

IN THE SUPREME COURT OF THE STATE OF IDAHO

SECURITY INVESTOR FUND LLC,)Supreme Court No: 45969-2018
SECURITY FINANCIAL FUND LLC,)
)
Plaintiffs/Appellants/Cross-Respondents,)Kootenai County No. CV-17-5541
)
vs.)
)
BRIAN CRUMB, JENNIFER O'CALLAGHAN)
and BRIAN O'CALLAGHAN, JITINVEST)
LLC, SPIRIT ELEMENTS, LLC, and TODD A.)
REEVE,)
)
Defendants/Respondents/Cross-Appellants.)

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County

Honorable Richard Christensen, Presiding

Darrin L. Murphey
MURPHEY LAW OFFICE, PLLC
402 West Canfield Avenue, Suite 2
Coeur d'Alene, ID 83815

Attorney for Defendant/Respondent/Cross-Appellant Brian Crumb

Arthur M. Bistline
BISTLINE LAW, PLLC
1205 N. 3rd Street
Coeur d'Alene, ID 83814

Attorney for Plaintiffs/Appellants/Cross-Respondents

I. REPLY ARGUMENT IN SUPPORT OF CROSS-APPELLANT'S APPEAL

A. **Security's allegations in their verified Complaint that Crumb is liable for breach of contract and that Security is entitled to attorney fees in this commercial dispute are sufficient to trigger application of Idaho Code § 12-120(3).**

Security acknowledges that Garner v. Povey, 151 Idaho 462, 259 P.3d 608 (2011) “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.” Reply Brief at 8-9.¹ However, Security argue that they did not allege a commercial transaction between Security and Crumb in their verified Complaint. Reply Brief at 9. The record provides otherwise.

Security brought an action for breach of contract against Crumb, alleging in their verified Complaint that “Crumb is bound by an express or implied contract with all FRITZ-HEATH landowners to provide them access to FRITZ-HEATH through the CRUMB ENTRANCE PARCEL”, and that “Crumb’s conduct constitutes breach of contract and/or fraud.” R. 13, § III, ¶ A (emphasis added). Security also allege in their verified Complaint that “Plaintiffs have been required to retain the services of an attorney in this commercial dispute solely as a result of

¹ See Garner, 151 Idaho at 470, 259 P.3d at 616 (“allegations in the complaint that the parties entered into a commercial transaction and that the complaining party is entitled to recover based upon that transaction, are sufficient to trigger the application of I.C. § 12-120(3).”); see also Intermountain Real Properties, LLC v. Draw, LLC, 155 Idaho 313, 320, 311 P.3d 734, 741 (2013) (“In other words, when a plaintiff alleges a commercial contract exists and the defendant successfully defends by showing that the commercial contract never existed, the court awards the defendant attorney fees.”); Hilt v. Draper, 122 Idaho 612, 622, 836 P.2d 558, 568 (Ct. App. 1992) (where an action was brought founded on an alleged contract within the scope of the statute, the statute applied even though the plaintiff ultimately failed to prove the existence of the contract, and the prevailing defendant was entitled to mandatory attorney’s fees under the statute); Miller v. St. Alphonsus Regional Medical Center, Inc., 139 Idaho 825, 87 P.3d 934 (2004) (action by physician alleging contractual right to staff privileges at hospital came under Idaho Code § 12-120(3) even though the court holds no contractual right existed); Noak v. Idaho Dept. of Correction, 152 Idaho 305, 271 P.3d 703 (2012) (award of fees to defendant proper where complaint alleged breach of covenant of good faith and fair dealing, but no contractual relationship was proved); Intermountain Real Properties, LLC v. Draw, LLC, 155 Idaho 313, 311 P.3d 734 (2013) (where complaint alleged commercial transaction defendant entitled to award of fees even though no transaction was proved); American West Enterprises, Inc. v. CNH, LLC, 155 Idaho 746, 316 P.3d 662 (2013) (defendant entitled to award of attorney fees in action where plaintiff alleged implied warranty, even though ultimately no privity of contract, thus no warranty, was found).

Crumb's incompetency, fraud, or breach of contract, and are entitled to an award of their reasonable attorneys fees incurred in this matter." R. 14, ¶ 15 (emphasis added). Security further allege in their verified Complaint that "Plaintiffs have incurred damages in an amount in excess of TEN THOUSAND DOLLARS AND NO/100 (\$10,000.00) to be proved at trial." R. 14, ¶ 16.

Security do not dispute that they alleged a breach of contract claim against Crumb in their verified Complaint,² and appear to acknowledge that they alleged a commercial dispute between Security and Crumb, but argue that the allegation is not the same as alleging a commercial transaction. Reply Brief at 9. Not surprisingly, the Idaho appellate courts have used the term "commercial dispute" synonymously with "commercial transaction" when analyzing Idaho Code § 12-120(3). *See Simono v. House*, 160 Idaho 788, 793, 379 P.3d 1058, 1063 (2016) ("However, because TVNA has prevailed in this commercial dispute, TVNA is entitled to attorney fees on appeal pursuant to Idaho Code section 12-120(3)."); *Eriksen v. Blue Cross of Idaho*, 116 Idaho 693, 695, 778 P.2d 815, 817 (Ct.App.1989) ("We deem it clear that the Legislature put the term 'commercial transaction' in this statute, not to narrow its scope, but to extend its coverage to litigation arising from commercial disputes as well as from certain non-commercial disputes.

2 The district court found that "[t]he agreement that the plaintiffs were attempting to enforce against Crumb was a 'Transfer of Assets and Withdrawal of Members (sic) Interest' agreement". R. 340. Security argued and submitted evidence that the Member Withdrawal Agreement contractually obligated A&C LLC to provide access to the Fritz Heath through the Crumb Parcel. Aug. 5, ¶ 15. Security now inconsistently argues that the Member Withdrawal Agreement does not apply to A&C LLC. Reply Brief at 5. If a party alleges the existence of a contract other than personal or household purposes, or a commercial transaction, the prevailing party is entitled to an award of attorney fees even though no contract, liability or commercial transaction actually existed. *Miller v. St. Alphonsus Reg'l Med. Ctr., Inc.*, 139 Idaho 825, 839, 87 P.3d 934, 948 (2004). The Member Withdrawal Agreement is a commercial transaction as defined by Idaho Code § 12-120(3). The Member Withdrawal Agreement contains an attorney fees provision. R. 355. The district court found that Security's breach of contract and fraud claims were frivolous: "Therefore, the Court finds such claims for breach of contract and fraud to have been brought, pursued or defended frivolously, unreasonably or without foundation." R. 342. Thus, Crumb is entitled to an award of attorney fees pursuant to Idaho Code § 12-120(3).

This intent is evinced by the Legislature’s use of the conjunctive phrase ‘and in any commercial transaction”’); DeWils Interiors, Inc. v. Dines, 106 Idaho 288, 292-93, 94-95 678 P.2d 80, 84-85, 86-87 (Ct.App.1984). Thus, as was the case in Garner and Intermountain, Crumb is entitled to an award of reasonable attorney fees pursuant to Idaho Code § 12-120(3) based on the allegations in Security’s verified Complaint that they are entitled to recover attorney fees “in this commercial dispute.” Garner, 151 Idaho at 470, 259 P.3d at 616; Intermountain, 155 Idaho at 320, 311 P.3d at 741.³ As such, the district court’s order denying attorney fees and costs to Crumb should be reversed.

B. Crumb is entitled to an award of attorney fees pursuant to Idaho Code § 12-121.

Security argue that although there was not an agreement between Crumb and Security, there was an oral agreement between Crumb and A&C LLC to grant an easement. Reply Brief at 10. Security ignores the law, the facts and the findings of the district court. The law is not debatable. Before an oral agreement to convey an interest in land will be enforced, the material term of price or consideration must be proven by clear and convincing evidence. Bear Island

3 Security pursued this lawsuit on the basis of an alleged commercial transaction and contract. Security submitted declaration testimony that “All FRITZ-HEATH landowners are intended beneficiaries of the express agreement that the CRUMB ENTRANCE would be used as a permanent access to the FRITZ-HEATH”, and that the alleged agreement was made for a commercial purpose, to make money. Aug. 9, ¶ 24. As discussed above, Security argued and submitted evidence that the Member Withdrawal Agreement contractually obligated A&C LLC to provide access to the Fritz Heath through the Crumb Parcel. Aug. 5, ¶ 15. The district court found that “[t]he agreement that the plaintiffs were attempting to enforce against Crumb was a ‘Transfer of Assets and Withdrawal of Members (sic) Interest’ agreement”. R. 340. The Member Withdrawal Agreement is a commercial transaction as defined by Idaho Code § 12-120(3). The Member Withdrawal Agreement contains an attorney fees provision. R. 355. Security not only alleged damages in their verified Complaint, Security stated in response to discovery, under oath, that “Security will seek at least \$700,000 in damages against Brian Crumb in the event that a forty (40) foot right of way easement is not declared over his property.” R. 150. As such, the gravamen of the lawsuit pursued by Security, “in this commercial dispute” (R. 14, ¶ 15), was an alleged oral agreement to grant an easement, which according to Security was to “make some money selling lots” (Aug. 9, ¶ 24) or “in order to save road construction costs.” R. 13, § III, ¶ A. Accordingly, Crumb is entitled to an award of reasonable attorney fees pursuant to Idaho Code § 12-120(3).

Water Ass'n, Inc. v. Brown, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994); Hoffman v. S V Co., Inc., 102 Idaho 187, 190, 628 P.2d 218, 221 (1981). The parties dispute that there was an oral agreement to grant an easement. Prior to Crumb's withdrawal from A&C LLC on September 26, 2006, Crumb made a verbal offer to the company that upon receipt of \$200,000 Crumb would grant an easement. Crumb's offer was never accepted, and Crumb withdrew from the company and executed the Member Withdrawal Agreement on September 26, 2006, wherein the parties agreed that there are no prior oral agreements between the parties.

The district court found that Security did not submit any evidence disputing that Crumb was to be paid \$200,000. R. 238. The district court further found that "Crumb never actually received any amount of money for the easement from A&C LLC." *Id.* Throughout the litigation, Security made various self serving ever changing arguments as to consideration. However, after reviewing all of the evidence, the district court concluded that "[Security] failed to present any evidence tending to show that the road construction, or anything else, was ever agreed upon as consideration in return for Crumb agreeing to grant an easement." R. 240. "Plaintiffs still have not pointed to any evidence in the record which proves the consideration or price term of the alleged oral contract to grant an easement." R. 295. At the conclusion of the case, the district court found that Security's attempt to enforce an easement based on breach of contract and fraud "to be wholly without merit". R. 342. As such, Security's attempt to enforce an easement based on a declaratory action, which requires the same proof - a written agreement that satisfies the statute of frauds; or, on a claim of part performance or estoppel, proof of the material terms of an oral contract, is likewise "wholly without merit".

It is not debatable that there is no written easement. “The Court has not received any written instrument, signed by Defendant Crumb, which both identifies the land subject to the easement and makes clear the parties’ intention to establish a servitude.” R. 299. It is not debatable that Crumb did not sell, transfer, or promise Security anything whatsoever. R. 106, ¶ 25, 107, ¶ 29. Security could have and should have searched the records of the Kootenai County Recorder, wherein they would have determined no easement existed over and across Crumb’s property to Security’s lots. R. 107, ¶ 29. Security failed to simply ask Crumb if there was an easement over and across his property to Security’s lots.⁴ Finally, it is not debatable that the merger clause contained in the Member Withdrawal Agreement precludes the alleged prior oral agreement to grant an easement. The district court found that Member Withdrawal 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.” R. 239.⁵ As such, Security’s declaratory judgment action for an easement, which required proof of a written easement, or proof of an oral contract, the same proof as Security’s breach of contract claim which was found by the district court to have been brought frivolously, unreasonably or without foundation,

4 Security argue that Crumb must rescind an agreement to grant an easement and sue for money damages. Reply Brief at 10. However, there is no agreement to rescind as Crumb did not enter into an agreement to grant an easement. R. 240, 295 and 342. Security also argues that Crumb must offer an explanation as to why a road was constructed over the Crumb Property. Reply Brief at 10. Security does in fact have legal access to their lots. R. 116. Security desires Crumb to grant Security with more convenient access over the Crumb Property, without any consideration to Crumb. Regardless, Security, not Crumb, has the burden to prove an agreement to grant an easement, including an agreement as to price and consideration, by clear and convincing evidence. Bear Island, 125 Idaho at 722, 874 P.2d at 533.

5 Security argued and submitted evidence that the Member Withdrawal Agreement contractually obligated A&C LLC to provide access to the Fritz Heath through the Crumb Parcel. Aug. 5, ¶ 15. The district court found that “[t]he agreement that the plaintiffs were attempting to enforce against Crumb was a ‘Transfer of Assets and Withdrawal of Members (sic) Interest’ agreement”. R. 340. Security now inconsistently argues that the Member Withdrawal Agreement does not apply to A&C LLC. Reply Brief at 5.

should have been likewise so found. R. 342; Idaho Code § 12-121. As such, the district court's order denying attorney fees and costs to Crumb should be reversed.

C. Crumb is entitled to attorney fees and costs on appeal.

For the reasons set forth in Crumb's opening brief and above, Crumb is entitled to attorney fees and costs before the district court and on appeal.

II. CONCLUSION

Based on the foregoing, Crumb respectfully requests that this Court affirm the district court's Judgment dismissing Security's Complaint with prejudice, reverse the district court's decision denying Crumb's attorney fees and costs, and award Crumb attorney fees and costs before the district court and on appeal.

DATED this 14th day of December, 2018.

MURPHEY LAW OFFICE, PLLC

By /s/ Darrin L. Murphey
Darrin L. Murphey,
Attorney for Defendant/ Respondent/
Cross-Appellant Brian Crumb

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 2018, I electronically filed the foregoing with the Clerk of the Court using the File and Serve system which sent an email to the email address that was identified as the party's service contact as indicated below:

Arthur M. Bistline
Bistline Law, PLLC
1205 N. 3rd Street
Coeur d'Alene, ID 83814

- U.S. MAIL
- HAND DELIVERED
- OVERNIGHT MAIL
- TELECOPY (FAX) to: (208) 665-7290
- iCourt: service@bistlinelaw.com

By /s/ Darrin L. Murphey
Darrin L. Murphey