4-30-2018

Brand Makers Promotional Products, LLC v. Archibald Appellant's Reply Brief Dckt. 44926

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

BRAND MAKERS PROMOTIONAL PRODUCTS, LLC, a Utah Limited Liability Company, Plaintiff-Appellant,

v.

NATHAN LLOYD ARCHIBALD, Defendant-Respondent,

* * * * *

Supreme Court Docket No. 44926-2017

APPELLANT'S REPLY BRIEF

* * * * *

Appeal from the District Court of the Seventh Judicial District for Jefferson County.
Honorable Alan C. Stephens, District Judge, presiding.

* * * * *

Bryan N. Zollinger, Esq., residing at Idaho Falls, Idaho, for Appellant, Brand Makers Promotional Products, LLC

Paul Ziel, Esq., residing at Idaho Falls, Idaho, for Respondent, Nathan Lloyd Archibald

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES: ***Pages***

STATUTES AND RULES:

ADDITIONAL STATEMENT OF FACTS

Archibald's Statement of the Case are inaccurate or misleading as follows:

1. Archibald states several factual inaccuracies and legal conclusions that are not supported by the record nor are there any citations to anywhere in the record to support these conclusions. Several of the facts come from Archibald's post trial brief which by rule cannot be considered the law of the case. Interestingly, this Court should note that the trial court's Findings of Fact and Conclusions of Law are virtually cut and pasted word for word from Archibald's post trial brief. Many of the alleged facts contained in that brief and in the trial court's Findings of Fact and Conclusions of law are not supported by the record and were not even mentioned at the trial.

2. Specifically, Archibald claims that "Brand Makers made a business decision" "because this lawsuit posed a serious threat to Brand Makers." However, there are no citations to any evidence in the record for this position. Brand Makers has shown through citation to the record in Appellant's Brief on Appeal and through the case *In re Archibald*, 482 B.R. 378, 388 (Bankr. D. Utah 2012) that this conclusion is inaccurate and untrue.

3. Archibald also inaccurately concludes that "Greaves committed fraud to induce Archibald into signing an unfavorable agreement" by "unilaterally" altering the severance and non-compete agreement. Again, there is no citation to anywhere in the record to support this conclusion and Brand Makers has shown in Appellant's Brief on Appeal with citations to the record that these legal conclusions are not supported by the facts contained in the record.

4. Archibald claims that "Brand Makers did not present any evidence at trial that Archibald worked for IPROMOTEU." Again, Brand Makers has cited to the record in Appellant's

Brief on Appeal showing through uncontroverted testimony that Archibald did in fact work for IPROMOTEU in contravention to the terms of the separation agreement.

5. Archibald claims that he "believed that he probably had not paid the full $51,986 back to Brand Makers" but that "Archibald repeatedly sought clarification from Greaves regarding the amount owing and never received an answer until Brand Makers filed suit." Again, this conclusion is not supported by any facts in the record and Brand Makers has shown through citation to the record that Archibald had in fact not paid the full amount but no where in the record are there any facts to show Archibald had ever sought clarification of the amount owed. The record is clear that Brand Makers continually sought payment from Archibald and Archibald consistently stated that he intended to pay but that he did not and still has not paid the amount due under either the express contract or the implied in fact contract.

In fact Archibald himself testified multiple times that he knew he owed something and that he believed he owed between "$14 -to $19,000 in fees."[1] A fact that the trial court apparently ignored when it cut and paste the new argument that "no money" was owed found for the first time in Archibald's post trial brief.

6. Finally, Archibald incorrectly asserts that the "District Court was correct to order attorney fees against Brand Makers because Archibald never contested that he owed money." As explained in Appellant's Brief on Appeal, not contesting that money is still owed on a contract is not a defense to breach of contract.

[1] TR Vol. I p. 272 Ll. 7-25 – p. 273 Ll. 1-3.

ARGUMENT

A. BRAND MAKERS IS NOT IMPROPERLY SEEKING TO SUPPLEMENT THE RECORD.

Archibald suggests that Brand Makers is improperly attempting to supplement the record by attaching a copy of the bankruptcy case *In re Archibald*, 482 B.R. 378, 388 (Bankr. D. Utah 2012) to Appellant's Brief on Appeal. Brand Makers did attach a copy of that case as a courtesy to this Court as an addendum to its brief but this case was discussed at the trial in this matter and this Court may consider the facts and findings of this case just as it would any other legal authority or case cited to in briefing. The facts and findings of that case are extremely relevant to this case and are settled law which Archibald cannot somehow disavow or change for convenience. In fact, Archibald has taken a position in this case directly contravening the position in that case. In the case *In re Archibald*, Archibald is clearly taking the position that transferring ownership to Greaves father Tom was not a fraudulent transfer but now in this case, Archibald is taking the position that Brand Makers was somehow at risk from that lawsuit.

B. THERE IS ABSOLUTELY NO EVIDENCE THAT THE 'IN THE PAINT' LAWSUIT POSED ANY RISK TO BRAND MAKERS AND THIS POSITION IS CONTRARY TO THE POSITION TAKEN BY ARCHIBALD IN THAT CASE.

Archibald in Respondent's brief on appeal, attempts to show through impermissible evidence not admitted at trial for that purpose, that the In the Paint litigation somehow benefited Brand Makers. Specifically, Archibald cites several time entries where counsel for Archibald discussed that case with James Greaves. However, Plaintiff's Exhibit 10 was only admitted for the limited purpose of showing that Brand Makers had paid these fees. Archibald objected to admission of Plaintiff's Exhibit for any other purpose and the trial court sustained that objection. Archibald cannot now come before this court and use this exhibit as evidence

for a purpose it was not admitted. Even were this Court to consider this exhibit for this improper purpose, there is no doubt that James Greaves was a material witness and therefore it logically follows that he would have considerable communication with Archibald's attorney. Again, there is no doubt from the record and *In re Archibald* that Nathan Archibald was party to the lawsuit and not Brand Makers. The record is also clear that Archibald is the person who retained the attorney, Archibald's own counsel asked Archibald at trial "[d]id you hire an attorney." In response Archibald said "yes" and that the attorney was Sumsion Law Offices.[2]

Finally, as explained in the prior section of this brief, Archibald is clearly taking a position in this lawsuit contrary to the position he took in *In re Archibald*. In that case, the entire crux of the case was whether Brand Makers had fraudulently transferred assets from Archibald to Tom Greaves. That court found that the transfer was not fraudulent which clearly shows that there was no risk to Brand Makers, yet now in this case, Archibald is taking the exact opposite position and arguing that Brand Makers was subject to risk. The uncontroverted testimony from Brand Makers at trial also supports the conclusion that Brand Makers knew it faced no risk from this litigation.[3]

C. THE RECORD SHOWS THAT PURSUANT TO THE TERMS OF SALES REPRESENTATION AGREEMENT ARCHIBALD OWES BRAND MAKERS FOR LOSSES SUSTAINED FROM THE JUST FOR DOES ACCOUNT.

Archibald at trial agreed that pursuant to the Independent Sales Representation Agreement that he signed, he was "responsible for the loss to the Company at his or her commission rate."[4] Archibald explained that "if the job goes bad, then the sales rep is

---

[2] TR Vol. I p. 237 Ll. 2-16.
[3] TR Vol. I p. 181 Ll.7-22.
[4] Trial Exhibit #25 p. 125.

responsible for half the loss" and that "if I was being paid 15 percent at that time...then I should be accountable for 15 percent. But if I truly was being paid 50 percent commission, then I should be responsible for 50 percent of the loss."[5] The only question for the trial court then was whether Archibald was being paid at the 15% or 50% commission rate, which Archibald admitted he did not know.[6] However, the trial court in its findings, improperly cut and pasted from a post-trial brief, which contains inadmissible conclusions, that Archibald did not owe any amount and did not ever rule on the rate for which Archibald should be liable for the loss sustained on the Just for Does account. Therefore, this Court should reverse the holding of the trial court and remand this issue to the trial court for a determination of which percentage Archibald should be liable to Brand Makers for the loss sustained on the Just for Does account.

D. THE FACTS OF THIS CASE SHOW THAT THE ELEMENTS OF AN IMPLIED IN FACT CONTRACT FOR ATTORNEY'S FEES PAID IN EXCESS OF THE EXPRESS CONTRACT EXISTED OR THAT THE DOCTRINE OF UNJUST ENRICHMENT SHOULD APPLY.

Archibald, in Respondent's Brief on Appeal, makes one of the same errors that the trial court made by claiming that for an implied in fact contract to exist, there has to be a meeting of the minds. However, as explained more fully in Appellant's Brief on Appeal, meeting of the minds is an element of an express contract and not an implied in fact contract.

> An implied-in-fact contract exists where there is no express agreement, but the conduct of the parties implies an agreement from which an obligation in contract exists. We have held that an implied in fact contract is defined as one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other ***often being inferred from the circumstances attending the performance***.

Clayson v. Zebe, 153 Idaho 228, 232 (2012)(Internal citations omitted)(Emphasis added).

---

[5] TR Vol. I p. 266 Ll.6-19.

[6] TR Vol. I p. 266 LL. 17-19.

The only other argument that Archibald makes in his reply brief is that "[e]ven if there was an implied contract between Archibald and Brand Makers for the payment of additional attorney fees and costs, there were no damages to Brand Makers." Archibald improperly claims there were no damages to Brand Makers because it benefited from Archibald winning the *In re Archibald* case. However, as explained above and in Appellant's Brief on Appeal, Brand Makers did not benefit from that lawsuit and Brand Makers clearly sustained damages in the form of attorney's fees it paid on Archibald's behalf. For these reasons, this Court should reverse the decision of the trial court and find that Brand Makers has fulfilled each of the elements of both and implied-in-fact contract and an implied-in-law contract and is entitled to damages for the attorney's fees it paid on Archibald's behalf.

E. BRAND MAKERS PRESENTED UNREBUTTED EVIDENCE OF BREACH OF THE NON-COMPETE AGREEMENT AT TRIAL AND THAT AGREEMENT IS ENFORCEABLE.

The unrebutted evidence in the record shows that Archibald was working for IPROMOTEU who is a direct competitor of Brand Makers and that sales were made to existing customers of Brand Makers during the term of the non-solicitation agreement.[7] Additionally, Archibald has testified that customers he served in violation of the separation agreement were currently Brand Makers clients and that he made at least $22,159.82.[8] As more fully explained in Appellant's Brief on Appeal, Idaho law created a rebuttable presumption that the geographic scope and the duration of the agreement are reasonable. Brand Makers has clearly shown a violation and Archibald has admitted to the breach, yet Archibald presented no evidence at trial to rebut the presumptions that the terms of that agreement were not enforceable.

[7] TR Vol. I pp. 85 L. 6 – p. 86 L. -86. 228 L. 11.
[8] R. Vol I pp. 497-98.

Because the trial court erred by not applying correct Idaho law and summarily held the entire agreement unenforceable despite the fact that Archibald did not present any evidence to rebut the presumptions of an enforceable agreement, this Court should reverse the decision of the trial court and remand this issue for a determination of damages incurred within 18 months of Archibald and Brand Makers separating. The agreement was very specific that upon violation, Brand Makers "shall be entitled" to repayment of all compensation Archibald received as a result of the violation. Uncontroverted evidence was presented on trial showing that Archibald had in fact violated the agreement within the 18-month period.[9]

F. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DENYING BRAND MAKER'S ATTORNEY'S FEES AND AWARDING ATTORNEY'S FEES TO NATHAN LLOYD ARCHIBALD.

> The determination of prevailing party status is committed to the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. When examining whether a district court abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason.

Oakes v. Boise Heart Clinic Physicians, PLLC, 152 Idaho 540, 542–43 (2012)(Internal citations omitted). Idaho Code § 12-120(3) provides that "[i]n any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase of goods, wares, merchandise, or services and in any commercial transaction unless otherwise prohibited by law, the prevailing party shall be allowed reasonable attorney's fee to be set by the court, to be taxed and collected as costs." Idaho Rule of Civil Procedure 54(d)(1)(A) states that "costs shall be allowed as a matter of right to the prevailing party." Rule 54(d)(1)(B)

[9] TR Vol I. p. 84 L. 16 – p. 86 L. 9.

states in relevant part that "[i]n determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties."

This Court and the Idaho Court of Appeals has in multiple cases determined that in a case without counterclaims, such as is the situation in this case, a plaintiff who prevails on only one of multiple claims or a plaintiff who only recovers a fraction of the overall amount sought, is the prevailing party and can be awarded attorney fees. *See Gilbert v. City of Caldwell*, 112 Idaho 386 (Ct. App. 1987) (Although plaintiffs received only five percent of what they originally sought, trial court did not abuse its discretion in determining that they were prevailing party); *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 542 (2012) (The Idaho Supreme Court found the lower court had abused its discretion by not finding plaintiff to be the prevailing party although plaintiff only recovered $2,043.92, "a fraction of the amount he sought," $32,794.10.) *Nguyen v. Bui*, 146 Idaho 187 (Ct. App. 2008) (Upholding a determination that the plaintiff was the prevailing party although plaintiff had only prevailed on one of multiple claims against the defendant.) This Court has agreed that "[m]ere dismissal of a claim without trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding costs and fees." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719 (2005). Commenting only on cases which involved counterclaims, this Court has held:

> "In determining which party prevailed ***in an action where there are claims and counterclaims*** between opposing parties, the court determines who prevailed 'in the action.' That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Eighteen Mile Ranch, L.L.C., v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). This Court has

> held that when both parties are partially successful, it is within the district court's discretion to decline an award of attorney fees to either side. *Israel v. Leachman,* 139 Idaho 24, 27, 72 P.3d 864, 867 (2003)."

Jorgensen v. Coppedge, 148 Idaho 536, 538 (2010)(Emphasis added).

The trial court in this matter erroneously found that Archibald was the prevailing party finding that Archibald "successfully avoided liability on the majority of Plaintiff's claims" and that Archibald "did not incur any liability beyond what Defendant was already expecting to pay."[10] In the trial court's Decision and Order Re: Attorney Fees, the trial court commented that Brand Makers failed on "all but one of the legal theories behind its claims" and that on the unjust enrichment claim that Brand Maker's prevailed on, Archibald "did not contest" that Brand Makers "was unjustly enriched." However, Archibald never conceded unjust enrichment and Brand Maker's had to pursue this claim through trial. Additionally, based upon Brand Maker's arguments contained earlier in this brief, Brand Makers believes it has actually prevailed on more than the one claim the trial court considered Brand Makers to have prevailed on. Additionally, Count Four of Brand Makers Amended Complaint which Brand Makers withdrew at trial was paid only after the Amended Complaint had been filed through an ancillary criminal case filed in Fremont County, Idaho case number CR-2015-658.[11]

The trial court, contrary to the actual facts, decided Brand Makers had only succeeded on one count, where Brand Maker's was found to owe $2,500 on Count Three. However, the trial court also held that Brand Makers was entitled to $3,276 in Count One (although somehow found there was not breach just money still owing) and completely disregarded the fact that

---

[10] Augmented R Vol. I p. 12.

[11] R Vol. I p. 661; See also TR Vol. I p. 77 L. 13 – p. 80 L. 4.

Brand Maker's recovered $1,727.60 which was only paid after Brand Makers filed the Amended Complaint. However, even assuming the trial court was correct and Brand Makers does not prevail on appeal on any of the above explained matters, Brand Makers, pursuant to Idaho law should still be found to be the prevailing party in the underlying matter.

Although the trial court in this matter correctly perceived this issue to be a matter of discretion, the trial court failed to apply the proper applicable legal standards and thus abused its discretion. The trial court only focused on one case and one factor in making its determination. Specifically, the trial court cited to *Eighteen Mile Ranch* for the position that "avoidance of liability is as good for a defendant as winning a money judgment is for a plaintiff."[12] Importantly, in *Eighteen Mile Ranch* as well as in *Oakes v. Boise Heart Clinic Physicians, PLLC*, the prevailing parties recovered some amount either on a claim found in the complaint or on a counterclaim. In this case, there were no counterclaims involved and Brand Makers ultimately recovered a monetary judgment against Archibald for $5,776.00.

Brand Makers has not found any case for the position that a party that defends against the majority of the issues but is still found liable on some issues and against whom a money judgment is ultimately entered may be the prevailing party and the trial court has not cited to any law supporting this position. There have been cases where this Court has held both parties were partially successful and declined attorney's fees to either side, but never a case where the only party receiving a money judgment against it was the prevailing party. *See Israel v. Leachman,* 139 Idaho 24, 27 (2003) and *Trilogy Network Systems, Inc. v. Johnson*, 144 Idaho 844, 847-48 (2007). Simply finding that attorney's fees may be awarded to a party who

---

[12] Augmented R Vol. I p. 12.

receives an money judgment against it because the other party only prevailed on a portion of the amount sought would lead to absurd results in all types of cases just as it has done in this case.

Because there were no counterclaims involved in this case and because Brand Makers ultimately recovered a judgment against Archibald for $5,776.00 this Court should find that the trial court applied an incorrect legal standard and has abused its discretion in finding Archibald to be the prevailing party. Additionally, should Brand Makers prevail on any of the other issues contained in this appeal, the result of attorney's fees being awarded against it is even more egregious. At a minimum this Court could find that because both parties prevailed in part, no attorney's fees should be awarded as it found in *Israel* and *Trilogy Network Systems, Inc.*

BRAND MAKER'S IS ENTITLED TO RECOVER ITS COSTS AND FEES ON APPEAL

Rule 40 of the Idaho Appellate Rules permits the award of costs to the prevailing party on appeal. Rule 40 states, "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." As the prevailing party on appeal, Brand Makers is entitled to recover its costs pursuant to Rule 40. Similarly, Rule 41 provides for an award of attorney's fees. A prevailing party on appeal is entitled to attorney's fees on appeal if that prevailing party was entitled to attorney's fees before the lower court. *Action Collection Servs., Inc., v. Bigham*, 146 Idaho 286 (Ct. App. 2008).

> Idaho Code section 12–120(3) states that "[i]n any civil action to recover on ... any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court...." "The mandatory attorney fee provisions of I.C. § 12–120 govern on appeal as well as in the trial court." Actions brought for breach of an employment contract are considered commercial transactions, subject to the attorney fee provision of I.C. § 12–120(3).

Oakes v. Boise Heart Clinic Physicians, PLLC, 152 Idaho 540, 546–47 (2012).

In this case, Brand Makers was entitled to attorney's fees pursuant to I.C. §12-120(3) before the trial court because this matter was filed as a civil action to recover on an open account, account stated, or contract relating to the purchase or sale of services within the meaning of Idaho Code § 12-120(3) and an employment contract which is a commercial transaction.[13] Because Brand Makers was entitled to fees pursuant to I.C. § 12-120(3) before the Magistrate Court, Brand Makers is also entitled to its appellate attorney's fees pursuant to I.A.R. 41.

CONCLUSION

For all the reasons set forth in this Brief, Brand Makers respectfully requests that this Court reverse the Trial Court's Findings of Fact and Conclusions of Law and entry of Judgment on Appeal finding:

1. The evidence presented at trial does not support the trial court's findings of fact;
2. The trial court's conclusions of law do not follow the findings of fact;
3. The trial court committed reversible error in denying Brand Maker's attorney's fees and awarding attorney's fees to Archibald; and
4. Brand Makers is entitled fees and costs below and before this Court.

DATED this 30th day of April, 2018.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Bryan N. Zollinger
Attorneys for Appellant

[13] R Vol. I, p. 283.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2018, I caused a true and correct copy of the forgoing **APPELLANT'S REPLY BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the U.S. Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Persons Served:

Paul Ziel, Esq. Murray & Ziel 770 S. Woodruff Avenue Idaho Falls, ID 83401 *Email: paulziel@gmail.com*	[✓] U. S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery [✓] Email

Bryan N. Zollinger, Esq.