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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

Supreme Court Case Numbers : 45391, 45645
Madison County District Court Number: CV-2009-288

CREDIT BUREAU OF EASTERN IDAHO, INC.

PLAINTIFF-APPELLANT

vs.

**CHARLENE A. HERMISOLLO AND JESSE HERMOSILLO, wife and
husband,**

DEFENDANTS-RESPONDENTS

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,

in and for Madison County

Hon. Gregory W. Moeller, District Judge

RESPONDENT- JESSE ACEDO'S BRIEF

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STATEMENT OF THE CASE

This matter involves a long standing collection effort by Credit Bureau of Eastern Idaho, INC (“CBEI”). The litigation and issues have been fueled by the consistent unlawful efforts of CBEI to collect against Jesse Acedo and the patently false statements and claims by CBEI to the Courts. The unlawful efforts and false statements continue on with CBEI’s appeal to this Court. Careful examination of each and every statement made by CBEI must be made, as the false statements are commonly made under the guise of well-established facts.

Initially, the false statements contained in the “Statement of the Case” section of CBEI’s brief must be addressed. It is true that this matter arises from unpaid medical bills. It is not established anywhere that Jesse Acedo (“Jesse”) lived with Charleane Hermosillo (“Charleane”). CBEI does not point to any established fact in the record to support this. The *Affidavit of Jesse Acedo in Support of Motion to Set Aside Default Judgment and for Sanctions* states that Charleane did not live at his residence. R. p. 185.

CBEI says that “Through the normal course of its regular operation of business, CBEI demanded payments from Charleane and Jesse for the unpaid debt.” *Appellant’s Brief on Appeal* p. 5. However, CBEI then states two sentences later, “At the time of filing the complaint, CBEI had no information as to who was the father of the child that received medical services from Madison Memorial Hospital.” *Appellant’s Brief on Appeal* p. 5. This should greatly call into question how CBEI “demanded payments from ... Jesse.” The fact is that the initial statement of the demands against Jesse is completely false.

CBEI filed a Complaint against Charleane and “John Doe wife and husband.” R. pp. 12-14. CBEI claims that Jesse should have been able to discern that the Complaint was against him, as “part of the debts listed in the complaint were incurred for the care of his own daughter.”

Appellant's Brief on Appeal p. 24. This claim by CBEI is misleading to the point of being absolutely false. The Complaint in this matter stated that the "John Doe" was the "spouse of the defendant, Charleane" and the debts (medical bills) were incurred "for the benefit of the community." R. p. 12. At no point in the Complaint does it mention a minor child, provide the name of the minor child or initials or otherwise designate for whom the medical bills were incurred. The Complaint did not even state when the medical bills were incurred. The claim that this total and complete lack of identification of the bills was sufficient to put Jesse on notice that the Complaint was against him is completely false and defies all logic.

CBEI then states that it attempted to serve Charleane and any John Doe at the residence of Charleane. This is also false. The process server went to the residence of Jesse only. The *Affidavit of Jesse Acedo in Support of Motion to Set Aside Default Judgment and for Sanctions* states that it was his residence, Charleane did not reside there and Jesse did not inform the process server that Charleane lived there nor that he was the husband of Charleane. *Id.* p. 185. Again, the process server for CBEI's statements are false.

On May 26, 2009, CBEI filed several documents, Motion for Name Change, Application for Entry of Default and Default Judgment, and proposed orders for each. None of these documents were served on Jesse. R. p. 185. On June 2, 2009, the Magistrate entered a Default and Order for Default and Entry of Default Judgment. These documents listed as Defendants, Charleane A. Hermosillo and Jesse Hermosillo, wife and husband, R. p. 30.

After obtaining the default judgment, CBEI then attempted to collect funds from any source it could determine. CBEI eventually had served on Jesse an Order of Examination. R. pp.41-42. Jesse then contacted CBEI to inform it that he was not "Jesse Hermosillo" and the judgement was not against him. R. p. 185. It was only once Jesse contacted CBEI that he found

out that some of the medical bills were for his daughter. *Id.* He had not received prior notice of the bills, what they were for or that they were being collected on. After discovering that his daughter had unpaid medical bills, Jesse began making payments on those medical bills, not the judgment as alleged by CBEI. R. p. 185.

After discovery that “Jesse Hermosillo” did not exist, CBEI did not seek to properly amend its pleadings, serve Jesse or alter the Default Judgment in any way. Rather, CBEI simply inserted “a.k.a. Jesse Acedo” into its documents initially (R. p. 74), then only Jesse Acedo (R. p. 94) and later inserted the social security number of Jesse into the documents. (R. p. 96) The result is a completely false document as there was not a judgment issued against Jesse Acedo and his social security number was never used in any proceeding in this matter. CBEI falsified documents to make it appear that it had obtained a judgment against Jesse and to take his money.

On March 13, 2012, Jesse filed a Verified Third Party Claim of Exemption. R. pp. 87-105. This claim indicated that Jesse was not the judgment debtor, he was not provided proper service, and that all funds were improperly taken. R. p. 87-88. CBEI responded to the claim and the Magistrate Court held a hearing on the claim.

At the hearing, the Magistrate Court discontinued all garnishments, the garnished funds were to be held in trust and ordered that Jesse file a motion to set aside the judgment. The Order on the hearing was to be prepared by CBEI. CBEI did not prepare a proper order and attempted to insert language not ordered by the judge. Counsel for Jesse attempted to have this language corrected, but counsel for CBEI would not correct the order.

Counsel for CBEI then submitted a false order to the Magistrate Judge for his signature. This false order included a time limitation for Jesse to file any motions, which time limit had already passed at the time of filing the order. Counsel for CBEI knew and had acknowledged that

the Court had not given a time limitation for Jesse to file any motions, but included the language anyway. In this way, counsel for CBEI knowingly submitted a false order to the Magistrate Court. To compound the issue of the false order, counsel for CBEI submitted the documents to the Magistrate Court without providing a copy or notice to counsel for Jesse. R. pp. 164-169. Counsel for CBEI had the order signed, and then filed a satisfaction of the judgment, thus attempting to take the funds it had wrongly obtained from Jesse.

After learning of the wrongfully obtained false order by CBEI, counsel for Jesse prepared a stipulation to correct the entry of the order. Counsel for CBEI, without any legal or factual basis, and knowing that the order was false, refused to correct the issue by signing the stipulation. Counsel for Jesse was required to file a motion and hold a hearing to have the wrongly obtained, false order set aside. Inexplicably, counsel for CBEI argued against setting aside the Order and attempted to justify his actions.

The Magistrate Court set aside the order and stated that the actions of CBEI's attorney were an ethical violation (T. pp. 11-12), violated the Rule of Civil Procedure (T. p. 14) and a dirty trick (T. p. 14). Counsel for CBEI had been directly caught in its falsehoods, ripe in this matter.

The Magistrate Court later determined that the Default Judgment against Jesse should be set aside. R. p. 248-250. CBEI appealed this Order to the District Court.

On May 9, 2013, the District Court entered its Decision on Appeal. R. pp. 325-341. In this decision, the District Court made the following factual and legal findings:

1. Jesse Acedo is neither Jesse Hermosillo nor the spouse of Hermosillo. R. p. 334.
2. The judgment (June 2, 2009) was issued against a person that does not exist. R. p. 333.

3. The judgment Plaintiff seeks to enforce is invalid. R. p. 333.

4. Jesse Acedo did not receive proper notice through service of the summons and complaint served on him in this case. R. p. 334.

5. The content of the judgment the Plaintiff seeks to enforce renders it invalid even if the method of service was correct. R. p. 333.

6. The judgment (June 2, 2009) is void as to Jesse Acedo. R. p. 333.

7. The Court does not have personal jurisdiction over Jesse Acedo in this matter. R. p. 333.

The Decision concluded by vacating the orders of the Magistrate Court and remanding the case “to the Magistrate Court for further proceedings consistent with this opinion.” R. p. 340. The District Court did not specify what those proceedings should be, as is claimed by CBEI. CBEI never appealed this decision by the District Court and it has, therefore, become the law of the case.

After remand, Jesse sought to have the Magistrate Court rule on his Third Party Claim of Exemption and for sanctions and attorney fees for the false order provided by CBEI. The Magistrate Court heard these motions on November 19, 2013. The Magistrate Court issued an Order on the motions on January 28, 2014. R. p. 388 – 392. The Magistrate Court held, based on the appeal decision from the District Court that Jesse was not a party to the action, the court did not have jurisdiction over Jesse, Jesse is a third-party, and no judgments could be issued against Jesse as a non-party. R. p. 389. The Magistrate Court also again awarded attorney fees against CBEI for its actions in providing a false order to the Court.

CBEI filed an appeal of this order and the following order granting attorney fees to Jesse. On appeal, the District Court initially entered an order dismissing appeal, as the Order from the

Magistrate Court was not a final order. This dismissal was on initially on November 24, 2014 at the hearing for oral argument on appeal. The written order was not entered until March 23, 2015, four (4) months later. A final judgment would not be entered until July 26, 2016, 15 months after the order dismissing appeal.

CBEI again appealed after the entry of the final judgment. After briefing and oral argument, the District Court entered its Decision on Second Appeal. R. P. 565-576. This Decision upheld the Magistrate Court's determinations on the issue of the Third Party Claim of Exemption based on the determinations of the previous appeal decision. The District Court, however, reversed the determination of Rule 11 sanctions against CBEI based on interpretations by the Idaho Supreme Court of Rule 11.

CBEI has now appealed this decision by the District Court. It is this decision only that is on appeal in this matter and not the previous determinations entered in this matter.

ISSUES PRESENTED ON APPEAL

- I. Did the District Court commit reversible error when it affirmed the Magistrate Court's order granting Jesse's Third-Party Claim of Exemption?
- II. Did the District Court commit reversible error when it awarded Jesse costs and attorney's fees on appeal?
- III. Is Credit Bureau of astern Idaho, Inc., entitled to an award of attorney's fees under I.C.12-120(1), (3) and (5) and I.A.R. 41.

ADDITIONAL ISSUES ON APPEAL

- I. Jesse's attorney fees and costs on appeal.

ATTORNEY FEES ON APPEAL

The Jesse hereby request attorney fees on appeal pursuant to Idaho Code §§ 12-120 and 12-121; Idaho Rules of Civil Procedure 54; Appellate Rules 40 and 41; and, all other applicable rules and statutes. On appeal, Idaho Code § 12-120(1) compels an award attorney fees to the prevailing party in any civil action where the amount plead is under \$35,000.00. In this case, the alleged amount was under the threshold. On appeal, I.C. § 12-121 authorizes the award of attorney fees and costs when the Court finds that the case was brought, defended or pursued frivolously, unreasonably or without foundation. In this matter, CBEI has continued a frivolous pursuit of collecting money from Jesse. This appeal is without foundation as CBEI has ignored the previous findings of the District Court. CBEI only continues to pursue this matter in the hopes that the ever increasing cost of defense will eventually prohibit Jesse from continuing.

ARGUMENT

Standard of Review

When reviewing the decision of a district court sitting in its capacity as an appellate court, the standard of review is as follows:

The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. Thus, this appellate court does not review the decision of the magistrate court. "Rather, we are 'procedurally bound to affirm or reverse the decisions of the district court.'" *Smith v. Smith*, No. 44970, 2018 WL 3097050, at *2 (Idaho June 12, 2018)

Several Idaho Code sections are applicable to the Claim of Exemption. I.C. §8-507 states that a writ of attachment, execution or garnishment shall be served ONLY on those individuals holding or having in their possession "personal property belonging to the defendant." I.C. § 8-507C states that the garnishment, if made on a third party, must again be for money or property held for a judgment debtor. I.C. §11-201 states that property liable to seizure is only that property "of the judgment debtor."

I. **The District Court did not error in affirming the Magistrate Court's order granting Jesse's Third-Party Claim of Exemption.**

In CBEI's initial argument, further false statements are put forward in an attempt to justify its position. CBEI states that in March of 2012 the Magistrate Court correctly denied Jesse's third party claim of exemption. This is a false statement, as the Magistrate Court never

denied the third party claim of Jesse. It was only on the false order presented to the Magistrate Judge that attempted to deny Jesse's third party claim. Also, CBEI claims that after the first appeal to the District Court the only possible action on remand was to have another hearing on a Rule 60(b) motion. This is also false. The decision from the District Court only stated that further proceedings consistent with the decision were to take place. Finally, CBEI states that Jesse improperly filed two additional motions following remand. This is also false on two levels. There were not two motions filed but a motion for a hearing on the Rule 11 sanctions and a request for hearing on the previously filed third party claim of exemption. It is clear that, even on this appeal, CBEI cannot help but submit false and misleading documents to the Court.

1. CBEI'S ARGUMENTS IN ITS BRIEF ONLY CONTAIN ISSUES NOT ON APPEAL

CBEI's arguments allegedly against the District Court's affirmation of the third party claim of exemption completely fail to address this issue and attempt to raise issues for the first time on appeal that were not addressed by the District Court on the second appeal. CBEI argues, 1. A judgment that is void for lack of personal jurisdiction must still have a motion to set aside the judgment; 2. 33 months is not a reasonable time for addressing a void judgment; and 3. The judgment was not void for improper service. Each of these arguments are **not** properly before this Court on appeal.

In the decision on second appeal, the District Court did not address the issue of any requirement for a Rule 60(b) motion. The District Court simply affirmed its previous, non-appealed, decision that Jesse was not a party to this action. The District Court then, correctly, stated that a non-party to a case does not have standing, or the ability, to seek to have a judgment set aside. R. p. 569. The District Court had previously determined that Jesse was not a party to this matter and that there was no judgment against Jesse. Therefore, it was unnecessary for Jesse

to seek to have the judgment set aside, as there was no judgment against him in the first place. *Id.*

The District Court also did not address the time frame to set aside a judgment pursuant to I.R.C.P. 60(b) in its decision on the second appeal. This was completely unnecessary for the District Court to do, as it had already determined that Jesse was not a party to the case and there was no judgment against him. As this matter was not addressed by the District Court on appeal, the issue is not properly before this Court on appeal now.

Finally, CBEI argues that this Court should reverse the District Court's decision that the judgment was void for improper service. This issue is not before the Court on appeal as this was a decision by the District Court on the first appeal, not on the second appeal. The time for CBEI to seek review of the first appeal has long since expired. If CBEI wished to have any determination by the District Court in the first appeal decision addressed by this Court, it only had 42 days from that appeal decision to do so. Having completely failed to appeal any part of the first appeal decision, CBEI cannot now seek review of those issues.

The issue of the third party claim of exemption is very simple. The first appeal decision by the district court made it perfectly clear that Jesse was not a party to this matter, the judgment in this matter was not against him, and the court had no jurisdiction over Jesse. These findings made it clear that Jesse was not a defendant and the judgment was not enforceable against him. After this decision by the District Court on the first appeal, the Magistrate Court was completely correct in granting the third party claim of exemption. Jesse was a third party to this matter, and there was nothing to show that he had any property of a defendant. The Magistrate Court correctly identified this status, the District Court affirmed the status and this Court should also provide a clear and definitive statement to CBEI that Jesse is not a part of this matter. CBEI has failed to support the argument in this appeal that the District Court was incorrect in affirming the

Magistrate Court. Having failed to support its argument with relevant argument, case law or statutes, this Court is left without any choice but to deny the appeal.

II. **The District Court correctly awarded Jesse costs and attorney fees on appeal.**

The District Court properly awarded Jesse attorney fees and costs on appeal. It is without a question that this matter is a collection case that involved less than \$35,000.00. Therefore, this matter falls into I.C. §12-120(1). Pursuant to this section and I.C. §12-120(2), the prevailing party is entitled to an award of attorney fees, in addition to costs. Additionally, CBEI has claimed that this is an action to recover on an open account. Therefore attorney fees as well as costs are available to the prevailing party.

It is also without question that Jesse was the prevailing party on his third party claim of exemption and the resulting appeal. Therefore the district Court was correct in awarding attorney fees and costs to Jesse pursuant to I.C. §12-120.

CBEI argues that I.C. §11-203 is the more specific statute and therefore there should not be an award of attorney fees possible. This is incorrect. The Idaho Court of Appeal has held, “Section 11–203(b) provides that the prevailing party in a hearing on a claim of exemption “may be awarded costs pursuant to the Idaho rules of civil procedure.” This section provides a basis for awarding costs, but not attorney fees, to the prevailing party in the hearing on a claim of exemption. It therefore does not provide the exclusive basis for any award of post-judgment attorney fees as the district court believed.” *Action Collection Servs., Inc., v. Bigham*, 146 Idaho 286, 289, 192 P.3d 1110, 1113 (Ct. App. 2008). As CBEI cited to this case in its own brief, it is well aware of this case law, but still, inexplicably, argues to the contrary. This is a clear example of CBEI’s willingness to attempt to deceive the Court on appeal.

Jesse, as a prevailing party in a case governed by I.C. §12-120 (1), (2), and/or (3) was

entitled to an award of attorney fees and costs. The District Court was correct in making this award.

III. **Jesse is entitled to an award of attorney fees and costs on appeal.**

As discussed above, this matter was brought by CBEI as a complaint seeking less than \$35,000.00 and/or on collection of an open account. This allows an award of attorney fees and costs to the prevailing party. I.A.R. 41 states that a party on appeal will be entitled to attorney fees if so entitled in the matter below. Jesse seeks an award of attorney fees pursuant to I.C. §12-120 (1), (2), and or (3) as supported by I.R.C.P. 54 and I.A.R. 41.

Additionally, Jesse seeks an award of attorney fees on appeal pursuant to I.C. § 12-121. On appeal, I.C. § 12-121 authorizes the award of attorney fees and costs when the Court finds that the case was brought, defended or pursued frivolously, unreasonably or without foundation. In this matter, CBEI has continued a frivolous pursuit of collecting money from Jesse. This appeal is without foundation as CBEI has ignored the previous findings of the District Court, presented arguments not timely appealed, and has attempted to provide false and misleading statements to the Court. This Court has previously held a very strict reading of I.C. §12-121, as noted by the District Court in its second appeal decision. These rulings have largely resulted in stripping the ability of the Court to find that “litigative misconduct” is a sufficient basis for an award. This Court should again review this line of authority to allow for findings of litigative misconduct as allowed for in the plain meaning of I.C. §12-121. There are numerous actions, events and procedures that can take place that result in an enormous amount of expenses that are not in the form of signed, written documents. This matter is a clear example of what can happen.

It should be found that CBEI only continues to pursue this matter in the hopes that the ever increasing cost of defense will eventually prohibit Jesse from continuing and that this appeal is completely frivolous and without foundation, resulting in litigative misconduct.

CONCLUSION

The decisions for the District Court should be affirmed and attorney fees and cost awarded to Jesse as noted above. Any further actions this Court deems proper should also be taken against CBEI and its counsel.

DATED this 2nd day of July, 2018.



LARREN K. COVERT, ESQ.
Attorney for Jesse Acedo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2018, I served a true and correct copy of the foregoing document on the following by the method of delivery indicated:

Bryan Zollinger
414 Shoup Ave, PO Box 50731
Idaho Falls, ID 83495

- U.S. Mail, postage prepaid
- Designated courthouse box
- Hand-delivered
- email:bnz@idaholaw.com



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