

No. 40362-5 II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY
BY

MAHER INGELS SHAKOTKO CHRISTENSEN LLP
a Washington Limited Liability Partnership

Respondent

v.

WILLIAM R. ROSE

Appellant

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON
THE HONORABLE KATHERINE M. STOLZ

BRIEF OF RESPONDENT

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COMES NOW Respondent MAHER INGELS SHAKOTKO CHRISTENSEN LLP, by and through its attorney of record, MAHER AHRENS FOSTER SHILLITO PLLC, and Kelly DeLaat-Maher and Jordan K. Foster, and submits Respondent's brief on Appeal as follows:

I. INTRODUCTION

The primary issue on appeal is whether the court erred in granting Plaintiff Maher Ingels Shakotko Christensen LLP's ("MISC") Motion for Summary Judgment and subsequently entering a judgment against Defendant William Rose ("Rose"), Appellant herein. The trial court's decision was consistent with Washington state law and was amply justified by Mr. Rose's conduct in this matter.

II. ASSIGNMENTS OF ERROR

Did the trial court err in granting MISC's motion for Summary Judgment when no material issues of fact existed that Mr. Rose signed the fee agreement in his personal capacity, and did not pay any of the fees incurred at his request? **No.**

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND OF THE CASE

This action arose out of Defendant's refusal to pay \$68,088.10 in unpaid invoices for legal services. CP 1-17 (Complaint). MISC and attorney Veronica Shakotko was first retained in early 2006 when William

Rose requested MISC to perform legal services on his behalf. CP 27, 122-143. Prior to that time, the parties had actually met in contemplation of work to be performed on a land lease issue, for which Ms. Shakotko sent Mr. Rose a Retainer Agreement that was not signed at that time, despite work being performed. CP 134, 194-195. A Firm Retainer Agreement was eventually memorialized on June 1, 2006, which was signed by Defendant, William Rose. CP 6-10; 144-148. That agreement contains a provision as follows:

LONGEVITY OF THE RETAINER AGREEMENT.

Depending on the case or cases, it is possible that the attorney client relationship could last for some time or handle many matters. In the event that it does, **this initial Retainer Agreement shall apply as signed to all cases and matters handled by the Firm, whether the cases are handled in your capacity as an individual, partnership, corporation, limited liability company, sole proprietorship or other business.** The enforceability of this Retainer Agreement shall remain intact notwithstanding the changes in name or composition to your company or business, or that this Firm may incur over time.

(Emphasis Added) CP 9, 104.

Beginning in earnest in approximately March 2006 through October 2006, MISC performed legal services and expended costs at Defendant's direction. CP 27, 114-142. MISC performed work pursuant to the terms of the agreement. CP 27. The work primarily consisted of assisting Defendant in a real estate business transaction concerning the

potential purchase of a commercial property in Spokane, WA. CP 114-142 (History Bill). Disputes arose during the transaction and eventually a lawsuit was started in Spokane County Superior Court – William Rose was a party to this lawsuit. *Id.*

MISC relied upon Defendant's promise to pay for legal services. CP 11-12, 106-107. Defendant continually promised to pay for legal services. Via email on October 4, 2006, Defendant stated as follows: "I will do my personal best to get some sort of payment but I can not guarantee how much or when, but I will pay you." CP 11, 106. In a follow up email on October 23, 2006, Defendant again reiterated his promise to pay stating, "I hope all is well with you and your family and I look forward to paying off my debt." CP 12, 107. Interestingly, in his e-mail of October 23, 2006, he actually references yet another project, the Terraces, as his method of getting MISC paid if he is able to find a partner in order to fund that project. CP 12, 107. Despite these promises to pay and acknowledgement of the outstanding debt, Defendant has never made a single payment on the fees, and instead now alleges MISC misrepresented the firm retainer agreement.

B. PROCEDURAL HISTORY OF LAWSUIT

Defendant was initially served with MISC's lawsuit on January 28, 2008, and the lawsuit was filed on February 21, 2008. CP 28. Defendant

initially failed to appear or respond and a default judgment was granted on February 21, 2008. *Id.* However, Defendant was permitted to set aside the default upon payment of \$5,000.00 in terms for failing to timely respond. *Id.*

Eventually, MISC brought a Motion for Summary Judgment, heard January 8, 2010. In his Response to the Motion for Summary Judgment, Defendant attempted to raise an issue of fact that he had not agreed to pay for fees in his personal capacity, and that the fees were the responsibility of several corporations which had since been dissolved. CP 39. He further made convoluted and baseless argument that he had not in fact signed a fee agreement, and had signed a blank sheet for the formation of a corporation instead. CP 39. He went on to argue that the fee agreement presented to the court was a fraudulent document based upon a copy of the document he received in discovery that did not contain Ms. Shakotko's signature (although it did contain his own signature, which he does not dispute). CP 40-41. These statements were made despite his earlier statements under oath to the court that he had in fact signed the agreement. For example, in a Declaration filed in April, 2008, Mr. Rose testified as follows:

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

CP 173. Additionally, one only needs to look so far as his own Counterclaim, wherein he alleges that he signed the agreement, but that it's legal effect was allegedly misrepresented to him. CP 20.

Notwithstanding Defendant's creative, confusing, but nonetheless baseless arguments, the court granted Plaintiff's Motion. CP 62-63. MISC subsequently moved for entry of Judgment against Mr. Rose, which was ultimately entered on January 29, 2010 in the amount of \$105,198.45. CP 80-83. This appeal followed.

IV. ARGUMENT

A. STANDARD OF REVIEW

On review of an order for summary judgment, the court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wash.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

On an appeal, the appellate court must engage in the same inquiry as the trial court, “. . .construing the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact.” *Dumont v. City of Seattle*, 148 Wn.App. 850, 860-861, 200 P.3d 764 (2009) (citing to *Sellested v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 857, 851 P.2d 716 (1993)). Summary judgment is proper “if reasonable persons could reach but one conclusion from the evidence presented.” *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Here, the court properly concluded that no material issues of fact existed.

B. A CONTRACT BETWEEN THE PARTIES EXISTED

Mr. Rose argues that the court erred when it determined that he was a party to the fee agreement between MISC and himself in his personal capacity. The court did not make an error in this regard, as all elements of a contract were met, establishing liability on the part of Mr. Rose for his breach of that contract.

“[T]he essence of a contract is that it binds the parties who enter into it and, when made, obligates them to perform it, and any failure of any of them to perform constitutes in law, a breach of contract.” *Charboneau v. Peterson*, 1 Wn. 2d 347, 374, 95 P.2d 1043 (1939). “[A]n attorney who gives ordinary care and diligence to matters entrusted to him or her is

entitled to compensation for his or her services” 7 Am. Jur. 2d Attorneys at Law § 254. Thus, Mr. Rose’s failure to pay for the services incurred constitutes a breach of contract.

Mr. Rose’s only argument is that he did not agree to be personally bound. Again, evidence exists to the contrary, simply in the form of his signature on the retainer agreement without reference to any other capacity. It is black letter law of contracts that for enforcement of a contract a plaintiff need only to prove that the defendant signed the contract. Well-settled Washington law provides that “one cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand.” *Nat’l Bank v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973). In fact, “the whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.” *Nat’l Bank*, 81 Wn.2d at 912; see also *Matsko v. Dally*, 49 Wn.2d 370, 373, 301 P.2d 1074 (1956) (“[H]e who seeks recovery on a contract has the burden of proving that the defendant was a party to that contract.”). Here, Mr. Rose does not dispute that it is in fact his signature on the retainer agreement.

Mr. Rose goes on to argue that he did not intend to sign in his personal capacity. This statement is contrary to the vast array of services

provided to Mr. Rose, as evidenced by the fee history, not to mention the fact that the corporations and other entities he alleges are in fact responsible are now dissolved and defunct. CP 198-203. Although the vast majority of the work was for litigation in relation to a real estate purchase in Spokane, MISC also assisted Mr. Rose in attempting to procure financing for that purchase, entity formation, a personal dispute with Titus Will, and a development project known as Terraces by the Bay. See Billing History, CP 114-142. Indeed, MISC was first contacted by Mr. Rose to provide services wholly unrelated to the Spokane litigation involving DARB, as evidenced by the letter evidencing the first contemplated services between the parties. CP 194-195. Mr. Rose also e-mailed Ms. Shakotko on June 27, 2006 asking as to the progress of his “personal stuff.” CP 196.

Mr. Rose unartfully points to the parol evidence rule as a basis for his contention that the case should have been submitted to a jury to determine whether he signed in his personal or representative capacity. Mr. Rose does not understand the purpose of the parol evidence rule. Parol evidence is not admissible if the contract is unambiguous. *Lynch v. Higley*, 8 Wn.App. 903, 911, 510 P.2d 663 (1973). Here, the contract does not contain any ambiguities, and parol evidence is not admissible.

If the court does consider the question of whether Mr. Rose did not sign the agreement in his personal capacity as ambiguous, parol evidence may be appropriate to resolve ambiguity over the representative capacity of a signature. *Puget Sound Nat. Bank v. Selivanoff*, 9 Wn.App. 676, 679, 514 P.2d 175 (1973). In doing so, the court should examine the context and surrounding circumstances of how the contract was entered into, as well as the subsequent conduct of the parties. In *Berg v. Hudesman*, the court outlined the “context” rule in interpretation of the contract as follows:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Thus, the court can look at the parties’ former dealings, as well as their subsequent acts in determining whether Mr. Rose entered into the fee agreement in his representative capacity only. Because the evidence revealed that Mr. Rose consulted with MISC on a number of issues, both personal and for separate entities, and he made personal promises to pay, the trial court safely concluded that Mr. Rose was personally bound and that the fee agreement was not limited to a representative capacity. Thus, even if

parol evidence is considered as to the circumstances surrounding Mr. Rose's signature, the evidence is consistent with the court's determination that he is personally bound for all fees incurred.

If the court must resort to parol evidence to interpret the contract, that does not automatically render summary judgment inappropriate, as Mr. Rose seems to suggest. Summary judgment is proper, if the written contract, viewed in light of the evidence of the parties' objective manifestations of intent, can have only one reasonable meaning. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn.App. 1, 9, 937 P.2d 1143 (1997). Again, when the court views that the contract was signed without reference to Mr. Rose's corporate capacity; that he consulted MISC on several matters; and that the retainer agreement itself contains language that it is meant to apply to all matters handled by the firm, whether in Mr. Rose's capacity as an individual, partnership, corporation, limited liability company or other business, the trial court's decision on Summary Judgment must stand.

C. BREACH OF CONTRACT WAS NOT THE SOLE MEANS FOR THE TRIAL COURT'S FINDING OF LIABILITY IN THIS LAWSUIT

Appellant's brief focuses solely on the issue of breach of contract liability. However, the trial court did not explicitly rule on a breach of contract theory. CP 1-17 (Complaint); CP 64 (Motion for Summary

Judgment); CP 62-63 (Order on Summary Judgment). MISC also sought summary judgment on the grounds of unjust enrichment and promissory estoppel. Further analysis was given to the account stated theory of law. Even should the trial court, or this court, find that the contract was non-binding or lacked signature, Mr. Rose was still liable for failure to pay attorney's fees.

In summary judgment, MISC also sought liability under the theory of account stated. Under the doctrine of account stated, a debtor cannot challenge the amount owed when there has been "a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." *Sunnyside Valley Irrigation Dist., v. Roza Irrigation Dist.*, 124 Wn.2d 312, 877 P.2d 1283 (1994) (quoting 2 Restatement (Second) of Contracts § 282(1), at 386(1981)). The doctrine of account stated operates as an admission of the facts asserted and a promise by the debtor to pay the sums indicated. *Sunnyside Valley Irrigation Dist.*, 124 Wn.2d at 315. Assent to the amounts due and owing is determined by examining the circumstances and acts of the parties, and may be implied. *Id.* 124 Wn.2d at 316. When the doctrine of account stated applies, the debtor is precluded from contesting the amount owed. *Id.*

The facts presented at summary judgment revealed that Mr. Rose was regularly invoiced for the amounts alleged due, and that he was regularly sent notices to pay for the legal services. CP 64. Mr. Rose never disputed the amounts due and owing, and he openly acknowledged the debts by promising to make payment when he could. In his own admission, Mr. Rose stated in email that he would do his “personal best to get some sort of payment but I can not guarantee how much or when, but I will pay you.” CP 11, 106. In a follow up email on October 23, 2006, Defendant again reiterated his promise to pay stating, “I hope all is well with you and your family and I look forward to paying off my debt.” CP 12, 107.

Thus, even in the unlikely event that a binding contract was somehow lacking, it would be an error to overrule the summary judgment, when the court would have reached the same conclusion on an alternative legal theory.

D. FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT REQUIRED ON SUMMARY JUDGMENT

Mr. Rose argues that the trial court erred in failing to enter Findings of Fact and Conclusions of Law. Findings of Fact and Conclusions of Law are not required in summary judgment. CR 52(a)(5)(B) clearly states that findings and conclusions are not necessary

“[o]n decisions of motions under rules 12 or 56 or any other motion, except as provided on rules 41(b)(3) and 55(b)(2).” See also *Bellingham Firefighters, Local 106, Intern. Ass'n of Firefighters v. City of Bellingham*, 15 Wn.App. 662, 663, 551 P.2d 142 (1976).

E. MISC IS ENTITLED TO ATTORNEY’S FEES ON APPEAL

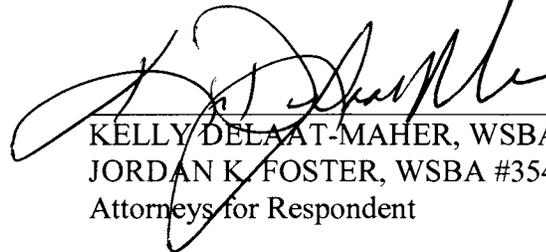
The retainer agreement signed and memorialized by the parties specifically contemplated and provided an award of attorneys’ fees to the prevailing party. Pursuant to that contract provision and RCW 4.84.330, MISC was awarded fees as the prevailing party below. Upon successful defeat of Mr. Rose’s appeal, MISC is entitled to fees on appeal pursuant to RAP 18.1.

V. CONCLUSION

Based on the foregoing, MISC requests that Mr. Rose’s appeal be denied, that the court affirm the trial court’s decision on Summary Judgment, and that the court award fees and costs on appeal.

RESPECTFULLY SUBMITTED this 17 day of September, 2010.

MAHER AHRENS FOSTER SHILLITO PLLC



KELLY DELAAT-MAHER, WSBA #26201
JORDAN K. FOSTER, WSBA #35490
Attorneys for Respondent

CERTIFICATION OF SERVICE

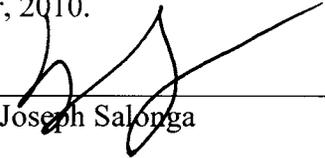
Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the above Response to Motion to Modify to Appellant as follows:

William Rose, Pro Se
11424 44th Ave. East
Tacoma, WA 98446

Service was made by:

- First class mail
- Facsimile
- Legal Messenger
- E-mail to wrose49@gmail.com

DATED this 17th day of September, 2010.



Joseph Salonga

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