

NO. 69155-4-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DEAN CURRY,
APPELLANT

v.

VIKING HOMES, ET AL.
RESPONDENTS.

FILED
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STATE OF WASHINGTON
2013 JAN 11 PM 4:28

APPEAL FROM THE SUPERIOR COURT OF SNOHOMISH COUNTY
CAUSE NO. 09-2-07715-9

APPELLANT'S BRIEF

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ORIGINAL

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I. ASSIGNMENT OF ERROR

1. The trial court erred in granting Defendant's Motion for Summary Judgment in that it did not identify the evidence it relied upon in its July 6, 2012 court order. Contrary to Washington State case law, the trial court's order granting summary judgment failure to state what evidence it relied upon in providing relief was improper. In granting a Motion for Summary Judgment the trial court must state the evidence it relied upon. CR 56 (h); *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 623, 128 P.3d 633 (2006). CP 154.
2. Assuming the trial court granted Defendant's Motion for Summary Judgment on the basis that genuine issues of material fact did not exist, the trial court committed reversible error in that based on the motions pleadings declarations, and discovery produced, in the light most favorable to the Plaintiff, genuine issues of material facts exist which warrant a trial on the merits.
3. The trial court committed reversible error in allowing Defendant, Viking Homes, to prevail on a Motion for Summary which procedurally related to a matter of discovery not produced and where Defendant never filed a Motion to Compel such discovery.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court's court order, granting Plaintiff's Motion for Summary Judgment, on its face requires remand in that it fails to state the evidence it relied upon in granting dismissal of Plaintiff's claims?
2. Whether the Honorable Judge Janis Ellis, in the light most favorable to the non-moving party, was mistaken in granting a Motion for Summary Judgment?
3. Whether the dismissal of Plaintiff's claim pursuant to CR 56, based on the non-production of evidence, was procedurally compliant with Washington State's Civil Rules of Procedure?

III. STATEMENT OF THE CASE

On August 14, 2009, Petitioner initiated a lawsuit in the Superior Court of the State of Washington in and for the County of Snohomish for claims of Breach of Contract, Breach of Settlement Contract, violation under the Contractor Registration Act, and violations under Washington State's Consumer Protection Act. CP 87-104

Petitioner, along with his wife, purchased a home from Respondents, a construction firm. Shortly after moving in, Petitioner noted significant construction quality issues and construction defects in the residence. Petitioner's Complaint alleged a significant list of very specific defects. These defects were especially troubling to Petitioner because his young daughter was suffering from cancer and would be living in what he regarded as hazardous conditions. Petitioner brought these issues to the attention of Respondent during a post-sale walkthrough. Respondent agreed to remedy the defects in accordance with the terms of the Purchase and Sale Agreement and Respondent's warranty on the home. Some of the defects discussed and not alleged in the Complaint were remedied. However, the defects as alleged in the Complaint were not remedied. CP 87-89.

On June 10, 2009, Petitioner mailed a pre-litigation dispute notification to Respondent with a list of all known defects. On July 2, 2009, Respondent replied that it would remedy the defects. Respondent has up to this time not cured any of the defects as alleged in the Complaint in violation of the Purchase and Sale Agreement, in violation of their oral agreement to cure the defects, and in violation of Washington State's Consumer Protection Act in that Respondent had made promises regarding their ability to provide high-quality products to Washington consumers. On August 14, 2009 Plaintiff initiated a lawsuit.

On May 11, 2012, Respondent filed a motion for Summary Judgment dismissal of the above referenced Complaint. On July 15, 2012, Petitioner appeared and asked for a continuance on Respondent's motion for Summary Judgment. On November 9, 2012, the Honorable Janis E. Ellis heard oral argument on the motion and Granted Summary Judgment dismissal of Petitioner's claims alleged in his Complaint.

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IV. ARGUMENT

- A. THE TRIAL COURT'S JULY 6, 2012 COURT ORDER GRANTING SUMMARY JUDGMENT FAILS TO IDENTIFY THE EVIDENTIARY BASIS FOR WHICH SUMMARY JUDGMENT WAS GRANTED.

The trial court erred in granting Defendant's Motion for Summary Judgment in that it did not identify the evidence it relied upon in its July 6, 2012 court order. Contrary to Washington State case law, the trial court's order granting summary judgment failure to state what evidence it relied upon in providing relief was improper. In granting a Motion for Summary Judgment the trial court must state the evidence it relied upon. CR 56 (h); *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 623, 128 P.3d 633 (2006). CP 124-127.

- B. THE TRIAL COURTS' GRANTING OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE VIEWED IN LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY, GENUINE ISSUES OF MATERIAL FACTS EXISTED.

Clearly, the trial court was in error in granting Respondent's motion for summary judgment. The question before the Court is whether the trial court properly granted the Respondent's Motion for Summary Judgment. This Court reviews an order granting summary judgment de novo and makes the same inquiry as the trial court. *Weden v. San Juan*

County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). This Court views the facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party. *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009).

What is troubling in this case, to say the least, are the contradiction’s in Judge Ellis’ ruling:

I have Mr. Curry's declaration that there are defects that he's complained of, that they are violative of one or more contracts, but I don't have a contract. And it is not Mr. Curry's role or responsibility to determine that an action is a violation of a contract, and it's my obligation to rule on whether or not there's been a breach a contract, and I can't do that without a contract.

The same is true for the other three causes of action. With respect to the claim that there's been a breach of the settlement contract, Mr. Curry generally alleges that Viking Homes breached an oral contract to fix the 49 defects. Viking Homes denies that there was such an oral contract. Mr. Curry reviewed some of the 49 defects, not all of them, and provided insufficient facts from which I can conclude that an enforceable oral contract existed or that it was breached.

See Appendix A, Court Transcript, Page 19, Lines 13-25.

In essence, the trial judge said in one paragraph that she cannot rule on the breach of contract issue without the contract. Then, in the next paragraph, she acknowledges that Petitioner claims that there was an oral contract, and that Respondent denies this. What on earth can this dispute about the existence of an oral contract be called, if not a dispute of material fact? The judge, instead of hearing Petitioner's testimony, weighing its truth, viewing his tone and body language, and in fact doing everything a trial judge is supposed to do so that justice is served, acknowledged that there was a dispute regarding the issue, and ruled in favor of summary judgment anyways. This was done despite the evidence right in front of her that the two parties disagreed. After all, if there really were 49 defects, and if there really was an oral contract to fix them, and if they really didn't fix them, would there not be a breach of contract? Certainly, when all is said and done, a reasonable person could very well conclude that Petitioner bought a house with a bunch of defects, that Respondent agreed to fix them, that Respondent failed to honor his word, and that Respondent should pay for it. Moreover, an important piece of Petitioner's evidence that Respondent agreed to cure the defects, and then failed to do so, is Petitioner's own word. This word deserves to be heard in open court, so that its truth can be gauged.

In this case, Plaintiff submitted a declaration, based on his own experience as a contractor indicating the defects that existed. CP 36-46. Conflicting assertions of fact in affidavits and counteraffidavits, or in other supporting and opposing documents, generally raise an issue of credibility requiring that summary judgment be denied. *See, Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Moreover, if reasonable persons considering the evidence and inferences could reach different conclusions, summary judgment should be denied. *See, Scott v. Pac W. Mountain Resort*, 119 Wn.2d 484 , 503-503, 834 P.2d6 (1992). Summary judgment must be denied if the record shows an even reasonable hypothesis that would create a genuine issue of material fact. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). Again, there is a reasonable basis for the establishment of a defect.

Simply put, Petitioner has the right-to testify and cross-examine Respondents' witnesses. *In re Dependency of A.K.* 162 Wn.2d 632, 174 P.3d 11 (2007), *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001) Cert. denied 535 U.S. 904, 152 L.Ed. 2d 141, 122. S.Ct. 1203 (2002), *Weyerhaeuser v. Pierce County*, 124 Wn. 2 d 26, 873 P. 2 d 498, (1994). This case was, in fact, one that especially cried out to be heard at a trial. The defects which Respondents orally agreed to fix occurred at a

time of unfathomable personal crises in Petitioner's family. His young daughter suffered from Leukemia. We do not say this as a cheap attempt to gain a point. It is significant in that Petitioner might have ordinarily asked that the agreement to cure the defects be put in writing, in addition to the original contract. As it is, it is truly necessary that Petitioner be afforded the opportunity to testify regarding the oral exchanges he had with Respondent, including the entire course of conduct leading up to the breach.

Moreover, in their Reply brief, Respondents assert that Petitioner "has not identified any specific defect or provided any admissible evidence or testimony substantiating the claim that the home is uninhabitable or otherwise defective" in breach of the Purchase and Sale agreement. CP 128-142. How they can claim this with a straight face is utterly beyond comprehension. Attached as Exhibit A to Petitioner's Response to Respondents' Motion for Summary Judgment shows such a plethora of evidence that Respondents Motion amounts to pure bad faith. CP 58. Outside of the list specifying exactly what the specific defects were, Petitioner provided a letter from the L&I addressing electrical safety violations at the job site, pictures and video of demolition of the driveway, a score of emails detailing the complaints, including such elementary necessities for habitation such as no cold water in the master-

bedroom, no phone jacks which worked, un-leveled floors, devastating water intrusion into the house, and hazardous mold everywhere, perhaps for good measure. Petitioner also provided scores of invoices, a Home Inspection report, his own declaration, and a host of other evidence which is listed in his Interrogatory Responses.

The Respondents claim that Petitioners house was habitable because “Mrs. Curry still lives there” is almost too comic to answer. Sure, one could live there, in the way one might live in a cave. But is a house without cold water in the bedroom, no phones, water intrusion, hazardous mold, horrid dust from various excavations, and so on, truly habitable in the civilized meaning of the word? And this is especially the case when there is a small child with cancer living there!

The Respondent’s argument in favor of Summary Judgment rested on the assertion that there were no factual issues of dispute in the case because no discovery had been provided. CP 54. They correctly cite law stating that for Summary Judgment to be appropriate, the mere assertion of a factual dispute is not enough. Some evidentiary basis that a factual dispute does indeed exist must also be provided. Unfortunately, their entire argument must fail if they are factually mistaken regarding if any discovery was provided or not. Specifically, Respondent’s assertion that

no discovery had been provided in the case is just plain false. CP 54. Or, to put it even more bluntly, it is a disingenuous act of bad faith, if not an outright misrepresentation. Interrogatories and Responses to Requests for Production of Documents totaling have been provided to Respondent detailing all the defects in question. CP 45. Literally, scores of emails, invoices, an inspection letter, the fact that Respondents engaged subcontractors to cure the defects, Petitioner's own declaration, a demand letter sent to Respondents detailing each defect with extraordinary specificity, all demonstrate a true plethora of evidence that create issues of fact with respect to Petitioner's claims for breach of contract, breach of implied warranty of habitability, and claims under Washington State's Consumer Protection Act. CP 45.

Outside of the factual evidence provided in Discovery which demonstrated clear issues of material fact, the Respondents' own Motion for Summary Judgment, on its face, demonstrates that there were serious disputes which needed to be resolved at a trial. It is in fact flabbergasting that Respondents have the audacity to claim that no factual disputes exist when they admit in their own motion that: "In the months following the initial purchase and walkthrough, it became clear to Viking that they would be unable to satisfy the Curry demands, which were changing and

escalating with every request.” Were such demands changing and escalating? Were the demands unreasonable or not? Of course, only a trial could tell. But a trial is precisely what Respondents wished to avoid. Petitioner also must point out that Respondent’s own Motion for Summary Judgment stated that “Curry identified forty nine (49) alleged defects.” As such, Respondents provided Petitioner with an extremely specific and detailed list of all the issues in dispute in this case. Frankly, their own motion displayed a catalogue of disputed issues. Again, “49 alleged defects.” If they are “alleged,” perhaps this means that they are also somewhat in dispute? CP 58-119

Respondents contradicted themselves in even more absurd ways. The Respondents here also happened to be Third Party Plaintiffs. If they are of the opinion that there are no issues of dispute here, why do they themselves bring their own claim? Perhaps it is a frivolous claim. Or, perhaps, Respondents happened to notice that their own list of 49 disputed facts were, in fact, truly in dispute. The fact is, Respondents hired all these subcontractors because they promised Petitioner that they would to cure all the defects in his house.

Respondents further claimed that of the list of 49 defects, “no specific details, no information with regard to the specific nature of the issues raised, nor of the damages claimed” were raised. Did they happen to read their own motion? Did they happen to look at the truly remarkable specificity of Petitioner’s list of defects?

For example, Respondents claim that no cause of action under Washington State’s Consumer Protection Act could survive here. Well, though the CPA does not define “unfair or deceptive act or practice,” if Petitioner’s declaration and testimony is true that Respondents held themselves out as providing quality homes, and if the defects he complained of did exist, than his claim under the CPA could surely succeed. Of course, “whether an alleged act is unfair or deceptive is a question of law. An unfair or deceptive act or practice need not be intended to deceive, it need only have the capacity to deceive a substantial portion of the public. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986); RCW 19.86.020. Petitioner has declared that Respondent has engaged in unfair and deceptive practices by making affirmative representations of quality, workmanship, and construction in marketing materials and then failing to provide homes that met the standards as represented. He also has declared

that Respondents failure to correct known defects in the homes constituted an unfair or deceptive acts. Viewing the evidence in the light most favorable to Petitioner, it is clear that the record shows that if Respondent did not correct deficiencies, when it holds itself out as building quality homes, then this is an “unfair or deceptive act.”

Additionally, “Washington has adopted the implied warranty of habitability” *House v. Thornton*, 76 Wn.2d 428, 436, 457 P.2d 199 (1969). In *House*, a builder-vendor constructed a house on an unstable site, resulting in severe deterioration of the foundation. The Court held the builder liable, defining the implied warranty rule as follows: “We apprehend it to be the rule that, when a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer’s intended purpose of living in it. Again, if the defects claimed by Petitioner existed, and the exchange of emails, invoices, and the fact that Respondent has sued a host of sub-contractors contracted to fix the defects show that they did, it is clear that there was a breach of implied warranty of habitability here. And again, how Respondents could have won a Motion for Summary judgment is simply inexplicable.

Finally, Respondents, in their Motion for Summary Judgment, also argued, *inter alia*, that Petitioner was involved in a divorce, that he was restrained from entering the house anyways, and that therefore his grievance should have basically just faded away. This argument is ludicrous. Would a mechanic be excused from an obligation to fix a car, just because its owner lost his driver's license? The two things simply have nothing to do with each other.

- C. THE TRIAL COURTS' GRANTING OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WAS PREAMTURE AS NO MOTION TO COMPEL OR TO STROKE THE PLEADINGS WAS NOTED DEFENDANTS' COUNSEL.

Defendant's successfully succeeded in a CR 56 Motion for Summary Judgment on the basis that no discovery was produced or existed other than the averments contained in the Complaint. As evidenced in Plaintiff's Response to a Motion for Summary Judgment, this was not the case, as numerous documents of discovery were produced that substantiate a basis for overcoming a Motion for Summary Judgment.

At the outset, Defendant's Motion for Summary Judgment was predicated on no discovery being produced and therefore there were

grounds for dismissal. However, there was never a Motion to Compel made pursuant to CR 37 and as CR 26 (i) reads in part:

The court will not entertain *any motion* or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection.

CR 26 (i); *emphasis added*.

In the instant case, Defendant prematurely noted a Motion for Summary Judgment due to a lack of alleged discovery not being produced. The noting of a Motion to Compel would have remedied the issue of whether indeed discovery was propounded or not and whether Plaintiff acted in bad faith wherein the striking of the pleadings was appropriate.

V. CONCLUSION

Petitioner respectfully requests the Court reverse the trial court's orders granting of Respondent's Motion for Summary Judgment.

Respectfully submitted this 11th day of January 2013

/s/ Edward C. Chung
Edward C. Chung, WSBA #34292
Attorney for Petitioner

APPENDIX A

Court Transcript, Page 19, Lines 13-25

1 Indeed, under that order all discovery is to be
2 concluded within one month of today's date. For example,
3 with respect to the first cause of action for breach of
4 contract, plaintiff hasn't produced a contract. I have
5 Mr. Curry's declaration that there are defects that he's 10:32
6 complained of, that they are violative of one or more
7 contracts, but I don't have a contract. And it is not
8 Mr. Curry's role or responsibility to determine that an
9 action is a violation of a contract, that is a question of
10 law. And it's my obligation to rule on whether or not 10:32
11 there's been a breach a contract, and I can't do that
12 without a contract.

13 The same is true for the other three causes of action.
14 With respect to the claim that there's been a breach of
15 the settlement contract, Mr. Curry generally alleges that 10:33
16 Viking Homes breached an oral contract to fix the 49
17 defects. Viking Homes denies that there was such an oral
18 contract. Mr. Curry reviewed some of the 49 defects, not
19 all of them, and provided insufficient facts from which I
20 can conclude that an enforceable oral contract existed or 10:33
21 that it was breached.

22 With respect to the violation of the Contractors
23 Registration Act, there's an absence of proof on that
24 cause of action as with respect to or also with respect to
25 the Consumer Protection Act claim. Ms. McFetridge is 10:33

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DEAN CURRY,

Appellant,

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VIKING HOMES, *et. al.*,

Respondents.

Case No: 69155-4-I

Superior Court No. 09-2-07715-9

CERTIFICATE OF SERVICE

TO: CLERK OF THE APPEALS COURT DIVISION I; and
TO: ALL OPPOSING COUNSEL.

I, SANTOS E. DELGADO, legal assistant with the law practice of CHUNG, MALHAS
MANTEL & ROBINSON, PLLC, declare under penalty of perjury under the laws of the State
Washington that I am a citizen of the United States, I am over the age of eighteen years old and I am
not a party to this matter. I further declare that on this 11th day of January 2013, I caused a copy of
the 1) APPELLANT'S BRIEF and 2) CERTIFICATE OF SERVICE to be served this 11th day of
January 2013, as follows:

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<p>Attorney for Corridor Electric, Inc.</p> <p>Kelly M. Madigan 1730 Minor Ave, Suite 1130 Seattle, WA 98101</p>	<p><input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Fax To: <input checked="" type="checkbox"/> E-Mail To: Madigak@nationwide.com <input type="checkbox"/> Other: E-Filing</p>

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Dated this 11th day of January, 2013.

/s/ Santos E. Delgado
Legal Assistant to Edward C. Chung, Esq.