hearing on the matter, the Honorable Darren B. Simpson dismissed with prejudice all of Kerr's claims on the merits because, among other reasons, Kerr was not a customer of Zions Bank and had no contractual relationship with Zions Bank. No appeal was filed. R. 30.

Kerr and his son, Dennis Kerr, filed the third lawsuit in the United States District Court for the District of Nevada ("**Case No. 3**").[4] Case No. 3 was dismissed on the merits, and also because the claims brought by Kerr in Case No. 3 were the same claims adjudicated and fully dismissed by Judge Simpson in Case No. 2. *See Kerr v. Bank of Am., N.A.,* No. 315CV00306MMDWGC, 2016 WL 5107069, at *5-6 (D. Nev. Sept. 19, 2016). Case No. 3 is on appeal before the Ninth Circuit Court of Appeals.

The lawsuit on appeal before this Court was filed by Douglas and Kerr on May 16, 2016 ("**Case No 4**").[5] The Honorable Joel E. Tingey of the Seventh Judicial District Court dismissed Kerr's claims because he asserted the same claims dismissed by Judge Simpson in Case No. 2. R. 31. Judge Tingey, likewise, dismissed all of Douglas' federal law claims because those

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[3] *Terry Kerr v. NationStar Mortgage, Zions Bank, N.A.[sic] et al.,* Case No. CV-15-2429, Seventh Judicial District Court, Bonneville County, Idaho (dismissed, no appeal).

[4] *Dennis Kerr and Terry Kerr v. Bank of America N.A., Zions Bank, N.A. [sic] and Quinney & Nebeker [sic],* Case No. 3;15-CV-00306, United States District Court-Nevada (dismissed, appeal pending).

[5] *Terry Kerr and David Douglas v. Zions Bank, N.A. [sic] Nationstar Mortgage LLC, and Prince Yeates P.C.*, Case No. CV-2016-2713, Seventh Judicial District Court, Bonneville County, Idaho (dismissed, appeal pending).

claims had been dismissed with prejudice on their merits by the United States District Court in Case No. 1. R. 31, 35. Douglas's state-law claims were also dismissed on their merits by Judge Tingey. R. 31-35.

Although difficult to discern in Appellants' Opening Brief, the main issue in this appeal is whether the trial court erred in dismissing Kerr's and Douglas's claims. As set forth herein, the Seventh Judicial District Court properly ruled that Kerr's claims were barred by the doctrine of res judicata as a result of the final judgment entered in Case No. 2. Likewise, the district court properly ruled that Douglas's federal law claims were finally adjudicated in Case No. 1, and that Douglas could not sustain a claim based on Idaho state law.

ARGUMENT

I. DOUGLAS AND KERR DO NOT PRESENT ARGUMENTS ON WHICH THIS COURT CAN RULE.

Douglas and Kerr's brief is full of conclusory accusations of conspiracy, crooked judges, corruption, and bribery. But none of these allegations is supported by a single reference to any evidence, much less the record on appeal.

"In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief." *The David and Marvel Benton Trust v. McCarty*, 161 Idaho 145, 384 P.3d 392, 402 (2016). When arguments "are presented in a conclusory fashion and do not contain any legal reasoning," this Court "will not consider" them. *Id.* This Court has reiterated on numerous occasions that '[w]hen issues on appeal are not supported by propositions of law, authority, or argument, they will not be

considered." *AgStar Fin'l Servs. ACA v. Northwest Sand & Gravel, Inc.*, 161 Idaho 801, 391 P.3d 1271, 1285-86 (2017). In the case of *Bach v. Bagley*, 148 Idaho 784, 229 P.3d 1146, 1152 (2010), this Court wrote:

> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, these assignments of error are too indefinite to be heard by the Court. A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. This Court will not search the record on appeal for error.

In this case, the district court held that all of Kerr's claims were barred by the doctrine of res judicata. Other than attacking the integrity of the district court and the honesty of opposing parties and counsel, Kerr does not respond to this ruling. The argument section of Douglas and Kerr's brief consists of a single paragraph that does not even contain the words "res judicata," much less any legal analysis or argument regarding the doctrine. Accordingly, there is nothing for the Court to consider on appeal with respect to any of Kerr's claims.

The same is true with respect to Douglas's federal claims. These claims were also dismissed by the district court on the basis of res judicata, and as with Kerr's claims, there is nothing that this Court can consider on appeal with respect to Douglas's federal claims because he presents no argument or authorities regarding res judicata.

The only remaining claims are Douglas's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, and tortious interference with contract. The only one of these claims that Douglas even mentions in the argument section of his brief is the claim for breach of the implied covenant of good faith and

fair dealing. Douglas cites the case *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204, 1216 (2000), for the proposition that there is an implied covenant of good faith and fair dealing in every contract. This is, of course, not in dispute. But Douglas never explains how the district court allegedly erred with respect to its ruling regarding application of the implied covenant in this particular case. And Douglas does not present any argument whatsoever regarding his other state-law claims. The failure to support an alleged error with argument and authority is deemed a waiver of the issue on appeal. *Bach*, 229 P.3d at 1152. Thus, there is nothing for this Court to consider on appeal.

Douglas and Kerr have not provided anything for this Court to consider on appeal, and they have not complied with Idaho Appellate Rule 35(a)(6), which requires a statement of the "reasons" for the appellants' contentions as well as citations to authorities and parts of the record relied upon. I.R.A. 35(a)(6). Where Douglas and Kerr have "wholly failed to comply with Rule 35(a)(6)," this Court should not consider their appeal. *Baughman v. Wells Fargo Bank, N.A.*, 2017 WL 2303530, *5 (Idaho 2017). The Court should deny the appeal on this basis alone.

II. IN ADDITION, DOUGLAS AND KERR HAVE NOT PROVIDED A RECORD TO SUBSTANTIATE THEIR APPEAL.

In addition to the failure to comply with Rule 35, Douglas and Kerr have not provided a record to substantiate their appeal as required by Idaho Appellate Rule 28(a) and (c). None of their briefs and none of the documents they presented to the district court are contained in the record on appeal.

An appellate court "will not presume error on appeal." *State v. Murinko*, 108 Idaho 872, 702 P.2d 910, 911 (Idaho 1985). "It is axiomatic that an appellant bears the burden of establishing a record, and presenting it on appeal, to substantiate his claims or contentions before the appellate court." Douglas and Kerr have not established a record to substantiate their contentions that the district court erred in its legal rulings. Nor have they established any kind of a record to substantiate their serious allegations that the district court is corrupt and accepted payoffs. In the absence of such a record, this Court cannot consider their arguments, and their appeal should be dismissed.

III. THE DISTRICT COURT PROPERLY DISMISSED ALL OF KERR'S CLAIMS AND DOUGLAS'S FEDERAL CLAIMS UNDER THE DOCTRINE OF RES JUDICATA.

The district court properly held that Kerr's claims, and Douglas's federal claims, were all barred by the doctrine of res judicata. R. 31. Res judicata "serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims." *Ticor Title Co. v. Stanion,* 144 Idaho 119, 157 P.3d 613, 617 (2007) (citation omitted). Under Idaho law, "res judicata covers both claim preclusion (true res judicata) and issue preclusion (collateral estoppel)". *Id.* (citation omitted).

Claim preclusion specifically "bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action which might have been

made." *Id.* (alteration and quotation marks omitted). For "claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment." *Id.* at 618. If these three requirements are met, "[c]laim preclusion bars adjudication not only on the matters offered and received to defeat the claim, but also as to every matter which might and should have been litigated in the first suit." *Id.* at 620 (citation and quotation marks omitted).

In other words, under Idaho law, "when a valid, final judgment is rendered in a proceeding, it extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose." *Id.* (citation and quotation marks omitted). Importantly, the "transactional concept of a claim is broad," meaning that "claim preclusion may apply even where there is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories." *Id.* (citation and quotation marks omitted).

Here, the district court properly dismissed Douglas's federal claims and all of Kerr's claims because "the complaint in this action contain[ed] the same claims against the same part[ies]" as those claims previously dismissed by Idaho state and federal courts. *See* R. 31. The federal claims asserted by Douglas in this case were the very same claims asserted by Douglas in Case No. 1. *See* R. 31. The claims asserted by Kerr in this case were the very same claims asserted by Kerr in Case No. 2. *Id.* The record is clear that neither Kerr nor Douglas disputed that their identical claims were dismissed in the previous cases. R. 30, 31. Under the doctrine of res judicata, Kerr and Douglas may not be permitted to repeatedly bring the same claims against Zions Bank merely because they hope for a different outcome. Therefore, the district court properly dismissed all of Kerr's claims and Douglas's federal claims.

IV. THE DISTRICT COURT PROPERLY DISMISSED DOUGLAS'S STATE LAW CLAIMS

Appellants' initial complaint in this case failed to meet Idaho's pleading standard, so the district court properly granted Zions Bank's Rule 12(b)(6) motion. This Court has held that "[e]ven under [Idaho's] liberal notice pleading standard, a complaint must reasonably imply the theory upon which relief is being sought." *Brown v. City of Pocatello,* 148 Idaho 802, 808, 229 P.3d 1164, 1170 (2010). The Appellants' use of the passive voice, insults, assumptions, and conclusory allegations in their complaint fail to meet this standard. Likewise, the Appellants fail to identify which Appellant allegedly suffered damages because of Zions Bank's acts, and they did not give Zions Bank notice of the acts and omissions it allegedly had taken. See e.g., *Kerr v. Bank of America,* 2011 WL 11047661, at *6 (Nov. 22, 2011) (dismissing Plaintiff's privacy claims against Bank of America for failure to meet Idaho's pleading standards). The district court's dismissal of Zions Bank as a party to this suit was proper because Appellants' complaint failed to meet minimum pleading standards.

Moreover, Rule 56 of the Idaho Rules of Civil Procedure provides that "[t]he court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a).[6] In Idaho, "[p]ro se civil litigants are not accorded special latitude merely because they chose to proceed through

[6] The district court converted Zions Bank's Motion into a motion for summary judgment. On appeal, the standard of review for a motion to dismiss and a motion for summary judgment is the same: "[a]fter viewing all facts and inferences from the record in favor of the non-moving party, [the Supreme Court of Idaho] will ask whether a claim for relief has been stated." *Garcia v. Pinkham*, 144 Idaho 898, 900, 174 P.3d 868, 870 (2007).

litigation without the assistance of an attorney." *Colafranceschi v. Briley,* 159 Idaho 31, 34, 355 P.3d 1261, 1264 (2015) (quoting *Michalk v. Michalk,* 148 Idaho 224, 229, 220 P.3d 580, 585 (2009)). Instead, "pro se litigants are held to the same standards and rules as those represented by an attorney." *Id.* (alteration omitted) (quoting *Trotter v. Bank of New York Mellon*, 152 Idaho 842, 846, 275 P.3d 857, 861 (2012)).

Thus, even if Douglas's state law claims had been adequately briefed before this Court, the Court should still affirm the district court's order because Douglas failed to properly state a claim for which relief may be granted, and failed to raise a genuine dispute as to any material fact before the district court.

A. DOUGLAS FAILED TO PLEAD A CLAIM THAT ZIONS BANK BREACHED ITS CONTRACT

Douglas claimed that Zions Bank breached its contract with him, but the district court correctly held that Douglas did not raise any genuine issue of material fact regarding this claim. In order to succeed in a breach of contract claim, Douglas would have needed to allege facts that 1) there was a contract, 2) that it was breached, and 3) that there were damages. *Melaleuca, Inc. v. Foeller,* 155 Idaho 920, 925, 318 P.3d 910, 914 (2014).

In his complaint in this case, Douglas alleged that Zions Bank modified the original contract and required him to have forced lender insurance, higher taxes, and higher overall payments. *See* R. 13. However, Douglas never cited to any term of the contract, and never presented any facts to support this claim. *Id.*

Likewise, in their opening brief before this Court, Douglas and Kerr do not address Douglas's contract claim. *See* Appellants' Br. Instead, Appellants attached a statement for a

home loan from Bank of America secured by real property situated in Nevada. Zions Bank is not Bank of America and the Nevada property is not at issue in this case. *See* Appellants' Br. Ex. A-1. Neither Douglas nor Kerr point to a contractual provision allegedly breached by Zions Bank, or allege how Zions Bank breached that provision. *See* Appellants' Br.; *Bach v. Bagley,* 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010)(the failure to support an alleged error with argument and authority is deemed a waiver of the issue.). Accordingly, the district court's dismissal of Douglas's breach of contract claim was proper.

B. DOUGLAS FAILED TO PLEAD A CLAIM THAT ZIONS BANK BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Douglas failed to state any fact that would support his claim that Zions Bank breached the implied covenant of good faith and fair dealing. The covenant is breached only when an action "violates, nullifies or significantly impairs any benefit of the ... contract is a violation of the implied-in-law covenant." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.,* 121 Idaho 266, 288, 824 P.2d 841, 863 (1991).

Similar to the breach of contract claim, Douglas failed to cite to any portion of the contract between him and Zions Bank, and he stated no facts to support the claim that Zions Bank prevented him from receiving that for which he had bargained. *See* R. 14. Douglas merely recites information about the covenant and then concludes that Zions Bank breached it, without offering any facts to support his allegation. *See Id.* Accordingly, the district court's dismissal of Douglas's breach of the implied covenant of good faith and fair dealing claim was proper.

C. DOUGLAS'S UNJUST ENRICHMENT CLAIM WAS PROPERLY DISMISSED BECAUSE DOUGLAS HAS A WRITTEN CONTRACT WITH ZIONS BANK

The district court correctly dismissed Douglas's unjust enrichment claim because "there [is] an enforceable express contract covering the same subject matter." *Wilhelm v. Johnston,* 136 Idaho 145, 152, 30 P.3d 300, 307 (Ct. App. 2001). Under Idaho law, "[a] right of recovery in quasi-contract, also known as unjust enrichment, occurs where the defendant has received a benefit which would be inequitable to retain[,] at least without compensating the plaintiff to the extent that retention is unjust." *Id.* (internal quotation marks omitted). However, the doctrine of unjust enrichment is not permissible where there is an enforceable express contract between the parties which covers the same subject matter." *Vanderford Co. v. Knudson,* 144 Idaho 547, 558, 165 P.3d 261, 272 (2007).

Here, Douglas's unjust enrichment claim was based on the same alleged wrongdoing as Douglas's breach of contract claims. R. 11-12. The contract here is both enforceable and express. Therefore, the unjust enrichment claim is barred under Idaho law and was properly dismissed with prejudice.

D. DOUGLAS'S BREACH OF FIDUCIARY DUTY CLAIM WAS PROPERLY DISMISSED BECAUSE ZIONS BANK WAS NOT A FIDUCIARY FOR DOUGLAS

The district court properly dismissed Douglas's claim for breach of fiduciary duty because Zions Bank owed no fiduciary duty to Douglas. No fiduciary duty arises between lender and borrower in an arm's length mortgage transaction. *Burton,* 2012 WL 976151, at *6 (quoting *Wade Baker & Sons Farms v. Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints,* 136 Idaho 922, 928, 42 P.3d 715, 721 (Ct. App. 2002)).

In the compliant, there is no indication that Douglas believed—or could have reasonably believed—that Zions Bank was not acting in its own interest, but was acting in the interest of Douglas. *See* R. 8-20. Because Douglas pled no set of facts that would morph this creditor-borrower relationship into a fiduciary relationship, his breach of fiduciary duty claim was properly dismissed with prejudice.

E. DOUGLAS'S INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS CLAIM WAS PROPERLY DISMISSED BECAUSE ZIONS BANK CANNOT INTERFERE WITH ITS OWN CONTRACT

Douglas's intentional interference claim is, in fact, a breach of contract claim. Douglas alleges in his complaint that "Defendants interfer[ed] with *their mortgage contracts*." R. 15 (emphasis added). In other words, he argued that Zions Bank interfered with its own contract. *Id.* "Under Idaho law it is factually impossible for a party to tortiously interfere with that party's own contract." *Taylor v. McNichols,* 149 Idaho 826, 884, 243 P.3d 642, 660 (2010) (citation omitted); *see also BECO Const. Co., Inc. v. J-U-B Eng'rs, Inc.,* 145 Idaho 719, 724, 184 P.3d 844, 849 (Idaho 2008) ("Since a party cannot interfere with its own contract, it follows that an action for intentional interference with contract can only lie against a third party."). Because Zions Bank is a party to the contract which Douglas alleged it interfered, Douglas's intentional interference claim was properly dismissed with prejudice.

F. DOUGLAS'S IDAHO DECEPTIVE TRADE PRACTICES ACT CLAIM WAS PROPERLY DISMISSED BECAUSE THE ACT DOES NOT APPLY TO SECURED TRANSACTIONS INVOLVING REAL PROPERTY

Although not stated as an individual claim, Douglas alleged that Zions Bank violated the Idaho Deceptive Trade Practices Act. R. 10, 14. However, "the Idaho Supreme Court has found

that only debts arising from the sale of goods and services are subject to the Trade Practices Act." *Cordero v. Am.'s Wholesale Lender,* 2012 WL 4895869, at *8 (D. Idaho Oct. 15, 2012) quoting *In re Western Acceptance Corp., Inc.,* 117 Idaho 399, 401, P.2d 214, 216 (1990) ("Debts that do not arise out of the sale of goods and services subject to the provisions of the Act are not covered.")).

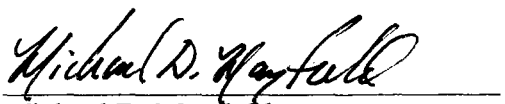
In *Cordero*, the court reviewed a *pro se* plaintiff's claim against her mortgagor under the Idaho Deceptive Trade Practices Act. The Court dismissed the case for failure to state a claim because it was based on a secured transaction involving real property. *Id.* Like the plaintiff in Cordero, Douglas's claim involves a secured transaction — a home mortgage. Accordingly, the district court properly dismissed Douglas's claim that Zions Bank violated the Idaho Deceptive Trade Practices Act.

CONCLUSION

Based on the foregoing, Zions Bank respectfully requests this Court to affirm the district court's decision and dismiss this appeal.

DATED this 6th day of June 2017.

RAY QUINNEY & NEBEKER P.C.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of June 2017, sent a copy of the RESPONDENT ZIONS BANK, N.A.'s BRIEF to the Clerk of the Idaho Supreme Court and I also served hard copies of the attached RESPONDENT ZIONS BANK, N.A.'s BRIEF via U.S. mail postage prepaid to:

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