6-16-2017

MFG Financial, Inc. v. Vigos Appellant's Reply Brief Dckt. 44718

IN THE SUPREME COURT FOR THE STATE OF IDAHO

MFG FINANCIAL, INC., an Arizona Corporation,

Plaintiff/Respondent/Cross-Appellant,
vs.

JUSTIN VIGOS,

Defendant/Appellant/Cross-Respondent.

Magistrate Case No. CV-OC-15-16099

Supreme Court Case No. 44718

CROSS-RESPONDENT'S BRIEF/ APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

Honorable Gerald F. Schroeder, Senior District Judge.

Honorable Patricia Young, Senior Magistrate Judge.

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I. ARGUMENT

To aid in resolution of this matter, Mr. Vigos will respond to MFG Financial's brief utilizing the same formatting of the arguments so that the Court can make direct comparisons. Mr. Vigos does not agree, though, that these arguments as presented are necessary to consider for the Court to make a decision; the arguments Mr. Vigos presented in his opening brief reflect his view of what this Court should find relevant.

A. Vigos did not admit the operative terms of the contract.

MFG argues at length in its brief that by judicial admission by statements made in summary judgment briefing that Mr. Vigos had admitted the operative terms of the contract. Both the magistrate and district courts rightfully rejected that argument. Only statements made in pleadings can be judicial admissions. *Charney v. Charney*, 159 Idaho 62, 68 n. 2, 356 P.3d 355, 361 n. 2 (2015) "The pleadings are a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, and an answer to a third party complaint." *Id.*

The fact MFG is fighting so hard to get the contract into evidence as a judicial admission shows the difficulty it has making the document admissible without an admission. While MFG argues that a contract is not hearsay for various reasons, there still must be some foundation for it to be admissible. No such foundation was presented to the magistrate, which is why it was not admitted into evidence.

B. MFG has not proven it has standing to enforce the contract.

It is a basic premise of law that a party must have the legal right to enforce a contract before it can do so. MFG argues the chain of title in this case is straightforward and clear, but only if the court takes leaps of logic and massive inferences, while ignoring the actual admissible evidence.

Summary judgment is a proper procedural method for dismissing a claim based on a lack of standing. *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002).

The magistrate court found that MFG had failed to prove it was the real party in interest with admissible evidence.

MFG cites several cases for the proposition that it can wait until trial to present admissible evidence. That misconstrues the holding of the cited cases. For example, *Gem State Ins. Co. v. Hutchison* states: "When considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial." 145 Idaho 10, 14, 175 P.3d 172, 176 (2007). MFG reads that as saying that as long as it is admissible by the time the case gets to trial, it does not have to be admissible in support of or in opposition to a motion for summary judgment. That reading is incorrect. What courts mean by the requirement that the evidence must be admissible at trial is that at the summary judgment stage the court must use the same evidentiary standards that it will use at trial.

Directly following the statement above in *Gem State Ins. Co.,* the Court says: "Thus, if the admissibility of evidence presented in support of a motion for summary judgment is raised by objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence 'before proceeding to the ultimate issue, whether summary judgment is appropriate.' "

MFG's contention that it could have gotten the contract into evidence at trial is more appropriately addressed by *Tri-State Nat'l Bank v. Western Gateway Storage Co.*: "Mere denials, assertions of what 'might have [been],' of what one has 'been told' or 'advised,' of matters not stated from personal knowledge, of numerous legal conclusions (especially by laymen), and of what one hopes 'will be shown at trial' are not enough to create a 'genuine issue' " under IRCP 56(e). 92 Idaho 543, 447 P.2d 409 (1968).

The only case MFG cites to support the notion that it could wait until trial to present its evidence in admissible form is from the Ninth Circuit. No Idaho case law could be found, because that is not the law in Idaho.

The facts of this case, in regards to the standing issue, mirror those of a case recently decided by this Court, *Portfolio Recovery Assocs., LLC. v. MacDonald,* 2017 WL 2376426 (Idaho June 1, 2017). In that case, in dicta, the Court addressed a Defendant's burden of proof when moving for summary judgment. The Court stated:

> MacDonald's burden in support of his motion for summary judgment could 'be satisfied by showing the absence of material fact with regard to' PRA's claim to be the assignee of MacDonald's obligation. If the materials that MacDonald submitted in support of his motion for summary judgment satisfied this threshold

> burden, then the burden shifted to PRA to demonstrate by way of admissible evidence that a genuine issue of material fact exists as to this issue. MacDonald failed to meet this initial burden. Consequently, PRA was not required to present admissible evidence to resist MacDonald's motion for summary judgment. MacDonald could have shown the absence of evidence of an assignment "either by an affirmative showing with [his] own evidence or by a review of all [PRA's] evidence and the contention that such proof of an element is lacking." *Id.* at 6.

The Court explained that because the Defendant had merely presented an affidavit providing the documents Plaintiff had produced in discovery, without specifying that it was all the documents produced in discovery, that it had failed to shift the burden of proof to Plaintiff.

Likewise, in this case, Mr. Vigos' counsel filed an affidavit stating that it was attaching evidence produced by MFG in discovery. The affidavit did not specify that it was all the evidence produced in discovery which would support MFG's claims, yet the magistrate court was able to correctly infer that it must be all the relevant evidence based on the fact MFG did not object or claim that Mr. Vigos had misled the court by not presenting all the evidence produced in discovery.

In a case cited in *MacDonald,* the court discussed how a defendant could win on summary judgment:

> Because Holdaway would bear the burden of proof as to causation at trial, Broulim's could carry its initial burden as the movant on summary judgment by establishing "the absence of sufficient evidence" that the door at Broulim's fractured the screw. "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all

> the nonmoving party's evidence and the contention that such proof of an element is lacking." Broulim's satisfied its initial burden by doing two things.
>
> First, it submitted Holdaway's medical records and demonstrated that they do not support the allegation that the door at Broulim's caused the screw in Holdaway's leg to fracture. Second, it successfully moved to strike the only statements in the record addressed to causation.

Holdaway v. Broulim's Supermarket, 158 Idaho 606, 611, 349 P.3d 1197, 1202 (2015), reh'g denied (June 22, 2015).(internal citations omitted).

What that case does not say, or any similar cases describing what a defendant must prove when moving for summary judgment, is that the defendant must affirmatively state in an affidavit that it is presenting the court with all possible evidence to support the plaintiff's claims and that it finds the evidence to be lacking. Rather, the cases say a review of the evidence must show that an element of the cause of action cannot be met. It is unnecessary hairsplitting to require the defendant to say it has presented all the evidence plaintiff has produced in discovery, when the plaintiff has made no claim that the evidence defendant has presented is anything other than all the evidence it has to support its cause of action.

Mr. Vigos established to the satisfaction of the magistrate court that MFG did not have adequate admissible evidence to prove it is the real party in interest and the district court erred in reversing that ruling.

C. The magistrate was correct in awarding attorney fees and costs to Vigos.

The district court did not address this issue because Mr. Vigos was no longer the prevailing party at the magistrate level after the decision granting him summary

judgment was reversed. However, should this court reverse the district court's decision, Mr. Vigos provided an adequate basis for the magistrate court to award attorney fees and costs.

MFG claims that Mr. Vigos' failure to list the statutory basis for fees in his memorandum of fees and costs prevents him from recovery. Mr. Vigos identified the appropriate legal basis for his request for attorney fees under the "prayer for relief" section of his "Answer to Complaint." Vigos requested: "3. Defendant be awarded his attorney's and costs of court of this action under I.C. §§ 12-120(1), 12-120(3), 12-121, and I.R.C.P 54, and such other further relief the court deems just and proper."

Oakes v. Boise Heart Clinic Physicians, PLLC, has facts on point with our case. The court found that where the party requesting attorney fees had not listed a basis for attorney fees in his actual memorandum in support of costs, the party had effectively put the opposing party on notice of the basis for attorney fees by stating said basis in his complaint. 152 Idaho 540, 544, 272 P.3d 513, 517 (2012).

Attorney fees are plainly available to the prevailing party under Idaho Code § 12-120(1) because the amount sought by the Plaintiff was less than $35,000.

D. MFG's motion to continue is irrelevant to this appeal.

The Court need not even consider MFG's argument that the magistrate court erred in denying its motion to continue. MFG made its motion on the basis that it wanted to do a deposition of Mr. Vigos to determine if he had made payments which

would bring the claim back within the applicable statute of limitations. The magistrate court bifurcated the issues and determined it did not need to make a determination on the statute of limitations argument because MFG had failed to prove the contract was enforceable and that it had standing to do so. Therefore, MFG was not prejudiced by the denial of the motion to continue and that denial has no bearing on the outcome of this appeal.

E. The district court erred in determining the prevailing party.

Mr. Vigos agrees that MFG did not file a cross-appeal to the district court on the denial of its motion for summary judgment. Therefore, it should have been the prevailing party on the appeal to the district court. However, it would only be eligible for an award of attorney fees and costs if it ends up being the prevailing party for the entire case. *See, e.g., Portfolio Recovery Assocs., LLC. v. MacDonald,* 2017 WL 2376426 (Idaho June 1, 2017).

II. CONCLUSION

Based on the argument above, Appellant requests this Court reverse the ruling of the district court denying Mr. Vigos' motion for summary judgment.

DATED this 16th day of June, 2017.

Ryan A. Ballard
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 15th day of June, 2017, I served true and accurate copies of the foregoing document on the following person(s), either by deposit in the U.S. Mail, addressed as follows, or by Facsimile, or by hand-delivery, as indicated below:

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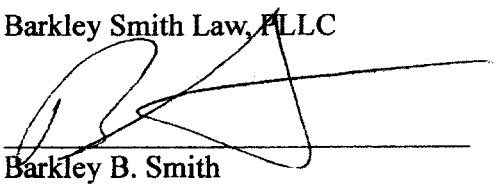

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