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IN THE SUPREME COURT OF THE STATE OF IDAHO

STEPHEN MERRILL,

Plaintiff/Appellant,

vs.

ERIK P. SMITH,

Defendant/Respondent.

DOCKET NO. 47511-2019

Kootenai County Case No.
CV28-19-1695

RESPONDENT'S BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF KOOTENAI**

THE HONORABLE LANSING HAYES
District Judge Presiding

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STATEMENT OF THE CASE

I. Nature Of The Case

On March 8, 2019 the Plaintiff, STEPHEN MERRILL (“Merrill”) brought his declaratory judgment action against the Defendant, ERIK P. SMITH (“Smith”), claiming that Merrill was owed attorneys fees pursuant to a contract with Smith, for Merrill’s representation of former clients, BRADLEY BLITON and SHANNON BLITON (“the Blitons”), arising from a personal injury case. Smith filed a Motion for Summary Judgment which was granted. Merrill filed a Motion to Reconsider which was denied.

II. Statement Of Facts

This case was filed as a complaint for declaratory judgment based on an alleged contract. (See Complaint of Plaintiff, filed herein on March 8, 2019). The unverified complaint set forth a single cause of action: the alleged attorneys fees agreement between Merrill and Smith.

Smith filed a Motion for Summary Judgment with three (3) accompanying affidavits, alleging that no contract existed. Merrill responded in a brief opposing Smith’s Motion for Summary Judgment, claiming that there was a written and contractual attorney fee split between the two attorney firms, and that Merrill’s subsequent termination by the Blitons did nothing to change that agreed-upon fee split. (See Plaintiff’s Brief, page 4). The Motion for Summary Judgment was granted, and Merrill filed Plaintiff’s Motion for Reconsideration of Summary Judgment (“Motion to Reconsider”), together with Plaintiff’s Brief in Support of His Motion for Reconsideration (“Brief on Motion to Reconsider”).

The court found that Merrill only filed three (3) documents: the motion, a notice of hearing on said motion, and his brief in support of the motion. (See documents as filed, and Motion to Reconsider Tr., pp. 7-8). In his brief, Merrill alleged that “. . . a proposed First Amended Complaint is filed with this brief.” (See Motion to Reconsider Tr., p. 3). The motion was denied.

ISSUE ON APPEAL

Did the district court correctly grant Smith's Motion for Summary Judgment?

STANDARD OF REVIEW

I. Review Of Order of Summary Judgment – De Novo

“This Court reviews an appeal from an order of summary judgment *de novo*, and this Court’s standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment.” *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 394 (2008). “Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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.” *Lockheed Martin Corp. v. Idaho State Tax Comm’n*, 142 Idaho 790, 793 (2006). In addition, this Court must consider I.R.C.P. 56(e), which provides that “the adverse party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.” *Curlee*, quoting *Rhodehouse v. Stutts*, 125 Idaho 208, 211 (1994).

ARGUMENT

I. There Was No Written Contract Which Entitles Merrill to Relief.

The underlying case which was the basis for this claim of attorneys fees was a personal injury case. Merrill and Smith were both attorneys for the injured parties, the Blitons. Both attorneys entered into a contingency fee agreement with the Blitons.

Merrill and Smith only tentatively negotiated the co-representation without formalizing a fee sharing agreement between themselves. It is undisputed that a written contract between the parties did not exist. The only contracts in existence were the contingency fee agreements between the Blitons and Merrill, and separately between the Blitons and Smith.

Merrill even admits that his suit “is not essentially based in breach of contract.” (Brief on Motion to Reconsider, p. 6) Further on Merrill states “the Plaintiff does not have available to him a common law breach of contract theory technically, since there has been no breach of contract. . .” (Brief on Motion to Reconsider, p. 8).

Despite these admissions, the single cause of action was for breach of contract pursuant to a declaratory judgment action. However, as set forth in the trial court’s memorandum decision, Merrill failed to proffer any admissible evidence of contract. (Memorandum Decision, pp. 3 – 4, *citing Shacocass, Inc. v. Airington Construction Company*, 116 Idaho 460, 463 (Ct. App. 1989)). Therefore, without any admissible evidence of contract the trial court properly granted the Motion for Summary Judgment on that basis.

II. Merrill Failed to Plead for Equitable Relief In His Complaint.

The trial court appropriately denied Merrill's claim for equitable relief for several reasons.

Firstly, Merrill failed to plead any facts or reference any law to support any equitable claim sufficient to meet notice pleading standards. (Memorandum Decision, p. 4). Secondly, a complaint for declaratory judgment could not in itself provide notice that equitable relief was being sought since the relevant statute omits any reference to equitable claims. See Idaho Code § 10-1202. The authority for a court to make a declaratory judgment is set forth in I.C. § 10-1202 which states that:

Any person interested a deed, will, **written contract or other writings constituting a contract or any oral contract**, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, **contract** or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, **contract** or franchise and obtain a declaration of rights, status or other legal relations thereunder.

(Emphasis added). The basic requirement for relief under the Declaratory Judgment Act is the existence of a deed, will, contract, statute, or municipal ordinance. None of these things are present in this case. Therefore there is no basis for Merrill's request for declaratory judgment on his claim.

Thirdly, relief sought upon an implied contract or equitable claim is not appropriate or allowed in a declaratory judgment. So even if properly pled, the complaint would fail. (Memorandum of Decision, p. 4).

III. There Was No Implied Contract.

Only for argument's sake, even if the Court finds that Merrill is entitled to have an equitable claim or Merrill appears to allege the existence of an implied-in-fact contract between himself and Smith, this Court may determine that an implied-in-fact contract did not exist by applying the meeting of the minds requirement in the implied contract context. An implied-in-fact contract exists where there is no express agreement, but the conduct of the parties implies an agreement from which an obligation in contract exists. *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 707 (2002). "The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact." *Homes by Bell-Hi, Inc., v. Wood*, 110 Idaho 319, 321 (1986). To find such a contract, the facts must be such that the intent to make a contract can be inferred from the parties' conduct. *Baker v. Boren*, 129 Idaho 885, 891 (Idaho App. 1997).

More specifically, an implied-in-fact agreement must be "founded upon a meeting of the minds... inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997). Thus an implied-in-fact contract "is one where the terms... are manifested by the conduct of the parties..." *Clayson v. Zebe*, 280 p.3d 731, 736 (2012). This requires the findings of: 1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance. *El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

A meeting of the minds or mutuality of intent is critical in finding an implied-in-fact contract. In *Baker v. Boren*, in upholding the trials court's finding of an implied-in-fact contract, the Court of Appeals of Idaho noted that the parties each had the same belief regarding the same underlying contract terms. *Id.* at 891. In this case, there was no meeting of the minds or mutuality of intent.

Also critical in finding an implied-in-fact contract is a lack of ambiguity. However, as set out above, Merrill's alleged agreement is nothing if not ambiguous. Where the parties and terms of an alleged agreement are entirely ambiguous, as here, there can be no implied-in-fact contract.

IV. Merrill's Contract With the Blitons Was Terminated.

Even if this Court strains to find that a contract of some nature did exist, Merrill's termination by the Blitons precludes him from recovery. Smith pled as an affirmative defense that, solely due to Merrill's actions Merrill was terminated by the Blitons from being their attorney. Therefore, any alleged contract with him was also terminated since he failed to include any contractual terms that his compensation would survive termination by converting the contingency basis to an hourly basis. (See attachments 1 and 2 to Merrill's Complaint). In this case, Merrill was terminated by the Blitons in December, 2017. Merrill has admitted that his contract for legal services was terminated by the Blitons on or around December 6, 2017, and that he performed no additional legal work. (See Affidavit in Support of Motion for Summary Judgment, Exhibit A (Requests for Admissions No. 1 and 2)).

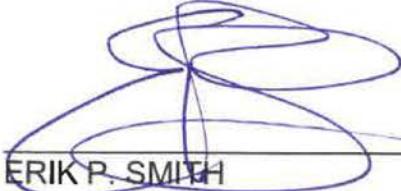
V. Merrill Failed to Amend His Pleadings.

After summary judgment was entered against Merrill, he filed the Motion to Reconsider, a Notice of Hearing, and the Brief on Motion to Reconsider. (See Motion to Reconsider Tr. pp 7 – 8). In his brief he merely proffered a proposed Amended Complaint. By this attempted proffering, Merrill acknowledged and admitted that his original complaint was deficient. However he failed to amend his complaint properly, despite the trial court's proviso. The trial court stated "there is not a grounds under these procedural circumstances to just simply allow the filing of an amended complaint that brings forth a whole new cause of action as a basis for reconsideration of the order granting summary judgment. . . ." (Motion to Reconsider Tr. p. 12). Merrill failed to amend his complaint and the trial court was correct in its decision.

CONCLUSION

The trial court should be affirmed in its grant of summary judgment.

DATED this 17 day of April, 2020.


ERIK P. SMITH
Pro Se Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2020, I caused to be served a true and correct copy of the foregoing by the methods indicated below, and addressed to all counsel of record as follows:

| | |
|--|--|
| STEPHEN MERRILL Boardwalk Office Suites 201 Barrow St. Ste. 103 Anchorage, AK 99501 attymerrill@anchorage lawyer.us | <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> FACSIMILE <input checked="" type="checkbox"/> ELECTRONIC MAIL |
|--|--|

The undersigned does hereby certify that the electronic brief is in compliance with all the requirements set out in I.A.R. 34.1, and that an electronic copy was served on the court and each party at the following email addresses:

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