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

SECURITY INVESTOR FUND LLC, SECURITY FINANCIAL FUND LLC,

Plaintiffs/Appellants,

vs.

BRIAN CRUMB, JENNIFER O'CALLAGHAN and BRIAN O'CALLAGHAN, JITINVEST LLC, SPIRIT ELEMENTS, LLC, and TODD A. REEVE,

Defendants/Respondents.

Supreme Court No: 45969

Kootenai County No. CV-17-5541

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

Honorable Richard Christensen, Presiding

APPELLANTS' BRIEF ON APPEAL

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Defendant/Respondent, Brian Crumb (hereinafter referred to as "Crumb"), and his wife and mother, were majority owners of Abbey & Crumb LLC ("LLC") which was formed to develop a subdivision ("Subdivision"). In 2006, Crumb agreed that the LLC would use a small portion of his adjacent property to construct an entrance to the subdivision. Based on this agreement, the LLC expended $45,000.00 to construct the subdivision entrance on Crumbs' land which destroyed the previous access road into the subdivision.

Crumb and his family members voluntarily exchanged their interest in the LLC for four (4) Subdivision lots. On May 29, 2014, Brian Crumb testified in a lawsuit brought against a title company concerning the Subdivision's access that "everybody has access and nobody will be denied" and that he would give an easement to "anyone that wants it." Notwithstanding his prior testimony, in 2017 Crumb began taking the position that he had not signed a written easement over the Subdivision Entrance, and that he could exclude other subdivision owners from using the Subdivision Entrance.

This suit was commenced to establish a right of access over Crumb's property by Security Investor Fund LLC and Security Financial Fund LLC (hereinafter referred to as "Security") which owned lots within the subdivision.

B. Proceedings.

The parties filed Cross-Motions for Summary Judgment. The District Court ruled that Security had not proven all the material terms of the oral agreement between Crumb and the LLC for the use of Crumbs' property because no evidence was in the record to show the price or consideration Crumb was to receive.

C. Facts.

In 2005, Crumb, his wife, mother, and other individuals formed the LLC to develop the Subdivision. (R p. 229, L. 3-6). Crumb and his wife owned a parcel of property adjacent to the subdivision. (R p. 99, L.7-11). The existing roads within the subdivision were logging roads that were too steep for residential traffic. (R p.201, L.7-8). In 2006, an engineering firm that was retained to design a road suitable for residential access informed the LLC that it would be much cheaper to construct the new access road through Crumb's adjoining property. (R p.229, L.10-13). Based on the engineer's recommendation, Crumb agreed to allow the LLC to construct the access road on a small corner of his adjoining property. (R p.230, L.3-8). The Crumbs were fully aware that the LLC obtained a Site Disturbance Permit from Kootenai County to build the Subdivision entrance over Crumb's property. (Aug. p.5, L. 1-6).

In early January 2006 Crumb, and all other members of the LLC, signed Covenants, Conditions and Restrictions (CC&R's) that mention an easement shown on an exhibit to the CC&R's. (R p. 229, L.14-17). The exhibit was never recorded. Id. On Summary Judgment, there was conflicting evidence concerning the exhibit that should have been attached to the CC&R's. Security put in evidence that the exhibit that should have been attached showed Crumb's adjoining parcel being utilized for access. (Id). Crumb, on the other hand, claimed the exhibit showed old logging roads. (R p.229, L.23 – p. 230, L.1-2).

In 2006, Crumb and his family withdrew from the LLC and entered into a Buy-Out Agreement with the other LLC members. (R p.230, L.9-10). As part of the agreement, Crumb and his family received four (4) Subdivision lots. (Id. L.11-12). The Buy-Out Agreement required, amongst other things, that the LLC was to "complete the road building work and to provide ingress and egress access to each lot." (Id, L.12-14). There is no evidence in the record

of any other way for the LLC to accomplish this contractual requirement except to utilize access built over Crumb's land.

Crumb claimed for the first time in his discovery responses that a term of his agreement with the LLC was that the LLC would pay him $200,000.00 to grant an easement. (R p.230, L.18-20). However, in 2014, Crumb testified at deposition that he had voluntarily relinquished any claim he had to compensation because he would "rather have [the LLC] spend money on the road then to pay me."

Q. And did you ever have any discussions with your other partners, and in particular Richard Abbey, about why that never came to fruition?

A. It was obvious the economy went in the toilet, and we -- they weren't selling any more lots. So I felt that I'd rather have them spend the money on the road to that than pay me.

Q. So you voluntarily gave up the agreement to receive compensation for ...

A. Yeah, if that's the way you want to put it.

Q. And is it still possible that you could receive compensation from Abbey & Crumb Developments for use of that portion of the 11.72 acres?

A. I guess. (R p. 35, L.4-17).

In a 2016 e-mail, Crumb expressed his dissatisfaction with not being compensated for the use of his land, but made no mention of the fact that he was owed $200,000.00. (Aug. p. 7). The Buy-Out Agreement which contained a merger clause did not mention Crumb being owed $200,000. Crumb has never filed a claim seeking payment of the $200,000.00. Also in the 2016 e-mail, Crumb admitted that the LLC's use of his land benefitted him and his family by providing better access to their Subdivision properties. In Crumb's own words, "Yes, it did benefit us as well, now it is easier to get up to our property on the 200,..." (Aug. p. 8, L.5-8).

Further, Crumb succinctly described the additional benefit he anticipated from allowing the road to be built on his adjoining property; namely, that "**we could make some money selling the lots"** (Aug. p. 4, L.18-24).

It is undisputed that Crumb allowed the design and construction of the new roads in the subdivision based upon the use of his property. Likewise, it is undisputed that the LLC spent at least $45,000.00 to construct the subdivision access using Crumb's parcel of land and, in the process, destroyed the old existing road which had provided access. (R p.198, L.4-8).

Crumb has claimed the ability to grant or deny access across his property to owners within the subdivision.

II. ISSUES ON APPEAL

A. Did the District Court Commit Error when it Granted Summary Judgment on the Grounds that Plaintiff Failed to Support Their Claim of an Oral Contract with Evidence of all Material Terms?

B. Did the District Court Commit Error When it Found That No Contract was Formed Because the Parties Did Not Agree on the Monetary Compensation to be Paid to Crumb for the Use of His Property?

C. Did the District Court Commit Error When it Found that New Road could be Referable to an Oral Promise to Grant an Easement or an Oral License?

D. Did the District Court Commit Error When it Determined that the Merger Clause in the Buy-Out Agreement Between Crumb and other Individuals was Evidence of a Lack of an Agreement Between Crumb and the LLC?

E. Did the District Court Commit Error When it Held on Summary Judgment That No Signed Writing Existed Memorializing the Easement Because a Material Question of Fact Existed as to What Whether or not Such a Document Existed?

F. Is Security Entitled to Attorneys Fees on Appeal?

III. ARGUMENT

A. Standard of Review

The District Court granted Summary Judgment in favor of Crumb. The Appellate Court utilizes the same standard as the District Court when reviewing a grant of Summary Judgment. Summary Judgment is proper if the depositions, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Regan v. Owen*, 163 Idaho 359, 413 P.3d 759, 762 (2018).

B. It Was Error for the District Court Grant Summary Judgment on Grounds that Plaintiff failed to support their claim of an oral contract with all material terms.

The District Court held that Security failed to submit evidence establishing all material terms of the underlying oral contract whereby Crumb agreed to allow the LLC to use his property for access to its property – specifically the compensation to be paid to Crumb for the use of his property. This is error because the parties are in full agreement that a contract was entered into. Under either version of the contract, Crumb is bound to allow the subdivision entrance to be used for its intended purpose.

Security's evidence is that Crumb agreed to have the subdivision entrance built on his adjoining property so that he could "make some money selling lots." Crumb's evidence was that the LLC also verbally agreed to pay him $200,000.00 for the use of his property. Either way, there was a contract. Viewing the facts most favorable to Security, Crumb agreed to provide an easement in exchange for the LLC's agreement to build an entrance which would save the LLC money and would enrich Crumb when the LLC sold lots. Crumb doesn't dispute this, but says that the LLC (as opposed to the individual subdivision lot owners) also agreed to pay him $200,000.00. The fact that Crumb was never paid the $200,000 does not change the fact that a bilateral agreement was reached and Crumb agreed to provide the easement.

> When the consideration for a contract fails—that is, when one of the exchanged promises is not kept—we do not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; we say that the contract was broken. See 23 R. Lord, Williston on Contracts § 63.1 (4th ed.2002) (hereinafter Williston). The party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely, see 26 *id.*, § 68.1 (4th ed.2003); but that is not the same thing as saying the contract was never validly concluded.
>
> *Gregory Scott Mcamis, v. State of Idaho,*., No. Docket No. 40417, 2013 WL 7832402 (Idaho Ct. App. Dec. 12, 2013) citing *Puckett v. United States*, 556 U.S. 129, 37, 129 S. Ct. 1423, 1430, 173 L. Ed. 2d 266 (2009).

Crumb has judicially admitted the existence of his agreement to provide the subdivision access over his property, and has admitted that the LLC built the entrance which has given his family better access to their lots. Crumb has neither sued for the payment of the $200,000, nor for rescission. It was error for the District Court to hold that there was no evidence of the terms of the agreement when the parties have judicially admitted the existence of the agreement, and the only dispute is whether the LLC has fully performed, or only partially performed the agreement.

The District Court's analysis was in error and would allow any party to a verbal contract to avoid contractual liability, no matter how great the substantial performance, by claiming after suit is filed that some dollar amount is unpaid. This Court should reverse the Trial Court's finding that there was no evidence to support the terms of an agreement, and find that Crumb agreed that his property would be used for the subdivision entrance, and that the LLC has at least partially performed the agreement by expending $45,000 to build the entrance of Crumb's property.

C. It Was Error for the Court to Find That No Contract Was Formed Because the Parties Did Not Agree on the Monetary Compensation to be Paid to Crumb for the Use of His Property. Monetary Compensation is Not an Essential Term of Any Contract.

The District Court found that Security had presented no evidence of the monetary compensation that Crumb was to receive for the use of his land so no agreement had been reached. This is an error because monetary compensation is not necessary to form an enforceable agreement. All that is necessary is the parties have a common understanding of their respective obligations and that the understanding be supported by consideration. Assuming that the parties never did agree on an amount of monetary compensation, the agreement to use Crumb's property is still supported by consideration because it benefitted Crumb.

All that is necessary to form a contract is that the parties understand their respective obligations and that the understanding be supported by consideration. "When consideration supports a distinct and common understanding of the parties, the understanding becomes an enforceable contract. *McColm-Traska v. Valley View, Inc.*, 138 Idaho 497, 501, 65 P.3d 519, 523 (2003) citing *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 607, 428 P.2d 524, 526 (1967). Consideration is any sort of benefit or detriment arising out of the parties' agreement. "There were also other elements of detriment or benefit which the jury may have considered sufficient to furnish consideration." *White v. Larsen & Shafer*, 51 Idaho 187, 3 P.2d 994, 995 (1931).

Brian Crumb's claim of money due him has shifted like the wind, but the agreement to use of Crumb's property cannot be in doubt. Crumb's own words: "So it was agreed that we would make the entrance for the 200 acres on Frankie's and my 12 acres parcel (sic) (where the double green gate is now)." (Aug. p. 4, L.18-24) Further, the e-mail acknowledges consideration received: "We have not got one dime for us giving up some of our property and our entrance to

our 12 acres so that all of you can have a good entrance to the 200. Yes, it did benefit us as well, now it is easier to get up to our property on the 200,..." (emphasis added). (Aug p. 8, L.5-8).

Even if the District Court is correct that no agreement was reached on the monetary compensation to be paid to Crumb, the parties still had a distinct and common understanding that Crumb would provide the property that the LLC would use to construct the new roads within the subdivision. This agreement was supported by consideration and is enforceable.

D. Whether the Location of the New Road was Referable to an Oral Promise to Grant an Easement or an Oral License, in Either Case, Crumb Cannot Withdraw His Consent to Allow the Subdivision Owners to Use His Property to Access Their Roads.

An oral promise to grant an easement is not enforceable because it is subject to the Statute of Frauds. An exception to this rule is the Doctrine of Part Performance which takes the oral agreement out of the operation of the Statute of Frauds. Before the Doctrine of Part Performance can be considered, the existence of an oral agreement must be shown. The District Court ruled that no enforceable oral agreement existed between the parties and refused to consider the Doctrine of Part Performance. As set forth above, the District Court's ruling was in error and ignored Crumb's own admission that there was an agreement to provide an easement.

The District Court speculated that the construction of the new road "might" only have been a license to the LLC. The Court's construction is directly contrary to Crumb's statement "So it was agreed that we would make the entrance for the 200 acres on Frankie's and my 12 acres parcel (sic) (where the double green gate is now)." Further, it is an unreasonable inference that a subdivision developer would spend $45,000 to construct an entrance over Crumb's property which Crumb could, at any time, revoke access to and use only for his and his family's benefit.

An easement is an interest in land that can only be transferred by written instrument. *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). "An easement established by unwritten agreement is merely a license, revocable by the licensor." *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). *Howes v. Barman*, 11 Idaho 64, 81 P. 48 (1905). An oral easement may be enforced if one of the parties has partly or completely performed provided the performance could only relate to the oral agreement. Id.

A license is the right to use the land of another. *Rowan v. Riley*, 139 Idaho 49, 56, 72 P.3d 889, 896 (2003). A license to use land can become irrevocable by estoppel when the licensor allows the licensee to incur considerable expense in the belief that the license would be perpetual or by oral agreement supported by consideration. *McReynolds v. Heregeld*, 26 Idaho 26, 31-34, 140 P. 1096, 1097-1098.

Crumb never argued that he granted a license to anyone, however, the District Court found that he did. "The evidence shows only that Defendant Crumb agreed that an entrance road could be constructed over his property." (R p.238, L.7-9). The District Court then found the construction of the new road "...might instead be referable to Defendant Crumb granting a license to use the roadway combined with the fact that the alternative road would have been far more expensive to construct and would have used more land." (R p.240, L.14-17). Whether the expense to construct the road was attributable to an oral promise to grant an easement or merely an oral permission to use Crumb's land, in either case, the law does not allow Crumb to withdraw his permission under such circumstances.

The District Court found that Crumb allowed the LLC to use his property for purposes of constructing the new roads. As set forth above, this oral promise is supported by consideration

so Crumb cannot now revoke the license. *McReynolds*, *supra*. Furthermore, the LLC has expended considerable sums building the road which destroyed the old road that otherwise might have been used by the subdivision owners to access their properties, all based upon reliance on Crumb's actions. Crumb is estopped from revoking the license if a license was all that he granted.

At a minimum, a material question of fact exists if the construction of the new road can be attributable to some other agreement.

E. The Buyout Agreement is Between the Members of the LLC and Crumb, Not the LLC and Crumb, so its Merger Clause is Not Relevant.

The District Court held that the, "...Buyout Agreement's merger clause serves as further evidence that there was no additional agreement between Defendant Crumb and A&C LLC to grant an easement." It is unclear if the District Court was ruling that the merger clause established as a matter of law that no other agreements existed or just evidence of the lack of any mention of the agreement to provide access. In either case, this is an error because Security was not a party to the Buyout Agreement. On remand, this Court should instruct the District Court that the Buyout Agreement's merger clause is not relevant between Security and Crumb.

F. It Was an Error for the District Court to Hold on Summary Judgment That No Signed Writing Existed Memorializing the Easement Because a Material Question of Fact Existed as to What Was Actually Attached to the CC&R's Crumb Signed but Removed Before Recording.

The District Court ruled that no evidence existed that a written easement was ever granted. (R.239, L. 13-14). This was an error because the evidence before the Court on Summary Judgment was that that Crumb signed CC&R's that contained a description of the roads, but that description had not been recorded with the rest of the CC&R's. The material question of fact which prevented the entry of Summary Judgment was what was actually

attached to the CC&R's when Crumb signed them. The fact that the description was not recorded is not relevant.

"In describing an easement, all that is required is a description which identifies the land which is the subject of the easement, and expresses the intention of the parties." *Quinn v. Stone*, 75 Idaho 243, 246, 270 P.2d 825, 826 (1954). "A description contained in a deed will be sufficient so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers." *Lexington Heights Dev., LLC v. Crandlemire*, 140 Idaho 276, 281, 92 P.3d 526, 531 (2004) citing *City of Kellogg v. Mission Mountain Interest, Ltd Co*., 135 Idaho 239, 244, 16 p3d 915, 920 (2000). "A conveyance does not depend upon when it is recorded." *Insight LLC v. Gunter*, 154 Idaho 779, 787, 302 P.3d 1052, 1060 (2013).

The CC&R's that Crumb signed state that the roads for the subdivision were shown on an exhibit attached to those CC&R's. The roads granted in the CC&R's can be identified by reference to an exhibit. The fact that the exhibit was not recorded does not mean that no exhibit was attached when Crumb signed the document. Crumb himself states that a different exhibit should have been attached when the document was recorded. Notably, he did not say no exhibit was attached when the document was signed.

The CC&R's grant the use of the roads shown on Exhibit "A" to the owners within the subdivision. Security put in evidence that Exhibit "A" showed the roads as they presently exist and the District Court was bound to accept that evidence on Summary Judgment. This Court should reverse the finding of the District Court that no evidence was in the record showing that an easement was ever granted.

A. Is Security Entitled to Attorney Fees on Appeal?

As set forth above, under Crumb's own version of the events, he agreed that his land could be used to provide access to the subdivision. The only difference between Crumb's recitation of the agreement and the LLC's was that Crumb claimed to be entitled to the additional consideration of $200,000. Crumb admitted the making of the agreement, and then alleged it was not performed. His remedy was to seek payment or seek rescission of the agreement. He did neither and denied access and precipitated this lawsuit therefore he should be ordered to pay Security's attorney's fees and costs in bringing and defending this appeal.

Attorney's fees may be awarded on appeal only if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Taylor v. Taylor*, 422 P.3d 1116 (Idaho 2018), as corrected (July 31, 2018). The foundation for Crumb's defense of this appeal is based solely on legal gymnastic. Crumb admitted to the existence of an agreement to use his property for access to the subdivision, admitted the road was constructed, admitted to signing CC&R's that referenced a road, required the LLC to complete the road when he parted ways with the LLC. Crumb further admitted he had forgone his alleged right to payment for the use of his property so the road could be completed. No evidence is in the record of any road work to be "completed" other than the new roads which were completed.

Crumb's defense to this action is based solely on his failure to include the correct exhibit to the CC&R's which were recorded. Given that he does not deny the existence of the agreement to use his property or that it actually was, this is an unreasonable defense of this appeal and he should be ordered to pay Security's attorney's fees and costs incurred on appeal.

IV. CONCLUSION

The District Court's Summary Judgment ruling should be reversed and Summary Judgment rendered in favor of Security to the effect that Crumb agreed that a portion of his adjoining lot be used as access to the subdivision, and that Crumb received consideration by the LLC's performance. Alternatively, the District Court's Summary Judgment should be reversed because numerous fact issues exist, and the District Court failed to assume facts and inferences in favor of Security when it granted Crumb's Summary Judgment.

DATED this 30th day of August, 2018.

ARTHUR M. BISTLINE
Attorney for Appellants/Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 30th of August, 2018, I served a true and correct copy of the following APPELLANTS' BRIEF by the method indicated below, and addressed to the following:

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