NO. 44063-6-II

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

SCOTT A. WALKER and FRED WAGNER
Appellants,

vs.

SCOTT SERVEN and JANE DOE SERVEN,
Respondents

vs.

LYNAE WALKER,
Third Party Defendant

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities

Table of Cases

<u>Statutes and Rules</u>

NATURE OF THE CASE

Four investors bought a dilapidated hotel in Mexico and rehabilitated it. After the real estate crash, two of the investors, the plaintiffs, want the largest investor to refund their money. On summary judgment, the trial court dismissed their claims for money due on a loan, securities fraud and common law fraud. Plaintiffs appeal.

COUNTER-STATEMENT OF THE ISSUES

1. Did Plaintiffs produce sufficient evidence to show that a genuine issue of material fact existed whether their investment in the hotel was really just a loan?

2. Did Plaintiffs produce sufficient evidence to show that a genuine issue of material fact existed whether Serven engaged in securities fraud when Plaintiffs bought the interests of two other investors?

3. Did Plaintiffs produce sufficient evidence to show that a genuine issue of material fact existed whether Serven violated the nine elements of common law fraud when Plaintiffs bought the interests of two other investors?

STATEMENT OF THE CASE

In 2005, while on a trip to Loreto, Mexico, local real estate developer Scott Serven saw a vacant, dilapidated hotel for sale. (CP 344 at 264.) The real estate market was booming and Serven had read that the area was about to take off. (CP 285 at 29-30; 292 at 59; 419 at 21.) Within two months he wrote an offer. (CP 285 at 32.) He wrote it disclosing that the property would be bought by a corporation he intended to form. (CP 286 at 34.) The offer was accepted. It allowed a 60 day contingency period for Mr. Serven to conduct a due diligence of the property, area and services. (CP 286 at 34-35, 40.)

During the contingency, three of Serven's friends and business associates became aware of the project and asked if they could get involved: Scott Griffin, Rick and Doreen Seddon, and Chris and Alicia Johnston. (CP 288 at 42; Serven Supp. CP at 2-3.) Their long term plans were uncertain but they intended to develop the property into an operating hotel regardless of whether they operated it. (CP 356 at 311-12; 465.)

All the parties agreed a Mexican corporation would own the property. Initially, Serven wanted to own the Mexican corporation and, when the project was complete, each of the participants would get shares of the corporation in proportion to their contribution. (CP 289 at 45.) Seddon and Johnston agreed. Griffin, however, wanted to be an owner in the corporation from the outset. Serven agreed to that. (CP 446 at 16.) As a result, when the Mexican corporation was formed, both Serven and Griffin held the shares. (CP 449 at 27-28.) The four made initial contributions in the following percentages: Seddon, 10%; Johnston, 10%; Griffin, 25%; Serven 55 %. (CP 465; Serven Supp. CP at 6.)

Seddon's and Johnston's interests are at issue in this lawsuit. Their interests were memorialized in a memorandum:

> On the day of May 3, 2006, [Rick and Doreen Seddon][Chris and Alicia Johnston] are hereby granted the right to purchase 10% of the Loreto Hotel Mission stock.
> The purchase price is base [sic] on the final cost to purchase and remodel/build the Hotel. Receipt is hereby acknowledged for payment to date of $120,000.00.
> The balance is payable as the expenses occur. The purchase [sic] hereby agrees to pay the share of expenses equal to their respective ownership within five business [sic] of notice. After payment for this stock is received in full, the purchaser shall be at their own expense officially added to the Mexican Corporation "Loreto Hotel Mission".
> Profit and losses shall be distributed to each member of the corporation based on their pro-rati interest in the corporation. Purchase [sic] hereby acknowledges and agrees to that this stock is subject to the management agreement for construction and operation of the hotel (see attached)

(CP 465, 474-78; Appendix.[1]) Though not a model of formality, the agreement is clear: After their initial investment, each put in additional capital in proportion to their initial investment until the project was complete. At the end, they got shares in the Mexican corporation in proportion to their total contributions. (CP 424 at 42-44; 458 at 61.)

It quickly became clear to Seddon and Johnston that they were in beyond their means. (CP 331 at 210; 423 at 38, 425 at 45-47; 426 at 51.) As

1. The record contains only an unsigned copy of this agreement. Seddon and Serven agree it was signed. (CP 423 at 38-39; 465.) Plaintiffs produced no evidence to the contrary, and have not disputed that this reflected the terms of Seddon's and Johnston's interests.

Seddon described it: "I couldn't go to those parties. You know, that was just way above my pay grade." (CP 433 at 77.) They approached Serven to buy their interests, but he declined. (CP 298 at 84; 300 at 90-91.)

Plaintiffs Scott Walker and Fred Wagner were among this group of friends and business associates. (Serven Supp. CP at 3-4.) Over the course of this period, they became aware of the project. Later in 2006, Johnston sold his interest to Walker and Seddon sold his interest to Wagner. (CP 333 at 220; 343 at 260; 344 at 263-64; 358 at 320; 381; 422 at 34, 37; 465; Serven Supp. CP at 4.) Both sales were for the amount of the seller's initial investment: $120,000. (CP 343 at 260; 378; 381; 426 at 49.) Serven was not involved in the sales. (CP 465.)

The project progressed, with all of the owners participating in the development. (CP 337 at 234-35; 458 at 62; 461 at 76.) For example, after demolition occurred and construction began in 2007, Walker and Serven traveled to the site about once a month for five to seven days at a time to manage the construction. (CP 346 at 271-72; 461 at 76; Serven Supp. CP at 7.) In 2008, Serven, Walker and Wagner went to Mexico to interview prospective managers. (Serven Supp. CP at 5.) As additional capital was needed, Walker determined the amount, collected the money from the participants and deposited it into a Washington bank account, then transferred the money to the Mexican corporation. (CP 312 at 139; Serven Supp. CP at 7-8.) He also provided financial reporting. (CP 359 at 321.) To date, Serven has invested $8.5 million, Walker $1.2 million, Wagner $1.35 million and Griffin, $1.6 million.[2] (Serven Supp. CP at 7.)

The hotel opened in late 2008. (CP 327 at 194.) Serven has repeatedly offered to have the shares called for in the initial agreement issued. (CP 470; Serven Supp. CP at 9.) Plaintiffs have declined until Serven agrees to have his shares held by a U.S. corporation. (CP 470.) Plaintiffs have not said what they expect with regard to Griffin's shares.

Serven believes this lawsuit is motivated because the project has produced a loss and he is the major investor. The worldwide decline in the real estate market has lessened the value of the investment. (CP 459-60 at 66-69.) While the hotel is operating, it does not make a profit and experienced negative cash flow for a significant period of time. (CP 459 at 66.) Walker and Wagner want their money back. Despite the clear terms of their investment, they claim their investment was just a loan, and in any event Serven engaged in fraud and other wrongdoing when he would not agree to

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2. Griffin's interest was reduced because, during the project, he was unable to meet his full capital contributions. (CP 319 at 166-67; 345 at 268; 448 at 24.)

have his shares in the Mexican corporation held by a US corporation.[3] They have not sued Griffin, who also refuses to have his shares held by a U.S. corporation. (CP 455 at 51.)

Walker and Wagner asserted four claims: (1) "money due on loan;" (2) "sale of unregistered securities;" (3) "securities fraud;" (4) "common law fraud." (CP 1-7.) In two separate motions, Serven sought summary judgment on all these claims.[4] (CP 515-23; 132-44.) The trial court granted the motions. (CP 127-29; 507-11.) Walker and Wagner appeal. They have abandoned their claim for sale of an unregistered security.

ARGUMENT

1. Standard of review

Appellate courts review summary judgments de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). This court

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3. Only Serven's and Griffin's shares are at issue because the Plaintiffs are free to have their shares held by a US corporation at any time. (CP 206; 248; 456 at 53.) Plaintiffs' complaint is that Serven won't agree to have his shares held by a US corporation.

4. An issue arose in the trial court when Walker and Wagner submitted hundreds of pages of documents and testimony in response to the motions for summary judgment, but failed to direct the court to nearly any of it. (CP 383.) For example, they submitted declarations with about 100 pages of exhibits in opposition to Serven's first motion for summary judgment, then did not cite to a single page of it in their memorandum. (CP 37-42.) In response to Serven's second motion, they submitted declarations with 200 pages of exhibits, including all 332 pages of Serven's deposition, (CP 154 - 361.) Yet, in their response to defendants' first motion, for example, they cited to any evidence just a few times, and then in multiple age blocks. (CP 366-67, 370.) This unfairly burdened the trial court with culling the record to understand its significance, if any.

may affirm on any ground supported by the record. *Washington Federal Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011).

Summary judgment should be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Summary judgment is appropriate if there is no substantial evidence of a material fact to sustain a verdict for the non-moving party. *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 539, 150 P.3d 589 (2007). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

Once a moving party has made a showing that no material facts are in dispute, the party opposing summary judgment must come forward with specific facts in dispute. A nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact or speculation. *Baldwin v. Silver*, 165 Wn. App. 463, 471, 269 P.3d 284 (2011); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Kennedy v. Sea-Land Service, Inc.*, 62 Wn. App. 839, 857, 816 P.2d 75 (1991).

Plaintiff must show a genuine issue of material fact as to each element of his claim. If the plaintiff fails to make out a prima facie case on the essential elements of his claim, summary judgment for the defendant is appropriate because a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

2. Plaintiffs did not produce substantial evidence that Serven promised that a U.S. corporation would hold the shares to the Mexican corporation.

The central premise of Plaintiffs' argument on all of their theories is that Serven promised that the shares in the Mexican corporation would be held by a U.S. corporation and he breached the promise. This, they contend justifies treating their investment as a loan, and allows them to sue for statutory and common law fraud. The record, however, shows that while the investors explored and discussed holding the Mexican shares in a U.S. corporation, there was no promise and ultimately no agreement to do that.

Clearly, holding the shares in a U.S. corporation was not part of the initial agreement. Walker and Wagner joined the project by buying Seddon's and Johnston's interests. They got what Seddon and Johnston owned. Seddon and Johnston had agreed to put in their initial capital, and put in additional capital in the same proportion until the project was complete. At the end of the project, they got shares in the Mexican corporation that owned the property and hotel. (CP 146, 149, 152; 466, 474, 477.) Plaintiffs produced no evidence that any of the other investors expected that a U.S. corporation would hold the shares. Serven denies it. (CP 332 at 214; 354-55 at 304-05.) Griffin said it clearest: "That was never the deal." (CP 458 at 62).

The record shows equally clearly that, despite self-serving statements about their "understanding" (CP 33-34, 374-76, 379-82.), Walker and Wagner never communicated as though Serven had promised the shares would be held by a U.S. corporation when they invested in the project or as a condition to future contributions. Plaintiffs submitted hundreds of pages of documents. Nearly all were written after their initial investment, and most after the project was complete. (CP 154 - 361.) The documents show that while the parties discussed forming a U.S. corporation, it was not part of the original transaction. For example,

> – In an email dated September 29, 2009, Walker asks Serven: "Are we creating or maintaining a company in the US that sits over the top of the Mexican company that owns the hotel asset." (CP 210-11.)
>
> – On April 27, 2010, Wagner writes to attorney Bart Adams saying: Here is an additional summary of financial/corporate items that we will want to resolve with the dilution of Griffin's stock and the creation of stock for walker [sic] and I. *Ideally this would be in a US corporation.* (CP 210 (emphasis added).)
>
> – On May 10, 2010, Wagner writes to Serven saying: "What do you think about what Bart has presented relative to forming a US corporation that would own the hotel assets?

> *I think this concept was put forth last year as a way to dilute Griffins stock and also as a way to create stock for Walker and I without the unknowns and logistic nightmares of doing that in Mexico.* . . . It would appear the US corporation is the best way to do the stock adjustments. Let me hear your thoughts. (CP 214 (emphasis added).)
>
> – On May 11, 2010, attorney Bart Adams writes to Serven, Walker and Wagner noting that Griffin must approve "the concept of having a US corp own the shares in the Mexican Corps." (CP 222.)
>
> – On May 12, 2010, Wagner writes to Serven: "I am in favor of having a US corporation, or LLC, own the hotel assets. I would feel far more comfortable with ownership in a US company." (CP 227.)
>
> – On May 12, 2010, accountant Ed Raisl writes to Walker: "It appears the sentiment is growing to create this US Corp to hold the Mexican Corp stock. . . . Bart is requesting we consider potential tax issues in the creation of the US Corp and the capitalization." (CP 232)
>
> – On September 27, 2010, Wagner tells Serven: "Since October 2008, *after the Griffin default*, it had been discussed and agreed that the way to go was to set up a US Company and manage the affairs of both the US entities and the Mexican entities from here." (CP 308 (emphasis added).)

Their attorney, Bart Adams, testified that as of May, 2010, "whether or not they [the investors] were going to transfer the Mexican ownership to a U. S. corporation was still up in the air." (CP 270 at 79.) Serven testified that Walker did not become interested in a U.S. corporation until later. (See CP 310 at 131.) This evidence shows exploration and consideration of the issue as part of the ongoing business development.[5] (CP 313 at 143.) It does not show a long-standing, prior agreement to form a U.S. corporation to hold the hotel stock.

3. Plaintiffs did not produce substantial evidence of a loan.

Serven's first summary judgment motion addressed Plaintiff's claim of money due on a loan. Serven argued that Plaintiff's had no evidence of a loan. (CP 515-23.) Plaintiffs argued that they should get their money back because Serven would not agree to have his shares in the Mexican corporation held by a U.S. corporation. (CP 40-41.) To the trial court and on appeal, Plaintiffs have provided much hyperbole about their expectations, and how they thought that if they could not agree on the terms for a U.S. based entity their money would be returned. Brief of Appellants at 13-15. But, their hyperbole and expectations notwithstanding, they provided no evidence of any element of a loan.

> The word "loan" imports an advancement of money or other personal property to a person, under a contract or stipulation, express or implied, whereby the person to whom the advancement is made binds himself to repay it at some future time, together with such other sum as may be agreed upon for the use of the money or thing advanced.

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5. Serven testified to the reason for his reluctance: After looking at the issue thoroughly, he concluded that the goal could not be achieved under Mexico law, because 100% of a Mexican corporation cannot be held by a U.S. corporation. He also believed that holding his stock in a U.S. corporation would result in double taxation. (CP 466-67) He also believed that Walker and Wagner wanted a controlling interest in a U.S. corporation despite his majority investment. (CP 315 at 149; 341 at 250.)

State ex rel. O'Connell v. Public Utility Dist. No. 1 of Klickitat County, 79 Wn.2d 237, 281, 484 P.2d 393 (1971); *Hafer v. Spaeth*, 22 Wn.2d 378, 384, 156 P.2d 408, 411 (1945). A borrower's promise to repay loaned funds is an essential element of a loan agreement. *National Bank of Commerce of Seattle v. Preston*, 16 Wn. App. 678, 680, 558 P.2d 1372 (1977).

As noted above, Plaintiffs underlying premise is unsupported: Serven did not and could not promise that the shares of the Mexican corporation would be held by a U.S. corporation. But, in addition, they produced no evidence of essential terms of a loan. Plaintiffs acknowledge they are sophisticated investors (CP 94, 111), yet they produced no evidence of the principal amounts of the loans, to whom the loans were made, who would repay the loans, or the terms of repayment. (See CP 33-34.) They produced no evidence why Serven would have to repay their investments when the property was held by the Mexican corporation which both Serven and Griffin owned. (*Id.*) They produced no evidence of conversations, let alone dates, times or contents of conversations, where a promise was made.

They did not produce the evidence because they did not have it. They did not have it because their investments were not loans. Seddon described the actual arrangement succinctly:

> [W]e had an agreement that I had 10 percent ownership. This wasn't, hey, put your money in and if you don't like how the game is going, you get to just take your cheese back and go

someplace else.

> I'm an owner. Here's our ownership. We're going to build this thing. We're going to have some management costs. We're going to have food costs, all this other stuff, promotions. And, we're hopefully, going to make a profit, you know. And that's how it was.
>
> It was never, you know, Jeez if tomorrow you decide or the market goes down or I get another opportunity that comes along, that . . . I could just call up and get my money back.

(CP 435 at 87-88). That is not a loan.[6]

The authorities Plaintiffs cite are not applicable.[7] They address legal theories (quantum meruit, unjust enrichment, etc.) that Plaintiffs did not plead, and circumstances not present here. In *Yates v. Taylor*, 58 Wn. App. 187, 791 P.2d 924 (1990), the plaintiff paid for half the cost to construct a duplex held in her parent's name. When the duplex was sold, her parents' estate rejected her claim for an interest in the proceeds. In *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 492 P.2d 1058 (1971), and *Losli v. Foster*, 37 Wn.2d 220, 222 P.2d 824 (1950), owners refused to pay contractors for

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6. Importantly, when the participants discussed a loan, they talked clearly in terms of a loan. For example, at one point Griffin was unable to make his payment for his share of expenses. This put a burden on the other participants to come up with the money. Among the alternatives they considered was a loan, to which Griffin would not agree. (CP 309 at 125-28; 448-49 at 25-26; 450 at 30-31.)

7. It is difficult to identify the points for which Plaintiffs cite these authorities because they do not direct the readers to any particular page within the decision.

work they had done on a project.[8] In all three, the plaintiffs contributed to projects owned by others, who then refused to recognize the plaintiff's interest. The court applied equitable remedies of constructive trust and quasi-contract to assure that the plaintiffs received compensation for their work and interests. Here, unlike the plaintiffs in the cited cases, Plaintiffs do not want what they paid for, they want out of the deal. They paid for shares of ownership in a Mexican corporation. Serven has never denied – indeed, he agrees – they are entitled to those shares, and wants them issued. (CP 468, 470; Serven Supp. CP at 9-10.) There is no basis for a quasi-contract or constructive trust even if Plaintiffs had pled the theories.

4. Plaintiffs did not produce substantial evidence of securities fraud.

Plaintiffs, argue that their investment is a security, and that Serven engaged in fraud when he refused to agree to have his shares held by a US

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8. Plaintiffs also cite *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 223 P.3d 513 (2009), as support for the statement "In order to grant summary judgment to the Defendant, the trial court had to determine that there was a complete agreement between Plaintiff and Defendants to have Plaintiffs invest in a Mexican entity." Brief of Appellant at 12. Aside from the statement being wrong – the trial court only had to decide that Plaintiffs failed to create a genuine issue of fact as to whether the parties agreed to a loan – the citation does not support the claim in any way. *16th Street* involved the court's interpretation of an what one party called an option to purchase a condominium, and the other called an agreement to agree on an option. The court decided that the transaction was an agreement to agree because there was not sufficient specificity to form a contract. 153 Wn. App. at 55-56. The court reversed the trial court's order granting specific performance and damages. Here, Plaintiffs' bought the interest of existing investors. All the investors understood the terms of investment.

corporation.[9]

RCW 21.20.010, the Washington State Securities Act, requires two essential elements: (1) a fraudulent or deceitful act committed (2) in connection with the offer, sale or purchase of any security. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). To establish liability under WSSA, the purchaser of a security must prove that the seller made material misrepresentations or omissions about the security in connection with the sale, and the purchaser relied on the misrepresentations or omissions. *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 264, 93 P.3d 919 (2004); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 851, 786 P.2d 285 (1990). Here, Plaintiffs failed to show any of these elements.

First, they failed to show that Serven made the promise. As discussed above, all the initial investors agreed that at the completion of the project they would receive shares in the Mexican corporation. By purchasing Seddon's and Johnston's interests, Walker and Wagner bought into that agreement. Plaintiffs produced nothing indicating they were to be treated differently than the other investors.

Even if they had produced evidence that Serven made the promise,

9. Plaintiffs contend Serven "engaged in several other deceitful acts over the course of the business relationship." Brief of Appellants at 24. They make no effort, however, to link these to the sale of a security.

Plaintiffs could not show that the promise was either material or one on which they relied. A material fact is a fact to which a reasonable person would attach importance in determining his or her choice of action in the transaction in question. *Aspelund v. Olerich*, 56 Wn. App. 477, 481-82, 784 P.2d 179 (1990). The WSSA requires that the material misrepresentation or omission be pre-closing. *Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006). A promise by Serven regarding ownership of the shares could not be material to their decision to invest, or reasonably relied upon, because Plaintiffs knew Serven did not have authority to make the promise unilaterally. There were other investors who also had to consent to make any promise viable. Walker and Wagner do not dispute they knew Griffin also was an investor when they invested their money. They also knew he held shares in the Mexican corporation. His shares cannot be held by a US corporation without his approval. If he does not approve, then Plaintiffs cannot obtain the right they claim – the right to have the shares in the Mexican corporation held by a US corporation. Griffin never approved.[10] (CP 452 at 38; 455 at 51; 456 at 53.) Plaintiffs do not claim Serven ever told

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10. Griffin's testimony on this point could not be clearer:

> Q. . . . At some point was there ever an agreement amongst everybody to do it that way, to transfer it to an entity in the U.S.?
>
> A. No. I never wanted to transfer it to a U.S. corporation, and these two [Walker and Wagner] know that. There was never unanimous agreement.
>
> (CP 455 at 51.)

them he did. Without such knowledge, a promise by Serven regarding ownership of the shares could not be material.

They also failed to show that Serven was a seller. A defendant is liable as a seller under RCW 21.20.430(1) if his acts were a substantial contributive factor in the sales transaction. Considerations important in determining whether conduct is a substantial contributive factor include: (1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant's conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (3) lapse of time. *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 131-32, 744 P.2d 1032 (1987). Here, Walker and Wagner engaged in one-on-one purchases from Seddon and Johnston. There is no evidence Serven was involved in any way.

Plaintiffs also failed to show that the transaction involved a security that falls within the WSSA. A "security" is "any note; ... investment contract; investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor *where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture[.]*" RCW 21.20.005(12) (emphasis added); *Douglass v. Stanger*, 101 Wn. App. 243, 252, 2 P.3d 998 (2000). The essential attribute of a security is an investment premised on a reasonable expectation of profits to be derived *from the entrepreneurial or managerial efforts of others*. *Firth v. Lu*, 103 Wn. App. 267, 273, 12 P.3d 618 (2000)(emphasis added). The efforts of the promoter or a third party must have been fundamentally significant ones that affected the investment's success or failure. *Ito Intern. Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 291, 921 P.2d 566 (1996). Interests like general partnerships are usually not considered securities. *Id.*

Here, Plaintiffs' investment was dependent upon their own efforts. Seddon described the investment as a real estate investment, not a stock market deal. (CP 435 at 85.) Regardless, the evidence shows plainly that, while Serven was more involved because he had the most to lose, Walker and Wagner were actively involved in every step of the project. Walker managed the money. Wagner was involved in the construction. All were involved in major decisions like whether to add a fifth floor to the project and whether to hold the shares in a U.S. corporation. All were actively involved with attorneys, accountants and advisors. Their involvement is not an attribute of a security.

Finally, their actual argument fails on its face. The heart of Plaintiffs' argument is that <u>after</u> they bought into the project, they would have stopped contributing if they had known Serven would not agree to hold his shares in a U.S. corporation. In other words, they contend they would have defaulted on their promise to continue contributing to the project if Serven did not agree with them. What they describe is not fraud or misrepresentation by Serven, it is blackmail by the plaintiffs. Plaintiffs could not be "induced" into fulfilling obligations they already had.

Walker and Wagner bought their interests in 2006. At that time, they agreed they would continue to fund the project in the same proportion as their initial investment. At the end, they would get shares in a Mexican corporation. In the interim, they were actively involved in the development. They produced no evidence that at any time before they joined the project Serven discussed, let alone promised, that the shares would be held by a U.S. entity, or that they could reasonably have relied on such promises even if he did. The trial court correctly dismissed their WSSA claims.

5. Plaintiffs did not produce substantial evidence of common law fraud.

Plaintiffs' common law fraud claims are based on the same facts as their securities fraud claim. They fail for the same reasons. Obviously, the existence of a false statement and reasonable reliance are threshold requirements for a claim of fraud. Because Plaintiffs failed to show either, they failed to show fraud.

However, one additional reason applies, which highlights Plaintiffs' failure to produce evidence. Unlike securities fraud, among the nine essential elements of common law fraud are the speaker's knowledge that his representation is false, and the intent that the receiver act upon the statement. *In re Patterson*, 93 Wn. App. 579, 586, 969 P.2d 1106 (1999); *Kittilson v. Ford*, 93 Wn.2d 223, 225, 608 P.2d 264 (1980). These elements bring the lack of specificity of Plaintiffs' evidence into stark relief. Plaintiffs failed to show any of the specifics of a promise such as when it was made and what was said. The failures highlight Plaintiffs' inability to provide evidence that Serven knew the statements were wrong at the time he made them, or that he believed Walker or Wagner would act differently if he told them the truth. If the trial court did not know when and under what conditions Serven made the statements Plaintiffs attribute to him, it had no basis for deciding Serven intended to deceive them.

Fraud must be shown by clear, cogent and convincing evidence. *Baddeley v. Seek*, 138 Wn. App. 333, 339, 156 P.3d 959 (2007). When weighing summary judgment where this is the standard of proof, the court views the evidence through the prism of that evidentiary burden. It must decide whether a rational trier of fact could find from the evidence in the record that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence. *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d

807 (2008). Plaintiffs failed to produce evidence of a false statement, reasonable reliance and intent, let alone clear and convincing evidence. The trial court correctly granted summary judgment on this issue.

6. Plaintiffs' statute of limitation argument is a red herring.

Plaintiffs argue the trial court erred by holding the statute of limitations barred their claims. The court made no such holding.

In their amended complaint, Plaintiffs alleged that Serven violated the WSSA by issuing unregistered securities. Among the arguments Serven presented in his second motion for summary judgment was that Plaintiff's unregistered securities claim was barred by the applicable statute of limitation. (CP 141.) RCW 21.20.430(4)(b) sets a three year statute of limitations for such claims that begins to run from the date of sale. Because the "security" was issued in 2006 and Plaintiffs did not file suit until 2011, their claims clearly fell outside the statute of limitations. The trial court accepted the argument and noted this among the reasons for dismissing plaintiffs' claims. See *Transcript* (8-31-12) at 21. The court did not indicate the statute of limitation formed the basis for dismissing all of plaintiff's claims.

CONCLUSION

Walker and Wagner bought into a real estate deal for the development of a hotel owned by a Mexican corporation. They agreed they would contribute to the development in proportion to their initial investments. When the project was done, each would get shares in the Mexican corporation. When the investment went bad, they wanted out. As investor Griffin said: That wasn't the deal.

The trial court ruled that Plaintiffs had not produced substantial evidence to support the essential elements of their claims and granted summary judgment. For the reasons set forth above, that ruling was correct. Defendants ask the court to affirm the trial court orders.

Dated this 4th day of March, 2013.

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for DANIEL R. KYLER, WSBA # 12905
Attorneys for Respondents

Appendix

Loreto Mission Hotel
"La Hotel Mision"

On the day of May 3, 2006 Chris and Alicia Johnston are hereby granted the right to purchase 10% of the Loreto Hotel Mission stock.
The purchase price is base on the final cost to purchase and remodel/build the Hotel. Receipt is hereby acknowledged for payment to date of $120,000.00.
The balance is payable as the expenses occur. The purchase hereby agrees to pay the share of expenses equal to their respective ownership within five business of notice. After payment for this stock is received in full, the purchaser shall be at their own expense officially added to the Mexican corporation "Loreto Hotel Mission'.
Profit and loses shall be distributed to each member of the corporation based on their pro-rati interest in the corporation.
Purchase hereby acknowledges and agrees to that this stock is subject to the management agreement for construction and operation of the hotel (see attached)

Loreto Mission Hotel
"La Hotel Mision"

On the day of May 3, 2006 Rick and Doreen Seddon are hereby granted the right to purchase 10% of the Loreto Hotel Mission stock.
The purchase price is base on the final cost to purchase and remodel/build the Hotel. Receipt is hereby acknowledged for payment to date of $120,000.00.
The balance is payable as the expenses occur. The purchase hereby agrees to pay the share of expenses equal to their respective ownership within five business of notice. After payment for this stock is received in full, the purchaser shall be at their own expense officially added to the Mexican corporation "Loreto Hotel Mission'. Profit and loses shall be distributed to each member of the corporation based on their pro-rati interest in the corporation. Purchase hereby acknowledges and agrees to that this stock is subject to the management agreement for construction and operation of the hotel (see attached)

FILED
COURT OF APPEALS
DIVISION II
2013 MAR -4 PM 4:54
STATE OF WASHINGTON
BY ______
DEPUTY

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

SCOTT A. WALKER and FRED WAGNER Appellants, vs. SCOTT SERVEN and JANE DOE SERVEN, Respondents/Third Party Plaintiffs vs. LYNAE WALKER, Third Party Defendant	NO. 44063-6-II CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 4th day of March, 2013, I did personally deliver the Brief of Respondent and this Certificate to the following:

Gary H. Branfeld
SMITH ALLING, P.S.
1102 Broadway Plaza, #403
Tacoma, WA 98402

Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

I declare and state under the penalty of perjury under the laws of the

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

State of Washington that the foregoing is true and correct.

Signed this 4th day of March, 2013, at Tacoma, Washington.

By : ______________________
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Respondents Serven

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