IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38105

LEON F. ATKINSON,	)	**2011 Unpublished Opinion No. 652**
	)	
Plaintiff-Appellant,	)	**Filed: October 5, 2011**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
NANCY LAUX and spouse, BRUCE CARDE and SHARON CARDE,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
	)	
Defendants-Respondents.	)	
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. John T. Mitchell, District Judge.

Order dismissing complaint, affirmed.

Leon F. Atkinson, Sandpoint, pro se appellant.

Bruce H. Greene, Sandpoint, for respondents.

MELANSON, Judge

Leon F. Atkinson appeals from the district court's order dismissing his complaint. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In May 2008, Atkinson filed a complaint against Nancy Laux and her spouse and Bruce and Sharon Carde (Respondents). Atkinson alleged that he entered into a water license agreement with the Respondents in which the Respondents agreed to provide Atkinson with water to his property from a well located on adjacent land. Atkinson alleged he was harmed when the Respondents stopped the flow of water from the well to Atkinson's land. Atkinson's complaint requested a temporary restraining order against the Respondents to cease any action which stopped the flow of water from the well to his land. In June 2008, a hearing was held on the complaint and the district court denied Atkinson's request for a temporary restraining order.

Nothing was filed in the case for over six months and, on January 1, 2009, the district court issued a notice of proposed dismissal. No response was filed by either party, and the district court dismissed the case. Subsequently, Atkinson sought an order to set aside the dismissal pursuant to I.R.C.P. 60(b)(1), (3), and (6). On May 26, 2009, the district court granted Atkinson's motion and the case was reinstated. In response, the Respondents moved to dismiss the case pursuant to I.R.C.P. 12(b)(6), arguing that Atkinson's complaint sought a restraining order which had already been denied. Oral argument was held on the Respondents' Rule 12(b)(6) motion on August 11, 2009. Just prior to the hearing, Atkinson filed an amended complaint. At the hearing, the district court found that the Respondents' motion to dismiss was a responsive pleading pursuant to I.R.C.P. 15(a) and, therefore, Atkinson needed to file a motion for leave to amend his complaint before the district court would consider it. After denying Atkinson's motion to amend his complaint, the district court heard argument on the Respondents' motion to dismiss the complaint. The district court granted the Respondents' motion to dismiss, finding Atkinson was only seeking the same temporary restraining order which it had previously denied.

In January 2010, Atkinson filed a motion to set aside the dismissal pursuant to Rule 60(b), alleging the Respondents committed fraud upon the court because the Respondents submitted a document into evidence with a missing page and that the missing page demonstrated one of the Respondents did not have an interest in the well. After a hearing, the district court denied Atkinson's motion to set aside and awarded attorney fees to the Respondents as a sanction pursuant to I.R.C.P 11(a)(1). Subsequently, Atkinson filed a second motion to set aside the dismissal, asking the district court to vacate the order denying Atkinson's previous motion to set aside and vacate the award of attorney fees. After hearing argument, the district court denied Atkinson's second motion to set aside and again imposed sanctions against Atkinson pursuant to Rule 11(a)(1). Atkinson appeals.

II.

ANALYSIS

Atkinson makes several arguments on appeal. Atkinson asserts that the district court lacked subject matter jurisdiction to hear his case, he was denied due process, and the district court erred in imposing sanctions against him. Atkinson also requests attorney fees on appeal.

A. Subject Matter Jurisdiction

Atkinson argues the district court lacked subject matter jurisdiction to hear his case. Specifically, Atkinson argues that the original complaint was not properly served on the Respondents pursuant to I.R.C.P. 4(a)(2) and that, therefore, the district court lacked subject matter jurisdiction and the dismissal of his complaint should be set aside. Atkinson also argues that the district court erred in recognizing the Respondents' attorney as the representative of the Respondents because the attorney did not properly file a notice of appearance in the case and the pleadings and motions filed by the attorney did not adequately notify Atkinson of who the attorney was representing.

Atkinson asserts that, because he did not properly serve the Respondents with the summons and complaint pursuant to I.R.C.P. 4(a)(2), the district court lacked subject matter jurisdiction over the case and therefore lacked authority to dismiss his complaint. Subject matter jurisdiction refers to the power of the court to determine cases over a general type of class of dispute. *City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 455, 247 P.3d 1037, 1042 (2011). The service of a summons confers a trial court with *personal* jurisdiction over a party. *Lohman v. Flynn*, 139 Idaho 312, 318, 78 P.3d 379, 385 (2003). Idaho Rule of Civil Procedure 4(i) provides that the voluntary appearance or service of any pleading by a party constitutes submission to the personal jurisdiction of the court. Thus, the voluntary appearance by a party is equivalent to service of the summons upon that party.[1] In this case, the Respondents voluntarily appeared when their attorney filed a motion and affidavit on June 18, 2008. Therefore, (even assuming improper service affects subject matter jurisdiction) because the Respondents voluntarily appeared, it is immaterial whether Atkinson properly served them with the summons and complaint pursuant to I.R.C.P. 4(a)(2). The district court did not lack subject matter or personal jurisdiction even though Atkinson failed to comply with the service requirements of Rule 4(a)(2).

Atkinson also argues that the district court lacked subject matter jurisdiction because the Respondents' attorney did not properly file a notice of appearance in the case and the pleadings and motions filed by the attorney did not adequately notify Atkinson of who the attorney was representing. Even assuming that opposing counsel's failure to properly file a notice of

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[1] The exceptions listed in I.R.C.P. 4(i)(2) do not apply in this case.

appearance could affect subject matter jurisdiction, we note that it was Atkinson who named the Respondents in his complaint--Nancy Laux and spouse and Bruce and Sharon Carde. During the hearing on Atkinson's motion for a temporary restraining order, the district court inquired of the Respondents' attorney whether he represented all of the Respondents, to which the attorney responded "correct." Atkinson was also present during this colloquy. Therefore, the record demonstrates that Atkinson was given proper notice of who the Respondents were and that the Respondents' attorney was acting on their behalf. The district court had subject matter jurisdiction to dismiss Atkinson's complaint.

B. Procedural Due Process

Atkinson argues that he was denied procedural due process on several occasions throughout his case. First, Atkinson argues that, had he known the June 20, 2009, order denying his motion for a restraining order was not a final disposition in his case, he would have filed his amended complaint sooner and the case would not have been dismissed. The June 20 order stated that the "request for a restraining order is denied" and, because Atkinson did not meet his burden of proof, the "motion is declined." This language indicates that it was the motion for a restraining order which was being denied. It does not indicate that Atkinson's complaint was being dismissed or otherwise indicate it was a final disposition of his case. We also note that, when the district court denied the temporary restraining order, the parties were informed that this ruling did not dismiss the lawsuit.

In addition, a notice of proposed dismissal was issued by the district court informing the parties that the case was subject to dismissal pursuant to I.R.C.P. 40(c). Rule 40(c) states that an action is subject to dismissal if no action has been taken in the case for six months. The record demonstrates that neither party filed any documents with the court demonstrating good cause for retention of the case and that the district court eventually dismissed the case pursuant to Rule 40(c). The record demonstrates that the district court provided Atkinson with notice that his case was subject to dismissal because nothing had been filed for six months. Had Atkinson acted on the notice of proposed dismissal, he could have prevented the dismissal of his complaint. Therefore, we hold that Atkinson was not denied due process on these grounds.

Atkinson also alleges that it was error for the district court to allow the Respondents' attorney to appear telephonically. Atkinson did not object to the Respondents' appearing telephonically at the hearings. Generally, issues not raised below may not be considered for the

first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). In addition, I.R.C.P. 7(b)(4)(A) allows a court to hold a hearing telephonically on any motion other than a motion for summary judgment. Therefore, we hold that Atkinson was not denied due process because the district court properly allowed the Respondents' attorney to appear telephonically.

Finally, Atkinson asserts that the district court erred in not allowing him to file an amended complaint prior to the hearing on the Respondents' motion to dismiss. The district court found that Atkinson was barred from filing the amended complaint without leave of the court pursuant to I.R.C.P. 15(a) because the Respondents' motion to dismiss was a responsive pleading for the purposes of that rule. Idaho Rule of Civil Procedure 15(a) provides that a party may amend its pleading once as a matter of course at any time before a responsive pleading is served. After a responsive pleading has been filed, a party may amend a pleading only by leave of the court or by written consent of the adverse party. I.R.C.P. 15(a). The decision whether to allow a party to amend its pleadings is left to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of that discretion. *Wells v. U.S. Life Ins. Co.*, 119 Idaho 160, 166-67, 804 P.2d 333, 339-40 (Ct. App. 1991). The refusal to allow a plaintiff to amend its complaint, where the record contains no allegations which, if proven, would entitle the plaintiff to the relief claimed, is not an abuse of discretion. *Bissett v. State*, 111 Idaho 865, 868-69, 727 P.2d 1293, 1296-97 (Ct. App. 1986). The record which was before the trial court contained no allegations which, if proven, would entitle Atkinson to the injunctive relief he claimed. The district court had already heard and denied Atkinson's motion for a temporary restraining order, and Atkinson provided no additional evidence demonstrating he was harmed. Therefore, we hold that the district court did not abuse its discretion in barring Atkinson from filing an amended complaint. Accordingly, we hold the district court did not violate Atkinson's due process rights on the grounds Atkinson alleges.

C. Sanctions

Atkinson argues that the district court erred in imposing sanctions against him pursuant to I.R.C.P. 11(a)(1). Specifically, Atkinson asserts that the district court lacked subject matter jurisdiction to impose the sanctions or, alternatively, that the district court abused its discretion in imposing the sanction.

Idaho Rule of Civil Procedure 11(a)(1) requires that pleadings, motions, and other papers be well grounded in fact; be warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and not be interposed for any improper purpose such as to harass, delay, or needlessly increase the costs of litigation. Rule 11(a) sanctions are a matter reviewed under the abuse of discretion standard. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Id.*

In imposing sanctions on Atkinson, the district court recognized the issue was one of discretion. The district court noted that I.R.C.P. 11(a)(1) sanctions are a management tool which should be exercised narrowly to weed out, punish, and deter frivolous filings. The district court found that Atkinson's two motions to set aside the dismissal were not based in fact and were not warranted by existing law. The record on appeal demonstrates that Atkinson's arguments in these two motions were frivolous. Therefore, we hold that the district court did not abuse its discretion in imposing Rule 11(1)(a) sanctions against Atkinson.

D. Attorney Fees

Atkinson requests attorney fees on appeal. Atkinson is pro se. This Court has long held that pro se litigants are not entitled to attorney fees. *See Barbee v. WMA Sec., Inc.*, 143 Idaho 391, 397, 146 P.3d 657, 663 (2006); *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 377, 973 P.2d 142, 148 (1999); *Curtis v. Campbell*, 105 Idaho 705, 707, 672 P.2d 1035, 1037 (1983). We also note that Atkinson is not the prevailing party. Therefore, we hold Atkinson is not entitled to attorney fees or costs on appeal.

Respondents also request attorney fees on appeal. An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995). The Respondents are the prevailing party on appeal. This Court notes that Atkinson was sanctioned twice by the district court under I.R.C.P. 11(a)(1)

for raising frivolous arguments almost identical to those raised in this appeal. Patently, this appeal has been brought frivolously and unreasonably. Respondents are awarded attorney fees on appeal.

III.

CONCLUSION

We hold that the district court had subject matter jurisdiction in this case, that Atkinson's due process rights were not violated, and that the district court did not err in imposing sanctions against Atkinson. Accordingly, the order dismissing Atkinson's complaint is affirmed. Costs and attorney fees are awarded to the Respondents on appeal.

Chief Judge GRATTON and Judge GUTIERREZ, **CONCUR.**