6-6-2017

Seward v. Musick Auction, LLC Appellant's Reply Brief Dckt. 44543

IN THE SUPREME COURT OF THE STATE OF IDAHO

KEVIN SEWARD, an individual

Plaintiff-Respondent,

v.

MUSICK AUCTION, LLC, an Idaho limited liability company,

Defendant-Appellant.

Supreme Court Docket No: 44543-2016
Canyon County No.: CV 15-4118

DEFENDANT/APPELLANT MUSICK AUCTION, LLC'S REPLY BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and For the County of Canyon

Honorable Davis F. VanderVelde Presiding

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I. INTRODUCTION

Plaintiff/Respondent Kevin Seward chose a summary judgment procedure for enforcement of an alleged oral settlement agreement. He is therefore required to prove there are no material disputed facts as to whether the parties each intended to be bound by the oral agreement prior to the execution of a written document. He failed to do so. Instead, the affidavits he submitted in support of his motion and of record before this Court show that the parties continued to negotiate a final agreement well after the mediation took place. The record before this Court also shows a clear issue of fact as to whether the parties agreed the settlement would be final prior to execution of written documents. Seward's counsel made herself the primary witness on his behalf, and her affidavits demonstrate the existence of many material facts precluding summary judgment. The district court's decision granting summary judgment in favor of Seward should therefore be reversed.

II. ARGUMENT

A. Seward Failed to Prove the Absence of a Genuine Issue of Material Fact.

Seward, as the moving party, bears the burden of proving the **absence** of a genuine issue of material fact. *Vanderford Co., Inc. v. Knudsen*, 150 Idaho 664, 670-671, 249 P.3d 857, 862-63 (2011). Only then does the burden shift to Musick Auction to show the existence of a genuine issue of material fact. *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass'n., Inc.*, 152 Idaho 338, 344, 271 P.3d 1194, 1200 (2012). Because this is essentially an appeal of a motion for summary judgment, this Court is bound to construe all facts and inferences in a light most favorable to Musick Auction as the non-moving party.

In attempting to enforce the alleged settlement agreement, Seward had two methods from which to choose: 1) amendment of the pleadings to add an alternative count for breach of the alleged agreement and a request for evidentiary hearing or 2) a motion to enforce settlement agreement. *Vanderford Co., Inc. v. Knudsen*, 150 Idaho 664, 249 P.3d 857 (2011). While Seward was not *required* to initiate a new lawsuit to enforce the alleged settlement agreement, it would have been, as the court stated in *Mihalka v. Shepard*, "better practice...to amend [his] pleadings to add a cause of action for breach of contract rather than, as here, filing a motion for summary judgment." *Id.*, 145 Idaho 547, 551, 181 P.3d 473, 477 (2008). The *Vanderford* opinion cautions against filing a motion for enforcement of settlement agreement and facing the summary judgment burden of proof required:

> Once again, we strongly urge practitioners who reach a settlement after a lawsuit has been initiated to amend their pleadings to add in the alternative a count for breach of the settlement agreement. The court can then hold an evidentiary hearing on the issues going to the formation of the new agreement and can decide credibility issues and disputed issues of fact.

Vanderford at 674, 249 P.3d at 867, Footnote 4 (citing *Mihalka* at 551, 181 P.3d at 477) (Internal citations omitted).

Given the fact that the recorded agreement was either not taken or not available, it would have been the best practice for Seward to amend his pleadings to add a claim for breach of the settlement agreement or at a minimum to request an evidentiary hearing. Had he chosen this route, both parties would have been afforded the opportunity to present testimony and cross-examine witnesses. The trier of fact would have been able to resolve all disputed issues of fact. Instead, Seward chose to bring a motion to enforce settlement agreement, and thus, is bound by the summary judgment standard of proof.

Despite Seward's failure to meet his burden, the strength of Worley's Affidavit, and the district court's legal obligation to view all facts and evidence in a light most favorable to Musick Auction, Seward succeeded in convincing the district court to grant summary judgment in his favor. This Court is now charged with holding Seward to the burden he chose. Therefore, the question on appeal is not whether there was substantial evidence to support the district court's finding that the parties entered into the alleged oral settlement agreement, but whether any genuine issues of material fact exist precluding its enforcement. *Vanderford* at 672, 249 P.3d at 865. Applying this standard to the evidence contained in the record, no conclusion can be drawn other than Seward failed to meet this burden and the district court's ruling must be reversed.

B. The Court Minutes Cannot Establish the Intent of the Parties or the Terms of the Settlement Agreement as a Matter of Law.

Seward continues to reply upon the Court Minutes – discretionary notes taken by a court clerk without any reference to the terms actually agreed upon by the parties. The clerk who took the minutes stated that the "parties and their counsel concurred with the settlement agreement as set forth on the record by the Court." R., p. 41. Seward argues that there is "no better, or more accurate, objective manifestation of the intent to be bound by the terms of the settlement agreement than the acknowledgment of such terms by the parties in open court before the district judge." Respondent's Brief, p. 9. While this could be true, the Court Minutes do not state the *terms of the agreement* the parties intended to be bound by – no doubt a key element to the enforceability. There must be no absence of material fact as to not just whether the parties intended to be bound, but also what terms they intended to be bound to. Without both, there cannot be an enforceable agreement. The Court Minutes do not contain any such terms.

Seward argues that the actual recording of the hearing before Judge Dunn at the conclusion of mediation is not required per Idaho Rule of Evidence 1004(1). Seward asserts that the Court Minutes presented to the District Court were sufficient to meet its burden of proof that no genuine issue of material fact exists regarding the terms of settlement. However, what Seward fails to acknowledge is that while I.R.E. 1004(1) states that the original recording is not required, and that other evidence of the contents of a recording is admissible, subsection (4) clarifies that is only the case if "the recording is not closely related to a controlling issue." Clearly, the missing recording in this case is not only closely related, but completely decisive of a controlling issue, i.e., what the exact terms and conditions of the alleged settlement agreement were.

Seward appears to also be arguing that the Court Minutes are a sufficient substitute for the missing tape recording of the verbal agreement made in open court, citing to I.R.E. 1004(1). Yet again, the Court Minutes do not provide the actual terms and conditions of the oral agreement placed on the record, and cannot be characterized as alternate evidence to establish the terms of the oral agreement. Whether the Court Minutes are admissible does not end the query. Musick Auction no doubt raised the issue to the district court that the tape recording was likely the necessary piece of evidence to establish mutual intent. Seward cites *U.S. v. Gerhart*, 538 F.2d 807 (8th Cir. 1976) for the proposition that the Court Minutes were correctly accepted by the district court as sufficient evidence under I.R.E. 1004(1) of the contents of the lost recording. However, *Gerhart* only supports the admissibility of the court minutes and Williams' Affidavit, two things which are not contested. The primary issue in *Gerhart* was whether a photocopy of a check was admissible to prove the contents of the original.

The *Gerhart* Court further stated "once an enumerated condition of Rule 1004 is met, the proponent may prove the contents of a writing by any secondary evidence, subject to an attack by the opposing party not as to admissibility but to the ***weight given the evidence, with final determination left to the trier of fact.***" *Id.* at 809 (citing 5 J. Weinstein, Evidence P 1004(01), at 1004-4, 1004-5 (1975)) (emphasis added). This comports with I.R.E. 104, which provides that while preliminary questions concerning the admissibility of evidence shall be determined by the court, a party has the right to "***introduce before the jury evidence relevant to weight or credibility.***" I.R.E. 104(e) (2017) (emphasis added). This is also borne out by I.R.E. 1008, which delineates between the functions of the court and the jury as trier of fact regarding the admissibility of other evidence of the contents of a recording as follows: "when an issue is raised...(c) ***whether other evidence*** of contents ***correctly reflects the contents***, the ***issue is for the trier of fact to determine as in the case of other issues of fact.***" I.R.E. 1008 (2017) (Emphasis added).

Thus, regardless of admissibility, the Court Minutes are not a substitute for the recording or the parties' testimony.

C. Seward's Attorney's Affidavit Does Not Establish a Settlement Agreement as a Matter of Law.

Given that the Court Minutes do not provide any terms of the agreement reached at the mediation, Seward must rely on Williams' Affidavit to prove the oral agreement reached was the final agreement between the parties. Seward acknowledges that, in order for an oral settlement agreement to be enforceable, there must be a manifestation of mutual intent to be bound and a meeting of the minds regarding the essential terms of the agreement. Respondent's Brief, p. 12. Seward argues that the emails between the parties' counsel attached to Williams' affidavit

demonstrate "Seward's counsel, at all times, insisted that a binding settlement had been reached and that the questionable terms included by Musick Auction's counsel were not part of the agreement placed before the court." Respondent's Brief, p. 15. Seward then quotes selected sections of emails sent by Kimberly Williams. *Id.*

Seward's argument in this regard is misplaced because Ms. Williams' emails cannot establish the intent on the part of Musick Auction to be bound to the settlement agreement prior to execution of a written document. Intent is typically a question of fact. Moreover, it is undisputed that a written agreement was to be prepared and signed prior to the time the agreement was finalized. This fact can be gleaned from several sections in the record.

For example, in an email sent December 15, 2015, by Ms. Williams to Mr. Webb, she requests several changes to the settlement agreement drafted by Mr. Webb and states: "with those changes Mr. Seward will sign the settlement agreement." R., p. 34. Again, on November 30, 2015, Ms. Williams states: "Mr. Seward is prepared to sign the settlement agreement with the revisions sent to you previously. Please have the revised agreement to me by Wednesday, December 2nd, at 12:00 p.m. Otherwise we will have to move forward with litigation of this matter." R., p. 25.

Moreover, in her Reply Affidavit filed with the district court, Ms. Williams testified: "The first time any indication was made regarding settlement documents was after the conclusion of mediation and after the terms had been read into the records at the hearing held the same day as the mediation, wherein Judge Dunn asked Defendant to prepare the associated documents." R., p. 78. It should first be noted that the Court Minutes directly contradict Ms. Williams' testimony. The Court Minutes clearly state: "the Court directed Mr. Webb to submit

necessary documents to dismiss the case, including a release."[1] R., p. 41. Thus, Ms. Williams' testimony that there was no mention of documents to be drafted until after the hearing is not accurate. Second, Ms. Williams' acknowledgment in her Reply Affidavit that "associated documents" were to be prepared and signed (regardless of when this was first agreed upon), *create* an issue of fact as to whether or not the parties intended to be bound by the oral agreement prior to execution of written documents.

The submission of Williams' Reply Affidavit merely illustrates that the opposing party's fact is disputed, i.e., that the parties agreed there would be a ***written*** settlement agreement. *Charles O. Bradley Trust v. Zenith Capital LLC,* No. C 04-02239 JSW, 2008 WL 3400340, at *6 n.2 (N.D. Cal. Aug. 11, 2008) (Defendant's introduction of new evidence "creates a dispute of fact" precluding summary judgment); *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F.Supp.2d 970, 984 n.13 (C.D. Cal. 2000) (Defendants' reply evidence "merely creates a genuine issue for trial."); *Johnson v. Freeburn*, 29 F.Supp.2d 764, 768 (E.D. Mich. 1998) (Defendant's affidavits created dispute of material fact which precluded summary judgment); *Fasules v. D.D.B. Needham Worldwide, Inc.*, No. 89 C 1078, 1989 WL 105264, at *4 (N.D. Ill. Sept. 7, 1989) (Contrary evidence in defendants' reply brief undermined summary judgment); *Ry. Labor Executives Ass'n v. Long Island R.R. Co.*, 651 F. Supp. 1284, 1285 (E.D.N.Y. 1987) (Movant's reply affidavits raised more factual issues than they resolved).

Finally, in her email to counsel Brian Webb of November 18, 2015, Williams states "you were tasked with drafting the agreement pursuant to the terms discussed at mediation and on the

[1] The presiding judge, or court, was not present at the time the minutes were taken. The clerk incorrectly refers to Judge Dunn as the Court. Judge Dunn served as an agreed upon mediator for the case, and not a Judge.

record at hearing." R. p. 23. This indicates that Williams was well aware there was to be a written agreement and further contradicts the Reply Affidavit she later filed. Thus, the Affidavits of Seward's counsel cannot establish an oral settlement agreement as a matter of law, and instead create genuine issues of fact.

D. The Record is Clear the Parties Contemplated the Execution of a Written Agreement and Release Prior to Payment of Funds and Dismissal of the Case.

It is well settled that "[w]hether the parties to an oral agreement or stipulation become bound prior to the drafting and execution of a contemplated formal writing is largely question of intent." *Vanderford* at 772, 249 P.3d at 865 (citing *Kohring v. Robertson*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002)). The formation of a contract requires mutual assent, or "[a] distinct understanding common to both parties...in order for a contract to exist." *Thompson v. Pike*, 122 Idaho 690, 696, 838 P.2d 293, 299 (1992). Furthermore, formation of a valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to contract. *Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (Ct.App. 2009) (citations omitted). When there is a dispute over contract formation it is incumbent upon the plaintiff to prove a distinct and common understanding between the parties. *Id.* Whether there is a sufficient meeting of the minds to form a contract is a question of fact to be determined by the trier of fact. *Vanderford* at 772, 249 P.3d at 865 (citing *Shields & Co. v. Green*, 100 Idaho 879, 882, 606 P.2d 983, 986 (1980)).

In its Opening Brief, Musick Auction discusses the applicability of *Vanderford*, *Lawrence*, and *Thompson*, *supra* in determining whether there was a meeting of the minds in this case sufficient for the district court to have held that an enforceable oral contract was made

during mediation. Seward attempts to distinguish this case from all three opinions by arguing that in all those cases, unlike here, there was no reading of the terms of the alleged settlement on the record in open court, with acknowledgment of the terms by the parties. Respondent's Brief, pp. 14-17. What Seward fails to acknowledge is that no recording exists containing the actual terms and conditions allegedly read into the record that day. That leaves the Affidavits of Williams and Worley, along with the Court Minutes and emails to determine whether an enforceable oral agreement to settle was made as a matter of law. The law and analysis utilized in all three cases is sound and applicable to the case at hand. When applied to the evidence in this case, the only conclusion to be had is that there was no meeting of the minds sufficient to form an enforceable oral settlement agreement.

Seward alleges Musick Auction has offered no evidence to dispute the accuracy of the Court Minutes or Williams'' characterization thereof. However, Worley's Affidavit directly contradicts Williams' characterization of the alleged settlement agreement. In his Affidavit, Worley clearly states that "[d]uring mediation, I agreed to some terms of a settlement agreement, such as the amount to be paid to the Plaintiff." R. p. 73; Worley's Affidavit, ¶ 3. He goes on to state that, "During the mediation, I agreed, that the settlement would be final **when a written agreement** containing all terms **was signed**." *Id.*, ¶ 5 (Emphasis added).

Worley's Affidavit likewise further contradicts Williams', as his testimony clearly states that "[o]ne of the main terms was a confidentiality agreement." R. p. 73, Worley's Affidavit, ¶ 7. Worley's Affidavit clearly raises issues of fact with regard to whether the parties intended the settlement would be complete upon the signing of a final written agreement. However, despite Worley's Affidavit containing facts that clearly contradict the characterization of events

contained within Williams' Affidavits, the district court summarily dismissed it as failing to contain "any admissible factual information" to dispute the evidence.[2] R. pp. 92-93. The district court further stated that Williams' Affidavit, in combination with the Court Minutes constituted "uncontroverted evidence...that the parties established a binding settlement agreement" at mediation. R. pp. 92-93. This adoption of Williams' Affidavit as more persuasive than Worley's contradicts the district court's role on a motion for summary judgment, since "judging credibility is not appropriate during summary judgment proceedings where no evidentiary hearing has been held." *Vanderford* at 674, 249 P.3d 857, 867 (citing *Baxter v. Craney*, 135 Idaho 166, 172, 16 P.3d 263, 269 (2000)) ("It is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact.")).

The district court should not favor Williams' affidavit over Worley's conflicting Affidavit, and in fact, was bound to favor the evidence submitted by Musick Auction as the non-moving party. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (Refusing to credit movant's version of the facts); *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980) (Court's obligation to credit factual assertions in favor of the party opposing summary judgment); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 464 n.3 (E.D. Pa. 2008) (Court "must credit the non-moving party's evidence over that presented by the moving party."); *Owsiak v. Kimco Corp.*, No. 95 C 4116, 1997 WL 722990, at *11 (N.D. Ill. Nov. 13, 1997) (Reply evidence did "not extinguish any genuine dispute" because court could not "ignore [contrary] testimony").

[2] The district court did not provide any explanation as to what parts of Worley's affidavit may not be admissible.

Williams' Affidavits, in addition to being contradicted by Worley, an actual party to this proceeding, are poor substitutes for the affidavit of Seward himself to attempt to prove that there was a meeting of the minds sufficient to have formed a binding oral settlement agreement. While Williams' Affidavits may technically be admissible, it is inappropriate for Williams to testify in place of her client regarding whether there was a meeting of the minds of the parties, and in support of what is essentially a motion for summary judgment, when Seward is clearly able to do so, and it would have constituted best practice. The correct inquiry is whether there is a meeting of the minds of the *parties, not* their *attorney's interpretation* thereof. Accordingly, the district court should have given much less weight to Williams' Affidavit (and Williams' Reply Affidavit had it considered it) than Worley's.

Seward chose to bring this action as a motion to enforce settlement agreement rather than requesting an evidentiary hearing where he could testify as to the terms and conditions of the alleged settlement agreement. Seward's testimony as a party should have been critical to the district court's analysis of the facts which support a finding on summary judgment that an oral settlement agreement existed as a matter of law. Williams' testimony was unnecessary when Seward was available.

Consistent with Worley's Affidavit, the emails further indicate the parties intended the written agreement to be the final expression of their oral agreement to agree, since the parties continued to negotiate the terms of settlement throughout. When Worley refused to sign the proposed settlement agreement without a confidentiality provision, Seward initially refused, then agreed. In a December 3, 2015 email to Webb, Williams stated: "I have spoken with Mr. Seward, he will include a confidentiality agreement upon the following conditions." She then

outlined additional terms that Seward wanted included, in addition to an extra $10,000.00. R. p. 29.

On December 7, 2015, Webb responded on behalf of Worley, declining the payment of an additional $10,000.00. R. p. 30. On December 15, 2015, Williams conveyed Seward's offer to settle without Worley's payment of an additional $10,000.00, but with the inclusion of the previously proposed terms. R. pp. 31, 34. After bantering back and forth through their attorneys for another week, the parties could not ultimately agree on the terms to include in the written agreement. These emails demonstrate that, contrary to Seward's assertion that all terms and conditions were agreed to orally on the day of mediation, the parties 1) intended for the written agreement to be a final expression of the settlement; and 2) did not and could not agree on the written terms and conditions of agreement.

Throughout her emails with Webb, Williams never once asserted that there were only two terms of settlement, namely the dismissal of the case by Seward in exchange for the payment of $15,000.00 as she asserts in her Affidavit of May 19, 2016, a full five months after negotiations broke down. R. pp. 19-38; R. pp. 13-16. This inconsistency in the evidence also constitutes a genuine issue of material fact.

E. Seward is not entitled to attorney's fees on the basis of frivolity

Seward alleges that Musick Auction has brought this appeal frivolously, unreasonably or without foundation, and that he is therefore entitled to attorney's fees pursuant to Idaho Code § 12-121. In any civil action, the judge may award reasonable attorney's fees to the prevailing party. *Phillips v. Blazier-Henry*, 154 Idaho 724, 730, 302 P.3d 349, 355 (2013). An award of attorney fees under [I.C.] § 12–121 is not a matter of right to the prevailing party. *Id.* (quoting

Michalk v. Michalk, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009)) (internal quotations omitted). In deciding whether to award attorney fees per I.C. § 12–121, the "entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Id.*

Arguing that Musick Auction failed to place any evidence in the record to refute a valid oral agreement to settle, Seward declares himself the prevailing party herein. As argued above, the district court failed to consider all the evidence submitted in the case and it failed to apply the appropriate summary judgment standard when presented with evidence that created a genuine issue of material fact. Musick Auction was within reason to file an appeal rather than be forced into a settlement agreement on terms it did not agree to. It should be noted that the district court denied Seward's request for attorney's fees in the action below. Seward was not held to be the prevailing party, and so his fees were denied on this basis. Based upon the foregoing, Seward's request for attorney's fees should be denied.

III. CONCLUSION

The record before this Court shows the parties did not intend for this case to be over until the final written agreement was signed. Musick Auction definitely did not intend to pay any money to Seward without a sufficient written agreement that protected all of its interests. Musick Auction respectfully requests this Court review all the facts and evidence in a light most favorable to Musick Auction, and reverse the grant of summary judgment to Seward.

DATED: June 6, 2017.

PICKENS COZAKOS, P.A.

By _____
Shelly H. Cozakos, Of the Firm
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I, the undersigned, certify that on June 6, 2017, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Procedure, to the following person(s):

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