

No. 47576-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BASIL D. BENA,

Respondent/Cross-Appellant,

v.

NATHAN B. SCHLEICHER and MARY L. SCHLEICHER,
husband and wife,

Appellants/Cross-Respondents.

- - - -

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY
THE HONORABLE CHRISTOPHER MELLY

REPLY BRIEF OF CROSS-APPELLANT

SMITH GOODFRIEND, P.S.

By: Valerie A. Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondent/Cross-Appellant

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I. CROSS-REPLY ARGUMENT

A. **Bena is entitled to attorney fees as the prevailing party under the fee provisions of the note and mortgage.**

The trial court erred in too narrowly interpreting the provisions of the promissory note and real estate mortgage, which directed an award of attorney fees if a suit is commenced to collect the note or if a party fails to perform under the mortgage, to deny Bena attorney fees. (CP 106, *purporting to interpret* Exs. 2, 3) The trial court properly concluded that while Bena's release was valid as to the Schleichers' lender – affirming that the note and mortgage in favor of Bena would be second to the financing provided by the lender – the release did not change the obligation between the parties. (Conclusion of Law (CL) 3(a), CP 28-29) But the trial court erred in concluding that Bena could not recover attorney fees under the fee provisions of the note and mortgage because the Schleichers were not yet in default of the note and Bena was not seeking “to collect” on the note by filing suit. (CP 106)

Under the note, a prevailing party is entitled to reasonable attorney's fees in case “suit or action is commenced to collect this note or any portion thereof.” (Ex. 3) Under the mortgage, a prevailing party is entitled to reasonable attorney's fees if there is a

default on the note or “in case of failure to perform any of the foregoing covenants,” including the Schleicher’s promise of a mortgage against Half Mile to Bena “to secure the payment of \$100,000,” according to the terms and conditions of the note. (Ex. 2)

As the trial court concluded, the note and mortgage in favor of Bena and against the Schleichers remained valid between the parties, regardless of the earlier executed release. (CL 3(a), CP 28-29) But because the Schleichers sought to disavow any obligation to Bena under the note and mortgage, Bena was required to sue. Bena’s suit to reinstate the note and mortgage that the Schleichers sought to avoid were necessary actions to both ensure collection on the note and to enforce the Schleichers’ obligation to secure their obligation under the note by executing a mortgage on Half Mile. An award of attorney fees was thus warranted to Bena for prevailing in his action.

A party’s action that is “necessary for it to succeed on the collection” of a debt warrants an award of attorney fees under a contract that provides for attorney fees as part of the “costs of collection.” *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 237, ¶ 6, 287 P.3d 606 (2012) (*discussed at* Cross-App. Br. 43-44). But for Bena’s suit seeking an order requiring the Schleichers to

affirmatively reestablish their obligation to Bena under the note and mortgage, Bena would be unable to collect on the amounts owed under the note and mortgage that the trial court reduced to judgment. (CP 21, 32) In fact, by entering a judgment in favor of Bena for \$100,000, consistent with the terms of the note, it is evident that the trial court intended that Bena “collect” on the note. (See CP 8)

This case is unlike *Hindquarter Corp. v. Property Development Corp.*, 95 Wn.2d 809, 631 P.2d 923 (1981) relied on by the Schleichers to claim attorney fees are not warranted because Bena’s suit was not “to collect” and they were not in “default” of the mortgage. (Cross-Resp. Br. 23) In *Hindquarter*, the parties signed a lease that provided for an award of attorney fees if an action was sought to “cur[e] a default[]” of the lease. The tenant sued the landlord for refusing to allow the tenant to exercise a lease renewal option. In its defense, the landlord claimed that it was not required to renew the lease when the tenant had a history of habitually being late making its lease payments. The Supreme Court affirmed the trial court’s decision dismissing the tenant’s action, but held that the landlord could not be awarded attorney fees to the landlord for

litigating the renewal issue because it was unrelated to “curing defaults” of the lease. *Hindquarter*, 95 Wn.2d at 815.

Here, beyond assuring his ability to collect on the note, Bena was required to bring suit to ensure that the Schleichers secured the note as is required under the mortgage. The mortgage states: “Nathan Bruce Schleicher and Mary Louise Schleicher mortgage [the Half Mile property] to Basil D. Bena to secure the payment of One Hundred Thousand Dollars (\$100,000) together with interest thereon at a rate of zero (0) percent per annum from date until paid, according to the terms and conditions of a certain promissory note.” (Ex. 2) The mortgage also states that “in the case of failure to perform any of the foregoing covenants, [] then this mortgage may at once be foreclosed [], and in such foreclosure suit there shall be included in the judgment a reasonable sum as attorneys’ fees.” (Ex. 3) Because the Schleichers refused to mortgage Half Mile in favor of Bena as is required under the mortgage, Bena was required to bring suit. As a result, the Schleichers should be required to pay Bena his attorney fees.

The guiding principle in determining whether attorney fees should be awarded under a contractual attorney fee provision is whether “the action arose out of the contract and if the contract is

central to the dispute.” *Brown v. Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001). In *Brown*, for instance, the buyer purchased a home from seller under a purchase and sale agreement that allowed for an award of attorney fees to the prevailing party in a “suit concerning this Agreement.” After moving in, the buyer found several defects including water leaks and a second story addition that was built without permits making the house structurally unsound. The buyer sued seller for misrepresentation and prevailed.

The trial court limited buyer’s attorney fees to only those incurred related to misrepresentations about the septic system. Division One reversed, holding that buyer was entitled to *all* of her attorney fees because the “action for misrepresentation arises out of the parties’ agreement to transfer ownership of [seller]’s house to [buyer]. Moreover, the purchase and sale agreement was central to her claims.” *Brown*, 109 Wn. App. at 59 (citations omitted).

Here, the trial court properly concluded that the Schleichers remain obligated on the original note and mortgage they executed. However, the Schleichers’ refusal to acknowledge their obligation, including their agreement to secure their obligation on the note with a mortgage on Half Mile, was the cause for Bena’s suit. Thus both the note and mortgage were “central” to the dispute between the

parties, and Bena was entitled to fees as the prevailing party. The trial court erred in refusing to award attorney fees under the provisions of the note and mortgage.

B. Bena is entitled to his fees on appeal under the note and mortgage.

The note and mortgage contain fee provisions that entitles the prevailing party to attorney fees. (Exs. 2, 3) This Court should award Bena attorney fees under the note and mortgage for having to defend this appeal and pursue the cross appeal. RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

II. CONCLUSION

This Court should affirm the trial court's orders enforcing the parties' agreement, reinstating the note and mortgage, and entering judgment in favor of Bena. This Court should, however, remand for an award of attorney fees in the trial court, and also award attorney fees to Bena on appeal.

Dated this 14th day of June, 2016.

SMITH GOODFRIEND, P.S.

By: 

Valerie A. Villacin, WSBA No. 34515

Attorneys for Respondent/Cross-Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 14, 2016, I arranged for service of the foregoing Reply Brief of Cross-Appellant, to the court and to the parties to this action as follows:

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Court of Appeals - Division I
One Union Square
600 University Street
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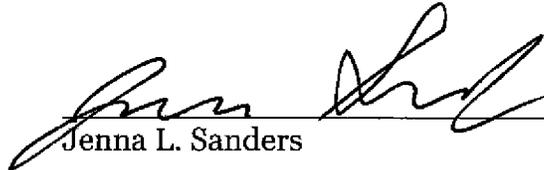
Craig L Miller
Craig L. Miller P.S.
711 E Front St Ste A
Port Angeles WA 98362
cmiller@craiglmiller.com

Facsimile
 Messenger
 U.S. Mail
 E-Mail

David H Neupert
Platt Irwin Law Firm
403 South Peabody
Port Angeles WA 98362
dhneupert@plattirwin.com

Facsimile
 Messenger
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Jenna L. Sanders

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Sender Name: Jenna Sanders - Email: jenna@washingtonappeals.com

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cmiller@craiglmiller.com

dhneupert@plattirwin.com

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