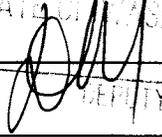


FILED
COURT OF APPEALS
DIVISION II

10 SEP 24 AM 11:35

STATE OF WASHINGTON

BY  DEPUTY

CASE NO. 40362-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

WILLIAM R. ROSE

Appellant

v.

MAHER, INGELS, SHAKOTKO, CHRISTENSEN, LLP

Respondent

Appeal from the Superior Court of Pierce County
The Honorable Kathrine M. Stolz
Pierce County Superior Court Cause No. 08-2-05446-8

APPELLANT'S REPLY TO RESPONDENTS RESPONSE

William R. Rose
11424 44th Ave East
Tacoma, Washington 98446
(253) 365 9333

Appellant / Pro Se

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR..... 1

III. STATEMENT OF THE CASE.....1

A. Factual Background1,2,3

B. Procedural History.....3,4

IV ARGUMENT.....4

A. Standard of Review.....4

B. Did a Contract Exist between the parties.....5,6,7

**C. Breach of contract was not the sole means of the trial courts
 findings of liability in the suit Failing to Issue Finding of Fact
 and Conclusion of Law to Support its Order.7,8**

D. Finding of facts.....8

E. Purpose of findings of Facts and Conclusions of law9

F. MISC is not entitled to attorney fees on appeal.....10

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986).....4

Matsushita Elec. Indus. Co. v. Zenith Radio Corp. , 475 U. S. 574,586 (1986).....4

Anderson v. Liberty Lobby, Inc., 447, U.S. 242, 253 (1986).....5

T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F. 2d 626,630 (9th Cir 1987)....5

Sunnyside Valley Irrigation Dist., v. Roza Irrigation Dist., 124 Wn.2d 312, 877 p2.d
1283(1994)6

State v. Nelson, 89 Wn.App. 179,948 P.2d 13 14 (1997).....7

State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988).....7

State v. Hill, 123 Wn.2d 641,644, 870 P.2d 3 13 (1 994)7

Statutes

RCW 25.15.1252

Rules and Regulations

CR 56(c).....4
CR 56(e).....4
CR 52 (a) (1).....8
CR 128
CR 568
CR 1110

I. INTRODUCTION

The primary issue on appeal is whether the trial court erred when it granted the motion for summary judgment, concluding that no issue of material fact existed concerning whether William Rose entered into a contract to personally guarantee a contract between DARB Organic Energy Conversion Company, a Nevada Limited Liability Company, a company that was a wholly owned subsidiary of Architectural Business Concepts & Development LLC, a Native American owned, Washington Limited Liability Company and Maher, Ingels, Shakotko, Christensen LLP.

II ASSIGNMENTS OF ERROR

Appellate reaffirms that the trial court erred when it granted Summary judgment when a issue of genuine material facts existed.

III STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

While it may be true that Rose requested legal service from “MISC” for the limited liability company to which he was involved with in early 2006, it is untrue that Rose signed personally for any agreement and the possibility of Rose signing on June 1, 2006 is impossible, as the same document

appears undated and un-witnessed some 17 months after the alleged signing.

Rose was first presented with the alleged Client retainer agreement in April of 2008, when Rose discovered that he was being sued for breach of contract. Rose was led to believe by “MISC” that this agreement was signed and witness on June 1, 2006. *CP 6-10; 144-148* , this alleged contract led to controversy between Rose and his former counsel. In his declaration Rose insists that he never signed any agreement to becomes personally liability for the debts of any company, this was further collaborated by the Declaration of Michael Lindberg dated 24 April 2008

Lindberg was Rose’s business collogue in the fore mentioned LLC. The mere fact that Rose was a member or manager does not subject him to liability for the acts or omissions of the limited liability company . RCW §25.15.125 provides as follows:

(1) Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

(2) A member or manager of a limited liability company is personally liable for his or her own torts.

Under this statute the mere status of member or manager does not subject Rose to liability for the acts or omissions of the limited liability company. Furthermore, the exception is liability for a member's or a manager's own torts. There is no liability for contract claims. Thus, again, "MISC" can find no money arising by the mere fact that Rose is the manager and a member of an LLC.

"MISC" refers to there LONGEVITY OF THE RETAINER AGREEMENT, this clause is overreaching, ambiguous, and legally inept and would create a great conflict to "MISC", as "MISC" formed one of the limited liability company and was fully aware and touted the protection it provided to its members. As to the email that eludes to the promise of payment, if the court would of read the entire email it clears states:

"Please keep in touch as I respect you and your company and appreciate the time and efforts on behalf of DARB and its members".

Anything less would be derelict in the fiduciary duty of the manager.

B. PROCEDURAL HISTORY

Rose was never served on January 28, 2008, in fact it was Rose's eldest son that was served at his home address, not Rose. The acknowledgement of this pocket service came months after a default judgment was entered, a well-situated error by "MISC".

"MISC" makes reference to the declaration of Rose when he states:

"When I signed the fee agreement at the "MISC" offices, I was accompanied by my business associate Michal Lindberg who was present most of the time during my interactions and communications with Veronica Shakotko"

that statement was made some 18 months after the alleged signing during a time that Rose was unaware that several retainer agreements existed, Rose was also unaware that the none of the agreements were dated or witnessed.

Although “MISC” acknowledges but makes light of the fact that there are two possibly three different documents, they refer only to the fact that their exhibit contains Rose’s signature, nowhere in their document is any salutation, confirmation written or typed of whose signature is on that document, had MISC not inserted the Date and Witness at a later date, the authenticity is not verifiable.

IV. AUGUMENT

A. STANDARD OF REVIEW

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law . Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof . Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986). There is no genuine issue of fact for trial where the record **taken as a whole**, could not lead rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp. , 475 U. S. 574,586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “ some metaphysical doubt”). See also Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute over a material facts exist if there is sufficient

evidence supporting the claimed factual dispute, requiring a judge or jury to **resolve the differing versions of the truth**. *Anderson v. Liberty Lobby, Inc.*, 447, U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F. 2d 626,630 (9th Cir. 1987). (*emphasis added*)

In this case it would be unconscionable that a court could come to one and only one conclusion, therefore this case must have been heard as a matter of law.

B. DID A CONTRACT EXISTED BETWEEN THE PARTIES

“MISC” contends that all elements of a contract existed however; the existence of a contract requires finding the following factual elements: a) an offer; b) an acceptance of that offer which results in a **meeting of the minds**; c) a promise to perform; d) a valuable consideration; e) a **time or event when performance must be made**; f) terms and conditions for performance, including fulfilling promises; g) performance. In order to breach a contract you must first have a contract.

Rose contents that the production of a second agreement and possibly a third agreement, opens the possibility of the authenticity of his signature. The Trial court denied Rose the opportunity to bring expert witnesses to discover the truth as to its validity of the agreement “MISC” used as exhibit “A”, without this validation any prior statement made by Rose would be conjecturer.

“MISC” in an attempt to link Rose personally, claims to have represented him in two other matters however; if they did they would of realize that those matters were part of a limited liability company as well. Rose has never received any billing personally for any services.

“MISC” alleges liability under the Doctrine of account and *cites* Sunnyside Valley Irrigation Dist., v. Roza Irrigation Dist., 124 Wn.2d 312, 877 p2.d 1283(1994) “MISC” sited this case in trial court. Putting aside the fact that Rose vigorously contests any obligation for him to personally answer for the debts of the LLC’S, if “MISC” places its hope on the reliance of Sunnyside Valley Irrigation District v. Rosa Irrigation District, 124 Wn.2d 312, 877 P.2d 1283 (1994) the factual inconsistency between the facts of this case and those of *Sunnyside*. are not comparable. Rosa had blithely paid Sunnyside’s invoices for the maintenance of drainage ditches for ten years essentially without any complaints. After ten years, Rosa refused to pay claiming overpayment during the previous ten years. Sunnyside sued and Rosa counterclaimed. The court dismissed half the claims under the statute of limitation and remaining claims were limited under the doctrine of accounts stated. Sunnyside supra 124 Wn.2d at 313-14.

The facts of this “MISC” v. Rose could not be more opposite. The law governing accounts stated has been explained by Washington courts as follows:

To impart to an account the character of an account stated it must be mutually agreed between the parties that the balance struck thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings to which

the account relates. The mere rendition of an account by one party to another does not show an account stated. There must be some form of assent to the account, that is, a definite acknowledgment of an indebtedness in a certain sum. . . . True, assent may be implied from the circumstances and acts of the parties, but it must appear in some form. Sunnyside supra 124 Wn.2d at 315-16.

Rose has disputed that he has any personal liability for payment of “MISC’S” attorney’s fees and further disputes the accountability, Rose further contends that any agreement that would have been provided to “MISC” by the LLC’S, would have been a hybrid agreement, as the conditions of payment were based on the performance of a loan.

C. BREACH OF CONTRACT WAS NOT THE SOLE MEANS OF THE TRIAL COURTS’ FINDINGS OF LIABILITY IN THIS LAW SUIT.

Rose’s brief focuses not only on the issue of personal breach of contract but further contends that he was never personally rewarded by the actions of “MISC” and that at no time did he ever promise to be personally liable for the debts of a limited liability company to which he was merely a member and that this action was frivolously brought against him personally some two years after the alleged contract.

FURTHERMORE, if a finding of fact and conclusion of law was rendered in this matter then the conclusion of those findings would have been addressed in this appeal.

D. FINDING OF FACT

“MISC” argues that Summary judgment motions under CR 12 or CR 56 do not require a finding of fact or conclusion of law. Rose argues if that is the case, the trial court erred without the written finding of fact and conclusion of law as, CR 52 (a) (1) provides in part that:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law.

The trial court made **NO** finding oral or written. If the trial court found that **NO** material fact existed in the breach claim, Rose contends that the trial court erred in entering Summary Judgment for attorney fees without findings of fact and conclusions of law on that issue, as Rose has always contended and “MISC” agreed, that any contract fees that would have been paid, would have been paid by an integrated agreement between “MISC” & the LLC and its/their ability to find funding.

E. PURPOSE OF FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Dispose of issues raised by the pleadings;
2. Make definite what was decided for purposes of res judicata and estoppel;
3. Evoke care on the part of the trial judge in ascertaining the facts; and
4. Allow for meaningful appellate review.

The Court of Appeals reviews these findings under the substantial evidence rule, State v. Nelson, 89 Wn.App. 179,948 P.2d 13 14 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. Findings of facts are considered verities on appeal absent a specific assignment of error. State v. Hill, 123 Wn.2d 641,644, 870 P.2d 3 13 (1 994).

F. "MISC" IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

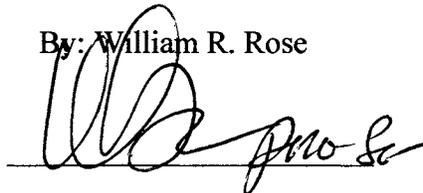
A genuine dispute over a material facts exist if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth, this case is text book of: "he said, she said", sprinkled with impropriety, various versions of unauthenticated documents, borders on CR 11 sanctions and should never have been adjudicated as a matter of law.

CONCLUSION

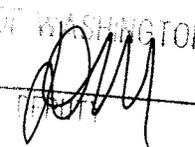
This case is riddled with inconsistencies, based on that and the foregoing, Appellate/Pro Se, "Rose" requests that this court reverse the decision of the trial court and remand this matter for trial

Respectfully submitted this _____ day of September, 2010

By: William R. Rose

A handwritten signature in black ink, appearing to read "WR Rose pro se", written over a horizontal line.

William R. Rose Appellant/ Pro Se

FILED
COURT OF APPEALS
DIVISION III
10 SEP 24 AM 11:36
STATE OF WASHINGTON
BY 

CERTIFICATE OF SERVICE

Under penalty of the laws of perjury of the State of Washington, I, William R. Rose, certify that, on this 24th day of September, 2010 I sent a true and correct copy of Appellants Opening Brief to be served by First Class US Mail on the persons whose names and addresses appear below:

Ms Kelly DeLaat-Maher
Attorney at Law
Maher Ahrens Foster & Shillito, PLLC
1145 Broadway, suite 610
Tacoma, Washington 98402

Telephone: (253) 722-1700
FAX: (253) 722-1701
e-mail: khmaher@mafslaw.com

Attorney for Plaintiff

U.S. Mail, postage prepaid

DATED this 24th day of September, 2010 .


By: William R. Rose
Defendant/Appellant, *Pro Se*