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Court of Appeals No. 72939-0-I

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SUPREME COURT OF THE STATE OF WASHINGTON

LEGACY BELLEVUE 530, LLC

Respondent,

v.

WGW USA, INC. and TIAN QING GUO,

Appellants.

ANSWER TO APPELLANTS' PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF RESPONDENT

Respondent Legacy Bellevue 530, LLC ("Legacy") requests this Court deny WGW's Petition for Review.

II. COURT OF APPEALS DECISION

The Court of Appeals decision affirming the trial court's decision was issued on December 28, 2015. The Court of Appeals decision is unpublished and no motion for reconsideration was filed by Appellant.

III. RESTATEMENT OF THE CASE

This lawsuit for rescission arises from a commercial lease ("Lease") WGW USA Inc. ("WGW") signed with Legacy Bellevue 530, Inc. ("Landlord") in 2012, to open and operate a restaurant known as the Spring Restaurant on the leased premises at 530 112th Avenue N.E., in downtown Bellevue, Washington (the "Property").

As the Court of Appeals concluded, the trial court correctly determined that the alleged undisclosed information WGW relied upon to support its rescission claim was always readily ascertainable to WGW, WGW had actual knowledge of Sound Transit's light rail expansion close to the leased property, and WGW presented no evidence that additional information about Sound Transit's plans was not readily ascertainable. Instead of basing its argument for review on the Rules of Appellate Procedure and the decisions below, WGW fails to cite any rule, let alone RAP 13.4, in support of its argument that review should be accepted by

this Court. WGW simply argues that because the Court of Appeals decision is unpublished,¹ this Court should define what the words "readily ascertainable" mean in RCW 18.86.030(1)(d) "(s)o that brokers and their sellers and buyer and their landlords and tenants have a clear understanding of what brokers must disclose...and explain if there is any distinction between disclosures in lease transactions and disclosures in purchase and sale transactions."

WGW's argument in support of Supreme Court review relies exclusively on a new fraud claim ---"fraudulent concealment."² The reason WGW would like this Court to entertain a new fraud claim and consider unidentified third parties and other transactions is because this is otherwise a simple private dispute involving a garden variety commercial lease transaction, properly decided by the trial court and affirmed by Division One in an unpublished decision.

The following restatement of the case is based largely on the actual theories properly presented to the courts below by WGW and the facts relied upon by the Court of Appeals, all of which are supported by citations to the substantial evidence in the record that caused the courts

¹ WGW never sought publication of the Court of Appeals' decision.

² The Court of Appeals refused to address WGW's fraudulent "misrepresentation" claims because WGW did not discuss this claim until its reply brief. *See* Court of Appeals decision at 14.

below to hold WGW to its contract with Legacy, and dismiss its rescission claims.

William Nelson began working for Legacy Commercial, LLC in 2007. Legacy Commercial is the parent company of Legacy. Legacy owns the property (the "Property"). Nelson's responsibilities included property management.

For years, Sound Transit and the City of Bellevue have been working together on the East Link Project, which will bring the link light rail, a commuter rail service, through Bellevue. In December 2008, Sound Transit published a draft Environmental Impact Statement (EIS) that identified a number of possible routes and included the Property as a "potentially affected parcel[.]"³ The EIS did not specify the likelihood of acquiring any particular parcel, or whether Sound Transit was contemplating a "partial" or "full" acquisition on any specific parcel.⁴

Sound Transit released its final EIS in July 2011. Sound Transit chose C9T (110th N.E. Tunnel Alternative) as the "preferred alternative" route at that time. That route planned to have the light rail cross the Interstate 405 overpass at the intersection of NE 6th Street and 112th

³ Clerk's Papers (CP) at 176-77, 180.

⁴ WGW asserted in its reply brief and during oral argument that there was, at that time, a 50 percent chance that Sound Transit would need to condemn the property. It does so again in its petition. That claim is not supported by the record.

Avenue NE. The light rail would cross at the north side of the intersection; the Property is on the south side. The final EIS also included the Property as a "potentially affected parcel[]." ⁵ It still did not specify whether there would be full or partial acquisitions of specific properties. Later that year, the City of Bellevue and Sound Transit signed a "Memorandum of Understanding," agreeing to route C9T. ⁶ All of these documents were available to the public online at Sound Transit's web site.

Nelson was aware of these developments. He attended at least one Sound Transit open house on the subject. He believed that there was not a real threat of Sound Transit needing to acquire the Property because the light rail path was always depicted as crossing the north side of the street and because it would have been very expensive for Sound Transit to acquire all the properties listed as "potential property acquisition[s]." ⁷

During the fall of 2012, WGW USA, Inc. expressed interest in leasing the Property for a new restaurant. Tian Qing Guo is the president and sole shareholder of WGW.. WGW hired real estate broker, Maci Lam, to help with the negotiations. Nelson negotiated on behalf of Legacy.

Nelson notified WGW that Sound Transit intended to build a station two blocks away from the Property. Nelson suggested that the

⁵ CP at 184.

⁶ CP at 187-88.

⁷ CP at 252, 255-56

light rail would increase foot traffic, which would be good for business. Nelson did not mention the possibility of Sound Transit acquiring the Property.

Neither Guo nor Lam asked Nelson anything about the possibility of Sound Transit needing to condemn part or all of the Property. Nor did they conduct any independent research on the proposed light rail project.

Representatives from WGW and Legacy signed a 10-year lease in September 2012. The lease commenced on October 1, 2012. Guo personally guaranteed the lease.

In March 2013, Sound Transit contacted Legacy to inform it that an alternative plan for the light rail had been proposed. The new plan relocated the track to the south side of the NE 6th Street overpass. The Bellevue City Council approved Sound Transit's new plan in late April 2013. Because the track would run on the south side of NE 6th Street, Sound Transit would have to put at least one support column on the Property and, at least temporarily, condemn all or most of the Property's parking lot by the second quarter of 2017.

By this time it was clear that WGW's restaurant was not doing well. Guo decided to "cut [his] losses" and attempted to sell the business in April 2013.⁸ WGW's business broker contacted Nelson in mid-May to

⁸ CP at 265.

discuss the property. Nelson informed the broker of Sound Transit's interest in the property. Because of the potential condemnation, prospective purchasers lost interest in the restaurant. The broker concluded that the business was not marketable. WGW then hired attorneys who discovered the history of Sound Transit's designation of the Property as a "potentially affected parcel[]."9

WGW failed to make its rent payment for June 2013. WGW notified Legacy that it was seeking rescission of the lease on June 18, 2013. Guo claimed he would never have entered into the lease if he had known about the Property's designation as a "potentially affected parcel[]."10 On June 20, 2013, Legacy served WGW with a "Three Day Notice to Pay or Vacate."11 WGW abandoned the Property. Legacy, offering better terms (specifically a lower security deposit and lower rent), leased the Property at XO Café, Inc.

WGW filed an action against Legacy for rescission of the lease based on Legacy's alleged fraudulent or negligent misrepresentation. Legacy cross-claimed against WGW for breach of the lease and against Guo for breach of his personal guaranty. The parties filed cross-motions for summary judgment. It was on the foregoing facts that the trial court

⁹ CP at 180.

¹⁰ CP at 401-02.

¹¹ CP at 48, 75.

ruled in favor of Legacy on all motions. The Court of Appeals affirmed the trial court's dismissal of WGW's rescission claims because the allegedly undisclosed information was readily ascertainable within the meaning of RCW 18.86.030(1)(d). As set forth below, the trial court's decision and the unpublished opinion of the Court of Appeals affirming it are wholly consistent with, and in fact compelled by, Washington law.

IV. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). WGW has not argued, nor can it meet any of the above grounds for review. As such, its Petition should be denied.

A. This Private Commercial Lease Dispute Does Not Involve an Issue of Substantial Public Interest.

On page 1 of its Petition for Review, WGW suggests but does not state that this case involves a substantial issue of public interest. The body of WGW's petition never addresses that suggestion. Using a new fraud theory, WGW argues that the Court of Appeals erred, but WGW never

explains why the alleged error constitutes an issue of public interest, let alone a substantial one. The Court of Appeals decision merely gave effect to the plain terms of RCW 18.86.030(1). WGW's belated concerns for brokers, sellers, landlords, tenants is disingenuous at best. Just vaguely suggesting that a case involves a substantial issue of public interest does not make it so.

There can be no "substantial public interest" in accepting review when the ruling sought by petitioner would have the effect of encouraging the parties in this case to ignore information known to them that could have both negative or positive impacts so that they can rescind or evade their contractual obligations. Given that it is undisputed that WGW never conducted any independent research on the proposed Sound Transit light rail project, and that all of the alleged undisclosed Sound Transit information was readily available to the public and WGW on Sound Transit's website,¹² WGW's professed concern for third parties is without merit, and does not meet the basis for acceptance of review under RAP 13.4(b)(4).

¹² This Court has held that Sound Transit gives adequate notice to the public and property owners of potential acquisitions and condemnations by posting notices on its website. *Cent. Puget Sound Reg'l Transit Auth. V. Miller*, 156 Wn. 2d 403, 412-417, 128 P.3d 588 (2006).

B. The Court of Appeals' Decision Does Not Conflict with an Earlier Decision of this Court or the Court of Appeals.

WGW offers no argument, nor is there any, that the unpublished Court of Appeals decision is in conflict with any decision from the Washington Supreme Court or Washington Court of Appeals.

WGW's new fraudulent concealment theory of recovery, and the cases it cites should be ignored. First, WGW's new fraudulent concealment arguments were never presented to the Court of Appeals.¹³ Second, none of the fraudulent concealment cases cited by WGW involve the language in RCW 18.86.010 about which it bases its request for this Court's review. Third, WGW's petition and its new fraudulent concealment arguments actually conflict with a prior decision of this Court.¹⁴ Therefore, there is no conflict between the Court of Appeals' unpublished decision and any prior decision of this Court or the Court of Appeals, and WGW's petition does not warrant granting review under RAP 13.4 (b) (1) or (2).¹⁵

¹³ See Court of Appeals Opinion at page 14. WGW's "fraudulent misrepresentation" arguments were not considered because those fraud claims were raised for the first time in WGW's reply brief. Here, its petition for review is premised on "fraudulent concealment" arguments that were also never raised below.

¹⁴ See note 12, citing *Cent. Puget Sound Reg'l Transit Auth. V. Miller*, 156 Wn. 2d 403, 412-417, 128 P.3d 588 (2006).

¹⁵ There is no indication in its petition that WGW seeks review under RAP 13.4(b)(3) so that provision will not be addressed here. No issue of constitutional law is raised by WGW's petition. WGW also never raised a question of constitutional law in the courts below.

V. CONCLUSION

This Court should deny review. WGW vaguely suggests this case involves an issue of substantial public interest, but never explains why or how. WGW also suggests the Court of Appeals decision conflicts with an earlier decision from this court or the Court of Appeals, but its support for this purported conflict is based on a new fraudulent concealment argument which was not presented below. In addition, none of the cases cited for this new theory involved the statutory language at issue in WGW's petition. As a result, there is no conflict that requires review.

Under the RAP 18.1(j) and the Lease,¹⁶ respondent Legacy is entitled to its fees in answering WGW's petition.

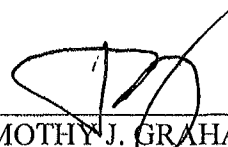
DATED this 23rd day of February, 2016.

DATED this 23rd day of February, 2016.

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¹⁶ CP 57 (Lease, Sect. 23(b), "Legal Expenses").

Supreme Court No. 92741-3

Court of Appeals No. 72939-0-I

SUPREME COURT OF THE STATE OF WASHINGTON

LEGACY BELLEVUE 530, LLC

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I, Cathy L. Anderson, certify that I am employed with the law firm of Hanson Baker Ludlow Drumheller P.S., whose address is 2229 112th Avenue NE, #200, Bellevue, Washington 98004; I am not a party to this cause; and I am over eighteen years of age.

On February 23, 2016, I caused to be filed with the Washington Supreme Court the Answer to Appellants' Petition for Review and Proof of Service by attachment to email.

In addition, on February 23, 2016, I served the Answer to Appellants' Petition for Review and Proof of Service on opposing counsel by email to:

Michael Todd Davis
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: February 23, 2016

Cathy L. Anderson

Print Name: Cathy L. Anderson

Signed at Bellevue, Washington

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Attached please find (1) Answer to Appellants' Petition for Review; and (2) Proof of Service in the following matter:

Supreme Court No. 92741-3
Legacy Bellevue 530, LLC, Respondent vs. WGW USA, Inc. and Tian Qing Guo, Appellants

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Please confirm receipt and filing. Thank you very much for your assistance.

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