7-5-2013

Edged in Stone v. Northwest Power Systems, LLC Appellant's Reply Brief Dckt. 40463

IN THE SUPREME COURT OF THE STATE OF IDAHO

EDGED IN STONE, INC.,

Plaintiff-Appellant,

v.

NORTHWEST POWER SYSTEMS, LLC,

Defendant-Respondent,

and

CATERPILLAR, INC. and PERKINS ENGINES, INC.,

Defendants.

Case No. CV-2010-4923-OC

Docket No. 40463-2012

APPELLANT'S REPLY BRIEF

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

Honorable Mitchell Brown, District Judge

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A. STATUTE OF FRAUDS APPLIES TO DEFEAT THE DEFENSE ASSERTED BY NORTHWEST

1. *The Agreement between Northwest and Edged was a Service Agreement, Yet Northwest Asserts a Goods Component, Making the Statute of Frauds Applicable.*

Northwest seems to misinterpret Edged's argument regarding the Statute of Frauds and the scope of the contract pled by Edged in this action. As Northwest points out, Edged admitted and pled that the contract in question (the one breached) was one for service—inspection of the Skid engine. In its *Amended Complaint and Demand for Jury Trial*, Edged pled as follows:

> 66. A contract existed between Edged and Defendant Northwest Power . . . with terms both express and implied, regarding the diagnosis and potential warranty repair and service of the Skid.
> 67. Defendants breached their contract, both express and implied, with Edged through their failure to obtain Edged's permission or request for an engine replacement in the Skid prior to replacing the Skid's engine, resulting in a substantial service bill to Edged.
> 68. As a result of Defendants' breach of contract, Edged was unable to pay the bill for the engine replacement and has suffered significant damages in an amount to be proven hereafter at a trial of the issue.

(*R* at 46).

Edged clearly pled a breach of a service contract. Northwest asserts that Edged "put forth no evidence in the record disputing that Northwest fulfilled the agreement" and that "[t]here is no genuine issue of material fact disputing that Mr. Adams determined what was wrong with the engine." *Resp't. Br.* at 22. As is evident from the underlying complaint in the matter, Edged did not plead that Northwest breached the contract by its

failure to "determine what was wrong with the engine" but rather through Northwest's going beyond the scope of the contract, failing to obtain Edged's permission "for an engine replacement in the Skid." Thus, notwithstanding Northwest's assertions that there is no dispute regarding a portion of the contract, there is certainly a dispute, with an evidentiary basis, regarding Northwest's breach of contract in going beyond the scope of the Parties' agreement to Edged's detriment.

Responding to Edged's contract claim, Northwest raised the defense that Edged, through its employee, Webb, contracted to have the Skid engine replaced. In interposing this defense, Northwest ***itself*** has made the UCC Statute of Frauds applicable, as this defense involves the assertion of a contract for the sale of goods for the price of $500 or more. In this case, the engine they claim Edged contracted to purchase from Northwest was billed to Edged at a price of $3,000 in a total bill of $4,385.18. (*R* at 104).

The Statute of Frauds, as applied in Idaho, provides the following:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or ***defense*** unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

IDAHO CODE § 28-2-201(1) (emphasis added).

Given the sale price for the engine of more than $500, Northwest is not entitled to present the contract by way of defense unless there is "some writing to indicate that a contract for sale has been made between the parties and ***signed*** by the party against whom enforcement is sought or by his authorized agent or broker." IDAHO CODE § 28-2-201(1) (emphasis added).

So, even though the Statute of Frauds does not apply to the underlying (and admitted) contract of service for "diagnosis and potential warranty repair and service of the Skid," it certainly applies to bar evidence of any alleged contract for sale of the Skid engine, absent a writing to indicate the contract was made and signed by Edged.

2. *There is no Bar through Equitable Estoppel.*

Equitable estoppel does not apply here. Northwest asserts that equitable estoppel applies "where an agreement is complete, definite and certain in all its material terms, or contains provisions that are capable in themselves of being reduced to certainty." *Resp't. Br.* at 27. Northwest further asserts that Northwest should be protected against being defrauded by Edged, declaring that "a party who is induced to rely on an oral agreement and who changes position to his own detriment cannot be defrauded by [one] who interposes the Statute of Frauds to declare the agreement invalid." *Resp't. Br.* at 27, citing Mikesell v. Newworld Dev. Corp., 122 Idaho 868, 874, 840 P.2d 1090, 1096 (Ct. App. 1992).

Simply stated, Edged has not interposed the Statute of Frauds to declare its agreement with Northwest invalid, thus equitable estoppel does not apply. Edged has made it very clear that the agreement for services, including diagnosis of the Skid engine, was fulfilled but that Northwest breached the contract by going beyond its terms to install a new engine to Edged's detriment. Edged is not attempting to declare the agreement invalid. Edged is only using the Statute of Frauds to prevent Northwest from fabrication of additional material terms, including the sale from Northwest to Edged of a $3,000 Skid engine.

B. WEBB HAD NO APPARENT AUTHORITY TO BIND EDGED

Edged would again emphasize that, even if the evidence were to point to apparent authority in this case, this Court has held that the "existence or lack of authority of an agent is a question of fact." Idaho Title Co. v. American States Ins. Co., 96 Idaho 465, 468 (1975), citing Clark v. Gneiting, 95 Idaho 10 (1972). Specifically, this Court has held that "whether or not there is apparent authority on the agent's part to act as he acted—it is a question for the trier of fact to resolve from the evidence." Bailey v. Ness, 109 Idaho 495, 498 (1985), citing Clark v. Gneiting, 95 Idaho at 12; John Scowcroft & Sons Co. v. Roselle, 77 Idaho 142, 146 (1955); Thornton v. Budge, 74 Idaho 103, 108 (1953) (emphasis in the original). Where there is any reasonable factual dispute as to whether an agent, such as Webb, has apparent authority, a ruling as a matter of law is improper, as the trier of fact (the jury) is to resolve this dispute. There is such a reasonable factual dispute here, as explained in Appellant's Brief.

Specifically regarding the case law cited by Northwest in support of its position on apparent authority, *Idaho Title Company v. American States Insurance Company* repeats the law that "apparent authority of an agent cannot be created by the acts or statements of the agent alone," while specifically finding that "American States had the duty of using reasonable diligence to ascertain if Idaho Title and its employee Turner had authority to request cancellation." 96 Idaho 465, 468 (1975). In the instant case, Northwest very candidly admits, when asked if Webb ever indicated that he had authority to deal with Northwest directly in making these decisions, that Adams "had no way of knowing if that was true or not" and that he had done nothing in terms of "reasonable diligence" beyond assuming "he was dealing with a standup company." (*Dep. of Mark*

Adams at 25, ll. 17–24, taken 5/23/2012, augmented 3/15/2013). This cannot be found to be "reasonable diligence." Even if the District Court believed this to be "reasonable diligence," this is a question for the trier of fact, the jury.

Killinger v. Iest stands, in part, for the proposition that the "declarations of an alleged agent, standing alone, are insufficient to prove the grant of power exercised by him and to bind his principal to third parties," further finding that "[t]he statements by the alleged agent, as to the scope of his authority, are admissible if, at the time the statements are offered in evidence, the existence of the agency has been proven by independent evidence." 91 Idaho 571, 575 (1967). Here, Northwest has built its case almost exclusively on the "statements [of] the alleged agent," Webb, before any independent evidence showing the existence of the agency have been proven. Northwest's case for Webb receiving the bid, transmitting it to Preston (Edged) and indicating to Northwest that Edged accepted the bid and wished to have the engine replaced are based exclusively on testimony from Webb without any independent evidence. However, even where there are "other corroborative facts and circumstances disclosed by the evidence, agency then becomes a fact question for the jury." Hayward v. Yost, 72 Idaho 415, 430 (1952). Thus, even were Webb's statements somehow corroborated, the grant of summary judgment and taking this determination away from the jury is improper.

C. THERE ARE FACTUAL DISPUTES WHERE NORTHWEST REPRESENTS THERE ARE NONE

Edged disputes that it authorized Adams to replace the engine. First, Webb was not authorized to deal with Northwest. (*R* at 152, 172, pp. 115, 194, ll. 17–22, 13–15). Second, Edged did not want Northwest to replace the engine. (*R* at 43, ¶ 32; *R* at 157, pp.

132, 133, ll. 20–25, 1–15). If Northwest and Adams had informed Edged of the non-warranty nature of the engine replacement, Edged would have had the engine rebuilt by its in-house mechanic at a substantial savings. *Id.*

In addition, Northwest states more than once that both Webb and Adams testified that Webb informed Preston of the dusting, that it was not covered under warranty and it needed to be replaced, but this is unsubstantiated by Adams's deposition testimony other than through hearsay statements regarding prior statements made by Webb. (*R* at 505, p. 26, ll. 7–11).

To respond to some representations made by Northwest that are not accurate, Northwest represents that "[t]here was no daily maintenance of the Skid." *Resp't. Br.* at 22. However, there was in fact daily maintenance of the Skid, or at least such is in contention. (*R* at 147–148, 200, pp. 93, 95, 98, ll. 19–20, 17–23, 8–17). This fact does little to resolve the legal dispute before the Court, but Appellant desired to clear the air on this issue.

Furthermore, Northwest makes it appear, through its briefing, that it was willing to release the Skid to Edged and that Edged simply failed to get the Skid. *Resp't. Br.* at 9. This account of the facts leaves out the important detail that, once Northwest took out the replaced engine and told Edged to come get the Skid, Northwest insisted on payment for its labor in ***replacing and removing*** the engine before the Skid would be released. (*Dep. of Mark Adams* at 44, 45, ll. 18–25, 1, taken 5/23/2012, augmented 3/15/2013). Due to Edged's inability to pay the bill, Edged was unable to pick up the Skid. (*R* at 43, ¶ 37).

Northwest states in its briefing that "Mr. George admitted he knew there was no warranty from Northwest on the engine," and goes on to hammer this point home. *Resp't.*

Br. at 7. This argument is out of place in Northwest's briefing because the issue of breach of warranty was voluntarily dismissed, has not been appealed and is no longer at issue.

To address Northwest's concerns regarding Mr. Adam's deposition being "augmented," Edged does not suggest that his deposition testimony was augmented or changed, but rather is following proper procedure in indicating to this Court the date on which the deposition of Mr. Adams was augmented into the record on appeal—the 15th day of March, 2013. This is regular practice and is in no way intended to cast aspersions on Northwest's practices or Mr. Adams's testimony in those particular instances.

Finally, Northwest responds to Edged's statements regarding Edged's potential lawsuit against Mr. Webb by stating that this position is "unfounded." *Resp't. Br.* at 21. Through reference to a potential lawsuit, Edged wishes to show that Mr. Webb has a personal interest in testifying in a manner consistent with his actual testimony. A quick look at Idaho Supreme Court precedent shows that Mr. Webb is at least in danger of a potential lawsuit from Northwest itself. In *Killinger v. Iest*, the Court reasoned that a "party entering into a contract in his self-assured capacity as agent, with no actual authority from the purported principal, or in excess of an existing authority, is personally liable to the other contracting party who acted in good faith and in reliance on the false representation." 91 Idaho 571, 576 (1967). Mr. Webb had every incentive to color and shade his testimony to shield himself from liability, so Edged's position regarding a "potential lawsuit" is not wholly "unfounded."

II. CONCLUSION

Based on the record and pleadings filed in this case, Appellant has met its minimal burden of producing facts that demonstrate material disputes of fact as to each

challenged element of his claims. As such, the District Court's decision is in error, and must be reversed so that the issue of apparent authority make be determined by the trier of fact—the jury Edged has demanded.

DATED this 3rd day of July, 2013.

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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing *Appellant's Reply Brief* was served on the following named persons at the addresses shown an in the matter indicated.

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