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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, SECURITIES BUREAU,

Plaintiff-Respondent

v.

SEAN ZARINEGAR and PERFORMANCE REALTY MANAGEMENT,

Named Defendants-Appellants

APPELLANT'S (SEAN ZARINEGAR'S) REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for ADA County
Hon. Samuel A. Hoagland, District Judge

:Sean; Zarinegar:
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CASES

Preliminary Statement

Appellant submits this brief in reply to the submission of Appellee. Appellee's submission seeks to continue the unconstitutional usurpation of Appellant's due process rights and rests upon assertions refuted by the record.

Factual Distortions

Appellee takes great liberty with the facts. First, it ignores that all the requisite information was available on Edgar. See https://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001433821&type=&dateb=&owner=exclude&start=40&count=40

Second, Appellee still ignores the fact that Appellant sold his shares to PRM and that's why he was owed the money they say he "misappropriated." See https://www.sec.gov/Archives/edgar/data/1433821/000165917316000466/ahitposam120160830_v2.htm

There were facts in dispute.

With respect to the conversion to CORIX, Appellee seems to want Appellant to show evidence of a negative. There is zero evidence that Appellant was involved at all during that "conversion." Burden was on Appellee to show the contrary.

Appellee states:

> On the substance, the District Court did not abuse its discretion. The District Court did not preclude Zarinegar from proceeding pro se, as Zarinegar claims. Rather, the District Court temporarily precluded Zarinegar from making oral arguments during the hearing on May 21, 2019, instead requiring that his recently fired counsel would make the oral arguments for Zarinegar and PRM at the

> hearing. In other words, consistent with IRCP 11.3(b)(2), the District Court conditioned the granting of the motion to withdraw on Brian Webb Legal remaining in the case long enough to provide oral argument on the motions it had filed and briefed, in order to prevent delay or prejudice to the Department Even if there had been an error, the District Court took additional actions to make sure to avoid any prejudice to Zarinegar. After granting summary judgment for the Department, the District Court did not enter final judgment for another three months, allowing Zarinegar more than adequate time to either obtain new counsel or raise any issues pro se.

This is totally false. The order was already in when Appellant was allowed to speak. Again, at this time, Appellant appeared by special appearance only to challenge jurisdiction.

The following statements in the Appellee's Brief are all made up and do not have any evidentiary support:

1. May 2014, Jack Combs, the managing partner of PRM, cold-called Rees of Boise, Idaho, a retired [redacted]

2. Zarinegar advertised and sold PRM securities also by way of a PPM, which he admits he personally caused to be created and then reviewed and approved.

3. Zarinegar who orchestrated all aspects of the sale of securities to an Idaho resident, including having his agents cold-call an Idaho resident, signing the seven contracts with the Idaho resident, signing the ownership unit certificates for Rees, and accepting the money from the Idaho resident.

Reply

A. No Jurisdiction Over Appellant: Judgment is Void

Appellant challenged personal jurisdiction. Tr. 74-75. The Court found that the issue was waived, but then decided the issue on the merits. Tr. 79. There is no waiver and no jurisdiction and the judgment is void.

There can be no waiver because "'waiver' does not operate retroactively so as to validate a void judgment." *Fisher v. Crest Corp.*, 112 Idaho 741, 744, 735 P.2d 1052 (Idaho App. 1987). More important, "…[H]owever late this objection [to the jurisdiction] has been made, or may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838). Thus this Court cannot avoid the question of whether the judgment is void.

"It is impossible to prove jurisdiction exists absent a substantial nexus with the state, such as voluntary subscription to license. All jurisdictional facts supporting claim that supposed jurisdiction exists must appear on the record of the court." *Pipe Line v Marathon*, 458 U.S. 50 (1982). "Where there is no jurisdiction at all there is no judge; the proceeding is as nothing." *Manning v. Ketcham*, 58 F.2d 948, 949 (6th Cir. 1932).

Appellant has no nexus with Idaho, much less a substantial one. No defendant can be compelled to answer in a state's courts unless minimum contacts exist among defendant, the forum state and the litigation such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 203 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). In deference to the sovereignty of the

forum's sister states, due process requires "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94, 297 (1980); *International Shoe*, 326 U.S. at 319.

Due process restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. at 251. Hence, the minimum contacts measure is not a question of "a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to" the laws of the forum state. *International Shoe*, 326 U.S. at 319. A state cannot justifiably assert jurisdiction over an individual with whom it has no constitutionally cognizable contacts or ties. *World-Wide Volkswagen*, 444 U.S. at 294.

Nothing gave Appellant reason to anticipate a suit outside of his home state. He had no face-to-face or even oral contact with any of the parties in Idaho. There is no evidence that Appellant ever negotiated with anyone in Idaho or even sent mail there in connection with the underlying dispute. He maintained no staff in the state of Idaho and as far as the record reveals, he has never even visited the state.

Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process. This Court, therefore, should reverse the judgment and remand with directions to vacate the judgment and dismiss the case.

B. Out of State Certificates are Inadmissible

Appellant did object to the out of state certificates as rank hearsay and renews that objection here. The public-records exception to the hearsay rule is inapplicable when, as here, the circumstances indicate lack of trustworthiness. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167-68 (1988); *United States v. Spano*, 421 F.3d 599, 604 (7th Cir. 2005). It is inapplicable because Plaintiff basically is relying on them for summaries of hearsay statements made by third parties. See, e.g., *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983); accord *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 778-79 (9th Cir. 2002) (affirming the district court's exclusion of exhibits that contained hearsay at summary judgment phase and noting that the plaintiff could not rely on one of the exhibits "because it is inadmissible hearsay").

C. The Judge was Prejudiced

The judge was prejudiced. Appellee says that Appellant was given the opportunity to speak, but this was after the order was in. Appellant appeared by special appearance only to challenge jurisdiction and the prejudice continued. The judge should have recused himself; he was prejudiced entering the order; he further didn't have the authority to rule on his own challenged jurisdiction. In addition, the judge was a respondent on the motion to recuse.

The Code of Judicial Conduct, Rule 2.11(A)(1), provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) (1) the judge has a personal bias or prejudice concerning a party."

The right to an impartial jurist is a "basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Under federal constitutional jurisprudence, courts evaluate whether a "serious risk of actual bias,' based on objective perceptions and considering all the circumstances

alleged, rises to an unconstitutional. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009); *Rippo v. Baker,* 580 U.S. ——, 137 S.Ct. 905, 907 (2017). Put differently, "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his [or her] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. Not only must judges actually be neutral, they must appear so as well.

The record shows that this fundamental precept was violated here.

D. Denial of a Jury Trial

Appellant was denied a trial by jury. He protested this in the trial court and in his opening brief here.

As noted in the opening brief, this is not an ordinary civil case, in which a formal jury demand is required. See I.R.C.P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed." Rather, as there noted, because it is brought by the state and the state seeks a punitive fine, it is properly characterized as a criminal case.

On this point *State v. Vasquez*, 163 Idaho 557, 416 P.3d 108 (2018) is controlling. In that case, the Court stated: "[I]n criminal cases trial courts must obtain a defendant's consent to waive the right to jury trial, not just from counsel, but from the defendant herself. Further, such waiver must be knowing, intelligent and voluntary. Failing to make these findings as to the defendant personally establishes a structural defect in the proceedings." *Id.* at 563, 416 P.3d at 114 (citations omitted).

The conclusion portion of the Court's opinion in *Vasquez* reads: "we hold that failure to obtain a personal waiver of jury trial from the defendant, either orally or in writing in open court

is a structural defect, which constitutes fundamental error." *Id.* at 564, 416 P.3d at 115.

Although the Court's conclusion in *Vasquez* expressly contemplates a written waiver, consistent with Article I, Section 7, the Court's conclusion also states that the waiver must be made in open court. Neither occurred here.

Simply put, there is no indication that Appellant waived his right in a knowing, voluntary manner. See *Vasquez,* 163 Idaho at 562, 416 P.3d at 113. Appellate courts carefully scrutinize an assertion that a defendant has waived his or her right to a jury trial and every reasonable presumption should be indulged against its waiver. See *State v. Wheeler*, 114 Idaho 97, 101, 753 P.2d 833, 837 (Ct. App. 1988).

E. Denial of Discovery

Appellant was denied discovery, which made it impossible for him to defend the case.

Reversal is required where "the denial of discovery resulted in actual and substantial prejudice to the complaining litigant." *Gile v. United Airlines, Inc.* , 95 F.3d 492, 495 (7th Cir. 1996)).

The control of discovery is within the discretion of the trial court. See *Vaught v. Dairyland Insurance Co.*, 131 Idaho 357, 956 P.2d 674 (citing *Service Employees Int'l Union, Local 6 v. Idaho Dept. of Health and Welfare*, 106 Idaho 756, 683 P.2d 404 (1984)). In reviewing whether the trial court abused its discretion in refusing to delay proceedings for further discovery this Court must consider: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. See *Eagle Water Company,*

Inc. v. Roundy Pole Fence Company, Inc., 134 Idaho 626, 628, 7 P.3d 1103, 1105 (2000) (citing *Sun Valley Shopping Center v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

Since the court considered none of these factors, it abused its discretion as a matter of law.

Conclusion

For the reasons stated, the judgment must be reversed and the case dismissed.

Dated: March 18, 2020

/s/ :Sean; Zarinegar