

NO. 67956-2-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GLV, INTERNATIONAL, INC.
a Washington Corporation,
Plaintiff/Respondent,

v.

AMERICAN RODSMITHS, INC. a Texas Corporation;
and ROBERT SCHERER and JANE DOE SCHERER,
Husband and Wife, and the marital community comprised thereof,
Defendants/Appellants,

REPLY BRIEF OF APPELLANTS/DEFENDANTS

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INTRODUCTION

Plaintiff's response reads more like the closing argument in a jury trial than an appellate brief. Essentially, plaintiff argues that its arguments "persuaded" the judge that its position was correct. That is exactly the problem. In a summary judgment setting, it is not the job of the trial court to weigh evidence and determine by which side it is persuaded. Its job is only to determine if there are material facts in dispute. The trial court erred in finding no material dispute regarding the amount owing.

As stated in the opening brief, there is no dispute that there is some amount owing. But the dispute always has been the exact amount. That decision cannot be decided on summary judgment, based on the declaration of Robert Scherer and the documents plaintiff submitted in the summary judgment motion.

Ultimately, there are material disputes as to how much is owing to plaintiff. This matter needs to be reversed, the attorneys' fees and pre-judgment interest needs to be reversed and this matter should be remanded for trial.

ARGUMENT

A. Robert Scherer's declaration and the documents submitted by plaintiff show that there are material issues of fact.

As set forth in the opening brief, and agreed to by plaintiff, the standard of review when reviewing an order on summary judgment is de novo. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 271 (2011). “The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (internal citations omitted).

Here, the evidence shows, at a minimum, disputed facts. In his declaration, defendant American Rodsmiths owner Robert Scherer stated that there are large amounts of product that his company never received, yet that product has been included in the judgment. See CP 47-63. This is supported by numerous documents provided by plaintiff in support of the summary judgment motion.

In support of summary judgment, Jack Huang, the president of plaintiff GLV, provided a declaration stating that the amount owed was \$328,277.23, the amount that was eventually entered as the principal judgment amount. CP 23-41 and CP 27. The document that supported

that number included references to two orders (ARS02/10 and ARS03/10), in the amounts of \$24,802.25 and \$55,107.25, respectively, that were listed as “ON HOLD.” CP 27. These amounts were included in the \$328,277.23.

In GLV’s reply in support of summary judgment, Mr. Huang submitted a reply declaration. CP 69-182. In this reply declaration, there are several communications between Mr. Huang and Mr. Scherer. These communications included references to these same “on hold” shipments. A March 23, 2010 email from Mr. Huang provides, regarding the ARS02/10 order, that it is “on hold to ship until account is cleared and payment is prepaid.” CP 141. Emails from December 2, 2010, also referencing those two orders clearly show they had not been shipped, as there is reference to air freight (CP 152) and Mr. Huang’s statement that “once the money is received, we will ship the 225PCs out immediately, and finish producing the 675PCs, which will take about 50 days to complete.” CP 153. Robert Scherer’s email of December 1, 2010 clearly shows his understanding that the amount owing included these two shipments that had not yet shipped. CP 154. In a February 2011 email, Mr. Huang knew that he had not shipped this product – “[m]y answer is we will ship the balance of the rod once the balance is paid in full. . . as soon as we get the money, we will ship the 225PCs to you.” CP 156.

These communications clearly show that about \$80,000 of product was never sent to American Rodsmiths. That \$80,000, however, was included in the judgment. It is clear that the judgment is in error, and must be reversed. Moreover, Mr. Scherer's declaration states that there is at \$35,000 worth of warranty issues with product that American Rodsmiths did receive, providing yet another reason why this judgment must be reversed. CP 47-63.

Plaintiff argues that its accounting was accurate and corroborated by agents of American Rodsmiths. (Brief at 6). As the above demonstrates, plaintiff's accounting was not accurate and Mr. Scherer indicated in a December 2010 email that the amount he stated was owing *included unshipped product*. CP 154. This product was never received. CP 48. And so, contrary to plaintiff's assertion, Mr. Scherer did not manifest an assent to the \$328,000 number as that number included product that was not shipped and never received.

B. The trial court erred in awarding attorneys' fees and prejudgment interest.

As stated in the opening brief, because summary judgment was improperly granted, so were the attorneys' fees. This determination can only be made after a trial on the merits, in which the true amount owing can be established. Similarly, the award of prejudgment interest was not

appropriate, as there is a dispute as to the amount owing. Prejudgment interest is not appropriate when the amount owing depends upon discretion or opinion of the fact finder. *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). Thus, it would be inappropriate to make the determination of whether any prejudgment interest is owed until the amount owing is established at trial.

C. The trial court erred in entering findings of fact and conclusions of law.

Plaintiff did not address the argument that the trial court erred in entering findings of fact and conclusions of law. “Findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court.” *Hemenway v. Miller*, 116 Wn.2d 725, 731 (1991) quoting *Chelan Cy. Deputy Sheriffs’ Ass’n v. Chelan Cy.*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987).

CONCLUSION

There are genuine issues of material fact regarding what amount is owing to plaintiff. As such summary judgment, attorneys’ fees and pre-judgment interest were all improperly entered. The trial court’s entry of summary judgment and judgment with attorneys’ fees and interest should be reversed and this matter remanded for trial.

RESPECTFULLY SUBMITTED this 21st day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 21st day of May, 2012, I caused a true and correct copy of the foregoing document, "Reply Brief of Defendants/Appellants" to be delivered by Legal Messenger and electronic mail to the following counsel of record:

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