1-3-2018

City of Middleton v. Coleman Homes, LLC Appellant's Reply Brief 2 Dckt. 45105

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 45105-2017

District Case No. CV-2015-8119

THE CITY OF MIDDLETON,

Plaintiff/Counter Defendant/Respondent/Cross-Appellant,

vs.

KUHLMAN HOMES, LLC, f/k/a COLEMAN HOMES, LLC, an Idaho limited liability company; WEST HIGHLANDS, LLC, an Idaho limited liability company; WEST HIGHLANDS SUBDIVISION HOMEOWNERS ASSOCIATION, INC, an Idaho Corporation; WEST HIGHLANDS LAND DEVELOPMENT, LLC, an Idaho Limited Liability Company.

Defendants/Counterclaimants/Appellants/Cross-Respondents.

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

Appeal from the District Court of Third Judicial District in and for the County of Canyon
Case No CV-2015-8119

Honorable Christopher Nye, District Judge, Presiding

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COURSE OF PROCEEDINGS ON APPEAL

1. The Defendants filed their *Brief on Appeal* on October 2, 2017.

2. The City filed its *Brief on Appeal and Reply Brief* as one document on October 27, 2017.

3. Defendants filed a *Reply Brief* on December 14, 2017. In that document, the Defendants responded to the City's Cross-Appeal in Section III, and provided their rebuttal argument in support of their Appeal in Section IV.

4. On January 3, 2018, the City filed this *Reply Brief* in support of its issues on Cross-Appeal.

REPLY ARGUMENT

A. The District Court's error in the *Second Amended* Judgment (stating in paragraph 4 that the obligation of providing the City a "financial guarantee" was an obligation of West Highlands, LLC, rather than Coleman Homes, LLC) was properly preserved for appeal.

The response of the Defendants to this issue on appeal is not persuasive nor particularly helpful. The *Second Amended* Judgment, ¶4, lists West Highlands, LLC rather than Coleman Homes, LLC, in error. The caselaw cited by the Defendants is not applicable because as noted below the Record demonstrates that the issue was preserved for appeal.

As a preliminary matter, there is no dispute that the 2011 Impact Fee Agreement ("IFA") was entered into by the City, West Highlands LLC, *and* Coleman Homes, LLC. It was also

signed by all three parties. (R. p. 451) There is no dispute that Coleman Homes, LLC[1] is expressly defined as and referred to in the IFA as "**Developer**." (R. p. 448). There is also no dispute that paragraph 3 of the IFA states that the "**Developer**" shall provide one or more financial guarantees. (R. p. 450). Therefore, a simple application of the Transitive Property of Equality[2] tells us that Coleman Homes, LLC shall provide the financial guarantee.

There can also be no valid dispute that the City has at all times asserted that the financial guarantee obligation was held by Coleman Homes, LLC. The city attorney even wrote a letter addressed to Coleman Homes, LLC asking that the guarantee be provided. (R. p. 157). Coleman Homes has refused to comply. This letter and the position of the City was before the Court on Summary Judgment. Not only had the City raised the issue on Summary Judgment but in ruling in the City's favor, the District Court had it correct in its original *Memorandum Decision* on Summary Judgment. (R. p. 821). In its decision the District Court correctly stated, "Pursuant to IFA ¶3, Coleman must provide one or more financial guarantees if it applies for building permits before completion of the equivalent service level of parks and streets." There the Court specifically identified "Coleman Homes" as the party responsible for providing the financial guarantee. The City agreed with that finding, and a Judgment was entered on November 7, 2016.

On February 21, 2017, Defendants filed a "Motion to Alter or Amend" that Judgment. (R. p. 972). That motion, untimely under IRCP 59(e), did not provide any argument that the party responsible for providing a financial guarantee was any entity other than Coleman Homes,

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1 "Coleman Homes, LLC" changed its name with the Idaho Secretary of State to "Kuhlman Homes, LLC" on the same day that the City filed its request for attorney's fees.

2 If a = b and b = c, then a = c.

LLC. The motion merely objected to paragraph four of the *First Amended* Judgment "on a number of grounds" without any specificity. (R. p. 974). Defendants concurrently filed a *Motion to Reconsider,* yet nothing within that asked the District Court to change paragraph 4 of the Judgment to apply only to "West Highland, LLC." Not only did the Defendants not specifically object to paragraph 4 of the Judgment, but Coleman Homes, LLC even acknowledged that that the obligation to provide a financial guarantee was the obligation of Coleman Homes, LLC itself. (R. p 837). For some unknown reason the District Court on its own accord and without legal basis removed the application of paragraph 4 to "Coleman Homes" in the Second Amended Judgment. (R. p. 999). Because the issue was raised at the trial court, that error is now properly before this Court on appeal.

As set forth above and in the City's opening brief, it is respectfully requested that this Court *remand* the case to the District Court with direction to amend paragraph 4 of the Impact Fee Agreement to designate Kuhlman Homes, LLC (FKA "Coleman Homes, LLC") as having the financial guarantee obligation.

B. The District Court's error in only awarding part, but not all, of the attorney's fees requested by the City was properly preserved for appeal.

On this point the Defendants now concede with minimal effort that on November 17, 2016 the City in fact asked[3] the court to recover *all* its attorney's fees pursuant to

[3] The Defendants reply brief notes that the City "mentioned" the contract as a basis for fees. It is unclear what distinction is being made, if any. A basis for relief is either raised, or it is not.

Idaho Code *and* the terms of paragraph 6 of the parties' Impact Fee Agreement[4]. The City even inserted the exact language from this contract into its *Memorandum of Fees*, including this specific "all costs and expenses, including attorney's fees incurred therein" language. (R. p. 893) That contract expressly stated the scope of attorney fees that could be recovered and was one basis upon which the City sought its recovery. The City asserted the contract as a basis for recovery and the District Court erred in not applying the terms of the parties' contract. *Zenner v. Holcomb*, 147 Idaho 444 (Idaho, 2009). (Finding that "I.C. §12-120 does not override a valid agreement".)

The "invited error" doctrine does not apply. As noted above, the City specifically cited the IFA as one basis for the recovery of its fees. As often occurs, the City sought a recovery of their incurred attorney fees pursuant to IRCP 54 and the parties' contract. Putting forth alternative basis for relief does not make an "invited error," nor is there any case law which supports rejecting the City's position on this point[5]. For the Defendants to now argue to this Court that the City did not ask for *all* its attorney fees (the City did ask) and that the City failed to assert this language of the IFA (the City did not fail), shows that the Defendants have simply

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[4] The Impact Fee Agreement which provided for the recovery of *all* attorney fees was initially drafted by the Defendants in September 2010. (R. p. 379, ¶4)

[5] *Buckhannon Board and Care Home v West Virginia Department of Health and Human Services*, 532 US 598, 121 S.Ct 1835 (2001) is clearly distinguishable and inapplicable to this case. In *Buckhannon* the Court was presented with the issue of federal litigation over the Fair Housing Act and the Americans with Disabilities Act. The facts are not relevant here, other than the fact that the trial court in *Buckhannon* dismissed the underlying case as moot, and therefore there was never a judicially sanctioned change of position by the parties. No judgment on the merits was entered. No consent decree was entered. The case was simply dismissed as moot.

refused to acknowledge the Record. The City requests that this Court remand the case with instructions to amend the Judgment awarding the City all of its incurred attorney's fees and costs, including those incurred on appeal.

ATTORNEY FEES ON APPEAL

The City respectfully requests the recovery of all of its attorney fees incurred on appeal pursuant to IAR 40 and 41, I.C. §12-120(3), IRCP 54, and the parties' written contract.

CONCLUSION

For the forgoing reasons, the City of Middleton respectfully requests that this Court affirm the Judgment of the District Court on those matters raised by Defendants' appeal, and to remand the case back to the District Court to alter the Judgment as follows: (1) correctly name Kulman Homes, LLC (FKA Coleman Homes, LLC) in paragraph four of the Judgment as having the obligation to provide a financial guarantee as set forth in the Impact Fee Agreement, and (2) award the City of Middleton all of its attorney's fees and costs incurred in this litigation and on appeal.

Respectfully Submitted this 3rd day of January 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2018, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

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