

67969-4

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NO. 67969-4-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

STEPHEN GANDARA, ET AL.,

Appellants,

v.

THE COMMERCE BANK OF WASHINGTON, N.A.,

Respondent.

2012 JUL 27 PM 4:01
COURT OF APPEALS DIV I
STATE OF WASHINGTON

**BRIEF OF RESPONDENT THE COMMERCE BANK OF
WASHINGTON, N.A.**

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I. INTRODUCTION

Appellants Stephen and Denise Gandara appeal the trial court's denial of their request for a continuance of Respondent The Commerce Bank of Washington, N.A.'s ("Commerce Bank") motion for summary judgment. The issue before the Court is whether the trial court abused its discretion in doing so.

Commerce Bank obtained summary judgment in October 2011, against the Gandaras for breach of the payment terms of a settlement agreement reached in October 2005, which resolved litigation between Commerce Bank and the Gandaras. During the 2005 litigation, Commerce Bank sought to recover over \$1.5 million the Gandaras owed on two unpaid promissory notes. The Gandaras were represented in the litigation by experienced counsel who conducted discovery in the litigation and ultimately negotiated the settlement agreement with Commerce Bank.

The settlement agreement concluded months of litigation and then negotiation. Under the terms of the settlement agreement, jointly drafted by counsel for the Gandaras and Commerce Bank, Commerce Bank agreed to compromise the Gandaras' outstanding \$1.5 million debt and the Gandaras promised to pay Commerce Bank \$400,000, plus interest. The Gandaras also agreed to a complete release of all claims asserted against Commerce Bank in the litigation. In connection with the settlement

agreement and release, the Superior Court dismissed the litigation and all claims asserted therein with prejudice.

Over the next several years, the Gandaras twice defaulted on the payment terms of the settlement agreement and requested accommodation from Commerce Bank. Each time, Commerce Bank agreed to the request, entering into two separate forbearance agreements in which the Gandaras reaffirmed the terms and conditions of the settlement agreement. When the Gandaras defaulted a third time, Commerce Bank brought this lawsuit to enforce the terms of the settlement agreement.

Seeing no genuine issues of material fact on the Gandaras' breach of the settlement agreement, Commerce Bank brought a motion for summary judgment. The Gandaras did not contest that they breached the settlement and forbearance agreements, but instead, through different counsel, asked the Superior Court for a continuance to conduct discovery on the same issues that had been litigated, settled and dismissed in connection with the 2005 litigation. The discovery the Gandaras sought was nearly identical to discovery conducted by previous counsel in the 2005 litigation.

The trial court denied the Gandaras' request for a continuance because (a) the discovery requested would merely duplicate discovery conducted in the 2005 litigation, (b) the parties had released all claims

relating to the issues on which the Gandaras sought discovery when they settled the 2005 litigation, and (c) the King County Superior Court had dismissed all claims relating to the issues on which the Gandaras sought discovery in 2005, after the parties settled the original litigation.

The Superior Court correctly exercised its discretion in denying the Gandaras' request for a continuance. The Gandaras presented no reason why conducting the same discovery they conducted six years ago would change the outcome of this case. The Gandaras had previously released all claims arising out of the facts on which they wanted to conduct discovery. The bargained-for release was a part of the settlement agreement their previous attorney had negotiated and jointly drafted with Commerce Bank's counsel. Additionally, the Superior Court had in October 2005 dismissed with prejudice all claims arising out of the facts on which the Gandaras wanted to conduct discovery. And the statute of limitations expired long ago on any fraud claims arising out of those facts.

Commerce Bank therefore asks this Court to affirm the decision of the trial court, which granted Commerce Bank's motion for summary judgment and denied the Gandaras' request for a continuance.

II. COUNTER-STATEMENT OF ISSUES PRESENTED

1. A trial court may deny a request for continuance when no genuine issues of material fact exist, the requesting party fails to explain

what evidence would be established by additional discovery, or the requesting party fails to provide a good reason for delay in obtaining the discovery for which a continuance is sought. Here:

- The Gandaras released all claims to which the requested discovery pertained;
- The King County Superior Court dismissed all claims to which the requested discovery pertained; and
- The Gandaras conducted the same discovery in the 2005 litigation.

Given these facts, did the Superior Court abuse its discretion when it denied the Gandaras' request for a continuance to conduct discovery?

2. The prevailing party is entitled to recover its attorneys' fees on appeal when the contract at issue provides for such an award, or when the appellant raises no debatable issues which could support reversal. The Settlement Agreement provides for attorneys' fees on appeal. And the Gandaras raise the same unsupported arguments that the trial court rejected when it refused to delay summary judgment so the Gandaras could conduct repetitive discovery on released and dismissed claims. Is Commerce Bank entitled to recover its attorneys' fees on appeal?

III. STATEMENT OF THE CASE

On March 25, 2005, Commerce Bank filed a complaint in King

County Superior Court commencing a lawsuit against the Gandaras (the “2005 Litigation”) to recover over \$1.5 million, the unpaid balance owed on two promissory notes. CP 88. After conducting discovery, the Gandaras’ attorney at the time, Thomas N. Bucknell, negotiated a written settlement agreement with Commerce Bank (the “Settlement Agreement”). CP 88–90. Mr. Bucknell and Commerce Bank’s counsel, Charles C. Robinson, jointly drafted the Settlement Agreement, under which Commerce Bank substantially compromised its claims on the unpaid promissory notes, and the Gandaras agreed to pay Commerce Bank \$400,000 plus interest over a five-year period. CP 44–45. The Gandaras and Commerce Bank also agreed to fully release each other from every claim that related to, arose from or existed in connection with the 2005 Litigation:

[T]he parties hereby waive, release and forever discharge the other . . . from every claim, demand or cause of action whatsoever, of every kind and nature, whether presently known or unknown, suspected or unsuspected, arising or alleged to have arisen or which may hereafter arise from any act, omission or condition which occurred or existed on or before the date of this Agreement, including without limitation, any claim or defense asserted in the [2005] Litigation or any claim arising under any loan transaction between the parties.

CP 45. On October 20, 2005, pursuant to a stipulation between the parties, the King County Superior Court dismissed the 2005 Litigation with prejudice. CP 139.

Over the next several years, the Gandaras made various payments to Commerce Bank. CP 41–42. Twice, after the Gandaras defaulted, the parties signed forbearance agreements. CP 50–56. In each forbearance agreement, the Gandaras acknowledged the terms and conditions of the Settlement Agreement. CP 50, 56. But ultimately, after the Gandaras continually failed to fulfill their obligations to Commerce Bank under the Settlement Agreement, Commerce Bank filed this lawsuit.

A. In 2005, Commerce Bank Sued the Gandaras to Recover the Unpaid \$1.5 Million Balance on Two Promissory Notes

The Settlement Agreement at issue here put to rest disputes between Commerce Bank and the Gandaras dating back to at least 2001. In 2001, Commerce Bank held two promissory notes from the Gandaras totaling approximately \$1.6 million in debt. CP 72, 75. The two promissory notes were originally secured by deeds of trust on property known as the “Edgewood Property.” CP 71. Around this time, however, the Gandaras apparently fell behind on a mortgage from Wells Fargo, also secured by the Edgewood Property, and Wells Fargo began non-judicial foreclosure proceedings against the Property. *Id.* Wells Fargo held a deed of trust senior to that of Commerce Bank, so the foreclosure sale was going to wipe out Commerce Bank’s security on its two deeds of trust.

To protect its position from foreclosure by Wells Fargo, Commerce Bank’s subsidiary, TCB Property Associates (“TCB”), bid at

the trustee's sale and purchased from the trustee (for cash) the Edgewood Property. On November 9, 2001, TCB bought the Edgewood Property from the trustee's sale for \$1,161,715.04. CP 71. Rather than simply evict the Gandaras, TCB entered into a lease agreement through which the Gandaras could lease the Edgewood Property while TCB sought a buyer (the "Lease Agreement"). CP 75-78.

Under the Lease Agreement, TCB agreed to lease the Edgewood Property to the Gandaras while it tried to sell the Property. CP 76. Once the Property sold, TCB would take any proceeds from the sale and transfer them to Commerce Bank toward reduction or satisfaction of the Gandaras' debts on the two outstanding promissory notes. CP 77. In the event of excess proceeds after the Commerce Bank debt was paid, the Gandaras would receive the amount of the excess. *Id.*

After two years of marketing the property for sale, TCB was finally able to close a sale of the Edgewood Property, on November 5, 2003. CP 136. Unfortunately, the net sale proceeds did not cover the Gandaras' full obligations on the two unpaid Commerce Bank notes.

By December 2004, the Gandaras still owed approximately \$1,537,930 to Commerce Bank on the two unpaid promissory notes and had made no progress towards payment of the debt. Accordingly, Commerce Bank's attorney contacted the Gandaras' then-attorney to

discuss resolution of the debt. CP 57–58. The Gandaras retained a succession of three different attorneys over the next several months to represent them with respect to the obligations owed to Commerce Bank: Michael Jennings, of the law firm McGavick Graves in Tacoma (admitted to practice September 3, 1971); Delbert Miller, a Seattle attorney (admitted to practice September 20, 1968); and Thomas N. Bucknell, of the law firm Bucknell Stehlik Sato & Stubner in Seattle (admitted to practice October 12, 1971). CP 87–88 (admission dates from Washington State Bar Association roll of Attorneys). Ultimately, Mr. Bucknell represented the Gandaras during settlement negotiations and litigation in 2005. CP 88.

The Gandaras and Mr. Bucknell met with Commerce Bank in January 2005 to try to resolve the outstanding debt on the two promissory notes, but the Gandaras failed to produce a suitable settlement offer. CP 58. On March 25, 2005, Commerce Bank filed a complaint in King County Superior Court commencing the 2005 Litigation. CP 88. In its complaint, Commerce Bank sought to recover over \$1.5 million the Gandaras still owed the Bank on the two unpaid notes. *Id.*

In response, Mr. Bucknell filed a counterclaim on behalf of the Gandaras alleging alter ego liability, breach of fiduciary duty, fraud, and negligent misrepresentation, among other things. CP 88, 99–102. Mr.

Bucknell also filed a third-party claim on behalf of the Gandaras against TCB, again alleging alter ego, breach of fiduciary duty, fraud, and negligent misrepresentation. CP 88, 109–12. The Gandaras alleged that Commerce Bank improperly created and controlled TCB to avoid extinguishing the Gandaras’ debt through Wells Fargo’s foreclosure sale: “Commerce Bank and TCB falsely represented that Gandaras [sic] were still indebted to Commerce Bank, when, they knew or should have known, that the alleged debt owed by the Gandaras was extinguished by the deed of trust foreclosure by the first deed of trust holder.” CP 101. The Gandaras further alleged that Commerce Bank and TCB had improperly rejected two offers on the Edgewood Property and sold it in an amount insufficient to generate enough excess proceeds to cover their outstanding debt to Commerce Bank (ignoring the fact that TCB bought the property from Wells Fargo and did not have to agree to put any of the proceeds from the later sale toward the Gandaras debt to Commerce Bank). CP 98–102.

Shortly after filing their answer, counterclaim, and third-party claim, the Gandaras, through attorney Bucknell, propounded discovery requests on both Commerce Bank and TCB relating to the counterclaims and third-party claims asserted against each of them, and relating to the 2003 sale of the Edgewood Property, and the formation and ownership of

TCB. CP 114–24. Among their numerous requests for production, the Gandaras sought, “all documents that pertain in any way to the Edgewood Property . . . including but not limited to any and all appraisals, valuation analyses, or opinions, purchase offers, marketing material, purchase contracts, [and] correspondence with interested or potential purchasers” CP 120. The Gandaras also requested “all documents that reflect the creation or formation of TCB”; “any and all documents that refer or relate in any way to the business purpose for forming TCB”; and “all documents that reflect any ownership interest in TCB.” CP 117, 121.

Commerce Bank and TCB served their responses to the discovery requests on July 5, 2005. CP 127. Commerce Bank and TCB produced over 2,000 pages of material, including all offers on the Edgewood Property and information regarding the formation of TCB. CP 129. Among the documents produced was an email conversation between Stephen Gandara and Commerce Bank’s Dave Friedenbergr in which Mr. Friedenbergr specifically described to Mr. Gandara the three offers received for the Edgewood Property, other than the one that was accepted. CP 132 - 134. Commerce Bank also produced a “Gandara Outline” which recapped the three offers from “Potential Buyers” and the conditions that led to rejection of each offer. CP 136.

B. The Gandaras and Commerce Bank Entered Into a Written Settlement Agreement by Which Commerce Bank Reduced the Balance Owed to \$400,000 and the Gandaras Released Commerce Bank from All Claims

In October 2005, three months after the Gandaras conducted their discovery, Mr. Bucknell and counsel for Commerce Bank and TCB successfully negotiated the Settlement Agreement to resolve the litigation and all claims among the Gandaras, Commerce Bank, and TCB. CP 58. The parties jointly drafted the Settlement Agreement and acknowledged that they had the opportunity to seek advice from independent legal counsel on its terms. CP 46–47.

Under the Settlement Agreement, Commerce Bank compromised its over \$1.5 million claim and accepted a significantly reduced amount of \$400,000, plus interest (the “Settlement Amount”). CP 44–48. The Gandaras agreed to pay the Settlement Amount in full by November 1, 2010 (the “Maturity Date”), through (a) annual principal payments of \$50,000, starting on November 1, 2006, and continuing on November 1 of each subsequent year until the Maturity Date; and (b) quarterly payments of interest on the outstanding principal amounts, starting on February 1, 2006 and continuing on May 1, August 1, November 1, and February 1 of each subsequent year until the Maturity Date, or until the Settlement Amount was paid in full. CP 44–45.

To discourage breach of the Settlement Agreement, Commerce

Bank and the Gandaras agreed that any party forced to take legal action to enforce the Settlement Agreement was entitled to recover its attorneys' fees and costs. CP 47.

The Gandaras and Commerce Bank further agreed to fully release each other from all claims "whether presently known or unknown, suspected or unsuspected, arising or alleged to have arisen or which may hereafter arise from any act, omission or condition which occurred or existed on or before the date of this Agreement." CP 45. Pursuant to the Settlement Agreement and stipulation of the parties, the King County Superior Court dismissed all claims, counterclaims, and third party claims in the 2005 Litigation with prejudice. CP 139.

C. After the Gandaras Breached the Settlement Agreement, They Twice Signed Forbearance Agreements Reciting the Continued Validity of the Settlement Agreement

The Gandaras initially made payments under the Settlement Agreement, but then began failing to meet their payment obligations. The Gandaras failed to make their second principal payment in full, due on November 1, 2007. CP 41. Instead, the Gandaras paid only \$14,300, leaving an unpaid deficit of \$35,700 on the second principal payment. *Id.*

To avoid the consequences of their inadequate payment, the Gandaras asked Commerce Bank to allow them to pay the remaining \$35,700 over time. *Id.* Commerce Bank agreed to accommodate the

Gandaras' request, so the parties entered into a forbearance agreement in June 2008 (the "Forbearance Agreement"). *Id.* Under the Forbearance Agreement, the Gandaras promised to pay the arrearage on the second principal payment through a series of monthly payments, with the entire amount paid on or before July 20, 2009. CP 50. The Gandaras acknowledged that they had entered into the Settlement Agreement and also reaffirmed their obligations owed under the Settlement Agreement: "All other terms and conditions of the Settlement Agreement shall remain in full force and effect and are incorporated herein." *Id.*

Despite Commerce Bank's accommodation, the Gandaras still failed to live up to their obligations. In 2009, the Gandaras once again defaulted, and once again asked Commerce Bank to agree to a forbearance arrangement. CP 41. Rather than try to resolve any individual payments, the Gandaras asked Commerce Bank to allow them to retire the entire outstanding debt on the Settlement Agreement through lowered monthly payments, with no further interest accruing. CP 41. Commerce Bank again agreed to accommodate the Gandaras and so, on October 15, 2009, the parties entered into a second forbearance agreement (the "Second Forbearance Agreement"). CP 41, 55–56.

Under the Second Forbearance Agreement, the Gandaras acknowledged that they had defaulted on the Settlement Agreement and

acknowledged the amount they still owed:

A. By Settlement Agreement and Release by and between Gandara, TCB Property Associates, LLC and Commerce Bank, dated October 14, 2005 (the "Settlement Agreement"), Gandara agreed to make payments of principal and interest to Commerce Bank on the schedule set forth in the Settlement Agreement.

...

D. Gandara is in default under the Settlement Agreement and Forbearance Agreement. As of October 1, 2009, Gandara owes the Commerce Bank \$304,876.78, including principal and accrued interest, pursuant to the Settlement Agreement (the "Unpaid Amount").

CP 55. As with the first Forbearance Agreement, the Gandaras again reaffirmed the terms and conditions of the Settlement Agreement. CP 56.

D. After Yet Another Breach by the Gandaras, Commerce Bank Brought this Suit to Enforce the Settlement Agreement

Even after two forbearance arrangements acknowledging the Settlement Agreement and the Gandaras' payment obligations, the Gandaras still defaulted on their payments to Commerce Bank. As of September 26, 2011, the Gandaras still owed Commerce Bank \$293,304.47 in principal on the Settlement Agreement, plus accrued interest. CP 41–42. Commerce Bank notified the Gandaras that they were in default and then commenced this litigation to enforce the Settlement

Agreement. CP 58–59.

On July 25, 2011, two days before the King County Superior Court was to hear Commerce Bank’s motion for default and two months after they were served with the complaint, the Gandaras finally filed their answer. CP 15–22, 28. The Gandaras made no effort to refute Commerce Bank’s allegations regarding their breach of the Settlement Agreement and Forbearance Agreements. CP 15–22. Instead, the Gandaras responded to nearly every allegation by claiming that “any alleged settlement agreement that may have existed was fraudulently induced and/or coerced through presentation of fraudulent misrepresentations by Plaintiff and/or TCB Property Associates, LLC.” *Id.* The Gandaras did not make any attempt to conduct discovery over the next several months on these allegations or otherwise.

E. In Response to Commerce Bank’s Summary Judgment Motion, the Gandaras Requested a Continuance to Conduct Discovery Identical to Discovery they Conducted in the 2005 Litigation, to Prove Claims they Released in the Settlement Agreement

Because the Gandaras could not dispute any of the material facts, Commerce Bank moved for summary judgment to enforce the Gandaras’ obligations under the Settlement Agreement. CP 23–37. Rather than challenge summary judgment, the Gandaras simply recycled their old arguments from the 2005 Litigation and asked the court for more time to

conduct discovery on those arguments. *See* CP 61–70. The Gandaras once again claimed that Commerce Bank improperly rejected two offers on the Edgewood Property, and that Commerce Bank improperly created and controlled TCB Property Associates. CP 62–63. The Gandaras made no attempt to explain why they had not conducted discovery on these issues in the four months between serving their answer to Commerce Bank’s complaint and filing their opposition to summary judgment. *See* CP 60–70.

As they had done in the 2005 Litigation, the Gandaras sought discovery regarding the relationship between Commerce Bank and TCB, and all offers on the Edgewood Property. But all information the Gandaras sought through discovery had been covered by discovery in the 2005 Litigation, and most of the Gandaras’ new requests covered identical topics:

2011 Discovery Topic	2005 Litigation Discovery Requests
1. All offers made on the Edgewood Property. Appellant’s Br. 11.	1. “[P]lease produce any and all documents that pertain in any way to the Edgewood Property . . . including but not limited to any and all appraisals, valuation analyses or opinions, [and] purchase offers, . . .” CP 120.
2. The formation of TCB Property Associates. Appellant’s Br. 11.	2. “Please produce all documents that reflect the creation or formation of TCB.” CP 117.

3. The ownership of TCB Property Associates. Appellant's Br. 11.	3. "Please produce all documents that reflect any ownership interest in TCB." CP 121.
4. All communications between Commerce Bank and TCB pertaining to the Edgewood Property. Appellant's Br. 11.	4. "[P]lease produce any and all documents that pertain in any way to the Edgewood Property . . . including but not limited to . . . correspondence with interested or potential purchasers, agents, . . . and any and all other documents that in any way reflect your efforts to market and sell the real property." CP 120.
5. Communications between Commerce Bank and TCB pertaining to other property purchases, sales, and leases. Appellant's Br. 11-12.	5. "[P]lease produce all documents that refer or relate to, or evidence, any type of understanding, agreement, or contract by and between either Commerce Bank, or TCB, and the Gandaras or either of them." CP 118. "Please produce all documents that refer or relate to how, when or why TCB is used to hold, sell or foreclose on real property collateral including, but not limited to, any portion of a policy manual or similar document that addresses that subject." CP 123.
6. Communications between Commerce Bank and TCB pertaining to the 2005 Litigation. Appellant's Br. 12.	6. Not requested in the 2005 Litigation. ¹
7. Any and all documents obtained, maintained, created, or collected	7. See Item 1 above.

¹ This is the only issue on which discovery was not conducted in the 2005 Litigation, but the Gandaras have given no explanation as to how this would in any way be relevant to their breach of the Settlement Agreement.

<p>regarding or relating to the sale, purchases, offers to purchase the Edgewood Property. Appellant's Br. 12.</p>	
<p>8. The collection and allocation of all monies relating to the Edgewood Property. Appellant's Br. 12.</p>	<p>8. "Please produce all documents that have recorded upon them any numeric dollar amount pertaining or relating to the Edgewood Property, including but not limited to any credit analyses, regulatory report, financial statement, or internal bank account or report." CP 121.</p>

CP 117, 121–22. Commerce Bank produced over 2,000 pages of documents in July 2005 responding these requests. CP 89.

In a desperate attempt to avoid summary judgment, Stephen Gandara also submitted a declaration that Commerce Bank told him that only one offer had been made on the Edgewood Property: "it was specifically represented by Commerce Bank and TCB Property Associates that the offer accepted for the sale of the property was the only offer made to purchase the property." CP 73. But email correspondence from Commerce Bank's Dave Friedenbergl to Gandara reveals that the Bank told Gandara about multiple offers on the Edgewood Property, and even explained why those offers were rejected:

Steve:

As I have mentioned, over the years that the house was for sale, including the auction, there was only one legitimate, serious offer

and that is the one we accepted. Following is information on the offers referred to in Reed's e-mail of 10/16/02:

4/24/02 - \$2.1 million with \$800,000 cash and a 2nd on the house for 3 years

5/14/02 - \$2.7 million with \$1.5 million in cash and a 2nd of a shopping center for 2 years. We countered with all cash and the offer was dropped.

An additional offer 3/20 was for \$2.0 million.

We were not interested in taking real estate or notes as partial payment. Also, in 2002 we all believed that the house would bring considerably more than was being offered.

Let me know if you have any questions.

Dave

CP 132–34. Commerce Bank produced these emails, along with a spreadsheet detailing all offers on the Edgewood Property, in response to the Gandaras' discovery requests in the 2005 Litigation. CP 132–36.

F. The Superior Court Granted Commerce Bank's Motion for Summary Judgment and Denied the Gandaras' Request to Continue the Hearing so They Could Conduct Discovery

King County Superior Court Judge Michael J. Heavey rejected the Gandaras' request for a continuance and granted summary judgment pursuant to Civil Rule 56(c). CP 141–42. The Gandaras could not challenge the fact that they breached the Settlement Agreement and subsequent forbearance agreements. There was no reason to grant a

continuance because the Gandaras released all claims on which they wanted to conduct discovery, the Superior Court dismissed those claims with prejudice over six years ago, and the proposed discovery would merely duplicate the discovery conducted in the 2005 Litigation.

G. The Gandaras Appealed the Superior Court's Denial of Their Request for Continuance

The Gandaras filed their Notice of Appeal on November 28, 2011. CP 155. The Gandaras did not contest that they breached the Settlement Agreement, but challenged the Superior Court's decision denying their request for a continuance. Six months after filing their Notice of Appeal, and after repeatedly missing the Court's deadlines, the Gandaras finally submitted their opening brief, repeating the arguments they made before the trial court.

IV. ARGUMENT

A. Summary of Argument

The King County Superior Court properly exercised its discretion when it denied the Gandaras' request for a continuance and granted Commerce Bank's motion for summary judgment. The Gandaras are still trying to re-litigate the 2005 Litigation in an attempt to avoid having to live up to their obligations under the Settlement Agreement. But they could not contest the material facts before the trial court, nor could they show how granting them additional time to conduct discovery would

change the outcome of the instant case.

Commerce Bank filed this lawsuit to address the Gandaras' breach of the payment obligation under the Settlement Agreement that resolved the 2005 Litigation. Under the Settlement Agreement, the Gandaras promised to pay Commerce Bank \$400,000, plus interest, in exchange for Commerce Bank's agreement to compromise its outstanding \$1.5 million claim. The Gandaras did not pay Commerce Bank the promised amount, and thus they breached the Settlement Agreement.

The Gandaras did not contest that they breached the Settlement Agreement, but instead asked for a continuance to conduct discovery on the claims that were resolved by that agreement. The Superior Court correctly exercised its discretion when it denied the Gandaras' request to conduct discovery on these long-since-resolved issues because that discovery would not create an issue of material fact. First, the Gandaras released all claims on which they wanted to conduct discovery as part of the Settlement Agreement. Second, the Superior Court dismissed with prejudice all claims on which the Gandaras had conducted discovery over six years ago. Third, the Gandaras conducted the same discovery in the 2005 Litigation, and were already provided responses to that discovery. And even if the Gandaras somehow survived release and dismissal, the statute of limitations expired years ago on any fraud allegations. Fourth,

the Gandaras waived any right to challenge the validity of the Settlement Agreement because they twice ratified it through the Forbearance Agreements, and accepted the benefits of Commerce Bank's compromise of its claim for over six years. Fifth, the Gandaras gave no reason why they had not conducted this discovery during the almost six months in which the case was pending before entry of summary judgment.

B. This Court Reviews the Superior Court's Denial of the Gandaras' Request to Continue the Summary Judgment Hearing for Abuse of Discretion

In their appeal, the Gandaras challenge only the trial court's decision to deny their request for a continuance on Commerce Bank's motion for summary judgment. A trial court "has broad discretion to grant or deny a continuance," which is reviewable on appeal for manifest abuse of discretion. *Doyle v. Lee*, 166 Wn. App. 397, 403–04, 272 P.3d 256 (2012) (citing *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001)). "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (citing *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

The trial court may deny a request for continuance when any one of the following is true: "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting

party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). To reverse, the Court must find that no reasonable person could take the view that any one of these three grounds was present.

C. The Superior Court Did Not Abuse Its Discretion by Denying the Gandaras’ Continuance Request to Conduct the Discovery

The Gandaras’ request for a continuance would do nothing more than delay enforcement of the Settlement Agreement. The Gandaras negotiated and entered into the Settlement Agreement over six years ago while represented by experienced counsel, and after conducting discovery on the same issues they now raise. The Gandaras released all claims on which they now want to conduct discovery, the Superior Court dismissed those claims with prejudice over six years ago, the statute of limitations expired on the Gandaras fraud allegations because they were given all facts relating to those allegations in 2005, the Gandaras twice ratified the Settlement Agreement, and the Gandaras gave no reason why they did not conduct the requested discovery before the Superior Court entered summary judgment.

1. The Requested Discovery Concerned Claims the Gandaras Had Released

The King County Superior Court correctly denied the Gandaras’

request for a continuance because the parties litigated and released, as part of the Settlement Agreement, the claims on which the Gandaras indicated they wanted to conduct discovery. As part of the Settlement Agreement, the Gandaras expressly released all claims of any kind “whether presently known or which may hereafter arise from any act, omission, or condition which occurred or existed on or before the date of this Agreement.” CP 45. The Gandaras acknowledged and reaffirmed this release on two subsequent occasions: in the first Forbearance Agreement, executed in 2008; and again in the Second Forbearance Agreement, executed in 2009. CP 50–51, 55–56.

Washington courts interpret releases as contracts, and give full effect to the parties’ stated intentions. *Boyce v. West*, 71 Wn.2d 657, 662, 862 P.2d 592 (1993); *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983). As the trial court correctly determined, there was no question the Gandaras had released their claims regarding Commerce Bank’s control of TCB Property Associates and its rejection of offers on the Edgewood Property. Those claims must have “occurred or existed” before the date of the Settlement Agreement because (a) the Gandaras specifically referenced those claims in their counterclaim and third party complaint in the 2005 Litigation, and (b) the Gandaras conducted discovery on those claims during the 2005 Litigation. CP 96–102, 106–

12, 117–24.

The trial court also correctly determined that the Gandaras had not shown any reason why the release should not be enforced. Courts “are loath to vacate properly executed releases because Washington favors finality in private settlements.” *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). A party seeking to avoid a release must prove that the release was not fairly or knowingly made, and that an unknown or hidden injury (including fraud) was only discovered after the release. *Id.* at 384. The Gandaras had no hope of showing either of these elements, nor were they seeking discovery to do so. The Gandaras’ attorney, Mr. Bucknell, negotiated the Settlement Agreement and release with Commerce Bank after conducting discovery; the Gandaras’ attorney jointly drafted the Settlement Agreement and release with Commerce Bank’s counsel; and the Gandaras had every opportunity to consult with their attorney if they did not understand the release. *See* CP 87–88, 90, 138–39.

As they did before the trial court, the Gandaras attempt to avoid the result of their execution of the Settlement Agreement and release by citing two cases, one overruled, in which uneducated individuals who were unrepresented were allowed to challenge releases they signed. In *Ketchum v. Wood*, 73 Wn.2d 335, 438 P.2d 596 (1988), the court upheld a

jury's decision to reject a release where an experienced insurance adjuster obtained a release from the plaintiff while she was still recovering from injuries suffered in a car accident. The court held that the plaintiff had met her burden of attacking the release because the plaintiff (a) had limited education, (b) was not represented by legal counsel when she executed the release, (c) believed the insurance adjuster who obtained the release was also her adjuster, and (d) signed the release without being told that it was in fact a release of all her claims against the defendant. *Id.* at 337–38.

Along the same lines, the court in *Hooper v. Yakima County*, 79 Wn. App. 770, 904 P.2d 1193 (1995), *overruled by Del Rosario*, 152 Wn.2d at 382–84,² remanded for consideration of whether the plaintiff knowingly executed a release because the plaintiff had not been represented by counsel when he executed the release, and had “considerable trouble reading, writing and spelling.” *Hooper*, 79 Wn. App. at 772–74. Because of the plaintiff's lack of education, and because he stated at the time of execution that he did not understand the release, the court found an issue of fact as to whether the plaintiff knowingly executed the release. *Id.*

² In overruling *Hooper*, the Washington Supreme Court stated that a release is interpreted like any other contract, and the party challenging the release must prove that an unknown or latent injury was only discovered after the release. *Del Rosario*, 152 Wn.2d at 382–84.

These cases could not support the Gandaras' attempts to discard the release here. Again, the Gandaras were represented by experienced counsel who negotiated and helped draft the release. CP 46–58. The Gandaras conducted the same discovery in the 2005 Litigation through which they were given specific information on the offers on the Edgewood Property and Commerce Bank's relationship with TCB. CP 114–36. The King County Superior Court thus correctly exercised its discretion when it rejected the Gandaras' request to conduct discovery on claims they released in 2005.

2. The Requested Discovery Concerned Claims Covered by Dismissal With Prejudice of the 2005 Litigation

The Superior Court further correctly rejected the Gandaras' request for a continuance because the Superior Court had in 2005 dismissed with prejudice the claims on which the Gandaras, in connection with the summary judgment hearing, indicated they wished to conduct discovery. CP 138–39. Under the doctrine of res judicata, a dismissal with prejudice bars re-litigation of all “claims that were, or should have been, litigated in a prior proceeding between the parties, including settlement agreements.” *See Hadley v. Cowan*, 60 Wn. App. 433, 439, 804 P.2d 1271 (1991). For the doctrine to apply there must be “a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the

claim is made.”” *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891, 1 P.3d 587 (2000) (quoting *Civil Service Comm’n of Kelso v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474 (1999)).

In *DeYoung*, the court applied res judicata to bar a plaintiff’s statutory hazardous waste claim when the trial court previously dismissed the plaintiff’s claim and the plaintiff raised no new facts in his second attempt to litigate the claim. *DeYoung*, 100 Wn. App. at 891–92. Going through the four factors, the court found that the subject matter was the same because in both cases the plaintiff sought money damages for alleged injuries to his land. *Id.* at 892. The causes of action were the same because both depended on the same evidence, dealt with the same rights, and arose out of the same nucleus of facts. *Id.* The third and fourth factors were also clearly met because the parties were identical. *Id.* at 892–93.

Res judicata applies with equal force here. The parties are exactly the same and the Gandaras litigated the same claims they wish to assert as a defense in the current litigation during the 2005 Litigation. Compare CP 62–63 with CP 96–98. The Gandaras already litigated their claims about the sale of the Edgewood Property and Commerce Bank’s relationship with TCB. The Gandaras’ extensive discovery requests on the exact same issues in the 2005 Litigation make clear that these issues were “litigated in

a prior proceeding between the parties,” *Hadley*, 60 Wn. App. at 439, and are thus barred by res judicata. The King County Superior Court correctly exercised its discretion when it rejected the Gandaras’ request for a continuance.

3. The Gandaras Conducted the Same Discovery in 2005 and any Claims Arising Out of Those Facts Expired With the Statute of Limitations Years Ago

The Gandaras’ request for a continuance would have served no purpose because the Gandaras conducted the same discovery in 2005 and were given previous access to all the information they indicated in their summary judgment briefing they would ask for in discovery. Because they were given this information, not only would the discovery be entirely duplicative, but the statute of limitations ran on any fraud claims arising out of those facts.

The Gandaras’ only specific allegation challenging the Settlement Agreement was that they were fraudulently induced to enter into the Settlement Agreement because they were told that only one offer was made on the Edgewood Property. But the Gandaras conducted discovery on all offers made on the Edgewood Property and Commerce Bank produced specific documentation showing that the Gandaras were told of multiple offers on the Edgewood Property back in 2005. CP 132–36. Putting aside the fact that this showed the Gandaras’ “one offer” fraud

allegation was false, it showed that the Gandaras were given the facts regarding their fraud allegation nearly seven years ago.

The statute of limitations for fraud is three years from the date upon which the alleging party discovers, or through due diligence should discover, the facts that constituted fraud. RCW 4.16.080(4). “Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it.” *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960). The issue of due diligence can be decided on summary judgment when reasonable minds could reach but one conclusion. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000). A party seeking to avoid the statute of limitations must demonstrate “the reasons why the claimant did not know of the cause of action, the means used by the culprits to keep him ignorant, *and* how he first obtained knowledge of the fraud.” *Id.* (emphasis added) (citing *In re Estate of Sackman*, 35 Wn.2d 864, 869, 210 P.2d 682 (1949)).

The Gandaras not only could have discovered, but did discover all facts regarding the offers made on the Edgewood Property and Commerce Bank’s relationship with TCB. *See* CP 117–36. They have not shown anything to suggest that Commerce Bank kept them ignorant of the facts—to the contrary, the Bank produced over 2,000 pages of documents in response to the Gandaras’ discovery requests in the 2005 Litigation. CP

89. The Superior Court correctly denied the Gandaras' request for a continuance and granted Commerce Bank's motion for summary judgment.

4. The Gandaras Twice Ratified the Settlement Agreement and Reaped the Benefits of that Agreement for Over Six Years Before Challenging Its Validity

For nearly six years the Gandaras operated under the view that the Settlement Agreement was valid. They reaped the benefit of Commerce Bank's compromise of its original \$1.5 million debt that entire time, and only challenged the validity of the Settlement Agreement after they failed to fulfill their end of the bargain. "A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, she remains silent or continues to accept the contract's benefits." *Snohomish Cty. v. Hawkins*, 121 Wn. App. 505, 510–11, 89 P.3d 713 (2004) (citations omitted); *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 793–94, 150 P.3d 1163 (2007). In *Ebel*, the court held that homeowners had ratified a covenant creating a homeowners' association, and were estopped from challenging the association's validity because they had full knowledge of the facts surrounding the covenant for over three years and accepted benefits from the association throughout that time. *Ebel*, 136 Wn. App. at 793–94.

The Gandaras are similarly estopped from challenging the

Settlement Agreement. They had full knowledge of the facts surrounding the Settlement Agreement in 2005 after they conducted discovery in the 2005 Litigation. The Gandaras further enjoyed the benefit of Commerce Bank's compromise of its claim for over six years, making some payments on the Settlement Agreement and otherwise avoiding collection actions related to their outstanding debts.

Moreover, the Gandaras twice reaffirmed the terms and conditions of the Settlement Agreement by signing the Forbearance Agreements. CP 50–51, 55–56. “[W]hen a party claiming to have been defrauded, enters after discovery of the fraud into new arrangements or engagements concerning the subject matter of the contract claimed to have been procured by fraud, he is deemed to have waived any claim for rescission and under certain circumstances for damages.” *Owen v. Matz*, 68 Wn.2d 374, 376-77, 413 P.2d 368 (1966). The Gandaras “discovered” the number of offers on the Edgewood Property, and therefore knew of any alleged misrepresentation that only one offer was made, before they entered into the Settlement Agreement, and long before they entered into the Forbearance Agreements. CP 89–90, 132–36. The Gandaras thus waived their right to rescind the Settlement Agreement on the basis of fraud or otherwise.

5. The Gandaras Gave No Reason for Their Delay in Conducting the Requested Discovery

The Gandaras had nearly five months to propound and conduct discovery before the date on which the Superior Court entered summary judgment, but they failed to do so. The Complaint was filed on May 20, 2011, CP 1, and served on May 31, 2011. Appellant's Br. 5. By the time of the October 28, 2011, hearing on Commerce Bank's motion for summary judgment, Gandara had failed to request or propound any discovery.

The trial court may deny a request for a continuance when "the requesting party does not offer a good reason for the delay in obtaining the desired evidence." *Turner*, 54 Wn. App. at 693. The only reason the Gandaras suggested as to why they had not conducted discovery was that Commerce Bank's motion was to be heard with still "eleven months before the close of discovery." CP 69. But the Superior Court was under no obligation to wait around for the Gandaras to finally get to commencing discovery before considering the motion for summary judgment.

A trial court does not abuse its discretion merely by granting summary judgment shortly after litigation commences. *See Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 742-43, 218 P.3d 196 (2009) (upholding summary judgment granted four months after litigation

commenced); *Manteufel v. Safeco Ins. Co. of America*, 117 Wn. App. 168, 175, 68 P.3d 1093 (2003) (upholding summary judgment granted one month after litigation commenced). The Washington Court of Appeals in *McCarthy* upheld a trial court's decision to grant summary judgment four months after the litigation commenced, holding that the appellant had not requested a continuance before the trial court, and noting that, like the Gandaras, the appellant had not made a single discovery request in the four months during which the litigation was pending. *McCarthy*, 152 Wn. App. at 742–43.

Like the court in *McCarthy*, the Superior Court properly exercised its discretion when it refused to delay summary judgment on the possibility that the Gandaras would conduct discovery they had not pursued in the preceding four months. The Gandaras bore the burden of presenting a “good reason” why they had not conducted discovery. The Superior Court did not abuse its discretion by rejecting the Gandaras’ reason for delay and thus did not abuse its discretion in denying the Gandaras’ request for a continuance.

D. Commerce Bank is Entitled to Recover Its Fees and Costs on Appeal Because the Settlement Agreement Provides for Fees on Appeal and Because the Gandaras’ Appeal Raises Frivolous Arguments

The Gandaras and Commerce Bank agreed through the Settlement Agreement that any party forced to take legal action to enforce the

Settlement Agreement was entitled to recover its attorneys' fees and costs. CP 47. The parties even called out the right to recover fees on appeal: "If any appeal is taken from the decision of the trial court or any arbitrator, the prevailing party shall also be entitled to recover its additional attorneys fees on appeal as determined by the appellate court." *Id.*

The Washington Court of Appeals has repeatedly held that the prevailing party is entitled to recover attorneys' fees on appeal where a contractual provision provides for such an award. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 740, 253 P.3d 101 (2011); *Thompson v. Lennox*, 151 Wn. App. 479, 491, 212 P.3d 597 (2009); *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 506, 761 P.2d 77 (1988); *W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985) ("A contractual provision for an award of attorney's fees at trial supports an award of attorney's fees on appeal under RAP 18.1."). The Settlement Agreement explicitly provides for an award of attorneys' fees on appeal and thus Commerce Bank is entitled to recover its fees.

Commerce Bank is further entitled to recover its fees on appeal because the Gandaras' appeal is frivolous. RAP 18.9(a) provides that any person who "files a frivolous appeal" may be ordered "to pay terms or compensatory damages to any other party who has been harmed." An

appeal is frivolous if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 356, 236 P.3d 981 (2010).

The Gandaras' appeal falls directly within this description. The Gandaras made untenable arguments before the trial court and proceeded to raise the exact same arguments on appeal. The Gandaras suggested duplicative discovery on claims they released and stipulated to dismiss with prejudice over six years ago. And the Gandaras based their factual allegations on Stephen Gandara's declaration, in which he misrepresented his knowledge of the multiple offers on the Edgewood Property at the time of the Settlement Agreement. Even a cursory glance at the 2005 Litigation would have revealed that the Gandaras' request had no merit. Yet the Gandaras raised the exact same arguments on appeal. These arguments had no merit at the trial court and have no merit on appeal.

Moreover, the Gandaras' actions from the very beginning of this case have made clear that their only intention is to create delay in these proceedings. The Gandaras waited until Commerce Bank filed its motion for summary judgment to, for the first time, allude to conducting discovery, in an effort to delay the hearing. In these proceedings, the Gandaras delay has continued. The Gandaras were warned three times by this Court to correct their failure to comply with deadlines or risk having

their appeal dismissed. Court's Motion to Dismiss for Failure to File, Jan. 10, 2012;³ Court's Motion to Dismiss for Failure to File, Mar. 6, 2012; Court's Motion to Dismiss for Failure to File, May 25, 2012.

The Gandaras' appeal lacks merit. The Gandaras have not presented any debatable issues that could result in reversal and thus Commerce Bank is entitled to an award of attorneys' fees on appeal as a sanction for the Gandaras' conduct.

V. CONCLUSION

The Superior Court did not abuse its discretion in denying the Gandaras' request for a continuance before granting Commerce Bank's motion for summary judgment. The Gandaras already conducted the discovery for which they sought a continuance; they released all claims relating to the discovery they proposed; and the trial court dismissed with prejudice all claims relating to the discovery they proposed. The Gandaras could not avoid this result by asserting a time-barred fraudulent inducement claim based on factual theories covered by their release, especially when no facts supported it.

The Superior Court correctly denied the Gandaras' request for a continuance. The Court of Appeals should affirm the Superior Court and

³ The Court of Appeals sent three letters to the parties as part of a single email on January 10, 2012, including one letter instructing the Gandaras to file their designation of clerk's papers and statement of arrangements, and a second letter instructing them to file a proof of service.

award Commerce Bank its fees on appeal, either under the Settlement Agreement or as a sanction or both.

DATED this 27th day of July, 2012.

GARVEY SCHUBERT BARER

By



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CERTIFICATE OF SERVICE

I, Patricia Shillington, declare under penalty of perjury under the laws of the State of Washington that, on July 27, 2012, I caused the foregoing **Brief of Respondent** to be served on the persons listed below via legal messenger:

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Dated at Seattle, Washington on July 27, 2012.


Patricia Shillington

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