2-10-2014

ABC Agra v. Critical Access Group Appellant's Reply Brief Dckt. 40573

IN THE SUPREME COURT OF THE STATE OF IDAHO

ABC AGRA, LLC, an Idaho limited liability company, Plaintiff/Appellant, v. CRITICAL ACCESS GROUP, INC., a Minnesota non-profit corporation, Defendant/Respondent.	**Supreme Court Docket No. 40573-2012** Jerome County Case No. CV-2012-513

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Jerome County

Honorable Robert J. Elgee, District Judge, Presiding

Gary D. Slette
ROBERTSON & SLETTE, PLLC
P.O. Box 1906
Twin Falls, ID 83303-1906
Attorneys for Appellant

Patrick J. Miller
Martin C. Hendrickson
GIVENS PURSLEY, LLP
P.O. Box 2720
Boise, ID 83701-2720
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

I. REPLY ARGUMENT

A. Standard of Review

In its Respondent's Brief, Critical Access Group, Inc. ("CAG") cited *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002) with regard to the standard of review in an appeal of the dismissal of a complaint under I.R.C.P. Rule 12(b)(6). In *Young, supra*, the Court stated:

> When we review an order dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences **from the record** viewed in his favor (Citations omitted).

(Emphasis added). 44 P.3d at 1159. CAG has also cited this Court to *Losser v. Bradstreet,* 145 Idaho 670, 183 P.3d 758 (2008) for the following proposition:

> After viewing all facts and inferences **from the record** in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.

(Emphasis added). 183 P.3d at 761. At CAG's request, counsel for the Appellant, ABC Agra, LLC ("ABC") executed a Stipulation to Correct Clerk's Record on Appeal on May 16, 2013, in order to insure that all of CAG's arguments in its various briefs would be included in the Clerk's Record. Judge Elgee signed the Order to Correct Clerk's Record on Appeal that same date.

In its briefing to the district court, CAG asserted a legal issue regarding its right to enforce certain other covenants in the Option Agreement, as well as an issue regarding the applicability of the merger doctrine, (R., pp. 75-77.) These issues will be discussed, *infra*, at pp.

6-7, but in any event, these assertions by CAG are a part of the record in this matter. All inferences from the record are to be construed in favor of the non-moving party.

B. The Need for Adjudication at the Present Time.

The letter dated February 9, 2012, (R., p. 60), authored by CAG's attorney to ABC is pregnant with the creation of uncertainty to warrant a finding of ripeness in this case. The following statement is taken from that letter:

> The fact that CAG is aware of your client's previous position [regarding the enforceability of the covenant] should not be interpreted as a statement that CAG agrees with such positions.

Id. The only logical conclusion that can be drawn from that statement is that CAG did not agree with ABC's position, i.e., that the entire 30.53 acres owned by CAG could be used only for "healthcare services and facilities." If CAG's response letter was not to be construed as an agreement with ABC's stated position regarding the applicability of the covenant, there was only one other alternative, i.e., that CAG disagreed with ABC's position. Couple that position with CAG's assertions that the doctrine of merger precluded the enforceability of the restrictive covenant, but that it could enforce other covenants within 200 feet of its own property, and it is abundantly clear that this case is ripe for adjudication. ABC is compelled to refer again to this Court's opinion in *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989):

> Deferring adjudication would add nothing material to the resolution of the legal issues presented, and it would, in fact, delay implementation of the agreement. "Generally, in determining whether to grant a declaratory judgment, the criteria is whether it will clarify and settle the legal relations at issue, and whether such declaration will afford a leave from uncertainty and controversy giving rise to the proceeding." *Sweeney v. Am. Nat'l Bk.*, 62 Idaho 544, 115 P.2d 109 (1941). Here, nothing can be gained by delaying

> adjudication of the issue. It is clear that this issue will be before us either now or in the future, and a declaration now of the various rights of the parties will certainly afford a relief from uncertainty and controversy in the future. "Since we are persuaded that 'we will be in no better position than we are now' to decide this question, we hold that it is presently ripe for adjudication." (Citation omitted).

778 P.2d at 765.

As stated in *Losser, supra*:

> The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.

183 P.3d at 760-61. This case presents a definite and concrete set of issues; there is a real and substantial controversy which exists, at least insofar as ABC is concerned; and there is a present need for adjudication of ABC's claim, as well as the issues raised by CAG regarding the doctrine of merger and the alleged right of CAG to enforce other restrictive covenants within 200 feet of the boundary of its property. (R., pp. 75-78).

CAG has cited this Court to *Paddison Scenic Properties Family Trust LC v. Idaho County*, 153 Idaho 1, 278 P.3d 403 (2012). As noted in that case, there was no present need for an adjudication because the parties all agreed that the public enjoyed access over the roadway at issue, and there was no disputed issue regarding its maintenance. The instant case is distinguishable from *Paddison* simply because CAG's initial letter, coupled with the legal arguments in its Brief regarding the alleged unenforceability of the Option Agreement covenants, has created real and substantial uncertainty for ABC. As stated by this Court in *Sweeney v. America National Bank, et al.*, 62 Idaho 544, 115 P.2d 109 (1941) (*overruled on other grounds*):

> It was held in Reliance Life Ins. Co. v. Burgess, 112 F.2d 234 [(8th Cir. 1940)] as follows: "The Declaratory Judgment Act must be liberally construed to attain its objective, which is to expedite and simplify the ascertainment of uncertain rights."

62 Idaho at p. 550.

CAG continues to assert that because it has not yet breached the covenant in the Agreement, this case must therefore be considered as not being ripe for adjudication. If that were truly the legal litmus test, it is submitted that the Idaho legislature would never have adopted the following language in Idaho Code § 10-1203:

> A contract may be construed either before or after there has been a breach thereof.

ABC did nothing to create the controversy in the instant case. Given the language in the Option Agreement, and the express definition given to the term "healthcare facilities" by its own attorneys, the last thing ABC expected from CAG was the letter dated February 9, 2012. However, CAG's response to ABC's letter clearly served as the basis for the creation of the requisite uncertainty to pass the ripeness test. When CAG asserted additional legal issues in its briefs as contained in the record, it only served to bolster the need for judicial adjudication.

C. ABC's Claim is not Predicated on Hypothetical Facts.

Far from being hypothetical, this case presents a definite and concrete controversy. If, as CAG stated in its letter, the letter should not be construed as agreeing with ABC's position regarding the enforceability of the covenant, the only thing left is the converse, i.e., that CAG did not agree with ABC's position. It would seem an utter futility to have to wait until an actual breach occurred which would necessitate the filing of a temporary restraining order or

preliminary injunction. Nothing at all is to be gained by putting off until tomorrow that which should be decided today. Deciding this case now will bring certainty for ABC relative to the enforceability of the restrictive covenant language. Furthermore, it will bring certainty to CAG with regard to the merger issue it has asserted, as well as CAG's continuing ability to enforce certain other restrictive covenants within 200 feet of its properties (See R., p. 75-77). If ever there was a need to have a contract construed under the Declaratory Judgment Act prior to the time of a breach, this appeal certainly presents such a case. Putting off the decision today will only delay the inevitable.

D. Contrary to CAG's Assertion, the Option Agreement is not a Matter of Public Record.

In footnote 4 at page 19 of its Brief, CAG has asserted, *ipse dixit*, that the Option Agreement is a matter of public record, and that prospective purchasers of property in the Crossroads Point Business Center PUD could satisfy themselves regarding CAG's contentions simply by reviewing the Agreement. ABC is unaware of any public record in Jerome County or elsewhere where the Option Agreement would be included. Although a Memorandum of Option Agreement was recorded in Jerome County (R., p. 54), there is no evidence whatsoever to support CAG's assertion that the Agreement itself is a matter of public record. Even if it was a public record, which it is not, a prospective purchaser would never have any way of knowing CAG's potential disagreement with the restrictive covenant, the merger issue, or the claimed right of CAG to enforce other restrictive covenants within 200 feet of the boundaries of its property. On the one hand, CAG asserts that the issue raised by ABC is not ripe for

adjudication. On the other hand, CAG asserts that there are contract issues regarding the merger doctrine and its claimed right to enforce certain restrictive covenants on property surrounding its property that would require its filing of a cross-claim. It is as if CAG would like to have its cake, and eat it too. It seems apparent that CAG believes that it can create impediments for ABC solely in an attempt to force ABC into a position where it would have to purchase CAG's property in order to resolve matters (See R., p. 77, LL. 14-16). Needless to say, ABC did not want to be involved in litigation, but neither did it want to be placed in a position where it faced claims from CAG that would impact its ability to market its property to others in the future.

E. Issues Raised by CAG in its Reply Memorandum only Bolster the need for an Adjudication in this Case.

CAG has referred this Court to the decision in *Losser, supra*, which provides that all facts and inferences **from the record** are to be viewed in favor of the non-moving party. Even though CAG has insisted that all of its briefs to the district court needed to be included in the record on appeal of this matter, CAG would now contend that this Court should ignore the pages of CAG's arguments devoted to the following issues of claimed contract uncertainties:

1. Does the doctrine of merger apply in this case?

2. Can CAG enforce its right not to have any property adjacent to, or within 200 feet of, its three lots developed except in accordance with uses specifically identified in the Option Agreement?

3. Is the expiration language in the Supplemental Declaration (R., p. 42) inconsistent with the Option Agreement? (See R., p. 76, footnote 1).

CAG acknowledged in its brief that these issues would compel it, "at a minimum to cross-claim

to clarify these rights if this litigation goes forward." (R., p. 78). The fact that the record establishes CAG's stated need to file a cross-claim in this case only substantiates that which ABC has asserted from the outset, i.e., this matter is not only ripe for adjudication, but the uncertainty espoused by both parties relative to the contractual document begs for a resolution. CAG's underlying motive is expressly stated in its Reply Memorandum as follows:

> ABC can essentially unwind the transaction and have complete control over the subject property by exercising its option to purchase all three lots for the same price that St. Benedict's paid for the single lot.

(R., p. 77). While such a resolution sounds deceptively tempting, it does not mean that it is viable. If "A" possessed an option to purchase "B's" property for $100, and "B's" property was only worth $50 at the time the option was exercisable, "A" would most likely refrain from exercising its option. Similarly, if "A" only possessed $50, and could not somehow obtain the balance, "A" would not be in a position to exercise its option. This appeal does not turn on the ability or desirability of ABC exercising its option. Rather, this appeal turns on the need for adjudication of all the issues at the present time, coupled with the reality that nothing will be gained or materially added by deferring the adjudication until a later date.

F. Attorney Fees.

The argument regarding attorney fees has been discussed in ABC's opening Brief. ABC would be hard-pressed to disagree with CAG's statement in its Respondent's Brief at pp. 19-20, except to say that if this Court reverses the decision, ABC would be the prevailing party on appeal, and the award of attorney fees at the district court would necessarily have to be vacated.

G. Conclusion.

ABC agrees with CAG that the parties should not be forced to litigate. But for the response of CAG to ABC's letter, ABC would not find itself in this position. There is no need to await a breach of the restrictive covenant before a judicial determination is made on the issue as asserted by ABC, and as compounded by the assertion made by CAG that it would be forced to file a cross-claim to litigate the issues it believes outstanding with regard to the Option Agreement.

When the Idaho legislature adopted Idaho Code § 10-1203, it clearly contemplated that there would be situations where a contract would need to be construed before a breach has occurred. This is one of those situations. Resolving the parties' multiple uncertainties regarding the Option Agreement at this time will only serve to afford both of them relief from uncertainty and controversy in the future. The district court will be in no better position than it is now to decide the questions presented. As such, the district court's decision should be reversed with the award of costs and attorney fees to CAG being vacated. Costs and attorney fees should be awarded to ABC as the prevailing party pursuant to the terms of the Option Agreement and I.A.R. Rules 40 and 41.

RESPECTFULLY SUBMITTED this 10th day of February, 2014.

ROBERTSON &, SLETTE, PLLC

BY: _____
GARY D. SLETTE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 10th day of February, 2014, he caused two (2) true and correct copies of the foregoing instrument to be served upon the following persons in the following manner:

Patrick J. Miller	[ ]	Hand Deliver
Givens Pursley	[✓]	U.S. Mail
601 W. Bannock St.	[ ]	Overnight Courier
Boise, ID 83701-2720	[ ]	Facsimile Transmission - 208-388-1300
	[ ]	Email pjm@givenpursley.com

Gary D. Slette