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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID LUJAN,

Plaintiff-Appellant, Cross-Respondent,

vs.

JUNIOR HILLBROOM, Individually and as the Trustee of the JLH Trust, akas Junior Larry Hillbroom Trust,

Defendant/Respondent, Cross-Appellant,

KEITH A. WAIBLE, as an Individual and as Trustee of the JLH Trust, aka Junior Larry Hillbroom Trust, and John Does 1-10, Individuals and entities presently unknown,

Defendant.

Supreme Court No: 48168-2020

Bonner County No. CV09-19-1604

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

Honorable Barbara A. Buchanan, Presiding

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff/Appellant David Lujan (hereinafter Lujan) obtained funds for Defendant/Respondent Junior Hillbroom (hereinafter Hillbroom) from Hillbroom father's estate. Lujan was employed by the trustee of a 1999 trust, Keith Weibel, which held the funds obtained from the estate. Lujan obtained funds for the trust but was not paid his entire fee. Lujan there after obtained a judgment in excess of $3,000,000 against Hillbroom as trustee and against the co-trustee of the 1999 trust.

Lujan discovered in 2018 that Hillbroom personally owned property in Bonner County, Idaho. In 2019, Lujan learned that Hillbroom had obtained title to that property in 2008 from a trustee of a trust of a very similar name to the 1999 trust which had the same trustees — Hillbroom and Keith Weibel. Lujan filed suit to set aside the transfer as a fraudulent transfer a little over four months after he discovered the transfer.

B. Proceedings Below.

Hillbroom moved for summary judgment claiming Lujan did not file suit within a year after he could have reasonably discovered the transfer from the trust to Hillbroom. Lujan responded and requested more time to conduct discovery. The motion for further discovery was denied and the District Court granted Hillbroom summary judgment and dismissed Lujan's entire complaint.

C. Facts.

Defendant Junior Hillbroom (hereinafter Hillbroom) is a pretermitted heir of Larry L. Hillblom.(R.9, ¶5)[1] Hillbroom was a minor at the time of Larry L. Hillbroom's death and had a

[1] The complaint is not verified but is incorporated by reference in the Declaration of David Lujan, R.104, ¶2.

guardian. (R.9-10, ¶6) That guardian hired David Lujan (hereinafter Lujan) to secure Hillbroom's portion of Larry L. Hillbroom's estate and agreed to pay Lujan a contingency fee based on a percentage of the recovery. (id) Larry Hillbroom's estate was settled in Guam and the Junior Larry Hillbroom Trust was created (hereinafter the 1999 trust) to receive funds from the estate. (R.10, ¶7) The trustee of the 1999 trust was Keith Wiebel (hereinafter Wiebel). (R.10, ¶7)

Wiebel entered into a new contingency fee agreement with Lujan in 1999. (R.10, ¶8) The JLH Trust received significant funds from Lujan's work from 2004 to 2009. (R.11, ¶11) The JLH Trust did not pay Lujan what was due to him pursuant to the contingency fee agreement and Lujan filed suit in the Superior Court in Guam. (R. 8-9, ¶ 1)

On September 18th, 2018, Lujan obtained a judgment for $3,791,125.97 against Weibel personally and as trustee of the 1999 trust and against Hillbroom in his capacity as trustee of the 1999 trust. The judgment was properly recorded in Bonner County. (R. 8-9, ¶1)

Hillbroom alleges that he started another trust called the Junior Hillbroom Trust, dated May 14th, 2005, separate from the 1999 trust and organized under different law (hereinafter referred to as the 2005 trust) (R.61-62, ¶5-6) Hillbroom and Wiebel were co-trustees of the 2005 trust. (R.67) In 2006, during the time the 1999 trust was incurring financial obligations to Lujan, the 2005 trustees purchased a parcel of property in Bonner County, Idaho. (R.65) Lujan did not know that the 2005 trust had been set up until Hillbroom's declaration in support of summary judgment, (R.105, ¶9), but the existence of the trust was alleged in the answer to the complaint filed December 6th, 2019. (R.33, ¶2).

In April of 2018, Lujan questioned Hillbroom in a deposition in Saipan about property he personally owned in Bonner County. (R.70-72) During that questioning, Hillbroom said nothing about the property having been acquired from the 2005 trust. After obtaining his judgment in September 2018, Lujan spent a significant amount of time and resources attempting to locate

assets to satisfy his judgment. (R.105, ¶4) In March 2019, Lujan ordered a litigation guarantee covering the subject property, (R.105, ¶4), which was received on April 11th, 2019. (R.105, ¶5). At this point, Lujan discovered the transfer of the subject property to Hillbroom personally from the 2005 trust. (R.105, ¶5) Lujan filed suit a little over four months later. (R.105, ¶6)

In his response to summary judgment, Lujan requested pursuant to I.R.C.P 56(d), a determination of the matter be deferred until further discovery could be conducted in order to:

> …ascertain if these claims have any validity, or that the Complaint herein should be amended to include multiple JLH trusts, together with discovering further data establish or trace assets and monies between said trusts and Respondent Junior. These trusts may even be identical and involve all the same parties in the same or similar capacities. (R.95)

The motion was denied in the written opinion as follows: "Upon consideration, the plaintiff's request for additional time to obtain declarations or to take discovery, pursuant to Idaho Rule of Civil Procedure 56(d), is denied. (R.~~183~~ 153) Summary judgment was granted to Hillbroom.

II. ISSUES ON APPEAL

1. Did the District Court commit error when it denied Lujan's motion to delay summary judgment to allow Lujan to conduct further discovery without explanation or analysis?

2. Did the District Court commit error when it inferred that Lujan could have discovered this transaction by a name search when that inference is not supported by the record?

3. Did the District Court commit error when it inferred that Lujan did not exercise proper due diligence when reasonable people could have reached a different inference based on the undisputed evidence?

4. Did the District Court commit error when it found that a constructive trust could not be imposed if it found that Hillbroom had created a different trust and not informed Lujan, funded that trust with money owed to Lujan and then used that money to buy property for himself?

5. Is Lujan entitled to attorney's fees on appeal?

III. ARGUMENT

A. The District Court abused its discretion when it refused to allow Lujan additional time to conduct discovery or add indispensable parties. The 2005 Trust was funded somehow and most likely by the 1999 Trust at the same time that trust was receiving millions because of Lujan's work and incurring millions in obligations to him. Lujan should have been allowed to develop this information.

The decision to grant or deny a motion to continue a summary judgment hearing to allow further discovery pursuant to I.R.C.P. 56(d) is reviewed for an abuse of discretion. *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 572, 261 P.3d 829, 849 (2011). A District Court does not abuse its discretion when it (1) recognizes the issue as discretionary, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason. *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008) citing *In re Jane Doe, I,* 145 Idaho 650, 651, 182 P.3d 707, 708 (2008) (*citing Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

"A motion denying a continuance under Rule 56(f) will be upheld if the court 'recognized it had the discretion to deny the motion, articulated the reasons for so doing and exercised reason in making the decision'". *Fagen, Inc. v. Lava Beds Wind Park, LLC*, 159 Idaho 628, 633, 364 P.3d 1193, 1198 (2016) citing *v. Boise Cascade Corp.,* v. Jenkins, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005).

The District Court here did not acknowledge that the matter was one of discretion, but more importantly, the District Court provided no explanation for its ruling. The District Court just denied the motion upon consideration. This is an abuse of discretion and the records supports that discovery likely would have revealed facts that allowed Lujan to survive summary judgment.

"A party seeking a continuance under Idaho Rule of Civil Procedure 56(d) "has the burden of setting out what further discovery would reveal that is essential to justify their

opposition, making clear what information is sought and how it would preclude summary judgment." *Haight v. Idaho Dep't of Transportation*, 163 Idaho 383, 389, 414 P.3d 205, 211 (2018), reh'g denied (Mar. 21, 2018).

Lujan's stated grounds for requesting time to conduct discovery were to allow the complaint to be amended to add additional trusts and to trace assets between Hillbroom and these trusts. The record creates a strong suspicion that the 2005 trust was created to avoid having to pay the legal fees the 1999 trust was incurring. The 2005 trust purchased property, so it was funded somehow. Given that the record supports that at least one of its co-trustees was a trustee of the 1999 trust, it seems likely the 1999 trust funded the 2005 trust at the time when the 1999 was incurring millions in obligations to Lujan.

What the discovery would have revealed is the relevant fraudulent transactions between the 1999 trust and the 2005 trust. If the 2005 trust was funded by the 1999 trust, then all the transactions the 2005 trust engaged in would be subject to being set aside and the 2005 trust would have to have been added as an indispensable party, and it is likely that other parties would have to be added.

Lujan aptly described Hillbroom's conduct as a shell game. The District Court committed error when it denied Lujan's request to try and unwind the shell game without explanation and the reasons for that denial are not readily apparent from the record. This Court should reverse the order granting summary judgment with instructions to allow Lujan to conduct discovery before responding to the motion for summary judgment.

D. The District Court committed error when it inferred that Lujan could have conducted a name search and discovered the transaction between Hillbroom and the 2005 trust because no evidence supports that inference. Even if the inferences are supported, reasonable people could disagree as to whether Lujan exercised due diligence and summary judgment was not proper.

1. Standard of Review

An Appellate Court review of a District Court's ruling on a motion for summary judgment is the same as that of the District Court in ruling on the motion. *Gregory v. Stallings*, 167 Idaho 123, 468 P.3d 253, 257–58 (2020). The District Court should grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. I.R.C.P. 56(a). "Not only are 'all disputed facts ... liberally construed in favor of the non-moving party,' but '[t]he burden of proving the absence of a material fact rests at all times upon the moving party." Id, citing *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). "Thus, it follows that if the moving party fails to challenge an element of the nonmovant's case, the initial burden placed on the moving party has not been met and therefore does not shift to the nonmovant." *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994).

This action would have been tried to the Court, so the District Court was free to draw probable inferences arising from the undisputed evidentiary facts. *Losee v. Idaho Co.,* 148 Idaho 219, 222, 220 P.3d 575, 578 (2009). Whatever inference the District Court draws from the undisputed evidence must be supported by the record. *Beus v. Beus,* 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011). If reasonable persons could reach differing conclusions or draw conflicting inferences from the undisputed evidence, then summary judgment is improper. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009), *Boise Tower Assocs., LLC v. Hogland,* 147 Idaho 774, 778, 215 P.3d 494, 498 (2009).

2. No evidence supports the Court's factual finding that Lujan could have easily discovered the transaction between Hillbroom and the 2005 trust.

Since Mr. Lujan was aware that Hillbroom owned the subject property in 2018, the District Court inferred that "Mr. Lujan could have conducted a name search of the Bonner County, Idaho, records in April 2018, and presumably, would have discovered Instrument No.

756186, transferring the subject property to Mr. Hillbroom." (R.149) Nothing in the record supports this inference, which is more of a factual finding.

As more fully discussed below, the issue on summary judgment was when Lujan reasonably should have discovered the relevant transaction. The District Court found that a name search would have revealed it, but did not explain what a name search was, what it would accomplish, how long it would take or how it would have revealed anything other than Hillbroom owned property in Bonner County. No evidence was in the record to support the inference that Lujan could have discovered the transaction between the 2005 trust and Hillbroom sooner based on the undisputed fact that he knew about it in 2018. It was an error to make that inference.

Furthermore, nothing in the record supports an inference that Lujan could have discovered the fraudulent nature of the transaction by conducting a name search and even if so, reasonable people could disagree as to whether Lujan exercised proper due diligence so summary judgment was not proper.

3. Even if the District Court's conclusion that Lujan could have discovered this transaction shortly after the 2018 deposition, reasonable people could reach differing conclusions as to whether Lujan exercised due diligence after he learned that Hillbroom owned property in Idaho so summary judgment was not proper.

As stated above, the District Court is free to draw the most probable inferences from the undisputed facts, but if reasonable people could reach differing inferences, then summary judgment should be denied. Here, Lujan ordered a litigation guarantee and when he discovered the transaction, he filed suit a little over four months later. Reasonable people could conclude that this was a proper exercise of due diligence.

Idaho Code 55-918(1) provides that a cause of action with respect to a transaction under this act must be brought within 1 year of the date the transfer could reasonably been discovered.

A transaction under the act is a transaction made by a debtor with 1) the actual intent to hinder, delay, or defraud any creditor or 2) was made without receiving reasonably equivalent value and the remaining assets of the debtor are unreasonably small in relation to the transaction or the debtor intended to incur further obligations beyond that which the debtor can pay. Idaho Code Ann. § 55-906.

Idaho Code 55-918(1) is a statute of limitations based the discovery of a fraudulent transaction. Whether or not someone should have reasonably discovered a fraud is a question of due diligence. *Davis v. Tuma*, 167 Idaho 267, 469 P.3d 595, 605 (2020) citing *McCoy v. Lyons,* 120 Idaho 765, 773, 820 P.2d 360, 368(1991). "The discovery rule applicable to fraud requires more than an awareness that something may be wrong but requires knowledge of the facts constituting fraud." Id.

The District Court concluded that Lujan could have discovered this transaction if he had run a "name search". As set forth above, no evidence supports the inference and even if supported, reasonable people could reach differing inferences as to whether Lujan exercised due diligence even if he did not run a "name search.

If the District Court was correct in presuming that the transfer could have been discovered by a name search in Bonner County, nothing in the record supports an inference that a title search would reveal the fraudulent nature of the transaction. In fact, the only thing it likely would reveal was that Hillbroom's predecessor in interest was a trust with a slightly different name and date than the trust Lujan had sued herein.[2] It would <u>not</u> have revealed what was revealed in this litigation – that Hilbroom had set up a whole different trust and that the trust was likely funded by a fraudulent transfer from the 1999 trust to the 2005.

[2] The slightly different name and date would not impart knowledge of a separate trust. The 1999 trust could have been amended in 2005 to remove the word "Larry" from the title.

Lastly, although not clearly stated in the record, it is reasonable to assume that Lujan is not from Idaho. Lujan would have no reason to know what a "name search" was. In addition, Lujan first ordered a litigation guarantee, then discovered the transfer, and filed suit just a little over four months later. Reasonable people could reach differing conclusions as to whether Lujan exercised due diligence and the District Court should not have granted summary judgment.

No evidence supports the inference that Lujan can have conducted a name search and discovered the relevant transaction nor its fraudulent nature. The District Court committed error when it inferred these two facts, but even if it did not, reasonable people could reach differing inferences on whether Lujan exercised due diligence and summary judgment was not proper.

4. To the extent the District Court relied on Idaho Code 55-811 to impart constructive notice to Lujan, such was error as that code section cannot be used to shield a person from a claim of fraud.

It is not clear if the District Court relied upon Idaho Code § 55-811 to impart constructive notice of the transaction to Lujan, but it did, such was an error.

Idaho Code § 55-811 provides that if a purchaser of real property fails to search the recorded documents before finalizing the transaction, the purchaser is deemed to have constructive knowledge of contents of recorded documents. *Large v. Cafferty Realty, Inc.,* 123 Idaho 676, 680, 851 P.2d 972, 976 (1993). The statute imports constructive knowledge to a purchaser for the sole purpose of protecting third party's holding prior recorded interest in real property from lawsuit. "The purpose and effect of I.C. § 55–811 is to protect persons with a recorded claim or lien on the property from claims by other persons who acquire an interest in the property after the interest is recorded." *Large v. Cafferty Realty, Inc.,* 123 Idaho 676, 680, 851 P.2d 972, 976 (1993).

As far back as 1905, the Idaho Supreme Court has held that the constructive notice provisions of Idaho Code § 55-811 do not shield a person from a claim for fraud based on

misrepresentations of the contents of recorded documents. *Eastwood v. Standard Mines & Milling Co.,* 11 Idaho 195, 81 P. 382, 383 (1905). The doctrine is based on principles of equitable estoppel.

> A public record is an available means of information as to questions of title, and one who does not take advantage of it cannot claim estoppel against one who merely fails to furnish such information. There are, however, cases in which the representation, by actively misleading the person setting up the estoppel and preventing him from having recourse to available means of information, has been held to excuse his failure to inform himself of the facts, even in the case of constructive notice by matter of record.

And more recently and more directly on point is *Large v. Cafferty Realty, Inc.,* 123 Idaho 676, 851 P.2d 972 (1993).

> I.C. § 55–811, however, is not meant to be a shield against fraud and misrepresentation. Large is not claiming a right in the property adverse to the recorded restrictive covenants. Rather, Large claims he was induced to purchase the property based on the misrepresentations of Cafferty and Diversified in failing to disclose the existence of the restrictive covenants.
>
> *Id* at 123 Idaho 676, 680, 851 P.2d 972, 976 (1993).

In this case, the Lujan is not claiming to have an unrecorded interest adverse to the Defendants. Lujan is claiming the Defendants obtained title by means of a fraudulent transfer and Idaho Coe 55-811 does not shield them from that claim.

5. The District Court had evidence of a secret trust being set up for Hillbroom's benefit at the same time that another trust for Hillbroom's benefit was incurring millions in attorney's fees. The facts before the District Court are more than sufficient to create a question of fact as to whether it would be unconscionable for Hillbroom to retain title to this property.

The District Court held that "…the Complaint and Declaration contain no factual allegations of nonfraudulent, but otherwise wrongful conduct which would support creation of a constructive trust. See *Witt v. Jones*, 111 Idaho at 168, 722 P.2d at 479." (R.151) The complaint

and declaration sufficiently allege that Hillbroom's trust received millions of dollars from Lujan's efforts and the trust did not pay those fees. Hillbroom's creation of a second, secret trust at the same time Lujan was incurring millions in legal fees that were not paid at least creates a question of fact as to whether the a constructive trust should be imposed on this property.

"A constructive trust arises where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one's necessities, or under circumstances otherwise rendering it unconscionable for the holder of legal title to retain beneficial interest in the property." *Davenport v. Burke,* 30 Idaho 599, 167 P. 481 (1917).

The evidence before the Court on summary judgment was that Lujan entered into a fee agreement with the trustee of the 1999 trust and that Lujan performed his part of the agreement and obtained enough funds to entitle Lujan to $3,791,125.97 in fees, which were not paid. At the same time that Lujan was obtaining all this money for the 1999 trust, Hillbroom and the other trustee, Keith Weibel, of the 1999 trust created a new trust as co-trustees of that trust and presumably transferred money to it since it had money to buy property in Hope, Idaho.

Hillbroom created a new trust for his benefit in 2005, did not disclose that fact to Lujan, was in charge of both trusts, presumably transferred all the assets of the 1999 trust to the 2005 trust and then used those funds to purchase the subject property for the 2005 trust. Hillbroom did not pay Lujan's fees and has not paid Lujan's judgment for those fees.

The evidence on summary judgment viewed in the light most favorable to Lujan is that Hillbroom created a new trust for his benefit in 2005, did not disclose that fact to Lujan, was in charge of both trusts, presumably transferred all the assets of the 1999 trust to the 2005 trust and then used those funds to purchase the subject property for the 2005 trust. Hillbroom did not pay Lujan's fees and has not paid Lujan's judgment for those fees.

These facts establish circumstances rending it unconscionable for Hillbroom to retain title to this property unless and until he pays Lujan's judgment, and the District Court should not have dismissed Lujan's claim to impose a constructive trust on summary judgment.

6. Lujan is entitled to attorney's fees on appeal because no evidence supports the District Courts inference and defending this appeal is frivolous.

It is undisputed that no evidence in this record supports the District Court's inference that a "name search" could have easily revealed this transaction. Furthermore, the law is clear that Idaho's Constructive Notice statute, Idaho Code 55-811. This appeal should not be defended, and the matter should be remanded with instructions to allow Lujan to determine if the 2005 trust was funded by the 1999 trust.

Reasonable attorney fees are available to the prevailing party under I.C. § 12–121 if the Court determines that the appeal was brought or defended frivolously, unreasonably, or without foundation. *Spencer v. Jameson*, 147 Idaho 497, 507, 211 P.3d 106, 116 (2009).

IV. CONCLUSION

Keith Weibel retained the services of David Lujan to secure funds for the trust of which he was a trustee and which was for the benefit of Junior Hillbroom. As Lujan performed his end of the bargain, and earned in excess of $3,000,000 in fees, Weibel and Hillbroom created a separate, secret, trust and funded it most likely with funds from the 1999 trust. Weibel and Hillbroom then refused to pay Lujan and Lujan obtained a judgment against them in their capacities of trustees of a trust, the 1999 trust, that does not appear to own any property. These facts support the imposition of a constructive trust upon a property owned by Hillbroom acquired from the 2005 trust.

The transactions that occur to fund trusts and buy property are not generally conducted with cash. How this 2005 trust came to be funded will be a simple matter to establish and Lujan should have been afforded the opportunity to do so.

This Court should reverse the District Court's dismissal of Lujan's complaint with instructions to allow Lujan to conduct further discovery.

DATED this 10th day of December, 2020.

ARTHUR M. BISTLINE
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December, 2020, I served a true and correct copy of foregoing APPELLANTS' OPENING BRIEF by the method indicated below, and addressed to the following:

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