ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 18-0238

KS VENTURES, LLC, an Arizona limited liability company,

Plaintiff/Appellee

~vs~

WILLIAM M. RUSSELL (; *et al.*)

Defendant/Appellant

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY, THE HONORABLE: JUDGE ROBERT B. ALLISON, Presiding

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APPELLANT'S REPLY

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PREFACE

"Fraud cannot often be proven by direct evidence. Fraud conceals itself. It does not move upon the surface in straight lines. It goes in devious ways. We may with difficulty know `whence it cometh and whither it goeth.' It `loves darkness rather than light, because its deeds are evil.' It is rarely that we can lay our hand upon it in its going. We are more likely to discover it at its destination, before we know that it has started upon its sinuous course. When we so discover it, the search light of a judicial investigation goes back over its trail and lightens it from beginning to end. As the woodsman follows his game by slight indications, as a broken twig or a displaced pebble, so fraud may become apparent by innumerable circumstances, individually trivial, perhaps, but in their mass `confirmation strong as proofs of holy writ.' The weight of isolated items tending to show fraud may be `as light as the shadow of drifting snow,' but the drifting snow in time makes the drift, the avalanche, the glacier. Fraud may hang over the history of the acts of a man like the leaden-hued atmosphere upon the house of Usher, `faintly discernible but pestilent, an atmosphere which has no affinity with the air of Heaven.'"

Merchants' Nat. Bank v. Greenhood, 16 Mont. 395, 429, 41 Pac. 250, 259, 851.

In Reply to KSV's Statement of the Case:

With regard to KSV's statement of the case, the District Court did deny Russell's request for oral argument but only after KSV moved that the request was untimely. However, after Russell pointed out to the Court that he had in fact requested oral argument in each of his pleadings since the initial filing of KSV's motion for summary judgment , the Court then, "later granted" his request.

Russell only failed to appear for oral argument due to the fact that he had no knowledge his request had even been granted or that the hearing had been scheduled. Immediately upon learning of such, Russell drove to Montana, and the next business day following the missed hearing, filed his request to reschedule the missed oral argument, explaining there was no intended waiver of his right to be heard. Russell had made no prior request to reschedule oral argument as KSV eludes[1].

Russell did file objection and opposition to the proposed judgment, foreclosure and order of sale and again requested a hearing on January 31, 2018; according to the last order he'd received in which the Court had denied oral argument and granted summary judgment for KSV.

[1] Pg.4, ¶1, "Russell's request to reschedule oral argument, *yet a second time...*" (*emphasis* added)

As stated, Smith (as KSV) purchased all but four parcels at the Sheriff's Sale on June 1, 2018; and between that sale and the Trustee's Sale she held in 2016, Smith ultimately purchased all of the lots in Sweetgrass Ranch.

Don Russell, appellant's brother, purchased three parcels which had been in their family and which Russell (William) had inherited from their father.

360 Reclaim, purchased parcel 4, which was Russell's place of residence. According to the order of the District Court in the Amended Final Judgment, 360 Reclaim was granted immediate possession of this parcel despite Russell's statutory rights provided by §71-1-229 & §25-13-821 MCA; statutes which this Court referenced when it stated,

"Sections 25-13-821, MCA, and 71-1-229, MCA, which guarantee the judgment debtor the right to possess land he and his family personally occupy as a home were not enacted until 1921 and were not applicable to the facts in Citizens' National Bank., ... The sections quoted above provide for an unqualified right to possession." ***Federal Land Bank of Spokane v. Snider, 808 P. 2d 475 – Mont: Supreme Court 1991*** [emphasis added]

It was here that not only were Russell's personal belongings kept, but also what remained of his life's savings. Albeit, existing in the form of heavy equipment, machinery, and materials, and again some inherited from his father, regardless, these articles represented his lifetime's work achievements and were what Russell

intended and considered as being his means of future financial resource. From the moment of realization, on June 1, 2018, that Russell was to be evicted and dispossessed of his residence, Russell has been ardently pursuing enforcement of his statutory right(s) in order to regain possession of his residence and personal belonging through the courts. To date, he has yet to be given an opportunity to be heard on the matter and remains dispossessed of his home and all of his belongings including any source of financial resource or reserve.

In Reply to KSV's Statement of Facts:

Regarding the allegation of "*Russell's fraud in entering into the marriage*." in KSV's brief at pg.5; in the annulment decree from the Superior Court, the Decree indicates [pg.2/2nd para.], Karen contended that the marriage should be considered null and void based upon Bill's failure to reveal or intentionally misrepresenting facts, primarily related to Bill's financial condition. Russell "vehemently" denied that any concealment occurred, and contended (as he yet maintains) that he provided full disclosure of all relevant information before the marriage ceremony.

If this appeal is granted in Russell's favor and remanded for a new trial, once given his day in Court, Russell can most *definitely prove* Smith had prior

knowledge to his financial state of affairs prior to the execution of the prenuptial agreement and most definitely prior to being wed.

Regarding KSV's claim at pg.6 of its appellee brief, that "*The Arizona Court also addressed Russell's various claims that he and Karen were in a partnership and the..Court..rejected them unequivocally.*" Regarding any 'partnership', the decree states, "*..the Court finds by clear and convincing evidence that Husband never intended to be bound by the (prenup) Agreement. The facts that support this conclusion include the following. "..As wife testified, husband previously stated (erroneously) that by marrying her Wife's assets would be considered marital assets and all debt would be considered marital debt. This is consistent[2] with Husband's testimony that he believed marriage to be a partnership much like an implied business partnership. While such an assumption may be consistent with the law in other jurisdictions, it is not the law in Arizona. See A.R.S. §25-211 et seq.*"

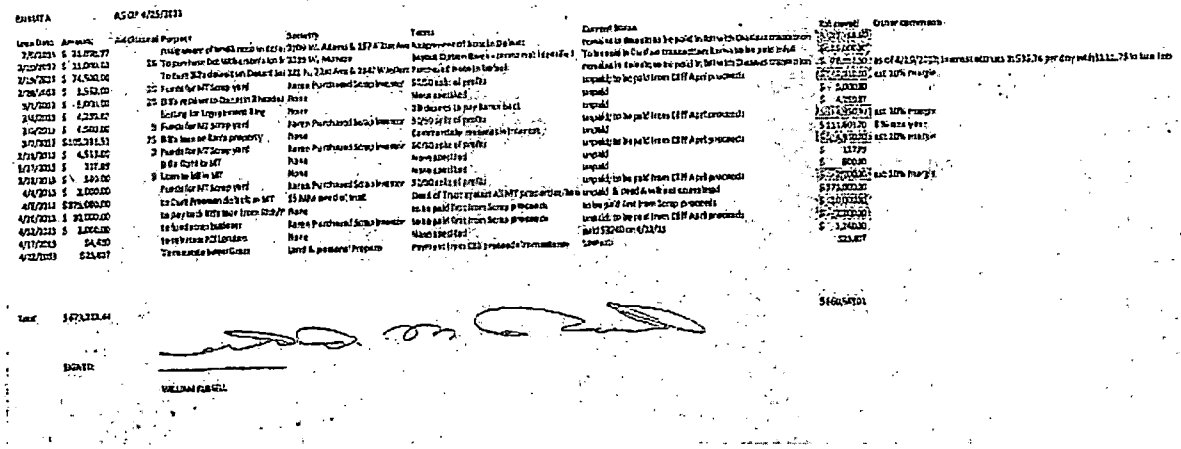
Russell's belief about marriage being a "partnership much like an implied business partnership", when taken in context, was intended to encompass what he believes such a relationship represents by its nature. That being that each no longer acts or exists merely as individuals when making decisions or in times necessary of

[2] This stated correlation is not definitive indication of consistency of the two statements being made here, by the Court. The reference to the fact that Russell testified that he "believed marriage to be a partnership much like an implied business partnership", limits its intended context, to merely being consistent with his previously stated beliefs about the effect of marriage on Smith's assets and all debt being considered "marital" properties.

consideration, but that each should also consider the wishes, desires, needs, and rights, along with the best interests of the two collectively, before acting or deciding to act upon matters of various aspects, including those personal, or business and / or otherwise. It is presumptuous to assume or elude that such a stated belief only pertained to their prenuptial agreement.

The repeated mention of partnership in this case is primarily to bring to light that Smith had/has a duty to Russell to deal fairly and in good faith with him. Smith knew Russell's weaknesses. Smith knew Russell, admittedly, due to ADD, does not pay attention to the 'fine print' of documents, and cannot when under pressure, comprehend what he reads of long documents. She knew Russell trusted her completely in matters during their marriage. They did have the agreement; she was to contribute her 'executive talents' (having gone to law school) in order to help him rehabilitate his business matters, and along with Russell's talents, their goal was to ultimately increase profits, assets, and value. In exchange for doing so, was agreed (as Exhibit A of the 'Loan Agreement' evidences[3],below) that Smith was to receive 50 percent of the profits on top of her initial investment.

[3] In reference to this exhibit A of the "Loan Agreement", Russell wishes to point out the size of his signature in relation to rest of the print and the layout of that document. Obviously it is a spreadsheet, in 'landscape' layout, and assumedly had to have been shrunk down to fit on one paper in 'portrait' layout; therefore, without some alteration, prior to the sheet being reduced in size, Russell's signature must have taken up well over half of the sheet. This is the only copy of any "Exhibit A" which has an actual signature.



As indicated, Russell does not dispute Smith made advances, nor that payments were made toward those advances (pg.8); but maintains Smith made such advances as her contributions in their joint venture arrangement. Russell at no time has suggested that Smith is not entitled to recover what she is rightfully entitled to recover. Russell simply asserts that Smith is not entitled to intentionally deceive the Court and with unclean hands present this matter as one of a lender, borrower type situation. Such is not the case. She decided she wanted a divorce, and with the help of a team of legal counsel, she devised a strategy to not only recoup her financial investments, but in the process of doing so, also profit greatly by the complete and utterly devastating, financial and character injury of Russell. As it stands on this date, Smith has not only effectively got her invested funds back, but has also taken every property of Russell's; smearing his name in the process, assaulting his character by making false allegations in order to get an order of protection against him; and if that wasn't enough, she has even defrauded

him out of his residence along with his clothing, food, all his personal and business records, etc..

Smith has brought a case built upon fraud and deceit. Painting herself as the victim when in reality, she is a fraudulent predator. According to KSV, Russell obligated himself to Smith by accepting a loan and revolving line of credit; by which, Russell allegedly was afforded a five million dollar revolving line of credit, for which, Smith was the "lender". Russell denies he was ever given such a loan nor had access to any such line of credit and contends that the document Smith drafted, which purportedly represents the supposed "loan agreement" and Russell's obligation, was never intended to be for such purpose. KSV alleges it brought this action to collect and foreclose on the "loan" due to Russell's 'default'; Russell purportedly was in default by failing to pay property taxes and by failing to keep current on mortgages underlying the "loan". Russell asks: why, if he had access to such amount of money via the purported "loan" and "line of credit", would he not have simply paid off the underlying mortgages and paid the property taxes? It makes no sense. It lends credibility to Russell's maintained assertion that he never had access to Smith's money and was never given that 'loan'/'line of credit'; she controlled the money she chose to invest and when she chose to. Smith collected all the rents, and profits, in fact any money that came in went straight to Smith in the marriage, Russell held no bank account. According to her loan

accounting, Russell was "loaned" money which Smith allocated to pay for future attorney fees in order to foreclose on his properties – an utterly preposterous notion. Also to be asked, is why were properties put in Smith's name but the costs to acquire them were charged to Russell on the 'loan' accounting? A lender does not loan money then require that any purchase made with that money be titled under its name? If however, Smith was acting as Russell's partner in joint business ventures, and money spent was with money Smith put forth as an investment in the joint venture, this would be logical. As their prenuptial clearly states, the parties intended to jointly work toward increasing the assets, value and profits of Russell's existing business. Russell counted on that to be so; he never dreamed that the implicit trust he placed in Smith would be used so maliciously against him, and ultimately used to defraud him of his entire lifetimes work achievements and inheritance. Russell simply asks that this matter be returned to District Court in order for this case to be actually tried. Russell has evidence to prove each of his statements, but lacks financial means or literal savvy to effectively argue the matter on paper.

REPLY TO ARGUMENT

I. This appeal is not moot; the controversy existing at the onset of this case remains and is substantive and qualificative, meriting appeal..

The Court in Stuivenga clarifies at ¶49, *"In sum, there are no magical "factors" in mootness analysis where the underlying judgment has been satisfied. The only question is whether this Court can grant effective relief, and that will depend on the unique facts, procedural posture, and relief requested in the particular case. If returning the parties to their original positions would be the only effective relief under the circumstances, but doing so is now impossible, then the appeal is moot. But if restitution or some other form of relief would be possible upon a reversal, then the appeal is not moot — even if property has changed hands and third-party interests are involved. Here, the issue presented at the outset of the action (Who was driving?) has not ceased to exist, and Stuivenga's payment of the funds to third parties does not render this Court unable to grant effective relief. This appeal, therefore, is not moot."*

Just like the referenced case in Stuivenga, the issue presented at the outset of the action (that there was no 'loan', but there was a joint venture) has not ceased to exist, and the fact that properties have been sold to third parties, does not render this Court unable to grant effective relief. Likewise this appeal, therefore, is not moot.

Russell still contends:

- The two agreed and conducted themselves as partners in joint business ventures.
- The "loan agreement" and deed of trust documents were not intended for the purpose of loaning $5,000,000.00 to Russell personally.
- The intention of said documents were two-fold; one, to be the means for protecting any financial investment Smith put forth toward the joint ventures; and two, as a means of protecting Russell's then under threat, investment properties by assigning them to Smith as collateral. In return, it was understood and intended that they would each split realized profits fifty-fifty on any of the investment returns.
- Smith owes Russell the fiduciary/partnership duty of good faith and fair dealing.
- Smith has converted all of Russell's property to her own benefit and gain.
- The District Court erred in granting summary judgment; and in denying Russell his fundamental right to be heard before depriving him of his property.

A. The procedural background and facts of this case in no way qualify this appeal for being considered "moot".

KSV submits that this Court is unable to grant effective relief, in essence, by simply inferring, that the damage is done.. and the extent of the damage is more than could be recompensed for. As stated in Stuivenga, ¶ *41 "Stuivenga engages in the same sort of analysis in the present case. He reasons that because Evans did not post a supersedeas bond or stay disbursement of the interpleaded funds, and because Stuivenga has since paid those funds to third parties, it is impossible for this Court to grant effective relief. The flaw in this analysis is that it fails to account for the possibility of a restitution claim. This Court in Hagerty — to which the "third party interests" factor may be traced — made a specific point of noting that it could not "effect restitution" upon a reversal of the district court's writ in that case. 130 Mont. at 558, 304 P.2d at 920. The Hagerty Court distinguished Kurth, where we held that "if [the appellant] is entitled to a reversal of the judgment," then "[w]e may exercise the right of compelling restitution by our own mandate or direct the lower court to do so." Kurth, 96 Mont. at 612-13, 32 P.2d at 16; see also Hagerty, 130 Mont. at 558, 304 P.2d at 920. The Turner Court, in contrast, did not analyze whether, upon a reversal of the judgment, the lien creditors would have "a claim in restitution as necessary to avoid unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment § 18; see*

also Restatement (Third) of Restitution and Unjust Enrichment § 18 cmt. f (discussing the rights of purchasers at execution sales); cf. Marriage of Gorton, ¶ 18 (reasoning that although the real estate had already been sold to a third party, "the basic question in analyzing mootness is whether effective relief could be granted," and "[i]f we were to conclude the [parties'] agreement is unconscionable or invalid, we would remand to the District Court to fashion a remedy which could involve payment from the sale proceeds or other adjustments").[4] Stuivenga, likewise, overlooks the fact that Evans may be entitled to restitution upon a reversal of the judgment in this case."

".. it was wrong to suggest [in Henke] that the involvement of third-party interests and the inability to restore the parties to their original positions necessarily moots an appeal. Again, the question, more accurately stated, is whether it is possible to grant some form of effective relief to the appellant."

"But if the appellant, upon reversal, will have "a claim in restitution as necessary to avoid unjust enrichment," see ¶ 21, supra, then effective relief can be granted and the appeal is not moot."

B. This Court is certainly capable of granting effective relief.

This Court can and should reverse the judgment rendered by the District Court and remand for a new trial.

"It is a long-standing legal principle that `[a] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable. . . .'") (quoting Restatement (First) of Restitution § 74 (1937)).

"A judgment debtor who is unable or is unwilling to post a supersedeas bond retains the right to appeal even if the judgment is executed. Koster & Wythe v. Massey,262 F.2d 60, 62 (9th Cir.1958). ***Strong v. Laubach, 443 F. 3d 1297 – Court of Appeals, 10th Circuit 2006***

The cases are legion which hold under an identical statute that the court may, in case the order appealed from is reversed or modified, either compel restitution by its own mandate or direct the lower court to do so. See the oldest and most quoted and cited case on this point, Haebler v. Meyers, 132 N.Y. 363, 30 N.E. 963, 15 A.L.R. 588; the extensive note in 96 Am. St. Rep. 124; and 18 West's Annotated California Codes, Code of Civil Procedure, section 957, page 225. ***Burgess v. Lasby, 94 Mont. 534, 24 Pac. (2d) 147, 153***

Stuivenga¶ 46 see also Strong v. Laubach, 443 F.3d 1297, 1299 (10th Cir.2006) ("A judgment debtor who is unable or is unwilling to post a supersedeas bond retains the right to appeal even if the judgment is executed. Should the judgment be reversed on appeal, a district court may, on motion or sua sponte, order the

judgment creditor to restore the benefits obtained." (citation omitted)). One of the underlying rationales for this rule is that any payment made in response to a judgment is treated as a payment made under compulsion. Restatement (Third) of Restitution and Unjust Enrichment § 18 cmt. c. Conversely, a payment by way of compromise and settlement, where the purpose of the agreement is to effect a final resolution between the parties irrespective of the validity or correctness of any prior decrees, is not subject to recovery in restitution unless the agreement of compromise may itself be avoided, on contract principles, for reasons such as fraudulent concealment or invalidating mistake. Restatement (Third) of Restitution and Unjust Enrichment § 18 cmt. c."

II. The District Court was not correct in entering Summary Judgment and Judgment.

A. The existence of a dispute as to the intent of the purported "Loan Agreement" document should have rendered summary judgment inappropriate.

"*The intent of the parties to the transaction is purely a question of fact..Ordinarily, such issues are inappropriate for summary judgment.*" Citizens Bank of Clearwater v. Hunt, 927 F.2d 707, 711 (2d Cir. 1991)

B. The District Court erred by weighing the evidence and thus concluding that none of the evidence suggests that Karen Smith entered into a joint venture with Russell.

US v. Shumway, 199 F. 3d 1093 – Court of Appeals, 9 Cir. 1999: *"..the district court was bound, on summary judgment, to determine only whether there was a genuine issue of material fact, and was not empowered to weigh the evidence or determine the truth of the matters asserted. [61] When a respondent to a motion for summary judgment submits proper affidavits by individuals with personal knowledge and other cognizable and significantly probative evidence, such that a reasonable juror drawing all inferences in favor of the respondent could return a verdict in the respondent's favor, the judge must treat that fact as genuinely at issue."*

A. Russell was not given a full and fair opportunity to be heard in the matter.

Russell could effectively in person, present evidence and issues relevant to this case, much more aptly than he is able on paper.

"*A hearing on motion for summary judgment allows the non-movant to establish existence of genuine issues of material fact..and which could defeat summary judgment.*" Virginia City v. Olsen, 2002 MT 176, ¶23, 310 Mont. 527, 52 P.3d 383

Russell never specifically waived oral argument or his right to be heard. This was a waiver made by KSV counsel and assumed and taken by Judge in District Court.

"*Parties have a right to hearing on motion for summary judgment unless the hearing is "specifically waived".* Linn v. Cty County Health Dept. (citing Rule 56c and Cole, 236 Mont. At 419, 771 P.2d 101.)

III. KS Ventures should not be awarded appellate costs and attorney fees because:

1. KSV has more financial resources than Russell with which to pay such fees;
2. Russell's positions in this action are no less reasonable than those of KSV; and
3. It violates Russell's Constitutionally protected right of equal protection under the law. In a case handed down by the U.S. Supreme Court twenty-nine years after the Fourteenth Amendment with its guarantee of "equal protection" was ratified, Gulf, C. & SFR Co. v. Ellis, 165 US 150 (1897), affirmed:

The act [that denied attorney fees to a party whether they win or lose] singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with

like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection.

CONCLUSION

WHEREFORE, Appellant, respectfully prays this Court:

1. Not consider this appeal moot.
2. Not dismiss this appeal.
3. Reverse the District Court's judgment, decree and order; and
4. Remand for a new trial; and
5. Deny KS Venture's request for Russell to pay their attorney fees; and
6. Grant Russell any such other and further relief as may be just and proper under the circumstances.

RESPECTFULLY SUBMITTED THIS 26TH day of October, 2018.

William M. Russell, Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2010 is less than 5,000 words, namely 4076 words, excluding caption, , certificate of compliance, and certificate of service.

Dated this 26 day of October, 2018.

By:_____
William M. Russell/Appellant

CERTIFICATE OF SERVICE

I, William M. Russell, hereby certify that I have served true and accurate copies of the foregoing Brief – Appellants Reply to the following on the 26 day of October, 2018:

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