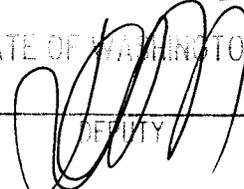


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39589-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GEONERCO, INC. and/or assigns, n/k/a RIVERSIDE HOMES, INC., an
Oregon corporation d/b/a Riverside Homes Vancouver,

Appellant,

v.

GRAND RIDGE PROPERTIES IV LLC,
an Oregon limited liability company,

Respondent.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Authority Under CR 60(b)

The crucial issue in this case involves the scope of the trial court's authority under CR 60(b). Riverside does not dispute that the trial court had the authority to relieve Grand Ridge from the obligation to perform under the August 2007 Final Judgment ordering specific performance. Riverside disagrees that the trial court should have granted such relief, but CR 60(b) does give the trial court discretion to "relieve a party . . . from a final judgment" under certain circumstances.

If the trial court had merely vacated the specific performance judgment, this case would have been over. However, the trial court ignored the confines of CR 60(b) and granted affirmative relief against Riverside – the judgment creditor – and in favor of Grand Ridge. Riverside vigorously disputes that a trial court has the authority under CR 60(b) to grant new, affirmative relief against the judgment creditor.

Riverside's opening brief established that under CR 60(b), a trial court only has the authority to grant relief to a judgment debtor from the requirements of an existing judgment. The trial court in this case exceeded this authority by ordering Riverside to perform under the REPSA, and by ordering the entry of a judgment for damages against Riverside if Riverside did not perform.

Grand Ridge's primary response is to mischaracterize what the trial court did. Grand Ridge argues that the trial court (1) did not order Riverside to close the transaction under the REPSA, (2) did not award damages against Riverside if Riverside did not perform under the REPSA, and (3) did not order the entry of a new judgment against Riverside if Riverside did not close. Grand Ridge claims that the trial court "granted relief to both sides", and that the trial court was merely awarding "terms" under CR 60(b).

Grand Ridge's arguments are pure fiction. The trial court did compel Riverside to close on the transaction. The trial court did rule that if Riverside did not close Grand Ridge was entitled to an award of damages against Riverside. The trial court did hold that if Riverside failed to close a new judgment would be entered against Riverside in the amount of those damages. Each of these rulings exceeded the trial court's authority under CR 60(b). And the trial court did not award "terms", and in fact never even mentioned "terms" in its written decision or order.

Grand Ridge also argues that the trial court had inherent authority sitting in equity to essentially do whatever it wanted. However, that is not the law. The civil rules govern all cases. Once a judgment is entered, the trial court's authority - even in equity - is

governed by CR 60(b). This is particularly true because Grand Ridge only sought relief under CR 60(b).

Liquidated Damages Provision

The other problem with the trial court's ruling is that it ignored the liquidated damages provision in the REPSA. Even if the trial court somehow had authority to grant affirmative relief against Riverside, Paragraph 15(b) of the REPSA expressly limits any damages – including interest – to forfeiture of Riverside's earnest money deposit. The trial court's award of damages and interest far exceeding the amount of the earnest money deposit was improper because it directly conflicted with this liquidated damages provision. Even sitting in equity a court has no authority to rewrite contracts.

II. ARGUMENT

A. THE STANDARD OF REVIEW FOR DETERMINING A TRIAL COURT'S AUTHORITY UNDER CR 60(b) IS DE NOVO.

Grand Ridge argues that this Court should evaluate the trial court's actions based on an abuse of discretion standard. Riverside agrees that the abuse of discretion standard is applied to a trial court's decision to grant a party relief under CR 60(b) from an existing judgment. However, whether a trial court has authority under CR 60(b) to award affirmative relief against a judgment creditor necessarily is a

question of law – which is reviewed de novo. *E.g., State v. Schwab*, 163 Wn.2d 664, 671, 185 P.3d 1151 (2008). Further, it is well settled that the interpretation of a court rule is subject to de novo review. *E.g., Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006); *Nevers v. Fireside, Inc.*, 133 Wn.2d. 804, 809, 947 P.2d 721 (1997). It makes no sense to say that a trial court has the discretion to determine the scope of its own authority under the civil rules.

In any event, Riverside prevails under either standard of review. A trial court obviously abuses its discretion as a matter of law if it grants relief beyond the authority granted in CR 60(b).

B. THE TRIAL COURT DID NOT HAVE THE AUTHORITY UNDER CR 60(b) TO ORDER AFFIRMATIVE RELIEF AGAINST RIVERSIDE AND IN FAVOR OF GRAND RIDGE.

1. The Trial Court Did Grant Affirmative Relief Against Riverside.

Despite the creative manner in which Grand Ridge characterizes the trial court's rulings, there is no question that the trial court ordered Riverside to perform under the REPSA, provided for the award of damages against Riverside, and provided for the entry of a judgment against Riverside for those damages.

First, the trial court did order specific performance. In its Memorandum of Decision, the trial court stated: "Riverside shall be **compelled** to file a purchase price plus interest on the purchase price

from the date in which the closing should occur, minus offsets previously awarded to escrow." (CP 415) (emphasis added). The trial court's Findings of Fact and Conclusions of Law and Order repeated this command, stating that Riverside "shall" tender into escrow the amount of purchase price stated in the REPSA. (CP 445).

Grand Ridge tries to suggest that the trial court gave Riverside an "opportunity" to close the transaction. Nothing could be further from the truth. The phrase "Riverside shall be compelled" can hardly be interpreted as an invitation. The trial court ordered Riverside to close.

Second, the trial court did provide for the award of damages against Riverside and in favor of Grand Ridge if Riverside did not perform under the REPSA. The Findings of Fact and Conclusions of Law and Order specifically provides that if Riverside fails to close on the transaction, Grand Ridge "shall be entitled to an award of damages" for the difference between the REPSA purchase price and the amount Grand Ridge obtained in any resale, plus incidental costs and interest. (CP 446 - ¶ 3) (emphasis added).

Third, the trial court did provide for an entry of a judgment against Riverside if Riverside failed to close on the transaction. The Memorandum of Decision states that if Riverside failed to close, "Grand Ridge will be awarded any difference in the purchase price plus

costs necessary to bring the property in compliance for sale as a judgment against Riverside plus such other costs that are incidental to the sale." (CP 415) (emphasis added). Similarly, the Findings of Fact and Conclusions of Law and Order provide that if Riverside failed to close Grand Ridge "shall be entitled to an award of damages, in the form of a Judgment". (CP 446 - ¶ 3) (emphasis added).

2. The Trial Court Did Not Grant Relief to Both Parties.

Grand Ridge argues that the trial court granted relief to both parties, suggesting that ordering Riverside to close on August 3, 2009 benefited Riverside by extending the closing deadline for a period of 163 days. This argument makes no sense.

Riverside was not seeking any relief from the trial court, other than denial of Grand Ridge's CR 60(b) motion. Riverside certainly did not request an extension of the closing deadline. Instead, Riverside made it clear that the transaction could not close because work costing over \$200,000 was still required to create finished building lots. (CP 371). In response to Riverside's refusal to close the transaction, the trial court ordered Riverside to perform under the REPSA by August 3, 2009. This clearly was not done to benefit Riverside. Instead, this was the grant of new, affirmative relief against Riverside.

3. The Trial Court's Order Provided for the Award of Damages, Not "Terms" Under CR 60(b).

CR 60(b) states that the court may relieve a party from a final judgment "upon such terms as are just". Grand Ridge argues that the Court's award of money damages to Grand Ridge for the difference between the REPSA price and the resale price (plus other consequential damages and interest) were merely "terms" allowed under CR 60(b). This argument is inconsistent with the trial court record.

The trial court never made any reference to "terms" during any stage in the proceedings. As stated above, the Memorandum of Decision awarded Grand Ridge the difference between the REPSA purchase price and the resale price "as a judgment against Riverside" if Riverside did not close. (CP 415). The Memorandum of Decision says nothing about terms under CR 60(b). The Findings of Fact and Conclusions of Law and Order state that if Riverside failed to close Grand Ridge would be entitled to "an award of damages, in the form of a Judgment". (CP 446). The Order says nothing about terms under CR 60(b). In fact, neither the Memorandum of Decision or the Findings of Fact and Conclusions of Law and Order quotes or even mentions CR 60(b). The trial court did not award terms – it awarded damages to Grand Ridge for Riverside's alleged breach of the REPSA.

It also is worth noting that Grand Ridge never requested that the trial court award "terms" under CR 60(b). Neither Grand Ridge's CR 60(b) motion (CP 292), its supporting memorandum (CP 296), nor its reply memorandum (CP 405) even mentioned the word "terms". In fact, Grand Ridge's memorandum did not even include the reference to "terms" when quoting CR 60(b). (CP 301).

4. The Trial Court Had No Authority Under CR 60(b) to Order Riverside to Perform Under the REPSA or to Provide for a Judgment for Damages if Performance Did Not Occur.

Other than mischaracterizing the trial court's order, Grand Ridge does not even attempt to argue that a trial court has the authority under CR 60(b) to enter affirmative relief against a judgment creditor. Grand Ridge has produced no Washington case (or any other case for that matter) suggesting that CR 60(b) allows a trial court to enter a judgment for damages against a judgment creditor. Grand Ridge fails to respond to Riverside's citation to a prominent treatise and cases in other jurisdictions that definitively establish that a trial court has no such authority. "Rule 60(b) is available only to set aside a prior order or judgment; a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment." 12 *Moore's Federal Practice* § 60.25 (2004).

Grand Ridge's only argument is that CR 60(b) "permits a trial judge to relieve a party from a final judgment when that party has

satisfied the judgment, or when it would no longer be equitable for the judgment to have prospective application". (Respondent's Brief at 32). Grand Ridge spends several pages discussing *Pacific Security Co. v. Tanglewood, Inc.*, 57 Wn. App. 817, 790 P.2d 643 (1990), in support of this proposition.

Riverside agrees with this position. Riverside concedes that the trial court had the authority to rule that Grand Ridge was relieved of its obligation to perform under the REPSA, and even to extinguish Riverside's rights to the property under the REPSA. But that is not the issue in this appeal. The issue is whether the trial court had the authority under CR 60(b) to go beyond relieving Grand Ridge from the terms of the judgment and grant affirmative relief against Riverside and in favor of Grand Ridge for Riverside's alleged breach of the REPSA. The clear answer on that issue is no, and Grand Ridge has presented no contrary argument or authority.

C. EVEN A COURT SITTING IN EQUITY DOES NOT HAVE UNLIMITED AUTHORITY TO "DO JUSTICE" IN THE CONTEXT OF A CR 60(b) MOTION.

Grand Ridge argues that because the underlying judgment involved the application of equitable relief – specific performance – the trial court had "inherent authority" to modify the judgment. Grand Ridge further argues that because the trial court was sitting in equity, it

had broad discretion to "do justice" in this case independent of any limitations imposed by CR 60(b). These arguments are misguided, and represent a misunderstanding of the relationship between a trial court's equitable powers and the court rules.

In general terms, courts "sitting in equity" have the discretion to fashion remedies that will produce an equitable result. Specific performance is an equitable remedy. For that matter, a motion for relief under CR 60 also is equitable in character. *E.g., Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). However, a court's equitable powers do not "trump" CR 60. Instead, once a judgment has been entered a trial court's authority – equitable or otherwise – necessarily is limited to the authority granted by CR 60.

There are several reasons why a trial court does not have authority independent of CR 60 to modify judgments. First, Washington courts have held that a trial court has no authority to vacate a judgment apart from a statute or court rule. "Once a judgment is final, a court may reopen it only when specifically authorized by statute or court rule." *In Re Schumaker*, 128 Wn.2d 116, 120, 904 P.2d 1150 (1995). *See also Rose v. Fritz*, 104 Wn. App. 116, 120, 15 P.3d 1062 (2001).

Second, CR 1 expressly subordinates equity proceedings to the court rules. "These rules govern the procedure in the superior court in

all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81" (emphasis added). Trial courts cannot ignore the court rules simply because they are "sitting in equity".

Third, Washington courts have recognized that CR 60 governs motions to vacate judgments even though the courts are acting in equity in addressing those motions.

While relief from a default judgment is governed by equitable principles, the grounds and procedures for vacating a judgment are provided in CR 60.

Ellison v. Process Systems Incorporated Construction Co., 112 Wn. App. 636, 641, 50 P.3d 658 (2002).

Fourth, the law is clear that a trial court cannot give relief on equitable grounds in contravention of a statutory requirement. *E.g.*, *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990); *Noble v. A & R Environmental Services, LLC*, 140 Wn. App. 29, 37-38, 164 P.3d 519 (2007). "Equity . . . also follows the law and cannot provide a remedy where legislation expressly denies it." *Stephanus v. Anderson*, 26 Wn. App. 326, 334, 613 P.2d 533 (1980). Although court rules are not statutes, there is no reason that this principle would not equally apply to court rules.

Fifth, allowing trial courts to exercise "inherent authority" independent of CR 60 to vacate or modify judgments would render CR

60 meaningless. Why would a party bother with the strict requirements of CR 60 when it could simply appeal to a trial court's equitable jurisdiction in an attempt to achieve the same result?

Sixth, Grand Ridge has provided absolutely no support in the law for the radical proposition that a court acting in equity is not limited to the authority granted in CR 60. Grand Ridge cites several cases generally discussing a court's equitable powers, but none of these cases involved modification or vacation of a final judgment and none of the cases involved CR 60(b). In the absence of any authority, this Court should resist Grand Ridge's attempts to create new law.

Finally, it is worth noting that Grand Ridge only sought relief under CR 60(b). Grand Ridge did not appeal to the trial court's general equitable powers. CR 60(b) was the basis for the trial court's (erroneous) decision, not some vague exercise of equity powers.

D. REGARDLESS OF THE TRIAL COURT'S AUTHORITY, ANY DAMAGES AWARDED AGAINST RIVERSIDE MUST BE LIMITED TO THOSE ALLOWED IN THE REPSA'S LIQUIDATED DAMAGES PROVISION.

As discussed above, the trial court did not have authority under CR 60(b) to award damages against Riverside and in favor of Grand Ridge, and accordingly the Court's order must be vacated in this respect. Even if the trial court somehow did have authority to award damages against Riverside, the trial court erred because it completely

ignored the liquidated damages provision in the REPSA. Paragraph 15(b) specifically states that if Riverside (the buyer) fails to complete the transaction, Grand Ridge's (the seller's) sole remedy is forfeiture of any earnest money deposits made by Riverside. Under this provision, Grand Ridge expressly waived any other remedy. (CP 332).

Understandably, Grand Ridge shrinks away from discussing the liquidated damages provision in its brief. Grand Ridge's only argument – referenced only in its introduction – is that the trial court awarded "terms" and not damages, and therefore the liquidated damages provision was not implicated. (Respondent's Brief at 5). As discussed above, the "terms" argument is inconsistent with the trial court's specific direction that a judgment for damages be entered against Riverside, and there is no mention of terms in the trial court's rulings. Grand Ridge does not even attempt to make any other argument against application of the liquidated damages provision.

As noted above, Grand Ridge also asserts that a trial court has sweeping powers while sitting in equity. However, even Grand Ridge does not go so far as to argue that a court's equitable powers include ignoring an enforceable liquidated damages clause. And there is no authority to support such an argument. Similarly, Grand Ridge has not attempted to argue and there is no authority to support an argument

that CR 60(b) somehow allows a trial court to ignore a liquidated damages provision.

In the absence of any credible argument from Grand Ridge, Paragraph 15(b) of the REPSA must be applied as written. Grand Ridge's sole and exclusive remedy is forfeiture of Riverside's earnest money deposits. Other than those deposits, Grand Ridge cannot recover any attorney fees, interest, or actual/consequential damages. (CP 332).

E. RIVERSIDE WAS NOT PRECLUDED UNDER THE DOCTRINES OF WAIVER, RES JUDICATA OR JUDICIAL ESTOPPEL FROM REQUIRING COMPLIANCE WITH THE TERMS OF THE REPSA BEFORE CLOSING.

Riverside's opening brief explains why the trial court erred in holding that Riverside had an obligation to close the transaction even though the conditions set forth in the REPSA have not yet been satisfied. The doctrines of waiver and res judicata clearly are inapplicable and do not prevent Riverside from enforcing the REPSA conditions or support the trial court's finding that Riverside breached the REPSA by insisting on compliance with those conditions. Those arguments will not be repeated here.

However, Riverside does need to address Grand Ridge's arguments regarding judicial estoppel. Riverside disagrees that judicial estoppel applies in this case, but even if it did the trial court

could rely on that doctrine only to relieve Grand Ridge of the obligation to comply with the specific performance judgment. Judicial estoppel necessarily cannot provide the basis for a finding that Riverside had an obligation to close even though the REPSA conditions had not been satisfied, a finding that Riverside breached the REPSA by failing to close, or the imposition of any affirmative relief against Riverside.

III. CONCLUSION

The trial court had the authority to relieve Grand Ridge from its obligation to comply with the Final Judgment ordering specific performance of the REPSA, and to extinguish Riverside's rights in the property. The trial court did not have the authority to command Riverside to perform under the REPSA, or to award damages against Riverside for failing to perform. CR 60(b) simply does not allow a trial court to grant affirmative relief – and especially an award of damages – against the judgment creditor. This Court should vacate those portions of the trial court's order.

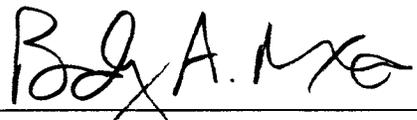
Even if the trial court did have authority to grant affirmative relief against Riverside, the liquidated damages provision of the REPSA precludes the award of any damages beyond forfeiture of Riverside's earnest money deposit. There is no question that the trial court awarded damages, not "terms" under CR 60(b), and Grand Ridge has

not even attempted to argue that the liquidated damages provision somehow is unenforceable. At the very least, the trial court's order must be reversed to the extent that it allows an award of damages beyond the earnest money deposit.

For the reasons stated above, appellant Geonerco, Inc. n/k/a Riverside Homes, Inc. respectfully requests that this Court reverse the trial court's CR 60(b) order.

Respectfully submitted this 12 day of March, 2010.

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By: 

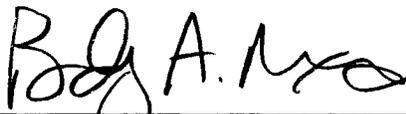
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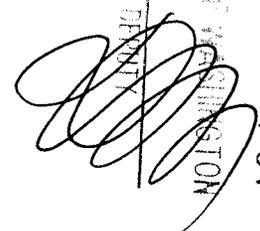
I hereby certify, under penalty of perjury, that on the 12 day of March, 2010, I served the foregoing REPLY BRIEF OF APPELLANT as follows:

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