No. 99338-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES B. NUTTER & CO.,

Appellant,

v.

ELLIOTT BAY ASSET SOLUTIONS, LLC as Court Appointed General Receiver over RCO Legal, P.S.,

Respondent.

ANSWER TO PETITION FOR REVIEW

Dominique Scalia, WSBA # 47313
Daniel J. Bugbee, WSBA #42412
DBS Law
155 NE 100th St, Suite 205
Seattle, WA 98125
(206) 489-3802
dscalia@lawdbs.com
Attorneys for Respondent

Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

With its petition for review, Appellant James B. Nutter & Co. asks this Court to review a unanimous decision of the Court of Appeals affirming summary judgment in a simple collection action by RCO Legal, P.S. ("RCO") against the law firm's former client.[1] The issues presented are neither novel nor complex. Appellant engaged RCO to perform legal services, then attempted to use RCO's shut-down and court-supervised receivership as an opportunity to avoid paying its invoices.

Before the trial court, Appellant admitted having engaged RCO, admitted having received the invoices in question, admitted it failed to pay the invoices, and presented no defense to payment other than affirmative defenses that were never pleaded and never proven. Both the trial court and Court of Appeals found no genuine issue of material fact to prevent summary judgment, and found that Appellant had waived any affirmative defense through its failure to plead. Both courts applied the correct standards; Appellant simply disagrees with the outcome.

II. STATEMENT OF THE CASE

Since at least 2012, Appellant engaged RCO to perform legal services. CP 299. RCO sent regular invoices, including those referred to

[1] RCO was a law firm that performed legal services in Washington and other jurisdictions. Respondent Elliott Bay Asset Solutions, LLC has been appointed general receiver over RCO and prosecuted the underlying collection lawsuit in such capacity.

on an Exhibit A to Respondent's Complaint (hereafter, "Exhibit A"). CP 303-304; CP 5-9. Appellant acknowledged it received the invoices and, with few exceptions, admitted to not having paid them. CP 303-304, 310.[2]

Respondent filed a Motion for Summary Judgment (CP 239-251 – the "MSJ"), to which Appellant argued for the first time that it held offsets based on fees and costs it incurred when RCO closed and Appellant hired a new law firm, McCarthy & Holthus, LLP. Appellant's argument failed because (1) Appellant never pleaded the affirmative defense of offset, and (2) Appellant was unable to establish that the fees and costs charged by McCarthy & Holthus entitled it to an offset.

On appeal, Appellant argued that the trial court had applied an incorrect standard and had not held Respondent to the burden of proof on summary judgment. The Court of Appeals properly disagreed, finding that Respondent had "met its burden to establish breach of contract" and that Appellant's "affirmative defense of offset was waived and, in any event, unsupported by sufficient evidence." Petition, A-1.

A. Undisputed Facts Supporting Summary Judgment

Appellant argued on appeal that Respondent failed to meet its burden of proof; yet, Respondent's affirmative claims were established by

[2] Appellant further admitted that it had no defense to payment of certain invoices totaling $67,322.32. CP 305, 311-313.

undisputed facts that the Appellant admitted through its pleading and responses to discovery.

Respondent's Complaint alleged that Appellant engaged RCO for legal services in exchange for payment and failed to pay the invoices listed on Exhibit A. CP 1-9. In its Answer, Appellant admitted it "engaged RCO for legal services" and that "RCO provided legal services," but broadly denied liability for the invoices. CP 14; *see also* CP 30. Appellant asserted thirteen affirmative defenses, not including offset. CP 15-16.

In discovery, after Respondent filed multiple discovery motions due to Appellant's insufficient responses, Appellant finally admitted that was "**not presently aware of any offset** …" to Respondent's claim. CP 56 (emphasis added). In other responses, Appellant refused to provide the specific amount it believed it owed RCO on the Exhibit A invoices, and refused to explain the basis for such belief. CP 44; CP 127-128.

B. Appellant's Vague Defenses to the Payment of Invoices

Three categories of fees and costs incurred by Appellant served as the basis for Appellant's allegations of offset. Appellant failed, however, to substantiate any claim of offset with respect to any category.

1. Transfer Fees

When RCO shut down, Appellant chose to move its cases to McCarthy & Holthus, LLP ("M&H"). The documents produced by

Appellant below revealed that M&H charged it a flat fee (generally $250) for services related to the transfer. CP 319; *see also* CP 314-318. For purposes of the MSJ, Respondent did not dispute the existence of the transfer fees. CP 416. The only dispute was whether the fees gave Appellant a legal defense to payment of the Exhibit A invoices. *Id.* Appellant merely argued that the transfer fees created "a genuine dispute of material fact as to the ultimate amount, if any, owed by [Appellant]" (CP 341-342) because the transfer fees could be the basis for an offset. CP 349-351.

2. Allegedly Duplicative Work

Similar to the transfer fees, Appellant argued that RCO had caused it to incur fees at M&H for "duplicate work …." CP 342. In support of the assertion, Appellant submitted two email exchanges about RCO's allegedly defective legal work. CP 389-399; CP 401-412. As to the first, Appellant failed to show whether the alleged defect occurred in a matter reflected on any of the Exhibit A invoices, or whether RCO or M&H had ever charged Appellant for allegedly defective work or its correction. CP 389-399. As to the other email, Respondent submitted evidence showing that no fees related to allegedly defective work were billed to Appellant on any of the Exhibit A invoices. CP 423; CP 417.

3. Debenture Interest

Finally, Appellant argued that "when a firm fails to initiate foreclosure by a certain date, or is required to restart the foreclosure process, it stands to lose substantial funds through the automatic curtailment of debenture interest." CP 343. Appellant provided a letter from HUD setting forth a policy related to the issue raised by Appellant. CP 369-379. Respondent never disputed the existence of the policy. Appellant did not, however, provide evidence establishing that Appellant lost money under this HUD policy as a result of some wrongful action(s) of RCO. CP 304; CP 314-318; CP 343-344; CP 417-418.

C. The MSJ Hearing and the Trial Court's Order

The trial court heard oral argument on Respondent's MSJ on August 9, 2019. RP 1. Appellant argued, "there's no contract submitted" and the trial court correctly pointed out, "But you've admitted that … [Appellant] engaged [RCO] to do the legal services …." RP 16.

The trial court then noted:

> …so we have Exhibit A. It was attached to the complaint. It summarizes in a lot of detail the invoices. ER 1006 allows a party to use a summary of voluminous invoices. You admitted that you got the invoices. You admitted that you hired RCO for legal services. You admitted that you owe $67,322.32 of those invoices.

RP 18. The court went on, "[Y]ou admitted that you have these invoices. You're not contesting that they exist or that they were sent." RP 19. Appellant replied, "**We, well, agree.**" *Id.* (emphasis added).

As for Appellant's alleged offsets, the trial court asked, "And so now I have to ask you, where in the record is that evidence? What would we be showing the jury?" RP 22. In response, Appellant pointed to the same limited evidence discussed above. RP 22-23. The court asked, "Don't you think, if you wanted to present that, that you would need a witness from [M&H] to testify to all of that?" RP 23. Appellant acknowledged, "Yes." *Id.* The court noted, "And you don't have that now today. … [T]oday's the day when you have to have the evidence …." *Id.*

The trial court granted summary judgment in favor of Respondent. CP 424-428. With regard to alleged transfer fees, duplicative work, and debenture interest, the court found that Appellant had "offer[ed] no admissible evidence to establish these theories as grounds that prevent summary judgment. [Appellant] … presents no testimony from any witness" regarding the alleged fees and costs incurred, and the documents Appellant submitted "do not explain or document how or in what amounts [Appellant] incurred fees or losses that should be offset from any particular invoices." CP 426. Further, Appellant presented "no testimony or evidence

from which a jury could conclude that RCO failed to competently perform the work represented in any particular invoice." *Id.*

Moreover, the trial court noted that Respondent was "correct that [Appellant] failed to allege the affirmative defense of offset, further supporting a grant of summary judgment to [Respondent]." *Id.* Further, Appellant "admitted it was not aware of offsets." *Id.*

D. Summary Judgment was Affirmed on Appeal

Without having asked for oral argument, Division I of the Court of Appeals affirmed the trial court's decision in an unpublished decision. The Court of Appeals further denied JBNC's Motion for Reconsideration without requesting a response from Respondent.

III. ARGUMENT

The Court of Appeals properly affirmed the trial court's conclusions that Elliott Bay met its burden to establish breach of contract, and that JBNC's affirmative defense of offset was both waived and not supported by sufficient evidence to overcome summary judgment. Petition, A-9.

Appellant made numerous assignments of error before the Court of Appeals, but did not challenge the trial court's findings that Appellant did not plead an offset, and that Appellant admitted to having no offset. CP 426; Appellant's Brief, at 2-3. Still, Appellant continues to argue that Respondent did not meet its burden of proof, and that Appellant somehow

established a genuine issue of material fact as to Respondent's affirmative claims. As set forth below, however, both the trial court and the Court of Appeals properly held Respondent to the burden of proof, which was met based on Appellant's own admissions.

A. The Court of Appeals Properly Applied the Correct Standard on Summary Judgment

Summary judgment "shall be rendered [upon motion] if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Court of Appeals applied this standard, noting correctly that the "moving party has the burden of demonstrating that there is no genuine issue of material fact." *See* Petition, at A-4, citing CR 56(c) and *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Once the moving party has met its burden, "The nonmoving party may not rely on speculation, argumentative assertions, 'or in having its affidavits considered at face value; … the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.'" *Becker v. Washington State Univ.*, 165 Wn. App. 235, 245-46, 266 P.3d 893, 899

(2011), quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The Court of Appeals correctly noted that "'If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute.'" Petition, at A-4, quoting *Atherton Condo.*, 115 Wn.2d at 516.

Further, the Court of Appeals noted that summary judgment should be "granted only if, from all of the evidence, reasonable persons could reach but one conclusion." Petition, at A-5, quoting *Valladingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Despite Appellant's contention that "reasonable minds could reach more than one conclusion" (Petition, at 7), the Court of Appeals applied that correct standard and Appellant merely disagrees with its conclusion. As discussed below, however, reasonable minds could only reach one conclusion, as both parties were in agreement as to all material facts.

B. The Court of Appeals Properly Found Respondent Met Its Burden as the Moving Party

Respondent obtained summary judgment against Appellant on its claims for breach of contract and account stated. CP 425-27. Both here and before the Court of Appeals, Appellant discusses only the elements of a breach of contract claim, arguing that Respondent did not establish those elements. But Respondent did establish the required elements of its breach of contract claim, and did so based on Appellant's own admissions.

Moreover, Respondent also established all required elements for its claim of account stated, fully entitling Respondent to the judgment entered below regardless of the outcome of the breach of contract claim.

1. Respondent Established Breach of Contract

Appellant argues that Respondent could not meet its burden of proof on a breach of contract claim because it did not submit a copy of a written contract between the copies, instead relying only on Appellant's admission that it engaged RCO to perform legal services. Petition, at 5-8. Appellant has never offered legal authority for the proposition that a breach of contract claim cannot be decided without a written contract in evidence. On the contrary, "pleadings, answers to interrogatories, and admissions on file" may serve as the basis for summary judgment. CR 56(c). Further, summary judgment clearly does not necessarily require a written agreement, as summary judgment can be had on an oral agreement. *See, e.g.*, *Hadaller v. Port of Chehalis*, 97 Wn. App. 750, 754-55, 986 P.2d 836, 838-39 (1999).

Respondent relied upon Appellant's admissions and answers to interrogatories, which establish that the parties are in complete agreement as to all material facts. Appellant first admitted it engaged RCO and agreed to pay for its services. CP 299; CP 303. Further, while Appellant denied that the balances on Exhibit were owed (CP 300-301), the trial court explicitly ordered Appellant on a discovery dispute to state "in detail the reasons it

denied … that Exhibit A contains the total outstanding amount owed by [Appellant], including specifying why it denies that certain invoices or amounts are not due and owing and its explanation for admitting to the amounts due to the extent they are shown in Exhibit A." CP 129. Appellant pointed to nothing in the agreement between the parties—which it admits existed—as a basis for the invoices not being due and owing. The only reasons given regarding disputed invoices were those reasons that served as the basis for Appellant's un-pled offset claim. CP 305.

Thus, any unknown terms that might have existed in the agreement between the parties is clearly immaterial; Appellant never pointed to the agreement as a basis for its position that it did not owe the invoices it admitted it received from RCO. Appellant therefore failed to create any genuine issue of material fact with respect to the contract it admits it entered into, or the terms thereof. Summary judgment was therefore appropriate.

2. Respondent Established Account Stated

Appellant has never addressed Respondent's claim for account stated on appeal, seemingly acknowledging that Respondent met its burden and that summary judgment was appropriate on this claim. Thus, Appellant's argument that Respondent failed to meet its burden to establish a breach of contract due to the absence from the record of a written contract is further made irrelevant by Respondent's other legal theory. The invoices

themselves—which Appellant admitted to receiving—create a new contract for payment of the amount stated thereon. *Parrott Mech., Inc. v. Rude*, 118 Wn. App. 859, 865, 78 P.3d 1026, 1029 (2003); *Sunnyside Valley Irr. Dist. v. Roza Irr. Dist.*, 124 Wn.2d 312, 315, 877 P.2d 1283, 1284 (1994). Respondent was therefore entitled to judgment for the full amount of the disputed invoices.

C. The Court of Appeals Properly Found that Appellant Failed to Plead Its Affirmative Defense, and Also Failed to Submit Evidence Sufficient to Establish an Affirmative Defense

As noted above, Appellant never assigned error to the trial court's findings that Appellant failed to plead the affirmative defense of offset and that Appellant admitted to having no claim to offset. Instead, Appellant attempted to turn arguments that it previously made in support of a claim to offset (*see, e.g.*, RP 20-21) into arguments that somehow Respondent did not meet its own burden, or that the trial court imposed too high a burden on Appellant. Neither is the case, however. Respondent met its burden as set forth above, and the evidence presented by Appellant in support of its waived offset claim do not establish true defenses to either of Respondent's claims for breach of contract or account stated. Both the trial court and the Court of Appeals imposed the correct burdens on both parties. Appellant simply failed to raise an issue of fact sufficient to avoid judgment.

The only affirmative defense raised by Appellant in response to the MSJ was offset (which, of course, Appellant failed to plead and later admitted it did not have). "[T]he party claiming an offset has the burden of proving this claim." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 735, 253 P.3d 101, 105 (2011); *see also Smith v. Eaton*, 81 Wash. 697, 142 P. 1199 (1914). It was therefore Appellant's responsibility to offer competent evidence to establish that the alleged transfer fees, duplicative fees, and loss of debenture interest both occurred and served as the basis for an offset against the invoices in question. *Smith v. McLaren*, 58 Wn.2d 907, 910, 365 P.2d 331, 332 (1961) (defendant failed to sustain burden of proof where she offered no competent evidence of value of alleged setoffs); *Alway v. Carson Lumber Co.*, 57 Wn.2d 900, 901–02, 355 P.2d 339, 341 (1960), *adhered to on reh'g*, 57 Wn.2d 900, 362 P.2d 358 (1961) (party claiming setoff must present evidence to establish amount of setoff).

The evidence Appellant submitted to the trial court was simply insufficient to avoid summary judgment. First, Appellant submitted two emails in support of its assertion that attorneys at M&H had to re-do certain legal work performed by RCO. CP 390, 399. Yet, as explained previously, Appellant submitted no evidence whatsoever tying the allegation of defective legal work to any of the disputed invoices listed on Exhibit A. The

trial court did not require Appellant to have a "trial-ready defense," (Petition, at 10); it required Appellant to present any competent evidence to show that it could eventually present a valid affirmative defense to a jury.

Next, Appellant submitted the letter from HUD setting forth the agency's policy regarding debenture interest. As explained previously, Respondent never disputed the existence of the policy outlined by the HUD letter. Yet, Appellant never submitted any evidence whatsoever that could turn this HUD letter into a defense. Appellant offered no evidence that RCO caused "delays" in Appellant's foreclosures, and it offered no evidence that any such delays resulted in damages to Appellant. Much less did Appellant offer evidence that any hypothetical damages have anything to do with any of the disputed invoices on Exhibit A. Again, the trial court did not demand the Appellant to be "trial-ready," but it did require Appellant to submit competent evidence to show a material issue of fact that a jury might eventually consider. Appellant failed.

Perhaps most importantly, Appellant could not establish the affirmative defense of offset regardless of its inadequate evidence because it failed to plead the affirmative defense of offset, and it admitted in response to Respondent's requests for admission that it had no offsets. All the arguments discussed above about the sufficiency of Appellant's evidence are actually moot in the face of those two fatal flaws.

Pursuant to CR 8(c), Appellant was required to set forth any affirmative defenses—including its claim of offset—in its responsive pleading. *See also*, *Maziarski v. Bair*, 83 Wn. App. 835, 839, 924 P.2d 409, 412 (1996). "Generally, affirmative defenses are waived unless they are (1) affirmative pleaded, (2) asserted in a motion under CR 12(b); or (3) tried by the express or implied consent of the parties." *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn. App. 427, 433–34, 842 P.2d 1047, 1051 (1993). The trial court correctly noted that Appellant "failed to allege the affirmative defense of offset," and Appellant has assigned no error to that finding. CP 426. Appellant never filed a CR 12(b) motion, and Respondent never consented to trying an unasserted affirmative defense for offset. *See* RP 7.

Moreover, in discovery below, Appellant actually admitted it had no claims to an offset. CP 56. The trial court noted this, too. CP 426. As such, Appellant clearly waived any right to claim an offset against Respondent's judgment. *See also Weber v. W. Seattle Land & Imp. Co.*, 188 Wash. 512, 515–16, 63 P.2d 418, 420 (1936) (where appellant did not plead offset, court of appeals has "nothing in that respect … to review").

IV. CONCLUSION

This case has always been a simple and straightforward collection matter related to invoices that Appellant admitted receiving, pursuant to an engagement agreement that Appellant admits entering into. The only

material facts were those facts on which the parties agreed: Appellant engaged RCO, agreed to pay RCO, and failed to pay RCO. The only disputes raised by Appellant were (1) immaterial with respect to the elements of Respondent's affirmative claims of breach of contract and account stated, and (2) instead designed to establish an affirmative defense of offset that was both waived and, even if not waived, unsupported by evidence.

The Court of Appeals upheld the trial court's entry of summary judgment because the trial court properly held both Respondent and Appellant to the proper standards of proof, with Respondent having met its own burden and Appellant having failed to raise a genuine dispute of material fact. The Court of Appeals, just like the trial court, applied the correct standards. This Court should decline to further review this case.

Respectfully submitted this 15th day of January, 2021.

/s/ Dominique R. Scalia
Daniel J. Bugbee, WSBA No. 42412
Dominique R. Scalia, WSBA No. 47313
DBS Law
155 NE 100th Street, Suite 205
Seattle, WA 98125
Telephone: (206) 489-3802
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Dominique Scalia, declare under penalty of perjury under the laws of the State of Washington that, on January 15, 2021, I caused to be served on the person(s) listed below, in the manner indicated, the foregoing Respondent's Brief:

Weston Dunn, WSBA #54385
Jordan Z. Dillon – *pro hac vice*
Todd W. Ruskamp – *pro hac vice*
Shook, Hardy & Bacon LLP
701 5th Ave, Suite 6800
Seattle, WA 98104
truskamp@shb.com
wdunn@shb.com
jdillon@shb.com
Attorneys for Appellant

☑ Via Email
☑ Via Court of Appeals Electronic Service

DATED at Seattle, Washington, this 15th day of January, 2021.

s/ Dominique R. Scalia
Dominique R. Scalia

DBS LAW

January 15, 2021 - 4:23 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99338-6
Appellate Court Case Title:	Elliott Bay Asset Solutions v. James B. Nutter & Co.

The following documents have been uploaded:

- 993386_Answer_Reply_20210115162001SC778350_5225.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Petition for Review
  The Original File Name was Answer to Petition for Review Final.pdf

A copy of the uploaded files will be sent to:

- dbugbee@lawdbs.com
- jdillon@shb.com
- truskamp@shb.com
- wddunn@shb.com
- weston@infinitycodes.com

Comments:

Sender Name: Heather Mullin - Email: hmullin@lawdbs.com
Filing on Behalf of: Dominique Renee Scalia - Email: dscalia@lawdbs.com (Alternate Email: paralegal@lawdbs.com)

Address:
155 NE 100th St.
Seattle, WA, 98125
Phone: (206) 489-3814

Note: The Filing Id is 20210115162001SC778350