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State of Minnesota

In Court of Appeals

Margaret A. Brickner, Margaret A. Brickner
as Trustee of the Thomas E. Brickner
Credit Trust, and Braam Investment, Inc.,

Respondents,

v.

One Land Development Company,

Defendant (A06-1940)
Appellant (A06-1957)

and

John Andrew Duckwall,

Appellant (A06-1940)
Defendant (A06-1957)

REPLY BRIEF OF APPELLANT JOHN ANDREW DUCKWALL

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ARGUMENT

Counsel for John Andrew Duckwall respond to Appellees' Brief.

I: Plaintiffs failed to offer the necessary proof as to special damages in their slander of title case against John Andrew Duckwall.

There is an unsettling diffidence on the part of plaintiffs–respondents as to John Andrew Duckwall's argument in his initial brief that plaintiffs rested without offering any evidence as to their special damages in the form of attorneys fees, an essential element in their slander of title case. It is too late for this Court of Appeals to set this omission on the part of plaintiffs–respondents right: All elements of a slander of title case must be offered during a party's own case–in–chief to establish the party's prima facie case. Without having offered any such testimony, Respondents' Counsel himself states, "Your Honor, [plaintiffs] conditionally rest." Tr. 5/12/05, Vol. 3, p. 4. The expression "conditionally rest" is not used in a single reported decision in Minnesota. Given that there is no common understanding of this phrase, one must assume that Plaintiffs rested and the result which follows is that plaintiffs–respondents failed to completely establish their slander of title case.

A fair reading of the citation to the record made by Respondents' Counsel Kletscher to support his assertion that the trial as to special damages had been bifurcated, Tr. 4/25/05, pp. 7–8, does not indicate that Counsel for John Andrew Duckwall agreed to any bifurcation of trial on the issue of slander of title nor is there any mention of special damages. The cited discussion between Respondents' Counsel and Kevin Giebel,

Counsel for One Land Development Company, specifically relates to contractual damages under the Asset and Real Property Purchase Agreement, not the special damages one must establish in a slander of title case. Respondents Counsel's citation to the trial transcript is patently false since Respondents' Counsel himself states, "Your Honor, my understanding of the way the procedural rules work under *seeking attorney's fees under contract* is after the trial is completed, you file a motion for attorney's fees, and that's what I was suggesting to [Mr. Giebel]." *Id.* (Emphasis added.).

The trial court's determination that John Andrew Duckwall slandered title to the property held by the Brickner–Braam family must be reversed as a matter of law and of proof.

II: One Land Development and Thomas Gambucci paid all necessary initial payments.

The re–parsing of the Asset and Real Property Purchase Agreement by Counsel for plaintiffs raises a sham issue. Certain items related as "facts" by plaintiffs are related in error or in utter derogation of plaintiffs' own trial testimony.

The purchase price in the Asset and Real Property Purchase Agreement includes $125,000 for equipment, $500,000 for real property and fixtures, and another $125,000 for good will, Exhibit 24, App. 63. Asset and Real Property Purchase Agreement, Article IV, 4.1. These payments total $750,000.

The earnest money (which is applicable to the purchase price per the Purchase Agreement, Article V, ¶ 5.1), is to be paid in two parts: $15,000 is to be paid at the time

of signing the Purchase Agreement, Article IV, ¶ 4.2 (a), and another $20,000 in earnest money if One Land Development Company either obtains approval for "its intended use of the Real Property by the City of Fridley" or "waive[s] such approval [by the City of Fridley]," Article IV, ¶ 4.2(b). There is no other mention in the Asset and Real Property Purchase Agreement of any other $20,000 payment, Trial Exhibit 24. Payment of the $20,000 in itself waives the City's approval; moreover, the Braams were provided with a waiver of the rights of One Land Development by Thomas Gambucci at the same time that the $20,000 was paid. Thomas Gambucci expressly mentions the extension

—Thomas Gambucci paid both amounts for One Land Development Company as required earnest money, first, the down payment of $15,000 at the signing of this purchase agreement and $20,000 at an extension. Ms. Braam acknowledges receipt of this $20,000, Tr. 4/25/05, P.M., p. 93. The $20,000 check drawn on the One Land Development Company account at Wells Fargo Bank Minnesota is payable to Margaret Brickner and the check memo line reads, "Ext. approval period," Trial Exhibit 18, App. 51.

Margaret Brickner admits that the $20,000 earnest money identified in Paragraph 4.2 of the Asset and Real Property Purchase Agreement was in fact paid by Mr. Gambucci and One Land Development Company. Tr. 4/27/05, p. 226. Ms. Brickner admits receiving the $20,000 for the extension. Attorney Kevin Giebel impeached Margaret Brickner from her deposition transcript where she said "Yes," to the question of

payment of additional earnest money and then changes her affirmative answer to a negative for purposes of clarification, Tr. 4/26/05, p. 199.[1]

One is baffled at the absence of any assertion in the Notice of Cancellation that $20,000 in earnest money had not been paid; one recalls that the same law firm which now advocates the respondents' position did not include this assertion in the Notice of Cancellation. Would not one identify the failure to pay earnest money as an additional default to be added to "failure to close"? Would one not include the failure to pay earnest money as an allegation in a Complaint? Such an allegation is absent entirely. See plaintiff's own Complaint in this matter, App. 1–9. The allegation is also entirely absent from the whole trial transcript. This particular argument that One Land Development Company and Thomas Gambucci failed to pay $20,000 under the Asset and Real Property Purchase Agreement raised for the first time in this Appeal is duplicitous.[2]

III: Not only may John Andrew Duckwall claim an interest in the property at issue in this litigation in his own right, through his assignments, but Duckwall may also claim an interest in the property through One Land Development Company's interest in the property.

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[1] Jesus proposes that one's "Yes" be "Yes," and one's "No" be "No," but apparently the metaphysical application of "clarification" allows "Yes" to be transformed into "No." One assumes the converse is also possible.

[2] John Andrew Duckwall and his Counsel adopt the argument offered by Kevin Giebel in Giebel's Reply Brief as part of their own argument. Comment regarding virtually every issue raised in the Reply Brief by Kevin Giebel, counsel for Thomas Gambucci, had been raised by Duckwall and his Counsel within the initial appellate brief of John Andrew Duckwall.

The brief offered by respondents turns entirely on the cancellation and the "record." If the purported cancellation is set aside as is here requested by Appellants John Andrew Duckwall and One Land Development Company, it is clear that Appellants have already established that Sellers, through the admissions of their own attorneys and witnesses, have breached the Purchase Agreement as a matter of law and as a matter of fact.

Respondent's Brief flatly ignores the position taken by both John Andrew Duckwall and One Land Development Company that the sellers could not arbitrarily invoke Minnesota Statutes § 559.21, without One Land or Duckwall being in breach under the terms of the Purchase Agreement. Paragraph 9.1 of the Purchase Agreement provides, "If Buyer defaults in the performance of this Agreement, Seller may cancel this Agreement upon thirty (30) days notice given pursuant to Minnesota Statutes Section 559.21, . . ." Trial Exhibit. 24, App. 68. By operation of this contractually–agreed–to provision in the Purchase Agreement, the parties modified the cancellation statute to expressly define when, and under what conditions, cancellation proceedings might be initiated. *See Raymond v. McKenzie*, 220 Minn. 234, 237, 19 N.W.2d 423, 424-25 (Minn. 1945) ("It is entirely competent for the parties to a contract to provide for the discharge or annulment thereof, either by subsequent agreement or by incorporating provisions or conditions to that end in the original agreement, and they may fix and limit the rights and liability of each in the event of a failure of performance, and the courts will enforce

contracts in this particular precisely as in other respects, and in accordance with the rights of the parties as they are thus fixed and limited.")

Plaintiffs–respondents argue that One Land Development Company had breached because it "failed to close." However, Sellers fail to notice the fact that One Land was still in the process of receiving "corrected" title commitments in November, 2002.[3] Tr. 4/26/05, p. 84. According to the definition of "Title Evidence" provided in the Purchase Agreement, these title commitments must be certified to date and include proper certification for searches covering bankruptcies, state and federal tax liens, judgments, unpaid taxes, assessments and pending assessments. Under the terms of the Purchase Agreement, One Land had twenty days after receiving this last evidence of title to object to the marketability of the title. Trial Exhibit 24, App. 68.

The trial court's conclusion that the earlier title commitment, in fact, the very first title commitment, constituted the"last of such Title Evidence" ignores the express language of the Agreement and the evidence presented at trial. Jeffrey Johnson, attorney for the Sellers, testified that the August 19, 2002, title commitment was the last such evidence of title under the Purchase Agreement. Tr. 4/27/05, p. 317. However, this biased, self–serving testimony on behalf of his clients is controverted by the testimony of

[3] This is in addition to the fact that Respondents failed to disclose the easements on the property.

Respondents' own witness, Donald Tonseth.[4] Title Examiner Tonseth requested an additional abstract which had not previously been provided—Tonseth specifically stated to Cynthia Braam, " I will review the abstract for Lot 3 & make any changes as necessary." App. 94, Trial Exhibit 30. Cynthia Braam received this request *after October 11, 2002.* Tr. 4/26/05, pp. 10–11. Discussion of prospective changes to the title commitment belies the notion that the August 19, 2002, title commitment is the "last" evidence of title. According to Black's Law Dictionary, the adjective "last" is defined as "Latest; ultimate; final; most recent." Black's Law Dictionary 882 (6th ed. 1990). The rhetorical question is "How is Gambucci supposed to review a title commitment when Title Examiner Tonseth has not even finished reviewing the abstract he requested?" It is unreasonable to expect that a title commitment should be construed as the "last" title evidence by the Court in light of the fact that the examiner is still reviewing abstracts.

Johnson misreads, as he must, Paragraph 3.2 of the Purchase Agreement. According to Johnson, the first title commitment is last evidence of title. Tr. 4/27/05, p. 317. However, this is not how the paragraph is written. First, Paragraph 3.2 defines "Title Evidence" as "a Commitment for the issuance of an ALTA owner's policy of title insurance . . . certified to date and to include proper certifications for searches covering bankruptcies, state and federal tax liens, judgment, unpaid taxes, assessments and pending

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[4] Mr. Johnson continued to represent the Respondents even at the time of the trial. Tr. Vol. 3, p. 351.

assessments." App. 62, Trial Exhibit 24. Then it goes on to state, "Buyer shall be allowed twenty (20) days after receipt of the last of such Title Evidence for examination and the making of any objections to the marketability of the title, . ." *Id.* Regardless of whether One Land made any written objections, Tonseth himself implicitly expresses the sense that he has not finished with his examination. Tonseth communicated this to Cynthia Braam; and she acknowledged receipt of this communication. Tonseth had been hired by Sellers, the Braams and Ms. Brickner. One ought not demand that One Land Development Company accept as final a title opinion in a preliminary stage.

Not only may Duckwall claim an interest in the property in his own right under the assignment, he may also claim an interest through his agreement with One Land Development Company.

Given the permissive language of the assignment provision in the Purchase Agreement, Duckwall has the right to receive assignments from One Land Development Company. However, even if the assignment provision is read in such a way that Duckwall may not enforce the provision in his own right, he still has the agreement between himself and One Land Development Company to establish his own right to the disputed property. A narrowly restrictive reading of the assignment clause does not void an agreement between One Land Development Company and John Andrew Duckwall. These parties have the right to freely contract between themselves without interference by a third-party, here the Sellers. In other words, Duckwall should be

permitted to claim an interest in the property through One Land Development Company. To do otherwise would sever the agreement running between One Land and Duckwall.

IV: John Andrew Duckwall did not abandon his interest in the property.

Sellers and the trial Court refuse to acknowledge the standard of proof that must be met in order to establish that rights under a contract has been abandoned. As stated in John Andrew Duckwall's initial brief, abandonment must be proved by clear and convincing evidence. *See, Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co.*, 295 N.W.2d 89, 93 (Minn. 1980). In its determination in the present *Brickner* case, the trial Court never applies this heightened standard or even references it by citation to a case. This is another serious omission on the part of the trial court. *See Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W.2d 655, 659 (Minn. 1987) ("We hold that the trial court committed fundamental error by failing to instruct the jury regarding the "clear and convincing" evidence standard for punitive damages imposed by Minn. Stat. § 549.20, subd. 1."). Counsel for John Andrew Duckwall admit that application of an incorrect standard of proof only requires reversal if the error prejudices the other party. *Kornberg v. Kornberg*, 542 N.W.2d 379, 387 n.3 (Minn. 1996). It is likely that the trial Court used a simple preponderance of the evidence standard to reach its conclusions considering the Court's almost naked analysis on this issue. This obviously prejudiced John Andrew Duckwall.

V: John Andrew Duckwall did not slander title to Sellers' property.

The trial court's conclusion that Duckwall slandered Respondents' title to the subject property should be overturned. Respondent argues that Duckwall's claim to the subject property was false for a number of reasons (some of them are redundant). However, as argued by both Appellants One Land and Duckwall, the cancellation was improper and invalid. If the cancellation was improper and invalid, it is void. One Land and, through One Land's agreement with Duckwall, Duckwall still have a claim in the property. If the cancellation is void, there is no need to enjoin the cancellation.

Also, as argued by One Land and Duckwall, they never abandoned their interest in the property.

Finally, once it is established that the cancellation is invalid; and there was no abandonment, the matter of whether Duckwall was a valid assignee under the Agreement is moot. Under the terms of the Purchase Agreement, One Land has the right to purchase the property and the Sellers would have no claim for slander of title against Duckwall.

In addition, the trial Court's conclusion that John Andrew Duckwall acted with malice should be overturned. John Andrew Duckwall did not act out of spite or to simply cause harm to Sellers. Duckwall wanted to purchase the property. "A rival claimant is conditionally privileged to disparage another's property in land, chattels or intangible things by an assertion of an inconsistent legally protected interest in himself."

Wenner v. Pioske, No. C5-90-89, 1990 Minn. App. LEXIS 885, at *9 (Minn. Ct. App. Sept. 11, 1990) (Add. 1) (citing *Restatement (Second) of Torts,* §647 (1977). *Wenner* goes on to point out that "[s]ection 647 permits the claimant to claim a legally protected interest as long as this claim is honest and in good faith, even though it is ultimately incorrect or unreasonable." *Id.* (citing *Restatement (Second) of Torts* §647, comment b.) However, the Restatement does warn that "[t]he privilege of a rival claimant to property is abused by asserting the claim without an honest belief that there is a substantial chance that the claim is sustainable." *Id.* (citing *Restatement (Second) of Torts* §647, comment e.) (Internal citation omitted.)

In its decision, the trial Court characterized Duckwall's actions as "reckless" and "unreasonable." App. 257. However, the authority cited by the court does not reference "recklessness" or "unreasonableness" with reference to one's actions and it fails to define "good faith." The *Restatement*, as cited by *Wenner*, appears to equate "good faith" with honesty. In addition, *Wenner* notes that individuals are protected even though their claim is ultimately proved to be unreasonable

As argued in John Andrew Duckwall's initial brief, Duckwall cannot be held to a standard of absolute prescience and omniscience. "Guessed wrong" cannot be equated with a finding of malice.[5] Duckwall cannot be held to the standard of a real property

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[5] The trial Court's seeming anger at John Andrew Duckwall in its final decision is completely incongruous with the decision by the Court not to grant summary judgment in favor of Sellers–Respondents. The facts were not altogether obvious notwithstanding

expert. John Andrew Duckwall relied on a number of individuals when he made his claim to the property. He relied upon the information and knowledge of One Land, the advice of his attorney, and his own limited layman's understanding of the law. John Andrew Duckwall made his adverse claim because he understood that he had received an assignment of the rights to the disputed property from One Land Development Company. John Andrew Duckwall understood that he had to act affirmatively to protect his interest in the property.

Under the *Restatement*, Duckwall did not have actually win his case, although he did have to show that a substantial chance existed that his claim was sustainable. The comment uses the words "chance" and "sustainable." These two words should be read together. The comment does not hold that Duckwall must show that his "claim is sustainable." It also does not say that Duckwall must show that "there is a substantial chance he would sustain his claim." Both of these words contemplate the possibility of loss; the possibility that John Andrew Duckwall's opinion might be adjudicated as "wrong" or "mistaken." According to the trial court, Duckwall was wrong. However, John Andrew Duckwall ought not be punished for his efforts to pursue his claim.

CONCLUSION

For all these reasons, this Court of Appeals should reverse the Orders and Judgments of the trial court and direct entry of judgment in favor of John Andrew

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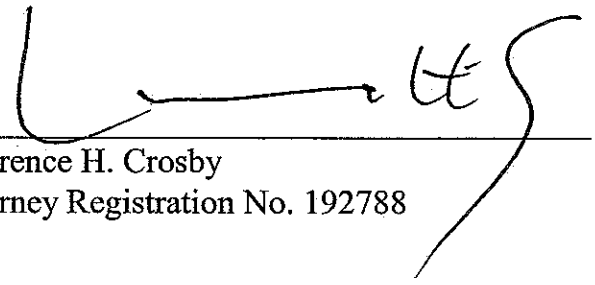
the pointed finger of Respondents' Counsel.

Duckwall and One Land Development on account of the uncured breaches of the Purchase Agreement on the part of Sellers and their failure to prove up a prima facie case.

Respectfully submitted,

Dated at Saint Paul, Minnesota, this 19th day of March, 2007

CROSBY & ASSOCIATES



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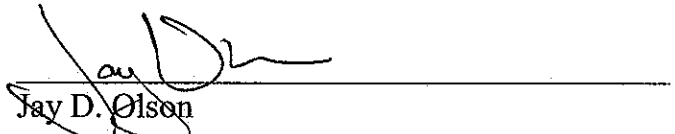

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