

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37957

TAMLA RENCHER, QUALITY EXCAVATION, LLC, an Idaho corporation,)	2011 Unpublished Opinion No. 659
)	
Plaintiffs-Appellants,)	Filed: October 14, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
RON BROWN, RON BROWN TRUCKING AND GRAIN HARVESTING, INC., an Idaho corporation,)	THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY
)	
Defendants-Respondents.)	
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Order granting partial summary judgment and order granting directed verdict, affirmed.

Alan R. Harrison Law, PLLC; Alan R. Harrison, Idaho Falls, for appellants. Alan R. Harrison argued.

Thomsen Stephens Law Offices, PLLC; Alan C. Stephens, Idaho Falls, for respondent. Alan C. Stephens argued.

PERRY, Judge Pro Tem

Tamla Rencher and Quality Excavation, LLC (“Rencher”) appeal from the district court’s orders granting partial summary judgment and directed verdict in favor of Ron Brown (“Brown”) in an action regarding Rencher’s purchase of real property and a vehicle from Brown. We affirm.

I.

FACTS AND PROCEDURE

Seeking property from which to operate her excavation and house moving business, Rencher met with Brown to examine his five-acre parcel, which included, among other things, a house and a pasture enclosed by a fence. Rencher testified she told Brown she intended to run a business from the property and in response, Brown indicated there was a variance on the

property which allowed him to operate his business from the property. Rencher also testified they discussed how a 5,000 gallon fuel tank--sitting outside and hooked up to a power source in a shop building by a wire running through a one-inch underground conduit--would be useful for her business. In addition to the property, Brown was also selling a Volvo truck, which he indicated to Rencher had a newly-installed engine and ran “really good.”

Rencher and Brown executed a purchase and sale agreement for the property and the truck. Prior to closing, Rencher returned to the property and noticed the fence was gone. Brown indicated he sold the fence at auction. Rencher nevertheless proceeded to closing.

Shortly after closing, Rencher discovered the truck required a new transmission. Also, a third party came to pick up the 5,000 gallon tank. The third party indicated he purchased the tank from Brown at an auction held prior to the closing date. When Rencher would not give the third party the tank, the third party filed an action against both Rencher and Brown. Rencher filed a cross-claim against Brown contending Brown should reimburse the third party for the tank as it was a fixture to the real property and, therefore, part of the purchase agreement.

Rencher also filed a separate suit against Brown¹ alleging breach of contract because, among other things: (1) the fence was removed; (2) the truck had mechanical problems even though Brown represented the truck ran “really good”; (3) there was water damage in the residence; (4) Brown sold the property “for a purchase price which was substantially higher than the value”; and (5) there was a zoning restriction on the land, which prevented Rencher from operating her business on the property. Rencher further asserted a warranty was breached in regard to the truck.

Rencher eventually released the 5,000 gallon tank to the third party, and her cross-claim against Brown on the issue from the other lawsuit was consolidated with her claims in this action. Brown filed a motion for summary judgment, which the district court partially granted, holding: (1) the tank was not conveyed by the purchase and sale agreement and was not a fixture; (2) Brown did not breach the contract when the appraised value was higher than the actual value of the land or in regard to the zoning status on the property; and (3) there was no warranty created as to the truck. The remaining issues--pertaining to the fence and water damage

¹ Rencher’s lawsuit also named Ron Brown Trucking and Grain Harvesting, Inc. (“Ron Brown Trucking”). However, the district court granted summary judgment as to Ron Brown Trucking, dismissing Ron Brown Trucking with prejudice.

in the house--proceeded to jury trial. After the close of Rencher's evidence, Brown moved for a directed verdict, which the district court granted as to the fence issue. The jury returned a verdict against Rencher on the remaining issue of water damage and the district court entered a judgment granting costs and attorney fees to Brown. Rencher now appeals.

II.

ANALYSIS

Rencher appeals from the district court's order granting summary judgment on her claims of breach of contract in regard to the tank and zoning issues, and breach of warranty as to the truck. Rencher also appeals the district court's entry of a directed verdict as to her breach of contract claim pertaining to removal of the fence. Finally, Rencher appeals from the district court's award of attorney fees and costs to Brown. Brown requests attorney fees and costs on appeal.

A. Summary Judgment

Rencher contends the district court erred in granting summary judgment on two of her breach of contract claims--that the 5,000 gallon tank was conveyed to Rencher as part of the purchase and sale agreement or was a fixture on the property, and that Brown concealed the zoning status of the property by his statements concerning a variance to run a business on the property and failure to disclose various zoning issues.

Summary judgment under Idaho Rule of Civil Procedure 56(c) is proper only when the pleadings, affidavits, and discovery documents before the court indicate no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust*, 147 Idaho 117, 123, 206 P.3d 481, 487 (2009). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The party moving for summary judgment initially carries the burden to establish there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopoulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element the nonmoving party will be required

to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence is established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under Idaho Rule of Civil Procedure 56(f). *Sanders*, 125 Idaho at 874, 876 P.2d at 156.

1. Fuel tank

Rencher contends the district court erred in holding there was not a genuine issue of material fact concerning whether the tank was conveyed to her as part of the contract. She asserts that although the contract does not specifically reference the tank, it was included as part of the sale by two provisions of the contract. The first provision consists of the following language written in the blank designated for the street address of the property: "8892 S. YELLOWSTONE + 5 ACRES + ALL SHOPS, GARAGES[,] HOUSE, BARN, ETC[.]" The tank, she contends, was included in the term "ETC." The second provision she points to as conveying the tank is language indicating that "unless specifically excluded" fixtures were conveyed with the property. Rencher argues this section applies because the tank was a fixture.

In regard to Rencher's contention that the tank was included in the term "ETC." as used in the property description, she provided no argument or authority on this point. Thus, we will not address the issue. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct. App. 1997) (holding a party waives an issue on appeal if either argument or authority is lacking).

Pertaining to Rencher's contention the tank was a fixture, the district court applied the general fixture test and concluded the tank was not a fixture subject to the language of the contract which transferred the fixtures with the sale of the property unless they were specifically excluded. A fixture is personal property attached to land or a building and regarded as an irremovable part of the real property, such as a fireplace built into a home. BLACK'S LAW DICTIONARY 652 (7th ed. 1999). For an object to become a fixture, thus becoming part of the realty, three essential elements must concur: (1) annexation to the realty, either actual or constructive; (2) adaptation or application to the use or purpose to which that part of the realty to

which it is connected is appropriated; and (3) intention to make the article a permanent accession to the freehold. *Everitt v. Higgins*, 122 Idaho 708, 711, 838 P.2d 311, 314 (Ct. App. 1992). Once an item becomes a fixture, it is thereafter treated as part of the realty until or unless it is severed by the fee owner. *Id.* Normally, the determination of what is a fixture is a mixed question of law and fact. *Rowan v. Riley*, 139 Idaho 49, 55, 72 P.3d 889, 895 (2003). However, application of the three-part test becomes a pure question of law when only one reasonable conclusion may be drawn from the evidence. *Id.* We turn to a review of the individual factors.

a. Annexation

Annexation is usually considered in light of the actual relationship of the object to the realty, although an object may be constructively annexed to the real property. *Everitt*, 122 Idaho at 711, 838 P.2d at 314. Constructive annexation may be found where the object, although not itself attached to the realty, comprises a necessary, integral or working part of some other object which is attached. *Id.* at 712, 838 P.2d at 315.

Here, the court concluded the tank was not annexed to the land because the evidence indicated the tank was, at most, merely connected to an outbuilding by the equivalent of a power outlet. The court also determined a finding of constructive annexation was not proper because there was no evidence “some fixture on the Property was rendered inoperable by the tanks [sic] removal.”

On appeal, Rencher contends the tank was attached to the land with “more than just a power outlet” because a wire providing electricity to the tank ran through a one-inch underground conduit under a gravel road to a shop outbuilding. Rencher’s employee observed the wire had been cut at the shop and at the tank after the tank was removed. She contends “[a]n item which is wired to the property is different than an appliance which can be unplugged and moved.” Further, she argues that since Brown ran the wire through an underground conduit, he had done more than just wire the tank to the building.

We agree that the tank was only connected to the land by the utilization of a power source and was not annexed to the property. *See Boise-Payette Lumber Co. v. McCornick*, 32 Idaho 462, 462, 186 P. 252, 252 (1919) (holding machinery was not a fixture where, among other factors, none were attached to the building “except by the bands or belts by which the motive power was transmitted to the machine”). More specifically, we do not agree with Rencher that the mere fact the wire providing power to the tank ran underground in a small

conduit transformed the tank into a fixture. Instances where Idaho courts have concluded underground installations have rendered objects as “fixtures” have included a significantly larger, more involved underground presence requiring significant damage to the land to effect removal. Here it is evident that a few snips of the wire disassociated the tank from the land with virtually no damage to the realty. *See Rowan*, 139 Idaho at 55-56, 72 P.3d at 895-96 (in holding the components of an underground well were annexed to the property, noting that while there was testimony indicating some of the well components could be removed with varying levels of difficulty, the well is best understood as annexed to the property because a hole in the ground cannot be removed and the other equipment is all necessary and integral to make the hole a working well); *Rayl v. Shull Enterprises, Inc.*, 108 Idaho 524, 528-29, 700 P.2d 567, 571-72 (1984) (holding a farm irrigation system was annexed to the land, either constructively or actually, where it was bolted to cement slabs buried in the ground and attached to pipes and electrical wires which were buried three to four feet underground, the removal of which necessitated digging).

Also, to the extent Rencher implies that the fact the wire was cut, rather than just unplugged, affects the character of the tank itself, we do not agree. In this sense, she appears to focus on the injury to the cord itself, while the case law in determining whether an item is a fixture focuses on whether removal causes injury to the real property. *See Boise-Payette*, 32 Idaho at 462, 186 P. at 252 (noting machinery held not to be fixtures could be removed “without injury to the building”). Further, the conduit utilized here was not destroyed but remained untouched, buried on the land. When delivered to the third party, the tank itself was removed simply by lifting it and removal did not cause injury to the land or any structure on the land. *Cf. Rayl*, 108 Idaho at 528-29, 700 P.2d at 571-72 (removing the irrigation system would have required digging three to four feet underground which would effectively damage the realty). Thus, we conclude, even considering the facts in the light most favorable to Rencher, the district court did not err in finding the tank was not annexed to the realty.

b. Adaptation

The “adaptation” requirement is generally held to be met when the particular object is clearly adapted to the use to which the realty is devoted. *Everitt*, 122 Idaho at 711-12, 838 P.2d at 314-15. This test frequently focuses on whether the real property is peculiarly valuable in use because of the continued presence of the annexed property. *Id.* at 712, 838 P.2d at 315. An

object placed on the realty may become a fixture if it is a necessary, or at least a useful, adjunct to the realty, considering the purposes to which the realty is devoted. *Id.*

In regard to this prong, the district court concluded that “Because there is some evidence that a fuel tank would be ‘at least useful adjunct’ to the stated purpose of running a business, there is at least a question of fact as to whether the tank is adapted to the purpose of the Property.” Brown does not appear to challenge the district court’s finding on this prong of the test. Therefore, it is unnecessary for this Court to review the district court’s finding that it was satisfied.

c. Intention

The test of the intention in installing the object is regarded as the most important of the three factors. The intention sought is not the undisclosed purpose of the annexer, but rather the intention implied and manifested by his act. *Rowan*, 139 Idaho at 56, 72 P.3d at 896; *Rayl*, 108 Idaho at 528, 700 P.2d at 571. Thus, the intent should be determined from the surrounding circumstances *at the time of installation*, and not necessarily from testimony as to the subjective intent of the installer and his frame of mind at the time of installation. *Rayl*, 108 Idaho at 528, 700 P.2d at 571. This objective intention may be inferred from:

- (1) the nature of the article;
- (2) the manner of annexation to the land;
- (3) the injury to the land, if any, by its removal;
- (4) the completeness with which the chattel is integrated with the use to which the land is being put;
- (5) the relation which the annexer has with the land such as licensee, tenant at will or for years or for life or fee owner;
- (6) the relation which the annexer has with the chattel such as owner, bailee or converter;
- (7) the local custom respecting treating such chattel as personal property or a fixture;
- (8) the time, place and degree of social, economic and cultural development, (e.g., a luxury in one generation is a necessity in another . . .);
- and (9) all other relevant facts surrounding the annexation.

Everitt, 122 Idaho at 712, 838 P.2d at 315.

In this respect, the district court concluded that where the record contained evidence that Brown was interested in selling the fuel tank, either with the property or by selling it separately, there was no evidence Brown intended to “make a permanent accession” to the property. On appeal, Rencher contends the district court erred in considering evidence of Brown’s intention as to the permanency of the tank at the time he was selling the property. Instead, she contends the court should have examined evidence of his intent at the time the tank was placed on the

property and that evidence--that he dug a conduit under a gravel road and put a wire through it to provide power to the tank--indicates his intention that it become a permanent part of the realty.

We agree with Rencher that Brown's act of selling the tank was not particularly relevant to the key inquiry of Brown's intent *at the time of installation*. On this latter issue, there was little evidence presented. But, as the *Everitt* Court noted, the "manner of annexation to the land" is a factor to be considered in identifying intent. As the district court found, the extent to which the tank was annexed to the land was minimal. Rencher did not meet her burden to show the tank is annexed to the land. Given there is no other evidence indicating Brown intended the tank to become a permanent part of the realty, and where Rencher bears the burden of showing the tank was a fixture, we conclude the district court did not err in finding this prong was not satisfied.

d. Conclusion

Upon conducting the three-prong analysis, the district court determined that, because all three elements must be met to classify an item as a fixture, the facts establish there is only one reasonable conclusion to be drawn from the evidence--the tank is not a fixture. On this basis, the district court granted summary judgment on the issue. For the reasons we discuss above, we conclude Rencher has failed to show error on appeal.

2. Zoning

Rencher contends the district court erred in determining there was not a genuine issue of material fact that Brown's statements that there was a variance to run a business on the property, and Brown's failure to disclose various zoning issues were a breach of contract causing her to be willing to pay more than the "proper value" for the property. Specifically, she argues it was not until after she took possession of the property that she received word from the zoning authority that: she could not operate her business on the land; there was no variance associated with the property; the lot across the street was zoned for a gravel pit; the State was intending to widen the highway in front of the house and take eighty feet of frontage; and Brown was aware of the latter facts, but failed to disclose them to her. As a basis for her claim, she relies on a clause in the purchase and sale agreement indicating "Seller warrants that there are no facts known to Seller materially affecting the value of the property which are not readily observable to the Buyer or which have not been disclosed to the Buyer."

In addressing Brown's motion for summary judgment on the issue, the district court first noted Brown's argument that Rencher had both constructive and actual notice of the property's zoning status as it, along with any variances, was a matter of public record. In that argument, Brown cited Idaho Code § 55-811 which provides, "Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgag(e)es." The court further noted Rencher herself had the property appraised before she purchased it and the appraisal report indicates the property was zoned residential. The court then granted summary judgment on the issue, concluding:

Rencher's claim presupposes a duty to disclose on which she does not elaborate, nor support with law. Additionally, Rencher's claim fails because she had received notice of the zone status by the appraisal she ordered and had in her possession.

On appeal, Rencher contends the district court erred in finding there was no genuine issue of material fact as to whether Brown's statements and nondisclosures caused her to pay more than the property was worth. However, she does not address the basis of the district court's grant of summary judgment--that she had both constructive and actual notice of the zoning conditions and that Brown had no duty to disclose. Rather, Rencher simply reiterates her factual contentions. In other words, Rencher completely fails to address the district court's pivotal conclusion that even viewing those facts in the light most favorable to Rencher (i.e., assuming these statements and nondisclosures in fact induced her to pay more than the value of the property), she has no legal recourse and therefore Brown is entitled to judgment as a matter of law. In fact, she cites *no* authority for any proposition she advances on this issue. Accordingly, we conclude Rencher has waived the issue on appeal, and we do not address it further. *Powell*, 130 Idaho at 128, 937 P.2d at 440 (holding a party waives an issue on appeal if *either* argument *or* authority is lacking).

3. Truck

Rencher also contends the district court erred in determining there was no genuine issue of material fact that Brown did not deliver a truck which "ran fine." Specifically, she contends there was an issue of material fact as to whether Brown's statements created a warranty with regard to the truck, which was breached when the truck did not run properly.

In granting summary judgment, the district court first cited the applicable Uniform Commercial Code provision:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

....

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

I.C. § 28-2-313. In addition, the court noted an official comment to the Uniform Commercial Code provision states:

The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain.

U.C.C. § 2-313 cmt. 8 (2004). On this basis, the court concluded:

In this case, Mr. Brown’s representations that the truck ran well, is merely an affirmation of the value of the truck. Additionally, “runs good” is a vague, ambiguous expression, which, if it is found to create a warranty, would invariably lead to problems defining what that warranty is.

On appeal, Rencher reasserts the facts presented to the district court and then challenges the court’s conclusions. Rencher states, in response to the court’s conclusion that Brown’s statement did not create a warranty because it was a “vague, ambiguous expression,” that “A truck which has difficulty going into reverse, low, and a hard time engaging the second axel does not run fine as Brown indicated.” She then states, “[t]he contract does not say ‘as is’ or ‘without any warranty,’ therefore Brown’s statements created an obligation for Brown to deliver a truck consistent with his representations.” Again, however, she cites *no* authority for her propositions challenging the district court’s conclusion that, even accepting Rencher’s version of the facts, she was not entitled to recourse because, as a matter of *law*, Brown’s words did not create a warranty. Accordingly, because Rencher cites no legal authority in support of her factual allegations, we consider the issue waived on appeal. *Powell*, 130 Idaho at 128, 937 P.2d at 440.

B. Directed Verdict

Rencher contends the district court erred in granting Brown’s motion for a directed verdict as to her claim that Brown breached the contract by removing the fence from the property after the agreement was signed, but prior to closing. Although the court allowed the claim to proceed to trial, the district court granted Brown’s motion for a directed verdict at the close of Rencher’s evidence on the basis the evidence was clear that prior to the closing date, Rencher knew the fence had been removed, but still proceeded to closing without mentioning it. Thus, the district court concluded, “whether it be by merger or by waiver [she lost] her claim as to the fence.”

On appeal, Rencher takes issue with the district court’s conclusion, stating “[t]he fact Rencher knew it was gone prior to closing should not preclude her from raising the claim against Brown” and the district court “should not have granted a directed verdict, but allowed the jury to hear the evidence and make its own determination of damages regarding removal of the fence.” Once again, Rencher cites no authority for this legal assertion, nor does she even cite to the standards applicable to directed verdicts in general and on appeal. Thus, once again, we consider the issue waived on appeal. *Powell*, 130 Idaho at 128, 937 P.2d at 440.

C. Attorney Fees

Rencher contends Brown should not have been awarded costs and attorney fees because there were genuine issues of material fact which should have precluded summary judgment on several issues. However, she conceded at oral argument that were we to affirm the merits of the district court’s grant of summary judgment and a directed verdict, affirmance of the court’s attorney fee award would be proper. Thus, as we have affirmed the district court on the merits, we also affirm its award of attorney fees.

Brown requests attorney fees on appeal pursuant to both Idaho Code § 12-120(3) and Idaho Code § 12-121. The former provides, in relevant part:

In any civil action . . . in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court, to be taxed and collected as costs.

The term “commercial transaction” is defined to mean all transactions except transactions for personal or household purposes.

I.C. § 12-120(3).

Here, although there was a house on the property, Rencher was clear she was not purchasing the realty for her residential purposes, but through her corporation with plans to lease the house to a third party and to operate her business on the remainder. Therefore, her involvement in the transaction was not for personal or household purposes. Accordingly, we conclude a commercial transaction was at issue and Brown is entitled to attorney fees on appeal. *See Cannon v. Perry*, 144 Idaho 728, 731-32, 170 P.3d 393, 396-97 (2007) (holding that while the property in question was residential in nature, the buyers purchased it for investment purposes--to collect rent and eventually sell it to the renters at the appraised price--and therefore the transaction as to them was a commercial transaction). Because we have awarded attorney fees pursuant to Idaho Code § 12-120(3), we need not address Brown's claim under Idaho Code § 12-121.

Brown also requests costs pursuant to Idaho Appellate Rule 40 which states, “[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court.” Since Brown is the prevailing party on appeal, we award costs.

III.

CONCLUSION

Rencher has failed to show error in the district court's granting of summary judgment and entering of a directed verdict. Specifically, the district court did not err in determining the 5,000 gallon tank was not a fixture and, thus, was not conveyed with the real property. Pertaining to the remaining issues, Rencher has failed to cite any authority in support of the arguments she attempts to assert. Therefore, Rencher has waived those issues on appeal. Brown is awarded costs and attorney fees on appeal. The district court is affirmed.

Judge LANSING and Judge MELANSON **CONCUR.**