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# Franklin Building Supply Co v. Hymas Appellant's Brief Dckt. 41041

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IN THE SUPREME COURT OF THE STATE OF IDAHO

\*\*\*\*\*

FRANKLIN BUILDING SUPPLY	)	Supreme Court No. 41041-2013
COMPANY, INC.,	)	
	)	District Court No. CV OC 11-19058
Plaintiff-Respondent	)	
	)	
v.	)	
	)	
AARON MICHAEL HYMAS,	)	
	)	
Defendant-Appellant	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE RICHARD D. GREENWOOD  
DISTRICT COURT JUDGE PRESIDING

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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is a case wherein Franklin Building Supply Company, Inc. (also hereinafter referred to as “Franklin Building Supply”) commenced on October 4, 2011 an action against Aaron Michael Hymas (also hereinafter referred to as “Hymas”). The basis of the action was to seek recovery of an enormous amount of money on an open account, namely, \$753,159.55 together with interest continuing to accrue at \$331.22 per diem from and after September 30, 2011. (*Clerk’s Record on Appeal “R”*, p.7, §6) The defendant filed an Answer to the Complaint on February 2, 2012. (*R*, pp.9-10) Defendant’s Answer was a general denial of the action and included the Affirmative Defense that the statute of limitations had run with respect to this obligation.

### **B. Course of the Proceedings**

The action commenced with the Complaint dated September 3, 2011, filed on October 4, 2011 by Franklin Building Supply Company, Inc. (*R*, pp. 6-8) The defendant’s Answer to Complaint dated February 1, 2012 was filed on February 2, 2012. (*R*, pp. 9-10) Subsequent thereto, on October 29, 2012, a Motion for Summary Judgment was filed by the plaintiff (*R*, pp. 11-12) and, in support of such, an Affidavit of Richard C. Pietrucci was filed on October 29, 2012, which included exhibits as attachments. (*R*, pp. 13-51) Exhibit “A” to the Affidavit was an Application for Credit; Exhibit “B” was a Continuing Guaranty’ Exhibit “C”

was a list of invoices and invoices that were claimed to be still outstanding and needed to be paid. Plaintiff also filed a Memorandum in Support of Motion for Summary Judgment at the same time. (*R*, pp. 52-58)

Defendant's Response to Motion for Summary Judgment was filed on December 4, 2012. (*R*, pp. 59-61) Attached thereto was Defendant's First Set of Interrogatories and Requests for Production of Documents and the Notice of Service of Discovery (*R*, pp. 62-69) which, at that point, had not been responded to. Such discovery had been outstanding since April 12, 2012. Subsequent thereto, on December 6, 2012, Plaintiff filed a response to Defendant's Response to the Motion for Summary Judgment. (*R*, pp. 70-84)

On January 14, 2013, a hearing was held with respect to the Motion for Summary Judgment, and the Court granted summary judgment. (*Reporter's Transcript of Proceedings "Tr"*, p. 20, Ll. 8-9) Before summary judgment was ever entered, the plaintiff had filed a Motion to Correct Calculation of Amount Claimed Owed Plaintiff on January 22, 2013. (*R*, pp. 85-89) In support of the Motion, it included an Affidavit of Joey Enochson in Support of Plaintiff's Motion. (*R*, pp. 90-92) Thereafter, Defendant filed his Motion and Memorandum to Reconsider Judgment on February 8, 2013. (*R*, pp. 93-96) It was supported by the Affidavit of Aaron Hymas filed on that same date. (*R*, pp. 97-99) Also filed on February 8, 2013 was a Motion to Shorten Time. (*R*, pp. 100-101) It appears from the record that it was never acted upon. On February 11, 2013 plaintiff filed an Objection to the Motion to Shorten Time and an Affidavit of David M. Swartley in support of such. (*R*, pp. 102-108.) On that same day, plaintiff

filed a Response to Defendant's Motion to Reconsider Judgment (*R*, pp. 109-122) and an Affidavit of David M. Swartley in Support of the Response. (*R*, pp. 123-136)

On February 21, 2013, defendant Hymas filed his Reply to Plaintiff Franklin Building Supply Company's Response to Defendant's Motion to Reconsider Judgment with Exhibits A-E included therein (*R*, pp. 137-155). More specifically, Exhibit "A" was six random invoices that were provided by the plaintiff as part of its discovery responses to the defendant; Exhibit "B" was an application in which the plaintiff relied upon in order to claim that the defendant as guarantor was liable; Exhibit "C" was the Articles of Dissolution of Crestwood Construction, Inc. dated February 11, 2005; Exhibit "D" was Articles of Incorporation of Crestwood, Inc. dated February 11, 2005; and Exhibit "E" was a Certificate of Assumed Business Name of Crestwood Construction, Inc. dated April 6, 2005. On February 26, 2013, the Plaintiff filed an Objection and Motion to Strike Defendant's Reply to Plaintiff's Response to Defendant's Motion to Reconsider Judgment. (*R*, pp. 156-158) On March 5, 2013, a Notice Re: Affidavit of Aaron Hymas in Support of Motion to Reconsider was filed. The Notice stated that Plaintiff's response to discovery was not attached to the fax-filed Affidavit of Aaron Hymas in Support of Motion to Reconsider dated February 7, 2013, and was then being attached thereto, namely, Plaintiff's Responses to Defendant Aaron Michael Hymas' First Set of Interrogatories and Requests for Production of Documents dated December 5, 2012. (*R*, pp. 159-167) On April 5, 2013, by its Memorandum Decision the Court granted summary judgment to Franklin Building Supply Company, Inc. and also denied the Motion to Reconsider. (*R*, pp. 168-175)



An Amended Judgment was entered by the Court on April 8, 2013. (*R*, pp. 176-177) An Affidavit of Aaron Michael Hymas was filed on April 26, 2013 (*R*, pp. 178-180); subsequent thereto, since it appeared that Exhibits A-E had not been attached to the initial affidavit, an Amended Affidavit of Aaron Michael Hymas was filed on April 30, 2013 to which Exhibits A-E were attached, which were the same exhibits as noted above. (*R*, pp. 181-198) Plaintiff filed on May 13, 2013 a Response to Defendant's Motion to Reconsider Amended Judgment Dated April 8, 2013 and the Memorandum Decision Issued April 5, 2013 (*R*, pp. 199-211) and the Affidavit of David M. Swartley in support of that Response (*R*, pp. 212-216).

On May 17, defendant Hymas filed a Motion to Reconsider Amended Judgment Dated April 8, 2013 and the Memorandum Decision Issued April 5, 2013. (*R*, pp. 217-218) (Summary of proceedings - *R*, p. 219). Ultimately the Court denied such Motion (*R*, pp. 228-229) from which a Notice of Appeal was filed on May 20, 2013 (*R*, pp. 220-223). An Amended Notice of Appeal was filed on June 4, 2013. (*R*, pp. 224-227) A Second Amended Notice of Appeal was filed on July 3, 2013 to change the name of the reporter. (*R*, pp. 230-233) (Notice of Transcript Lodged - *R*, p. 234).

This matter is now before this Court for determination on appeal.

**C. Concise Statement of the Facts**

Franklin Building Supply Company, Inc. claimed that prior to agreeing to provide materials and goods to Crestwood Construction, Inc., a Credit Application was prepared and signed by Justin Walker and Aaron Hymas. The Credit Application in question provided, among

other things, that the parties who were authorized to purchase were listed in Part G, namely, Chris Georgson, Justin Walker and Aaron Hymas. In addition, a Continuing Guaranty was also signed by Justin Walker and Aaron Hymas. Because of the failure to pay invoices which commenced on, as best as can be determined, on December 22, 2006. It was for goods which were allegedly provided by Franklin Building Supply to Crestwood Construction, Inc. The action was initially brought against Aaron Hymas for goods sold during the latter part of 2006 and went through sometime in the middle of 2007. It appears from looking at the Affidavit of Richard C. Pietrucci filed October 29, 2012, that the invoices in question for which the plaintiff seeks to collect appear to be on twenty (20) different accounts. (*R*, pp. 23-51) In each case, there is a single page per invoice for the different accounts except on pages 49 and 50, which is a summary of invoices.

When summary judgment was filed in this matter, the response was (1) that the statute of limitations had occurred, and (2) that without supporting information as to the invoices amount, it would be difficult, if not impossible, to determine whether the amount claimed to be owed by the plaintiff was in fact owed. This was also further enhanced by the fact that the Credit Application provided the names of the authorized purchasers and, in order to prevail in a summary judgment, it must be demonstrated that the invoices in question were authorized by one of the three authorized purchasers.

Furthermore, the Plaintiff indicated that he had not received the Request for Production of Documents dated April 12, 2012, as evidenced by the Notice of Service in the

discovery which was attached. The discovery attached and provided, among other things, that there was a request for production of a copy of all documents that Franklin Building Supply intended to use as exhibits in the trial of this matter. Subsequent thereto, but unbeknownst to the counsel for the Defendant, the documentation was in fact received. This receipt of documents occurred prior to the argument of the summary judgment matter.

The Court granted summary judgment to the Plaintiff. After which, the Court granted summary judgment orally but no written order was issued. The only ruling was an oral ruling from the Court. Immediately thereafter on January 22, 2013, a Motion to Correct Calculation of Amount Claimed Owed Plaintiff and an Affidavit in support of such.

Thereafter, Defendant filed a Motion and Memorandum to Reconsider Judgment. It was stressed that the information was not available at the time that the Defendant responded to the summary judgment. The responses were then reviewed by the Defendant and discovered that none of the invoices were signed and, since there were many different accounts, there was no indication that the invoices were ever delivered to Crestwood Construction, Inc. Furthermore, the Answers to Interrogatories indicated that those invoices would be used as evidence in the trial. At the hearing on February 27, 2013, it was discovered that Plaintiff's responses to discovery (with the exception of the CD referred to therein) that were to have been attached to the fax-filed Affidavit, were not attached. Therefore, on March 5, 2013 the Court requested that the Plaintiff provide, among other things, invoices for materials ordered by the Defendant and delivered to the Defendant's job sites that the Plaintiff intended to use at trial.

An additional motion was filed to bring to the Court's attention that on February 8, 2005 the corporation of Crestwood Construction, Inc. was dissolved effective as of December 31, 2005. (*R*, p. 196) After which, Crestwood, Inc. was formed and then used the assumed business name of Crestwood Construction, Inc. In other words, an additional issue of fact arose, namely, the dissolution of Crestwood Construction, Inc. and a new entity altogether doing business after February 11, 2005. It is important to note that initially, when the Complaint was filed in this matter, it was seeking for payment on an open account, not on the personal guaranty. That is the reason why the Answer to the Complaint indicated that the Statute of Limitations had run. After that, the action changed from that of collecting on a personal account to collecting on a guarantor, which would have changed the Statute of Limitations from four years to five years meaning that the transaction in question was, in fact, not barred by the Statute of Limitations.

## II. STANDARD OF REVIEW

An appeal from an order of summary judgment is reviewed by the Court under the same standard used by the trial court in ruling on a motion for summary judgment. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003). Under that standard all facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences are to be drawn in favor of the non-moving party. *Id.* Summary judgment is only appropriate if the pleadings, depositions, admissions, and affidavits on file, show that there is no genuine issue relating to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

If there is no disputed issues of material fact, then the Court exercises free review over the remaining questions of law. *Id.*

### III. ISSUES PRESENTED ON APPEAL

- A. The Court Erred in Granting Summary Judgment When it Failed to Require More Evidence Than the Opinion of a Witness as to the Amount Without More Supporting Documentation.
- B. The Court Erred When it Allowed the Judgment to be Amended to Include Interest.
- C. The Court Erred When it Denied the Defendant's Motion to Reconsider.

### IV. ARGUMENT

- A. **The Court Erred in Granting Summary Judgment When it Failed to Require More Evidence Than the Opinion of a Witness as to the Amount Without More Supporting Documentation.**

The relevance of all of such is that Franklin Building Supply was attempting to collect on a guaranty a very large debt, specifically, approximately \$700,000. In attempting to collect that debt, it filed a Motion for Summary Judgment with an Affidavit that merely provided a summary and then an amount for each of the twenty accounts and totaled them as to bring about the claim that was owed. An affidavit supporting a motion for summary judgment must be made on personal knowledge and show that the affiant is competent to testify to the material contained therein. Idaho R. Civ. P. 56(e). The Rule further states that the "court may permit affidavits to be ... opposed by depositions, answers to interrogatories, or further affidavits." *Id.*

In this case, Rule 56(e) raises two issues. First, since the amount in question was based upon invoices, the Court should have granted the defendant the opportunity to depose the affiant who filed the Affidavit in Support of Motion for Summary Judgment. Second, nothing in the Affidavit in Support of Motion for Summary Judgment indicates that Mr. Pietrucci (the affiant) has personal knowledge that the items listed on the Customer Transaction Report actually correspond to goods that were actually delivered to Defendant. Defendant should have been allowed to opportunity to depose Mr. Pietrucci, so that it could be determined whether in fact each of the summaries of open accounts, twenty in nature, were in fact all incurred by Crestwood Construction, Inc. The Court declined to do so. Also, no evidence was presented that would indicate the Mr. Pietrucci in fact personally knew if those invoices corresponded to items actually delivered to Crestwood Construction Inc., or to some other entity. A further issue of fact arises because the Credit Application required that only certain people were authorized purchasers, namely, Chris Georgson, Justin Walker and Aaron Hymas. No evidence was presented to show that, in fact, had occurred. If the contents of an affidavit could not be within the affiant's personal knowledge they are not cognizable under Rule 56(e). *Resource Engr., Inc. v. Nancy Lee Mines, Inc.*, 714 P.2d 526, 528 (Idaho App. 1985). Thus, in this case summary judgment was not appropriate since the Defendant was not given the opportunity to depose the affiant and no supporting evidence was provided that the affiant had personal knowledge relating to the invoices relied upon to determine the amount Defendant owed.

Furthermore, the Request for Production of Documents included that the Court should consider the invoices since, ultimately, the responses of the Plaintiff would be used at trial. It is hard to understand while they were not used in the summary judgment, but felt they were needed in trial. Rule 56 states that summary judgment is only appropriate when there are no genuine issues of material fact in the case. Idaho R. Civ. P. 56(c). However, the invoices (which were not considered at summary judgment) give rise to some factual issues. First, the information contained in the invoices is particularly important since they refer to 20 different accounts at 10 or 20 different locations and no evidence was provided showing that the Defendant did in fact receive those items listed on the invoices. Second, there is the addition issue of whether in fact the alleged purchases were authorized by one of the three individual authorized to do so. By not having fleshed out these facts, the trial court left some material factual disputes dangling, which should be addressed by a trier of fact.

Added to all of that is what effect, if any, it had on the Credit Application for the personal guaranty of the Defendant that Crestwood Construction, Inc. was dissolved. Said dissolution having occurred before it appears any of the charges at issue here were incurred and after the credit application was signed. Thus, a new entity, Crestwood Inc., was formed, which is altogether a different entity than Crestwood Construction, Inc. Crestwood Inc., then began using the assumed business name of Crestwood Construction, Inc. In other words, there was no credit application filed with respect to the existing entity and, thus, no guaranty of the obligation. Furthermore, it is important to note that as one looks at the different invoices (*R*, pp. 23-51), the

invoices were all in the name of Crestwood Construction, and Aaron Hymas did not guaranty Crestwood Construction but only Crestwood Construction, Inc. Thus creating an addition factual issue and another reason why the trial court erred by granting summary judgment. Thus looking at the amount of money at issue in this case (over \$700,000) there are significant material facts in disputes which would justify this matter being tried.

**B. The Court Erred When it Allowed the Judgment to be Amended to Include Interest.**

When summary judgment was sought, it was sought for the original amount and the Court granted that amount. Thereafter, it was improper for the Court to allow that amount to be corrected and add the interest. Once that interest was added, it should have been added only at the contract rate of 12% and not 18%. Idaho Code § 28-22-104.

**C. The Court Erred When it Denied the Defendant's Motion to Reconsider.**

In addition to what has previously been demonstrated, additional issues were in fact presented to the Court. Specifically, showing what the Plaintiff's Production of Documents provided and additional information that should have suggested to the trial court the genuine issues of material fact existed and it should not have granted summary judgment in the matter.

**V. ATTORNEY FEES**

Since this is a commercial transaction, the Court should grant attorney fees under Idaho Code § 12-120.

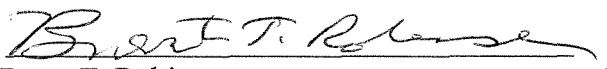


## VI. CONCLUSION

This case should be remanded in its entirety to the District Court to determine the correct amount of the indebtedness of Defendant, for Franklin Building Supply to show that a debt is in fact owed by Crestwood Construction, Inc., and if Aaron Hymas is in fact a guaranty of that particular debt.

DATED this 22<sup>nd</sup> day of January, 2014.

ROBINSON & TRIBE


By:   
Brent T. Robinson  
Attorneys for Defendant/Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of January, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

David M. Swartley, Esq.  
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