
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
 DIVISION I

RICHARD AZPITARTE, *appellant*

vs.

DANIEL SPINO et al, *respondents*

APPELLANT'S REPLY BRIEF

2018 FEB 17 11 15 AM
 COURT OF APPEALS
 STATE OF WASHINGTON
 Richard Azpitarte
 153 S. 420 St.
 Seattle, Wash., 98168
 206-694-9879

ORIGINAL

RESPONSE TO APPELLEES REPLY STATEMENT OF CASE

Appellee Spino continues to make misrepresentations of fact to the court that have no basis in law or fact, and does not make any references to the record to back up these allegations.

First, he alleges without any basis, that it was the county who auctioned off the vehicle and it was lawfully done in March or April of 2005. First of all, there is no evidence that the county even came into possession of the vehicles, let alone conducted an auction. The auction, if it occurred at all (something that the appellant contests) occurred on February 24, 2005, and was conducted by Cedar Rapids towing and Jony McCall, not the county. (CP 275-288) The records for that auction, show the buyer of the vehicle in question (69 Chevelle Vin ##136379B353345) was Burien Collision, not appellee Spino (CP 208). It was not until Spino used the AVR that had been forged and altered to reflect him as the buyer, did his name show up on the AVR. (CP 413), There is nothing in the record of this case that shows that this car was ever part of the auctions in March and April.

Then, after misrepresenting the dates to this court as to the date of the auction, Spino then argues that this supports the courts finding that Azpitarte had knowledge of the auction. While it is true that Azpitarte might have knowledge of one auction in March, because he was refused entry, there is absolutely nothing in the record that shows that he had knowledge of an auction in February of 2005.

For making this misrepresentation to the court, the appellant respectfully requests sanctions of \$5000 against both Spino and his counsel.¹

1. THE APPELLEE SPINO MISTATED THE BURDEN OF PROOF ON THE AFFIRMATIVE DEFENSES OF BONA FIDE PURCHASER.

In his response Spino cites the well known rule that the burden is on the moving party show an absence supporting the non-moving party's case. He then argues that once the plaintiff has met that burden, then the burden shifts forward to the non-moving party to put forward specific facts rebutting the non moving party's contentions.

¹ RPC 3.3(a)(1) requires an attorney to show candor to the court. "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"

Here, the moving party Spino never put forward any evidence that support his affirmative defense of the Spino being a bona fide purchaser. Our Supreme Court in *Glaser v. Holdorf*, 56 Wash. 2d 204, 352 P.2d 212 (1960) defined bona fide purchaser. The court stated:

A bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration.

Spino did not submit any evidence or declarations at all that show then he even purchased the vehicle, let alone paid the vender Cedar Rapids Towing consideration. Generally courts will put the burden of proof on the defendant for an affirmative defense "because generally, affirmative defenses are uniquely within the defendant's knowledge and ability to establish." *State v. Riker*, 123 Wn.2d 351, 367 (citing *State v. Knapp*, 54 Wn. App. 314, 320-22, 773 P.2d 134, review denied, 113 Wn.2d 1022 (1989)). See also *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 493, 859 P.2d 26 (1993) (the defendant bears the burden of proof "only where it asserts an 'affirmative defense'"); *Locke v. City of Seattle*, 133 Wn. App. 696, 713, 137 P.3d 52 (2006) ("The burden of proof is ... placed

The appellant further requests that the court make a finding that Spino's attorney violated this provision when awarding sanctions.

upon the party asserting the avoidance or affirmative defense.”).

Even if Spino had met his initial burden (something which Azpitarte disputes), the appellant Azpitarte has met his burden showing that Spino was not a purchaser in good faith.

The burden of establishing that a purchaser had prior notice of another's claim, right, or equity, rests upon the one who asserts such prior notice." Glaser, at 209.

...

There is no necessity of establishing actual notice, however. The purchaser need only have "such information as would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry". Glaser, at 209.

Here there is several things that would excite apprehension in an ordinary mind and prompt a person of average prudence to make an inquiry. The AVR stated that Spino purchased the car on an auction on February 24, 2005.(CP 413) Spino knew that was not true. The AVR also gave notice of a statute that showed only the purchaser at the auction could turn it into a title. He knew that was not him. Also, in comparing the altered AVR(CP 413) with the original (CP 208) , the type of alteration must have put Spino on notice that the document was forged. For example, he knows he does not live or even have a business located at the Burien Collision address. It is difficult to understand how a major forgery

of this magnitude could have been carried out without the use of whiteout or something similar. That would have put Spino on notice that there was something wrong with the AVR, yet as far as this record is concerned, there is no evidence he made any inquiry at all.

2. AZPITARTE HAS SHOWN THAT SPINO PARTICIPATED IN THE FRAUD.

Spino attempts to argue that Azpitarte has only shown that Sauve, not Spino, forged the AVR in question. Azpitarte never argued that it was Sauve that forged the document, only that it was forged. Azpitarte was not allowed any discovery to delve into the issue as to who actually forged the document. Spino correctly alleges that Azpitarte also claims that someone from the DMV probably was involved. Then Spino argues that none of this shows that Spino was involved.

However, by the very nature of the crime, Spino had to be involved. He is the one that had to go down and convert the AVR into a title. When he did so with a document that stated under oath, facts that he knew were not true, which included the allegation that Spino purchased the car on an auction on February 24, 2005 that implied he was the purchaser at the auction, that had an incorrect address for him, and had

been altered by forgery. Spino claims there is no proof of forgery, but a comparison of the AVR issued at the auction (CP 208) with the altered one (CP 413) shows that someone altered and changed the original. Spino offers no plausible explanation as to how the document could be nothing else but a forgery.

Next, defendant claims that Azpitarte should have been able to discover these facts through other litigation. But the defendant has not included anything in the record which could have shown how he could have obtained this information. There is nothing in the record which demonstrates how litigation against the county over the original tows would have led to the discovery of fraudulent auctions and title transfers that occurred much later. In fact, there is nothing in this record that shows that Azpitarte was allowed any discovery in many of the other suits Spino refers to.

In fact, the record in this case demonstrates, at a minimum, Spino had to have knowledge of the fraud being conducted, as he is the one who had the title converted into his name. It is a reasonable inference that Azpitarte only learned of this much later when he finally able to learn of

the fraud through the Helton report which he found out about on March 27, 2009

3. THE ISSUE OF STATUTE OF LIMITATIONS DOES NOT PRECLUDE THE AMENDMENT OF THE COMPLAINT TO INCLUDE RICO AND OTHE ISSUES.

Finally, Spino attempts a circular argument to claim that the plaintiff has never addressed the issue of statute of limitations for RICO and it should be denied for that reason. He also argues that the amendment should be denied because the United States District Court for the Western District of Washington has already ruled the statute of limitations has not been met.

First of all, statute of limitations has never been raised as an affirmative defense in the present case. The record only shows that the plaintiff brought an unopposed motion to amend on April 18, 2013. (CP 76-77, 83-84). This is well before the order for motion for summary judgment was filed on 6-27-2013. (CP 457-459). The defendant Spino, in his response, has never addressed the failure of the court to grant the motion to amend as required by *Taglimi v. Colwell*, 10 Wash. App. 227, 517 P.2d 207 (1973). Since the court never addressed the amended

complaint, (CP 457-459), the appeal should be sustained on that reason alone.

Even if the statute of limitations had been raised, the plaintiff's complaint was well within the four year statute of limitations of RICO if the discovery rule and equitable tolling are considered. In *Pincay v. Andrews*, 238 F.3d 1106, 1108 (9th Cir. 2001) the Ninth Circuit ruled the "injury discovery" rule applies to RICO actions. The defendants would like to argue that the injury discovery rule would apply to auctions that occurred in March and April of 2005, but as the plaintiff points out, the Spino car was supposedly sold at an auction in February of 2005, for which Azpitarte had no knowledge. Even if Spino tried to argue that knowledge of the transfer should have been obtained when Spino titled the vehicle later on in 2005, they offer no explanation as to how Apitarte could have discovered that fact, especially since they offer no argument to Azpitarte's claim that titling documents are not public records.

The plaintiff intends to extend the statute of limitations through the doctrine of equitable tolling, by saying that he did not learn of the possible claim until after the wrongful conduct of the defendant. This is consistent with the principle of equitable tolling under federal law, e.g. See, e.g.,

Santa Maria v. Pac. Bell, 202 F.3d 1170, 1175, 1178 ("If a reasonable plaintiff would not have known of the existence of a possible claim . . . then equitable tolling will serve to extend the statute of limitations . . . until the plaintiff can gather what information he needs."); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) ("Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant . . ."); In *Klehr v. A.O. Smith Corp.*, 521 US 179 (1997) the Supreme Court ruled that the doctrine of fraudulent concealment equitably tolls the running of the limitations period in RICO actions if the plaintiff has exercised reasonable diligence in respect to its RICO claim, that is, the period is tolled if and to the extent that the plaintiff shows he neither knew nor in the exercise of due diligence, reasonably could have known of the RICO violation

Spino then tries to argue that the complaint should not have been amended (even though he did not oppose it down below) because of the subsequent finding by Judge Martinez in federal case no. C-13-1413. The problem with this is that Judge Martinez applied res judicata to this case in order for him to rule on statute of limitations on that case. For example, the federal court cited to this case for the proposition that Spino was a

bona fide purchaser, simply because this court did. So if this court, does as it should, which is set aside the bona fide purchaser finding because there is not evidence, then Judge Martinez's assumptions that this court's ruling is binding also fails.

Also, Judge Martinez's rulings fail for the same reason as argued here. Judge Martinez assumes that Azpitarte found out about the auction in February. There is nothing in the record that supports that finding, and there is nothing in the record that even supports the idea that an auction ever occurred. As the defendants point out, Richard Azpitarte filed a motion on those points, which were unopposed by the other parties, and was noted for January 2, 2014. Since Judge Martinez has yet to rule on the motion, the order the defendants refer to is not final.

CONCLUSION

For all the reasons stated above, the appellant requests that the ruling of the trial court be reversed and the case reinstated with the plaintiff being allowed to continue with discovery.

Dated this 13 day of February, 2015


Richard Azpitarte

I hereby certify that on September 13, 2015, I caused to be served a copy of the appellants opening brief by the method indicated below and addressed to the following:

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- Hand Delivered By: _____
 U.S. Mail first class postage prepaid
 Overnight Mail fees prepaid
 Federal Express fees prepaid
 Facsimile time of completion : _____



Richard Azpitarte