12-22-2015

Union Bank, N.A. v. JV L.L.C. Appellant's Reply Brief Dckt. 42479

IN THE SUPREME COURT OF THE

STATE OF IDAHO

UNION BANK, N.A., a national banking association, Plaintiff/Respondent, vs. JV L.L.C., an Idaho limited liability company, Defendant/Appellant, And NORTH IDAHO RESORTS, LLC, an Idaho limited liability company, Defendant/Appellant, And PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company, DAN JACOBSON, an individual, SAGE HOLDINGS LLC, an Idaho limited liability company, TIMBERLINE INVESTMENTS, LLC, an Idaho limited liability company, STEVEN G. LAZAR, an individual, an individual, AMY KORENGUT, an individual, HLT REAL ESTATE LLC, PANHANDLE STATE BANK, an Idaho corporation, R.E. LOANS, LLC, a California limited liability company, WELLS FARGO FOOTHILL, INC, a Delaware corporation, PEND OREILLE BONNER DEVELOPMENT HOLDINGS,	DOCKET NO. 42479 (Bonner County Case 2011-0135) APPELLANT'S REPLY BRIEF

INC., a Nevada corporation, PENSCO TRUST CO. custodian f/b/a Barney Ng, a California corporation, MORTGAGE FUND '08 LLC, a California limited liability company, B-K LIGHTING, INC., a California corporation, FREDERICK J. GRANT, an individual, CHRISTINE GRANT, an individual, RUSS CAPITAL GROUP, LLC, an Arizona limited liability company, JOSEPH DUSSICH, an individual, MOUNTAIN WEST BANK, an Idaho corporation, STATE OF IDAHO, Department of Revenue and Taxation, MONTAHENO INVESTMENTS LLC, a Nevada limited liability company, TOYON INVESTMENTS LLC, a Nevada limited liability company, CHARLES W. REEVES and ANN B. REEVES, husband and wife, ACI NORTHWEST, INC., an Idaho corporation, DOES 1 through 20 inclusive,

Defendants/Respondents.

* * * * *

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

* * * * *

THE HONORABLE MICHAEL GRIFFIN, DISTRICT JUDGE, PRESIDING

* * * * *

Gary A. Finney
Finney Finney & Finney, P.A.
120 E. Lake Street, Ste 317
Sandpoint, ID 83864
Attorney for Appellant, JV

Christopher Pooser
Stoehl Rives, LLC
101 S. Capital Blvd., Ste 1900
Boise, ID 83702-7705
Attorney for Respondent, Bank

TABLE OF CASES AND AUTHORITIES

COMES NOW the Appellant, J.V., LLC, and files its REPLY brief, as follows:

DENIAL OF JV'S MOTION FOR JUDGMENT ON THE PLEADINGS

The Respondent's Brief, in the Section V. Argument, heading A., argues that on JV's Motion For Judgment on the pleadings, the District Court did not consider "any matters outside of the pleadings" and that the District Court properly denied JV's Motion. The Respondent's Brief fails to recite the actual facts that the Bank's First Amended Complaint did not allege the word "subordinate" or any words of fact as to how or why the Bank's Mortgage recorded August 6, 2008 could be senior to JV's Mortgage recorded June 19, 2006.

The Bank's pleading, Second Claim for Relief was in paragraph 5 seeking "For a determination that the lien created by the Note and Mortgage is valid, enforceable and existing as against the Defendants and the property described therein and for a decree of foreclosure." (R. Vol. I, p. 135, p.5). There was not pleading of any particular priority of the Bank's recorded Mortgage, which was recorded, in 2008, over a year later than JV's Mortgage recorded in 2006. So, there is no way the pleadings disclosed a theory, factually or legally, as to how the Bank's Mortgage could have priority over JV's Mortgage.

Idaho law is clear that the prayer for relief is not part of the cause of action. As stated in JV's Appellant's

Brief, the prayer of a complaint is nothing more than a statement of the pleader's opinion of what the facts stated in the Bank's amended complaint, without dispute alleged JV's Mortgage recorded in 2006 would be prior to the Bank's Mortgage recorded in 2008. The prayer forms no part of a statement of a cause of action, facts alleged and not the relief demanded are of chief important.

In summary, no part of the Bank's Respondent's Brief submits any facts or law, as to its later recorded Mortgage could be superior to JV's Mortgage. Idaho's race/notice statutes give priority to the first in time recording. The "Subordination Agreement" was totally outside and missing from the facts alleged even considering the standard that only a short and plain statement of the claim showing the pleader is entitled to relief.

Respondent's Brief claims that its Mortgage recorded in 2008 had priority by reason of subordination.

B. Respondents Bank claims the District Court's decision on summary judgment was correct. The Legal Standards were correctly set forth by the District Court, but the District Court was in error to hold that the facts entitled the Bank to summary judgment as a matter of law. The District Court only expressed its conclusions. The facts were at issue and disputed on the record. JV's Affidavit of James W. Berry was lengthy and factual that the Bank gave no consideration, JV had no contract or agreement

with the Bank. Charles Reeves for the land owner, POBD, obtained JV's signature based on fraudulent misrepresentations. The Subordination Agreement had a place for the Bank Officer's signature, which was unsigned and remain in blank. The Bank submitted nothing in dispute of the Affidavit of James Berry. The Respondent's Brief, page 10, cites the rule that "based on undisputed evidence...the Court can make "inferences". That theory of law does not apply because the facts and evidence were entirely in dispute.

The District Court was short on findings, only concluding that a valid subordination (sic) contract was entered into by which JV's mortgage was made inferior to UB's Mortgage. The Subordination Agreement was not signed and recorded until August 6, 2008, a copy of it is on page 086 of Respondent's Brief as an appendix. The Subordination Agreement could not be an inducement for the Bank to loan POBD $5.0 million dollars, because the money loan occurred in October of 2007, with no mortgage, then the loan was renewed by a new mortgage on the real estate recorded March 25, 2008. The Subordination Agreement was long after the Bank Loans, and the Bank's Mortgage was recorded four (4) months ahead of the Subordination Agreement.

The Respondent Bank, paragraph B. 1. claims that JV presented no legal authority on its argument that summary judgment was improper, which is not accurate. JV's

Appellant's Brief, on its issue II, covers pages 14 through 19, and it uses the facts from the record, and the applicable law. With all of JV's Affidavit facts undisputed or contested in any way, the District Court's summary judgment is reversible error.

In JV's caption III, JV submitted that on its Motion To Alter, Amend, and Reconsider, the District Court erred by refusing to consider additional facts, being 3 letters from POBD's Attorney, Mr. Sterling. The 3 email letters from Attorney Sterling were to induce JV to subordinate its first lien Mortgage. The District Judge did not permit those email letters and the facts therein contained to be admitted at all, but he gave no reasons for that ruling. JV's Respondent's Brief, pages 24 through 29, in detail shows facts that the representations of Sterling's 3 email letters were false. The Bank's response is at paragraph C, page 24 of Respondent's Brief stating that JV's new evidence failed to raise an issue of fact. JV submits that the District Judge refused to consider the new evidence. Decisions on summary judgments are interlocutory in the sense that the facts and issues can be reconsidered at any time, within fourteen (14) days of the final judgment. Rule 11(a)(2)(B) Motion For Reconsideration, a motion to reconsider any interlocutory order of the trial court may be made at any time, but not later than 14 days after entry of final judgment. In the Amended Findings and Conclusions, R. VII.,

p. 1479, the District Court, end of the first paragraph, stated the Court ... will not consider the three 3-mails; however, no reason was given.

The rule is stated in *Idaho First National v. David Steed*, 121 Idaho 356, 825 P.2d 79 (1992) that on a Rule 11(a)(2)(B) a party filing a motion to reconsider may submit additional new facts, which the Court must consider in ruling on JV's Motion to Reconsider. A summary judgment is interlocutory as no final judgment exists. "The order granting summary judgment was an interlocutory order, not a final order" (*Idaho First National v. David Steed*, 121 Idaho 356 at 361). For example, in *Coeur d'Alene Mining v. First National Bank of Idaho*, 118 Idaho 812, 800 P.2d 1026, the Supreme Court noted that when presented with a motion for reconsideration of an interlocutory order pursuant to I.R.C.P. 11(a)(2)(B) "the trial court should take into account any new facts presently by the moving party that bear on the correctness of an interlocutory order." (*Coeur d'Alene Mining v. First National Bank of Idaho*, 118 Idaho at 823.

The Bank submits the Court's refusal to exclude the emails was harmless. (Respondent Brief p. 26) JV's Appellant's Brief, pages 23 through 29, analyzes each separate email and points out that the facts and representations made by POBD's attorney Sterling were false inducements seeking JV to sign the Subordination Agreement.

Bank's Respondent's Brief, paragraph E, page 30 is its claim that JV was properly excluded from the trial. The Bank goes on to acknowledge that proper due process requires some process to insure the individual is not deprived of his rights, and the Bank states, mainly "an individual must be provided with notice and opportunity to be heard" (Respondent's Brief, page 31). In response to the District Judge's Letter Order, JV filed an Objection and Motion to Set Aside the Court's Letter to Counsel. The District Court made no response, no hearing was offered, held, and the District Court proceeded through trial in total disregard of JV's procedural due process rights. Respondent Bank does not refer to any opportunity for JV to be heard but claims that because JV was provided opportunity to be heard on the first summary judgment and then on reconsideration. (Respondent's Brief, page 32, beginning paragraph).

JV submits that prior hearings on summary judgment and reconsideration had nothing to do with the Court's Letter of April 30, 2014, which occurred subsequently, months later. The Respondent's Brief seems to entirely support JV's issue that JV was entitled to notice and opportunity to be heard.

D. District Court's Refusal to Allow JV to discover the full Settlement Agreement by the Bank and its Debtors, POBD, BOLBY and MERSCHEL.

The Respondent Bank submits that it was a matter of pure discretion for the District Judge to deny JV's motion

to discover the Bank's Restructure and Settlement Agreement between it and its debtor POBD, Merschel and Bolby. The Respondent Bank submitted as legal authority the rule that IRCP 26(b)(1) permits broad discovery...so long as it is "reasonably calculated to lead to the discovery of admissible evidence. (Respondent's Brief, page 29, first para, cases cited).

JV's reply is:

a) The Bank's attorney, in open court, had previously said, "I don't have a problem giving him the global settlement document." (Tr. Vol 2., p. 96, ll.9-11). This statement stipulation by Bank's counsel binds the Bank to furnish the document requested.

b) The District Court entered a written Order which stated that he "it (sic) did not find the agreement to be relevant to the remaining issues in this case; however the document may lead to relevant evidence". (Order Re: Discovery, R. Vol. VII, p. 1539).

In other words, the District Court did find the standard recognized by Respondent's Brief that discovery is permitted of any matter, "so long as it is reasonably calculated to lead to the discovery of admissible evidence. The District Judge explicitly stated the rule permitting discovery of the matter (Settlement Agreement of the Bank and Debtor) because it reasonably could lead to discovery of admissible evidence. However, the District Court did not

define the "remaining issues" or how the document "may lead to discovery of relevant evidence". (This is at R., Vol. VII, page 1539-40; the Appellant's Brief, page 31, 3rd line, in error referred to it as Vol II, it is in fact in Vol. VII.)

Only a "redacted" copy was furnished, and it is in evidence as Defendant NIR Exhibit SSS. In paragraph 3 Reaffirmation of Obligations it was stated that all terms and conditions of the Loan Documents would remain in force and effect. The relevance of that provision is that the LOAN DOCUMENTS include a Collateral Pledge of cash by Bolby of 2.5 million and Merschel of 2.5 million, a total of $5.0 million dollars in cash collateral that should have applied to almost entirely pay-off the Note and Mortgage to the Bank.

Of a matter of course in the proceedings, JV was not heard on its motion to quash the Judge's Letter denying JV the right to sit at counsel table and participate in the trial. That also denied JV any opportunity to present the discoverable evidence of how, why, where, did the $5.0 million Cash Collateral go? It was not applied to the loan at all, as the Bank was suing to foreclose a $5.0 million dollar Mortgage on the real estate when in fact it held 5.0 million cash collateral to pay the Loan, without the need to foreclose the Mortgage as to the first $5.0 million cash was in fact held by the Bank as collateral. The Bank never

asserted that the full Settlement Agreement was privileged, nor did the District Court find it was privileged.

JV submits it was denied discoverable knowledge of the facts of the $5.0 million cash collateral, which is a substantial prejudice to JV & NIR.

ATTORNEY FEES

Respondent's Brief seeks attorney fees on this appeal, as a "commercial transaction" under Idaho Code §12-120(3). There was no commercial transaction between the parties, the Bank, and JV. The Bank was not a party to the Subordination Agreement, and the interest of JV was only as a Mortgage holder on the same real estate as the Bank's Mortgage. The Bank's Mortgage being recorded in 2008 and JV's Mortgage recorded in 2006. The only issue between the Bank and JV was the priority of each other's Mortgage on the same real estate. This action did not involve a "commercial transaction". The "gravamen" of the Bank's action against JV was not a commercial transaction because it is not integral to the claim upon which the Bank was seeking against JV. This action was primarily a priority as to real property dispute. (*Sun Valley Hot Springs Ranch v. Kelsey*, 131 Idaho 657, 962 P.2d 1041(1998).

UNION BANK CLAIM FOR ATTORNEY FEES BY IDAHO CODE §12-121

Union Bank claims the appeal issues and Appellant Brief are brought or pursued frivolously, unreasonably, or without

foundation. JV agrees that such is the standard under Idaho Code §12-121.

JV submits that the factual record shows JV validly pursued having a priority mortgage on the real estate at issue. JV should have been entitled to judgment on the pleadings because the facts allege the date of recording for JV in 2006 and the Bank in 2008. There was not one word about "Subordination" (Agreement), as the prayer for relief is not part of the cause of action or factual allegation, it is only opinion of the pleader. The Affidavit of James Berry alleged substantial facts so that the facts were subject to genuine issues of material fact. The District Judge refused to consider JV's additional evidence on reconsideration of the interlocutory order of summary judgment. JV was denied discovery of evidence (Settlement Agreement) that the District Judge found would lead to discovery of relevant evidence.

The Trial by the District Judge was ordered to be without JV having any participation. There was no opportunity to be heard and no meaningful hearing, at all.

JV'S RELIEF ON ITS REPLY

JV moves the Supreme Court to deny attorney fees to the Respondent Bank, and to reverse the District Court and to remand the matter to the District Court for new proceedings and a new trial. Alternatively, JV moves the Supreme Court to find and hold that JV had the first priority mortgage

recorded June 19, 2006 and the Bank held a subsequently recorded mortgage recorded March 25, 2008. The Subordination Agreement did not bind JV as a contract, there was no consideration, and it was obtained by fraud in the inducement. Because the Subordination Agreement was recorded August 6, 2008, over 4 months after the Bank's Mortgage, so the Bank could not be a third party beneficiary.

RESPECTFULLY SUBMITTED this ____ day of December, 2015.

Gary A. Finney
Attorney for Appellant JV

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing was served as indicated, this _____ day of September, 2015, and addressed as follows:

Christopher Pooser
Stoehl Rives, LLC
101 S. Capital Blvd., Ste 1900
Boise, ID 83702-7705
VIA US MAIL

Susan Weeks
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
VIA US MAIL

recorded June 19, 2006 and the Bank held a subsequently recorded mortgage recorded March 25, 2008. The Subordination Agreement did not bind JV as a contract, there was no consideration, and it was obtained by fraud in the inducement. Because the Subordination Agreement was recorded August 6, 2008, over 4 months after the Bank's Mortgage, so the Bank could not be a third party beneficiary.

RESPECTFULLY SUBMITTED this 17TH day of December, 2015.

Gary A. Finney
Attorney for Appellant JV

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing was served as indicated, this 19th day of December, 2015, and addressed as follows:

Christopher Pooser
Stoehl Rives, LLC
101 S. Capital Blvd., Ste 1900
Boise, ID 83702-7705
VIA US MAIL

Susan Weeks
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
VIA US MAIL

recorded June 19, 2006 and the Bank held a subsequently recorded mortgage recorded March 25, 2008. The Subordination Agreement did not bind JV as a contract, there was no consideration, and it was obtained by fraud in the inducement. Because the Subordination Agreement was recorded August 6, 2008, over 4 months after the Bank's Mortgage, so the Bank could not be a third party beneficiary.

RESPECTFULLY SUBMITTED this 17TH day of December, 2015.

Gary A. Finney
Attorney for Appellant JV

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing was served as indicated, this 17th day of December, 2015, and addressed as follows:

Christopher Pooser
Stoehl Rives, LLC
101 S. Capital Blvd., Ste 1900
Boise, ID 83702-7705
VIA US MAIL

Susan Weeks
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
VIA US MAIL