7-5-2013

Pocatello Hospital v. Quail Ridge Medical Investors Appellant's Reply Brief Dckt. 40566

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 40566-2012

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTERS, LLC;
Plaintiff/Respondent

v.

QUAIL RIDGE MEDICAL INVESTORS, LLC; Defendant/Appellant

and

CENTURY PARK ASSOCIATES; Defendant

APPELLANT 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 W. Brown, District Judge, presiding.

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I. REPLY ARGUMENT

A. The Respondent, Portneuf Medical Centers, LLC (PMC), is not entitled to attorneys fees on appeal.

In its Statement of the Case, PMC requests attorney fees on appeal. (Respondent Br. at 8-9.) However, PMC does not address its request for attorney fees in the argument portion of the Respondent Brief. This Court has held that the failure to raise and address attorney fees in the argument portion of briefing is fatal to any request for attorney fees. *See Bagley v. Thomason*, 149 Idaho 806, 808, 241 P.3d 979, 981 (2010); *Bagley v. Thomason*, 149 Idaho 799, 805, 241 P.3d 972, 978 (2010); *Weaver v. Searle Bros.*, 129 Idaho 497, 503, 927 P.2d 887, 893 (1996). PMC has failed to comply with Idaho Appellate Rule 35(a)(6), which requires that the argument portion of the brief contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes, and parts of the transcript and record relied upon." IDAHO APP. R. 35(a)(6) (2012).

PMC has failed to support its assertion with argument, authority, or analysis. As such, its request for attorney fees should be denied.

B. The evidence at trial supported a finding of modification.

Contrary to PMC's arguments, the district court had undisputed evidence before it pertaining to the modification of the Ground Lease. PMC misunderstands Quail Ridge's position. The district court erred when it ruled that the parties had not modified paragraph 1.3(b) of the Ground Lease in 2001.

PMC attempts to force all responsibility for the changes between the 1996 and 2001 estoppel certificates on Faulkner. PMC's efforts to avoid responsibility for IHC's voluntary and

knowing conduct vis-à-vis the 2001 transactional documents are unsupported by the evidence. Quail Ridge did not "slip" changes to the 2001 Landlord Consent and Estoppel Certificate into the transaction without IHC's full knowledge and consent. Faulkner never engaged in any form of subterfuge or deceit when he negotiated with IHC over the contents of the 2001 transaction. The negotiations were open and transparent. In fact, the evidence before the district court established that there was a significant exchange of ideas and changes by the parties to the 2001 transaction. (*See, e.g.*, R Vol. II, p. 291; Trial Tr. Vol. II, 164:8-23; Def. Ex. 228). The parties clearly negotiated over the terms, addressed issues of concern and redlined proposed documents. The 2001 transaction was an "arm's-length" transaction. There is nothing in the record to support PMC's oblique aspersions and suggestions that changes to the 2001 Landlord Consent and Estoppel Certificate was accomplished by deceit or any other underhanded tactics.

The Court should keep in mind that multiple parties reviewed the 2001 transaction documents. IHC and Quail Ridge were not the sole parties to the transaction. Sterling Development was involved as well as PERSI. Ultimately, all of the parties to the 2001 transaction signed the 2001 Landlord Consent and Estoppel Certificate, including Everett Goodwin, IHC's Senior Vice-President and Chief Financial Officer. (*See* Def. Ex. 228.) Quail Ridge did not create the document in a vacuum without IHC and others having a chance to review it. Thus, what Faulkner did or did not do during negotiations over the substance of the document is beside the point. The point is that *all of the parties* removed *key* language from the 1996 iteration of the estoppel certificate in 2001. The evidence also established that IHC assented to the updated form of the estoppel certificate because IHC had its attorney negotiate

and review its language and then had its authorized representative sign the 2001 Landlord Consent and Estoppel Certificate.

IHC's signature is significant. The signature is evidence of mutual assent to the modification. Mutual consent is necessary for a modification to exist. *Watkins Co., LLC v. Storms*, 272 P.3d 503, 508 (Idaho 2012). The district court erred by limiting its consideration of the evidence to Faulkner's conduct as opposed to all of the facts that the parties presented during trial. The 2001 Landlord Consent and Estoppel Certificate contains terms that are materially different than those contained in the Ground Lease Agreement and the 1996 version of the estoppel certificate. The 2001 transaction substantially changed and updated the parties' relationships. Whereas the Ground Lease Agreement and the 1996 estoppel certificate both contemplate the adjustment of rent pursuant to Section 1.3(b), the 2001 Landlord Consent and Estoppel Certificate clearly represents that rent is the fixed amount of $9,562.50. (*See* Pl. Ex. 101; Def. Ex. 228.) The 2001 document is materially different than all prior transactional documents executed by the parties and their predecessors.

Quail Ridge recognizes the language contained in paragraph 2 of the 2001 document However, paragraph 2 must be placed in the proper context of an estoppel certificate. As noted in prior briefing, estoppel certificates are designed to make binding representations concerning the facts relevant to a real estate transaction. *Lakeview Mgmt., Inc. v. Care Realty, LLC*, 2009 U.S. Dist. LEXIS 28171, *54 (March 30, 2009). The representation that the Lease is in full force and effect merely represented that the Lease existed and was still the operative document at the time the parties executed the 2001 Landlord Consent and Estoppel Certificate. Paragraph 2 is

not a statement that the Lease was not being modified or altered in the 2001 transaction. The representation in the 2001 Landlord Consent and Estoppel Certificate merely represented to all of the parties that the Ground Lease had not been superseded by any extant document at the time the parties consummated the 2001 transaction. The 2001 transaction made changes that did not previously exist. For example, as a part of the 2001 transaction, Forrest Preston signed a personal guarantee. The personal guarantee had never existed before and was new to the 2001 transaction. (*See* Trial Tr. Vol. II, 164:22-23.) The district court, and subsequently PMC in its briefing, have entirely misperceived and misapplied the law of estoppel certificates to the contents of paragraph 2. There is no evidence that the district court considered this information that was present in the record during trial. Therefore, the district court erred.

PMC also argues that the following language defeats Quail Ridge's arguments for modification:

> Landlord's consent to the assignment and assumption and/or to the sublease as set forth herein shall not constitute or be construed as (a) an acknowledgement of or consent to any other assignment, assumption, and/or sublease, (b) a waiver or modification by Landlord of the Tenant's duties or obligations under the Lease, or excuse Tenant's performance of any term or condition of the Lease, and/or (c) a waiver or modification by Landlord of any of its rights under the Lease, including without limitation Landlord's rights pursuant to Section 12.1 of the Lease.

(Def. Ex. 228.) The foregoing language does not apply to the estoppel certificate. It applies to the assignment and assumption documentation that the parties executed in 2001. There is nothing in the estoppel certificate that precludes the representations made in the certificate from (a) differing, altering, or amending the Ground Lease and (b) binding IHC/PMC. The document that the language applies to is entitled "Sale and Assumption Agreement and Agreement for

Substitution of Liability." The document was submitted as Plaintiff's Exhibit 103. If the district court were limited to deciding whether the Sale and Assumption Agreement and Agreement for Substitution of Liability document constituted a modification then PMC's argument could be considered.

The 2001 Landlord Consent and Estoppel Certificate is a separate, legal document executed concurrent with the Sale and Assumption Agreement and Agreement for Substitution of Liability. The 2001 Landlord Consent and Estoppel Certificate's provisions as to rent have a separate legal effect as noted in *Lakeview Management* and other authority pertaining to the effects of estoppel certificates. Nothing in the estoppel certificate prevents its own terms from modifying the Ground Lease Agreement.

PMC also takes issue with the fact that the modification occurred by removing language from a prior estoppel certificate. PMC, however, fails to point out any legal basis for rejecting "modification by subtraction." There is no legal precedence supporting PMC's implication that this is somehow legally improper. The term "modification" merely means introducing or cancelling terms. BLACK'S LAW DICTIONARY 1155 (4th Ed. 1968). A perfectly acceptable way to cancel terms is by removing them altogether from a legally binding document or instrument.

PMC suggests that it would have been easier for the parties to modify the document through a different legal mechanism. PMC's arguments are impertinent. What the parties could or could not have done is not relevant to what the parties *actually did* in the 2001 transaction. PMC also glosses over the fact that a paucity of evidence existed suggesting that the parties intended anything other than to fix the rent at $9,562.50 in the 2001 Landlord Consent and

Estoppel Certificate.

The parties mutually agreed to the modification in the 2001 Landlord Consent and Estoppel Certificate. IHC represented to all of the parties in the 2001 transaction that the rent was going to be fixed at a set amount and that it would not be altered in the future. The 2001 representation by IHC is different than its representation in 1996. There is no question that the representations made in the certificate should bind PMC. The document should have legal significance and the district court erred by failing to find modification. The district court misapplied the law to the facts before it by ignoring the document's language and terms. The evidence does not support the district court's findings and it should be reversed.

C. The district court erred by failing to find waiver.

PMC's arguments about waiver fail. Acquiescence to a course of conduct contrary to the rights and obligations of a party can waive those rights. In this case, IHC manifested its intent to waive the rent adjustment provision of the Ground Lease when it signed the 2001 Landlord Consent and Estoppel Certificate. Signing the document constituted a clear and unequivocal act manifesting intent to waive. This was equivalent to estoppel. Waiver or estoppel is the entire essence of the estoppel certificate. The 2001 estoppel certificate constitutes a binding, unequivocal act that waives all prior rights except those contained in the estoppel certificate. *See Plaza Freeway Ltd. P'ship v. First Mountain Bank*, 81 Cal. App. 4th 616, 626, 96 Cal. Rptr.2d 865, 872 (2000).

D. The district court erred by not applying estoppel to bar PMC's claim.

The district court erred by not estopping PMC from claiming adjusted rent because the

2001 Landlord Consent and Estoppel Certificate makes binding representations for PMC. In its response, PMC agrees with the legal principles and authority cited by Quail Ridge (Appellant Br. at 14-15) but tries to distinguish the authority. (Respondent Br. at 22.) PMC's efforts fail.

The district court erred by not holding PMC to the contents of paragraph 5 of the 2001 Landlord Consent and Estoppel Certificate. (*Id.*) That language provides the rent amount under the Ground Lease. (*Id.*) As noted, *supra*, PMC's arguments that the document "is not intended to modify the 1983 Lease Agreement" are incorrect and misread the document. Nothing in the 2001 Landlord Consent and Estoppel Certificate precludes the parties from modifying the Ground Lease. Moreover, nothing in the document prevents its representations from binding PMC to its plain language. *See, e.g., K's Merch. Mart, Inc. v. Northgate Ltd. P'ship*, 835 N.E.2d 965, 971 (Ill. 2005); *Plaza Freeway Ltd. P'ship v. First Mountain Bank*, 81 Cal. App. 4th 616, 626, 96 Cal. Rptr.2d 865, 872 (2000).

As noted previously, IHC represented to Quail Ridge, Sterling Development, Pocatello Medical Investors (PMI), and PERSI that the rent due under the Ground Lease was $9,562.50 per annum. (Def. Ex. 228, ¶ 5.) The 2001 representations are fundamentally different than the 1996 representations. (*Id.*; *see also* Def. Ex. 211.) The district court never explained why, or how, it could justify failing to give effect to the estoppel certificate. PMC never should have been allowed to assert its claim for declaratory relief because it had, through extensive arms length negotiations, expressly agreed to forego representations to the contrary.

E. The district court erred by disregarding the Ground Lease's language.

PMC's arguments essentially concede that the district court failed to apply the contract's language and that the district court's findings are not an interpretation of the Ground Lease but rather constitute a new contract fashioned by the district court. The district court lacks the power to rewrite the contract and to disregard the contract's language when interpreting the document.

When a district court is tasked with interpreting an ambiguous contract, it should actually interpret the subject language rather than disregarding or ignoring the language, or rewriting the contract altogether. *See Potlach Educ. Ass'n v. Potlach Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010) (when interpreting a contract the court starts with the contract language). Quail Ridge understands the district court's actions in this case; however, those actions are not reflective of what the district court had been asked to do in the case and deviated from established precedent of contract interpretation. The district court should have sought to effectuate the parties' intent as set forth in the actual agreement. As noted in prior briefing, "[t]o determine the intent of the parties, the contract must be viewed as a whole and in its entirety." *Id.*

> When interpreting a contract, this Court begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.

Knipe Land Co. v. Robertson, 151 Idaho 449, 454-55, 259 P.3d 595, 600-01 (2011). PMC seems to imply that when a court is faced with ambiguous contract language that it *must* have extrinsic

evidence in order to interpret that ambiguous language. This is not the case. Even here where there was a small amount of extrinsic evidence about the meaning of the "taking into account" language, the district court still had the contract language before it and should have interpreted it rather than disregarding the language in its entirety. (*See* R Vol. I, p. 195.) Ignoring the contract's language forms a new agreement and does not enforce the parties' intent.

PMC's arguments about the relatively small amount of extrinsic evidence exhibit the same flaws as the district court. The district court reasoned that since no parole evidence was admitted during trial about the terms it found ambiguous that it could not interpret the contract as written. The ambiguity in the paragraph 1.3(b) of the Ground Lease has nothing to do with how the parties reached the $15,000.00 amount. (Pl. Ex. 101.) PMC ignores the fact that the ambiguous language has little to do with how the parties reached that number when adjusting subsequent rent values. Instead, the $15,000 value should have been considered, factored in, or taken into account when the district court reached its decision in this case. (*Id.*) The district court, by its own admission, did not take the language into account in reaching its findings. Therefore, the district court erred.

Quail Ridge's arguments do not "elevate the guidelines" to an inappropriate level. Quail Ridge seeks only to have the contract language actually considered rather than ignored. Quail Ridge's position is consistent with the law governing contract interpretation, i.e., that the court actually interpret the contract language and not ignore it. *Potlach Educ. Ass'n v. Potlach Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). It is only by parsing the contract language, and ignoring the ambiguous terms, that the district court could have reached

the result that it did in this case. The district court failed to take into account the very terms that it should have been considering, i.e., taking into account the parties' original agreement that the initial minimum rent was the 15% of a fair market value of $15,000/acre and the subsequent determinations or acquiescence to values for prior adjustment periods. (Pl. Ex. 101.) The district court erroneously applied the law because it failed to consider the relevant facts. *Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 706-07, 52 P.3d 848, 851-52 (2002). The district court should be reversed.

PMC also misunderstands Quail Ridge's position regarding adjustment. The Ground Lease does not require that rent only be increased. (Pl. Ex. 101.) Instead, the document provides for an adjustment of rent. (*Id.*) This adjustment could be an increase or a decrease.

The time period for adjustment that is the subject of this appeal is the time period between 2007 and 2010. The evidence is undisputed that the land values in the Pocatello area decreased from 2007 to 2010. (Trial Tr. Vol. I, 62:11-65:2; Vol. II, 202:2-7.) In fact, PMC's own expert, Brad Janoush, testified that the decrease in was -8.33%. (*Id.* Vol. I, 64:11-18.) The Ground Lease does not require an objective market based approach to the rent adjustment. (Pl. Ex. 101.) Instead, the Ground Lease requires that the subsequent rent adjustments take into account (1) the original value assigned by the parties and (2) any subsequent adjustments by the parties. (*Id.*) There is no dispute that the parties never adjusted rent for over 27 years. The parties all agreed, acquiesced, or otherwise conceded for the majority of the life of the Ground Lease that the rent would remain static. The district court should have taken that course of conduct into account when it decided this case. The findings and conclusions, however,

demonstrate that it did not do so. Had the contract language been interpreted by the district court, the rent should have been adjusted as a decrease in favor of Quail Ridge.

The district court did not follow the law of contract interpretation and construction. Even under the "priorities" identified by PMC in Section 203 of the Restatement (Second) Contracts (1981), establish that the district court failed to properly apply the law. First, Quail Ridge's interpretation of the contract language is proper because it considers all of the language contained in the Ground Lease and does not ignore key terms. Based on Restatement Section 203, an interpretation that gives effect to all terms is preferred to one that "leaves a part unreasonable, unlawful, or of no effect." RESTATEMENT (SECOND) CONTRACTS § 203(a). The district court's interpretation left terms having no effect. Quail Ridge's interpretation also considers the express terms of the contract *and* factors in the course of performance. *See id.* § 203(b). This interpretation considers the fact that the parties *never adjusted rent over 27 years* of dealing and also factors in the ambiguous language that the district court should be interpreted in this case. The third priority also supports Quail Ridge's position. The taking into account language in 1.3(b) is not "general language" as PMC suggests. It is just as integral to the rent adjustment process as any of the other terms. In fact, one might argue that "taking into account" is the most specific language in the section because it adds unique layers to the rent adjustment calculus. Regardless, and contrary to PMC's assertions, the "prime directive" of Section 1.3(b) of the Ground Lease is adjusting rent as follows:

a. Based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account;

b. Take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre; and,

c. Take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.[1]

(Pl. Ex. 101.) Each factor identified in the Ground Lease is of equal weight and are of mutual importance. PMC lacks any legal basis for arguing to the contrary.

PMC makes a mystifying and specious argument that the "taking into account" language is precatory. PMC's argument makes no sense and relies on isolating the three words from the entire context of paragraph 1.3(b). The relevant portion of 1.3(b) reads:

> The rent adjusted shall be equal to fifteen percent (15%) percent (sic) of the fair market value of the leased land, exclusive of improvements on the premises. Determination of fair market value *shall* be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. The determination *shall* take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and *shall* also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.

(*Id.*, emphasis added). The taking into account language is not just a useful suggestion or helpful tip for the parties. The language is mandatory because it is preceded by the word "shall". The word "shall" is defined "as used in statutes, contracts, or the like, this word is generally

[1] The mandatory directive that they "shall" be considered when adjusting rent precedes each of the foregoing elements of the rent adjustment process. This is important given PMC's argument that the taking into account language is precatory.

imperative or mandatory." BLACK'S LAW DICTIONARY 1541 (4th Ed. 1968). The phrases preceded by "shall" are anything but precatory.

F. The district court erred by not finding a course of dealing.

Inaction is a type of course of dealing. The parties and their predecessors all chose not to adjust the rent for a variety of reasons, some known and some unknown. The district court had before it information that showed a conscious decision by IHC to not adjust the rent. Those choices are relevant to course of dealing. There is also no dispute that following the 2001 transaction that PMC failed to adjust the rent once it stepped into IHC's shoes. The district court failed to take the course of dealing by the parties into account when it reached its decision. This was an error by the district court and its decision should be reversed and remanded.

G. The district court erred by admitting Brad Janoush's testimony.

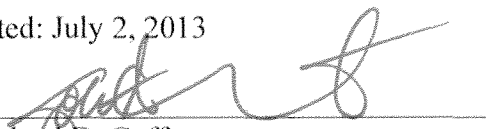
There should be no dispute over whether Janoush *ever* reviewed the substance of the Ground Lease. He never reviewed the document prior to his appraisal. (Trial Tr. Vol. I, 63:10-15.) PMC does not even argue that Janoush considered the Ground Lease's terms when coming up with his value for the property. This was improper because the fair market value was never to be based solely on an objective appraisal of the property. Janoush's methodology was irredeemably flawed and the district court erred by admitting Janoush's testimony and then by relying on the testimony when the district court fashioned its remedy.

Since Janoush was the sole source of evidence for the district court when it calculated the adjusted rent, the Amended Declaratory Judgment should be vacated, Janoush's testimony stricken from the record, and the district court reversed.

II. CONCLUSION AND RELIEF REQUESTED

As a result of the foregoing, the district court should be reversed and remanded.

Dated: July 2, 2013



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I certify I am a licensed attorney in the state of Idaho and on July 2, 2013, I served true and correct copies of the APPELLANT REPLY BRIEF on the following by the method of delivery designated below:

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