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SUPREME COURT
STATE OF WASHINGTON
1/2/2019 4:57 PM
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Case No.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

OF THE STATE OF WASHINGTON

BluZEBRA TECHNOLOGIES, a division of
COPIERS NORTHWEST, INC., a Washington Corporation, Respondent

v.

YATES, WOOD & MacDONALD, INC, a
Washington Corporation, Petitioner

PETITION FOR REVIEW

Submitted By:

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Yates Woods & MacDonald, Inc. (hereinafter "YWM") asks this Court to review the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

YWM requests the Supreme Court to review the Washington State Court of Appeals Decision in Case No. 77106-0-I, in an unpublished opinion, filed December 3, 2018 and attached as an Appendix.

YWM asks this Court to review the decision affirming the trial court's granting of summary judgment to respondent. YWM asserts that the Appellate Court erred in finding that the Copier Agreement between the parties permitted increasing the cost of black and white copies during the term of the lease and that respondent had no duty to maintain the copier during the term of the lease. YWM asserts that the Appellate Court erred in finding that respondent's failure to give notice of default as required by the parties master service agreement, phone and server lease prior to initiating its claims for breach of those agreements.

C. ISSUES PRESENTED FOR REVIEW.

The Decision of the Court of Appeals is in conflict with a decision

of the Supreme Court and / or is in conflict with a published decision of the Court of Appeals.[1]

The appellate court properly found that respondent Bluzebra Technologies, a division of Copiers Northwest, Inc. (hereinafter "BZ") presented no evidence that either no evidence that the agreement it claims was breached was executed by BZ as that agreement clearly required for it to be effective. The appellate court erred, however, in finding that an ambiguity allowing it to use parol evidence of the parties' subsequent conduct (billing and paying for copy increases) to then find that the "Copier Program Agreement" is the parties contract. There was no ambiguity for the appellate court to resolve. The "Copier Program Agreement" unambiguously required the OWNER (BZ) to execute the Agreement. The agreement provided "THIS AGREEMENT IS NOT BINDING UPON OR EFFECTIVE UNTIL AND UNLESS WE EXECUTE THIS AGREEMENT." The court did not explain how this provision is ambiguous. The sales order does not permit increasing the monthly lease payment and is likewise not ambiguous. Absent an ambiguity for the court to clarify, the court erred by essentially finding the

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[1] RAP 13.4 (b)(1) and (2).

course of performance as suitable for altering the terms of the sales order as it relates to the monthly charges for the base number of copies per month.

The Court of Appeals further found that an email terminating one contract and silence as to the other contract amount to disregard of the notice provision in the contract as a matter of law. However, such finding is contrary to the existing Washington law, which requires notice be given if the parties negotiate for a notice in their contract.

Petitioner further requests that the Supreme Court reverse the attorney fee award pending the outcome of the trial on the merits in the Superior Court.

D. Statement of the Case:

a. Copier Program Agreement/Lease:

A second question is whether CNW may enforce the right to increase monthly payments when that right is contained in a contract that conditions its effectiveness is conditioned on execution, but the agreement has not been executed. The parties entered into a purchase agreement and lease with conflicting terms regarding the monthly payment required. One provided for a flat monthly payment of $605.06 for 60 months, the other

provided that the monthly rate could be increased annually by no mor than 7%. The specific question is whether CNW was, as a matter of law, entitled to annually increase the monthly payment for the fixed number of copies. CNW entered into a series of contracts with YWM. The parties entered into a copier lease dated 12/6/2011. Index to Clerk's Papers, Doc. 31, pg. 226. The copier lease was evidenced by a sales order that provided for a monthly payment of $605.06 for 60 months in exchange for copying a set number of black and white and color copies. Id. at 231. This agreement was a final and binding agreement and non-cancelable. Id. No provision was included permitting CNW to increase the monthly payment. Id.

The parties then executed a document entitled a "program agreement." Id. at 232., Index of Clerk';s Papers, Doc. 21, pg. 80, para. 6. The program agreement provided some additional terms such as the per page price of monthly copies that exceeded the monthly number permitted for $605.06 per month. Id. The program agreement then declares that the $605.06 is a minimum monthly payment. Id. On the reverse side, paragraph 1 of provided that CNW would provide full service and maintenance. Paragraph 2 provides that service covers normal wear and

tear, but that CNW is not responsible for any service or maintenance of the equipment. Id. at 232. Paragraph 4 provides that CNW may raise the minium monthly payment no more than 7% during the term of the agreement. Id. at 233. No additional consideration is stated for the change in price from the sales order to the program agreement. The monthly cost of the lease was unilaterally increased by CNW 4% per year. Excess copies were not addressed in the purchase order lease. During the course of the lease, YWM paid a total of $3,022.74 over and above the $605.06/month for the allotted number of copies.

In March 2016, YWM inquired about the cost of paying of the lease early and purchasing the copier. Clerk's Papers, Doc. 31 pg. 237. CNW responded with the monthly lease payments left on the agreement and the option of either paying the residual and purchasing the copier or returning the copier to CNW. Id. at 236. YWM elected to pay the remaining monthly lease payments in advance and the residual buy out. Id. at 235. No further writing memorializing the agreement occurred and no document terminating the lease agreement was executed. YWM paid the demanded sum. Id. at 226. In April 2016, YWM noticed that routine maintenance had not been completed on the copier maintenance had not

been completed and requested service from CNW. Id. at 245-251, CNW refused to undertake service stating that they were under no obligation to provide service despite accepting all lease payments through the end of the lease in advance. The Declaration of John Hines states that the copier was sold as is with no warranty, but references an exhibit (h) that does not mention the copier. Clerk's Papers, doc. #21, pg. 87. para. 31.

In March 2016, CNW sent an invoice for remaining excess copies totaling $508.22. It is not disputed that this invoice was not paid, but the sums are not owed due to the previous overpayments and CNW's refusal to undertake maintenance during the period of lease prepayment.

On September 28, 2012, CNW and YWM entered into a Master Service Agreement to provide network services. Id. at 263-272. Despite the termination of the parties agreement, CNW continued to invoice YWM for such services from October 2015 through February 2016 with YWM paying the invoices. Id. para. 29. YWM refused to pay subsequent invoices for March 2016 and April 2016. Id. YWM did not receive any back up data or access to its data either at termination or upon request. Id. at 231, para. 26.

Both the master client services agreement and phone lease require

written notice of default as a condition to termination and an action for damage. Clerk's Papers, Doc. 31, pg. 254 and 264.

E. Argument

Granting of Summary Judgment

The standard of review for an Order Granting Summary Judgment is de novo. The appellate court undertakes the same inquiry as the trial court[2]. In reviewing a grant of summary judgment, the reviewing court should view the facts and reasonable inferences in the light most favorable to the nonmoving party, here that is respondent. [3]

A. The copier lease.

The sales order is a contract as it contains all the essential elements of a contract. Plaintiff in their original motion for summary judgment contended that this order was replaced by a subsequently executed Copier Program Agreement. No evidence was presented that the Copier Program Agreement was later executed. The agreements were executed by YWM on the same day. The declaration of Hines provides no foundation for the contention that the purchase order only provided "initial terms which were

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2 Ruvalcaba v. Ho Baek, 175 Wash. 2d 1 (2012)

3 Michak v. Transnation Title Insurance Co. 148 Wash. 2d, 788 (2003).

satisfactory" and that the parties entered into a more detailed copier program agreement later that same day. Clerk's Papers, Doc. #21, pg. 80.

Mr. Hines provides no foundation for the declaration and the declaration itself is contradicted by the purchase order which states it is a final and binding contract. Clerk's Papers, Doc. 31, pg. 232. The sales order obligated CNW to lease the identified copier for 60 months at a cost to YWM of $605.06. The monthly cost is for a set number of black and white as well as color copies each month. There is no provision authorizing CNW to unilaterally increase the monthly cost of the lease for the copies permitted copies provided in the sales order.

The Copier Program Agreement provides for additional terms, most notably a provision for charging for excess copies used by YWM during the term of the agreement. The program agreement provided for a monthly minimum payment of $605.06 for a minimum number of impressions and an additional cost per page for copies over a certain amount per month. The copier agreements were drafted by the plaintiff and presented to YWM. Id.

Neither agreement was signed by a representative of CNW. The program agreement, states that "**Once we accept this agreement, you**

may not cancel at any time during the term." Clerk's Papers, Doc. #21, pg. 99. The program agreement further states that "THIS AGREEMENT IS NOT BINDING UPON US OR EFFECTIVE UNTIL AND UNLESS WE EXECUTE THIS AGREEMENT." Clerk's Papers, Doc. #21, pg. 98. No such limitation to its effectiveness is contained in the sale order setting the amount of copies covered by the agreed upon monthly charge and the monthly charge. Having conditioned enforcement and effectiveness of the agreement only upon their signature, CNW's failure to execute the agreement means the parties reached no agreement on terms outside of the purchase order.[4] As a result, CNW had no right to increase the minimum monthly payments and has demonstrated no contractual right to charge for excess copies in the amounts it charged YWM in March 2016. [5]

Even if the court were to accept the program agreement as not so conditioned, the lack of a signature and requirement of the same as a condition to effectiveness is evidence that the integration clause does not control the parties' understanding. Integration clauses are a strong

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4 *See* Pacific Food Products, Co. V. Mukal, 196 Wash. 656 (1938)

5 Badgett v Security State Bank, 116 Wash 2d 563, 569-570 (1991).

indication that the parties intended complete integration of a written agreement, however, they will not be given effect if it appears the provision is factually false.[6] In such cases, parol evidence can be used to show whether denial of the existence of any other agreement is controlling.[7]

Here, there is both intrinsic and extrinsic evidence demonstrating that the purchase order is, in fact, controlling, at least of the, agreed upon monthly number of copies in exchange for the monthly payment. The purchase order itself is a binding non-cancelable contract with CNW. CNW did not include any provision that conditioned its enforcement on mutual execution. In addition, the program agreement listed both the number of copies and monthly payment as minimums. Nowhere in the record were the minimum monthly copies raised an amount corresponding to the new minimum monthly payment charged by CNW. That is, YWM was only permitted to make the same amount of monthly copies for the monthly charge that it was invoiced throughout the lease term. That evidence, combined with the purchase order forming a non-cancelable

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6 Black v. Evergreen Land Developers, Inc., 75 Wash. 2d 241 (1969)

7 Id

contract and setting a fixed rate for a fixed number of copies is evidence that the integration clause was, factually, false and should not be enforced.

As detailed to the trial court, the additional payments made by YWM more than exceed the amount (even assuming that CNW could charge for those copies on a copier it had sold) alleged by CNW as due for copies above and beyond the copies covered by YWM monthly payments. These overcharges must be considered in determining whether the invoice in question is, in fact due and owing by YWM. Generally a plaintiff, in an action for breach of contract is entitled to his net gain that he would have realized had the contract been performed. Munson v. McGregor, 49 Wash. 276 (1908). Due to the years of overcharging YWM, CNW has no net gain that it would have realized even if it could prove entitlement to additional sums for copies above the monthly allotment in the purchase order.

B. Telephone System Lease

On 3/2/13 YWM and CNW entered into an agreement to lease a ShoreTel telephone System from plaintiff, a network VoIP switch and 33 ShoreTel phones from BZ at the rate of $665.00 per month for 60 months plus Tax. The contracted for amount included monthly "maintenance and

management" of the phone system. Plaintiff made clear that their promise to provide a phone solution included support. Out of the $665.00 monthly payment, $200.00 per month was attributed to management and maintenance.

Nowhere in the contract are the terms "maintenance and management" defined, but the phone proposal clearly stated it includes support. Courts will give terms in a contract their plain and ordinary meaning unless the entirety of the agreement demonstrates a different intent. Hearst Communications v. Seattle Times Co., 154 Wash. 2d. 493 (2006). "Support can also mean the personal assistance vendors provide to technicians and end users concerning hardware, operating systems and programs. The term is frequently associated with telephone help lines provided by most vendors..... The best customer of technical support consists of real time conversations between end users and knowledgeable representatives for the vendor." whatis.techtarget.com. That is the plain and ordinary meaning of support and is encompassed by a management and maintenance agreement. This was made clear because, at the time that the solution was offered, CNW specifically represented that their services included support without a separate line item for the charge or a limitation

on the length of time that support was provided. Here the vendor was CNW. CNW promised to provide on going monthly management and maintenance, which most people would believe includes answering questions regarding the phone system and helping solve problems such as the one that occurred in March 2016.

CNW claims to fill in the void of missing facts as to the definitions of what "maintenance and management" actually means vs. the word "support." The declaration fails to note that at the time, plaintiff's proposal included support. What most people would consider part of an agreement to also manage and maintain the phone system. The declaration contradicts what CNW said when initially queried for help with the phone system. Clerk's Papers, Doc. #33. CNW confirmed that they contract out support. Id. Then when it became clear that CNW's contractor did not support the phone system plaintiff promised to maintain and manage, CNW for the first time stated that support is not included in the management contract without further explanation.

Yates understood the ordinary and usual meaning of the words "maintenance and management" and what they were paying for was a company that could solve its phone problems throughout the course of the

lease. YWM's understanding is consistent with the commonly understood meaning of support and well within the reasonable expectation of a party who is paying $200.00 per month for management and maintenance of their phone system in an agreement where support is specifically included in the proposal. YWM has offered no evidence to support its contention that their support of the phone system was limited to one year. Apparently, plaintiff did but did not incorporate any such limitation in their promises to Yates.. The proposal given to YWM provided that the agreement includes "all installation costs and support." Clerk's Papers, Doc. 34.t

Lastly, the phones and master client service agreement both require written notice as a perquisite to an action and termination. A party that bargains for notice, has a right to such notice .[8] The maxim that a useless act does not apply to notice and cure requirements. Id. *citing* Republic Investment Company v. Naches Hotel Co., 190 Wash. 176 (1938) which held "Having failed to give the notice required under the terms of the lease, this action cannot be maintained for cancellation of the lease or for damages for breach. Id. at 182.

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[8] DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.
179 Wash. App. 205 (2014)

Lastly, the contract provides that failure to pay is an event of default. However, the contract also provides for remedies in the event of default. Written notice is a pre-requisite to acceleration and to sue for and receive all rental payments due under the contract and accelerate the balance of such rental payments. CNW offered no evidence that it provided YWM any written notice of default. The Master Client Services Agreement required ten days written notice and an opportunity to cure. Payments were made on this and the phone agreement until, CNW failed to honor its agreements by failing to provide licenses and thereafter providing the code so YWM could access the local server. A party that bargains for notice, has a right to such notice .[9] The maxim that a useless act does not apply to notice and cure requirements.[10]

D. Managed Network Services:

CNW failed to provide Yates with the contracted for services under the Managed Network Services Agreement. Additionally, the MNSA did

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[9] DC Farms, LLC v. Conagra Foods Lamb Weston, Inc. 179 Wash. App. 205 (2014)

[10] Id. *citing* Republic Investment Company v. Naches Hotel Co., 190 Wash. 176 (1938) which held "Having failed to give the notice required under the terms of the lease, this action cannot be maintained for cancellation of the lease or for damages for breach. Id. at 182.

not have a roll over provision and was confirmed that it ended on 9/25/15. Holmes. Nathan Mumm confirmed no roll over and stated that he would consider the date of 3/15/16 as termination date. Nothing in the agreement provided a requirement for a 30 day notice to terminate and the agreement by its terms expired on September 25, 2015, no further payments are due to plaintiff under that agreement. A contract that, by its terms has expired is not actionable for breach. "The second reason is that a contract which by its terms has expired is legally defunct and, since the vitality which it once had has ceased, there is nothing upon which an extension may legally operate. So long as a contract remains executory, the parties thereto, acting upon sufficient consideration, may by agreement rescind, alter, modify, supplement, or replace it; but when the contract has terminated or been extinguished, it is no longer subject to extension, for extension implies an existing agreement. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms." [11]

No evidence was presented to the trial court that a new agreement entered into after expiration of the network services agreement was

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[11] Pavey v. Collins, 31 Wash. 2d. 864, 871 (1948).

entered into between YWM and CNW. YWM, having paid the monthly payments through September 25, 2015 owes nothing further under this agreement. CNW argued to the trial court that the Master Client Service Agreement had not terminated, but this is no help to their claim for network services invoiced in March and April 2016. That agreement provides that the terms of the statement of work (i.e. the network services agreement) controls. Clerk's Papers, Doc. #31, pg. 263. Having no contract to provide and require payment of such services, the operative contract having expired by its terms, CNW cannot claim that a failure to pay invoices for such services is a breach of contract entitling it to damages.

CNW has made a separate claim for services in relation to the transition to YWM's own network in April 2016. Yates is entitled to an offset of any and all payments made from October 2015 to February 2016 under the Managed Network Services agreement against any and all claims for damages that BZ may have against Yates. Yates paid $8,855.00 to BZ from October 2015 to February 2016 after it had fully paid the contract for network services September 25, 2015 and was certainly terminated no later than March 1, 2016. CNW offered no evidence or support for the

reasonable value of services provided and accepted by Yates related to network monitoring and relies only on an agreement that was fully paid and expired. Because the contract which gave rise to the $171.23 invoice for labor at the time of rendering of labor was terminated and YWM has shown that it overpaid from October 2015 through February 2016, there is no basis for CNW to claim any right to labor costs that are not offset by the overpayments established above.

Even if the Court finds otherwise, the master client services agreement requires notice and an opportunity to cure. CNW has offered no evidence that it satisfied this requirement and it is not entitled to judgment as a matter of law.[12]

F. Conclusion

The Court of Appeals found, contrary to the established Washington law, that the course of dealing may alter the terms of the sales order as it related to the monthly amounts due on the base contract.

The Court of Appeals found, contrary to the established Washington law, that a party may disregard a notice requirement in a contract as a matter of law even when parties negotiated a mandatory

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[12] Republic Investment Co. *supra*

notice requirement.

YWM seeks an order permitting it to recover its attorney fees on this appeal or, in the alternative, reserving on attorney fees pending the outcome of trial after remand.

Respectfully Submitted

January 2, 2019

/s/ Mark G. Passannante

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Mark G. Passannante, WSB#25680
Of Attorneys for Petitioner

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BLUZEBRA TECHNOLOGIES, a division of COPIERS NORTHWEST, INC., a Washington corporation,	)	No. 77106-0-I
Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
YATES, WOOD & MACDONALD, INC., a Washington corporation,	)	
Appellant.	)	Filed: December 3, 2018

LEACH, J. — Yates, Wood & MacDonald Inc. (Yates) appeals a summary judgment granting four breach of contract claims of BluZebra Technologies (BZ) and dismissing Yates's counterclaims against BZ. BZ claims that Yates did not pay a number of invoices for goods and services authorized by the copier program agreement, the master client services agreement, the telephone lease, and the server lease. Yates does not contest this. And Yates does not present sufficient evidence to create a genuine issue of material fact about BZ's claims or its counterclaims. We affirm.

FACTS

Yates is a property management company and commercial real estate firm. BZ, a division of Copiers Northwest, sells, leases, and maintains copier

machines, telecommunications equipment, and related products and services. Yates has had an ongoing business relationship with BZ since the 1980s. This appeal involves four agreements between Yates and BZ: the copier program agreement, the master client services agreement, the telephone lease, and the server lease. The telephone and server leases state that in addition to their respective terms, they are governed by the master client services agreement.

In February 2016, Nancy Darlington sold Yates to Mark Holmes. On March 18, 2016, Holmes notified BZ that Yates was terminating its contractual relationship with BZ for network services. On April 27, 2016, BZ representative Mark Fisher e-mailed Holmes to confirm that April 28, 2016, would be the last day that BZ would provide services to Yates. Holmes responded,

> There are many open items that even with our involvement don't seem to be answered or resolved by the BZT Team. In addition, there is some question as to end dates.
>
> Rather than asking us "are we good" you should be telling us whether we are good or not. You are the Network people, not us. We are merely taking it over when it is ready to be taken over. My understanding is there are still areas where the BZT Team does not understand what is occurring and how things are being accessed and/or controlled.

Fisher responded,

> We've answered every question that you've asked, and provided you with all of the network details needed to run the network. Attached is an email correspondence between Josh Weiland and your IT [information technology] contact David Berge. As you can see, there is a list of network details and thoroughly

answered questions. This information should be sufficient for your IT team to manage the network.

We're not exactly sure what you're asking of us. Is there some missing piece that is preventing your people from taking over responsibility?

Holmes described his expectations in deposition testimony:

Q. Exhibit 19 is an e-mail chain. Mark Fisher sends the first e-mail to you and copies a couple people. You respond.

A. Yeah. I even said here—this worried me too. He's like, hey, effective this date, we're going to cut off your service.

I'm like jeez. Well, you know, we paid you hundreds of thousands of dollars over decades. I would think you'd work with us to kind of get us to where we need to go.

That's why I responded back. Hey, you know, I'm not a technology guy. Our IT guy's down in Portland. It's 20 days, 20 business days.

After this, I mean, I don't think their technology person, who I don't think ever even worked on the system, got in contact with David.

David asked him a whole series of questions, and he didn't know. We had to bring our people in to take pictures and tell David what we had.

That was communicated to their technology person, and then he started getting bits and pieces of this. Meanwhile[,] while this was going on and we were wondering you know, jeez, I hope they don't try to cut over, I was getting e-mails from them going, hey, are we all good?

I'm like, well, don't—you're the IT. You know, you've got—you've had the system and received hundreds of thousands of dollars. You know, you tell us if we're good.

Q. Well, you chose to terminate those services; right?

A. Yeah.

Q. You essentially fired them from providing these services. You expect them to continue to provide the services after you fired them?

A. Well, not to provide the services, but to help us transition.

Q. And you don't think they did that?

A. No. In fact, I think they said, well, you know, we're going to have to—if it goes over the date, we're going to have to charge you. Really?

That's what kind of got me. It's like really? After all this? It just—it just—given everything I knew, it was just—it just was very unjust.

Q. So the fact that they wanted more money to stay on as your service provider after you had fired them was an unjust request on their part?

A. Given the length of time, the money we had spent and the problems that we had put up with with the company, yes. I think for them to say that if you don't get cut over by a certain date, it wasn't—you know, they were in charge of telling us what we had and what we could cut over.

For them to say we're going to have to bill you, like to give us an ultimatum, yes, in my view was an unjust thing to do.

. . . .

Q. What should they have done?

A. Well, I think we've been over this.

Q. I thought I heard you say you expected them to work for free until you were satisfied that you had everything you needed to take over for them.

A. Well, not until I was satisfied. There's a reasonableness here. I mean, a week or two after they delayed the transition a week or two, yes. I think that's fair.

I mean, did I expect them to stay on for four years and not get paid? No. If that's what you're kind of trying to paint me out as that type of person, no.

Q. I'm just trying to understand what your expectations were. It was a week or two?

A. What?

Q. Your expectations were maybe a week or two for—

A. Yeah, or however long. You know, we'd been with them for decades, paid them hundreds of thousands of dollars.

(Emphasis added.)

In March 2016, Yates stopped paying BZ's invoices. Yates does not dispute this. Holmes testified, "[I]f [BZ] billed this and records show they billed it and records showed we haven't paid it, then it's been billed and it has not been paid."

In October 2016, BZ sued Yates, claiming breach of the copier program agreement and the master client services agreement, including the telephone lease and the server lease. Yates asserted as affirmative defenses accord and satisfaction, lack of an enforceable contract, and laches. Yates also alleged a number of counterclaims. The trial court granted BZ summary judgment and dismissed with prejudice Yates's affirmative defenses and counterclaims. It awarded BZ about $40,000 in damages and $25,845 in attorney fees and costs.

Yates appeals the trial court's grant of summary judgment to BZ and the court's dismissal of its counterclaims.

STANDARD OF REVIEW

This court reviews summary judgment orders de novo.[1] "To survive a motion for summary judgment, [the nonmoving] party must respond to the motion with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues."[2] Summary judgment is appropriate when the evidence, viewed in a light most favorable to the nonmoving party, shows no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law.[3]

"'In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous.'"[4] A contract is ambiguous only if its terms are uncertain or are subject to more than one reasonable meaning.[5]

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[1] Life Designs Ranch, Inc. v. Sommer, 191 Wn. App. 320, 327, 364 P.3d 129 (2015).

[2] Walker v. King County Metro, 126 Wn. App. 904, 912, 109 P.3d 836 (2005).

[3] Life Designs, 191 Wn. App. at 327.

[4] Dice v. City of Montesano, 131 Wn. App. 675, 683-84, 128 P.3d 1253 (2006) (quoting Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995)).

[5] Dice, 131 Wn. App. at 684.

Interpretation of an unambiguous contract is a question of law this court reviews de novo.[6]

ANALYSIS

The Scope of This Court's Review

As a preliminary issue, BZ asks this court not to consider the original and corrected declarations Yates submitted to the trial court. These include declarations from Holmes, Darlington, Jamie Emerson, a Yates employee, and Yates's counsel, Mark Passannante. BZ claims that none of the original timely declarations stated the place of signature or that they were made under penalty of perjury under the laws of the State of Washington. Yates filed "corrected" declarations after the deadline to submit evidence to the trial court. BZ objected.

The trial court's order granting BZ summary judgment states that it reviewed the timely declarations only. While they did not comply with GR 13(a) and RCW 9A.72.085, the court also found that they did not create a genuine issue of material fact on any issue.

BZ contends that this court should not consider these declarations because of these deficiencies. It also asserts that if this court decides to consider the corrected declarations, it should not rely on the inadmissible hearsay statements and speculation in Holmes's declaration. Because the timely

[6] Dice, 131 Wn. App. at 684.

declarations do not create a genuine issue of material fact about any of the issues on appeal, we do not address BZ's contentions about their form and content. We do not consider the untimely corrected declarations.

Yates's Citations to the Record

As a second preliminary issue, BZ notes that Yates did not cite to the record in violation of RAP 10.3(a), which impaired BZ's ability to respond. It asks this court to reject Yates's briefing and affirm the trial court. RAP 10.3(a) states that the appellant's brief should contain:

> (5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.
>
> (6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

A reviewing court may decline to consider issues raised on appeal when the brief lacks proper references to the record.[7] BZ claims that Yates states many facts with no citation to the record and many citations that it provides are ambiguous or inapposite to the proposition cited. Indeed, Yates does not provide

[7] State v. Camarillo, 54 Wn. App. 821, 829, 776 P.2d 176 (1989).

citations for a number of its statements of fact or its arguments.[8] But its citations are not so lacking that we decline to consider the issues it raises on appeal.[9]

BZ's Breach of Contract Claims and Yates's Counterclaims

Yates challenges the trial court's granting of summary judgment in favor of BZ and its dismissal of Yates's counterclaims. We reject these challenges.

"A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant."[10] A party's failure to perform a contractual duty constitutes a breach.[11] And "[r]epudiation of a contract by one party may be treated by the other as a breach which will excuse the other's performance."[12] A party must prove damages with reasonable certainty or support them by competent evidence in the record.[13]

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[8] For example, without citing to the record, Yates states that it "made all payments required under its [copier] lease in full and without discount and paid the residual value of the copier as required by the lease."

[9] See Camarillo, 54 Wn. App. at 829 ("[B]ecause the brief contains no references to the record, RAP 10.3, we decline to consider the issues it raises." (emphasis added)).

[10] Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

[11] DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn. App. 205, 230, 317 P.3d 543 (2014).

[12] CKP, Inc. v. GRS Constr. Co., 63 Wn. App. 601, 620, 821 P.2d 63 (1991).

[13] Hyde v. Wellpinit Sch. Dist. No. 49, 32 Wn. App. 465, 470, 648 P.2d 892 (1982).

Evidence of damages is sufficient if it provides a reasonable basis for estimating the loss and does not require speculation or conjecture.[14]

A. Copier Program Agreement

Yates claims that it created a genuine issue of material fact about whether it breached the copier program agreement because the copier sales order, not the agreement, established the parties' contract. Yates counterclaims that BZ overcharged it for excess pages and failed to maintain the copier during the lease term. We disagree.

BZ's chief financial officer, John Hines, stated in his declaration that Darlington, on behalf of Yates, signed the copier sales order on December 6, 2011. This order provided that BZ would lease a copier to Yates for 60 months at a cost of $605.06 per month. This included 17,500 black-and-white pages per month and 1,800 color pages per month. Hines stated that after signing the copier sales order, Darlington signed the more detailed copier program agreement. In addition to the lease term, the monthly cost, and the number of pages included in that cost, the copier program agreement provides that BZ would charge Yates $0.0079 per page for black-and-white copies in excess of 17,500 per month and $0.059 per page for color copies in excess of 1,800 pages per month. It also stated that these charges would be metered and billed

[14] Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 510, 728 P.2d 597 (1986).

quarterly and would be subject to annual increases of no more than seven percent.

On March 22, 2016, BZ invoiced Yates for excess copy charges of $508.22 after taxes for the three-month period of December 21, 2015, to March 20, 2016. This invoice shows that Yates made 11,331 color copies, 5,931 more than were included in the base rate. During this three-month period, the base rate was $0.077340, which included a 6.2 percent annual increase over five years. The invoice states that payment was due on April 21, 2016. Yates does not contest that it did not pay this invoice.

First, Yates counterclaims that the copier sales order and not the copier program agreement is the parties' contract. Because the sales order does not include a price for excess copies, BZ overcharged it for excess copies. So Yates does not owe BZ for any unpaid invoices. Yates relies on a provision in the copier program agreement that states, "THIS AGREEMENT IS NOT BINDING UPON [BZ] OR EFFECTIVE UNTIL AND UNLESS WE EXECUTE THIS AGREEMENT." Yates asserts that because BZ did not sign the copier sales agreement, it never became effective and the sales order controls.

BZ relies on the principle that when two contracts made by the same parties and covering the same subject matter conflict, the later contract has the

legal effect of rescinding the earlier contract.[15] BZ claims that because undisputed evidence shows that Darlington signed the copier program agreement after the copier sales order, the copier program agreement controls. BZ, however, presented no evidence that it signed the copier program agreement as required.

But BZ's and Yates's course of performance establishes the copier program agreement as the parties' contract. Extrinsic evidence consisting of course of performance, course of dealing, and usage of trade is admissible to add or clarify unambiguous terms.[16] BZ presented undisputed evidence that Darlington paid the increases to the base rate for excess copies required under the copier program agreement from 2011 until she sold Yates to Holmes in 2016. Yates's and BZ's course of performance over these five years establishes the copier program agreement as the controlling agreement. So BZ did not overcharge Yates for excess copies because the copier program agreement authorized them.

Second, Yates counterclaims that BZ breached the copier program agreement by not maintaining the copier during the lease term. Undisputed evidence shows that in March 2016 Yates paid the remaining lease payments

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[15] Higgins v. Stafford, 123 Wn.2d 160, 165-66, 866 P.2d 31 (1994).

[16] Morgan v. Stokely-Van Camp, Inc., 34 Wn. App. 801, 808-09, 663 P.2d 1384 (1983).

and purchased the copier. In April 2016, Yates obtained an estimate to repair the copier for $1,731 plus tax. Yates asked BZ to pay for the repair costs. BZ responded that Yates was responsible for the repairs. Yates claims that BZ's refusal to pay breached its maintenance obligation under the copier program agreement. But the copier program agreement states that BZ was "not responsible for any service, repair, or maintenance of the Equipment, and . . . not a party to any maintenance service agreement." It also states that BZ provided the copier on an "as-is" basis without any warranties. Yates does not create an issue about whether BZ breached the agreement by not providing any contractually required maintenance.

B. Master Client Services Agreement

Yates claims that it raised a factual question about whether it breached the "managed network services agreement." It counterclaims that BZ did not provide all contractually required services and improperly charged Yates for services after the agreement ended on September 25, 2015. We disagree.

On September 25, 2012, Yates signed a sales order for managed network services with BZ. Yates refers to this order as the "managed network services agreement." The services BZ agreed to provide included desktop remote monitoring, server remote care, antivirus, antimalware, patch management, business continuance backup solution, technology road mapping, and those

services "stated within the Statement of Work." The sales order had a term of 36 months ending September 2015.

Three days later, on September 28, 2012, Yates and BZ signed the master client services agreement. The agreement's "SCOPE OF SERVICES" provision states, in relevant part, that BZ

> agrees to assist Client with professional hosting services and advice as set forth in Schedule 1, Addendums and as set forth in one or more applicable statements of work (each, a "Statement of Work") that may be executed from time-to-time by both parties under this Agreement (collectively, the "Services"). To be effective, each Statement of Work (if any) shall reference this Agreement and, when executed by both parties, shall automatically be deemed a part of, and governed by the terms of, this Agreement.

The agreement does not state a specific term or an end date. Schedule A to this agreement is the same statement of work referenced in the sales order. It required that BZ provide additional network services, such as process consulting, software configuration, and installation and training services. E-mail correspondence between Yates and BZ establishes that BZ provided Yates network services until the negotiated termination date of April 28, 2016. BZ claims that Yates failed to pay invoices for the network services that BZ provided in March and April 2016. Yates does not dispute this. The unpaid invoices total $3,907.68 plus 18 percent annual interest.

First, Yates claims that BZ did not provide it with all the contracted for services. But Yates provides no evidence to support this claim. This claim

appears to relate to the server lease, not the master client services agreement. Holmes testified that he had expected BZ to better support Yates's transition of its network services in-house. But Yates does not say that this dissatisfaction is the basis for its claim that BZ did not provide all required services under the agreement. In addition, Yates does not show that either the master client services agreement or the statement of work required that BZ provide Yates more transition-related support than it did.

Yates also fails to support its offset claim for network service-related payments made for services provided from October 2015 to February 2016 that it did not owe because it did not contract for these services after September 2015. Yates does not dispute that it received network services after September 2015 or the value of those services.

Only the sales order for managed network services, not the master client services agreement, described September 25, 2015, as the termination date. As discussed above, both of these agreements referenced the same statement of work, which covered select network services. Yates does not identify what, if any, network services BZ provided after September 2015 were authorized by only the sales order. Also, Yates's and BZ's e-mail correspondence shows that the agreed date to terminate network services was April 28, 2016. Yates does not raise an issue of fact about whether it breached the master client services

agreement, whether BZ did not perform under this agreement, or whether Yates overpaid for any network-related services.

C. Telephone Lease

Yates also claims that it raised an issue about whether it breached the telephone lease because BZ did not provide "support" as required by the telephone lease. We reject this claim.

On March 28, 2013, BZ and Yates signed a 60-month rental agreement for a telephone system, including 33 phones. The lease set a rate of $665.00 per month plus applicable taxes. This rate includes a fee for "maintenance and management" of the telephone system. Yates stopped making payments with 27 months left on the lease. Yates does not dispute this. The lease provides default remedies that include payment of the full lease balance immediately with interest at the rate of 18 percent per year from the date of default until paid. BZ claims $19,359.99 in damages plus interest at 18 percent per year.

Yates counterclaims that because BZ did not provide "support" as the telephone lease required, BZ repudiated the contract, excusing Yates from its duty to pay. But, as stated above, the contract states that BZ would provide "maintenance and management." Although this provision does not include the term "support," Yates claims that BZ "made clear that their promise to provide a phone solution included 'support.'" To support its claim, Yates relies on only

Darlington's declaration stating, "When I entered into the phone agreement, I was told by the sales representative that support was included and it was part of the cost of [the] monthly management and maintenance."

Yates also asserts that because the contract does not define the terms "maintenance and management," they should be given their ordinary meaning.[17] Yates relies on a definition of "support" from whatis.techtarget.com to show that "support" can include the personal assistance vendors provide to end users for operating systems, hardware, and programs. Yates maintains that management and maintenance includes this support. We do not need to resolve the exact meaning of maintenance and management because Yates's only evidence of BZ's alleged breach is a statement by Emerson:

> Since the inception of Yates' phone lease, Yates has experienced intermittent problems with the degradation of the phone call quality and/or dropped calls. . . . BZ responded to problems by switching out phone cords, but those efforts were only moderately effective. During these requests, BZ did not indicate that resolving these problems was not part of its services to Yates. My understanding of the service provided by BluZebra in relation to the phones included directing any phone issues, errors and updates (including as the result of personnel changes) to BluZebra and that they would attempt to correct them.

However Yates labels the services that BZ provided, Emerson stated that BZ responded to telephone-related issues that Yates experienced. The fact that

[17] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005) ("We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.").

BZ's efforts were only "moderately successful" does not excuse Yates's duty to pay. Simply put, Emerson's statement supports that BZ fulfilled its contractual duty to provide maintenance.

Yates also claims that BZ did not provide support when Yates experienced a "global phone problem" in March 2016. Yates maintains that when it e-mailed BZ asking for a support contact, a BZ representative responded that Cerium, BZ's phone vendor, did not support the ShoreTel phones that BZ provided Yates. BZ also stated that Yates purchased the phones with a one-year service plan through ShoreTel, which had expired. Yates maintains that it was not until after BZ told Yates that BZ's contractor did not support the phone system that BZ stated support was not included in the contract. Yates, however, does not identify what support BZ did not provide. Yates claims only that it experienced a "global phone problem" and does not explain how BZ failed to address any issues related to it.

Yates does not raise an issue about whether it breached the telephone lease or about its counterclaim that BZ repudiated the contract by not fulfilling its contractual duty to provide "support."

D. Server Lease

Yates claims that it raised an issue about whether it breached the server lease because BZ repudiated it by failing to provide Yates with information that the lease required. We disagree.

In September 2013, BZ proposed to upgrade Yates's servers. Yates chose a rental agreement with a purchase option. The server lease authorizes a rate of $542.25 plus taxes per month. On March 18, 2016, Holmes e-mailed Fisher about terminating BZ's network services and stated, "We've got about a year and a half on the Server/Vault and about three years on the phones left. No problem." But with 21 months remaining on the 48-month server lease term, Yates stopped making payments. Like the telephone lease, the server lease provides default remedies, including payment of the full lease balance immediately with interest at the rate of 18 percent per year from the date of default until paid. Yates does not contest this. BZ claims $12,324.72 plus 18 percent annual interest in damages.

Yates claims that BZ repudiated the server lease on two grounds. First, Yates asserts that BZ did not provide it with software license serial numbers until discovery. Yates contends that without this information, it could not ask Microsoft for assistance and paid $8,000 in additional staff time "during transition." Yates maintains that when it asked BZ about these licenses, BZ incorrectly stated that it

had no obligation to provide them. Yates identifies no evidence in the record that supports its claim. BZ responds that it provided the necessary software, which Yates does not contest. BZ does not address whether the contract also required it to provide Yates the software license serial numbers. But because Yates does not identify any provision in the contract requiring that BZ provide it with software license serial numbers, it does not raise an issue about whether BZ breached the contract. And because Yates does not support its claim for $8,000 in damages due to additional staff time with competent evidence, it does not create an issue about damages.

Second, Yates claims that BZ did not provide it with the password to access Yates's server and local backup data. Yates asserts that BZ repeatedly refused to provide the password. Again, it identifies no evidence in the record that supports this claim. Even if BZ breached the lease with this alleged failure to provide the password, Yates produced no evidence about any damages this breach caused. Yates does not establish a genuine issue of material fact about whether it breached the server lease or about whether BZ repudiated the lease.

Notice

Yates also claims that BZ did not provide it proper notice of default before filing this lawsuit. The master client services agreement states that if Yates materially breaches the agreement, BZ has the right to terminate it provided that

BZ notifies Yates of the breach in writing and Yates does not cure it within 10 days after receipt of this notice. Both the telephone and server leases state that if Yates were to default by failing to pay a rental payment when due, upon written notice, BZ can declare the balance of the unpaid payments immediately due and payable and sue to recover payment.

> As stated above, in March 2016, Holmes sent BZ an e-mail stating, We've got about a year and a half on the Server/Vault and about three years on the phones left. No problem. What I was referring to when I spoke with Nathan about a service that had ended was the Managed Network Services. . . . We manage our network in-house, so that's why I gave notice on that piece.

Holmes testified that this e-mail meant that he "was aware that there was still time on the agreements" and Yates wanted to manage its network in-house. But, as discussed above, the sales order for network services and the master client services agreement refer to the same statement of work, which covers select network services. BZ could thus reasonably have interpreted Yates's e-mails as terminating the master client services agreement, including the telephone and server leases. And these agreements do not require that BZ give Yates notice if Yates terminates them. Yates failed to present evidence of a genuine issue of material fact as to whether BZ's reading of the e-mail was reasonable and excused any notice requirement.

Attorney Fees and Costs

BZ asks that this court award it attorney fees and costs on appeal under the master client services agreement and RAP 18.1. RAP 18.1(a) allows a reviewing court to award a party reasonable attorney fees if applicable law grants a party the right to recover them and the party requests them in compliance with RAP 18.1. BZ correctly notes that RCW 4.84.330[18] makes attorney fees provisions like the one in the master client services agreement enforceable. This agreement states, "Client shall be liable for all reasonable attorneys' fees as well as costs incurred in collection of past due balances including but not limited to collection fees, filing fees and court costs." We award BZ attorney fees and costs on appeal subject to its compliance with RAP 18.1(d).

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[18] RCW 4.84.330, in relevant part, states as follows:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

CONCLUSION

Yates does not create a genuine issue of material fact about whether it breached the four agreements at issue, about its counterclaims, or damages. We affirm.

Leach, J.

WE CONCUR:

Smith, J.

Mann, A.C.J.

BROER & PASSANNANTE

January 02, 2019 - 4:57 PM

Filing Petition for Review

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