

66723-8

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No. 66723-8

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION 1

224 WESTLAKE, LLC,
a Washington limited liability company,

Plaintiff/Respondents,

v.

ENGSTROM PROPERTIES, LLC,
a Washington limited liability company,

Defendant/Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 AUG 31 PM 2:12

REPLY BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Based on facts Westlake introduced in response to Engstrom's motion for summary judgment, reasonable persons could reach the conclusion that Engstrom waived any objection to IPDC's Assignment to Westlake. Specifically, reasonable persons could find implied waiver through Engstrom's course of dealing, and because Engstrom neglected to investigate the ownership of Westlake after learning of the Assignment. The Court only reaches the issue of waiver if it determines that the trial court's finding that Engstrom acted unreasonably in refusing to consent to the Assignment is not supported by substantial evidence, which Westlake disputes. Nonetheless, if this Court reaches the issue of waiver, Westlake is entitled to a finding that the trial court's order granting Engstrom summary judgment on the issue of waiver was in error and should be reversed.

II. ARGUMENT

A. Summary of Facts Surrounding the Issue of Waiver

Appellate courts review the grant of a motion for summary judgment de novo, considering the facts in the light most favorable to the nonmoving party. Reynolds v. Farmers Ins. Co., 90 Wn. App. 880, 884,

960 P.2d 432 (1998). Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and the affidavits show that there is no genuine issue as to any material fact, that reasonable persons could reach but one conclusion, and that the moving party is entitled to judgment as a matter of law. Id.; CR 56(c).

IPDC notified Engstrom on October 23, 2008 of its Assignment of the POA to Westlake. Ex. 2. Nearly one year later on August 29, 2009, and many months into litigation, Engstrom moved for summary judgment, alleging for the first time that the Assignment was void. CP 20-25. On summary judgment, the trial court addressed whether Engstrom's refusal of consent to the Assignment to Westlake was unreasonable, and whether Engstrom had waived any objection to the Assignment. CP 157-58.

Regarding the former issue, the trial court denied summary judgment, finding "Engstrom cannot reasonably withhold consent to assignment, according to the Agreement. Even though he was not asked at the time of the Assignment, this requirement still exists. Genuine issues of material fact preclude judgment on this issue." CP 157-58. However, with respect to the issue of waiver, the trial court granted Engstrom judgment, erroneously finding there were no disputed facts. Id.

Engstrom subsequently proceeded to trial on the merits, offering the trial court the opportunity to adopt Engstrom's version of events. The trial court declined to do so, finding instead that Engstrom acted unreasonably in refusing to consent to the Assignment. CP 356-62. The trial court considered substantial evidence that Engstrom never investigated the financial capability of either IPDC or Westlake to close. RP 175, 372-75. Based on this evidence, the trial court properly found that a reasonably prudent person in Engstrom's position, having received all monies to which it was entitled under the POA, would not have withheld consent, and that Engstrom's refusal to consent to the Assignment was unreasonable. CP 356, 361-62.

As described below, the trial court's grant of summary judgment on the issue of waiver was erroneous because Westlake introduced facts from which a reasonable fact-finder could conclude that Engstrom waived any objection to IPDC's Assignment to Westlake.

B. Westlake Presented Genuine Issues of Material Fact Regarding Waiver

Implied waiver arises where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it.

Kessinger v. Anderson, 31 Wn.2d 157, 168, 196 P.2d 289 (1949)

(reversing judgment for respondents and finding implied waiver where respondent was initially silent, but later objected in litigation). A waiver is unilateral and arises by the intentional relinquishment of a right, or by neglect to insist upon it. Id. at 169. The waiver of a right to rescind a contract is a factual issue that depends on all facts and circumstances of the case. 25 Wash. Prac., Contract Law And Practice § 11:8. (Supp. 2011).

Westlake raised genuine issues of material fact in response to Engstrom's motion for summary judgment that establish Engstrom, through course of dealing, waived any objection to the Assignment. Westlake established that Engstrom, after receiving notice of the Assignment, interacted with Westlake for several months toward closing the sale. CP 95-96. Specifically, Engstrom commenced clean up activities on the Property, corresponding with Westlake to arrange access for environmental consultants. Id. For example, in Westlake's June 23, 2009 letter to Engstrom, Westlake expressly referenced the "Real Estate Purchase Option Agreement dated November 20, 2006, between Engstrom Properties, LLC and Investco Properties Development Corporation subsequently assigned to 224 Westlake LLC..." and signed as Westlake,

by its Manager, IFC. CP 101. Finally, in February 23, 2009 correspondence from Engstrom addressing Westlake's right to perform confirmatory testing, Engstrom specifically referenced Westlake in the context of a purchaser. CP 103.

Indeed, until Engstrom breached the POA, Engstrom's course of dealing was consistent with a party performing its contractual duties. Engstrom removed the underground storage tanks, a condition that IPDC and Westlake required for the sale to close. RP 203-04, 207-208. Engstrom also acknowledged Westlake's contractual rights when it allowed Westlake access to the Property to conduct independent environmental testing. RP 249-53. Finally, Engstrom ratified the POA's legal effect when it attempted to force Westlake to close the deal, even though Engstrom had not performed all of its contractual duties. RP 266-68.

Nonetheless, several months into the litigation, Engstrom complained for the first time about IPDC's assignment of the POA to Westlake. CP 20-25. In raising the issue after nearly a year of accepting Westlake as the assignee, Engstrom waived any and all objections to the

Assignment. A reasonable trier of fact could have so concluded. The trial court therefore erred by granting Engstrom judgment on the issue of waiver.

C. Engstrom Cannot Rely On Lack of Knowledge When Engstrom Neglected to Insist on a Known Right

Engstrom's argument that the doctrine of implied waiver does not apply because Engstrom did not know Westlake was not owned by 51 percent of IPDC's owners at the time of the Assignment fails.¹ Waiver arises through course of dealing, but it also arises when a party neglects a known right. Kessinger, 31 Wn.2d at 169. By failing to investigate the percentage of IPDC's ownership of Westlake after Engstrom learned of the Assignment, Engstrom waived the right to do so as part of this litigation.

In Kessinger v. Anderson, *supra*, the Supreme Court addressed whether a parties' assertion that they did not have prior knowledge of an encumbrance on property precluded their opponent's argument that the parties had waived the right to assert a claim for damages. 31 Wn.2d at 168. In making its decision, the Kessinger Court accepted the parties'

¹ As was established at trial, had Engstrom inquired, Engstrom would have learned that Westlake's guarantor, ECT, beneficially owned 60 percent of Westlake. RP 196-99.

assertion that they lacked knowledge of the encumbrance, but nonetheless held they had waived any right to object. Id. at 170-71. A key factor in the Court’s decision was that the parties had remained silent on the issue until after they profited on the transaction, and only then did they raise the issue of the encumbrance as a defense in litigation. Id. at 171-72.

The same analysis applies here. Ex. 1. Section 13 of the POA allowed either party to assign the POA on prior written consent. Id. It also authorized IPDC to transfer the POA to an entity in which it owned 51 percent of the ownership interests. Id.² Consistent with “Investco’s” business model, IPDC assigned the POA to Westlake, an “Investco”-related, single-asset LLC. RP 196-99. Subsequently, IPDC provided Engstrom with written notice of the Assignment on October 23, 2008, along with notice that it intended to exercise the option and close the sale by the March 2, 2009 date provided in the POA. Exhs. 2, 3.

Engstrom first learned about IPDC’s assignment to Westlake in October of 2008. Ex. 2. Once it received written notice of the assignment, it had a duty to raise any and all concerns with the transfer,

² The Agreement made it clear that, in either scenario, “consent shall not be unreasonably withheld.” Id.

including the right and the duty to question IPDC about its percentage of ownership interest in Westlake and to raise any other concerns with the Assignment in October 2008. Yet Engstrom failed to do so prior to the scheduled March 2, 2009 closing date. Ex. 3. Rather, Engstrom waited to object until after it had received all \$600,000 in option payments, and after Westlake had expended \$436,310 in development and feasibility costs. RP 38-39; Exhs. 49, 50 to 220, & 253. Indeed, Engstrom waited nearly a year after receiving notice of the Assignment, and six months after filing its Answer (which is silent on the issue) to object to the IPDC's Assignment to Westlake in a motion for summary judgment. RP 372-75.

Because a reasonable fact-finder could find that these facts support Westlake's argument that Engstrom's neglect of a known right constitutes waiver, the trial court erred in granting Engstrom judgment to the contrary.

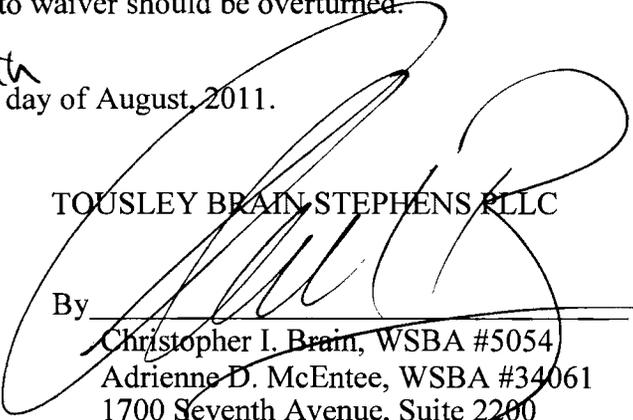
III. CONCLUSION

Based on these facts, and contrary to the trial court's order, reasonable persons could reach the conclusion that Engstrom waived any objection to IPDC's Assignment to Westlake, through Engstrom's course of dealing, and its neglect to investigate IPDC's ownership interest in

Westlake. If the Court reaches the issue of waiver, the trial court's order on summary judgment as to waiver should be overturned.

DATED this 30th day of August, 2011.

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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 31st day of August, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

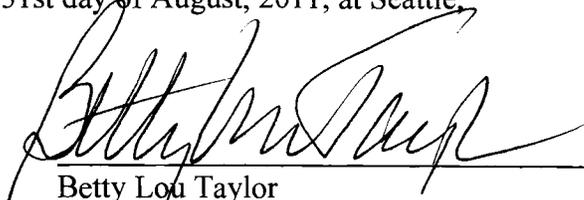
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- Electronic Mail

Attorneys for Defendant/Petitioner

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

EXECUTED this 31st day of August, 2011, at Seattle,
Washington.


Betty Lou Taylor