

NO. 35646-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ST. J. ...
BY: *yn*

JOHN HARPER and LANA KUDINA,
Plaintiffs-Petitioners,

v.

COLDWELL BANKER BARBARA SUE SEAL PROPERTIES and
PYRAMID HOMES INCORPORATED
Defendants-Respondents.

COLDWELL BANKER BARBARA SUE SEAL PROPERTIES'
RESPONDING BRIEF ON APPEAL

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RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not abuse its discretion when it denied plaintiffs' last-minute motion for a continuance of the summary judgment hearing.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Must a trial court grant a motion for continuance of a summary judgment hearing for purposes of obtaining an interpreter when (1) the party making the request did not inform the court of the need for an interpreter until three days before the date set for hearing; (2) the record showed that, until the summary judgment hearing, the party making the request had actively litigated the case without seeking the assistance of an interpreter; and (3) the court specifically found that the party making the request appeared to speak and comprehend English competently?
2. Even if the trial court erred when it denied the continuance, should this court nevertheless affirm the judgment of the trial court because plaintiffs have not challenged the merits of the summary judgment itself and because there can be no dispute but that defendant was entitled to judgment as a matter of law?

RESPONSE TO STATEMENT OF THE CASE

1. Procedural History

Plaintiffs initiated this case on May 8, 2006, naming Coldwell Banker Barbara Sue Seal Properties (CBBSSP) as defendant. (CP 1-10). Plaintiffs later amended their complaint to name Pyramid Homes, Inc. ("Pyramid") as an additional defendant. (CP 38). Between May 24, 2006,

and October 16, 2006, plaintiffs actively engaged in litigation of their claims. Plaintiffs served defendant with requests for production and interrogatories. (CP 24-28, 29-37). Plaintiffs filed pleadings, motions, and memoranda of law with the court, including an amended complaint, motions for default, motions to strike, and responses to defendants' motions. (CP 38-46, 47-48, 49-53, 165-170, 171-178). At all times, plaintiffs represented themselves. (CP 10, 21, 27, 36, 46, 52, 169, 177). There is no evidence that plaintiffs relied on interpreters for assistance with their discovery or motion practice, and none of plaintiffs' motions to court included a request for interpretive services.

On September 28, 2006, CBBSSP filed a motion for summary judgment as to all plaintiffs' claims for relief and served the same on plaintiffs. (CP 11-19). The motion was noticed for hearing on November 3, 2007. (CP 197). On October 26, 2006, plaintiffs contacted counsel for CBBSSP and indicated that they wish to reschedule the summary judgment hearing in order to bring an interpreter. (CP 188). Counsel for CBBSSP told plaintiffs that she had no objection to an interpreter's presence, but that the dates plaintiffs proposed were unworkable. (CP 188-89). She asked plaintiffs to get back to her with new dates that would work for all parties and the court. (CP 189). Plaintiffs never followed up. (CP 189).

At no time before October 31, 2006, did plaintiffs advise the court that plaintiffs were unable to participate in the summary judgment hearing

without the assistance of an interpreter. On October 31, 2006, three days before the date set for hearing, plaintiffs filed and served a "Notice of Hearing Strike." (CP 20). In that motion, plaintiffs alleged, inter alia, that they were unable to proceed without an interpreter. (CP 20-21). Plaintiffs did not issue a citation setting their Notice of Hearings Strike, nor did they serve defendants with the notice within the time set by CR 6(d).

At the hearing on November 3, 2006, plaintiffs advised the court that they refused to proceed with the summary judgment hearing without an interpreter. (RP 1). Plaintiffs acknowledged to the court that, because they were not indigent, it was their responsibility to obtain an interpreter's services. (RP 3). Defendants objected to any set-over because plaintiffs had more than 28 days notice of the upcoming hearing in which to hire an interpreter, and plaintiffs had participated in other hearings in the case without interpretive assistance. (RP 4, 5). After hearing argument, the court denied the motion for continuance:

"Okay. I have reviewed the material that has been submitted and the discussions that have been conducted. It is the Plaintiffs' responsibility, obviously, to have the interpreter available to them. They're aware of the issues, and if they felt there was an issue triggering this, obviously, they should have proceeded prior to the occasion of last week. * * * So I'm denying the motion."

(RP 5-6).

The trial court then proceeded with the summary judgment hearing, and granted both defendants' motions for summary judgment. (RP 14). Orders reflecting the trial court's rulings were filed on December 22, 2006.

(CP 201, 204, 208, 215).¹ In its order denying plaintiffs Notice of Hearing Strike, the court expressly found that “Plaintiffs appear to speak and comprehend English competently and an interpreter is not required to adjudicate the matter.” (CP 216; Finding 2). The court also found that plaintiffs had failed to issue a citation setting their Notice of Hearings Strike for Hearing, and that they had failed to provide defendants with sufficient notice of their motion. (CP 216; Findings 3, 4).

2. Historical Facts

Jenny Keepers is a real estate broker, licensed by the State of Washington, and affiliated with defendant CBBSSP. (CP 54). On March 17, 2006, plaintiffs advised Ms. Keepers that they wanted to make an offer to purchase real property being offered for sale by co-defendant Pyramid. (CP 54). Ms. Keepers contacted Rollie Wolk, the agent for Pyramid Homes, and advised him of plaintiffs’ intent to submit an offer on the property. (CP 54, 57). Mr. Wolk informed Ms. Keepers that Pyramid was already considering another offer on the property. (CP 54, 57). Ms. Keepers explained to plaintiffs that another offer had already been made, but plaintiffs requested that she nevertheless submit an offer on their behalf. (CP 55). Ms. Keepers submitted the offer, but Pyramid rejected plaintiffs’ offer and accepted a different offer. (CP 55, 58). Plaintiffs then initiated this action against CBBSSP and, later, by amended complaint, against Pyramid, alleging conspiracy, negligent misrepresentation,

¹ The trial court also denied plaintiffs’ motion for default, motion to strike CBBSSP’s Affirmative Defenses and Counterclaim, and cross-motion for summary judgment. (CP 209, 211).

“disclosure of restricted information,” discriminatory housing practices, and civil right violations. (CP 3-10, 38-46). Specifically, plaintiffs contended that: (1) defendants conspired to defraud plaintiffs in violation of RCW 19.86.030; (2) that Jenny Keepers negligently misrepresented the address of the property that plaintiffs wished to purchase; (3) that Jenny Keepers disclosed restricted information when she allegedly advised Pyramid that plaintiff John Harper was a builder; and (4) that defendants discriminated against plaintiffs on the basis of John Harper’s status as a builder. (CP 42-45).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion when it denied plaintiffs’ motion for a continuance of the summary judgment hearing. Plaintiffs did not indicate any need for an interpreter in over five months of litigation, did not advise the court of their alleged need for an interpreter until three days before the summary judgment hearing, and failed to give defendants adequate notice of their motion. Further, the trial court expressly found that plaintiffs could speak and comprehend the English language competently and were able to proceed without an interpreter. Finally, any continuance would have been futile, because there was no factual or legal support for plaintiff’s claims and defendants were entitled to judgment as a matter of law.

ARGUMENT

A. Plaintiffs Were Not Entitled To The Continuance They Sought

1. Standard of Review

“A court’s denial of a motion for continuance is reviewed for abuse

of discretion only.” *Port of Seattle v. Equitable Capital* 203, 127 Wn.2d 202, 213-14, 898 P.2d 275 (1995). “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). As plaintiffs have conceded, the standard of review for appointment of an interpreter is also abuse of discretion. *State v. Gonzales-Morales*, 138 Wn.2d 374, 387, 979 P.2d 826 (1999). Under an abuse of discretion standard, the burden rests on the appellant to establish that the denial was manifestly unreasonable. *Port of Seattle*, 127 Wn.2d at 214.

2. Plaintiffs Had No Right, Constitutional or Statutory, To An Interpreter And Court Did Not Abuse Its Discretion When It Proceeded With The Summary Judgment Hearing Over Plaintiffs’ Objections

Plaintiffs’ reliance on RCW Chapter 2.43 is misplaced. The provisions in that chapter were enacted for the benefit of “non-English speaking” persons who, “because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language.” RCW 2.43.010. A “non-English speaking person” is “any person involved in a legal proceeding who cannot readily speak or understand the English language[.]” RCW 2.43.020(1).

Here, the record shows, and the trial court expressly found, that plaintiffs speak and understand English competently.² Plaintiffs initiated this action, engaged in discovery and motion practice, and represented themselves at other hearings; all without the aid of an interpreter and without any request for an interpreter. Accordingly, the statutory provision regarding the appointment and waiver of interpreter services simply do not apply.

Plaintiffs' constitutional arguments are equally without merit. First, the cases upon which plaintiffs rely are, without exception, all cases in which the party seeking the assistance of an interpreter has been the defendant. Further, the majority of those cases were criminal prosecutions. As such, the Sixth Amendment constitutional right to confront witnesses and to be present at one's own trial was implicated by the request for an interpreter and the courts' treatment of such requests. *See, e.g., State v. Teshome*, 122 Wn.App. 705, 709-10, 94 P.3d 1004 (2004). It is arguable that the policy and constitutional considerations that are implicated when the power of the state is being wielded against a party whose English-language skills are minimal are not of the same weight when the party seeking assistance is the one who chose to initiate the court proceedings in the first place.

² Plaintiffs state that, "The trial judge never doubted Petitioners' claim of inadequate English skills and their need for a Russian interpreter assistance." Pl. Br. at 8. There is absolutely no support for this contention in the record. In fact, the trial court's express finding on that issue is to the contrary. (CP 216)

Even assuming for the sake of argument that constitutional due process requirements for a fair hearing apply to plaintiffs' appeal, there is no evidence that plaintiffs did not receive all the process that was due them. First, it must bear repeating that plaintiffs initiated this proceeding. They chose to be in court; they were not dragged into litigation against their will. Second, plaintiffs had at least 28-days notice of the hearing in which to identify and hire an interpreter. Any failure to have an interpreter present at the time set for hearing was the of the plaintiffs, not of the court or defendants.

Further, even when constitutional rights have been involved, the a trial court's failure to appoint a qualified interpreter, or its determination that an interpreter was not necessary, does not necessarily require reversal. Reversal is only merited when the trial court's decision has been manifestly unreasonable under the circumstances. *See, e.g., Teshome*, 122 Wn.App. at 716 (defendant's "significant" English skills mitigated interpreter's alleged incompetence); *State v. Mendez*, 56 Wn.App. 458, 462-63, 784 P.2d 168 (1990)(trial court has no affirmative obligation to appoint an interpreter for a defendant where that defendant's lack of fluency or facility in the English language is not apparent); *State v. Woo Won Choi*, 55 Wn.App. 895, 902, 781 P.2d 505 (1989) (defendant whose language skills are adequate enough to understand trial proceedings and present defense has no right to interpreter); *Perovich v. United States*, 205 U.S. 86, 91, 27 S. Ct. 456, 51 L. Ed. 722 (1907)(no abuse of discretion in failure to appoint interpreter); *United States v. Barrios*, 457 F.2d 680, 682

(9th Cir. 1972)(same); *United States v. Sosa*, 379 F.2d 525, 527 (9th Cir. 1967)(same); *People v. Soldat*, 207 N.E.2d 449, 451 (Ill. 1965)(no abuse of discretion in failure to provide interpreter for witness whose English was broken and ungrammatical, but nevertheless intelligible).

Finally, the trial court's denial of plaintiffs' motion was based not only on its conclusion that plaintiffs did not need an interpreter, but also because plaintiffs had failed to comply with the Civil Rules of the Superior Court by providing defendants with notice of their motion as required by CR 6(d).

Plaintiffs' last-minute request for an interpreter was nothing more than a desperate attempt to avoid an inevitable adverse ruling on the merits. The record supports the trial court's conclusion that plaintiffs' comprehension of English was adequate and its refusal to continue the hearing was not an abuse of discretion.

B. A Continuance Would Have Been Futile Because Plaintiffs' Claims Had No Merit

Even if this court were to conclude that plaintiffs' request for a continuance to hire an interpreter should have been granted, it should nevertheless affirm the judgment of the trial court.

First, although plaintiffs' Notice of Appeal referred to the court's grant of defendants' motions for summary judgment, plaintiffs have not assigned error to that ruling, or offered any argument as to its merits. "It is well-settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Escude*

ex rel. Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn.App. 183, 190 n. 4, 69 P.3d 895 (2003).

Second, a review of the summary judgment record reveals that plaintiffs had no hope of prevailing, regardless of whether the motions were heard on November 3, 2006, or any other date.

1. Standard of Review

The appellate courts review a grant of summary judgment *de novo*, applying the same standard as the trial court. *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004). A summary judgment motion can be granted only if the pleadings, affidavits, depositions and admissions on file demonstrate the absence of any genuine issues of material fact and show that the moving party is entitled to judgment as a matter of law. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App 372, 377, 972 P2d 475 (1999). The court must consider all facts submitted and draw all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Morris v. McNichol*, 83 Wn.2d 491, 494, 519 P2d 7 (1974).

2. Plaintiffs Failed To Meet Their Evidentiary Burden

In support of its motion for summary judgment, CBBSSP offered affidavits and declarations containing evidence demonstrating that it was entitled to judgment as a matter of law. Accordingly, it became plaintiffs' burden to set forth specific facts rebutting CBBSSP's contentions and disclosing the existence of the issues of material fact. *Young v. Key*

Pharm., Inc., 112 Wn.2d 216, 225, 770 P2d182 (1989). Speculation or argumentative assertions that unresolved factual issues remain is not sufficient to preclude summary judgment. *Vacova Co. v. Farrell*, 62 Wn.App 386, 395, 814 P2d 255 (1991). If a party fails to respond to a motion for summary judgment with specific facts as would be admissible in evidence to show a genuine issue for trial, then the court shall enter summary judgment, if appropriate, against that party. CR 56(e).

Plaintiffs failed to meet their burden. In response to CBBSSP's motion, they offered only argument and conclusory accusations unsupported by any admissible evidence. (CP 171-177). Plaintiffs offered no admissible evidence to show a genuine issue for trial as to any of their claims against CBBSSP.³ Plaintiffs offered no admissible evidence to create a genuine issue for trial as to whether defendants conspired to defraud plaintiffs. Plaintiffs offered no admissible evidence to create a genuine issue for trial as to whether any negligent misrepresentations by Ms. Keepers led to Pyramid's rejection of plaintiffs' purchase offer. Plaintiffs offered no admissible evidence to create a genuine issue for trial as to whether Ms. Keeper's alleged disclosure of plaintiff John Harper's profession as a builder led to Pyramid's refusal to sell plaintiffs property, nor did plaintiffs offer any intelligible argument or legal authority as to why such disclosure or refusal to sell based on such a disclosure would be actionable. Accordingly, the trial court was within its authority to grant CBBSSP's motion for summary judgment.

³ Of plaintiffs' four claims for relief, only the first three implicate CBBSSP.

C. This Court Should Order Plaintiffs To Pay CBBSSP's Attorney Fees On Appeal

RAP 18.9(a) allows this court to sanction a party who files a frivolous appeal. Sanctions may include, as compensatory damages, an award of attorney's fees to the opposing party. *Legal Foundation v. The Evergreen State College*, 44 Wn.App. 690, 697, 723 P.2d 483 (1986). A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts. *Id.*

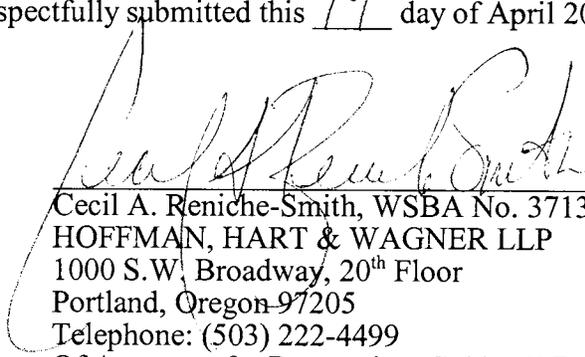
Plaintiffs' appeal, like their initial complaint, is frivolous. There are no debatable issues upon which reasonable minds might differ, and plaintiffs claims are so devoid of merit as to warrant sanctions. Plaintiffs' intransigence throughout these proceedings has forced CBBSSP to expend considerable time, effort, and money defending against meritless claims. Accordingly, plaintiffs should be order to pay CBBSSP's attorney fees on appeal, without regard to CBBSSP's need or plaintiffs' ability to pay. *Greenlee and Greenlee*, 65 Wn.App. 703, 711, 829 P.2d 1120 (1992).

CONCLUSION

The trial court did not abuse its discretion when it denied plaintiff's request for a continuance of the summary judgment hearing. Not only was plaintiffs' request for an interpreter untimely, the trial court found that plaintiffs were able to speak and comprehend English competently. Plaintiffs had actively and aggressively litigated their case without the assistance of an interpreter; the late request for a continuance was simply a last-minute attempt to avoid an inevitable adverse ruling on the merits. Under those circumstances, the trial court was well within its authority to

order that the hearing proceed as scheduled. Further, any continuance would have been futile, because it was clear from the summary judgment record that plaintiffs could not prevail. This court should affirm the judgment of the trial court, and award defendant CBBSSP its attorney fees on appeal.

Respectfully submitted this 19th day of April 2007.



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I, Cecil A. Reniche-Smith, having first been duly sworn, state that on April 19, 2007, I mailed a copy of the foregoing COLDWELL BANKER BARBARA SUE SEAL PROPERTIES' RESPONDING BRIEF ON APPEAL to petitioners' attorney, postage prepaid and addressed as follows:

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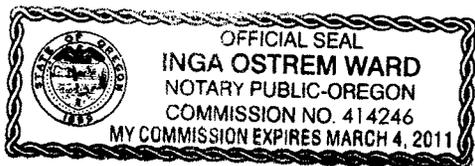
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STATE OF OREGON
NOTARY PUBLIC
BY: IN
APR 19 2007
PORTLAND, OREGON

DATED at Portland, Oregon this 19 day of April 2007

Cecil A. Reniche-Smith
Cecil A. Reniche-Smith, WSBA No. 37132

Sworn and signed before me this 19 day of April 2007



Inga Ostrem Ward
NOTARY PUBLIC FOR OREGON
My Commission Expires: 3-4-11