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11/21/2018 12:21 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the 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' REPLY BRIEF

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A. The Relevant Agreement to this Dispute is Between the LLC and Defendant, Brian Crumb (hereinafter referred to as "Crumb"), not Crumb and Plaintiffs (hereinafter referred to as "Security").

Crumb focuses in various places on the fact that Security is the party bringing this action and Security was not a part of the agreement between himself and the LLC. Security is the successor in interest to the LLC as regards Security's lots within the subdivision. If Crumb granted the LLC the right to use the road and that right became appurtenant to those lots, then that right was passed onto Security and the other lot owners within the LLC. Security is a "third party beneficiary" of the agreement between Crumb and the LLC, but not as that phrase is used on contract jurisprudence. Security is the beneficiary of the fact that Crumb granted the LLC an easement because it is the successor in interest to the LLC.

B. Crumb has Made no Attempt to Meet Security's Argument That all the Material Terms of the Agreement Between Crumb and A&C LLC Regarding the Easement were Before the District Court on Summary Judgment.

Crumb's response brief proceeds upon the assumption that the District Court held that Security's claim to the right to use Crumb's property was barred by the Statute of Frauds. (Respondent's Brief at page 14). The District Court did not rule based on the Statute of Frauds, it ruled that the terms of the underlying agreement sought to be enforced had not been proved, which as error since Crumb admitted to all the terms.

The District Court recited the law regarding the creation of an easement, then discussed the Statute of Frauds and in the process cited *Bear Island Water Ass'n, Inc. v. Brown,* 125 Idaho 717, 722, 874 P.2d 528, 533 (1994) for the proposition that the terms of the underlying oral

agreement must be proved by clear and convincing evidence. In the very next sentence, the District Court states that Security had not submitted evidence of all the material terms of the underlying oral agreement. (R. Vol. 1, pages 237-238). This is not a ruling that the Statute of Frauds bars the claim, only that the underlying oral agreement was not proven. Crumb has made no attempt to respond to Security's argument that the terms were proven.

Security argued in its Opening Brief that this finding was in error because Crumb had judicially admitted that he agreed that the LLC could use his property for access to the subdivision in exchange for $200,000. In Crumb's Response Brief, Crumb admits that he offered to grant an easement for $200,000 but the offer was never "consummated." (Respondent's Brief at page 22). "Consummated" is not a legal term. The question is whether or not the LLC accepted Crumbs offer[1] and clearly it did when it constructed the road. The fact that Crumb did not ever receive the $200,000 has nothing to do with whether an agreement was reached. *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). If Crumb was not paid, one of his remedies might be rescission, id, but he has made no attempt to do so or seek any other relief based on this agreement.

[1] Security is not conceding that Crumb was ever promised to be paid $200,000. This case was dismissed on summary judgment for failing to prove the terms of the deal. On summary judgment, those terms were proved by Crumb himself is Security's only point.

On Summary Judgment, the evidence established all the material terms of the agreement between Crumb and the LCC whereby Crumb allowed the LCC to use his property to access the subdivision and it was an error for the District Court to conclude otherwise.

C. Crumb is Arguing that the Consideration Crumb Received was Inadequate, not Non-Existent, and the Adequacy of Consideration is not Relevant, just its Existence.

Security argued that the parties to an agreement do not agree to "consideration" they agree to some course of performance. If the agreed upon course of performance is supported by consideration, the agreement is enforceable. Security argued specifically that Crumb's agreement to allow the corner of his property to be used for access to the LLC as supported by consideration because it made it easier from Crumb to get his property and because it allowed A&C LLC, of which Crumb was a member, to make more money selling lots.

In response to Security's argument regarding the benefits provided to Crumb from the deal to use his land, Crumb only recites to this Court that the District Court did not find the parties did not agree on consideration without addressing in any manner the consideration that Crumb admitted existed as argued by Security. Crumb only attacks the sufficiency of the consideration.

> Security continues to argue that the consideration was that A&C LLC could make more money selling lots with a more convenient easement through the Crumb Property, which would indirectly enrich Crumb as a member of the Company. Of course a company could make more money if an asset is gifted to the company by a member, and the profits of the company are passed down to its members. Crumb did not offer to gift an easement." (Respondent's Brief at page 23).

Crumb admits that his allowing his property to be used to in connection with the construction of the new road would have made him more money because the LLC in which he shared profits would make more money. Crumb then implies that those additional profits are not sufficient for the transfer of the use of his land for the access.

Then later, Crumb again argues in a foot note that the consideration Crumb received was inadequate.

> According to Security's argument, it does not matter if Crumb and A&C LLC agreed that the price or consideration for the easement was $200,000, and that Crumb did not receive any payment whatsoever for the easement, because the road made it easier for Crumb and anyone else with a license or an easement over the Crumb Property to access the Fritz Heath, then an agreement was supported by consideration. It is an unreasonable inference that Crumb would agree to grant an easement that is worth more than $200,000 for no payment whatsoever. (Respondent's Brief at page 25, Foot note 8).

First, no evidence is in the record that the property in question as worth $200,000 or any other amount for that matter. More importantly, this is another argument that the consideration Crumb received was not sufficient and that is not a ground to invalidate a contract. "However, 'this Court will not inquire as to the adequacy of consideration as bargained for by parties to an agreement so long as some consideration is provided. *Sirius LC v. Erickson*, 150 Idaho 80, 85, 244 P.3d 224, 229 (2010).

Security argued that Crumb received adequate consideration for his agreement to allow the LLC to use his property to provide access even if it was never agreed that he would be paid $200,000. Crumb did not deny that consideration was provided, and only argued that it was inadequate which is not grounds to find that no enforceable contract was reached.

D. The Merger Clause is not Relevant to this Dispute because the LLC was not a Party to it.

Crumb misunderstands Security's argument regarding the merger clause to be that the merger clause is not applicable because Security was not a party to it. Security is arguing that A&C LLC was not a party to that agreement which is why the merger clause has no application to this dispute.

The relevant agreement (use of Crumb's property) was between Crumb and A&C LCC. The merger clause is in a contract between Crumb and the other members of the LLC, not A&C LLC and Crumb. The LLC was not a party to the agreement, so it cannot be bound by the merger clause.

E. The District Court did not Rule on the Statute of Limitations Issue so it is not Ripe for Appeal.

Crumb argues that the Statute of Limitations to enforce the oral agreement had passed. Crumb raised this below, but the District Court did not rule on it so it is not ripe for review by this Court.

> We note that although Wells Fargo raised the issue of standing during the trial court proceedings it was never ruled on by the district court. "To raise an issue on appeal, the record must contain an adverse ruling to form the basis for assignment of error...." *State v. Hoyle*, 140 Idaho 679, 687 99 P.3d 1069, 1077 (2004) (citation omitted) (quotation marks omitted). *Houpt v. Wells Fargo Bank, Nat. Ass'n*, 160 Idaho 181, 186, 370 P.3d 384, 389 (2016), *reh'g denied* (Mar. 10, 2016).

This issue has not been decided by the District Court so it should not be considered on appeal.

F. Crumb Admits that a Material Question of Fact Exists as to What was Attached to the CC&Rs that Crumb Signed and is Incorrect that the CC&Rs Would be Insufficient to Find that a Grant of Crumb's Land to the LLC Occurred.

Security argued that a material question of fact existed as to what was attached to the roads set forth in the CC&R's when Crumb signed them. Crumb in Foot Note 12 on page 33 of Respondent/Cross-Appellant's Brief admits that a question of fact exists as to what was attached to the C&R's when Crumb signed them.

> Although a determination of what document should have been attached to the CC&Rs is an academic exercise, it is apparent that the intended exhibit was a document depicting a road in the location of the only road providing access to the Fritz Heath at that time, as set forth in the Amendment (R. 111-113) and Second Amendment (R. 115-117) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard advertising the lots in the development which was located at the entrance to the Fritz Heath (R. 119), the internet advertising materials (R. 121-122), and the Annexation Order Map. R. 126.

Crumb avoids the problem of the question of fact by arguing that the CC&Rs would be insufficient to grant the use of the roads depicted on them to the owner of lots in the LLC anyway.

> There is no language in the CC&Rs that describes that Crumb granted an easement over and across the Crumb Property. R. 298; Aug. 20-26. There was no exhibit attached to the CC&Rs. R. 298-99. There is absolutely nothing whatsoever in or attached to the CC&Rs that indicates that there is an easement or road over and across the Crumb Property. Id.

District Court ruled that the CC&Rs reserved an easement for roads. (R. Vol. 1, page 298) but that the CC&Rs did not grant the roads because the "...CC&Rs present to the Court do

not contain any identification of the land subject to the claimed easement." (R. Vol. 1, pages 298-299). The recorded CC&Rs that were put into evidence do not contain the attachment, but that does not answer the factual issue of what was attached to the CC&Rs when Crumb signed them.

The District Court concluded that the CC&Rs could not be used to establish the right to use the roads based solely on the fact that the recorded document did not have an attachment. What was attached to the CC&Rs when Crumb signed them is a material question of fact that should have been resolved at trial.

G. A&C LLC Constructed the Roads, not any Individual Lot Owners, so A&C LLC Conduct in Doing so Cannot be Explained by Crumb's Granting a License to Individual Lot Owners.

Security argued that even if the act of building the road could be attributable to Crumb granting Security a license, that license ripened into the functional equivalent of an easement when Security constructed the new road and destroyed the old.

Crumb's response was to mischaracterize the District Court's Decision as stating that the construction of the road could be attributable to Crumb's granting individuals other than A&C LLC a license.

Crumb argues:

> However, the District Court did not find and Security did not present any evidence that Crumb granted Security a revocable license. The District Court noted that the road construction might be referable to Crumb granting a license.
>
> [..]

> It is a reasonable inference by the District Court that the road construction may be referable to other reasons, including a revocable license to certain individuals,... (Respondent's Brief at page 27).

The party who constructed the road was A&C LLC, not any of the individual lot owners. Therefore, the construction work performed by A&C LLC cannot be attributable to Crumb granting individual lot owners licenses.

If nothing else, at least a material question of fact exists which would prevent Summary Judgment on the issue of part performance or whether an oral license turned into an easement because of improvements made to the license area.

H. Crumb is not Entitled to Attorney's Fees Pursuant to 12-120(3) Because no Transaction Between the Parties to this Action was Alleged, let Alone a Commercial Transaction.

Crumb argues that Security plead that this case involved a commercial transaction so it is entitled to fees pursuant to Idaho Code § 12-120(3). This argument fails because nothing in the complaint alleges any transaction between Crumb and Security, let alone a commercial transaction.

A District Court's conclusion regarding whether fees may be awarded pursuant to Idaho Code § 12-120(3) is a question of law over which this Court exercised free review. *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 136 Idaho 466, 470, 36 P.3d 218, 222 (2001).

Crumb relies heavily upon the case of *Garner v. Povey*, 151 Idaho 462, 259 P.3d 608 (2011) for support of his argument that when one party alleges the case involves a commercial transaction, Idaho Code § 12-120(3) automatically applies. That case does hold that a party

alleging a commercial transaction triggers the application of Idaho Code § 12-120(3) even if the transaction was not proved. However, the case certainly cannot be read to mean that a party can call anything a commercial transaction and trigger the application of 12-120(3). One party must at least be alleging some sort of interaction between the parties that the party is characterizing as a "commercial transaction" or at least an attempt at one. In *Garner* the parties had entered into a transaction and one of them alleged that it was commercial. No such allegation exists in this case and no facts support the existence of any transaction let along a commercial one.

Not a single allegation of Security's Complaint alleges any interaction of any kind between Crumb and Security other than Crumb recently announced his intention to withhold easements from owners within the subdivision. Nothing in the record establishes any other interactions between Crumb and Security which pertain to the agreement between Crumb and A&C LLC to allow the LLC to use his property for access. Security alleges that this dispute is a "commercial dispute" but that is not an allegation that a transaction occurred, let alone a commercial transaction.

Security did not plead that this was a commercial transaction and nothing in the record indicates it was a commercial transaction. Crumb is not entitled to fees pursuant to Idaho Code § 12-123(34).

I. Crumb is not Entitled to Fees Pursuant to § 12-121 Because Security's Claims were not Frivolous.

Crumb argues that the District Court ruled that Plaintiffs' breach of contract claims and fraud claims were frivolous, then the declaratory claim was frivolous because it requires the

same proof. The District Court found the contract claims to be without merit because there was "no evidence of a contract between plaintiffs and Crumb,..." (R. Vol. 1, page 342). There was no contract between Crumb and Plaintiffs, but lack of contractual privity between Crumb and Plaintiffs has nothing to do with whether Crumb granted an easement/irrevocable license to the LLC who in turn sold lots benefitted by the easement to Plaintiffs.

The facts of this case are not in dispute. Crumb, a member of A&C LLC, and A&C LLC agreed that A&C LLC could use Crumb's property to build new roads for the benefit of the subdivision that A&C LLC owned and was developing. The road was constructed based on this agreement and the old roads destroyed with Crumbs full knowledge and consent.

Crumb devotes one-half of his brief describing how plat map easements were the only access to the Fritz-Heath lots prior to the new access road being built over his property. Crumb simply ignores the Trial Court's finding that the ". . . new access road was constructed over the Crumb property, which rendered the previous access road impassable by wheeled vehicles." (R. Vol. 1, page 231). Crumb offers no explanation as to why Fritz-Heath landowners should now be denied access to their lots given that Crumb's actions destroyed their old access.

Crumb himself testified to the terms of this deal that he agreed to and that he was not paid the $200,000 he was entitled to. Rather than take some legal action to collect his money, Crumb has chosen to rescind his grant of the right to use his property. Crumb has no right to do this until a Court rescinds the agreement between him and A&C LLC.

The fact that Crumb allowed an entire subdivision road system to be designed based on the use of his property, and his property was in fact used with his consent is enough grounds to

determine that Security's attempt to declare its rights to use Crumbs property to access the subdivision is not frivolous.

J. Crumb is Not Entitled to Fees on Appeal.

For all the reasons set forth above that Crumb was not entitled to fees at the District Court which are incorporated here as if set forth in full, Crumb is not entitled to fees on appeal.

DATED this 21st day of November, 2018.

ARTHUR M. BISTLINE
Attorney for Appellants/Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 21st of November, 2018, I served a true and correct copy of the following APPELLANTS' REPLY BRIEF by the method indicated below, and addressed to the following:

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/s
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