

6-1-2016

Kelly v. Wagner Respondent's Brief Dckt. 42301

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL L. KELLY,)
)
 Plaintiff/Respondent,)
)
 vs.)
)
 PAMELA G. WAGNER, dba)
 DIVERSIFIED FINANCIAL MANAGEMENT)
 GROUP,)
)
 Defendant/Appellant.)
 _____)

Supreme Court No: 42301-2014
Kootenai County Case No. 2009-1670

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai

Honorable Richard Christensen, Presiding

RESPONDENT'S BRIEF ON APPEAL

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FILED - COPY
JUN 01 2016
Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

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I. STATEMENT OF THE CASE

Respondent Michael Kelly (hereinafter "Kelly") has no objection to the Nature of the Case and Proceedings sections of Appellant Wagner's opening brief.

The facts presented by Appellant Ms. Wagner's counsel are also accepted, subject to the suggestions as to a more appropriate construction, as set forth below.

Respondent Michael Kelly was represented at trial by Attorney Jeffrey Child. Mr. Child began his presentation, with Mr. Kelly on the witness stand, by carefully examining Mr. Kelly (Tr. p. 6, L. 6 generally) about the work he and his company (a proprietorship) had performed for Ms. Wagner on property she and her deceased husband owned in Hayden, Idaho, over the course of approximately 18 months. (Tr. p. 11, L. 15-16), beginning in 2004. Ms. Wagner appears in the caption of this case as someone who was, at the time, doing business as "Diversified Financial Management Group", and we soon learn that Pamela Wagner and her late husband had planned on using the building that is the subject of this litigation as a place of business, as well as a personal residence. (Tr. p. 72, L. 13-16)

Through the next several pages of the transcript, Mr. Child was able to admit his Exhibit 1 (Tr. p. 10, L. 2-6), Mr. Kelly's occupational license (electrical), he had Mr. Kelly explain that he was acting as a general contractor for the various jobs he handled for Ms. Wagner, and he explained how the financial relationship between his company and Ms. Wagner worked. (See Tr. 12, p. 19-24) Other than Exhibit 1, Exhibits 2-7 related to the amount of payment that Kelly

argued remained due from appellant, Ms. Wagner, to Mr. Kelly for work done by Kelly and his crew to the Wagner property. These exhibits were admitted without objection.

Mr. Kelly testified at trial that, from the beginning, he was basically proposing to do the work Ms. Wagner wished to have done to her new home-office building on a “cost plus” type of arrangement, where he would charge Ms. Wagner what it cost him to get the work done, plus an additional 10-15% as his “profit” (Tr. 14, L. 6-15). This arrangement seemed to work quite well for several months. Toward the end of the relationship, however, Ms. Wagner was continuing to request bids for “several other big things, indoor swimming pool and a few other items that would take another (sic) quite a bit of time.” (Tr. 16 L. 3-6). The relationship soured, though, after Mr. Kelly had failed to timely pay a subcontractor, resulting in a lien being filed against the Wagner building. Ms. Wagner then decided to hire one of Mr. Kelly’s workers to take over as the new foreman for her project. Mr. Kelly’s testimony was that, even though it only took a week or so to get the lien released, that incident caused Ms. Wagner to make the decision to replace him. (Tr. 16, L. 7-25).

Mr. Kelly further testified that during the course of his relationship with Ms. Wagner, he would sit down with Ms. Wagner periodically, look over a list of projects that she wanted to have done, and then prepare a written proposal covering the expected cost of performing the items on her list. (Tr. 12, L. 19-25). This methodology seemed to work between the parties for a fairly long period of time, Mr. Kelly testifying that he had submitted and been paid for approximately

“40” proposals that he completed, with essentially no complaints from Ms. Wagner.

(Tr. 13, L. 8). Mr. Kelly testified at trial that Ms. Wagner, towards the end of his job with her, and for the first time in the long professional relationship Mr. Kelly had with her, failed to pay Mr. Kelly for his work, and that of his crew. Even though Exhibits 2-7 were all admitted without objection, and were accurately reflected in Exhibit 9, Mr. Kelly's demand letter seeking payment, Ms. Wagner simply refused to pay the amount that the trial judge found was still due and owing, a net principal amount of \$4,694.64. That amount was based on Mr. Kelly's unpaid invoices, minus some unfinished work by Mr. Kelly and an attorney's fee that Ms. Wagner had to pay in connection with the lien release issue.

Exhibit 9, the demand letter, makes a demand for recovery of attorney's fees in the event suit is required, as of course it was, and Exhibit 9 references I. C. § 12-120 as the basis for an award of fees by the Trial Court, pursuant to the holding in *Keybank Nat'l Association v. PAL 1, LLC*, 155 Idaho 287, 311 P. 3d 299 (2013). The date of Exhibit 9 is February 13, 2006. The Complaint in this matter was dated February 27, 2009.

I. C. § 12-120(3) excludes from an award of fees “transactions for personal or household purposes”. The issue of whether attorney's fees should be awarded in this case does not appear to have been addressed in the litigation below. However, it is clear that if multiple offices were being incorporated in Wagner's building, under the name “Diversified Financial Management Group”, as Mr. Kelly worked on it, such work would not have been for “personal or household

purposes”, and fees would be recoverable by the prevailing party. (See Tr. p.72, L. 13-16 for a brief description of Ms. Wagner’s plans).

The trial judge, Hon. John P. Luster, retired after his decision in this case was written. In that decision he wrote that “The Court finds [the] testimony [of Michael Kelly] persuasive in establishing that Kelly performed work for Wagner for which he has not been paid in the amount of \$9,429.64. (R., p. 6 of 44).

Judge Luster then analyzed the counterclaim that Wagner filed against Kelly and found that Kelly was paid \$4,285.00 for work on the rear entry of the Wagner property that was inadequately completed, and subtracted that amount from the award to Kelly. Finally, Judge Luster found that Ms. Wagner had been required to pay \$450.00 to an attorney in order to obtain a lien release, and found that Kelly was responsible for that required payment. That brought the net award to Kelly to \$4,694.64 as of July 15, 2013. (See R., p. 29 of 44).

On January 9, 2014, the docket entry reads “JUDGMENT SUBMITTED BY COUNSEL FOR KELLY AS DIRECTED IN THE DECISION UPON COURT TRIAL FILED 7/16/13.” (Caps in original) .

On January 31, 2014 the docket shows that Wagner filed an objection to Plaintiff’s (Kelly’s) Proposed Judgment. It appears at that point that Judge Luster’s responsibility for the case was passed on to the newly appointed District Judge, Rich Christensen, and the issue became whether pre-judgment interest should be awarded to Mr. Kelly. On April 25, 2014, Judge

Christensen issued his opinion that pre-judgment interest was appropriate in this case, and that it should be awarded to Michael Kelly. (R. p. 32 of 44).

The final judgment in this case was executed by Judge Christensen on May 20, 2014, in favor of Respondent Michael Kelly, in the net amount of \$13,762.54, and it is that judgment from which this appeal was filed.

II. ISSUES ON APPEAL

- A. Was it error for the District Court to find that Kelly was owed any amounts because Kelly did could (*sic*) not testify if the invoices he submitted for payment had been paid or not?
- B. Was it error for the District Court to conclude that Kelly and Wagner did not have an open account agreement because Kelly testified on more than one occasion that the Wagner home was a project and he estimated each part of that project?
- C. Was it error for the District Court to award Kelly any sums because Kelly did not present any evidence of the charges to or payments made toward Wagner's account?
- D. Was it error to award Kelly prejudgment interest because the amount owed to him was subject to conflicting evidence that had to be resolved by the Trial Court and because Wagner was awarded damages for construction defects?
- E. Is Wagner entitled to attorney's fees and costs on appeal?

III. ARGUMENT

Appellant's Brief sets forth issues on appeal in an acceptable way, and respondent will therefore construct his argument on the basis of the statement of issues provided by appellant.

The issues identified by Appellant will be treated in order below:

- A. *Was it error for the District Court to find that Kelly was owed any amounts because Kelly did could (sic) not testify if the invoices he submitted for payment had been paid or not?*

No, it was not error. We can overlook the obvious proofreading error in order to understand what Appellant means. The defense offered by Ms. Wagner as set forth above, was simply that Mr. Kelly had the burden of proving, in some way other than he did, that he had not been paid on the invoices admitted in evidence as Exhibits 2-7. This issue offers an opportunity to analyze how trial evidence is supposed to work. Mr. Kelly unequivocally testified that the 6 exhibits he submitted, his invoices, had not been paid. His testimony was clear, definitive, and credible. Judge Luster responded to that testimony by awarding Kelly judgment for the net amount of Mr. Kelly's claim, and Judge Christensen then added in pre-judgment interest to that claim, for a total judgment of \$13,762.54 as of April 25, 2015. (R., p. 35 of 44).

In the ordinary case involving payment of money, the problem might be for the person in Ms. Wagner's position to present evidence that she *had paid* the invoices, such as by offering the cancelled checks used to pay them, since she testified that she always paid by check, noting the

check number on the invoice so that she could keep track. (Tr. p.78, L.15-22). No evidence was ever offered to support Ms. Wagner's conclusion, and Judge Luster rejected it.

Had she shown evidence of overpayment or defective workmanship, or complete non-performance by Kelly, if those were her contentions, certainly the Court could have decided differently than he did. She did not, and the Court therefore had nothing to act upon other than the non-payment of Mr. Kelly's last 7 invoices.

B. *Was it error for the District Court to conclude that Kelly and Wagner did not have an open account agreement because Kelly testified on more than one occasion that the Wagner home was a project and he estimated each part of that project?*

No, it was not error. The issue arose upon counsel's oral Motion to Dismiss at the conclusion of Mr. Kelly's evidence, at which point Mr. Child stated: "The open account concept has taken me by surprise, quite frankly. And if that is going to be the issue that the case turns on, I would ask the Court for an opportunity to brief that issue." (Tr. p. 54, L. 20-23).

The Court responded, "Well, I guess the Court's position right now was, is that its not inclined to grant the motion to dismiss. The motion to dismiss, I think, certainly at this state of the juncture certainly requires the Court to first accept the truth of the evidence of the adverse party that has been offered here by the plaintiff and draw every reasonable inference in favor of Mr. Kelly's case.

The objection here with respect to the open account, this has not been brought as an action alleging an open account, but it certainly was an action alleging that there were contracts

for services to be provided and certain services were provided to Mrs. Wagner over a period of time, and that there was an unpaid balance. And that's essentially what's been alleged." (Tr. p. 55., L. 1.-13).

Judge Luster continued: "And to the extent that that requires Mr. Kelley to establish that the services provided were reasonable, the testimony that's been offered here is that he had done work for Ms. Wagner in the past, that he prepared an invoice that designated a certain job, he would sit down with her, they'd discuss the invoice, she would pay the invoice, and that this was the course of dealing that he had with Ms. Wagner through the course of their business relationship until the final six invoices were presented to her. Apparently, these were not paid." (Tr. p. 55, L. 14-24).

The Court below specifically found that "The proposition that the entirety of the account needs to be established or proven by Mr. Kelley, I don't believe the Court's inclined to agree that that's what the law does require." (Tr. p. 56, L. 10-13).

C. *Was it error for the District Court to award Kelly any sums because Kelly did not present any evidence of the charges to or payment made toward Wagner's account?*

No, it was not error. Respondent respectfully suggests that this issue is a repetition of Issue A., above. The Court found that the arrangement between parties had an established "course of dealings" which constituted a series of contracts for particular services to be performed by Mr. Kelly and paid for by Ms. Wagner. Mr. Kelly produced and admitted into

evidence the documents showing his work and materials supplied to Ms. Wagner. (Exhibit 2-7). He testified that those invoices were not paid. Ms. Wagner failed to submit any evidence to the contrary. Judge Luster agreed.

D. *Was it error to award Kelly prejudgment interest because the amount owed to him was subject to conflicting evidence that had to be resolved by the Trial Court and because Wagner was awarded damages for construction defects?*

No, it was not error. Judge Christensen wrote the Memorandum Opinion of the issue of prejudgment interest, (R. p. 32-37 of 44). There the Court explained that “Reading *Ervin (Ervin Construction Co. v. Van Orden, 125 Idaho 738 (Ct. App. 1992)* and *Suebert (Seubert Excavators, Inc. v. Eucon Corp., 125 Idaho 409, 871 P.2d 826 (1994)* permitted prejudgment interest to be properly awarded to Kelly in this case, but not to Wagner. The reason for that is “the two claims in the case (the one before the Court), like the claim in *Seubert*, arise under the same contract but are not so closely related that the unliquidated claim renders the [amount of the] liquidated claim unascertainable.” *Seubert, supra*.

E. *Is Wagner entitled to attorney’s fees and costs on appeal?*

No, Wagner is not entitled to attorney’s fees and costs on appeal. In Idaho the writer believes it is correct to say that, generally all fee shifting statutes, such as I. C. § 12-120, condition an award of fees upon the recipient being the “prevailing party”. Ms. Wagner does not qualify as the prevailing party in this litigation.

Perhaps more significantly, however, is the fact that no determination as to an award of fees was made by the District Court. A Memorandum of Costs and Fees was filed by Mr. Kelly within the requisite time period, however it was objected to by Ms. Wagner. When the issues of costs and fees was brought back before Judge Christensen, quite recently (March 30, 2016), an “Order Staying Pending Remittitur from Idaho Supreme Court” was entered (April 4, 2016), so it could be argued that the issue of fees is not presently ripe for appeal.

IV. CONCLUSION

As in every appeal, it is incumbent upon the Respondent to remind this Court that, as pointed out by opposing counsel, the “trial court’s findings of fact....will not be disturbed on appeal unless clearly erroneous.” Appellant’s Brief on Appeal, p.7, citing *Bird v. Bidwell*, 147 Idaho 350 (2009).

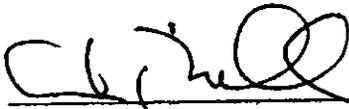
“Decisions by judges are traditionally divided into three categories, denominated questions of law (which are reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion).” 9th Cir. Guides, citing *Harman v. Apfel*, 211 F3d 1172 (9th Cir. 2000).

A good source for authoritative material on this subject is Rule 52(a), I.R.C.P., which sets forth the basic rule of law, and explains that “...regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appear personally before it.” Rule 52(a), I.R.C.P., in relevant part.

Respondent believes that the District Judges who decided this case were correct, and that Judge Luster, in particular, who had the opportunity to hear testimony personally, formed his conclusions in this case based to some large extent on witness credibility.

We urge this Court to allow the Findings and Conclusions entered in the written decisions of the two judges below to stand. Those decisions should be affirmed.

Respectfully submitted this 31 day of MAY, 2016.



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Attorney for Respondent