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CASE NO. 67956-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

GLV INTERNATIONAL, INC.,
A Washington Corporation,

Plaintiff/Respondent,

vs.

AMERICAN RODSMITHS, INC., A Texas Corporation; and ROBERT
SCHERER and "JANE DOE" SCHERER, Husband and Wife and the
Marital Community Comprised Thereof,

~~Respondent.~~
Appellant

RESPONDENT'S BRIEF ON APPEAL

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ORIGINAL

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I. INTRODUCTION

The underlying lawsuit from which this appeal was taken stems from Appellants' failure to pay an outstanding balance of approximately \$300,000.00 for the purchase of recreational fishing inventory from Respondent. Appellant Robert Scherer, the owner of American Rodsmiths, Inc., ("ARI") signed a personal guaranty that guaranteed payment of American Rodsmiths' account balance.

GLV filed for summary judgment on the basis that there were no issues as to the amount owed or that both ARI and Scherer were jointly and severally liable for ARI's account balance. In support of its Motion, GLV presented evidence verifying that Appellants acknowledged the amount owed, made promises to pay the amount owed, and never requested the invoiced amount.

In an unsuccessful attempt to argue that issues of material fact did exist, Appellants offered conclusory statements that they believed the amount invoiced was incorrect and that they had vague concerns regarding the quality of goods. Respondent provided direct and irrefutable evidence that Appellants acquiesced in and repeatedly acknowledged the invoiced amount, verified the invoiced amount, and never complained of the quality of goods. Because the Court found that Appellants failed to raise an issue of material fact, it awarded judgment in the amount of \$328,277.23 plus

prejudgment interest, costs and attorney fees. Appellants did not dispute the amount of attorney fees awarded.

II. STATEMENT OF THE ISSUE.

Did the trial court err in granting Respondent's Motion for Summary Judgment when Appellants failed to raise issues of material fact regarding the outstanding balance on the account, when Appellants acknowledged the amounts owed, when Appellants stated they would pay the amounts owed, and when Appellants never asserted that any of the goods sold were defective? **No.**

III. STATEMENT OF CASE

FACTS

GLV International (hereinafter "GLV") is a wholesaler of goods and supplies for recreational fishing. American Rodsmiths, Inc. (hereinafter, "ARI") is a retail fishing supplies store located in Houston, Texas that purchased certain rods and other goods from GLV. (CP 1-4) After ARI's account became delinquent with GLV, GLV agreed to extend ARI credit if ARI's owner personally guaranteed ARI's account. (CP 1-4, 28-30) Scherer executed the personal guarantee. (Id.) Despite numerous conversations and correspondence in which Appellants acknowledged the amount owed and acknowledged that Scherer personally guaranteed ARI's

performance, ARI refused to pay the balance of its account. (CP 31-41)

As a result of ARI's breach, GLV filed suit against ARI and Robert Scherer.

LEGAL HISTORY

After GLV filed suit and engaged in brief discovery, it filed the motion for summary judgment that is now on appeal. In its Motion, GLV sought judgment as follows:

1. Judgment against ARI for its account balance;
2. Judgment against Scherer for ARI's account balance pursuant to the personal guaranty; and
3. Prejudgment interest, costs and attorney fees. (CP 14-22)

In support of its Motion, GLV provided the final invoiced amount (CP 26), the personal guaranty (CP 28-30), and communications between Scherer and Huang (the principal at GLV) in which Scherer admitted that Appellants owed an undisputed amount of money along with promises to pay (CP 31-41).

In response, Appellants admitted that amounts were owed but disputed the exact amount owed. Despite their allegations though, Appellants did not provide any evidence that the final invoice (CP 26) was incorrect. Further, Appellants failed to provide any evidence that certain equipment was defective or that Appellants had notified GLV of

289 247 P.3d 778 (2011) The Court's inquiry here is whether Appellants pled facts sufficient to show an issue of material fact. As Washington case law establishes, after the moving party has set forth adequate affidavits, the nonmoving party must submit "specific facts rebutting the moving party's contentions and disclose that a genuine issue of material fact exists." *Id.* To defeat a summary judgment motion, the nonmoving party cannot rely on either speculation or conclusory assertions to establish issues of material fact; rather, they must set forth specific facts rebutting the moving party's contentions. **Meyer v. University of Washington**, 105 Wn.2d 847, 852 719 P.2d 98 (1986). "Once there has been an initial showing of the absence of any genuine issue of material fact, the party opposing the summary judgment motion must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues." **Estate of Kepi v. State**, 34 Wn. App. 5, 11-12 659 P.2d 1108 (1983) (internal citations omitted). "Mere allegations in pleadings not supported by evidence are insufficient to avoid summary judgment." **Long v. Home Health Svcs**, 43 Wn. App. 729, 738 fn. 3 719 P.2d 176 (1986). "An affidavit containing bare allegations of fact without any supporting evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. **Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel**, 21 Wn. App. 929, 933 587 P.2d

191 (Wash. Ct. App. 1978) *review denied by* 92 Wn.2d 1009 (1979).

Here, Appellants failed to establish that there were issues of material fact to rebut Respondent's Motion. In an effort to oppose Respondent's Motion, Appellants did make allegations which they claimed were material: the accounting of the amount owed and alleged incomplete orders and defective products. Appellants' arguments were not persuasive to the trial court, and they should be discarded by this court on appeal.

First, Respondent's accounting is accurate and corroborated by agents of American Rodsmiths (and in fact based upon its estimates). (CP 154, 135) Secondly, Respondents had never asserted any warranty issue or that the orders were incomplete. Indeed, this baseless and factually void assertion was first raised in response to GLV's summary judgment motion. Finally, the document attached to the Declaration of Robert Scherer did nothing to support Appellants' assertion that some of the items were defective. Presumably Exhibit 1 (CP 50-63) shows items customers returned to American Rodsmiths, but the documents do not show the items were defective or who was the wholesaler. Accordingly, Appellants failed to meet their burden showing issues of material fact exist and summary judgment was proper.

Appellants' assertion that the amount owed was unclear strains credibility and was advanced in clear violation of Civil Rule 11 because

even after Robert Scherer signed the personal guarantee it was understood that American Rodsmiths' balance was in excess of \$300,000.00. Further, contrary to Appellants' assertions, the \$200,000.00 payment American Rodsmiths made was incorporated into the amount owed and, in fact, was evidenced in Appellants' own accounting.

Respondent met its burden and established that no issues of material fact exist in this matter. Appellants failed to present evidence to rebut Respondent's position and therefore the trial court properly granted summary judgment.

V. LEGAL ARGUMENT AND ANALYSIS.

A. The Amount Awarded at Summary Judgment is Supported by Undisputed Evidence and Was Corroborated by Appellants' Own Admissions.

Appellants' assertion that the principal amount awarded at summary judgment is improper and constitutes an issue of material fact fails because the principal judgment amount is supported by evidence provided by GLV and was corroborated by Appellants' own admissions. In order to show that no material issues of fact exist and that summary judgment is proper, the moving party must support its assertion with admissible evidence and/or testimony. Once the moving party meets its burden, the nonmoving party must show, with admissible evidence, that issues of

material fact exist that must be resolved by a trier of fact. Importantly though, the nonmoving party cannot rely on either conjecture, mere speculation, or conclusory statements. Rather, the nonmoving party must provide specific evidence showing which material facts are in question. Notably, a Court may disregard evidence set forth to rebut the moving party's assertion that no issues of material fact exist if the evidence is simply too incredible to believe. Here, Respondent provided an accounting to establish the principal amount owed that was corroborated by Appellants' own email correspondence. Further, at no time in the parties' business relationship did Appellants assert a warranty issue or claim that the orders were incomplete. Rather, only after Respondent moved for summary judgment did Appellants seek to create these vague and specious defenses. Such a defense would only have been cognizable for legal purposes if it had been pled as an affirmative defense or claim for offset under Civil Rule 8. It was not. Factually, it was devoid of any merit or basis whatsoever.

The burden is on the moving party to establish its right to judgment as a matter of law. All facts and reasonable inferences from the facts are considered in favor of the nonmoving party. **Goad v. Hambridge**, 85 Wn. App. 98, 931 P.2d 200 (1997). However, once the moving party has established that no issues of material fact exist, the burden shifts to the

constitutes consent. *Id.* Payment does not, by itself establish an account stated as a matter of law. However, payment, together with a failure to manifest objectively either protest or an intent to negotiate the sum at some future time, does establish an account stated." **Sunnyside Valley**, 124 Wn.2d at n 1.

Here, there is no question that Appellants were aware of the amount owed for a period of time without objecting to it. As noted above, Appellants provided GLV with communications that corroborated the amount Appellants owed. Further, Appellants systematically promised payment of the account without any protests to the invoice.

Because Appellants acknowledged the amount owed, made promises and assurances to pay the balance on American Rodsmiths' account, and never objected to the amount invoiced, the account constitutes an account stated and Appellants cannot now challenge the invoice's accuracy. Indeed, Appellants' arguments advanced below and before this Court are so completely disingenuous that they are improper.

*C. The Trial Court Properly Granted
Attorney Fees.*

Appellants' assertion that the trial court erred when it awarded attorney fees against Appellants is factually and legally unsupportable

because the Court determined that the fees requested met with Lodestar standards, Appellants did not object to the amount of fees requested, and because the Court's award of fees was based upon Appellants' clear breach of the personal guarantee.

D. The Trial Court did not Err When it Awarded Prejudgment Interest.

The trial court did not err when it awarded prejudgment interest because as discussed above, the balance on Appellants' account constituted an account stated and the amount owed is not in controversy. Here, Appellants did not offer to the trial court any evidence that raised issues of material fact regarding the balances owed. In fact, the amount owed was discussed on numerous occasions prior to this action with Appellants acknowledging that American Rodsmiths' account balance exceeded \$300,000.00. Washington courts will allow for the award of prejudgment interest if the amount owed is either liquidated or if it is readily ascertainable from the contract. **Hansen v. Rothaus**, 107 Wn.2d 468, 730 P.2d 662 (1986). Here, the invoiced amounts were acknowledged, promises to pay were offered, and therefore the invoiced amount became an account stated. Because the amount owed is easily ascertainable it is deemed to be liquidated and prejudgment interest is proper. Accordingly, the trial court did not err when it

awarded GLV prejudgment interest.

E. Respondent Should be Awarded Attorney Fees and Costs to Respond to Appellants' Brief on Appeal.

Pursuant to RAP 18.1 GLV is entitled to an award of its costs and attorney fees as the parties' agreement allowed for an award of fees and costs to the prevailing party. **Borish v. Russell**, 155 Wn. App. 892, 230 P.3d 646 (2010). Accordingly, upon this Court's affirmation of the lower court ruling, Respondent will supply the Court with a cost/fee memorandum as prescribed by the Rules of Appellate Procedure.

VI. CONCLUSION

Appellants' appeal must fail because Appellants failed to present evidence that an issue of material fact exists or existed as to the amount owed and guaranteed by Appellants. Robert Scherer acknowledged that his company owed in excess of \$300,000.00. Robert Scherer acknowledged that he personally guaranteed payment of ARI's account. Additionally, Appellants' claims regarding alleged warranty issues are void of legal merit as they were first asserted in Appellants' response to summary judgment. Further, at no time during the course of almost seven months of communications regarding ARI's account did Appellants raise any warranty or similar concerns. Put simply, Appellants' present assertions are baseless and appear to have been

raised in an improper attempt to retard collection of the Judgment in Texas.

Appellants' motives notwithstanding, this Court should affirm the trial court's decision as Appellants failed to raise issues of material fact to show why summary judgment should not have been granted. The trial court did not err.

Dated March 22, 2012

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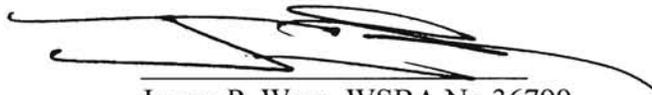
DECLARATION OF SERVICE

I certify that on March 22, 2012 I caused a true and correct copy of this Respondent's RESPONSIVE BRIEF ON APPEAL to be delivered to:

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Dated: March 22, 2012



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