8-16-2017

Hull v. Giesler Appellant's Reply Brief Dckt. 44562

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY HULL, Plaintiff-Counterdefendant-Appellant, vs. RICHARD B. GIESLER and Idaho Trust Deeds, LLC, Defendants-Counterclaimants-Respondents.	)	Docket No. 44562-2016 Twin Falls No. CV-2012-2168

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Randy J. Stoker, Presiding

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RULES

Idaho Appellet Rule 35(c) 1

Pursuant to Idaho Appellate Rule 35(c), Appellant submits his Reply Brief in support of his appeal. References to the record and trial transcript are incorporated in the body of this Reply Brief. References to the Transcript and the Record refer to the exhibits on file in this appeal.

ARGUMENT

The District Court's findings awarding direct and indirect costs are not supported by substantial and competent evidence when the record is replete with admissions that such expenses included costs not related to Triple Crown Phase 1.

During the first phase of developing the property, Respondent developed what is referred to as the Belmont and Emerald Subdivision consisting of 40 acres. Appellant was entitled to a half interest in the profits from that phase pursuant to the parties' oral contract. Respondent acquired Appellant's interest in the profits from Belmont and Emerald by paying Appellant $200,000 and agreeing to be solely responsible for all development costs from Belmont and Emerald.

In spite of that agreement, Respondent submitted expenses to be repaid as development costs for Phase 1. In Respondent's Reply Brief, they take issue with whether the Order appealed from should be reviewed as issues of law or fact. Regardless of which standard is applied, the District Court's findings cannot stand as there is no basis to approve the holding. While recognizing that findings of fact are reviewed on appeal if they are supported by substantial and competent evidence, the record will show that the indirect costs allowed by the District Court

were in violation of the parties' agreement to buy out the Appellant's interest in the Belmont and Emerald phase.

The District Court allowed Respondent to recoup $124,564 as an "indirect cost" for Idaho Power charges. (R. p. 231). The allowance of the charges in question were undisputedly incurred during the Belmont and Emerald phase and should have been disallowed under the parties' prior agreement whereby Respondent was to pay the development costs of the prior phase. Otherwise, Appellant would have to be allowed to share in the profits which he waived. The Court's allowance of the entire Idaho Power invoicing violates the standard of reasonably implied terms since the only agreement between the parties was that Respondent was to pay all the costs from the first phase of development.

The District Court's Order also allowed reimbursement of $15,029 for Riedesel Engineering which were likewise expenses incurred during the Belmont and Emerald phase. Consequently, the Riedesel Engineering costs cannot be passed through to Appellant without violating the parties' expressed terms that Appellant only pay for expenses associated with Triple Crown Phase 1. (R. p. 231)

The District Court also erred in its finding of allocation of direct costs where it awarded charges which were admittedly not for the benefit of Triple Crown 1 properties. In the instances provided below there is no dispute that the charges were not for expenses of Triple Crown Phase 1. For instance, the District Court permitted recovery of $63,694.18 for a pressurized irrigation system. (R. p. 229). However, during trial, Respondent admitted that those charges included invoicing for supplying irrigation hook-ups for four lots within the Belmont and

Emerald Subdivision which had previously not had irrigation water, but were drawing water off their own domestic wells:

> **A They didn't have individual hookups, if that's what you're saying. They -- the irrigation system, the piping was in. The pipe, the main line was in. If what you're driving at is where was the water supplied from, it was supplied from the farm irrigation pumps from down on the other end, if that's what you're looking for.**
>
> **Q** My understanding of the facts is that there were or four lots in Belmont and Emerald that never had water Triple Crown was put in, and the irrigation system was
>
> three until changed, and a head gate was moved over to the lot 12 pond. Is that wrong?
>
> **A When you say you understand they never had water, they didn't have --**
>
> **Q** Irrigation water.
>
> **A They didn't have irrigation water because they hadn't put in the individual hookups. The main line was there to hook into, but they chose not to do that, to pump out of their wells instead.**

Tr. p. 204, L. 8-25

> **A No. And I also didn't allocate any of the Farmore bills from when I put in the original system and went forward. Belmont and Emerald were serviceable when it was finished. The engineer certified it.**
>
> **Q** So those four lots in Belmont and Emerald, even though they had no water, you considered those serviceable?
>
> **A Even though they had no water. They may not have had their individual hookups in. But there was water there.**

T. p.205, L. 9-16

The Districts Court's reimbursement of these indirect costs directly conflicts with the parties' agreement that Respondent pay all development costs of the Belmont and Emerald phase

under the terms of Appellant's buy-out from the Belmont/Emerald phase for $200,000. Respondent was responsible for payment of all costs associated with the first phase. (R. p. 223). Contrary to that agreement, the District Court also allowed Respondent to recoup $124,564 it described as "indirect costs" for Idaho Power invoices. (R., p. 231). These charges again were for prior charges incurred during the Belmont and Emerald development.

The District Court also reimbursed Respondent $15,029 for Riedesel Engineering expenses (R. p. 231) which again violated the parties' prior agreement to be bought out of the Belmont/Emerald phase. In fact, Respondent was candid in admitting the charges were for properties beyond Triple Crown Phase 1.

During Cross examination, the Respondent admitted that he had passed through Belmont/Emerald expenses:

> **Q** And those costs, we've seen references both in the billings and in different exhibits that Belmont and Emerald expenses are now being asked to be absorbed in Triple Crown. Why would that be if you had agreed to accept the expenses of Belmont and Emerald?
>
> **A Only, only in the categories of power, the entrance, and the original Riedesel 797 billing. Those are the only ones that we allocated.**
>
> **Q** You're expecting Triple Crown to accept a hundred percent of its expenses for the Idaho Power bills associated with its development?
>
> **A Yes.**

T. p. 206, L. 1-12.

From the above admission, it is clear that Respondent admitted that both direct and indirect costs were passed through to Triple Crown from the Belmont and Emerald phase.

The District Court's findings regarding development costs are inherently erroneous if the Respondent admits the charges for development costs were for the benefit of lots in a different phase and were in fact included as part of the charges incurred for irrigation expenses. (T. p. 95, L. 1-17 to p. 103-1-8 and Defendants' Exhibits 9(b) to 9(e)). (Acknowledging over $63,943 in invoicing to both Sliman and Butler Irrigation, Inc., and Farmore of Idaho).

Additional expenses were approved by the District Court which included charges for a storage unit supposedly to house a mailbox. However, on cross examination, Respondent admitted that he had paid for a storage unit supposedly to warehouse a mailbox he did not even buy for several months:

> **Q** And then you installed, I presume, a mailbox after you received it sometime in -- when did you receive that mailbox, by the way? You ordered it in the middle of September 2015.
>
> **Q** So the storage unit was doing what between September and December?
>
> **A I don't know.**
>
> **Q** Do you think that's a reasonable charge, sir?
>
> **A Somebody's got to pay it. I paid it. It was an expense. Might not have been the best, might not have been the best expense, but it was an expense.**
>
> **Q** Just because you spent the money doesn't mean Mr. Hull had pay for you to have a storage unit.

T. p. 226, L. 23-25; pg. 227, L. 1-11.

Assuming findings of fact are given deference if supported by substantial and competent evidence, they must be supportive of the expense approved. When the party admits that expenses sought for reimbursement have included costs beyond the scope of the project, it

cannot be reasonable since they are not attributable to Triple Crown. All of the references above clearly indicate that the Respondent admitted the expenses noted were either for costs from Belmont and Emerald lots, such as the irrigation upgrades or for expenses incurred during the Belmont and Emerald development phase for which Respondent was to be solely responsible. Those costs cannot, therefore, be reasonable since they had no correlation to Triple Crown Phase 1. All such "costs" were beyond the subject of this phase of development and should not have been approved by the District Court.

Respondent in this case alleges that the District Court's findings were supported by substantially and competent evidence. However, evidence is not supported by substantial evidence when a party admits that the expenses being charged were for costs outside the development. Idaho Rule of Civil Procedure 52(a) provides in relevant part that:

> A party may raise the question of the sufficiency of the evidence to support the findings whether or not the party raising the question has made an objection to the findings or a motion to amend them or a motion for judgment.

The case before the Court presents a question as to the adequacy of the findings of the District Court, not based on conflicting evidence, but rather on the admission of a party that the expenses in this case were incurred specifically for other properties not the subject of Triple Crown Phase 1.

Although Appellant acknowledges for this aspect of the appeal that it carries the burden of showing error in the District Court's Findings of Fact, such rule presupposes that there is a dispute as to the evidence. *Muniz v. Schrader,* 115 Idaho 497, 797 P.2d 1272 (Ct. App. 1989).

In this case, the Appellant seeks reversal of the Trial Court's award of development costs when the Respondent admitted at trial that the expenses in question were not for the subdivision in question. Respondent has admitted expenses sought to be reimbursed were for expenses outside the scope of the property. See, *Aztec Ltd., Inc. v. Creekside Inv. Co.*, 100 Idaho 566, 602 P.2d 64 (1979).

CONCLUSION

Whether the Court reviews the rulings of the District Court as either "Conclusions of Law" or "Findings of Fact," they are objectionable. In the case of allowed indirect costs, those charges specifically should be reviewed as a disputed contract interpretation since they involve a contract term that required Respondent to be responsible for all development costs of the Belmont and Emerald Subdivision.

The District Court's rulings on direct costs are likewise objectionable, even under the standard of being supported by substantial and competent evidence. In the categories outlined, the Respondent specifically admitted that the charges associated with the irrigation system upgrade included invoicing for providing irrigation water to four Belmont and Emerald lots. Respondent also acknowledged that the Riedesel invoicing was charged to Triple Crown incurred during the Belmont and Emerald development phase.

Finally, the example of the expenses claims being allowed by the District Court to include items which had no bearing on Triple Crown are further examples of errors not

supported by substantial or competent evidence, but rather were admitted to as not included in Triple Crown at all.

Under these circumstances, this Court should find that the District Court's ruling was in error and remand for further proceedings.

Dated this16th day of August, 2017

GERY W. EDSON, P.A.,

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2017, I served a true and correct copy of the foregoing to the following parties by the method(s) indicated below:

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