

63651-1

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 1

ABOVE ALL ROOFING
SPECIALISTS, INC. And
JOHN DOE d/b/a Above All
Roofing Specialists,

C of A Case #63651-1-1¹

No. 07-2-29746-4 SEA

Respondent,

v.

RICHARD PEDOWITZ,

Appellant.

REPLY BRIEF OF PLAINTIFF/APPELLANT

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December 2, 2009

FILED
CLERK OF COURT
STATE OF WASHINGTON
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¹

The original appeal number 63993-9-1 was consolidated into number 63651-1-1.

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I. THE 18 MONTH CONTRACTUAL PROVISION WAS COMPLIED WITH AND CANNOT BE ENFORCED AS A STATUTE OF LIMITATIONS	1
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STATUTES

RCW 19.186.020	8
RCW 4.16.170	9

OTHER SOURCES

Bruner & O'Connor on Construction Law §328	3, 4
Blacks Law Dictionary	5, 6
Washington Practice §7:12	9

INTRODUCTORY STATEMENT

This Reply Brief is submitted by Plaintiff-Appellant in response to the Brief of Respondent dated October 30, 2009.

Defendant addressed three issues in its Brief:

1. The 18 month limitation provision;
2. Its contention that filing and service had to be completed within 18 months; and
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These issues will now be serially responded to. To the extent additional facts may be helpful to counter those stated by Defendant, they will be presented within the arguments below.

ARGUMENT

I

THE 18 MONTH CONTRACTUAL PROVISION WAS COMPLIED WITH AND CANNOT BE ENFORCED AS A STATUTE OF LIMITATIONS

As an abstract principle, parties have some ability to contract for shortened limitations periods within which actions

must be commenced; however, that is not what happened here. Here the contract is one of adhesion, the provision regarding an 18 month obligation to file was not negotiated, the language of the provision does not give clear notice that a lawsuit had to be commenced within a certain time, and there is an ambiguity as to what the word “filed” means. That ambiguity should be strictly construed against the Defendant drafter. *Walter Implement, Inc. v. Focht*, 42 Wash.App. 104, 709 P.2d 1215 (Wash.App. III, 1985).

The contract in this case is one of adhesion because it is a pre-printed form (CP 13-14), prepared by Defendant with no offer to change it - indeed with no discussion regarding its terms (CP-90), and there was no equality of bargaining power. *Zuver, v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 304 (2004); *Bennerstrom v. Department of Labor & Industries*, 120 Wash.App. 853, 862, 86 P.3d 826, 830 (Wash.App. Div. I, 2004). While there is no dispute but that parties can negotiate

periods of time within which lawsuits have to be brought, such provisions are not free from scrutiny on public policy grounds. *McKee v. AT&T Corporation*, 164 Wash.2d 372, 859, 191 P.3d 845 (2008)(the Supreme Court considered the public policy implications of AT&T's effort to shorten a limitations period in a consumer service contract and ruled against AT&T).¹

The focus on this appeal is one of how contracts of adhesion should be interpreted; not unconscionability (Respondent's Brief, pp. 11, 13-16), an argument that was not made by Plaintiff. As a guide to interpretation *Bruner and O'Connor on Construction Law*, Philip Lane Bruner, Patrick J. O'Connor (West, 2009), is instructive

Modern contract interpretation theory, taking into account commercial reality, has developed a more favorable view of adhesion contracts. Many

¹ The provision that was denied enforcement in *McKee* contained a separate section on dispute resolution that carefully articulated the shortened limitation period as well as the procedure for bringing a claim. The instant contract contains no such disclosures or instructions.

contracts now are adhesive in nature insofar as they are form agreements developed by one party possessing more knowledge and leverage than the other party and offered on a more or less "take it or leave it" basis. The modern approach is to attempt to interpret adhesion contracts so as to give effect to the reasonable expectations of the parties and enforce the agreement unless it is so unfair as to be unjust. With respect to particular terms found to be unfair, the modern adhesion contract analysis permits the court to refuse to enforce such terms while still upholding the balance of the contract. This is in contrast to the older theory which simply invalidated any contract it deemed to be the product of adhesion.

Id., Chapter 3, §328.

In this case the 18-month provision is ambiguous with respect to what had to be done within 18 months. The provision contained in paragraph #7 provides

Any claim by either Contractor or Customer arising out of or in any way relating to the work performed under this Agreement, including warranty claims involving Contractor, must be filed within eighteen (18) months of substantial completion

CP-39.

The word “filed” is not defined or described and the concept of a “legal action” is not referenced until the next numbered paragraph, #8, on the back of the contract. CP-39. No words connect “filed” with “legal action” and the provision does not state that a lawsuit has to be started within 18 months.²

Defendant has not disputed Plaintiff’s statement that: (i) the parties never discussed the provision regarding filing; or (ii) that Defendant never said that filing included serving. CP-90. Accordingly, there is no extrinsic evidence that evidences the parties ever having had any meeting of the minds or intent with respect to the meaning of the word “filed”.

Moreover, even Defendant’s incomplete reference to an older edition of *Black’s Law Dictionary* provides more than one meaning for the term “file”. Resp. Brief. P. 18. The first

² There is an inconsistency between the requirement that all claims, including warranty claims, be filed within 18 months (at the end of paragraph #7) and the 5 year guaranty against defects (at the beginning of paragraph #7). CP-39. A 5 year guaranty is illusory if a claim cannot be brought after 18 months.

meaning referenced in Defendant’s Brief refers to simply delivering something to the court clerk or to the record custodian for placement in the official record, whereas the second meaning says it is to commence a lawsuit. The current edition of *Black’s Law Dictionary* (8th ed. 2004) gives four meanings to the word “file”³

file, vb. 1. To deliver a legal document to the court clerk or record custodian for placement into the official record <Tuesday is the deadline for filing a reply brief>. — Also termed (in BrE) lodge. 2. To commence a lawsuit <the seller threatened to file against the buyer>. 3. To record or deposit something in an organized retention system or container for preservation and future reference <please file my notes under the heading "research">. 4. Parliamentary law. To acknowledge and deposit (a report, communication, or other document) for information and reference only without necessarily taking any substantive action.

Last year this court was presented with a question regarding the word “remove” in an escrow agreement and

³ The word “filed” is not separately defined.

found it to be ambiguous

Respondents argue in the alternative that even if the structure is King's personal property, the escrow instruction stating that the "buyer shall have 20 days after closing to remove the house" gave them authority to destroy it. While the meaning of "buyer" is clear and undisputed, the meaning of "remove" is not. Specifically, it is not clear that the word "remove" authorized destruction of the modular structure. Under the "context rule" of contract interpretation, the parties' intent is determined by viewing the contract as a whole, the objective of the contract, the contracting parties' conduct, and the reasonableness of the parties' respective interpretations. Extrinsic evidence may be considered regardless of whether the contract terms are ambiguous. While extrinsic evidence may not modify or contradict a written contract in the absence of fraud, accident, or mistake, we may use it to clarify the meaning of words employed in the contract. This is the case even when there is an integration clause, as long as the court uses the extrinsic evidence to explain undefined contract terms, not to modify, vary, or contradict terms of the written contract. If extrinsic evidence does not resolve the ambiguity, the contract will be construed against the drafter.

King v. Rice, 146 Wash.App. 662, 670-71, 191 P.3d 946, 951 (Wash.App. Div. 1 2008)

The objective of the contract in issue was to have a new roof installed on Plaintiff's house. There was no discussion of what to do in the event of a dispute, Defendant did not call Plaintiff's attention to paragraph #7 on the back of the printed contract, the concept of a statute of limitations was not discussed, and it was never said that the word "filed" in paragraph #7 on the back of the printed contract actually meant "to commence an action".

Plaintiff's interpretation, that the dispute only had to be filed with the court clerk within 18 months, is reasonable under the circumstances. This is particularly true given the public policy interest in protecting consumers from roofing contractor deceptive practices (RCW 19.186.020; and as articulated by the Supreme Court in *McKee v. AT&T Corporation, supra.*). Thus, once the filing was timely accomplished Plaintiff had until the end of the statutory statute of limitations within which to effect service.

§ 7:12. Commencement and the statute of limitations—The 90-day rule

The 90-day rule relates only to the statute of limitations and does not impose a general requirement that a defendant be served within 90 days after filing. Thus if the statute of limitations has not expired when the 90-day period expires, the plaintiff still has time to serve the defendant, up to the time the statute of limitations expires.

14 *Washington Practice*, Civil Procedure § 7:12, Current through the Second Ed.

Defendants reliance on *Wothers v. Farmers Ins. Co. of Washington*, 101 Wash.App. 75, 5 P.3d 719 (Wash.App. Div. 1 2000) is not on point. The language in *Wothers*, unlike the language here, clearly stated that the aggrieved had to “bring suit” within a specified time.

An insured who is required under a policy to “bring suit” within one year of the date of loss does not comply with that requirement by the mere filing of the suit but without proper service of process within 90 days. We accord the same meaning to “bring suit” under the policy as to the term commencement of an action in CR 3 and RCW 4.16.170.

Id. 101 Wash.App. at 76, 5 P.3d at 720.

The language in the contract at issue was not precise, it allows for more than one meaning and, as Defendant was the draftsman of the form contract, it should not be interpreted to Plaintiff's detriment.

II

ATTORNEY FEES SHOULD BE DENIED DEFENDANT

Attorney fees should be denied Defendant for the reasons set forth in Plaintiff's moving Brief. Furthermore, the argument proffered by Defendant in the second footnote of its Brief independently warrants a judicial denial of fees to Defendant.

Defendant's Brief, citing paragraph 9 of Defendant's Motion For Summary Judgement to Dismiss (CP-3), misleads the court when it states

Above All actually abandoned all collection attempts when the 18-month statute of limitations from the date of substantial completion (January 31, 2006) expired on July 31, 2007.

Resp. Brief. P. 26.

If Defendant abandoned all collection efforts as of July 31, 2007

- Why did it counterclaim for those monies ten months later on May 14, 2008? CP-106; and
- Why on January 19, 2009, seventeen months later, did Plaintiff ask the arbitrator to rule for Defendant on its counterclaim? CP-99.

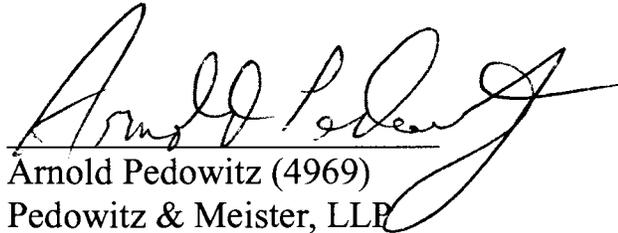
The point is: (i) that as recently as January 19, 2009 Defendant was vigorously pursuing collection efforts on its counterclaim; and (ii) the truth is that Defendant had not “abandoned all collection attempts” as urged in its Brief. Defendant’s claim for attorneys fees, both below and on this appeal, should be denied.

CONCLUSION

For the foregoing reasons the decision granting summary judgment should be reversed, this action should be reinstated,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of New York that on this date I served the following documents:

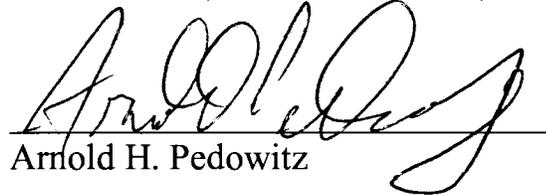
Brief of Plaintiff/Appellant by mail, postage prepaid to:

Alan Bradford Hughes
Alan B. Hughes PS
7016 35th Ave NE
Seattle, WA 98115-5917

and Joseph Chalverus
Attorney at Law
PO Box 25050
Seattle, WA 98165-1950

and by email to: alan@alanbhughesps.com; and
joe@chalverus.com

In New York, this: December 2, 2009


Arnold H. Pedowitz

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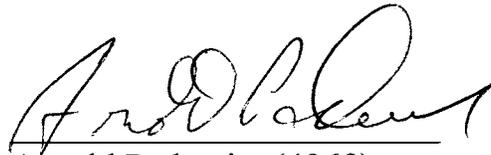
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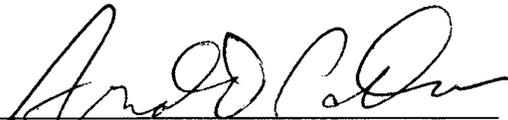
Brief of Plaintiff/Appellant by mail, postage prepaid to:

Alan Bradford Hughes
Alan B. Hughes PS
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Seattle, WA 98115-5917

and Joseph Chalverus
Attorney at Law
PO Box 25050
Seattle, WA 98165-1950

and by email to: alan@alanbhughesps.com; and
joe@chalverus.com

In New York, this: December 2, 2009



Arnold H. Pedowitz