FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 FEB -6 PM 1:46

NO. 67956-2-I

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,

BRIEF OF APPELLANTS/DEFENDANTS

Timothy L. Ashcraft, WSBA #26196
WILLIAMS, KASTNER & GIBBS PLLC

Attorneys for Defendants/Appellants
1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

ORIGINAL

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE 3

ARGUMENT 4

A. The court erred in granting summary judgment. 4

B. The trial court erred in awarding attorneys' fees. 6

C. The trial court erred in awarding pre-judgment interest. 6

D. The trial court erred in entering findings of fact and conclusions of law. 7

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Chelan Cy. Deputy Sheriffs' Ass'n v. Chelan Cy.,
109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987) 10

Crabtree v. Lewis,
86 Wn.2d 282, 544 P.2d 10 (1975) 6

Garbell v. Travel Shop, Inc.,
17 Wn. App. 352, 562 P.2d 211 (1977) 5

Hansen v. Rothaus,
107 Wn.2d 468, 730 P.2d 662 (1986) 6

Hemenway v. Miller,
116 Wn.2d 725 (1991) 7

Moeller v. Farmers Ins. Co. of Wash.,
173 Wn.2d 264 (2011) 4

Wilson v. Steinbach,
98 Wn.2d 434, 656 P.2d 1030 (1982) 5

RULES

CR 56 6

CR 56(c) 4

INTRODUCTION

This is a breach of contract case in which plaintiff GLV International, Inc. alleges that they provided goods to defendant American Rodsmiths, Inc. GLV sued American Rodsmiths and Robert Scherer, who had signed a guaranty on behalf of American Rodsmiths.

Defendants did not dispute that there was some amount owing, though did disagree with the amounts claimed by plaintiff. The plaintiff moved for summary judgment. In response, defendants admitted that there was some amount owing and set forth disputes as to product charged for but not received, and also raised warranty issues.

In spite of the factual disputes, the trial court granted summary judgment and awarded attorneys' fees to plaintiff. The summary judgment and attorneys' fees should be reversed and remanded for a trial on the issue of how much money is owing, whether attorneys' fees are appropriate and if so, the appropriate amount of attorneys' fees.

Assignments of Error

1. The court erred in granting summary judgment and entering the subsequent judgment.

2. The court erred in awarding attorneys' fees

3. The court erred in awarding pre-judgment interest.

4. The court erred in entering findings of fact and conclusions of law with the judgment.

Issues Related to the Assignments of Error

1. Does a trial court err when it grants summary judgment and subsequently enters judgment in the presence of issues of material fact regarding the amount of money owing? Yes.

2. Does a trial court err when it awards attorneys' fees on summary judgment in the presence of issues of material fact regarding the amount of money owing? Yes

3. Does a trial court err when it awards attorneys' fees based on a fee clause in a guaranty when there has been no showing that the original obligor on a contract with no fees cannot pay? Yes.

4. Does a trial court err when it awards pre-judgment interest when the amount owing is disputed and thus involves discretion or opinion of the fact finder?

5. Does a trial court err when it enters findings of fact and conclusions of law based on a summary judgment? Yes.

STATEMENT OF THE CASE

This is a contract dispute arising out of transactions between Plaintiff and American Rodsmiths, Inc. There is no dispute that the two companies have transacted business together.

In the Complaint, plaintiff alleged that defendant American Rodsmiths purchased approximately $300,000 worth of goods from plaintiff. CP 2. Defendant American Rodsmiths, Inc. admitted that there was some amount owing, but did not agree on the amount. CP 10.

Plaintiff moved for summary judgment. Attached to the motion was the declaration of Jack Huang, the president of GLV. CP 23-41. In that declaration, Huang attached a document which showed that defendant American Rodsmith had paid $200,000 toward the outstanding debt. CP 26. This document was a summary, purportedly prepared by plaintiff. The plaintiff did not submit with the motion any purchase orders from defendant American Rodsmiths. See CP 14-22, 23-41.

In response to the motion, Robert Scherer, the president of American Rodsmiths, Inc. submitted a declaration. CP 47-63. In that declaration, Mr. Scherer stated that he authorized approximately $300,000 worth of goods to be purchased and that of the goods claimed to have been purchased by his company, American Rodsmiths did not receive over

$97,000 worth of those goods. CP 48. Additionally, Mr. Scherer stated that there were warranty issues on over $35,000 worth of the products. CP 48, 50-63.

In reply, GLV submitted for the first time invoices they claimed showed the purchase of the product. In a reply declaration, Mr. Huang admitted that American Rodsmiths had paid $200,000 toward any outstanding debt. CP 70. In his reply declaration, Mr. Huang disputed Mr. Scherer's statements regarding product not received and warranty issues. CP 70-71.

The trial court entered summary judgment in the amount of $328,277.23. CP 184. Subsequently, the court also awarded attorneys' fees, entering judgment in the amount of $342,497.13. CP 186-193.

ARGUMENT

A. The court erred in granting summary judgment.

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). "A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. 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). "A summary judgment should not be used as a means to 'cut litigants off from their right to trial.'" *Garbell v. Travel Shop, Inc.*, 17 Wn. App. 352, 353, 562 P.2d 211 (1977).

In its complaint, plaintiff alleged a purchase of goods of approximately $300,000. Plaintiff is bound by that assertion. Of that approximately $300,000 worth of goods, the evidence shows that defendant American Rodsmiths paid $200,000. Thus, based on the allegations in the complaint, it is difficult to see how the trial court entered judgment for over $300,000. Moreover, there is a genuine issue of material fact as to whether American Rodsmiths received all of the goods claimed by plaintiff, as stated by Mr. Scherer in his declaration. While the plaintiff calls Mr. Scherer's statement "conclusory" it is difficult to imagine how to prove a negative (i.e. I didn't receive certain product) other than by your own testimony. In any event, that is sufficient to create an issue of fact, as is the issue of whether any of the products were

defective and had warranty issues. CR 56; see *Crabtree v. Lewis*, 86 Wn.2d 282, 544 P.2d 10 (1975).

B. The trial court erred in awarding attorneys' fees.

Because summary judgment was improperly granted, so were the attorneys' fees. Rather, this determination can only be made after a trial on the merits. In addition to summary judgment being inappropriate, plaintiff did not set forth a basis for collecting fees. While plaintiffs argued below that the guaranty has a fee provision, plaintiff did not set forth any basis for collecting fees on the original claim against American Rodsmiths, Inc. Given that the guarantee would only come into effect if the original debtor cannot pay, that request for fees was, at best, premature.

C. The trial court erred in awarding pre-judgment interest.

As set forth above, the entry of summary judgment was inappropriate. For the same reasons, prejudgment interest is not appropriate. 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.

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

As part of its judgment, the trial court entered findings of fact and conclusions of law. This was improper. "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

The trial court was presented with 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 ___ day of February, 2012.

WILLIAMS, KASTNER & GIBBS PLLC

By_____
Timothy L. Ashcraft, WSBA #26196

Attorneys for Defendants/Appellants

1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 10th day of February, 2012, I caused a true and correct copy of the foregoing document, "Brief of Defendants/Appellants" to be delivered by Legal Messenger and electronic mail to the following counsel of record:

Counsel for Plaintiff/Respondent:
James P. Ware, WSBA #36799
Mark D. Kimball, WSBA #13146
MDK LAW ASSOCIATES
The Law Offices of Mark Douglas Kimball, P.S.
Skyline Tower, Suite 2030
10900 N.E. Fourth Street
Bellevue, WA 98004

DATED this 10th day of February, 2012, at Tacoma, Washington.

Karen Becker

3359206.1