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IN THE IDAHO SUPREME COURT OF THE STATE OF IDAHO

MARJORIE LOIS ELLMAKER,
a single woman,

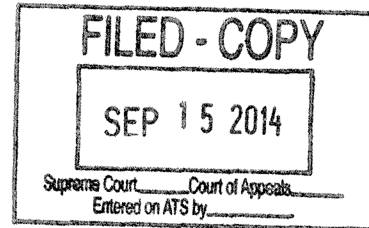
Supreme Court No. 41846

Plaintiff/Appellant,

vs.

CALVIN TABOR and KEITH TURNER
and A1 REAL ESTATE, an Idaho
Limited Liability Company,

Defendants/Respondents



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Third Judicial District
for Canyon County.

Honorable George A. Southworth, District Judge

Kenneth F. Stringfield
Residing at Caldwell, Idaho, for Appellant.

David E. Kerrick
Residing at Caldwell, Idaho, for Respondent.

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I.
THE AFFIDAVITS, DEPOSITION TESTIMONY, AND NUMBEROUS ATTACHED DOCUMENTS ARE SUFFICIENT TO SUPPORT MARJORIE ELLMAKER'S CLAIMS AND CREATE MATERIAL ISSUES OF FACT.

A. Legal Standards for Summary Judgment.

The trial court failed to follow the legal standards when it granted Calvin Tabor's motion for summary judgment. The trial court must construe "disputed facts ...in favor of the non-moving party [Marjorie Ellmaker]," and resolve "all reasonable inferences that can be drawn from the record...in favor of the non-moving party." *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394 (2008). A court must deny a summary judgment motion if reasonable people might draw conflicting inferences and conclusions from the evidence. *Pro Indiviso v. Mid-Mile Holding*, 131 Idaho 741, 745 (1998); *Farmers National Bank v. Shirey*, 126 Idaho 63, 67-68 (1994). The trial court cannot weigh evidence or resolve controverted factual issues. *Am. Land Title Co. v. Isaak*, 105 Idaho 600, 601 (1983).

B. Marjorie Ellmaker Presented Sufficient Evidence of Her Standing to Withstand Summary Judgment and Dismissal.

Marjorie had legal standing to bring this suit. The trial court determined that it would not consider Martha's will as evidence of her devise to Marjorie under I.C. § 15-3-102. Although admission of the will to show a devise is permissive, the trial court reasoned that (1) there was no explanation why it was not probated, and (2) the court could not determine that it was Martha's last will. Mr. Tabor adopted the trial court's reasoning in his brief. Mr. Tabor's brief addressed the application of I.C. § 15-3-102 and I.C. § 15-3-108, but failed to address Marjorie's other standing arguments; therefore, she assumes that Mr. Tabor does not contest them.

Marjorie's October 22, 2013 affidavit stated that Steve Scanlin prepared Martha

Chitwood's will. (R., pp. 137, 138.) Mr. Scanlin confirmed this in his October 22, 2013, Affidavit. (R., pp. 103, 104.) The record contains no evidence that Martha made any other will. Marjorie was present when Mr. Scanlin and Martha reviewed Exhibit B, and Martha affirmed that the will stated her intent. Mr. Tabor made no argument suggesting, nor produced evidence of, any other will. A reasonable inference, based on Marjorie's evidence, and applying the presumptions in favor of her, is that the will, Exhibit B, was Martha's only will.

Mr. Scanlin's law practice focused on elder law including estate planning, wills, and probates. Mr. Scanlin assisted (represented) Marjorie as Martha's personal representative; he prepared Affidavits of Non-Probate to "transfer [the promissory note – debt -at issue in this case] to Marjorie. Mr. Scanlin believed those documents effectively transferred Martha's property to Marjorie. (The October 22, 2013 affidavits of Marjorie and Mr. Scanlin.) It is reasonable to infer that Mr. Scanlin believed a probate was unnecessary to transfer Martha's estate. It is a reasonable inference that Marjorie relied on her lawyer's judgment, and did not need to probate the will to transfer Martha's property.

The record shows that she met the requirements of the exception to I.C. § 15-3-102; Marjorie possessed the property according to the will, and no one else had claimed it since Martha's death. The record also shows that Marjorie was an heir under intestacy. In granting Mr. Tabor's motion for summary judgment, the trial court failed to make reasonable inferences in Marjorie's favor and therefore abused its discretion.

C. Count I –Oral Contract. Marjorie Ellmaker Presented Sufficient Evidence of Mr. Tabor's Oral Agreement to Withstand Summary Judgment and Dismissal.

Marjorie presented evidence that Mr. Tabor orally agreed that he would repay the

debt both before and after it was in default. However, the trial court found that there was no consideration for any agreement by Tabor to repay the debt because Marjorie had no valid claim against Tabor to forgo. Mr. Tabor argued that as a promisor, he cannot be both guarantor and a principal debtor and there was neither consideration nor a writing. But, if Mr. Tabor received any benefit because Marjorie delayed bringing an action against either him or A1, then there was consideration. *Mickelsen Construction, Inc. v. Horrocks*, 154 Idaho 396 (2013) quoting *Vincent v. Larson,* 1 Idaho 241, 248 (1869) ("It would seem that any gain to the promisor, or loss to the promisee, however trifling, ought to be sufficient consideration to support an express promise") (emphasis added). Mr. Tabor's arguments ignore the exceptions to the parol evidence rule, and his oral agreement to pay the loan is an original agreement not governed by the statute of frauds.

The trial court was mistaken when it determined that Marjorie had no valid claim to give up, or it was presuming that there was no claim because Marjorie had no standing. Marjorie's valid claims against Mr. Tabor, Mr. Turner, A1, or any combination of them included: (1) mistake, misrepresentation or fraud, reformation, rescission, or unjust enrichment; or at least (2) enforcement of valid agreements between A1, or all of the defendants, and Martha (and later Marjorie). Marjorie could have filed a lien against the sold McCall property to the extent of the loan and A1's interest in it. Had Marjorie filed a lawsuit, then A1 and the partners' assets would have been negatively affected. One of the reasons that she did not file the suit then was because she did not understand that Mr. Tabor had misled her and taken advantage of the close personal relationship he had developed with Martha and Marjorie. The size of the loan, its terms

– including not keeping a security interest in the property until the loan was paid, its changing due dates, and that Mr. Tabor knew he could not get a loan like this from a bank, are a few of the facts demonstrating the degree of trust that Mr. Tabor developed with Martha and Marjorie. By not filing suit earlier because of Mr. Tabor's promises to pay, A1, Mr. Tabor and Mr. Turner gained a "trifling" benefit. This benefit was sufficient consideration to Mr. Tabor even assuming the loans were to A1.

Mr. Tabor's promises to Marjorie to pay the loan are original promises and an exception to the Statute of Frauds. I.C. § 9-506. If the debt was A1's, Mr. Tabor's promises to pay it, combined with the consideration that he received from Marjorie are covered by I.C. § 9-506(2) & (3). Whether an oral promise constitutes a collateral or an original obligation, for the purposes of the statute of frauds, is generally a question for the finder of fact. *Dalby v. Kennedy*, 94 Idaho 72 (1971). *See also*, *Wright v. Wright*, 97 Idaho 439 (1976). Marjorie stated under oath, that both before and after the note was in default, Mr. Tabor orally agreed that he was responsible for the debt and would pay it.

Whether Mr. Tabor agreed to pay the debt creates an issue of material fact. For these reasons, the trial court erred by granting summary judgment on Count I.

D. Count II – Good Faith and Fair Dealing. Marjorie Ellmaker Presented Sufficient Evidence that Mr. Tabor Failed to Act in Good Faith and Fair Dealing to Withstand Summary Judgment and Dismissal.

Mr. Tabor failed to act in good faith and fairly both before and after entering into the loan agreement. The state court ruled that Marjorie's Count II claim that Tabor violated the implied covenant of good faith and fair dealing (covenant of good faith) was only based on Tabor's "fraud or undue influence" in the formation of the Note. While that was part of Marjorie's claim, the claim was also based on Mr. Tabor's actions as a LLC member/manager.

After the loan was due, including after A1 had been administratively dissolved, Mr. Tabor represented to Marjorie that he – not A1 was responsible for and would repay the loan. Because of Mr. Tabor's representations, Marjorie delayed her collection action. (R., pp. 189, 190.) Because of the delay, the assets of A1 that secured the loan no longer existed. "The implied covenant of good faith and fair dealing is a covenant implied by law in the parties' contract." *Idaho Power Co. v. Cogeneration, Inc.,* 134 Idaho 738, 750 (2000) (other citations omitted). "The covenant requires that the parties perform, in good faith, the obligations imposed by their agreement...." *Id.* If he was not responsible for the loan because it was to A1, then Mr. Tabor was obligated to let Marjorie know before he did in the fall of 2009. A person's duty to speak to prevent harm to another was raised in *James v. Mercea,* 152 Idaho 914, 918 (2012)(quoting *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 521 (1991)). The Court identified that this duty arises,

> (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it.

If Mr. Tabor was not responsible for the debt, he had a duty to refrain from saying that he was.

As a LLC member/manager, Mr. Tabor also failed to act in good faith good faith to repay the loan. Instead, he allowed A1 to loan money for non-business purposes and appears to have distributed A1 assets (that secured the loan), to himself after the loan was in default. Marjorie has not claimed that Mr. Tabor is liable for the debt "solely by reason of the member acting as a member or manager acting as a manager." Mr.

Tabor, a businessman experienced LLC formation and dissolution, was obliged to "wind up" A1 affairs once it was administratively dissolved. I.C. § 53-642.[1] Once A1 administratively dissolved, Mr. Tabor could "…not carry on any [A1] business except that necessary to wind up and liquidate its business and affairs under section 53-644, Idaho Code, and notify claimants under sections 53-648 and 53-649, Idaho Code." I.C. § 53-643B. Winding up required Mr. Tabor to make sure that he used A1's assets to pay back A1's creditors – particularly creditors whose loans were secured by A1 assets. I.C. § 53-646.

Mr. Tabor claimed that they did not wind up A1 because of its debt – implying that A1 did not have assets for its creditors. Mr. Tabor also claimed that he was an A1 creditor and that payments to him as a creditor were not included in distributions. There are two problems with this argument. First, I.C. § 53-646 sets out the post "administrative dissolution" priority of distribution of assets to creditors; it required the assets be distributed to creditors like Marjorie. Second, A1's tax documents show that he took the money as a distribution, not as compensation for services. The tax documents appear to show that A1 had assets that could have been used to repay at least part of its debt. Mr. Tabor and Mr. Turner could have made sure that the money went to Marjorie in and attempt to fulfill their good faith obligations. Instead they appear to have claimed the assets for themselves; and after the dissolution, Mr. Tabor made statements assuring Marjorie that he would repay the loan.

In any event, Marjorie placed sufficient evidence in the record that had the trial

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[1] Mr. Tabor's brief cites the newer statute for authority. However, the statute in place during the formation and administrative dissolution was the older Title 53, Chapter 6.

court made all reasonable inferences in her favor, it would have found issues of fact and not granted Mr. Tabor's motion for summary judgment on Count II.

E. Count III – Promissory Note. Marjorie Ellmaker Presented Sufficient Evidence that Mr. Tabor was Liable under Agency Doctrines to Withstand Summary Judgment and Dismissal.

The trial court statement of reasons for dismissing Marjorie's Count III claim show that the court failed to weigh the facts in favor of the non-moving party. The trial court stated the promissory note was clearly and unambiguously entered into between A1 Real Estate and Martha and that "there is no evidence that Martha was misled in any way." Mr. Tabor adopts the court's statements. The problem with the court's statement is found in Marjorie's affidavits that were available to the trial court. In her October 22, 2013 affidavit, Marjorie stated that Mr. Tabor misled Martha (and Marjorie) and that, based on what he told them, they believed the loan was to Mr. Tabor. Her affidavit also sets out Mr. Tabor's statements after the loan was made, consistent with her allegation that he misled them. Moreover, the trial court appears to have failed to consider the potential effects and legal significance of Mr. Tabor's misrepresentations as an agent, member, and manager of A1.

Mr. Tabor argues that the four corners of the documents show the agreement. Marjorie agrees that the Purchase and Sale Agreement and the Notes are in the name of A1 Real Estate LLC. But points out that there is an ambiguity whether the note is secured. The purchase and sale agreement says that the loan is secured by the assets of A1 Real Estate: the note does not mention security: and the closing documents say that it is unsecured. Idaho law allows parol evidence in a case where misrepresentation is alleged, to show "representations by one party were a material part of the bargain." *Aspiazu v. Mortimer,* 139 Idaho 548 (2003) quoting, *Thomas v. Campbell,* 107 Idaho

398, 402 (1984). Parol evidence is also admissible in cases alleging "'mutual mistake or other matters which render a contract void or voidable.'" *Gillespie v. Mountain Park Estates, LLC,* 138 Idaho 27, 30 (2002) quoting *Mikesell v. Newworld Development Corp.,* 122 Idaho 868, 876 (Ct.App.1992). Therefore, even though Mr. Tabor correctly cites the law regarding the usual interpretation of contracts, the impact of an integration clause, and the admissibility of parol evidence to interpret a contract, he incorrectly applies it to the facts of this case.

Mr. Tabor was A1's agent and member/manager when he negotiated the loan with Martha and Marjorie. The trial court should have considered Mr. Tabor's pre-loan statements to Martha and Marjorie about who the loan was to, and his later representations to Marjorie that he was responsible to repay the debt as: (1) evidence that Mr. Tabor caused Martha and Marjorie to be mistaken about a material term of the agreement; (2) consistent with his course of conduct;[2] and (3) evidence that he misled Martha and Marjorie. Mr. Tabor's representations and omissions were particularly influential because of the amount of trust that Martha and Marjorie had in him. Even though the Purchase and Sale Agreement and the Note show the borrower was A1 Real Estate LLC, Mr. Tabor has the burden to show that he adequately disclosed A1 because of his statements to and relationship with Martha and Marjorie. See *James v. Mercea*, *Supra*. They knew that Mr. Tabor was acting for a principal; but they did not know what principal. Restatement (Second) of Agency § 321 (1957); *Keller Lorenz Co. v. Insurance Assoc. Corp.*, 98 Idaho 678 (1977) (*citing* Restatement (Second) of Agency

[2] *Scott v. Castle*, 104 Idaho 719 (Ct. App.1983) ("fact of agreement may be implied from a course of conduct in accordance with its existence and assent.")

§ 4(2) (1957), the plaintiff knew the defendant was acting as agent for some principal, but did not know which principal); see also, *Western Seeds, Inc. v. Bartu*, 109 Idaho 70 (Ct.App.1985). How can Mr. Tabor's listing of A1 as the borrower on a single document that he drafted have been an adequate disclosure of its identity, where Martha and Marjorie could not distinguish between the two entities (Mr. Tabor and A1), when they did not know, of, or the significance of, limited liability companies?

Marjorie put facts in the record that showed Mr. Tabor failed to make sure that they knew the significance of dealing with A1. To them, A1 was just a name for Mr. Tabor and his partner's business; it was not a separate principal (entity). Therefore under agency principles, Mr. Tabor is personally liable on the note even if it is in A1's name.

F. Count IV – Unjust Enrichment. Marjorie Ellmaker Presented Sufficient Evidence that Mr. Tabor Received a Benefit and is Liable under Unjust Enrichment Withstand Summary Judgment and Dismissal.

Calvin Tabor was enriched in two ways when he received and failed to repay the loan from Martha Chitwood. First, his business, A1, was able to use the $150,000.00 for its benefit. Secondly, he took distributions in cash and other assets from A1 after he obtained the loan. The trial court appears to have ruled that Mr. Tabor did not receive a benefit because A1 dissolved due to being insolvent. But, the elements of unjust enrichment do not only apply if A1 was solvent at the time that it was administratively dissolved. Mr. Tabor argues that Marjorie's Count IV claim is outside of the statute of limitations for bringing an action against him involving distributions of A1's assets to him according to I.C. § 30-6-406, Liability for Improper Distributions. Mr. Tabor misapplies the statute.

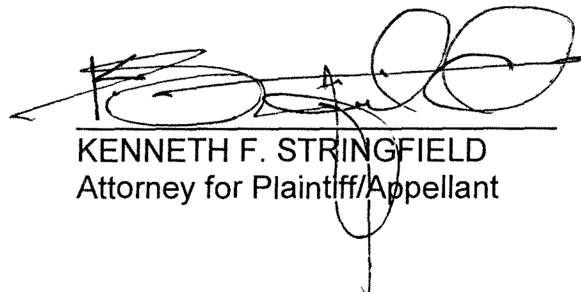
Mr. Tabor argued that Marjorie's unjust enrichment claim is time barred. However, the statute that he relied on was not in place at the time of the distribution. But, even if the statute applies to the time period and distribution, it does not apply in this case. The statute appears in Title 30, Chapter 6, Part 4; this part governs the "Relations of Members to Each Other and to Limited Liability Company." It applies to an action by a member or the company, against another member, not to an action by a third party against a member. In this case, the statute would apply between Mr. Tabor and Mr. Turner. For example, Mr. Tabor could bring a claim against Mr. Turner under this section if A1 was unable to pay back its loan to Martha when it became due in December 2007, because Mr. Turner had taken distributions in violation of I.C. § 30-6-405 and 30-6-409. That is not the case here. Neither Martha nor Marjorie were members of A1 so the statute's time limits to bring a suit do not apply. Presumably, the time limit applies against members, because as company insiders they are in a position to know quickly whether (1) distributions have been made, and (2) whether the LLC is unable to pay its debts as they become due. An outsider would not necessarily have that information. Finally, it seems incongruent that a member who wrongfully took a distribution, could defeat a creditor's claim by claiming it is time barred under this statute, where I.C. § 30-6-704 "Other Claims Against Dissolved Limited Liability Company" establishes a five (5) year limitation on actions for claimant against a member who received distributed assets after dissolution. A1 could have resolved any of its creditors' claims by filing an article of dissolution and notifying its creditors of the dissolution.

Marjorie put facts before the trial court that demonstrated Mr. Tabor received a benefit under, at best for him, questionable circumstances; no doubt, he appreciated the benefit when he took a distribution after the loan was in default. Mr. Tabor does not claim that he did not receive a benefit from the loan. And, based on the circumstances alleged and placed before the court in Marjorie's affidavits, the evidence demonstrates that it would be unjust for him to retain the benefit without paying back the loan. The trial court erred by failing to construe the evidence in favor of Marjorie and by finding that there were no issues of fact as to Count

II.
CONCLUSION

For the reasons stated above, Marjorie L. Ellmaker respectfully asks the Court to reverse the trial court's grant of summary judgment in favor of Calvin Tabor.

RESPECTFULLY SUBMITTED this 15th day of September, 2014



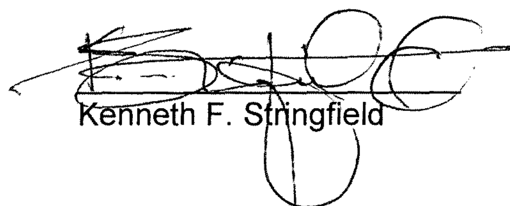
KENNETH F. STRINGFIELD
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES That a true and correct copy of the above was hand delivered to:

David E. Kerrick
Attorney for Respondent
1001 Blaine St.
Caldwell, Idaho 83605

DATED: September 15, 2014.



Kenneth F. Stringfield