IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

MIDLAND FUNDING, LLC,

Plaintiff/Respondent,

vs.

BARRY STIMPSON

Defendant/Appellant

CV-14-830-C

MEMORANDUM DECISION

This matter is before the court on appeal from a judgment for the plaintiff Midland Funding entered upon the court's ruling upon cross motions for summary judgment. The appellant, Barry Stimpson, was the defendant in the court below and appears by counsel, Ryan A. Ballard, Rexburg. The respondent, Midland Funding, LLC, was the plaintiff in the court below, and appears by counsel, Sean Beck, of Johnson Mark, Meridian.

For reasons stated, the judgment in favor of the plaintiff is vacated. The case is remanded with directions to deny the motion for summary judgment filed by the plaintiff, to grant the motion fixing the statute of limitation as four years under Idaho Code §5-216,

to reconsider the motion for summary judgment filed by the defendant, and to determine and award costs and attorney fees to the defendant as directed herein.

Facts and Procedural History

In overview, in February of 2010, Midland Funding bought in bulk a large number of credit card accounts that had been written off by the card issuer, Capital One Bank. Midland Funding pays cents on the dollar for these charged off accounts, then works them again, usually more aggressively than the issuing banks, to salvage what it can. In this case, it claims that a credit card account of the defendant was included in the acquisition, that Midland had acquired all of Capital One Bank's interest in this account, had the right to pursue suit against debtors identified in the accounts acquired, including this defendant, and that this defendant was liable to it for the balance due on the account. The complaint was filed by Midland Funding against Stimpson on January 27, 2014.

Stimpson filed an answer generally denying all allegations except personal jurisdiction, and advancing a number of defenses including the defense that the named plaintiff had no standing to sue and that any claim was barred by the statute of limitations. After some discovery, cross motions for summary judgment were filed.

Defendant Stimpson observed in his motion that according to the records submitted by the plaintiff, the last transaction posted to the account standing in Stimpson's name occurred more than four years prior to the filing of suit, and thus suit was barred by the applicable four year statute of limitation. Stimpson further claims that the proof submitted by Midland was insufficient to establish its case on the merits. Stimpson contends that the affidavits and documents submitted in support of Midland's motion are not admissible, and therefore it has failed to prove its case.

Midland claims that the debt is based upon an agreement in writing, and therefore the applicable statute of limitations is five years, not four. Suit was filed within five years of the last posting, and is therefore timely.

The trial court concluded that the applicable statute of limitations was five years under Idaho Code § 5-216, rather than the four year statute in I.C. § 5-217, and denied Stimpson's motion on the statute of limitations issue.

The trial court further concluded that all of the affidavits supplied by the plaintiff were admissible, that the affiants were competent to testify, that a sufficient foundation was contained in the affidavits for the documents under Idaho Rule of Evidence 803(6) or 803(24), and that the combination of affidavits and documents was sufficient to establish plaintiff's case. Since there was no argument on the merits submitted in opposition to the claim, he granted summary judgment to the plaintiff.

This appeal followed.

Analysis

The entirety of Midland's case as argued to the court below was contained in three affidavits submitted with its summary judgment briefing, together with certain documents attached to the affidavits. The affidavits were not separately filed; they were attached to the brief, and the brief was filed.

Exhibit 1 was the affidavit of Stephanie Urbani, introduced as "an employee" of Capital One Services. No documents were attached to the Urbani affidavit.

Exhibit 2 was the affidavit of Lily Haas, introduced as "an officer" of Midland Funding. Documents attached to the Haas affidavit consisted of a one page document purporting to be a summary of the Capital One credit card account standing in Stimpson's

name, approximately one year's worth of copies of the monthly statements that plaintiff claimed would have been sent to defendant's address, and a copy of the cardholder agreement. Haas represented in her affidavit that these documents were all prepared from the records of Capital One Bank that Midland received when it purchased the accounts. Exhibit 3 was the affidavit of Jonathan Stalls, introduced as "a managing vice president" of Capital One Bank. One document was attached to the affidavit of Jonathan Stalls: a copy of the bill of sale of accounts, presumably from the documentation of the sale of accounts from the bank to Midland.

The problem with these three affidavits and the documents attached to them is that essential evidentiary underpinnings are completely lacking. As is discussed below, there is not sufficient demonstration of the competency of the affiants to testify, there is not sufficient foundation for the documentary evidence, and there is no evidence of the necessary linkage between the bulk account sale and the individual account of this defendant.

In the Stalls Affidavit – the only one offered from an employee of Capital One Bank—Stoll tersely states that his bank sold a "pool of accounts" to Midland Funding on February 16, 2010. Stalls states that the transaction was accomplished by the transfer of electronic files containing the individual accounts. The files of the bank were transferred to the buyer (Midland Funding) as part of the transaction. He attached a copy of the bill of sale, which identified the transaction to be that contained in a specific electronic file identified by a 24 character file label with a 3 character extension. According to this document, the electronic files were conveyed in the bill of sale "without recourse or

representation except as expressly provided herein." There were no representations or warranties provided in the bill of sale that was attached.

The other document of sale, apparently being a Forward Flow Receivable Sale Agreement dated December 16, 2009, is referred to in the bill of sale, but was not supplied to the court either with the Stalls affidavit or elsewhere.

The Stalls affidavit may be competent to identify the bill of sale, since Stalls signed it and therefore could testify from personal knowledge. (I think better practice is for the affidavit to affirmatively state that he is the same individual who signed the document. I further think that attached documents should be referenced in the affidavit, if nothing more than identifying the fact that such are attached. However, I do not criticize these failures here, for none would be significant enough to overturn the decision of the trial court in accepting them.)

If I take Stalls' testimony as given, and accept reasonable inferences from it, I could conclude that there is admissible evidence that some sort of bulk sale of accounts did occur in 2010 between Capital One Bank and Midland Funding. I think this is as far as it can go in evidentiary value to this case.

The Stalls affidavit says that as managing vice president of the bank, he is a custodian of the books and records that were transferred to Midland. Presumably this was an attempt to start a foundation for these records under the business records exception to the hearsay rule, which is codified at Idaho Rule of Evidence 803(6). Even so, it is obvious from the nature of the transaction in question that the electronic transfer was not a transaction occurring in the ordinary course of business, nor would the electronic files transferred qualify as business records maintained in the usual course of business. Rather,

this was a transaction out of the ordinary course of business where files and accounts were culled, separated, reorganized and restructured into the separate electronic file, and then sold in bulk to the new entity. Nothing about this transaction could be said to be part of the routine business of either the bank or of Midland.

The electronic file had to be a specially constructed file of those delinquent accounts that were to be sold, prepared just for the purpose of the sale to Midland. There is no evidence how it was created, whether by manual selection or by some sort of sweep of the bank's active accounts. There is no evidence of the algorithms or criteria used for account selection, nor any explanation of error traps, any audits for accuracy, or any other information helpful if not essential to establish the reliability and creditability of the new file. This file would be the antithesis of a record of routine business activity maintained in the ordinary course. If this file was to be used in evidence, substantially more foundational information would have to be provided, probably by an expert witness with substantially more background knowledge than demonstrated by the Stalls affidavit.

Since it appears that Stalls was personally involved with the transaction and has personal knowledge of it, I would accept that he is a competent witness to testify that the bulk sale transaction occurred, and that the bill of sale is the record of it. He would be competent to testify from personal knowledge that the electronic file was the mechanism used to transfer the accounts from the bank to Midland.

On the other hand, he is not competent, on the foundation provided, to testify that this file was accurate, or complete, or reliable for later use by Midland in managing collection efforts. Any assumption that any of these elements could be within the reach of the Stalls affidavit is erroneous.

With respect to the Haas affidavit and the documents that were attached to it, it appears that the electronic file identified in the Stalls affidavit constituted what Haas referred to as the business records of Capital One. As noted above, these were not routine business records of Capital One, maintained in the ordinary course of business. Haas has no personal knowledge of how the source data for these files was created or maintained by the bank, prior to the transfer of the electronic file to Midland.

To further complicate this, Haas avers that Midland Funding does not own or operate a computer or computer system to handle computer files like that generated by Capital One, but contracts with its affiliate, Midland Credit Management, Inc., to do so. Haas states: "MCM holds the computer records and account information for accounts purchased by Plaintiff."

Haas states that she is a "Legal Specialist employed by MCM," and explains that she is trained in the use of MCM computer equipment, and knows how it acquires data from the bank records that have been transferred to it. She avers that it was the ordinary business for MCM to maintain these records for Midland, and to create the documents. I think this could be considered minimally sufficient to qualify the records activities of MCM, and perhaps even MCM on behalf of Midland. I am troubled here, because the only witness to Haas's authority to act is Haas – presumably in her capacity as an officer. In effect, Haas as an officer of Midland is testifying that Midland by Haas has authorized MCM, acting through Haas as its legal specialist, to prepare the identified documents. Better practice would be to require at least two people to establish the qualifications of one to act for the other, rather than permitting the same person to both authorize the action and also to carry it out. When two entities are involved, it might take at least four

witnesses – two from each entity, one qualifying the actions of the other – to properly lay the foundation for the admission of business record documents and data. It is truly a false economy to attempt to telescope all of these evidentiary steps into a single witness.

However, the defect here is much deeper. Although the records were maintained for a time by MCM for Midland, the information relevant to this case is information or data that was placed into the records while they belonged to the bank, not while they were being maintained by MCM. The relevant data is the existence of the separate account for Stimpson, the identifiers of that account, the transaction history of that individual account while it was active, and the balance due upon its transfer to Midland. None of this data was created or sourced into the computer records while they were maintained by MCM or Midland; all of it would have been created or sourced by the bank.

Haas may be qualified to explain what MCM did, or Midland, with respect to its own records or data created during its time, but she cannot establish a foundation for the bank data – she has no personal knowledge, she was not a custodian of the bank's records while they were with the bank, and the records in Midland's hands do not qualify as business records. Because the electronic file transferred to Midland from the deal did not come to Midland as an ordinary business record of the bank, it cannot be said that the data in this file became routine business records of the Midland or of MCM, maintained in the ordinary course. Therefore, the documents created by Haas from the Midland Funding's copy of the electronic file for transfer of accounts could not be a said to be routine records maintained in the ordinary course of Midlands business. Haas was incompetent as a witness to identify the source document, the monthly statements or the

cardholder agreement. Without a witness from the bank with knowledge and probably an expert to walk the court through the steps of culling the necessary data pertaining to the accounts to be transferred from the regular business records of the bank, then getting the data into particular computer files for transfer from one system to another, and finally in actually getting them transferred and up and running with Midland – the files on the individual accounts, and therefore the documents extracted from them are not admissible.

Finally, the affidavit of Urbani is worthless. She avers that she is an employee of Capital One Services, not Capital One Bank. This means she is not an employee of the bank or of Midland, and therefore has no cognizable standing as either a custodian or qualified person to establish the nature of file data as a business entity, without first actually establishing an adequate foundation of the witness as a person with actual knowledge, or as an expert with specialized knowledge, relevant and material to the issue of the qualification of records. Here, there is no explanation of what her job is or was, who she reports to, what her duties are or were, or how she obtained any of the knowledge to which she testifies.

Urbani states that her affidavit is based upon the books and records of the seller, which are maintained in the ordinary course of business. However, she was the employee of a service agency; she was not an employee of the seller. The affidavit is dated and notarized in March of 2014, whereas it is averred that the bank records were sold or transferred in February of 2010. There is no attempt to explain the hiatus.

If Urbani is testifying that the Stimpson records of which she speaks were, to her personal knowledge, extracted from the bank's records before the records were culled for the transfer, and if Urbani could be qualified as a custodian of those records, that might

suffice. Nonetheless, as noted, the only records anyone seemed to have access to when the litigation affidavits were prepared were the transfer files referred to in Stalls' affidavit, which are not records of regularly conducted business activity kept in the ordinary course, but were the special culled records created for the purpose of effecting a sale of the accounts. Urbani's statement that they are business records is wrong. If she knew the legal elements, the statement is false. Her statements about Stimpson, his address and the balance due are hearsay. No exception seems to apply, so the whole works should have been held inadmissible.

The court below found that the affidavits and attachments were adequate to meet the business records rule of I.R.E. 803(6). For the reasons set forth above, the magistrate is in error. The foundation requirements of I.R.E. 803(6) are detailed and specific. The record in question has to pertain to a regularly conducted business activity; it has to have been created at or close to the time of the act; and finally all the steps and the documents have to be introduced to the court and jury by witnesses qualified as custodians of these records or the equivalent. Under the rule, this means the crucial evidence has to be qualified by a custodian of the records or other qualified witness.

The original credit card account records for the individual accounts, maintained by the bank or by the service company on behalf of the bank, would probably fit the I.R.E. 803(6) requirements while the account was active and before the sale of the accounts to Midland, so long as a proper custodian or qualified person was advanced to provide the foundation. Be that as it may, once these original business records were disturbed, tossed into the computer to be culled, reorganized, restructured and restated, they lost the two critical elements of the business record hearsay exemption – the

resulting special file for transfer no longer pertained to a regularly conducted activity of a business, and the source entries made to create these individual accounts within the transfer files were not made by persons with knowledge at the time of the acts in question. With respect to the individual accounts, the bulk transfer file no longer contains only data pertaining to the individual transactions sourced at the time by persons with knowledge.

The upshot is that the affidavits are not competent to establish a foundation for the admission of any of the documents, and without the documents, any testimony concerning what the documents contain becomes hearsay. The plaintiff's case collapses entirely.

If the two entities – the bank and Midland – are still on speaking terms, the errors are probably fixable. A proper witness who was an employee of the bank at the time, meaning prior to the transfer of accounts in 2010, can probably be found to replace or buttress the testimony of Urbani and establish that at the time of the transfer, and before the preparation of the transfer files, the defendant existed in the routine files as a delinquent customer, etc., and to connect those records of the individual accounts with the transfer records referred by Stalls. Then someone, perhaps even Haas, can be found to connect the records being used by Midland and MCM with the transfer files identified by Stalls as the accounts being purchased. It may take nothing more than matching the numbers on the data records with the file number on the bill of sale. Finally, surely a witness or two can be found to explain Haas's roll and authority to better qualify her as a technical witness with knowledge. The task is akin to establishing chain of custody in any evidence situation where the reliability today depends upon how the evidence was

created and maintained. It simply requires that every link in the chain be established by competent evidence, usually a witness with knowledge.

Although these defects are fixable, this does not make the errors subject to waiver at the discretion of the trial judge. The court observed that although the dots were not connected with actual evidence, it was "certainly more than just coincidence" that Midland wound up with an account in the defendant's name, and with possession of his address, social security number, and credit card number. It is also noted that the trial judge misread the occupation of Urbani as being an employee of the bank, rather than the independent service agency. The magistrate observed that the balance due from defendant according to "the books and record of the seller (Capital One) at the time of the assignment of the account to Midland [was] $1,952.05 on February 10, 2010." The problem here is that there is no evidence of what the books and records of the bank were before the transfer on February 10. The only testimony pertained to what the record transferred to Midland showed after the transfer, and as fully discussed above; there is not sufficient foundation for consideration of this record.

It does not make these missing elements trivial to observe that at the end, it all looked on the up and up with monthly statements, the pro forma summary of file, and the figures that seemed to connect, and the fact that the defendant lived where the record said he lived, and did have an account, and probably used it. These documents are not self authenticating, and the fact that they appear to show what was expected of them is irrelevant.

The self authenticating provisions of I.R.E. 902(11) do not help here because the activity the master exhibit appears to document is the bulk transfer of accounts and the

creation of the special transfer file of the delinquent accounts being sold by the bank to Midland. The rule applies to records of regularly conducted activities within the scope of Rule 803(6); the bulk transfer of accounts does not appear to be such. In any event, the Stalls affidavit would only qualify as a Rule 902(11) certificate to the record as evidence of the bulk transfer. It does not serve to qualify every element of the transfer, such as the details of the specific account alleged to be due from Stimpson. Stalls had no specific knowledge of the files or how they were maintained, and made no representations of anything further in his affidavit. The master document of sale does not appear to warrant or represent that such exists, the bill of sale is silent on the issue of the accuracy of the file of accounts transferred, and certainly the Stalls affidavit does not reach this issue. Just because the electronic file may be admissible under Rule 902(11) for one purpose – as evidence of the bulk transfer – does not make it admissible for all purposes – here the accuracy of an individual account, dependent upon the accuracy of the bank records from which such data was drawn. This is where the foundation breaks down. It is where the foundation is essential to make the record admissible.

Finally, the catch-all of I.R.E. 803(24) is not applicable. This rule is to apply when the item of evidence is not covered by another rule. Here, the evidence is squarely within the ambit of Rule 803(6), and the errors noted in the foundation are relatively straight forward to repair. More specifically, what is missing from the foundation is the testimony of witnesses with actual knowledge or the equivalent of the source of data, and the maintenance of the data by the bank in the ordinary course. Witnesses with the specific knowledge, or IT experts familiar with the bank's computer system and the methods of producing special reports on request should exist. If plaintiffs now want to

argue that evidence cannot be found to repair the defects in the foundation to make the actual evidence of the accounts admissible, flags should go up on whether even deeper problems exist with the evidence. While there is no reason to be suspicious yet, there is no reason to believe or assume that the data under examination has any collateral or circumstantial guarantee of trustworthiness which should be recognized and evaluated by the court as being sufficient to replace the testimony of a qualified expert or a witness with actual knowledge.

There simply is no basis to conclude that justice favors the admission of this evidence in the absence of appropriate foundation by witnesses with knowledge, or the testimony of an appropriate expert to explain why and how the evidence may be considered trustworthy, etc. It may appear to be a slim chance that this record has been corrupted or tampered with in this particular instance, but the slim chance is more than sufficient to completely swallow the amount alleged due.

The catch-all exemption of I.R.E. 803(24) is intended only to provide an avenue for consideration of evidence that does not fit within any other exception. It is not intended to be available as an alternative route to admission when a specific hearsay rule applies but counsel have failed to fashion the evidence to meet the specific requirements for admission of the evidence. If anything, if I.R.E. 803(24) is to be applied, the requirements for the exception should be more strictly applied under the catch-all. Before allowing evidence with substandard foundation under traditional rules, the court should ensure that all witnesses and other evidence available have been examined for their knowledge on point. This case does not offer a situation for the catch-all.

The errors are material, and affect the entirety of plaintiff's case. Without the affidavits and exhibits, there is no evidence to support plaintiff's contention that it has standing to sue, or that it should prevail on the merits. The order granting summary judgment is reversed. The judgment entered is vacated.

The motion for summary judgment was an interlocutory motion, and the defects noted are repairable. If the case survives re-examination of the statute of limitations issue, discussed next below, an opportunity should be offered to plaintiff to repair the foundation defects in the summary judgment materials, and the motion could be re-argued. If the repairs are not forthcoming, the court should grant the defense motion and dismiss the case.

Statute of Limitations

Jurisdictions are split as to whether to treat a credit card debt as a written or oral contract for purposes of determining the applicable statute of limitation. A minority of states hold that it depends upon whether the credit card application, agreement or the receipts are signed by the cardholder. *Fulk v. LVNV Funding LLC*, No. CIV.A. 5:14-125-DCR, 2014 WL 5364807, at 3 (E.D. Ky. Oct. 21, 2014); *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC,* 702 F.Supp.2d 826, 839 (N.D.Ohio 2010UI., 538 F. Supp. 2d 1165, 1174 (D. Neb. 2008)

Other jurisdictions hold that it is a debt pursuant to a written contract. *In re Tran*, 351 B.R. 440, 445 (Bankr. S.D. Tex. 2006) aff'd, 369 B.R. 312 (S.D. Tex. 2007). In some cases, the reasoning is that the written cardholder agreement encompasses all of the terms of the contract, and that use of the credit card makes that written agreement binding regardless of whether the cardholder signed any agreement, or that circumstances did not

result in an open account. *In re Brown*, 403 B.R. 1, 4 (Bankr. E.D. Ark. 2009); *Hill v. Am. Exp.*, 289 Ga. App. 576, 577, 657 S.E.2d 547, 548 (2008). Given the nature of credit card agreements between a bank and a cardholder, and the clear definition of an open account, the reasoning in these cases is either poorly reasoned or just plain wrong.

The better reasoned view of a substantial number of cases is to treat credit card agreements as contracts not in writing. These cases do so either because such agreements typically do not contain on their face all the essential terms necessary to constitute a written contract, or because they find that mere use of the credit card without a written expression of the cardholder's acceptance of the terms of the contract is insufficient to establish a written contract. See *Conway v. Portfolio Recovery Associates, LLC*, No. CIV. 13-07-GFVT, 2014 WL 1331370 (E.D. Ky. Mar. 31, 2014)(internal citations omitted); *Capital One Bank v. Creed*, 220 S.W.3d 874, 878 (Mo. Ct. App. 2007).

An additional reason for treating such debts as oral contracts is that a credit card obligation is, in fact, an open account. *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1158-60 (Ind. Ct. App. 2010); *Portfolio Acquisitions, LLC v. Feltman,* 391 Ill.App.3d 642, 330 Ill.Dec. 854, 909 N.E.2d 876, 881 (2009); *see also Falmouth & Lewisville Turnpike Co. v. Shawhan,* 107 Ind. 47, 48, 5 N.E. 408, 409 (1886) (holding that statute of limitations governing unwritten contract applies where contract is partially in writing and partially based on parol evidence).see also *Capital One Bank (USA), N.A. v. Conti*, 345 S.W.3d 490, 491-92 (Tex. App. 2011).

Black's Law Dictionary defines an open account as an unpaid or unsettled account, or an account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either party finds it convenient to settle and close,

at which time there is a single liability. This clearly encompasses a credit card account. As the Court *in Smither v. Asset Acceptance, LLC,* supra, stated:

> [C]redit card accounts would appear to closely resemble the common law definition of an "open account."
>
> > An "open account" is an account with a balance which has not been ascertained and is kept open in anticipation of future transactions. An open account results where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits. This single liability is fixed at the time of settlement, or following the last entry in the account, and such liability must be mutually agreed upon between the parties, or impliedly imposed upon them by law. *Thus, an open account is similar to a line of credit.*
> >
> > **Observation:** Openness of an account, for purposes of an action on an open account, is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined.
> >
> > The continuity of an account is broken where there has been a change in the relationship between the parties, or where the account has been allowed to become dormant.
>
> This definition encompasses credit card agreements: the precise amount of indebtedness that a customer may incur is unknown and fluctuating and the account is kept open in anticipation of future transactions, unless one of the parties decides to close it.

Smither v. Asset Acceptance, LLC, 919 N.E.2d 1153, 1158-60 (Ind. Ct. App. 2010)(internal citations omitted).

I conclude that the better reasoned view prevails, and that credit card debts in Idaho are treated as open accounts and are thus subject to the four year statute of limitation. The magistrate below concluded that the debt was due under written agreement, meaning the statute of limitations was five years. For the reasons set forth

above, I believe this to be error. The account may have been set up under a written application, but no obligation exists until the account is used in commerce. Then, the bank advances money to merchants upon the debtor's order; the bank renders periodic statements to the debtor; and the debtor remits payment against the balances reflected in the statements. The account is operated as an open account. There is no specific written agreement from defendant to the credit card issuer pertaining to repayment of any specific amount upon the rendition of monthly statement; the bank calculates a minimum payment and the holder may remit whatever he wishes at or above the minimum and up to the balance of the account. I conclude this to be squarely within the definition of an open account, upon which I.C. § 5-217 applies.

I do not think I.C. § 5-216 applies. This section provides that an action upon any obligation or liability founded upon an instrument in writing is subject to a five year statute of limitation. The instrument in writing here needs to be the agreement to repay the specific amount. Here that amounts to be paid are contained in statements provided to the debtor from time to time, but no specific signed agreement to repay is generated. As such, the credit card account maintained by Capital One prior to the assignment of accounts to Midland was an open account, and subject to the four year statute of limitations for oral contracts.

The magistrate's ruling that the statute of limitations on this cause of action was five years is reversed. The case is remanded with directions to apply a four year statute of limitation under I.C. §5-217. On remand, the court should consider whether any exceptions or extensions to the four year statute exist, and if none are found or are found insufficient, the case should be dismissed.

Attorney Fees

Plaintiff was not the prevailing party in the court below, and any order or award of attorney fees and costs to the plaintiff is vacated. If the defendant ultimately prevails, either on its motion for summary judgment or on its motion pertaining to the statute of limitations, the court should consider defendant's application for fees and costs in advancing and defending the plaintiff's cross motions for summary judgment and the motion on the state if limitations. Defendant should be deemed the prevailing party on these motions the first time around, and is entitled to his attorney fees and costs for advancing his motion and defending against the crossing motion in the court below.

Further, defendant is entitled to his fees and costs incurred in connection with prosecuting this appeal. On remand, I direct that the magistrate hear and determine any application for costs and attorney fees that might be advanced in a timely fashion for defendants costs and fees incurred in prosecution this appeal through the district court level, and take such into account in the final disposition of the case..

Conclusion

For reasons given, it is hereby ordered as follows:

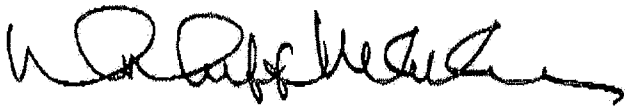
1. The judgment heretofore entered is vacated.
2. The order granting summary judgment to the plaintiff is reversed;
3. The order holding that the statute of limitations is I.C. § 5-216 is reversed;
4. The case is remanded with directions to allow plaintiff the opportunity to correct the defects noted in the evidence foundation, and then to reconsider the motions of both parties in the light of the court's ruling here;
5. The order granting attorney fees to the plaintiff is reversed.

6. The award of attorney fees and costs against the defendants and in favor of the plaintiff by eh court below is vacated;

7. The defendant is the prevailing party to this appeal, and is awarded his costs and attorney fees in prosecuting this appeal through the district court level. I remand the matter for the purpose of (1) determining the amount of fees and costs to which defendant is entitled for prosecuting the post judgment motions; (2) determining the amount of fees and costs to award counsel on appeal; and (3) determining the entitlement to costs and fees upon the re-argument of issues before the lower court, if any.

It is so ordered.

Dated this 5 day of December, 2014.



Sr. Judge D. Duff McKee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was forwarded to the following persons on this _____ day of December, 2014:

DEC 15 2014

Ryan Ballard
Ballard Law, PLLC
PO Box 38
Rexburg, ID 83440

Sean Beck
Stacy L. Wallace
Johnson Mark LLC
3023 E. Copper Point Drive; Ste. 102
Meridian, ID 83642

Theresa Randall
Appeals Clerk
Canyon County Courthouse

T WATKINS

Deputy Clerk