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NO. ~~68-112-5-1~~

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

FRED PALIDOR,

Appellant,

v.

DAVID HOVDE, HARVEY AND JUDITH FLAX LIVING
TRUST, JUDITH FLAX, HARVEY FLAX and their marital
community, KEYWEST LOCK SERVICE, INC. GREGORY
PURCELL, JANE DOE PURCELL, and their marital
community,

Respondents.

Appeal from Whatcom County Superior Court
No. 10-2-03266-1

RESPONDENTS KEYWEST LOCK SERVICE, INC.,
GREGORY PURCELL AND JANE DOE PURCELL'S
OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
FILED

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I. INTRODUCTION

These respondents adopt and incorporate herein the brief filed by the other respondents and would only add the following additional information for the court's consideration.

KeyWest Lock Service is owned and run by defendant Greg Purcell. Mr. Purcell is a Locksmith. He was routinely called to a commercial property by property manager, David Hovde and asked to change the locks. He did so for a modest fee of \$135.62. After changing the locks, he left the premises. There is no evidence in the record that he had any other involvement in this dispute and in fact, he did not.

Subsequent to the very limited activities of Mr. Purcell, there were apparently discussions between the other parties to this dispute that resulted in Mr. Palidor loaning \$10,000.00 to his wife, Nancy Taylor, which she then gave over to Mr. Hovde in order to gain access to the premises. Once more, there is nothing in the

record which shows Mr. Purcell had any role in these discussions or was even aware they took place.

Even though his role in this matter was insignificant, Mr. Purcell, his business and his spouse were sued by Mr. Palidor; a man they never met, never dealt with, talked to, or even knew existed before suit was filed against them.

The trial court properly dismissed the claims made against Mr. Purcell, his wife and his business as Mr. Palidor was not the real party in interest as to any possible claim against them.

II. ASSIGNMENTS OF ERROR

A. Issues Pertaining to Assignment of Error.

1. Did the Trial Court Properly Dismiss Mr. Palidor's Claims under CR 17(a) in Order to Protect the Defendants from Any Subsequent Action by Other Parties and to Insure That the Any Judgment in this Case Would Have its Proper Res Judicata Effect?

III. STATEMENT OF THE CASE

The KeyWest respondents adopt the statement of the case set forth in the brief of the other respondents with these additional facts set out.

The transaction which occurred between Nancy Taylor and Fred Palidor was a loan from Palidor to Taylor and they both characterized it as such in their declarations.

In discussing the funds in question, Ms. Taylor stated:

“I spoke with my husband Fred Palidor. He had never made *loans* to me or my business *previously*.” (Emphasis added). CP 12

In discussing the funds in question, Mr. Palidor stated:

“I had never provided financial support to Nancy or her business *previously*.” (Emphasis added). CP 14

There is no evidence in the record that the KeyWest parties played any role whatsoever in the facts leading up to this dispute other than to engage in a routine business transaction with Mr. Hovde.

There is no evidence in the record that the KeyWest parties ever met with, spoke to, dealt with or even knew of the existence of either Fred Palidor or Nancy Taylor before suit was filed against them.

IV. ARGUMENT

1. Standard of Review.

The KeyWest respondents agree that the correct standard for review is the abuse of discretion standard for the reasons set forth in the brief of the other respondents.

2. The Trial Court Correctly Held That Fred Palidor Was Not the Real Party in Interest under CR 17(a).

CR 17(a) has two purposes. The first is to insure that the plaintiff holds the rights that he or she is seeking to redress and is

actually entitled to recover. The second is to protect a defendant from any subsequent action by the party actually entitled to recover and to insure that the judgment will have its proper res judicata effect.

“CR 17(a) is identical to Federal Rule of Civil Procedure 17(a). Thus, analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive.”

Sprague v. Sysco Corp., 97 Wn.App. 169, 172, 982 P.2d 1202 (1999).

As is stated in the Advisory Committee Notes for Rule 17, the origin of the rule was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover and to insure generally that the judgment will have proper res judicata effect. See the Notes of Advisory Committee on the 1966 Amendments to

Rule 17. See also *U-Haul Int'l, Inc. v. Jartran, Inc.* 793 F.2d 1034, 1039 (9th Cir., 1986).

Washington's cases have acknowledged this identical purpose for the rule and have cited and/or quoted the above advisory committee notes directly. *Sprague v. Sysco Corp.*, 97 Wn.App. 169, 172, 982 P.2d 1202 (1999). See also *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998). Thus, as the Advisory Committee Notes acknowledge, dismissal under CR 17(a) is proper to ensure that the person defending the action can preclude anyone else from ever seeking to vindicate, or collect on, that claim again if the defendant prevails on the merits.

As the tenant there seems to be little doubt that Nancy Taylor (or more properly, the bankruptcy trustee in her bankruptcy) would be a real party in interest and have the right to bring an action to recover the funds involved. Not even Mr. Palidor has suggested otherwise. However, if the trial court had allowed Mr. Palidor to continue to prosecute the rights of Ms. Taylor to recover

the funds he loaned to her, there is no doctrine these respondents are aware of that would have prevented Ms. Talyor or her bankruptcy trustee from subsequently bringing their own action over this same transaction. Any favorable judgment the KeyWest respondents might obtain in the litigation commenced by Mr. Palidor would have no res judicata or preclusive effect on the rights of Ms. Taylor or her bankruptcy trustee as they were never made parties to this action. Thus, the trial court properly exercised its discretion in dismissing Mr. Palidor's claims under CR 17(a).

The trial court's ruling is also particularly within its discretion when one considers that the allegedly wrongful acts took place in May of 2010 and neither the 3 year statute of limitations for tort actions nor the 6 year statute of limitations applicable to the written lease agreement has even yet expired. There remains time for either Ms. Taylor or her bankruptcy trustee to institute an action in their own name if they felt it had any merit.

In summary, the trial court correctly determined that Mr.

Palidor was not the real party in interest and correctly applied CR 17(a) in this matter when it dismissed Mr. Palidor's suit.

3. The Trial Court Properly Held That Palidor Had Failed to Add Taylor or Her Bankruptcy Trustee as Parties Within a Reasonable Time.

Mr. Palidor commenced this action in December of 2010. He made no attempt to join Ms Taylor or her bankruptcy trustee as a party to it at any time thereafter through the date of the filing of respondents' motion to dismiss which occurred in November of 2011. Thus, almost a year went by without any action on Mr. Palidor's part to bring the real parties in interest into the case. Thereafter, when the respondents filed their motion to dismiss his claims, there is nothing in the record to show that he made any attempts in the 28 days between the filing of the motion and the hearing date to substitute parties, add parties or obtain the consent or ratification of his action by either Ms. Taylor or more

importantly, the bankruptcy trustee. [It seems reasonably clear that the bankruptcy trustee would actually be the real party in interest to pursue any claims Ms. Taylor might have. *Bartley v. Kendall*, 134 Wn.App. 95, 138 P.3d 1103 (2006).]

Given the failure of Mr. Palidor to make any showing to the trial court that he had made any effort to even attempt to add the correct parties to this action in the year since it was filed or during the 28 days between the filing of the motion to dismiss and the hearing, the trial court did not abuse its discretion by determining that he had more than reasonable time to take these actions. The court was correct to dismiss it.

**4. Response to Appellant's Request for Rap 18.1
Attorneys Fees and Request for an Award of
Fees in Favor of the Keywest Parties**

Appellant Fred Palidor requests that the court grant him his costs and attorneys fees on appeal citing RAP 18.1 and RCW 19.86.090 (the consumer protection act). Yet he fails to cite any

authority in his brief that would provide this court with any basis to apply the consumer protection act to the KeyWest parties. As noted above, there is no evidence in the record that these parties engaged in any business transaction with Palidor, met him, spoke with him or otherwise were involved in any unfair or deceptive activity that might make the consumer protection act applicable to them. There certainly has been no determination at the trial court level on the merits that the KeyWest parties could be liable to Mr. Palidor on a consumer protection act theory.

In fact, the trial court has already ruled in favor of the KeyWest defendants on their post dismissal motion for attorney's fees and costs incurred in defending this action. The court held that both Mr. Palidor and his counsel, Mr. Seymour violated CR 11 and RCW 4.84.185 by bringing this action against the KeyWest parties and by making reckless and baseless allegations of criminal conduct by the KeyWest parties. The KeyWest parties were awarded their full costs and fees incurred in defending this matter.

Presentation for the entry of the Findings of Fact and Conclusions of Law related to that motion as well as for entry of judgment thereon is noted for July 13, 2012. No doubt that ruling will be made part of this appeal after that procedural step.

The undisputed record is that Mr. Palidor has made no showing that he prevailed on a theory that he had some viable consumer protection act claim against the KeyWest parties in the trial court nor any showing of a right to fees on appeal. His request for fees is frivolous.

The KeyWest parties request their fees and costs on appeal under RAP 18.1 for the reasons set forth in the brief of the other respondents which is adopted hereby and incorporated herein.

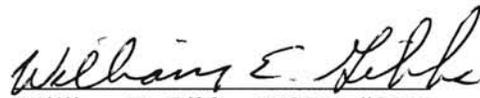
V. CONCLUSION

The trial court acted well within its discretion when it dismissed Mr. Palidor's complaint. CR 17(a) is designed in part to protect defendants from multiple actions by different parties, each asserting that they have some right to the same damages or funds.

The court's ruling in this case correctly served the purposes of CR
17(a).

Respectfully submitted this 25th day of June, 2012

BERGMAN & GIBBS, LLP

A handwritten signature in cursive script, appearing to read "William E. Gibbs".

William E. Gibbs, WSBA #8903

Attorneys for the KeyWest Respondents

CERTIFICATE OF SERVICE

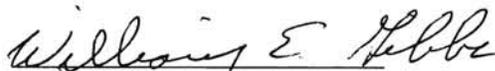
I certify that on the 25th day of June, 2012 I caused a true and correct copy of Respondent's Opening Brief to be served on Thomas J. Seymour by personal delivery and the remaining parties listed below by a U.S. Mail:

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Dated this 25th day of June, 2012


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