

66303-8

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NO. 66303-8-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JASON (GABRIEL) FELIX,

APPELLANT,

v.

PICO COMPUTING, INC.

RESPONDENT.

OPENING BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JUN -2 AM 10:42

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I. Introduction

This appeal arises from cross-motions for summary judgment in a lawsuit brought by Plaintiff Jason Felix against Pico Computing alleging, under the Uniform Declaratory Judgment Act, that a valuation forwarded to Felix by Pico Computing did not satisfy a contractual requirement of providing a “signed appraisal.”

II. Assignments of Error

1. The contract provides for a valuation process for shares upon withdrawal of shareholder from the Company. The process required an independent appraisal to establish the value of the shares. Pico obtained a valuation from an independent appraiser that established that Pico shares were worth nothing. Is this valuation proper under the express terms of the shareholder’s agreement?
2. The contract provides for a valuation process for shares upon withdrawal of shareholder from the Company. The process required each party to obtain an independent appraisal to establish the value of the shares. Felix did not nominate any appraiser; Pico provided a valuation. Upon receipt of the valuation, Mr. Felix thanked Pico for fulfilling its contractual obligations to him, and returned the stock certificates. Did Mr. Felix waive his right to a

signed appraisal by agreeing that Pico had fulfilled its obligations and returning his shareholder's certificates?

3. The contract provides for a valuation process for shares upon withdrawal of shareholder from the Company. The process required each party to obtain an independent appraisal to establish the value of the shares. Felix did not nominate any appraiser; Pico provided a valuation. Did Felix's failure in obtaining an independent appraisal waive his rights to claim defects in Pico's valuation?
4. The contract provides for an award of attorneys' fees and costs to the prevailing party should litigation arise for breach of the contract. Is Pico entitled to attorneys' fees and costs in defending this appeal?

III. Statement of the Case

Appellant Mr. Felix filed suit seeking a declaratory judgment finding that the shareholder contract had been breached by Respondent Pico Computing, Inc. CP 181-189. The contract provided that upon resignation of a shareholder, the parties would engage in a valuation process to determine the value of the shares. CP 222-240.

The contract between Pico and Mr. Felix provides:

5.1.3.2. If the Purchase Event is set forth in Section 4.1 and the Selling Shareholder and the Corporation are unable to agree on the selection of an appraiser within thirty (30) days after date of the Purchase Event, each shall select an independent appraiser before the fortieth (40th) day after the Purchase Event. The independent appraiser to be selected by the Corporation shall be selected by a vote of a majority of the Board, not counting the Selling Shareholder. If the majority of the Board, not counting the Selling Shareholder, are unable to decide on an independent appraiser, the Shareholder holding the most shares of the Corporation (other than the Selling Shareholder) shall select the independent appraiser for the Corporation. The two appraisers so selected shall each independently determine the fair market value of the Corporation. As long as the difference between the two appraisals does not exceed twenty-five percent (25%) of the lower of the two appraisals, the fair market value of the Corporation shall be conclusively deemed to equal the average of the two appraisals.

*5.1.3.3. If the Selling Shareholder fails to select an independent appraiser within the time required by this paragraph, **the fair market value of the Corporation shall be conclusively deemed to equal the appraisal of the independent appraiser timely selected by the Corporation.** Likewise if the Corporation fails to select an independent appraiser within the time required by this paragraph, the fair market value of the Corporation shall be conclusively deemed to equal the appraisal of the independent appraiser timely selected by the Selling Shareholder.*

...

5.3.1.5 Each appraiser shall determine the fair market value of the Corporation on the Valuation Date, or the Purchase Event if no valuation has been made within twelve (12) months of the Purchase Event. The fair market value will be based on the cash price that a willing buyer would pay to a willing seller when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts. In determining the fair market value of the Corporation, the appraisers appointed under this Agreement shall consider all opinions and relevant

evidence submitted to them by the parties, or otherwise obtained by them, and shall set forth their determination in writing together with their opinions and the considerations on which the opinions are based, with a signed copy of the appraisal delivered to each party. *Emphasis Added*, CP 231-232.

When Mr. Felix tendered his resignation, Pico requested the valuation of the shares Richard Hanlin, of Hanlin Moss. CP 307. Mr. Hanlin, after reviewing the financials of the company, determined that the value of the shares was zero. CP 98. He e-mailed a copy of his findings to Pico's President, Dr. Robert Trout. CP 97-98. Dr. Trout then forwarded Hanlin's findings to Mr. Felix. CP 97-98. Mr. Felix acknowledged receipt of the e-mail. CP 312. He then responded in an e-mail stating "thank you for satisfying your contractual obligations," and agreed to return his stock certificates. CP 97.

While Pico followed the terms of the contract and obtained a valuation, Mr. Felix sought counsel from a CPA. CP 308-309. That CPA advised him that the share were likely worthless:

14 Q. What did you discover when you looked at
15 the

16 books?

17 A. It's kind of confusing. I wasn't like an

18 accountant guy, but I don't know. I took the
19 numbers and

20 printed them up -- or not printed them, sent them
21 and then

22 took them to an accountant. The accountant that
23 Trout

20 recommended said I was screwed. CP 254.

...

6 Q. Well, you said this accountant, this unknown
7 accountant told you you were, quote/unquote,
"screwed"?

8 A. Yeah.

9 Q. What did that mean?

10 A. I think he felt that the company didn't have
value

11 based on what was in the books. CP 308-309.

Mr. Felix then decided it would not be wise to spend his money on an appraisal; he attempted to nominate himself to complete the appraisal. CP 311. Pico objected on the basis that he was not an independent appraiser as required by the terms of the shareholder's agreement, Mr. Felix withdrew this request as he was not qualified to value the shares. CP 311. Mr. Felix never obtained an appraisal or valuation of Pico's shares. CP 311.

Eight months after the valuation came back from Mr. Hanlin, Mr. Felix filed the underlying action, arguing that Mr. Hanlin's appraisal was not signed, therefore, was not valid under the terms of the agreement. CP 181-189.

During the course of the litigation, Plaintiff deposed Mr. Hanlin threatening to sue him for fraud if he called the valuation an appraisal. CP 397. Mr. Hanlin admitted the document was not intended to be a full appraisal, but had a full appraisal been undertaken, the results would have

been the same. CP 401. In his opinion, Pico shares would have been valued at \$0.00 per share. CP 401

Mr. Felix presents evidence from an expert who opines the valuation performed by Mr. Hanlin was not an “appraisal” as defined by professional standards. CP 352- 363. However, Mr. Felix’s expert did not opine that the results were incorrect. CP 352-363.

Following granting of the summary judgment in favor of Defendant, the Court awarded attorneys’ fees to Pico Computing. Attorneys’ fees

IV. Summary of Argument

Mr. Felix’s argues that Mr. Hanlin’s valuation is not a “signed” appraisal under the terms of the shareholder’s agreement. The purpose of the valuation process is to determine the fair market value of the shares of Pico when a shareholder leaves. Mr. Hanlin’s valuation served that purpose and established a valuation of \$0.00 per share. This valuation corresponded to Mr. Felix’s investigation into the value of his Pico shares with another accountant. Mr. Felix did not object to Mr. Hanlin’s analysis when he received it. As a result, this valuation is proper and Mr. Felix cannot prevail on the merits of his Uniform Declaratory Judgment Act and breach of contract claims.

Not only does Mr. Hanlin's valuation satisfy the terms of the contract, but Mr. Felix waived any right to object to this valuation when he thanked Pico for fulfilling the terms of the shareholder's agreement and agreed to return his stock certificates to Pico.

Finally, based on Mr. Felix's own waiver of damages, he is not entitled to recover for any breach of contract.

V. Argument

Review of an order granting summary judgment is de novo, with the appellate court engaging in the same inquiry as the lower court. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The relevant inquiry is whether there is any genuine issue of material fact to preclude judgment as a matter of law. CR 56; *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Where a defendant moves for summary judgment on the basis that the plaintiff cannot establish a prima facie case on one or more elements of the claim, the defendant bears the burden of specifically identifying the defects in the plaintiff's case. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *see also, Baldwin v. Sisters of Providence, Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989). Then the burden shifts to the plaintiff to produce evidence of specific facts to establish, or raise a genuine issue

of material fact with respect to, the disputed elements of the claim. *Young*, 112 Wn.2d at 225-27.

A. Facts

Mr. Felix admits that there are no genuine issues of material of fact at issue; as a result, the only issue is whether Pico is entitled to judgment as (1) Mr. Hanlin's valuation is proper under the terms of the contract, (2) Mr. Felix waived his right to object to Mr. Hanlin's valuation and waived any defects in Mr. Hanlin's valuation, and (3) as Mr. Felix avers no actual damages, he is not entitled to claim breach of contract.

B. The Valuation Was Proper

Here, the only issue in this litigation is whether the failure to provide a signed copy of Mr. Hanlin's valuation is a breach of the shareholder's agreement with the contract. Pico concedes that there was not a signature on the e-mailed document. But Mr. Felix's narrow reading of the word "signature" is in error. Washington follows the objective manifestation theory of contracts, whereby the Court interprets what was written, not what was intended to be written. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). The contract between the parties requires a signed appraisal to be provided. The language of the contract does not require a

handwritten signature. One can presume that any form of signature would satisfy the contract terms. While no common law cases discuss what constitutes a valid signature for purposes of this type of contract, the UCC's definition of "signed" is persuasive; "[signed] includes any symbol executed or adopted by a party with present intention to authenticate a writing." RCW 62A.1-201(39). See also WPIC 2:23. Here, there is no dispute Mr. Hanlin's report is authentic; he prepared the document and the valuation of \$0.00 was accurate. CP 401. For example, the typing or stamping of creditor's name on signature line of financing statement is a sufficient signature for purposes of the UCC. *Hobart Corp. v. North Central Credit Services, Inc.*, 29 Wn.App. 302, 628 P.2d 842 (1981)(*superceded by rule on another issue*).

Another analogous body of law is the federal ESign Act. 15 U.S.C. § 7001 et seq. Whether an electronic communication constitutes a signature for purposes of the ESign Act is a matter of intent. The ESign Act defines an electronic signature as "an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign." 15 U.S.C. § 7006(5).

Here, the Defendant forwarded Mr. Hanlin's e-mail, which included the appraisal, to the Plaintiff. CP 97-98.

Mr. Hanlin typed his name on the email to which the appraisal was attached, and stated in the email that the “attached is a brief finding of value for the Company.” CP 97-98. Under the definition of signature, Mr. Hanlin’s original e-mail is legally sufficient to indicate that Mr. Hanlin intended to authenticate the document. As a result, the fact that handwritten signature was not on the valuation, is immaterial to performance under the contract. Summary judgment dismissing Mr. Felix’s claims associated with failure to produce a signed appraisal is appropriate.

C. Mr. Felix Waived His Claims

An agreement to relinquish a known right under the terms of a contract constitutes a waiver, excusing the other party's obligation to perform according to the relevant contract terms. *Sherman v. Lunsford*, 44 Wn.App. 858, 723 P.2d 1176 (1986). A party against whom waiver is claimed must have intended to relinquish the right, advantage, or benefit and his action must have been inconsistent with any intent other than to waive it. *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). *State ex rel. Cornell v. Lane*, 110 Wn. App. 328, 331, 41 P.3d 486 (2002); *accord*, *State v. Christen*, 116 Wn. App. 827, 833, 67 P.3d 1157 (2003); *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 925, 10 P.3d 506 (2000). “To constitute implied waiver, there must

exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors. The party asserting waiver bears the burden of proving an intention to relinquish the right.” *U.S. Oil & Refining Co. v. Lee & Eastes Tank Lines, Inc.* 104 Wn. App. 823, 830-831, 16 P.3d 1278 (2001). *Panorama Residential Protective Ass'n v. Panorama Corp.*, 97 Wash.2d 23, 28-29, 640 P.2d 1057 (1982) (acceptance of lesser sums waived contractual right to higher rents; waiver may be unilateral and without consideration so long as the right waived was known and existed at the time of the knowing waiver); *Bowman v. Webster*, 44 Wash.2d 667, 669-70, 269 P.2d 960 (1954). *See also* RCW 62.2-209(4) & Official Comment 4; Restatement (Second) of Contracts §§ 150, 84 (1981); E. Farnsworth, *Contracts* § 8.5, at 561 (1982) (waiver involves “the excuse of the nonoccurrence or of a delay in the occurrence of a condition of a duty”).

In this case, Felix expressly acknowledged that the appraisal satisfied Pico’s contractual obligations to him, and agreed to return his share certificates. CP 97. As a result, Felix has waived any claims arising from the transmission of the valuation in electronic format. He clearly knew the right to have a signed appraisal; it was expressly provided for in the contract. Summary judgment on his appraisal claims is appropriate.

D. Mr. Felix Alleges No Damages

The appraisal provided to Mr. Felix is sufficient under the terms of the contract. Further, as Mr. Felix has averred, he has suffered “unascertainable” damages as a result of this alleged breach. CP 181-189. “To bring a cause of action for breach of contract, [a plaintiff] must establish the existence of a valid and enforceable contract, the rights of the plaintiff and obligations of the defendant under the contract, violation of the contract by the defendant, and damages to the plaintiff.” *Citoli v. City of Seattle*, 115 Wn. App. 459, 476, 61 P.3d 1165 (2002); accord *N. W. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (“A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.”).

Here, even if the valuation is produced with a handwritten signature from Mr. Hanlin, Mr. Felix is not directly challenging the appraisal. Further, after having deposed Mr. Hanlin, it is apparent that Mr. Hanlin prepared the valuation and provided it to Pico. Therefore, he has suffered no damages; he received what he was entitled to under the terms of the Shareholder agreement. Summary judgment dismissing Mr. Felix’s declaratory judgment claims is appropriate.

E. Attorneys’ Fees Should Be Awarded on Appeal

RAP 18.1(a) allow parties to request attorney fees on appeal. The contracts at issue here provides attorneys' fees to the prevailing party. The trial court awarded attorneys' fees to Pico; the Court of Appeals should do the same pursuant to the terms of the contract.

VI. Conclusion

Summary judgment was properly entered in favor of Pico. Mr. Hanlin's valuation was proper. It established the value of Pico shares at \$0.00. This valuation is the same as the value established by Mr. Felix when he discussed the valuation with an accountant. Mr. Felix had ample opportunity to obtain an independent appraisal of Pico, but chose not to do so. Mr. Hanlin's valuation satisfies the contractual provisions and Mr. Felix's claims should be dismissed.

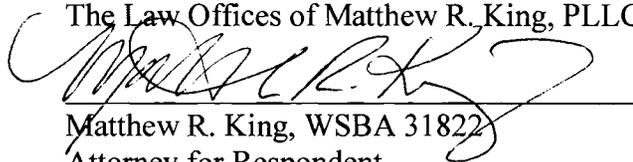
Similarly, Mr. Felix has waived his claims that Mr. Hanlin's valuation does not satisfy the contract. Mr. Felix admits receiving and reviewing Mr. Hanlin's valuation. Mr. Felix admits that the valuation was consistent with his own investigation into the value of Pico shares. Mr. Felix admits to sending a thank you to Pico for "fulfilling" its contractual obligations to him and agreeing to return the stock certificates. These acts all establish waiver of any defects in performance by Pico. Summary judgment in favor of Pico is proper.

Mr. Felix also cannot maintain an action for breach of contract against Pico where he alleges no damages as a result of the claimed breach. Here, Mr. Felix is only concerned that Mr. Hanlin's valuation was not signed. He has no evidence that the valuation was inaccurate or improper in any way. As a result, no breach of contract claim lies and summary judgment in favor of Pico is proper.

Finally, Pursuant to the terms of the contract, Pico is entitled to an award of attorneys' fees and costs associated with this appeal should the Court find summary judgment was proper.

Respectfully submitted this 1st day of June, 2011.

The Law Offices of Matthew R. King, PLLC

A handwritten signature in black ink, appearing to read 'Matthew R. King', is written over a horizontal line. The signature is stylized and cursive.

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I, Matthew King, hereby declare under penalty of perjury under the laws of the State of Washington, that I caused an original of the Respondent's Brief to be mailed on June 1, 2011 via US Mail, Postage Prepaid, to:

Court of Appeals, Division One
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One Union Square
600 University St
Seattle, WA 98101-1176

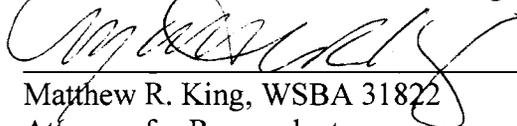
I further declare that I caused a copy of the Respondent's Brief to be mailed on June 1, 2011 via US Mail, Postage Prepaid, to:

Scott J. McKay
6523 California Avenue SW
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Respectfully submitted this 1st day of June, 2011.

I make the foregoing declaration under penalty of perjury under the laws of the State of Washington.

Dated this 1st day of June 2011 at SEATTLE, Washington.

The Law Offices of Matthew R. King, PLLC


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