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No. 65635-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NEW HORSESHOE SALOON ASSOCIATES, LLC, a Washington
Limited Liability Company,

Appellant,

v.

COMMERCE BUILDING LIMITED PARTNERSHIP,

Respondent.

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JULIAN DENES

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by granting Commerce Building Limited Partnership's Motion to Dismiss and Dissolve Temporary Restraining Order, dated April 27, 2010, under CR 12(b)(6).
2. The trial court erred by denying New Horseshoe Saloon Associates' Motion for Reconsideration entered on May 24, 2010.

B. Issues Pertaining to Assignments of Error

1. Whether hypothetical facts alleged by New Horseshoe Saloon Associates for the first time on appellate review state a claim upon which relief can be granted? (Assignment of Error 1.)
2. Whether the trial court abused its discretion by refusing to vacate the dismissal when new evidence discovered since the dismissal of New Horseshoe Saloon Associates' complaint support its claim? (Assignment of Error 2.)

II. STATEMENT OF THE CASE

This case involves an emergency exit egress utilized by the Appellant, New Horseshoe Saloon Associates (“Horseshoe Saloon”), which runs from Horseshoe Saloon’s building located at 1805 Hewitt Avenue, Everett, Washington, through Respondent’s adjacent building, the Commerce Building, located at 1801/1803 Hewitt Avenue, Everett, Washington. Clerk’s Papers (“CP”) 2. This action ensued after Commerce Building (“Commerce”) intended to close the emergency exit egress on or about January, 2010. CP 111.

On or about January 10, 1995, John Bennett (“Bennett”), the owner of the Horseshoe Tavern Building at the time, negotiated with Commerce and The City of Everett a proposal to create a second fire exit from the west wall of the Horseshoe Tavern Building through the east wall of the Commerce Building. CP 4-5. The City of Everett approved the proposal on or about January 12, 1995. CP 4.

The parties subsequently filed an “Easement for Emergency Ingress and Egress” with the City of Everett, and Bennett applied for a permit application to the construct the fire exit door. CP 4-5. Shortly after September 30, 1996, the City of Everett approved the construction permit. CP 5.

On or about October 4, 1996, Bennett and Commerce entered into a letter of understanding, after verbal agreement, whereby Commerce granted Bennett the access, right of use and construction of an emergency egress from the subject property through the Commerce Building. CP 123-24. The parties agreed that “the parties would execute a recordable easement or similar evidence of right of access and use, sufficient to comply with the City of Everett, Snohomish County, or State of Washington codes and standards pertaining to emergency egress.” CP 5. Bennett agreed to pay compensation in the sum of \$600 per annum for the first two years of use and afterwards increasing to \$1,800 per year for years three through five. CP 124. A document evidencing this compensation and arrangement was agreed to be entered into by November 1, 1996. CP 124.

On or about May 8, 1998, Bennett sent a letter to Housing Hope indicating Bennett’s intention to sell the Horseshoe Tavern Building. CP 5. In the letter, Bennett requested an extension of the \$50.00 per month fee to use the emergency second exit. CP 5. On or about May 19, 1998, Housing Hope approved the extension of the payment and stated that it was the intent of Housing Hope to “complete the execution of recordable easement or similar right of access and use, sufficient to comply with relevant City of Everett...codes and standards pertaining to emergency

egress.” CP 5-6. No easement or similar right of access and use was ever recorded by Commerce or Horseshoe Saloon’s predecessors in interest. CP 124.

On or about December 1, 2000, Bennett sold the property located at 1805 Hewitt Avenue, Everett, Washington, to Craig Douglas Dieffenbach (“Dieffenbach”). CP 123. On or about November 26, 2001, Dieffenbach, sold the subject property to the Pete and Helen Sikov (“Sikov”) through a statutory warranty deed. CP 123. During the transfer, Sikov had no notice, either actual or constructive, of a license or any restriction on the use of the exit through the east wall of the Commerce Building. CP 123. Sikov was under the belief that the purchase of the property included the emergency exit egress. CP 84. Shortly thereafter, on February 13, 2002, Sikov transferred the subject property via a quit claim deed to the Appellant, Horseshoe Saloon, which is owned by Sikov. CP 123. Horseshoe Saloon has owned, managed, and cared for the property since that time. CP 123.

Horseshoe Saloon’s building was occupied by various tenants during the years of 2000 through 2006. CP 82. During this period, there were no license agreements signed or dues paid for the use of the emergency exit, and the use of the exit was never restricted. CP 82.

On or about January 24, 2006, Joel Starr (“Starr”) executed a commercial lease agreement with the Horseshoe Saloon. CP 83. This lease agreement commenced on January 24, 2006, and continued through February 29, 2009. CP 83. On or about April or May 2006, Edwin Peterson (“Peterson”), the executive director of Housing Hope, contacted Starr and indicated that Starr needed to sign an emergency egress license agreement, or else he would lock the emergency exit to the Commerce Building. CP 78-79. To avoid losing his business due to fire code violations, Mr. Starr agreed to the terms of the agreement. CP 78-79.

Starr believed that the emergency egress was required by the Everett Fire Department as part of Code Compliance of the building. CP 79. Starr never notified Sikov or Horseshoe Saloon of the demand made by Housing Hope because he thought this was a tenant issue and not the building owner. CP 79. Starr signed the agreement with Housing Hope and made payments of \$150 per month from the months of July 2006 through December 2008. CP 79.

Sikov and Horseshoe Saloon first became aware of Starr’s egress agreement in November 2009, when Commerce Building and Housing Hope requested the then current tenant of the Horseshoe Saloon sign the same license agreement. CP 83. Commerce and Housing Hope intended to lock the emergency egress exit if Horseshoe Saloon’s tenant refused to

sign the license agreement. CP 83-84. Shortly thereafter, this action ensued. CP 33. To date, no emergency has occurred necessitating the use of the emergency exit. CP 81.

On or about February 26, 2010, Horseshoe Saloon obtained an emergency injunction to prevent the closing of the emergency egress exit, and a bond was subsequently filed with the Court. CP 34. A hearing was set on March 10, 2010, for the continuation of the emergency injunction. CP 34. On or about March 8, 2010, Kristi Favard, from Anderson Hunter Law Firm, filed her appearance on behalf of Commerce Building. CP 34.

Shortly after the appearance, counsel discussed the possibility of negotiating an out-of-court resolution and settlement of this matter. CP 34. Negotiations were unsuccessful and on March 23, 2010, Commerce Building filed a Motion to Dismiss and Dissolve the injunction in place, and scheduled a hearing for April 27, 2010. CP 34. Horseshoe Saloon filed responses to the motion and the Honorable Gerald Knight heard the matter. CP 34. The Court dismissed Horseshoe Saloon's causes of action with prejudice and dissolved the injunction restraining Commerce Building from closing the emergency exit. CP 34.

Following the dismissal, Horseshoe Saloon discovered new documents through the City of Everett which it believed showed both agreement and intent by the adjoining property owners to create what the

future owner of the Horseshoe Tavern Building could only perceive as an approved, permanent, unrestricted emergency exit through the east wall of the Commerce Building. CP 4. Horseshoe Saloon subsequently filed a Motion for Reconsideration with the Court requesting the reversal of the dismissal on the breach of agreement cause of action and reinstatement of the injunction based on newly discovered evidence. CP 34. The Honorable Gerald Knight denied the motion. CP 1. This appeal followed.

III. ARGUMENT

A. Standard of Review

When a party brings a CR 12(b)(6) motion to dismiss for failure to state a claim, the “trial court's ruling on [the] motion to dismiss . . . is a question of law and is reviewed de novo by an appellate court.” *Cutler v. Philips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994) (citing *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). Under this standard, “a court should dismiss a claim ‘only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214 (2005) (quoting *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)).

In making the determination, the Washington Supreme Court has stated, “any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.” *Bravo*, 125 Wn.2d at 750, 888 P.2d 147 (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). Most importantly, the Court has held that “in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, *including facts alleged for the first time on appellate review of a dismissal under the rule.*” *Id.*; *Parmelee v. O’Neel*, 145 Wn. App. 223 (2008) (emphasis added.)

In assessing whether or not these proffered hypothetical facts need to be supported by evidence, the Washington Supreme Court has stated: “[w]e need not determine that the story related by counsel is true, or even that it is supported by some evidence, to use it as a context for consideration of the . . . dismissal motion.” *Brown v. MacPherson’s*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975). Because of this standard, a motion to dismiss “should be granted ‘sparingly and with care.’” *Cutler*, 124 Wn.2d at 755, 881 P.2d 216 (quoting *Hoffer*, 110 Wn.2d at 420, 755 P.2d 781).

B. Hypothetical Facts Alleged By Horseshoe Saloon For the First Time On Appellate Review State a Claim Upon Which Relief Can Be Granted

As stated above, the proffered hypothetical facts asserted by a party need not be supported by evidence to defeat a CR 12(b)(6) motion. *Brown*, 86 Wn.2d at 297, 545 P.2d 13. In *Brown v. MacPherson's*, the plaintiffs sued a numerous of defendants, including the State of Washington, for wrongful death after an avalanche in Stevens Pass killed a number of people and damaged property. *Id.* at 294, 545 P.2d 13. The State of Washington filed a CR 12(b)(6) motion stating that the plaintiff's complaint failed to state a claim, and the trial court granted the motion against certain plaintiffs. *Id.* The Washington Supreme Court reversed the trial court and held that “[i]n the context of [the appellant's] ‘hypothetical’ factual background, appellants’ complaints state possible causes of action against the State.” *Brown*, 86 Wn.2d at 299, 545 P.2d 13.

In that case the appellants on appeal asserted hypothetical facts to defeat the State's motion to dismiss for failure to state a claim. *Brown*, 86 Wn.2d at 298, 545 P.2d 13. Specifically, the appellants' hypothetical factual background consisted of “an alleged series of communications between [a number of defendants]” which led to the failure of the State of Washington to warn of the avalanche danger to certain key individuals. *Id.* This failure, the appellants contended, made them “unable to avoid the

losses they suffered when the avalanche that had been predicted actually occurred.” *Brown*, 86 Wn.2d at 298-99, 545 P.2d 13. The Court considered this hypothetical scenario when considering the trial court’s dismissal and held that the appellant’s asserted hypothetical facts were sufficient to “state possible causes of action against the State under two different theories of negligence.” *Brown*, 86 Wn.2d at 299, 545 P.2d 13. Thus, the proffered hypothetical facts need only be assertions by a party to be sufficient to defeat a CR 12(b)(6) motion. *See Brown*, 86 Wn.2d at 297-99, 545 P.2d 13.

Additionally, these hypothetical facts can be asserted for the first time on appeal, as the court outlined in *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978). There, a widow sued the City of Seattle for the “alleged failure of city officials to enforce the building, housing, and safety codes” when her husband died in a hotel fire in 1976. *Id.* at 674, 574 P.2d 1190. The trial court granted the City of Seattle’s motion for dismissal under CR 12(b)(6) for failure to state a claim. *Id.* On appeal to the Washington Supreme Court, the City argued that the widow could not assert hypothetical facts for the first on appeal. *Halvorson*, 89 Wn.2d at 674, 574 P.2d 1190. The Court disagreed with the City and stated there is “nothing improper in [the widow’s] additional allegations of fact made initially upon this appeal.” *Id.* at 675, 574 P.2d 1190.

Specifically, on appeal the widow argued hypothetically, that the “City had been aware of the code violations existing in the hotel for at least 6 years prior to the fire . . . and [the city] had never followed through to force the owners of the hotel to bring the structure into compliance.”

Halvorson, 89 Wn.2d at 675-76, 574 P.2d 1190. The widow had no solid evidence of this – it was only an assertion for the first time on appeal to support her claim against the City for the death of her husband in a tragic hotel fire. *See id.* The Court considered her hypothetical assertions, and reversed the trial court’s dismissal, holding that her hypothetical facts were sufficient to state a claim upon which relief could be granted.

Halvorson, 89 Wn.2d at 678, 574 P.2d 1190. Thus, hypothetical facts raised for the first time on appeal can be sufficient to overcome a CR 12(b)(6) motion to dismiss. *See Halvorson*, 89 Wn.2d at 674-8, 574 P.2d 1190.

Here, Horseshoe Saloon sued Commerce, the owner of the adjacent building, for causes of action including breach of agreement, after Commerce threatened to close an emergency egress exit through its building which had been in existence for nearly fourteen (14) years. CP 123-125. When Sikov, the owner of Horseshoe Saloon, purchased the subject property in 2001, he was under the belief that the purchase of the property included this approved, permanent, and unrestricted emergency

exit through the east wall of the Commerce Building. CP 4, 84. Like the appellant in *Brown*, whose asserted hypothetical facts were sufficient to defeat a CR 12(b)(6) motion, and the widow in *Halvorson*, who successfully raised hypothetical facts for the first time on appeal to overcome a CR 12(b)(6) motion to dismiss, Horseshoe Saloon here can assert hypothetical facts for the first time on appeal to defeat Commerce's motion to dismiss. *See Brown*, 86 Wn.2d at 297-99, 545 P.2d 13; *see also, Halvorson*, 89 Wn.2d at 674-8, 574 P.2d 1190.

Horseshoe Saloon is asserting that Sikov, the owner of Horseshoe Saloon, was under the belief that this emergency egress exit was an approved, permanent, and unrestricted emergency exit through the east wall of the Commerce Building because, hypothetically, he could have had an agreement with Commerce, supported with consideration of monthly payments to Commerce, that the emergency exit was indeed an approved, permanent, and unrestricted emergency exit available to Horseshoe Saloon. No evidence is needed to support this hypothetical assertion of an agreement between Horseshoe Saloon and Commerce since this court "need not determine that the story related by counsel is true, or even that it is supported by some evidence, to use it as a context for consideration of the . . . dismissal motion." *See Brown*, 86 Wn.2d at 297, 545 P.2d 13.

Based on the hypothetical facts asserted by Horseshoe Saloon, which would state a claim under CR 12(b)(6), Horseshoe Saloon is requesting this court reverse the dismissal of its breach of agreement cause of action against Commerce, and reinstate the injunction to prevent Commerce from closing the emergency egress exit. This would allow the parties to begin discovery on the matter.

C. New Evidence Discovered Since The Dismissal of Horseshoe Saloon's Complaint Justifies Reinstating Its Breach of Agreement Cause of Action

On appellate review, “[a] trial court’s ruling on a motion for reconsideration is reviewed for an abuse of discretion.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88 (2003) (citing *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 777, 37 P.3d 354 (2002)). An abuse of discretion occurs “when [the court’s] decision is manifestly unreasonable or based upon untenable grounds or untenable reasons.” *Id.*

Civil Rule 59(a)(4) allows the court to vacate a trial court’s order and grant a new trial for “newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial.” CR 59(a)(4). To justify vacating a trial court’s order and granting a new trial based on newly discovered evidence, a party must show: “(1) that the new evidence will

probably change the result if a new trial is granted; (2) that the evidence must have been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching.” *Nelson v. Mueller*, 85 Wn.2d 234, 239, 533 P.2d 383 (1975) (citing *Hill v. L.W. Weidert Farms, Inc.*, 75 Wn.2d 871, 454 P.2d 220 (1969)). Horseshoe Saloon’s newly discovered evidence is outlined in CP 2-32.

First, the new evidence must be of such strength that there is a probability the new evidence might change the result of the trial. *See Paddock v. Todd*, 37 Wn.2d 711, 721-22, 225 P.2d 876 (1950). Here, the correspondence between the City and Bennett, the filing of the “Easement for Emergency Ingress and Egress” with the City of Everett, and the subsequent agreement of the parties to comply with all relevant “codes and standards pertaining to emergency egress,” provides a basis for claiming the emergency exit was indeed an approved, permanent, and unrestricted emergency exit. CP 38, 4-6. If the emergency exit was an approved, permanent, and unrestricted emergency exit, and Commerce threatened to close the permanent exit, it would likely change the outcome of a trial since closing the exit would be breaching an agreement for a permanent and unrestricted emergency exit.

Secondly, the evidence must truly be newly discovered, and not simply evidence that was available but not presented at trial. *See Vance v. Offices of Thurston County Com'rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003). In this case, before Horseshoe Saloon had time to prepare and serve Commerce with a formal discovery request and issue subpoenas to those involved, Commerce filed and served a Motion to Dismiss. CP 34, 108. In Commerce's sworn declarations submitted to the trial court, Commerce misrepresented the fact that other documents other than those presented by Horseshoe Saloon to the trial court before the dismissal were in existence. CP 35-36. Simply put, Horseshoe Saloon did not have the opportunity to initiate the discovery process to discover these documents. CP 4-5. After the dismissal, however, an extensive and time-consuming review of the City of Everett records, a number of documents were discovered reflecting the original negotiations and agreement to create an approved, permanent, and unrestricted emergency exit. CP 4-5. Because these documents were discovered after the dismissal and before Horseshoe Saloon had the opportunity to initiate the discovery process, Horseshoe Saloon has satisfied the second prong of the test.

Next, it must be shown that the party exercised due diligence to discover and present at the trial all the evidence that was of value in establishing the case. *Wick v. Irwin*, 66 Wn.2d 9, 13, 400 P.2d 786 (1965).

Here, as mentioned above, Horseshoe Saloon had not yet had the opportunity to initiate the discovery process before Commerce prepared and served the Motion to Dismiss. CP 36-37, 3-5. Before the dismissal, Horseshoe Saloon believed it had presented to the trial court sufficient documentation of an agreement for an approved, permanent, and unrestricted emergency exit. CP 36-37. During this time, Commerce had in their possession these new documents, but Horseshoe Saloon had to prepare the response to the motion to dismiss without the opportunity to conduct discovery. CP 36-37, 3-5. Horseshoe Saloon acted with all the due diligence it could have given the short timeline of events from the filing of the lawsuit and the dismissal, and therefore, Horseshoe Saloon has satisfied the third prong of the test.

The fourth requirement of the test requires that the new evidence be material to the merits of the case. *See Hill v. L.W. Weidert Farms, Inc.*, 75 Wn.2d 871, 454 P.2d 220 (1969). In the instant case, the newly discovered evidence as described in CP 2-32, supports Horseshoe Saloon's claim by detailing the process in which Commerce and Horseshoe Saloon's predecessors in interest created the emergency exit door in question. *See* CP 2-32. These documents contain correspondence to the City of Everett proposing the door, the emergency exit door's approval by the City of Everett, the Fire Department's requirements for the door,

Commerce's acknowledgement outlining the conditions of the approval for the door, an "Easement for Emergency Ingress and Egress," and the permit application. *See* CP 2-32. These documents address the emergency exit door in question and therefore would be material to the merits of an agreement between the parties regarding the door.

Finally, the evidence must not be cumulative or impeaching. *See Nelson*, 85 Wn.2d at 239-40, 533 P.2d 383. Here, each of the newly discovered documents as outlined in CP 2-32, address separate topics dealing with the creation of the emergency exit and therefore would not be considered cumulative. Thus, Horseshoe Saloon has satisfied the final requirement.

In conclusion, Horseshoe Saloon's newly discovered documents satisfy the five (5) elements required to vacate the dismissal order and grant a trial on the merits. Horseshoe Saloon is requesting that this court reverse the dismissal and reinstate its breach of agreement cause of action to allow the opportunity for discovery in this case.

IV. CONCLUSION

Horseshoe Saloon is respectfully requesting this court reverse the dismissal of its breach of agreement cause of action against Commerce, and reinstate the injunction to allow the parties to begin discovery on the matter.

Dated this 22nd day of October, 2010.

DENES & DENES, PS

A handwritten signature in black ink, appearing to read "M. Julian Denes", written over a horizontal line.

M. Julian Denes, WSBA No. 37505
Attorney for Appellant, Horseshoe Saloon

CERTIFICATE OF SERVICE

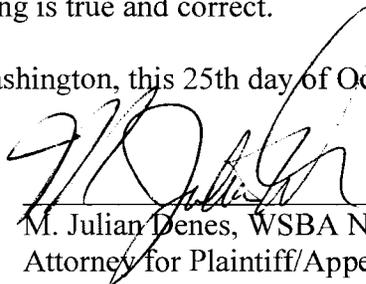
I hereby certify that on October 25, 2010, I caused to be served a true and correct copy of the foregoing document, BRIEF OF APPELLANT, as set forth below:

Kristi Favard, Esq.
ANDERSON HUNTER LAW FIRM PS
2707 Colby Avenue, Suite 1001
Everett, WA 98206
Attorney for Defendant/Respondent

By: personal delivery

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

Dated at Everett, Washington, this 25th day of October, 2010.



M. Julian Denes, WSBA No. 37505
Attorney for Plaintiff/Appellant