

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37300

M. STANLEY SLOAN,	)	2011 Unpublished Opinion No. 542
	)	
Plaintiff-Appellant,	)	Filed: July 7, 2011
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
RANDALL GILLINGHAM,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Charles W. Hosack, District Judge.

Appeal from judgment dismissing complaint for conversion, affirmed.

Richard P. Wallace, Coeur d’Alene, for appellant.

John P. Whelan, Coeur d’Alene, for respondent.

MELANSON, Judge

M. Stanley Sloan appeals from the district court’s judgment dismissing his complaint with prejudice. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Sloan was the owner of real property along the Spokane River in Post Falls. Sloan acquired a loan from a credit union, using the property as collateral. When Sloan defaulted on the loan, the credit union conducted a trustee’s sale and Randall Gillingham purchased the property during that sale in March 2003. Gillingham pursued eviction proceedings against a tenant living in the basement of the home located on the property and received a judgment authorizing eviction on June 16, 2003. Sloan did not live on the property, but visited it in April and May 2003 in order to collect rent from the tenant.

Sloan’s attorney sent Gillingham’s attorney a letter on June 16, 2003, asserting that Gillingham would be required to pursue an action for possession in order to remove any of Sloan’s personal property from the upstairs portion of the home. On June 21 and 22, Gillingham

and a crew of men removed items from the home and took them to a storage unit in Post Falls. The crew also hauled a cargo van, a U-Haul trailer, and another vehicle to Gillingham's property in Spokane, Washington, for storage. Finally, the crew removed wood and other materials from the grounds of the property, disposing of those materials at a local landfill.

On June 23, Sloan's attorney sent Gillingham's attorney another letter requesting that Gillingham reveal the location of the items removed from the property. Gillingham's attorney responded in a letter stating that Sloan had abandoned the property at issue. On June 30, Sloan's attorney sent yet another letter indicating, among other things, that Sloan's attorney had spoken to Gillingham directly and that Gillingham refused to divulge the location of Sloan's property without payment from him for moving and storage costs. The letter also stated, "Please advise if this is incorrect." In response, Gillingham's attorney sent a letter on July 9 requesting that Sloan deal with Gillingham directly. Finally, on August 1, Sloan's attorney sent a letter to Sloan, indicating that counsel had not learned of the location of Sloan's property but provided Sloan with Gillingham's phone number and advised Sloan to contact Gillingham directly in order to retrieve the property.

After receiving no contact from Sloan for approximately one year, Gillingham emptied the storage unit and hauled its contents to the dump. Gillingham also disposed of the vehicle that was stored on his property in Spokane. Three years later, on June 30, 2006, Sloan filed a complaint against Gillingham, alleging conversion of his property. The case was tried before the district court without a jury. After a two-day trial, the district court dismissed Sloan's complaint with prejudice, holding that Sloan failed to demonstrate that Gillingham was liable for conversion of Sloan's personal property. Sloan appeals.

## **II.**

### **STANDARD OF REVIEW**

Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Benninger v. Derifield*, 142 Idaho 486, 488-89, 129 P.3d 1235, 1237-38 (2006). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. *Rowley v. Fuhrman*, 133 Idaho 105, 107, 982 P.2d 940, 942 (1999). This Court will not set aside a trial court's findings of fact unless the findings are

clearly erroneous. I.R.C.P. 52(a); *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006). If the trial court based its findings on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238. Additionally, this Court will not substitute its view of the facts for that of the trial court. *Ransom*, 143 Idaho at 643, 152 P.3d at 4. This Court exercises free review over matters of law. *Bolger v. Lance*, 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002).

### **III. ANALYSIS**

At trial, Sloan did not dispute that Gillingham became the lawful owner of the real property by means of a trustee's sale and, as a result, lawfully came into possession of Sloan's personal property located both in the home and on the grounds of the property. Rather, Sloan argued that his personal property was wrongfully converted by Gillingham when he refused to allow Sloan back onto the property to retrieve his belongings soon after the eviction of Sloan's tenant. Sloan also asserted that the removal of wood and other materials from the grounds of the property constituted conversion because he had not abandoned those items at the time that Gillingham disposed of them. Finally, Sloan argued that he made a proper demand for Gillingham to return the personal items that were placed in storage, which constituted conversion when Gillingham refused to return those items.

As to the first allegation of conversion, the district court found that Sloan made no direct contact with Gillingham prior to the removal of the personal property to demonstrate that Sloan wanted to recover those items before they were disposed of or placed in storage. The district court held that the only evidence presented regarding Sloan's interest in his personal property prior to the time it was removed was an ambiguous letter sent by Sloan's attorney on June 16, 2003. The district court found this evidence to be insufficient to support a finding that a proper demand was made for return of the property.

Regarding the second allegation of conversion, the district court held that it was not conversion for Gillingham to dispose of the materials found on the grounds of the property because it was reasonable for Gillingham to conclude that those materials were worthless or waste. Specifically, the district court stated that "Gillingham could reasonably conclude that Sloan had abandoned the personal property constituting waste."

Finally, the district court concluded that Gillingham did not wrongfully convert the items taken from the property and placed into storage because Sloan did not make a proper demand for the return of those items. The district court held that the letters sent by Sloan's attorney to Gillingham's attorney were not sufficient to prove a demand by Sloan for the return of his personal property.

On appeal, Sloan argues that the district court erred when it determined that the letter of June 16, 2003, was ambiguous. In addition, Sloan asserts that the district court erred when it found that Gillingham reasonably concluded that Sloan had abandoned his personal property. Sloan also asserts that the district court's finding that he failed to prove a proper demand for the return of his property was clearly erroneous.

Conversion is defined as an intentional act of dominion or control wrongfully asserted over another's personal property in denial of or inconsistent with rights therein. *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743, 979 P.2d 605, 616 (1999); *Luzar v. Western Sur. Co.*, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984); *Wiseman v. Schaffer*, 115 Idaho 537, 540-41, 768 P.2d 800, 803-04 (Ct. App. 1989). An actor may be liable where he or she has wrongfully engaged in a positive act of dominion or control over the property of another, even if he or she is unaware of the existence of a third party's rights in the property. *Peasley*, 132 Idaho at 743, 979 P.2d at 616. A defendant's intentions, good or bad faith, as well as any relevant knowledge or mistake, are immaterial. *Id.*; *Carver v. Ketchum*, 53 Idaho 595, 601, 26 P.2d 139, 141 (1933). A right of action accrues in favor of the owner of property as soon as the property is wrongfully taken from his or her possession or wrongfully converted. *Carver*, 53 Idaho at 601, 26 P.2d at 141. The plaintiff bears the burden of proving to the trier of fact the liability of the defendant, as well as damages arising from the conversion, to prevail at trial. *See Peasley*, 132 Idaho at 742-43, 979 P.2d at 615-17 (magistrate did not err in denying relief to cross-claimant where, even though she had proved some damages in the form of expenses incurred for return of property, she failed to prove any wrongful taking of property).

If possession of the property at issue was not acquired by a tortious taking or where possession is obtained rightfully in the first instance, no evidence of conversion exists until there is proof that a proper demand for possession was made by the rightful owner and that the possessor wrongfully refused delivery. *Peasley*, 132 Idaho at 743-44, 979 P.2d at 616-17. *See also Oakes v. Am. Sur. Co. of N.Y.*, 58 Idaho 482, 491, 76 P.2d 932, 936 (1938) (holding that

cause of action against sheriff did not accrue until the plaintiff made demand for the possession and the sheriff refused to comply with the demand).

**A. Letter of June 16, 2003**

In its memorandum decision, the district court stated, “Sloan argues that the conversion was in Gillingham’s refusal to allow Sloan to retrieve Sloan’s personal property that remained on the premises after [the tenant] had been evicted.” In response to this argument, the district court held that the only evidence in the record indicating Sloan’s interest in his personal property after the eviction of his tenant was an ambiguous letter sent by Sloan’s attorney to Gillingham’s attorney on June 16, 2003. The letter stated in part:

It is my understanding that your client, Randall Gillingham, has evicted Mr. Sloan’s downstairs tenant. . . . In our view this adds to the damages Mr. Sloan will be seeking against [the credit union].

Be advised that the upstairs portion of the home is possessed by Stan Sloan who has not been served with process. *Your client is not to remove Mr. Sloan’s property without pursuing an action for possession which Mr. Sloan intends to contest.*

(emphasis added). The district court held that the language of the letter expressed Sloan’s intent for Gillingham to *leave* Sloan’s personal property in the upstairs portion of the home. As a result, the district court found the letter was ambiguous as to Sloan’s assertion that the letter placed Gillingham on notice of his wish to return to the property to *retrieve* his personal belongings. In other words, the district court determined that the language of the letter did not indicate to Gillingham that Sloan wished to remove the personal items himself. Rather, the language revealed that Sloan intended to remain on the property and contest Gillingham’s ownership of the real property obtained in the trustee’s sale.

On appeal, Sloan argues that the district court’s interpretation of the language of the letter was clearly erroneous because Sloan’s request in the letter regarding his real property could not reasonably be interpreted to exclude his personal property. Sloan also argues that the district court’s determination of ambiguity is a question of law. Sloan is correct that this is the proper standard of review for a district court’s interpretation of a written legal instrument. *See DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). However, we interpret the district court’s statement involving the “ambiguity” of the June 16 letter as a finding by the district court that the letter was not sufficient to prove that Sloan provided Gillingham with notice of his intent to retrieve his personal property. As such, we review this finding to

determine if it was supported by substantial and competent evidence. *See Opportunity L.L.C. v. Ossewarde*, 136 Idaho 602, 605, 38 P.3d 1258, 1261 (2002).

At trial, Sloan presented the June 16 letter as evidence of his intent to retrieve his personal property after the eviction of the tenant, but prior to Gillingham's removal of such property. The letter expressly informed Gillingham not to remove Sloan's property from the home, but it did not request that Sloan be allowed to remove the property himself. Rather, the letter indicated that Sloan intended to contest the trustee's sale and Gillingham's possession of the property in general. As noted by the district court, testimony at trial indicated that Sloan visited the property after the trustee's sale to collect rent from the tenant in April and May and on the weekend that Gillingham removed Sloan's belongings from the property. However, no evidence was presented to demonstrate that Sloan attempted to retrieve his property or place anyone on notice that he wanted to remove his property on any of those occasions. Sloan testified that he attempted to gain access to the home in order to repossess his belongings on the weekend of their removal, but was turned away by Gillingham and other men who were carrying guns. The district court concluded that the testimony at trial regarding any interaction between Gillingham and Sloan that weekend was vague at best, and any findings regarding their interaction would be pure speculation.

This Court liberally construes the facts in favor of the district court's decision because it is the province of the district court to weigh the evidence and determine the credibility of the witnesses. *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 525, 248 P.3d 1256, 1260 (2011). Construing the record liberally in favor of the judgment of the district court, we conclude that substantial and competent evidence supports the trial court's conclusion that the June 16, 2003, letter was ambiguous as to Sloan's intent to retrieve his personal property after the eviction of the tenant and, as a result, was not sufficient to demonstrate a demand that Sloan be allowed to remove his personal belongings from the property himself.

#### **B. Materials on the Grounds of the Property**

We next address Sloan's argument that the district court erred by finding that it was reasonable for Gillingham to believe that Sloan abandoned the wood and other materials located on the grounds of the property. Specifically, the district court determined that Gillingham could reasonably conclude that Sloan had abandoned those materials because Sloan made no affirmative effort to claim such materials prior to their disposal. Further, the district court held

that Gillingham's actions were reasonable because it would cost more to store those materials than what they were worth and because the nature and quantity of the materials were such that they interfered with Gillingham's reasonable use of the property.

In its memorandum decision, the district court, interpreting a statement made by the Idaho Supreme Court in *Wiseman*, 115 Idaho at 540, 768 P.2d at 803, held that a reasonable belief by an actor induced by the acts of the other that the actor is not acting inconsistently with the rights of the other relieves the actor of any liability for conversion. Applying this statement from *Wiseman* to the facts of this case, the district court concluded that Gillingham reasonably believed that Sloan had abandoned the materials on the grounds of the property. However, the district court did not cite to any particular acts performed by Sloan, relied upon by Gillingham, to indicate that the materials on the grounds were abandoned waste. Rather, the district court relied upon the condition of the materials and Sloan's *lack* of action in order to conclude that Gillingham's belief that the materials were abandoned was reasonable.

On appeal, Sloan does not assert that the district court applied the incorrect standard or erred by considering Gillingham's beliefs in determining his liability for conversion. Rather, Sloan argues that the district court's factual conclusion that it was reasonable for Gillingham to believe Sloan had abandoned the property was clearly erroneous. However, even if we were to determine that the district court erred in finding that Gillingham was not liable for the conversion of the materials found on the grounds of the property, Sloan concedes on appeal that he failed to sufficiently prove the value of such materials during trial. As mentioned above, the plaintiff bears the burden of proving to the trier of fact the liability of the defendant, as well as damages arising from the conversion, to prevail at trial. *See Peasley*, 132 Idaho at 742-43, 979 P.2d at 615-17. Because Sloan admittedly failed to prove damages resulting from the disposal of the materials on the grounds of the property, we need not address this argument further on appeal.

### **C. Demand**

Finally, we turn to Sloan's argument that the district court erred when it determined that Sloan did not prove a proper demand for his personal property after it had been removed and placed into storage. As mentioned above, the parties concede that Gillingham lawfully came into possession of Sloan's personal property upon purchasing the real property in a trustee's sale. At trial, Sloan asserted that the wrongful conversion occurred when Gillingham removed personal items from the home on the property, hauled away vehicles from the grounds, placed those items

into storage, and never notified Sloan of their whereabouts. Specifically, Sloan argued that Gillingham had an affirmative duty to notify Sloan of the property's location upon moving it to storage. The district court held that the storage and disposal of Sloan's property one year later did not constitute conversion because Sloan failed to demonstrate that he made a proper demand for the return of his personal property as required by *Peasley*, 132 Idaho at 743-44, 979 P.2d at 616-17.

On appeal, Sloan argues that this determination was in error based on statements made by his attorney in letters to Gillingham's attorney. The first letter, dated June 16, 2003, is described above. The district court determined that the June 16 letter was ambiguous as to whether Sloan made a proper demand for the return of his personal property. Indeed, the letter was sent prior to Gillingham moving or storing any of Sloan's personal property. The language of the letter demonstrates that the purpose of the letter was to inform Gillingham of Sloan's challenge to the validity of the trustee's sale. The letter does not prove a demand for the return of Sloan's personal property considering that such property had yet to be removed from the home at the time that the letter was written.

The second letter, sent from Sloan's attorney to Gillingham's attorney on June 23, 2003, stated in part:

As I informed you, last Saturday, your client, Randall Gillingham and/or his agents, went to the property located at 11193 Crystal Bay Road in Post Falls and removed Mr. Sloan's personal property therefrom. This occurred after Mr. Gillingham was placed on notice that Stan Sloan contests the legality of the sale under which Mr. Gillingham purported to purchase the property; that Mr. Sloan was in possession of the upstairs portion of the home; that Mr. Gillingham was not to remove Mr. Sloan's property; and that Mr. Sloan intended to defend against an action for ejectment. It is my understanding that you were unaware of your client's activities in that regard.

Currently we are unaware of the location of Mr. Sloan's personal property. We demand notice in that regard immediately. If I do not receive notice by tomorrow then I will presume that Mr. Gillingham's intent is to convert such property and appropriate legal action will be taken.

At trial, Gillingham testified that, after he removed Sloan's items from the property, he spoke with someone acting on behalf of Sloan regarding the location of Sloan's belongings. Gillingham stated that he told this person that he had Sloan's belongings in storage:

I said he can go get his stuff out of storage. The stuff I had stored, I didn't demand fee on. He could go pay for his storage where his stuff was and pick it up.

Gillingham's testimony appears to be, for the most part, consistent with another letter sent by Sloan's attorney dated June 30, 2003, which stated, in part:

During a conversation with Mr. Gillingham, which he placed to my office at your request, Mr. Gillingham refused to divulge the location of Mr. Sloan's property and *demanded payment of an unspecified amount* prior to doing so. Had Mr. Gillingham followed a proper course of action the *expenses for moving and storage*, for which he now demands payment, would not have been incurred by him. Mr. Gillingham also requested that I contact him directly . . .

(emphasis added). Finally, on August 1, 2003, Sloan's attorney sent a letter to Sloan, indicating that counsel had not learned of the location of Sloan's property and that he had provided Sloan with Gillingham's phone number on two occasions. Sloan's attorney advised Sloan to contact Gillingham directly in order to retrieve the property.

The district court found that there was insufficient evidence to demonstrate that Sloan or anyone on his behalf communicated with Gillingham in order to demand recovery of his belongings once he discovered that they had been placed into storage. The record supports the district court's conclusion that Gillingham informed Sloan's attorney that his belongings had been placed in storage and reasonably requested that Sloan pay the storage fee in order to retrieve the items. The language of the June 30, 2003, letter indicates that Sloan was aware that his personal property was being stored by Gillingham and belies Sloan's assertion on appeal that he was never advised of how the property could be retrieved. While Gillingham's and Sloan's testimony were at times conflicting in this regard, this Court will not overturn the district court's findings if they are supported by substantial evidence, even if such evidence is conflicting. *See Benninger*, 142 Idaho at 489, 129 P.3d at 1238.

Further, the record reveals that Sloan's attorney and Gillingham's attorney informed Sloan that he should contact Gillingham directly in order to recover the property kept in a storage unit and on Gillingham's property in Washington. Sloan failed to present any evidence at trial to demonstrate that he attempted to contact Gillingham directly after being advised by his attorney and Gillingham's attorney to do so. Sloan had three years, from the time that he learned that his property was in storage until he filed his complaint in 2006, to contact Gillingham and demand a return of his personal property. As such, Sloan failed to demonstrate that he made a demand for his property's return within a reasonable period of time. *See Mayfield Smithson Enter. v. Com-*

*Quip, Inc.*, 896 P.2d 1156, 1163 (N.M. 1995) (holding that an action for conversion requires demand for return of the property prior to filing a complaint).

Construing the record liberally in favor of the judgment of the district court, we conclude that substantial and competent evidence supports the trial court's conclusion that Sloan failed to demonstrate a proper demand for his personal property after he was informed that Gillingham had moved the belongings into storage.

#### **D. Attorney Fees**

Gillingham requests attorney fees under I.C. § 12-123 on appeal. Idaho Code Section 12-123(2)(b) sets forth a specific procedure for attorney fees and requires a motion by a party, notice, and a hearing in the trial court. *See Spencer v. Jameson*, 147 Idaho 497, 507, 211 P.3d 106, 116 (2009). There is no evidence in the record that these procedures were followed in this case. Furthermore, the statute limits an award of attorney fees to twenty-one days after the entry of judgment in a civil action. Idaho Code Section 12-123(2)(a) states:

[A]t any time prior to the commencement of the trial in a civil action or within twenty-one (21) days after the entry of judgment in a civil action, the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct.

The statute makes no provision for attorney fees on appeal. Therefore, attorney fees are not awarded under I.C. § 12-123.

### **IV.**

#### **CONCLUSION**

Substantial and competent evidence supports the district court's finding that the June 16, 2003, letter was not sufficient to prove a demand for the return of Sloan's personal property. Further, even if we were to conclude that the district court erred by determining that Gillingham reasonably believed that the materials on the grounds of the property were abandoned waste, Sloan failed to prove damages for the loss of those materials at trial. Finally, the district court's finding that Sloan failed to prove a proper demand for the return of his property in storage was also supported by substantial and competent evidence. Accordingly, the judgment dismissing Sloan's complaint is affirmed. Costs, not attorney fees, are awarded to Gillingham on appeal.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**