

NO. 69158-9-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

LAW OFFICES OF PAUL TAYLOR, INC.,

Respondent

vs.

JOSEPH AND KIMBERLY WOODMANSEE,

Appellants

REPLY BRIEF OF APPELLANTS

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1. SUMMARY OF REPLY

Taylor's Brief studiously avoids confronting the "null and void" termination provision of the Settlement Agreement, although that contract language is the basis for Woodmansees' argument that the Agreement is void and unenforceable. Taylor's Brief similarly ignores the fact that Mr. Taylor expressly took the position in the trial court that the Agreement was "terminated" and "null and void", although that is the basis for Woodmansees' judicial estoppel argument. Taylor's Brief simply evades the issues of this appeal.

To avoid addressing the termination clause, Taylor claims that the Agreement was breached on the date the closing occurred. Taylor denies that the Agreement specifies the termination deadline expires unless there is both "closing *and payment*". Taylor's Brief ignores the Agreement provision for notice in the event of a potential shortfall in proceeds from closing, and ignores the fact that Taylor extended the payment deadline because such a shortfall arose from events occurring a few days before the closing date. The deadline was in Taylor's control, he deliberately let it expire, and when it expired, the Agreement was expressly "void". Taylor can proceed with his original claims. The trial court erred in enforcing the void Agreement.

2. REPLY TO TAYLOR'S STATEMENT OF FACTS

A critical piece of revisionism in Taylor's brief requires correction. Respondent's Brief, p. 2, states that Taylor's claim was "that he should be entitled to one third of the net profits" that Woodmansees made from the sale. Taylor did not cite to the record for that statement, and it is incorrect. *Before he was hired*, Taylor wrote that his contingent fee was calculated on Woodmansees' profits, but after the arbitration panel denied Woodmansees' damages claim, Taylor asserted he was entitled to one-third of the *gross sales proceeds*, and that is what he sued for in this action. This lawsuit arose from Mr. Taylor's greedy attempt to alter his fee agreement after the verdict.

Taylor's Brief attempts to alter the facts of Taylor's misconduct underlying this action. In response to a specific question from Woodmansees before they hired him, Taylor wrote: "If the arbitrators order specific performance we could calculate the amount of the net damages related to the anticipated profit", CP 49, and that his fees would be calculated on the "net recovery". CP 59. But after the initial arbitration ruling which denied Woodmansees' damages claim and also declined to order specific performance, CP 15 ¶6, Taylor told Woodmansees they owed him \$4,000,000.00, one-third of the *gross sales proceeds* of all the lots

which *might potentially* be closed. CP 50. When Woodmansees “asked him how he figured this amount which represented 33% of the total gross amount of the entire transaction”, CP 50, Taylor wrote back that the fee agreement “does not specify ‘damages’ or ‘net proceeds’”, CP 51, 78, although that was what Taylor originally wrote.

If Taylor had really only sought one-third of the net profits, there would be no dispute, because there were no profits. Respondent’s Brief, p. 4, claims “Woodmansee received \$4,635,480.72 from the sale”, citing CP 337-338, which is Mr. Taylor’s own declaration. But the actual settlement statements from the transactions, CP 351-353, 363, show that the sale proceeds were paid to banks and construction lien claimants, not to Woodmansees. These settlement statements were exhibits to the same Taylor declaration cited in Respondent’s Brief, but they show the opposite of what Respondent’s Brief claims. Taylor’s Complaint sought \$1,500,000, CP 9, which was one-third of the gross proceeds, not one-third of the “net profits” as he now claims.

Taylor tried to change his fee agreement after the verdict, he sued Woodmansees for not agreeing to his new version of his fee agreement, and now his Respondent’s Brief pretends otherwise. Taylor is not the wronged party here.

3. ARGUMENT

A. Respondent's Brief never addresses the Agreement's termination provision that the Agreement was no longer "binding" and was "null and void and of no effect" after the deadline for "closing and payment".

Taylor's Brief acknowledges that a contract should be construed as a whole, but Taylor never addresses or analyzes the effect of the termination provision in the Agreement. The Agreement expressly provides that the Agreement is "null and void" after the deadline for "closing and payment". The deadline passed; the Agreement became void. Taylor never attempts to explain what the phrases "null and void", "not binding" and "of no effect" mean in the Agreement, or why they are there. Taylor simply ignores the termination provision of the Agreement.

The parties could have provided otherwise, but they chose to void the Agreement in the event of non-payment. This was a form of "in terrorem" clause. They provided that after the deadline, the original claims of the parties revived, and the Agreement was void. The law is clear that once a contract is void, it is unenforceable. Taylor fails to address this principle of law, although it is the primary argument in Woodmansees' appeal.

Taylor's Brief, p. 5, quotes selectively from the Agreement to argue that the sole "condition for payment . . . was the closing of

the sale”. Taylor claims that Woodmansee “grossly misconstrues” the Agreement by contending that “in the event of non-payment by the deadline” it was null and void, (Respondent’s Brief, p. 7), but that is *exactly* what the termination provision of the Agreement says:

the deadline for closing **and payment** . . . shall not be extended unless . . . in Taylor’s sole discretion. If the applicable deadline expires . . . then this agreement is null and void and of no effect.

CP 118, ¶ B.5. Taylor’s brief (p. 7) quotes that language, but then claims that it is only the expiration of the deadline “without having a sale of lots that renders the agreement void.” The deadline provision encompassed both “closing and payment”. Closing and payment both had to occur, or the Agreement was void.

Taylor’s brief (p. 7) manages to confuse itself further by arguing that “the triggering condition is that there be a sale of lots by the closing date.” The Agreement was contingent upon a sale of lots, CP 118, ¶ B.4, but it does not logically follow that the termination clause was therefore also limited to that one contingency. Taylor’s argument about “conditions” is a red herring. Payment was not a “condition” that Woodmansees chose not to perform (Respondent’s Brief, p. 8). Taylor apparently argues that Woodmansees’ interpretation of the termination clause

makes the Agreement an illusory contract. The arbitration panel's last-minute reduction of its award was an intervening event which prevented payment, and the parties made express provisions for this possibility, including notice and an option for Taylor to extend the deadline. Taylor never addresses the existence of those provisions, why they were there, or the fact that the foreseen events occurred. The only reason for those provisions was that the parties foresaw that payment might not happen upon closing. In that event, they provided for termination of the Settlement Agreement.

Taylor's brief ignores another clause in the termination section of the Agreement: "This Agreement is **binding on all parties until** the October 24, 2011 closing date . . .". CP 118, ¶ 5. The Agreement's entire design was for automatic termination. It simply was no longer binding after the closing date, unless extended. The parties intended that unless everything went together on that date, they would not be held to the Agreement thereafter, but would resume their original claims.

Taylor's Brief (p. 13) argues that the "executory" nature of a settlement agreement allows him to elect whether to enforce it or revert to his original claims. But none of Taylor's arguments or authorities involve a contract after it is void. The Agreement was

no longer executory after it was void. After termination, there was no “performance [to] be done in the future”, (Respondent’s Brief, p, 10); the parties were no longer “pending full performance of the accord” (Respondent’s Brief, p, 11).

The Agreement provided that once it became void, “the parties shall retain all rights that they had against one another.” CP 118, ¶ B.5. The parties reverted to their original claims. Under the Agreement Taylor had the option to either extend the Agreement and wait for payment, or void it and proceed with his original claims. He chose to void it. He cannot later enforce it. “A contract which by its term has expired is legally defunct.” Thayer v. Damiano, 9 Wn.App. 207, 210, 511 P.2d 84, 86 (1973). Taylor has no answer to that, so he ignores it.

B. Taylor ignores the Agreement’s provisions for notice of potential shortfall, option for extension of deadline, and termination unless both closing and payment occurred.

There were three different possible outcomes foreseen by the parties to the Agreement. If there was a closing and payment, the Agreement was fully performed. If there was no closing, then the contingency was not satisfied, and the Agreement expired. But the parties also contemplated that might be a closing but no money available for payment, so they included provisions for notice to be

given to Taylor in the event of potential shortfall, for an option for Taylor to extend the deadline, for termination of the Agreement in the event that both closing and payment did not occur, and for the parties to retain their original claims in that event. Taylor's brief ignores these provisions because they are all inconsistent with his argument that non-payment is breach of the Agreement, rather than an event that voids the Agreement, as it expressly states.

The parties foresaw that events might prevent payment upon closing, so they provided that Woodmansees would give notice to Taylor if they became aware of circumstances that might prevent payment, CP 118, ¶ B.4, they provided Taylor the option to extend the deadline, CP 118, ¶ B.5, and they provided that the expiration of the deadline for "closing and payment" would void the Agreement. CP 118, ¶ B.5. And that is exactly what happened. Woodmansees gave Taylor notice that just prior to closing, the arbitration panel had reduced the closing by 10 lots (\$700,000.00), and specifically told him that there would not be enough money at closing to pay him. CP 220, 221. Taylor temporarily extended the deadline to give Woodmansees an opportunity to get the panel to reconsider. CP 220. But after a week, Taylor chose not to further extend the deadline, which caused the deadline to expire and automatically voided the Agreement. That did not retroactively

create a breach of the Agreement; it terminated the Agreement.

Taylor's main claim is that Woodmansees breached the Agreement by not making payment *on the closing date*. But Taylor extended the payment deadline, after Woodmansees gave him notice that there was insufficient money from closing to pay him. He cannot claim that the Agreement was breached by nonpayment on the closing date, because he extended the payment deadline beyond the closing date.

The "deadline" expressed in the Agreement was for "closing *and payment*". CP 118, ¶ B.5. The closing occurred, so Taylor's extensions can only have been extensions of the *payment* deadline. Taylor ignores the fact that he extended the payment deadline, because the extensions are inconsistent with his claim that a breach occurred on the closing date. With the provisions for shortfall notice and option to extend, the parties clearly provided for the potential separation of the closing and payment events. Both closing and payment were required or else the Agreement became void. Taylor does not address the termination provision, because a void agreement is unenforceable.

C. Woodmansees' interpretation of the Agreement is reasonable, while Taylor's interpretation ignores several provisions and renders them meaningless.

Taylor's interpretation of the Agreement is that it required payment at closing, regardless whether events had occurred which prevented payment at closing, and regardless whether Taylor had extended the payment date. Taylor's interpretation is that the notice of shortfall and payment extension provisions of the Agreement make no difference in the performance required; essentially, that they are meaningless surplusage. But courts attempt to give meaning to all a contract's provisions; that is what is meant by construing a contract "as a whole".

An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used. Wagner v. Wagner, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980).

Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 840, 271 P.3d 850, 856 (2012).

Taylor's interpretation of the Agreement relies on one contract provision taken out of context, by excluding several other provisions. Taylor's interpretation is unreasonable, and renders these other provisions of the Agreement meaningless. Woodmansees' interpretation gives meaning to all the Agreement provisions, and is therefore the more reasonable interpretation.

When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we adopt the latter interpretation.

Berg v. Hudesman, 115 Wn.2d 657, 672, 801 P.2d 222 (1990).

D. The doctrine of judicial estoppel prevents Taylor from enforcing the Agreement, after he obtained an order vacating the stay imposed by the Agreement because the Agreement was void.

All three elements of the judicial estoppel doctrine are present here, and it would be equitable to enforce the doctrine.

1. Taylor took inconsistent positions.

Taylor's Brief never acknowledges or addresses his repeated pleadings to the trial court that the Agreement was "void", CP 201, ln. 9; CP 202, ln. 23; CP 205, ln. 20, CP 209, ll. 6, 9., that the Agreement had "expired", CP 205, that "the Settlement Agreement has terminated." CP 209, ll. 6, 9. He obtained an order vacating the stay under the Agreement on that basis. Now Taylor's Brief (p. 16) claims that "there was one position from the get go", implying that he always claimed the Agreement was enforceable. That is simply not true. Taylor's Brief (p. 16) claims that because he moved to amend his complaint at the same time he moved to vacate the stay, "there were not earlier and later inconsistent positions" (Respondent's Brief, p 17).

Taylor apparently claims a distinction in that he took his inconsistent positions simultaneously. But a motion to amend a complaint is not the same as moving to enforce the amended complaint; they do not meet the same scrutiny in the trial court, or on appeal.

Taylor argues that the trial court “did not abuse its discretion by allowing Taylor to amend the complaint” (Respondent’s Brief, p. 13), and expresses surprise that Woodmansees did not assign error to the order allowing the amended complaint. From that, Taylor concludes that “the complaint was properly amended” (Respondent’s Brief, p. 16), as if that means that his amended complaint is therefore unassailable. But it is summary judgment which is at stake here, not the motion to amend the complaint. An order allowing an amended complaint is not even subject to appeal. RAP 2.2; Albin v. Seattle Elec. Co., 46 Wash. 420, 421, 90 P. 435, 436 (1907). Woodmansee has discovered no authority requiring a party to assign error to an order allowing amendment of a complaint, in order to be entitled to appeal from a judgment entered under it. Taylor’s position on summary judgment enforcing the Agreement is inconsistent with his prior position that the Agreement was void, which took in his motion to vacate the stay imposed by the Agreement.

2. One trial judge or the other was misled.

In his motion to vacate the stay imposed by the Agreement, Taylor expressly told the trial court the Agreement was void. The court agreed with him and lifted the stay. Later when he moved for summary judgment, Taylor told the visiting trial judge that the Agreement was enforceable. Those positions are contradictory. Taylor received affirmative relief from each of two judges, based on contradictory positions on the enforceability of the Agreement. The judge who enforced the void Agreement was misled.

Taylor's brief argues (p. 17) that he moved to vacate the stay in order to amend the complaint, so the court was not misled. He moved to vacate the stay in order to proceed with his action; his amended complaint simply added an additional, and specious, claim. Taylor's argument assumes that the substance of the amended complaint was at issue in the motion to amend, which was not the case. A motion to amend does not require the court to weigh the claim at that time. Whether the Agreement was enforceable was not the issue before the trial court in Taylor's motion to amend.

Taylor's Brief (p. 16) insinuates that Woodmansees waived their right to argue judicial estoppel at summary judgment because they did not oppose the motion to amend the complaint. Taylor

implies that a motion to amend the complaint requires the non-moving party to raise affirmative defenses and substantive objections to the proposed amended complaint at that time. Of course, an answer to an amended complaint is due after the amended complaint is filed, not before the order allowing it to be filed. Taylor's attempt to enforce the Agreement on summary judgment was inconsistent with his earlier motion to vacate the stay based on the Agreement being void. The first time Woodmansees were required to raise that inconsistency in order to argue for judicial estoppel was when Taylor moved for summary judgment.

3. Unfair advantage from inconsistent positions.

Taylor took unfair advantage of his prior inconsistent position when he moved for summary judgment. The trial court vacated the stay imposed by the Agreement because of Taylor's position that the Agreement was void; eight months later Taylor asked the visiting trial judge to enforce the Agreement because it was not. It may be useful to look at what might have occurred if Taylor had not moved to vacate the stay. In that event, the Agreement would have remained in place, the lawsuit could not proceed, and Taylor could not amend the complaint. Taylor may have been paid under the Agreement if he had not terminated it.

If the Agreement had expired at the end of its stated term without further action, Taylor would not have been able to seriously argue that it was still enforceable. But Taylor exercised the option to terminate it, he forced the parties back into litigation, then he claimed that the Agreement was still valid and enforceable. He was able to convince the visiting trial judge to enforce a void Agreement, but that would not have been the case if the full term of the Agreement had expired.

E. Woodmansees are entitled to fees on appeal.

Woodmansees' opening brief requested fees and costs in the trial court in the event of remand, and in this court based on RAP 18.1 and RAP 14.2. Woodmansees refer to the authorities cited in their Appellants' Brief without repeating them here.

Woodmansees request relief as set forth in their Appellants' Brief.

Respectfully presented this 10th day of December, 2012.

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