11-17-2016

Green River Ranches v. Silva Land Co. Respondent's Brief Dckt. 43547

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket Nos. 43547-2015 and 43548-2015

GREEN RIVER RANCHES, LLC
Plaintiff,
v.
SILVA LAND COMPANY, LLC, et al
Defendant.

JACK MCCALL,
Plaintiff-Respondent,
v.
SILVA DAIRY, LLC, an Idaho limited liability company,
Defendant-Appellant,
and
MAX SILVA, an individual
Defendant.

RESPONDENT'S BRIEF IN RESPONSE TO MAX SILVA

Appeal from the District Court of the Fifth Judicial District in and for Twin Falls County
Consolidated Case Nos. CV-2013-3154 / CV-2013-4728 / CV-2013-4732
The Honorable Randy J. Stoker, District Judge

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case presented a simple question at trial—with whom did Jack McCall contract to sell 116 head of cattle? Was it the bankrupt entity, Silva Dairy, LLC, or Max Silva as an individual?

At trial, the district court found that Jack McCall's contract was with Mr. Silva, individually. The district court found credible Mr. McCall's testimony that he would not have entered into an agreement with a bankrupt entity like Silva Dairy. The district court also found relevant that there was no evidence that Silva Dairy had sought permission from the bankruptcy court to purchase such cattle as a Chapter 12 Debtor-in-Possession, and thus the agreement was with Mr. Silva.

Mr. Silva requests that this Court retry the case on appeal, by reweighing evidence and reevaluating the credibility of the witnesses. But, the district court's findings are not clearly erroneous, and should thus be affirmed on appeal. Similarly, the district court did not abuse its discretion in declining to award Mr. Silva his attorney fees, and thus that decision should not be disturbed on appeal.

B. Facts

Mr. McCall is a businessman, lender, and rancher in the Twin Falls area. (Tr. Vol. I (June 2014 trial), pp. 146-56.) In late November 2011, he learned that Farmers Bank had seized 101 dairy cattle from a dairy that was in default. (*Id.* at p. 343, LL 21-25, p. 344, LL 1-24.) Mr. Silva was taking care of the cattle for the bank while the bank made arrangements to sell the cattle. (*See id.* at p. 344, LL 11-13.) Mr. Silva was interested in purchasing 101 head of those cattle, and asked Mr. McCall to purchase them on his behalf:

> [T]here was 101 cows that Max said he thought would still be good milk cows. So he picked those cows, the bank was willing to sell those cows at 64 cents a pound or beef price, and Max asked if I would buy those cows for him. I said, at the 64 cents a pound, I'll buy the cows for you, Max. But I am buying them for you, Max Silva.

(*Id.* at p. 344, LL 18-24.) Mr. McCall did purchase the cattle on Mr. Silva's behalf. (*Id.* at p. 344, L 25, p. 345, LL 1-2.) The bank transferred ownership to Mr. McCall (as evidenced by the brand inspection) but the brand was never transferred to Mr. Silva, as Mr. McCall did not receive payment for the cattle. (*See id.* at pp. 346-48.) Mr. Silva owed Mr. McCall $84,150.00 plus interest for the cattle. (*Id.* at p. 346, LL 4-5.) Similarly, Mr. McCall had sold Mr. Silva another 15 head at the same price for which Mr. Silva failed to pay, owing Mr. McCall another $13,542.00. (*Id.* at p. 356, LL 13-21, p. 357, LL 9-12.) It is undisputed that both of these transactions occurred after August 18, 2010—the date on which Silva Dairy had filed for Chapter 12 "family farm" bankruptcy. (Augmented R. Vol. I,[1] at pp. 93, 103-04.)

C. Procedural History

Mr. McCall agrees with Mr. Silva's timeline of the course of proceedings laid out in his Appellant's Brief, pages 5-9, and thus refers the Court to the same. However, Mr. McCall will briefly call the Court's attention to the more important factual elements in the proceedings.

Mr. McCall's claim against Mr. Silva for payment for the 116 cattle was tried to the court on June 27, 2014. (Tr. Vol. I, beginning on p. 343.) After trial, the district court issued a memorandum decision, and found that Mr. McCall's agreements regarding the fifteen head of cattle and the 101 head of cattle were both with Max Silva, individually. (Augmented R. Vol. I, pp. 103-05.) The court further found that Mr. Silva purchased the cattle for $13,542.00 (the

[1] Mr. McCall will refer to the various records in the same manner as set forth in Appellant's Brief for Max Silva pg. 5, n. 1.

fifteen head) and $84,150.00 (the 101 head). (*Id.* at 104.) Additionally, the court set the prejudgment interest rate at 12%, as there was no agreement for interest in writing. (*Id.* at 105.) However, because Mr. Silva paid Mr. McCall some monies for cattle that had been culled and sold, the district court declined to enter a judgment pending further evidence. (*Id.* at 104-05.) Mr. Silva filed a motion for reconsideration, and included an affidavit with further evidence in support of his position that the agreement was with Silva Dairy, not himself as an individual. (Augmented R. Vol. I, pp. 108-22.) The Court denied this motion, stating that "I don't find that any of the additional information presented in these affidavits is sufficient to change my opinion." (Tr. Vol. I, p. 590, LL 7-10.)

After the June 2014 trial, Mr. McCall filed a motion for summary judgment on the amount due on the claim, and the court granted that motion and awarded Mr. McCall $85,408.22 plus interest for the 101 head of cattle and $19,362.33 for the fifteen head plus interest. (R. Vol I, p. 38.) The court entered judgment in favor of Mr. McCall and against Mr. Silva in the amount of $104,770.55 on July 16, 2015. (*Id.* at p. 91.) The court declined to award attorney fees in favor of any party, finding that while each party prevailed on some individual claims involved in the consolidated action, there was no overall prevailing party in the action. (*See id.* at pp. 87-89.)

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

Attorney Fees on Appeal: Mr. McCall seeks costs and attorney fees on appeal as authorized by I.A.R. 40 and 41. Mr. McCall bases his claim for fees on I.C. § 12-120(3) as the prevailing party in a commercial transaction.

III. ARGUMENT

A. The District Court's Finding that Mr. McCall Sold the Cattle To Max Silva As An Individual Is Not Clearly Erroneous.

The standard of review over the factual findings and legal conclusions of a trial court was restated by this Court in *Electrical Wholesale Supply Co., Inc. v. Nelson*:

> Review of a district court's findings of fact is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Roell v. Boise City*, 134 Idaho 214, 999 P.2d 251 (2000) (citing *Conley v. Whittlesey*, 133 Idaho 265, 895 P.2d 1127 (1999). ***A district court's findings of fact in a court-tried case are construed liberally on the appeal in favor of the judgment entered. Id.*** It is the province of the trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Id.* If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal.

136 Idaho 814, 820, 41 P.3d 242, 248 (2002)(emphasis added). Further, this Court stated:

> Determining and weighing the credibility of the witnesses and their testimony offered at trial is best left to the district court judge. *Worzala v. Worzala*, 128 Idaho 408, 413, 913 P.2d 1178, 1183 (1996) ("When reviewing factual determinations on appeal, this Court will defer to the magistrate's weighing of evidence and determination of witness credibility") (citing *Rohr v Rohr*, 118 Idaho 689, 691, 800 P.2d 85, 87 (1990) ("[d]eference must be given to the special opportunity of the trial court to assess and weigh the credibility of the witnesses who appear before it."). This Court generally does not second-guess the district court's findings unless they are unsupported by the evidence in the record.

Id. at 822, 41 P.3d at 250.

"A trial court's findings of fact which are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal; which is to say the findings of fact will not be set aside unless clearly erroneous." *Reed v. Reed*, 137 Idaho 53, 56, 44 P.3d 1108, 1111 (2002) (citing *Dechambeau v. Estate of Smith*, 132 Idaho 568, 571, 976 P.2d 922, 925 (1999)). A finding of fact is "clearly erroneous" only if it is not based upon substantial and competent evidence. *Kraly v. Kraly*, 147 Idaho 299, 302, 208 P.3d 281, 284 (2009). Competent evidence must be admissible, relevant and material. *Pacificorp v. Idaho State Tax Commission,* 153 Idaho

759, 768, 291 P.3d 442, 451 (2012). "Competency is an evidentiary perquisite to admission. If evidence is incompetent, it is the opponent's obligation to object to that evidence offered for admission. Idaho R. Evid. 103." *Id.* "Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *Id.*, citation and internal quotations omitted.

Here, the Court's finding that the sale of the cattle was to Max Silva as an individual, rather than Silva Dairy, is not clearly erroneous. The district court had the opportunity to hear Mr. McCall testify as to the agreement with Mr. Silva, and had the opportunity to evaluate Mr. McCall's credibility on the stand. It also had the opportunity to hear Mr. Silva's version of events and pass judgment on his credibility, as well as that of the other relevant witnesses. Mr. McCall testified as follows, with regard to the purchase of the 101 head:

> I agreed to sell them to Max Silva individually, but I would not sell those cows to Silva Dairy, LLC, because Silva Dairy, LLC, was in bankruptcy at that stage, plus their lender was D.L. Evans Bank, who had perfected liens on all of Silvas' cows, and I was not going to get into a situation where I carried paper on cows to a bankrupt entity that I knew had a bank that had senior priority lien positions on the rest of Silvas' cows and get in a big fight with the bank over my cows versus their cows. I wasn't going to do that, and I wouldn't do that.

(Tr. Vol. I, p. 345, LL 18-25, p. 346, LL 1-3.) Further, Mr. McCall knew that Silva Dairy, LLC had entered bankruptcy, and testified that he had significant experience dealing with business entities that had entered bankruptcy. (*Id.* at p. 350, LL 18-25, p. 351, LL 1-6.). Due to these past experiences, he had no desire to sell cattle to Silva Dairy. *Id.*

Mr. McCall also testified that as to the 15 head, he expressly avoided selling cattle to Silva Dairy: "Again, I may not be the smartest guy in the world, but I was not going to get involved with Silva Dairy, a bankrupt dairy with a bank that I knew had a senior position on the livestock. I would not do that." (*Id.* at p. 354, LL 8-12.)

Further, Chapter 12 Trustee Forrest Hymas testified that Silva Dairy would have had to get approval to buy the cattle from the bankruptcy court and trustee, and that it did not do so. Mr. Hymas testified as follows:

> Q: Now let's say that Silva Dairy wanted to buy 100 cows from John Doe during the pendency of the bankruptcy and incur a liability, debt to Silva Dairy. Would they have to give notice in bankruptcy court?
>
> A: Yes, they would. If it's other than in the ordinary course of business.
>
> Q: And so they would have to give notice to the bankruptcy court and their creditors, correct?
>
> A: That is correct.
>
> Q: Are you aware of any time post petition that the Silvas have sought to go out to another purchaser other than for D.L. Evans Bank, under the name of Silva Dairy, LLC, and acquire additional cows and incur additional debt?
>
> A: No.
>
> Q: If that was to have been done, under bankruptcy procedure, it needed to include the process we've just described?
>
> A: That is correct.

(Tr. Vol. I, p. 502, LL 22-25, p. 503, LL 1-22.) Mr. Silva did not object to this testimony on any grounds.

Additionally, Mr. Harry DeHaan, bankruptcy counsel for Silva Dairy, testified that even if Silva Dairy purchased *replacement* cattle, in the ordinary course of business, it would have to be approved by the creditor D.L. Evans Bank as it would be a replacement of the bank's security. (*Id.* at p. 439, LL 20-25, 440, LL 1-8.) Further, Mr. DeHaan thought that if Silva Dairy bought another herd of 101 cattle and had a debt with a new lender, such acquisition would have to be blessed by the bankruptcy court. (*Id.* at p. 440, LL 9-12.) As Mr. DeHaan put it, "buying replacement cows is an ordinary, necessary part of running a dairy; buying a herd is not." (*Id.* at p. 439, LL 24-25, p. 440, L 1.) Neither Mr. Silva nor Silva Dairy objected to this testimony.

Based on this evidence, the trial court found that:

> McCall's fourth claim is for the sale of 15 cull cows. At the time of this sale, Silva Dairy was in a Chapter 12 bankruptcy proceeding. There is no evidence that the Bankruptcy Court approved the purchase of these cows by Silva Dairy even though they were apparently taken to Silva Dairy No. 2. The Court

> finds that Max purchased these cows as an individual for $13,542.00 and is therefore personally liable for any remaining debt.
>
> . . . .
>
> McCall claims that he sold 101 head of cows to Max. Max admits that the cows were sold and does not dispute the price, but asserts that the contracting party was Silva Dairy, not himself. The Court finds that the contract was with Max as an individual and not with Silva Dairy. The reasoning for this conclusion is the same as set forth above regarding McCall's sale of 15 cows. At the time of the sale of the 101 head of cows, as with the sale of the 15 cows discussed above, Silva Dairy was in a Chapter 12 bankruptcy proceeding. McCall's testimony that he knew of this fact and that based upon his experience with bankruptcy proceedings there was "no way" he would ever enter into transactions with a bankrupt entity is very convincing. He was aware that Silva Dairy's cattle were subject to a first lien in favor of D.L. Evans Bank and that an unsecured sale to Silva Dairy would mean that these cattle would be subject to the bank's line. Moreover there is no evidence before the Court that the Bankruptcy Court approved this purchase. Therefore, the Court Finds that Max Silva is personally liable for this debt.

(Augmented R. Vol. I, pp. 103-04.)

Thus, the court listened to the testimony of the parties and of the other witnesses, reviewed the documentary evidence, and concluded that Mr. McCall had made the contract for the sale of cattle with Mr. Silva. And, the Court declined to reconsider its finding even with additional evidence from Mr. Silva. The district court had the opportunity to listen to both parties' testimony, and was in the best position to determine that Mr. McCall's testimony was credible, and that Mr. Silva's was not. Mr. McCall's testimony was also supported by Mr. Hymas and Mr. DeHaan, who testified that such a sale of cattle to Silva Dairy would be out of the ordinary course of business and would have to be approved by the bankruptcy court and Mr. Hymas as trustee. Ultimately, it is unreasonable to believe that Mr. McCall, a sophisticated creditor with prior dealings with the bankruptcy court, would willingly sell livestock to a bankrupt debtor knowing he would not be paid, or with high probability that he would not be

paid. It makes no sense to believe that Mr. McCall would just give away his cattle to the bankrupt dairy. The district court's reasoning is sound.

Certainly, there is some conflicting evidence in the record, including Mr. Silva's testimony.[2] Some of this evidence could be consistent with a finding that Mr. Silva bought the cattle but did later transfer the cattle to the dairy; Mr. McCall recognized that Mr. Silva may ultimately decide to transfer them to Silva Dairy despite buying them as an individual. (Tr. Vol. II, p. 504, LL 19-23.) In any event, it is the district court's job to assess the weight of conflicting evidence and to come to a conclusion as to a disputed fact. Conflicting evidence is not a reason to overturn a trial court's findings on appeal. Here, the district court's finding is supported by substantial and competent evidence, is not clearly erroneous, and should be upheld on appeal.

B. The Court Did Not Abuse Its Discretion in Declining to Award Mr. Silva His Attorney Fees and Costs.

"The determination of who is a prevailing party is committed to the sound discretion of the trial court." *Bream v. Benscoter*, 139 Idaho 364, 368, 79 P.3d 723, 727 (2003); see also Idaho R. Civ. P. 54(d)(1)(B). Idaho R. Civ. P. 54(d)(1)(B) sets forth the governing legal standards on the prevailing party issue. There are three factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Nguyen v. Bui*, 146 Idaho 187, 192, 191 P.3d 1107, 1112 (Ct. App. 2008).

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[2] Mr. McCall notes that the argument regarding agency law found on pages 15-17 of Mr. Silva's brief is a red herring. The district court did not hold that Mr. Silva was an agent for the dairy but still personally liable on the agreements—rather, it held that the agreement was in fact with Mr. Silva as an individual.

The court in its discretion may determine that a party prevailed in part and did not prevail in part, and may apportion the costs and fees between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (Idaho 2005). When both parties are successful, it is within the Court's discretion to decline to award attorney fees to either side. *Crump v. Bromley*, 148 Idaho 172, 174, 219 P.3d 1188, 1190 (Idaho 2009). Of particular relevance here is this Court's observation that, "[i]n determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action.' That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Eighteen Mile Ranch*, 141 Idaho at 719, 117 P.3d at 133.

Here, there were numerous claims among Mr. McCall, Mr. Silva, and their various business entities. (App. Br. at p. 5.) Ultimately, the claims were consolidated into a single action. *Id.* The district court found that, while Mr. McCall prevailed on the claim for the sale of the 116 cattle against Mr. Silva, he did not prevail on everything, including on the $10,000.00 loan cause of action as well as the pasture claim. (R. Vol. I, p. 88.) At the same time, Mr. Silva prevailed on defending the $10,000.00 claim and the pasture claim, but ended up with a judgment of over $100,000.00 against him. *Id.* While the district court's decision could be somewhat less vague, it is clear that *as to the action as a whole*, neither party prevailed, and the district court would decline to award either party fees. *Id.*

Mr. Silva contends that under *Schroeder v. Partin*, the district court should have evaluated the fees spent by both Mr. McCall and Mr. Silva on their prevailing claims and

defenses and should have apportioned the fees out accordingly. (App. Br. 21-24.) Mr. Silva further assumes that he has spent more fees on "prevailing" than Mr. McCall did. *Id.*

However, the rule in *Schroeder* related to parsing out fees on prevailing claims is quite narrow. *Schroeder v. Partin*, 151 Idaho 471, 478, 259 P.3d 617, 624 (2011). In that case, each party had filed a request for fees and provided a cost bill to the court. *Id.* When neither party objected, the court awarded the requested fees to *both* parties. *Id.* The Supreme Court reversed, and held that "although the district court had discretion to award costs and fees to both Schroeder and Partin as prevailing parties, the court had a duty to apportion to each of the parties only the attorney fees related to the claims upon which each party prevailed." *Id.* Similarly, in *Ramco*, prevailing parties were entitled to have their fees apportioned out. *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 113, 794 P.2d 1381, 1386 (1990).

In this case, the court held that, viewing the *action* in its entirety, neither Mr. Silva nor Mr. McCall was entitled to fees as prevailing party. While each party may have prevailed on some claim or defense, the *action* itself did not have a clear winner, and the court declined to declare a prevailing party for the action and award either party his fees. It was therefore within the district court's sound discretion to decline to award fees to any party in this situation.

C. Mr. McCall Should be Awarded His Fees and Costs on Appeal

Mr. McCall requests and is entitled to attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and under Idaho Code § 12-120(3) as the prevailing party on appeal.

IV. CONCLUSION

For the foregoing reasons, Mr. McCall respectfully requests this Court affirm the judgment of the district court and award him his attorney fees and costs in defending this appeal.

DATED: November 17 2016.

GIVENS PURSLEY LLP

Bradley J. Dixon
Kersti H. Kennedy
Attorneys for Jack McCall, an individual and doing business as JT Livestock

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 2016, I served a true and correct copy of the foregoing **RESPONDENT'S BRIEF IN RESPONSE TO MAX SILVA** in the above-entitled matter as follows:

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