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No. 72114-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

ALGO, INC., a Washington corporation; ALLEN R. GRANT, individually and his marital community; and JANE DOE GRANT, her marital community,

Defendants/Appellants/Cross-Respondents,

v.

WASHINGTON FEDERAL SAVINGS; a United States corporation,

Plaintiff/Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE REGINA CAHAN

REPLY BRIEF OF CROSS-APPELLANT

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I. INTRODUCTION

Allen Grant ("Grant") argues that the trial court did not err in awarding a principal judgment of only $850,000 because "There is no evidence that the parties agreed to accelerate the payment option in the event of a failure to provide security". (Response to Cross-Appeal, p. 7.)

The fallacy of this argument, and the error of the trial court, is that Washington Federal's entitlement to its contractual damages of $1,000,000 is not due to explicit agreement on that point. Rather, it flows directly as a matter of law from Grant's material breach of the Settlement Agreement.

Grant's arguments are supported by neither the law nor the equities. This Court should increase the principal judgment amount to $1,000,000, affirm the trial court in all other respects, and award Washington Federal its fees and costs incurred on appeal.

II. ARGUMENT AND AUTHORITY

A. Failure to Provide Security Was a Material Breach of the Settlement Agreement.

Grant's arguments are clever, but unpersuasive. Whether Grant's failure to provide security is defined as a "default" under the Settlement Agreement is irrelevant. It is a breach of the Settlement Agreement as a matter of law, as the trial court previously found. Grant did not challenge

this finding, which is a verity on appeal. *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. 384, 390, 220 P.3d 1259 (2009).

Grant's failure to tender the collateral constitutes a material breach. The Settlement Agreement states that "the note shall be secured by a first position deed of trust encumbering one or more properties owned by GO Merced GP (either the 145-acre parcel or the 56-acre parcel) . . . ." (CP 160.) The failure to provide such security was a material breach of the Settlement Agreement as a matter of law. *Ins. Co. of the West v. Alpha Development Corporation, et al.*, No. C09-5426, 2009 U.S. Dist. LEXIS 116763, *10-11 (W.D. Wash. Dec. 15, 2009) (holding a failure to post collateral security pursuant to an indemnity agreement a material breach as a matter of law); *Ins. Co. of the West v. Afford-A-Home, Inc. et al.*, No. C14-5350, 2014 U.S. Dist. LEXIS 166928, *7 (W.D. Wash. Dec. 2, 2014) (same). Grant admits that "[n]o doubt the security for payment was material. . . ." (Response to Cross-Appeal, p. 29) Thus, Grant cannot deny that he materially breached the Settlement Agreement.

Grant's breach naturally makes the entire $1,000,000 due, along with prejudgment interest, and an award of attorney fees and costs.

> The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the

> contract. It is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed. He is entitled to the benefit of his bargain, i.e., whatever net gain he would have made under the contract.

Lincor Contractors v. Hyskell, 39 Wn. App. 317, 320-21, 692 P.2d 903 (1984) (quoting *Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372 (1957). The parties could have agreed that Grant would pay $850,000, unless he pays late. Instead, they agreed that Grant would pay $1,000,000, unless he pays early. He did not pay early. Thus, no "acceleration clause" is necessary for Washington Federal to recover all of its contract damages flowing from Grant's breach.

Washington Federal's expectation damages are not limited to the monetary value of the note. The value of the collateral promised by Grant is undeniable. Had Washington Federal received it, Washington Federal would have been a secured creditor when Grant filed for bankruptcy. It then would have recovered the full $1,000,000 without years of delay. Failure to compensate Washington Federal for this tangible benefit that Grant refused to provide would be inequitable and an error of law. Contract damages are "ordinarily based on the injured party's expectation interest and are intended to give the injured party the benefit of the bargain." *Brotherton v. Kralman Steel Structures, Inc.*, 165 Wn. App.

727, 269 P.3d 307 (2011) *(quoting Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 142 (1984)).

Grant misleadingly asserts that the trial court discounted the $1,000,000 due under the Settlement Agreement to award a judgment of $850,000 based on the fact that "the parties had already agreed as to the amount of the payment due in the first 24 months. . . ." (Response to Cross-Appeal, p. 7.) The trial court's reference to the $850,000 figure stems from an early payment discount in the Settlement Agreement. Grant's material breach of the Settlement Agreement renders this discount inapplicable. It is undisputed that Grant did not provided security to Washington Federal, nor did he actually pay Washington Federal $850,000 by August 1, 2014. Grant asserts that a judgment for $850,000 "amounts to an effective discount rate of less than 5% per annum." (Id.) But the trial court made no reference to a discount rate, and there is nothing in the record to suggest that one was used. Instead, the only possible reason to award $850,000 is an erroneous application of the prepayment discount.

The Settlement Agreement has not been honored in good faith by Grant. *Rosen v. Ancestry Technologies, Inc.*, 143 Wn. App. 364, 373, 177 P.3d 765 (2008) ("the Washington Supreme Court has recognized that CR 2A 'give certainty and finality to settlements and compromises . . . .'")

(quoting *Edelman v. McGhan*, 45 Wn.2d 432, 275 P.2d 728 (1954)). The Court should not permit Grant to treat the Settlement Agreement as just another obligation to be ignored and then parsed.

B. Washington Federal Is Entitled to Its Attorneys' Fees Below and on Appeal.

Grant asserts that "[b]ecause Washington Federal is not entitled to recover its fees below, it is not entitled to recover them on appeal." (Response to Cross-Appeal, p. 12.) Grant reasons that Washington Federal is not entitled to its fees under RCW 4.84.330 because an action to enforce "the note" is distinct from an action to enforce the "settlement term sheet". Grant cites no law in support of this position and this Court should reject it.

The trial court awarded attorney fees and costs in light of the facts and circumstances of this action, which include Grant's assertion of fees in a letter concerning this action and his prayer for relief in his Amended Complaint. (CP 386; CP 1366-68.) Grant's fee request encompassed the entire action, not just the note. Rendering this fee request bilateral must similarly and logically extend to the entire action. *Wachovia SBA Lending, Inc. v. Deanna D. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009) ("By its plain language, the purpose of RCW 4.84.330 is to make

unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision."). Grant's suggested myopic interpretation of the application of attorney fees would lead to the very result abhorred by Washington law, whereby Grant could seek his attorney fees without consequence and without the potential liability of paying Washington Federal's fees.

Grant also skews authority to attempt to hold Washington Federal to an erroneous elevated standard for the recovery of its fees. Grant, citing *Sharbono*, asserts that "[e]ven if Washington Federal prevails on the right to recover fees generally but not as to the amount, on the issue of prejudgment interest, or on its cross-appeal for a larger judgment, then it is not entitled to fees incurred on appeal either." (Response to Cross-Appeal, p. 12); *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 161 P.3d 406 (2007).

Sharbono merely stands for the proposition that an appellate court may decline to award attorney fees in a case in which neither party totally prevailed on appeal (noting that "[a]lthough the Sharbonos prevail on the reasonableness of their settlement and the trial court's determination that Universal acted in bad faith, Universal has prevailed on the coverage,

stacking and CPA issues"). *Sharbono*, 139 Wn. App. at 423.

Washington Federal need not prevail on every issue below or on appeal to be the substantially prevailing party. The Court does not require a party to prevail on all issues in order to be awarded fees. *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997) (noting that prevailing party for the purposes of RCW 4.84.330 "has been interpreted to mean the party who substantially prevailed" in light of the "entire suit"). Thus, the Court should award Washington Federal its attorney fees on appeal pursuant to RAP 18.1 if it finds that Washington Federal has substantially prevailed in the case. Given that Grant accepts as a verity on appeal that Washington Federal correctly prevailed on its breach of contract action, any ambiguity regarding who has more substantially prevailed on appeal should be resolved in Washington Federal's favor.

Grant argues that Washington Federal's fees on the original claim on loan documents should be segregated from its subsequent claim for breach of the Settlement Agreement asserted in its Amended Complaint. (Response to Cross-Appeal, p. 22.)

Though this Court may see a coherent means of segregation, it does not follow that the trial court abused its discretion in ruling to the contrary. Courts have held that there is no prescribed method of

determining when claims are too closely related to segregate them. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424 (1983) (finding that "the [trial] court necessarily has discretion in making this equitable judgment"). Grant cites no new authority that warrants reversing the trial court's use of its discretion on this point. *Mayer v. City of Seattle*, 102 Wn. App. 66, 80, 10 P.3d 408 (2000) (quoting *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) ("A trial court is not required to segregate the time if it determines that the various claims in the litigation are "so related that no reasonable segregation of successful and unsuccessful claims can be made.")) This Court should defer to the trial court's exercise of discretion in determining that no such segregation was warranted.

The Court retains the discretion to determine which party it deems to have prevailed. The trial court correctly awarded Washington Federal its fees below and this Court should echo the trial court's decision.

III. CONCLUSION

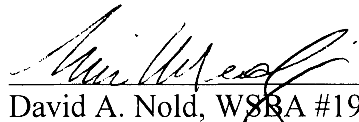
Grant breached his obligations to Washington Federal. The parties mediated, and Washington Federal agreed to accept a secured judgment for $1,000,000. Instead of honoring the Settlement Agreement, Grant breached it with the same impunity that he breached the loan documents.

Now he offers only hypertechnical arguments to support various specious positions that seek to undermine Washington Federal's attempt to receive the benefit of its bargain.

Under the Settlement Agreement as fairly construed, the entirety of the $1,000,000 became due when Grant breached as a matter of law. The trial court erroneously credited Grant for an early payment discount premised on compliance with the Settlement Agreement. As such, this Court should reverse the trial court and remand with instructions to enter judgment in the principal amount of $1,000,000, along with a corresponding increase in prejudgment interest and the fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED this 6th day of July, 2016.

NOLD MUCHINSKY PLLC



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

ALGO, INC., a Washington, corporation, and ALLEN R. GRANT, individually and his marital community, and JANE DOE GRANT, her marital community, Defendants/Appellants, vs. WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff/Cross-Appellant.	NO.72114-3-I DECLARATION OF SERVICE

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUL -5 AM 10: 26

I, Jodi Graham, declare as follows:

1. I am not a party to the above-captioned action and am over the age of 18.

2. I am competent to testify to the matters herein and do so based upon my personal knowledge.

3. I caused the following documents to be filed with the Court of Appeals and served on Miles Yanick on July 6, 2016

A. Reply Brief of Cross-Appellant; and

Nold ♦ Muchinsky PLLC
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B. Declaration of Service.

4. The above documents were served on the following in the manner indicated:

Court of Appeals
Division I
600 University Street
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Via hand delivery

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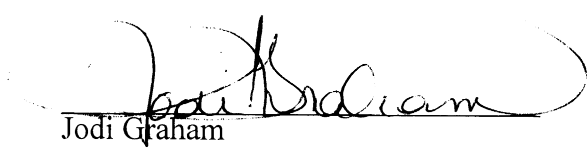
myanick@sbwllp.com
Via email

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of July, 2016 Bellevue, Washington.



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