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Court of Appeals
Division II
State of Washington
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No. 53636-6-II

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

OTTO GUARDADO
Appellant
v.

JAMES KIMBALL d.b.a. REALTY PRO,
Respondent,

DIANA GUARDADO, MARK AND MICHELLE TAYLOR,
Defendants.

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

REPLY BRIEF OF APPELLANT

OTTO GUARDADO
6135 NE 14th Ct.
Vancouver, WA 98665
360-713-2448

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I. RESTATEMENT OF FACTS

Realty Pro seems to suggest that its agent Rick Shurtliff, as the selling agent, was not under any duty to Otto. Resp. Brief at 3. However, RCW 18.86.030 states, in part: "the broker owes *to all parties* to whom the broker renders real estate brokerage services the following duties, which may not be waived" (emphasis added). Regardless of whether there was a signed agreement between them, Rick Shurtliff was clearly engaged with Otto in "real estate brokerage services" defined as "rendering of services for which a real estate license is required under chapter 18.85 RCW". RCW 18.86.010; CP 191, 197-98. "A realtor has a common law and a statutory duty to exercise reasonable care in representing a seller's interests. RCW 18.86.030(1), .040(1), .110. This duty exists regardless of any contractual provision." *Boguch v. Landover Corp.*, 153 Wn. App. 595, 619, 224 P.3d 795 (2009). On the issue of Realty Pro's contention that Rick Shurtliff was not hired for Otto's benefit, RCW 18.86.110 states: "[t]his chapter shall be construed broadly." Accordingly, Otto asserts that Mr. Shurtliff owed him statutory duties as a real estate broker.

Realty Pro speculates that the reason why the trial court held Otto in contempt could have come from statements made by the special master. Resp. Brief at 4. However, there is no record that the special master ever communicated with the trial court. It is the prevailing party's duty (here, Diana Guardado) to procure formal written findings. *Peoples Nat. Bank of*

Washington v. Birney's Enterprises, Inc., 54 Wn. App. 668, 670, 775 P.2d 466 (1989). Diana did not. CP 202.

Realty Pro disputes the value of the house, citing Rick Shurtliff's August 5, 2016 declaration that it would sell for "$289,000 within a reasonable time" (Resp. Brief at 4) or sight-unseen for $250,000 (CP 88). The Taylors took possession of the home around December 17 or 18, 2016. CP 9, 160. Less than three weeks later on January 5, 2017, Realty Pro themselves listed the home for $325,000, calling it a "Fantasic [*sic*] home" and "move in ready". CP 92, 166. Subsequently, they received an offer for $325,000. CP 92. Importantly, Realty Pro gives no explanation why the Guardado home was worth $240,000 – $289,000 when Otto owned it, but $325,000 just weeks later when Taylors took possession of the home. CP 92, 166. Mr. Shurtliff's self-serving declaration does not explain how he came about his evaluation. CP 199-200. The record is completely absent of any methodology or comparisons. At one point, he suggests selling the house for $30,000 - $40,000 (CP 197-98), an absurd amount. It is obvious that Mr. Shurtliff was not interested in getting "top dollar" (CP 193).

Realty Pro suggests that the November 17, 2016 Order on Contempt (CP 142-43) was held pre-sale because it includes language relevant to the sale. The closing was also on November 17, 2016. CP 8, 42, 56-69. Although the records do not show the time of day, the closing was held in the morning and the contempt hearing in the afternoon.

Realty Pro notes that Mr. Shurtliff's June 13, 2016 email documents receipt of a listing agreement. Resp. Brief at 6. However, on June 14, 2016, Mr. Shurtliff states that the listing agreement "did not have signatures". CP 193. No signed listing agreement has ever been filed with any court, has never appeared in any record, nor ever been produced by Realty Pro. Since there is no evidence of a contract[1], it is inappropriate to assume that one existed.

II. ARGUMENT IN REPLY

A. The Skamania Court could not produce a valid judgment or sales transaction in excess of its jurisdiction.

The Respondent concedes that the original Skamania Court lacked jurisdiction (Resp. Brief at 5, 15, 27), and states that lack of jurisdiction is not a "substantive issue" (at 5). Realty Pro does not present any authority that lack of jurisdiction is not a substantive issue.

But, a judgment is void when the court does not have personal or subject matter jurisdiction, or "lacks the inherent power to enter the order involved." *Mueller v. Miller*, 82 Wn. App. 236, 251, 917 P.2d 604 (1996), citing *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975). An order in excess of the jurisdiction of the court is void. *Pearce v. Pearce*, 37 Wn. 2d 918, 923, 226 P.2d 895 (1951). A judgment entered by a court lacking subject matter

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[1] If the unsigned listing agreement on CP 236-38 is representative of a signed agreement, then there are irregularities, such as: the listing price is agreed at $289,000, not the final price of $240,000 (CP 238); the Broker agrees to publicly market the home in RMLS (CP 236). In fact, Mr. Shurtliff never publicly listed the home. The first instance of a public listing is January 5, 2017 when Realty Pro attempted to re-sell the Guardado home for the Taylors. CP 92. Mr. Shurliff's numerous emails make no mention of any public listing or soliciting any public bids.

jurisdiction is void; and a party may challenge such judgment at any time. *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 808, 274 P.3d 1075 (2012).

This Court's opinion in *Guardado v. Guardado*, 200 Wn. App. 237, 402 P.3d 357 (2017) stated that the Skamania court "did not have authority" to modify the dissolution decree (at 239, 242-43, 244, 245). The final judgment was subsequently vacated for this reason. Yet, Realty Pro relies heavily on the authority of Skamania's final judgment for its arguments. A judgment which has been vacated is of no force or effect and the rights of the parties are left as though no such judgment had ever been entered. *Matter of Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986) (holding that a daughter's adoption decree held no legal effect after vacation even though it was vacated well after her birth father's estate was already admitted to probate.)

The holding that the Skamania Court had no authority is the law of the case. Because the venue of the case was subsequently changed to Clark County and the cases consolidated, the Clark County Court is bound to follow this Court's holding enunciating a principle of law. However, the lower court did not properly take this fact into account when determining summary judgment in favor of Realty Pro.

Bank of America, N.A. v. Owens, 177 Wn.App. 181, 191, 311 P.3d 594 (2013) is instructive. Despite having two appellate courts already make rulings, the lower court revisited Bank of America's claim of a superior lien and rendered summary judgment in favor of the bank. *Id.* at 186-87. Bank of

America argued that because the Supreme Court "did not specifically direct the entry of judgment in favor of the [appellant]", then it was up to the trial court to exercise discretion on remand. *Id.* at 189. The third appellate court disagreed, stating that the trial court could exercise discretion, but not for issues that had *already been decided* by the appellate courts. *Id.* Since the issue of the Skamania Court's authority had already been decided in *Guardado*, the Clark County Court erred when it treated the Skamania Court's final judgment as valid and decided in favor of Realty Pro. *See also* RAP 12.2 ("the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs *all subsequent proceedings in the action in any court*") (emphasis added).

Otto argued the defective jurisdiction to the trial court. RP 20:10-20; 21:8-19; 31:15-32:22. The trial court sidestepped this issue. It questioned if this Court reached the issue of whether the home sale was void or not on appeal. RP 32:20-33:4. However, the trial court may not have kept the timing of events in mind:

- **May 26, 2016:** The Skamania court's final judgment was entered. CP 141.
- **May 31, 2016:** Otto's discretionary review (48903-1-II) converted to an appeal by matter of right. Id.
- **November 4, 2016:** Appellant's Opening Brief mailed to this Court. CP 163.
- **November 15, 2016**: Brief filed. CP 124.
- **November 17, 2016:** Closing documents signed by Mark Taylor and special master Vern McCray. CP 42.
- **November 18, 2016:** Deed recorded by Clark County auditor. CP 128

- **August 22, 2017:** This Court issues opinion. CP 14.

The trial court may have wished the opinion to rule on the validity of the home sale. But this Court could not, since the issue was not before it. When Otto's opening brief was filed on November 15, 2016, the closing was still two days away. CP 56-69. Only issues raised in the Appellant's opening brief are considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, this Court was not in a position to address the November 17, 2016 home sale, even if Otto had brought it up in his reply brief.

The trial court did not refute the Skamania Court's lack of jurisdiction. In fact, it recognized this fact. CP 239-40. However, it erred when it did not reach the ultimate conclusion that lack of jurisdiction equals a lack of ability to make a valid order or a valid sales transaction.

Realty Pro's argument, at its core, is that the Skamania Court order was just, the resulting home sale was just, and retention of their sales commission is just. Realty Pro argues that the authority of the Skamania Court should be respected, but this Court has already said that it had "did not have authority". But a court without authority does not have jurisdiction, and a court without jurisdiction can never enter a valid judgment. Realty Pro offers no authority why an invalid judgment should be enforced. Accordingly, the trial court's order to dismiss should be reversed and Otto be allowed to pursue his claims.

B. Realty Pro is a proper target for unjust enrichment.

Realty Pro claims that they are not a proper target because Mark and Michelle Taylor conferred the benefit of their sales commission through the

home purchase, and it was not Otto who "paid" the commission. Resp. Brief at 12-14. This does not square with the facts.

The Housing and Urban Development (HUD) Settlement Statement plainly shows that Realty Pro received a commission of $10,000, "Paid From Seller's Funds at Settlement". CP 41. The "Seller" is defined as "Otto Guardado". CP 40. Realty Pro even notes that "Plaintiff received less money from the sale than he would have received had no commission been paid" (Resp. Brief at 13), but doesn't logically explain how Otto received $10,000 less from the transaction without actually *paying* for the commission.[2] Realty Pro dismisses this as "a record-keeping formality" (*id.*), but does not explain how this is a mere "formality" or why a title company's "record-keeping" system would lead to irregular and ambiguous records.

In addition, the Order on Contempt directs that the realtor "shall be paid out of the proceeds of the sale". CP 143. Courts may determine the plain meaning of an undefined term from an English dictionary. *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.,* 184 Wn.2d 428, 443, 359 P.3d 753 (2015). "Proceeds" is defined as "1. The value of land, goods, or investments when converted into money; the amount of money received from a sale". BLACK'S LAW DICTIONARY 1458 (11th ed. 2019). Obviously, money is not converted

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[2] One logical reason would be in the form of a rebate that was later applied in the HUD Statement, but no evidence suggests this happened.

until a sale is finalized, and the seller (here, Otto) receives "proceeds" in a real estate transaction.

The Skamania Court ordered that the "sale price of [Otto's] property shall be reduced to $240,000 to allow for quick sale". CP 202. It did not specify that the buyer (Taylor) was to pay for additional fees or commissions. It fixed the price at $240,000, with no provisions for anyone else to pay for the associated fees. Diana's attorney also plainly states that Realty Pro's commission should come from Otto's proceeds. CP 82. The Skamania court clearly intended that Otto pay for realtor fees.

Realty Pro also claims that because Otto was uncooperative with the realtor (not conceded), he could not have conferred any benefit on Realty Pro. Resp. Brief at 13. Otto sharply denied that he was uncooperative. CP 133-138. Regardless, RAP 12.8 contemplates that a party may be involuntarily divested of property that requires restitution after reversal. Even assuming that Otto obstructed Mr. Shurtliff's task as he describes, the violation of an order patently in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt. *State ex rel. Superior Court of Snohomish Cty. v. Sperry*, 79 Wn. 2d 69, 74, 483 P.2d 608 (1971).

The elements of unjust enrichment also do not distinguish between benefits voluntarily or involuntary conferred. A claim of 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." *Norcon*

Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 490, 254 P.3d 835 (2011), quoting *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008).

Realty Pro's claim that they were paid by Mark and Michele Taylor and thus not a proper target fails.

C. Realty Pro's agent's actions give rise to an unjust enrichment or restitution claim.

The trial court did not even test Otto's unjust enrichment claim, hewing only to Realty Pro's theory under the Restatement of Restitution. RP 38:3-15. Realty Pro places great reliance on work performed by its agent that make his commission "just". However, whether someone is subject to an unjust enrichment claim is not measured by the amount of work performed. "Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another." *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 160, 810 P.2d 12 (1991).

Realty Pro argues that their agent was "trying to work" with Otto during the pendency of the original appeal to sell the house in good faith. However, Mr. Shurtliff's emails only show what his purported intentions were when privately emailing the special master and Diana's attorney, they do not prove his actions. CP 82, 83, 189, 191, 194, 197, 203, 205. Otto was not included on most of these emails. He did not obtain them until well after the home closed during a request for discovery items around January 2017. *Id.* The emails show that Mr. Shurtliff often consulted and followed the advice of Otto's opponent.

Realty Pro does not explain why Mr. Shurtliff failed to contact Otto's attorney, Josie Townsend, when requested, even though he was given her name and number. CP 195, 196, 197. Instead, Mr. Shurtliff consulted with Diana's attorney on July 10, 2016 about the circumstances. CP 197. He told Mr. Shurtliff that "Josie isn't going to screw around with Altmans [*sic*] order." CP 197.

Realty Pro argues that Rick Shurtliff acted appropriately because he was hired by the court to take action "known to be adverse" to Otto. Regardless, realtors owe a duty of responsibility to "all parties" under RCW 18.86.030; *See also Jackowski v. Borchelt*, 151 Wn.App. 1, 13, 209 P.3d 514. Mr. Shurtliff is not able to avoid his statutory duties regardless of the conditions of his appointment.

Realty Pro contends that the June 17, 2016 "effectively" cancels the June 20, 2016 meeting because of a pending motion before a commissioner of this Court. CP 195. Otto disputes this characterization, but even if this were true, there was no reason why Mr. Shurtliff couldn't reestablish communication after the motion was decided in Diana's favor just 11 days later on June 28, 2016. There was nothing legally preventing him from normal communication at that time. The Respondent repeatedly accuses Otto of being uncooperative (Resp. Brief at 13, 19 n. 7, 22), but does not produce any evidence apart from Rick Shurliff's self-interested statements that Otto was uncooperative (not conceded).

Mr. Shurtliff himself describes that Otto was cooperative as of June 14, 2016. CP 193. However, when Otto used legal remedies in an attempt to stop the sale (CP 195), Mr. Shurtliff's attitude changed (CP 197). Soon thereafter, Mr. Shurtliff floated the idea to the special master and Diana's attorney to "sell it to an investor for $30,000 to $40,000 sight unseen", a price for 1/10th of the fair market value. CP 197-98. He never returned to the house (CP 181), and never listed the house for public sale according to the terms in a standard listing agreement (CP 92, 181, 236). The relationship soured quickly. Mr. Shurtliff then wrote a declaration to the court on Diana's attorney's pleading paper that was highly critical of Otto and urged the court to sell Otto's home at a discount to a private investor. CP 199-200. Otto denied Mr. Shurtliff's accusations. CP 133-138. Mr. Shurtliff cut off communication with Otto and future critical communications went just to the special master and Diana's attorney. CP 82-83, 147, 203-06.

It is true that there was significant legal action to halt the sale in this Court, which must have been frustrating for Mr. Shurtliff (*see* CP 197-98). But he began his real estate duties *after* the appeal was filed (CP 141, 190), and had intimate knowledge about the litigation (CP 146), so this should not have been a surprise. Rick Shurtliff was tasked to disclose legal pleadings with "any potential buyer" by the special master. *Id.* Mr. Shurtliff did not. In fact, it was Otto that had to disclose documents to Mark Taylor. CP 70. If Mr. Shurtliff was not competent to serve as a realtor in a judicially-ordered sale, then he was obligated to have asked to be excused (RCW 18.86.030(1)(a)). Alternatively,

the special master could have dismissed him (*Cf.* RPC 6.2(c)). Neither of those occurred.

Realty Pro claims it cannot be a subject of a restitution claim under Restatement of Restitution §72 because Mr. Shurtliff was not an "officer" of the court. Mr. Shurtliff was tasked to do the official work of the court, was hired by the special master who was also appointed to do the official work of the court (RPC 6.2), and followed the advice of Diana's attorney, who is a officer of the court (*See* RPC, Preamble; *also Fite v. Lee*, 11 Wn. App. 21, 28, 521 P.2d 964 (1974)). Numerous emails demonstrate that Mr. Shurtliff was within the orbit of Diana's attorney, and turned to him for advice. CP 82-83, 190, 197-98, 203, 205-06. When Otto asked him to speak to his attorney, Josie Townsend, he did not. CP 181, 195, 196, 197. Instead, he sought the advice of Diana's attorney. CP 197.

An "officer" is defined as "someone who holds an office of trust, authority, or command." BLACK'S LAW DICTIONARY 1307 (11th ed. 2019). He had fiduciary duties towards Otto. 18.86 RCW does not abrogate professional and fiduciary duties of real estate agents. *Jackowski v. Borchelt*, 151 Wn. App. 1, 14, 209 P.3d 514 (2009). In the scope of this home sale, Mr. Shurtliff was an "officer" of the court.

Mr. Shurtliff also failed to disclose material facts to the buyer or seller during the transaction in contravention of RCW 18.86.030(1)(d). A material fact is "information that substantially adversely affects the value of the property or a party's ability to perform its obligations in a real estate

transaction, or operates to materially impair or defeat the purpose of the transaction." RCW 18.86.010(9). *Bloor v. Fritz*, 143 Wn. App. 718, 733, 180 P.3d 805 (2008) (substantial evidence existed that a real estate agent failed to disclose his knowledge of a previous drug manufacturing facility at a property he marketed).

On October 13, 2016, Rick Shurtliff states after studying the title report, that a selling price of $240,000 will not cover the liabilities on the property. CP 82. Instead of disclosing this to the buyers or sellers, he seeks advice from the special master and Diana's attorney. *Id.* Diana's attorney says he is "not concerned with anyone downstream" and to continue with the plan. CP 82.

On October 27, 2016, he again alerts them that the court's price of $240,000 was inadequate for the liens on the property: "In rounding up the info on the the Guardodo [*sic*] home I have roughly figured that to pay off the mortgage and liens that I would have to sell it for $280,000." CP 83, 205-06. This time, he includes a table showing that a selling price of $277,511.57 is needed to cover existing liens. CP 206. Instead of disclosing this to either buyer or seller, he instead asks the special master and Diana's attorney for advice. Realty Pro represented both the buyer and the seller. CP 8, 35, 168.

Since the house sold for $240,000 and not $280,000, a reasonable person can reasonably infer that Mr. Shurtliff ignored concerns that the selling price of $240,000 was inadequate. In doing so, he failed to disclose material facts impacting the property. RCW 18.86.030(1)(d).

The Respondent also claims witness immunity. Resp. Brief at 20. However, the authorities he cites deal primarily with expert witnesses and the blanket argument that "all" witnesses are immune from "all" claims arising from "all" testimony is too broad to apply here. It is not just Mr. Shurtliff's *testimony* at issue, it is his conduct and failure to perform his duty. As the only real estate company involved in this transaction, Realty Pro owed a duty to the parties to deal fairly.

Realty Pro argues that a claim under Restatement §73 is defective, but ignores that §73 also relies on other sections of the Restatement. In particular, §70 supplements §§72-74, and states that a transaction made under duress may be avoided as if the transaction were obtained by fraud. Restatement §70, comment a, ¶2. The word "fraud" is not ambiguous, but defined as "misrepresentation", "concealment", and "non-disclosure" to cause or continue a mistake, or induce someone into entering a transaction. Restatement §8(1)(a-c).

The trial judge commented that he did not know about any alleged fraud of the Respondent, apparently using the sense of "fraud" as in a legal action. RP 38:3 – 39:12. Whether Rick Shurtliff's actions rise to the legal definition of "fraud" is not a factor here. Under the Restatement of Restitution §8, "fraud" is defined as misrepresentation, concealment, or non-disclosure. It could also be that Mr. Shurtliff committed legal fraud as well, but the trial court's dismissal terminated discovery efforts that could unearth additional facts. The trial court erroneously defined "fraud" as a legal action, not under the correct definition

under the Restatement of Restitution. RP 38:16 – 39:12. Since the trial court (RP 24:19-20, 25:10-20, 38:3-15) and also Realty Pro (RP 22:1-15, 34:5-10) relied on the Restatement for authority in its decision, they should not rely on a definition of "fraud" that is unmoored from the Restatement.

Realty Pro's agent did not act in good faith during the transaction. He did not make good faith efforts to market the property, and made critical statements against Otto. He regularly consulted with Otto's opponent and failed to disclose material facts that harmed him. Mr. Shurtliff's conduct does not afford him the exemptions necessary to dismiss a claim under the unjust enrichment or restitution doctrines.

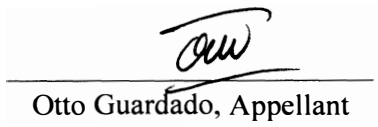
III. CONCLUSION

When the Skamania County Court made its order, it had no authority or jurisdiction. Yet, it made a decision that harmed Otto and had long-lasting impact, even four years later. He had no agency to sell his home independently, and the right to use his own property was taken away. The original order has been vacated. The validity of the order granting Realty Pro a commission is a material fact that should have given rise to a denial of summary judgment.

Realty Pro conducted all its sales activity knowing Otto's appeal was pending, and there is question about whether its agent's conduct allows it to fall under a proper exemption to avoid a claim of unjust enrichment or restitution.

Accordingly, the trial court's order dismissing Realty Pro should be reversed and remanded.

Respectfully submitted February 20, 2020,



Otto Guardado, Appellant

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

OTTO GUARDADO, Plaintiff v. DIANA GUARDADO, an individual; MARK AND MICHELLE TAYLOR, husband and wife, and their marital community; JAMES KIMBALL dba REALTY PRO, INC. Defendants	Clark County No. 18-2-01081-4 Court of Appeals No. 53636-6-II CERTIFICATE 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 the date below, I arranged for service of:

- Appellant's Reply Brief

to the parties as follows:

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