

FILED
Court of Appeals
Division II
State of Washington
1/21/2020 2:59 PM

NO. 53636-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

OTTO GUARDADO,

Appellant,

vs.

JAMES KIMBALL dba REALTY PRO, INC.,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff brought two claims against Defendant James Kimball dba Realty Pro (“Realty Pro”): “Unjust Enrichment” and “Specific Restitution” under RAP 12.8. Each claim requires proof that: (a) Plaintiff conferred a benefit on Realty Pro; (b) Realty Pro is a proper target for Plaintiff’s claims; and (c) it would be “unjust” to allow Realty Pro to retain the benefit.

Under the undisputed facts, there is no genuine issue on any of these elements: (a) the \$10,000 commission paid to Realty Pro came from funds provided by Defendants Taylor, not Plaintiff; (b) Realty Pro is not a proper target because it was not a party to the underlying judgment reversed on appeal; and (c) Realty Pro earned the commission by expending significant time and energy to comply with the special master’s directions and complete the sale of Plaintiff’s home.

Because the facts are undisputed and Plaintiff lacks sufficient evidence to create a genuine issue on any of the elements identified above, the trial court’s award of summary judgment should be affirmed.

II. ASSIGNMENTS OF ERROR

Plaintiff’s Opening Brief identifies four “assignments of error,” but each “assignment” is actually a *reason* why Plaintiff believes the trial court should not have granted summary judgment in Realty Pro’s favor. It

appears that Plaintiff is attempting to assert a single assignment of error: that the trial court should not have granted summary judgment in Realty Pro's favor. Realty Pro disagrees with Plaintiff's "assignments" and respectfully submits that the trial court did not commit any error.

III. STATEMENT OF ISSUES

This appeal presents three issues, as follows:

1. Has Plaintiff presented sufficient evidence to create a genuine issue of material fact as to whether he conferred a benefit on Realty Pro?
2. Is Realty Pro a proper target for Plaintiff's claims when Realty Pro was not a party to the underlying judgment?
3. Has Plaintiff presented sufficient evidence to create a genuine issue of material fact as to whether Realty Pro earned its commission?

An answer of "no" to any of these questions means that the award of summary judgment was proper. As shown below, all three questions should be answered in the negative.

IV. STATEMENT OF THE CASE

This dispute arose as a result of Plaintiff's repeated failure to make mortgage payments on the home he retained following a divorce. This failure to make payments was harming Mrs. Guardado's credit, which

prompted the necessity for court action. *Guardado v. Guardado*, 200 Wn. App. 237, 240, 402 P.3d 357 (2017) (“Otto’s failure to make mortgage payments adversely impacted Diana’s credit.”). That is the context – Plaintiff’s repeated failure to make mortgage payments – in which the judgement ordering the sale of the home was entered.

With this context in mind, Realty Pro agrees that, for the most part, Plaintiff’s Opening Brief accurately summarizes the basic facts related to this matter. While Plaintiff’s citations to the Clerk’s Papers (CP) often lead to allegations or arguments rather than to actual evidence, Realty Pro only disputes five of Plaintiff’s factual assertions, as follows:

First, on page three of his Opening Brief, Plaintiff states that Realty Pro’s agent, Rick Shurtliff, “allegedly signed a contract with the special master, ostensibly for [Plaintiff]’s benefit.” Plaintiff proceeds to assert that, therefore, Realty Pro owed statutory duties to Plaintiff as the seller. Realty Pro does not dispute that it was hired by the special master to sell Plaintiff’s home but points out that it was clearly *not* hired for Plaintiff’s benefit. Rather, Realty Pro was hired for the specific purpose of taking action – selling Plaintiff’s home – that was court-directed and *against* Plaintiff’s wishes. To suggest that Realty Pro was statutorily prohibited from taking this action makes no logical or legal sense in this context.

Second, on page four of his Opening Brief, Plaintiff states that “[o]n August 25, 2016, the trial court held Otto on [*sic*] contempt based on Mr. Shurtliff’s declaration. CP 202.” However, the Order does not identify the basis for the trial court’s decision, so it may not have been “based on Mr. Shurtliff’s declaration.” Among other possibilities, the trial court may have been relying on statements by the special master.

Third, on page four of his Opening Brief, Plaintiff states that the approximate value of the home at the time of sale “was \$325,000-\$335,000.” The record shows that Mr. Shurtliff, a realtor, had opined that “the Property would sell for \$289,000 within a reasonable time.” CP 200.

Fourth, still on page four of his Opening Brief, Plaintiff states that “Mr. Shurtliff emailed Diana’s attorney on October 13 and 27, 2016, expressed concerns that the liabilities on the house exceeded the court’s fixed price of \$240,000, and asked for his advice. CP 82-83, CP 190.” It should be noted that the emails were sent to the special master in addition to the attorney for Diana Guardado.

Fifth, on page five of the Opening Brief, Plaintiff asserts that “[p]ost-sale, the court held Otto in contempt. CP142-143.” The referenced contempt order directed the special master “to sign the deed and all closing documents for the sale of the Property,” CP 143, so it appears this order was meant to effectuate the sale and could not be “post-sale.”

The remaining facts asserted in Plaintiff's Statement of the Case appear accurate and are not disputed by Realty Pro. However, there are additional facts that merit consideration.

Initially, it should be noted that the judgment ordering the sale of the home was reversed due to a lack of jurisdiction, not because of any substantive issue. *Guardado*, 200 Wn. App. at 239 (“... the trial court erred in granting Diana’s CR 60(b)(11) motion because it did not have authority under CR 60(e)(1) to modify the dissolution decree in the separate breach of contract action.”).

The following timeline provides further details to fill-in some gaps in Plaintiff's account of the facts:

- On or about June 2, 2016, the trial court appointed attorney Vern McCray as special master to carry out the home sale. *See* CP 180. Shortly thereafter, the special master hired Realty Pro to find a buyer and coordinate the sale. *Id.*
- On June 6, 2016, Mr. Shurtliff of Realty Pro sent an email to the special master documenting that he “went past this residence approximately 15 times over the weekend,” left his card, knocked on the door, and spoke to neighbors in an effort to establish contact with Plaintiff. CP 190.

- On June 7, 2016, Mr. Shurtliff sent another email to the special master confirming that he “installed the real estate sign,” met with Mr. Guardado, conducted a walk-through and scheduled a follow-up meeting with Mr. Guardado to discuss, and reach an agreement upon, “a showing method.” CP 191.
- On June 13, 2016, Mr. Shurtliff emailed the special master to inform him that he “met with Otto last night” and “gave him a list of things that need to be addressed before his home brings top dollar.” The email also documents receipt of a listing agreement from the special master, and notes that Mr. Shurtliff had a follow-up meeting scheduled with Mr. Guardado for June 20, 2016, “to get a key and showing instructions.” CP 193.
- On June 17, 2016, Mr. Guardado emailed Mr. Shurtliff, stating “Upon advisement of my attorney, I’ve been directed to let you know that the matter of the stay is before the WA Court of Appeals and for you to not take any action regarding the home sale at this time.” CP 195.¹

¹ At various times, Plaintiff has accused Mr. Shurtliff of failing to show for a meeting planned for June 20, 2016. This accusation ignores Plaintiff’s email of June 17, 2016, which effectively cancelled any previously-scheduled meeting and made clear that Plaintiff was not going to cooperate with the sale.

- On July 10, 2016, Mr. Shurtliff sent an email to the special master stating that he spoke with Mr. Guardado, who “is in denial that the home needs to be sold and states that it would never get thru title with him contesting the sale. When I ask for a key and showing instructions he advises me to call his attorney...”. CP 197.
- In response, the special master instructed: “Put a sign in the yard and sell for the best price possible. You have my signature on the listing agreement and I intend to follow the direction of the court.”
Id.
- On August 5, 2016, Mr. Shurtliff signed a Declaration confirming the basic facts set forth above and concluding “that the Property would sell for \$289,000 within a reasonable time, and it could easily be sold to an investor, without them even seeing it, for around \$250,000.” CP 199-200.
- On August 25, 2016, the Skamania County Superior Court signed an “Order on Contempt” directing that “[t]he sale price of Respondent’s property shall be reduced to \$240,000.00 to allow for quick sale.” CP 202.
- On August 29, 2016, the special master ordered Mr. Shurtliff to provide copies of all relevant court pleadings to any potential buyers. CP 146.

- On October 27, 2016, Mr. Shurtliff sent an email to the special master and Mrs. Guardado's attorney stating that he had calculated the amounts owing against the house and had created a list of the same. CP 205-06. Mr. Shurtliff was trying to determine how the sale could work with so much owing on the house and wrote: "I am also willing to go talk to Otto to see if he will reconsider and co-operate with me to get more money...". *Id.*
- On November 17, 2016, the trial court signed an Order on Contempt providing, among other things, that the special master shall "sign the deed and all closing documents for the sale of the Property" and "[t]he special master and the realtor shall be paid out of the proceeds of the sale." CP 142-43.
- On November 18, 2016, the sale of the home to the Taylor defendants closed for \$240,000. CP 38. The money to fund the transaction came from the Taylors. CP 35, 38. Realty Pro was paid a \$10,000 commission with that money. CP 39, 143.

Plaintiff's Complaint in this action asserted two claims against Realty Pro, as follows:

“A. CLAIM FOR UNJUST ENRICHMENT

3.1 The Defendants were unjustly enriched by purchasing Guardado’s home at a significant discount in a private transaction, and by receiving sales commissions, absent of any existing court authority.

B. CLAIM FOR SPECIFIC RESTITUTION

3.2 The Defendants were given constructive notice of an appeal and refuse to recognize the authority of the Court of Appeals decision and the subsequent vacation of the trial court orders, consequently denying the Plaintiff of possession of specific property under RAP 12.8 and other authority.”

CP 9-10. While the Complaint alleges that Defendants Taylor “were not buyers in good faith” because “they took constructive receipt of the knowledge that Guardado’s home was under litigation,” CP 9, the Complaint does not make any similar allegations of bad faith against Realty Pro. Rather, the Complaint merely alleges that Mr. Guardado “demanded a refund of the \$10,000 fees paid to Realty Pro in sales fees,” and Realty Pro refused. *Id.* Accordingly, Realty Pro moved to dismiss Plaintiff’s Complaint on the basis that it failed to state a claim against Realty Pro upon which relief could be granted.

After the trial court granted Realty Pro’s Motion to Dismiss, CP 216-217, Plaintiff moved for reconsideration, arguing that the motion should have been treated as a motion for summary judgment. CP 218.

In an Order dated June 26, 2019, Judge Daniel L. Stahnke addressed the Motion for Reconsideration, writing:

“Plaintiff Guardado’s motion for reconsideration of the dismissal of Defendant Kimball d/b/a Realty Pro Inc. argues an incorrect analysis was conducted on the motion. Whether presented in 12(b) or CR 56 the outcome is the same. The real estate agent was hired, competed their task and was entitled to be compensated from the proceeds.”

CP 246. Plaintiff’s appeal followed.

V. ARGUMENT

A. Standard of review

Realty Pro agrees that, as stated by the Washington Supreme Court, “[t]he standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The trial court was correct to grant summary judgment “if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Id.* at 300-301.

B. This Court should affirm the award of summary judgment because Plaintiff lacks sufficient evidence to support a restitution claim under Rule of Appellate Procedure 12.8 or a common-law unjust enrichment claim.

Plaintiff's two claims against Realty Pro are similar in nature, have similar legal requirements, and fail as a matter of law for similar reasons.

Rule of Appellate Procedure 12.8 provides:

“If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.”

Meanwhile, a claim for unjust enrichment requires proof of three elements: “(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.” *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008).

Both claims are equitable in nature and depend, ultimately, on a weighing of the facts and circumstances to determine whether restitution should be required. This similarity between the two claims is shown, in part, by the Washington Supreme Court's reliance on the *Restatement of*

Restitution for purposes of analyzing claims under RAP 12.8. *See Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 591, 159 P.3d 407 (2007) (“In terms of generally accepted common law principles, this court has indicated that *Restatement of Restitution § 74* is an appropriate source to be used in construing RAP 12.8”). Due to the similarity of the claims, they will be analyzed as one-and-the-same during the remainder of this brief, except as noted.

As will be shown below, both claims fail for the same three reasons: (1) Plaintiff did not confer a benefit on Realty Pro; (2) Realty Pro is not a proper target for a restitution claim; and (3) retention of the commission is not unjust, as Realty Pro acted under court order and earned its commission. If this Court agrees with Realty Pro on *any* of these three points, then the award of summary judgment should be affirmed.

1. Plaintiff's claims fail as a matter of law because Plaintiff did not confer any benefit on Realty Pro.

The first requirement under either a common law unjust enrichment claim, or a restitution claim under RAP 12.8, is that the Plaintiff conferred a benefit upon the Defendant. Here, it is undisputed that Realty Pro received a \$10,000 commission for its efforts to find a buyer and close the sale of Plaintiff's home. However, the commission was paid with money from the purchase price of the home. That money

was paid by Defendants Taylor, CP 35; CP 143², so they are the ones that conferred a benefit on Realty Pro, not Plaintiff.

Plaintiff points out that the commission was taken from the sale proceeds, meaning it was charged to Plaintiff's side of the ledger and Plaintiff received less money from the sale than he would have received had no commission been paid. However, this is just a record-keeping formality, and it is clear the actual money came from the Taylors. Plaintiff did not contribute one penny towards the sale, let alone cooperate with the same, so he cannot rightfully claim that he conferred any benefit on Realty Pro. In fact, the impetus for this entire dispute was Plaintiff's *failure* to make mortgage payments on the house.

Another way to look at this is to consider the purpose of RAP 12.8, which is to return the parties to their pre-judgment positions. *See, e.g., Arzola v. Name Intelligence, Inc.*, 188 Wn. App. 588, 593, 355 P.3d 286 (2015) ("Under RAP 12.8 and section 74 of the Restatement of Restitution, [defendants] are entitled to be restored to their original positions.").

If the goal is to "unwind" the sale and return the parties to their pre-sale condition³, then Plaintiff would recover either the property or the

² The Superior Court's November 17, 2016 Order on Contempt provides: "The special master and the realtor shall be paid out of the proceeds of the sale."

value thereof (minus encumbrances) at the time of sale, and the Taylors would recover the money they spent. Under no scenario would Plaintiff recover the commission paid to Realty Pro out of the Taylors' funds. And, Plaintiff certainly cannot recover the property (or its value), as he seeks⁴, plus the commission.

In summary, because Plaintiff never paid the commission it cannot be "returned" to him. Accordingly, both of Plaintiff's claims are fatally flawed, and the award of summary judgment should be affirmed.

2. Realty Pro is not a proper target for a restitution claim.

Because Realty Pro was not a party to the underlying judgment requiring the sale of Plaintiff's home, Realty Pro is not a proper target for Plaintiff's claims. Washington's Supreme Court has explained:

"Under RAP 12.8, a trial court judgment debtor who has satisfied the judgment against him may be entitled to restitution following a successful appeal. However, such restitution is warranted only in 'appropriate circumstances.' In accordance with the common law of restitution, as set forth in the *Restatement of Restitution* § 74 (1937), ***such circumstances do not include restitution from nonparties to the judgment***, as was sought in this case."

³ The Skamania County Superior Court's order which vacated the judgment also provided: "The Court shall afford further relief necessary **to place the parties in the position they occupied prior to trial.**" CP 27 (emphasis added).

⁴ "As he has stated before, he wants his house back." CP 124.

Ehsani, 160 Wn.2d at 588 (emphasis added). Because Realty Pro was not a party to the judgment, it cannot be subject to Plaintiff's restitution claim. *See id.* at 595 ("The McCulloughs were the judgment creditors in this case; they were the beneficiaries of the trial court's error. Thus, it is the McCulloughs, not Cullen, who may be liable to Ehsani in restitution.").

Plaintiff makes four arguments in an effort to extend the reach of his restitution claims. As explained below, all four arguments fail.

First, Plaintiff argues that restitution from Realty Pro is proper because the trial court lacked jurisdiction to either (a) enter the judgment requiring the sale of Plaintiff's home; or (b) appoint a special master for purposes of accomplishing the sale. Because there was no authority to enter the judgment or appoint the special master, Plaintiff argues, Realty Pro also acted without authority and, therefore, should be compelled to return any benefits it obtained.

However, the trial court's judgment was reversed for a jurisdictional issue of first impression, *see* Opening Brief, p. 1 (so conceding), and it is undisputed that there was nothing on the face of that judgment which should have led Realty Pro to question its validity.

Similarly, Plaintiff argues that Realty Pro should not have agreed to act on behalf of the court when it knew the underlying judgment was on

appeal. However, a similar argument was raised in *Ehsani* and was squarely rejected by the Supreme Court:

“As noted above, RAP 7.2(c)⁵ expressly authorizes judgment creditors to execute their judgments. Yet, this authority would essentially be rendered meaningless if attorneys involved in the execution process were required to assume the type of liability *Ehsani* seeks to impose: Few attorneys would be willing to provide the necessary assistance to their clients to distribute judgment funds placed in the attorney’s trust account when to do so would require the attorney to assume personal liability for the entire judgment amount.”

Ehsani, 160 Wn.2d at 601. While this is not the precise situation faced here, it is similar in that the trial court’s judgment remained valid during the pendency of the appeal, and Realty Pro was hired by a special master of the trial court for the specific purpose of completing the sale of Plaintiff’s home. Realty Pro’s task – as assigned by the trial court – was to sell the home; not to evaluate whether or not the underlying judgment would likely be upheld on appeal.

The question must be asked: Who would be willing to serve as an agent of the court or a special master in future matters if this Court holds that Realty Pro must return its commission, even though it diligently

⁵ RAP 7.2(c) provides: “In a civil case, except to the extent enforcement of a judgment or decision has been stayed as provided in rule 8.1 or 8.3, the trial court has authority to enforce any decision of the trial court and a party may execute on any judgment of the trial court. ***Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rule 8.1 or 8.3.***” (emphasis added).

carried out its assigned task, simply because of an error in the underlying judgment that was outside of Realty Pro's control?

Second, Plaintiff argues that Realty Pro is a proper target for a restitution claim because Realty Pro owed him the regular duties of a real estate agent, including the duty to 'tak[e] no action that is adverse or detrimental to the seller's interest' (RCW 18.86.040(1)(a))." Opening Brief, p. 3. However, this argument makes no logical sense in the context of this case. It is undisputed that Plaintiff opposed the sale of his home. Thus, Realty Pro was hired by the Court (via the special master) to take action known to be adverse to Plaintiff's desires and interests. If Plaintiff's argument were valid, then a trial court could never use the assistance of a real estate agent for the purpose of completing a home sale opposed by one of the parties to a divorce.

Third, Plaintiff contends that Realty Pro is a proper target if the court evaluates his claims under the Restatement of Restitution §73, rather than the Restatement of Restitution §74. However, the Supreme Court was clear in *Ehsani*, 160 Wn.2d at 591, that §74 is the proper guide for the analysis.

Nevertheless, Plaintiff's restitution claims still fail *even if* we use §73 as the guide. Specifically, Comment "c" to §73 is titled "*Restitution from whom*," and provides in the first sentence: "There can be recovery

from the judgment or attaching creditor if payment has been made to him.” CP 299. The comment continues:

“If, instead of payment made on demand, there has been a seizure of property under a void judgment or process, there can be recovery against the creditor, the purchaser, or the officer subject to the privilege of the latter as stated in Subsection (2).”

CP 300. Here, Realty Pro is not “the creditor, the purchaser, or [an] officer.” While Realty Pro was appointed by an officer of the court (the special master), Realty Pro is not an “officer” itself and, therefore, is not a proper target for a restitution claim.

Fourth, and finally, Plaintiff argues that Realty Pro is a proper target for restitution because Realty Pro agent Rick Shurtliff submitted a declaration to the court, allegedly in bad faith and for purposes of encouraging the sale. This argument fails for at least five reasons: (1) in stating that “nonparties to the judgment” are not proper targets, the *Ehsani* Court did not make any exception for situations where there are allegations that the nonparty acted in bad faith; (2) the declaration was submitted *after* the Court had already ordered the sale of the home, so it could not have been the basis for the forced sale⁶; (3) because substantial

⁶ Plaintiff may respond that while Mr. Shurtliff’s declaration is not responsible for the forced sale, it is responsible for the fact that the court ordered the sale at the reduced price of \$240,000. However, not only does the record fail to indicate the reasons for the trial court’s August 25, 2016, order, we also know that the court mandated a sales price of \$240,000, CP 202, while Mr. Shurtliff’s

evidence in the record *supports* the statements in Mr. Shurtliff's declaration⁷, there is no indication that the declaration represented anything less than Mr. Shurtliff's honest recollection of the events which had transpired⁸; (4) Plaintiff should be barred from relying on an argument that is contrary to responses he provided in discovery⁹; and, most

declaration suggested a sales price of \$289,000 or, possibly, \$250,000. CP 199-200. Thus, we know that the court must have been relying on something beyond Mr. Shurtliff's declaration in setting the sale price at \$240,000.

⁷ While the dates used in Mr. Shurtliff's declaration appear to be erroneous (and immaterial), the substantive statements (*i.e.*, that Plaintiff was not cooperating with the sale) are supported. For example, please refer to, *e.g.*, CP 189 (email from Mr. Shurtliff to the special master noting that Plaintiff "would not make time for me to meet with him until next Monday the 13th... He says that the case is in appeals and he wants to wait for that verdict.... He is very congenial but at the same time not overly co-operative."); CP 190 (email from Mr. Shurtliff to the special master: "I would appreciate if [Plaintiff] would co-operate..."); CP 191 (email from Mr. Shurtliff to the special master: "He would not agree to a showing method..."); CP 195 (email from Mr. Guardado directs Mr. Shurtliff "to not take any action regarding the home sale at this time."); CP 197 (email from Mr. Shurtliff to the special master: "[Plaintiff] is in denial that the home needs to be sold and states that it would never get thru title with him contesting the sale. When I ask for a key and showing instructions he advises me to call his attorney...").

⁸ Plaintiff wants this Court to imply an improper motive on Mr. Shurtliff, but it is clear from the record that Mr. Shurtliff was trying to work with Plaintiff and was sensitive to his concerns. *See, e.g.*, CP 205 (email from Mr. Shurtliff to the special master indicated concern that the sale price may not be high enough to "pay off the mortgage and liens" and stating: "I am also willing to go back to [Plaintiff] to see if he will reconsider and co-operate with me to get more money...").

⁹ Realty Pro's Interrogatory No. 5 asked Plaintiff to "[s]tate any facts supporting your claim that the sales fees or commission paid to James Kimball or Realty Pro were unjust or unearned." Plaintiff responded: "Order was voided by the court of appeals. No order exists that gives authority for special master to conduct transaction with Realty Pro, nor of Realty Pro to keep commissions from transaction. Realty Pro never entered a sales agreement with Plaintiff Guardado." *See* CP 211. There was no mention of an allegedly improper

importantly, (5) Realty Pro is absolutely immune from any claim premised on the witness declaration submitted.

As to this last point, it is undisputed that Mr. Shurtliff's declaration was submitted in the context of litigation. Therefore, he is "absolutely immune" from claims based on the declaration. *See, e.g., Bruce v. Byrne-Stevens & Assocs. Eng'rs*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989) ("As a general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony."); *Dexter v. Health District*, 76 Wn. App. 372, 376, 884 P.2d 1353 (1994) ("**All witnesses** are immune from **all claims** arising out of **all testimony**.") (emphasis added). Accordingly, Plaintiff cannot use Mr. Shurtliff's declaration to support his claims.

3. Realty Pro earned its commission, so there is no "unjust" enrichment to support Plaintiff's claims.

Even assuming that Plaintiff conferred a benefit on Realty Pro and that Realty Pro is a proper target for Plaintiff's claims, those claims still fail because the undisputed facts show that Realty Pro expended considerable time and effort to sell the home. In other words, the commission was earned, so it would not be "unjust" to allow Realty Pro to retain the same.

declaration or any other allegedly "bad faith" conduct. Accordingly, Plaintiff should be prevented from relying on such new allegations for purposes of avoiding summary judgment. *See, e.g., CR 33(a)* ("Each interrogatory shall be answered separately and fully....").

Washington law is clear that “[t]he mere fact that a defendant has received a benefit from the plaintiff is insufficient alone to justify recovery.” *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 490, 254 P.3d 835 (2011). Rather, “[t]he doctrine of unjust enrichment applies only if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying.” *Id.*

Here, the undisputed facts establish that Realty Pro expended considerable time and energy in its efforts to sell the home. For example, shortly after receiving the assignment in June of 2016, Mr. Shurtliff “went past th[e] residence approximately 15 times over the weekend,” left his card, knocked on the door, and spoke with neighbors in an effort to establish contact with Plaintiff. CP 190. Soon thereafter, Mr. Shurtliff “installed the real estate sign,” met with Plaintiff, conducted a walk-through and scheduled a follow-up meeting with Plaintiff to reach an agreement on “a showing method.” CP 191.

Mr. Shurtliff developed “a list of things that need to be addressed before [the] home brings top dollar,” and provided that list to Plaintiff. CP 193. Mr. Shurtliff scheduled a meeting with Plaintiff “to get a key and showing instructions,” *id.*, then, shortly thereafter, received an email from

Plaintiff telling him “to not take any action regarding the home sale at this time.” CP 195.

Mr. Shurtliff then had to follow-up with the special master for further directions in light of Plaintiff’s refusal to cooperate and was directed to “[p]ut a sign in the yard and sell for the best price possible.” CP 197. Thus, Mr. Shurtliff moved forward with his efforts despite the lack of cooperation from Plaintiff.

At the end of August 2016, the special master directed Mr. Shurtliff to provide copies of all relevant court pleadings to potential buyers, CP 146, thereby requiring Mr. Shurtliff to take action which is not necessary for most sales.

Then, in October, Mr. Shurtliff developed a list of all liens that needed to be paid off and warned the special master that it appeared there would be insufficient funds to close the sale. CP 205. Finally, the sale closed on or about November 18, 2016, CP 38, *after* Realty Pro and Mr. Shurtliff had worked for more than five months on the transaction.

Thus, Realty Pro and Mr. Shurtliff invested substantial time and energy into the home sale, and they earned the \$10,000 commission. Requiring forfeiture of that commission would impose a substantial injustice on Realty Pro and would discourage other realtors from assisting this State’s courts when requested.

In contrast, Plaintiff brought this problem upon himself by failing to file a supersedeas bond. As the Supreme Court explained in *Ehsani*:

“At first glance, it may seem unfair to conclude that Ehsani is limited to seeking restitution from the McCulloughs.... However, Ehsani had the ability to protect himself from this precise situation by filing a supersedeas bond, *see* RAP 8.1; yet, he chose not to do so. While filing a bond is not a prerequisite to recovery under RAP 12.8, failure to do so entails assuming the risk of execution prior to reversal and no recovery thereafter. That Ehsani took this risk and lost suggests that he is not entitled to equitable relief.”

160 Wn.2d at 595 n. 3 (internal citation omitted).

Plaintiff contends that *even though* he did not file an effective supersedeas bond, it would still be fair to require restitution because Realty Pro was aware of his appeal. However, this argument has also been rejected by Washington’s Supreme Court. *Malo v. Anderson*, 76 Wn.2d 1, 6, 454 P.2d 828 (1969) (“If appellant’s knowledge of the pending appeal prevented her from doing anything with the property, except at her own risk, the appeal itself would act as a supersedeas.”); *Ehsani*, 160 Wn.2d at 601 (“If Ehsani were to prevail, future judgment debtors may conclude that filing a supersedeas bond is unnecessary because they can always recover through restitution.... Such a result would strip RAP 8.1 of its essential purpose...”)

In summary, because Realty Pro performed actual and substantial work in furtherance of the home sale while Plaintiff failed to file a supersedeas bond, there is no basis for a finding that Realty Pro's receipt of a commission was "unjust." Accordingly, the award of summary judgment was proper and should be affirmed.

C. Alternatively, this Court should affirm the trial court's decision on Realty Pro's motion to dismiss.

As set forth in the Statement of the Case, above, Realty Pro originally moved to dismiss Plaintiff's Complaint on the basis that it failed to state a claim upon which relief could be granted. Specifically, Realty Pro argued that it was not a proper target, as a matter of law, for the restitution claim, *see* CP 171 ("Realty Pro is not a 'real party in interest' regarding the dispute between Plaintiff and Diana Guardado..."); and that the Complaint failed to allege how it would be "unjust" for Realty Pro to retain its commission. *See* CP 172 ("Plaintiff has alleged that the Taylors were not buyers in good faith, but he has made no such allegation against Realty Pro.").

After the trial court granted the motion to dismiss, Plaintiff moved for reconsideration, arguing: "Because the Defendant's motion relied on materials outside of the original complaint, the motion should have been

heard as a motion for summary judgment under CR 56, using a different standard than under CR 12.” CP 218. The trial court ruled:

“Plaintiff Guardado’s motion for reconsideration of the dismissal of Defendant Kimball d/b/a Realty Pro Inc. argues an incorrect analysis was conducted on the motion. Whether presented in 12(b) or CR 56 the outcome is the same. The real estate agent was hired, completed their task and was entitled to be compensated from the proceeds.”

CP 246. Thus, the trial court ruled that Plaintiff’s claims were improper *regardless* of what standard was applied.

Effectively, then, the trial court accepted Plaintiff’s request to treat Realty Pro’s motion as a motion for summary judgment, and then granted that motion. Should this Court believe it was improper to award summary judgment, then this Court should consider whether it can affirm the trial court’s decision to grant the motion to dismiss.

The dismissal of Plaintiff’s Complaint was proper because Plaintiff did not plead a sufficient legal basis for either an unjust enrichment claim or a claim for restitution under RAP 12.8. Rather, the Complaint affirmatively alleged facts showing that no claim against Realty Pro was proper. Specifically, Plaintiff alleged that “[t]he special master assigned Rick Shurtliff of Realty Pro as the selling agent,” a sale occurred, and “Realty Pro was paid \$10,000 in sales commissions.” CP 8, 9.

The Complaint alleges that Plaintiff demanded a “refund” of the commission, and Realty Pro refused, CP 9, but the Complaint fails to specify why a “refund” was required. For instance, there is no allegation of bad faith or misconduct by Realty Pro. Rather, the sole basis for Plaintiff’s claim, as pled, is that the underlying judgment which authorized the sale was reversed on appeal. Realty Pro’s motion pointed out that this was insufficient, as a matter of law, to support a claim for unjust enrichment or restitution under RAP 12.8.

Plaintiff contends that Realty Pro’s motion to dismiss was improper because it relied on materials “outside of the original complaint.” CP 218. However, the only documents Realty Pro submitted with its Motion were copies of the Complaints filed by Plaintiff, as well as a copy of the Court of Appeals’ September 2, 2016, letter ruling finding that Plaintiff’s Supersedeas Bond was legally deficient. CP 167-68.

The complaints are not extraneous materials, and the letter ruling is public record. Washington law is clear that “the trial court may take judicial notice of public documents if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss.” *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008). Accordingly, the Motion to Dismiss was proper and there was no need to convert the motion to dismiss into a motion for summary judgment.

Therefore, Realty Pro respectfully submits that *even if* this Court does not affirm the award of summary judgment in Realty Pro's favor, it can and should affirm the trial court's decision to grant Realty Pro's Motion to Dismiss.

VI. CONCLUSION

This dispute arose following Plaintiff's repeated failure to make mortgage payments when due. This behavior prompted court intervention to order the sale of Plaintiff's home and prevent further harm to the credit of Plaintiff's ex-wife, Defendant Diana Guardado. Realty Pro became involved as a result of a request from the special master appointed by the Court to complete the sale. Realty Pro followed the special master's instructions, diligently performed the necessary tasks to complete the sale, and earned a commission as a result.

Due to a jurisdictional problem unknown to Realty Pro, the Court of Appeals reversed the underlying judgment which ordered the sale of the home. This reversal, however, did not change the fact that Realty Pro invested significant time and energy to comply with the special master's request, complete the sale, and earn its commission.

Plaintiff has neither pled a sufficient basis, nor submitted adequate evidence, to require a "refund" of the commission. Rather, the undisputed facts show that the commission was paid from funds provided by

Defendants Taylor, such that Plaintiff never conferred any benefit on Realty Pro. Moreover, Realty Pro was not a party to the underlying judgment that was reversed and, therefore, is not a proper target for Plaintiff's claims. And, most importantly, Realty Pro earned its commission, so it would be unjust to require its forfeiture.

For all the reasons explained above, Realty Pro respectfully submits that this Court should affirm the award of summary judgment or, alternatively, affirm the trial court's decision to grant Realty Pro's Motion to Dismiss.

Dated this 21st day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be delivered via the Court of Appeals electronic service to:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of January, 2020.

s/ Kathleen Roney

Kathleen Roney, Paralegal

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January 21, 2020 - 2:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53636-6
Appellate Court Case Title: Otto Guardado, Appellant v. Diana Guardado, et al, Respondents
Superior Court Case Number: 18-2-01081-4

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