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Court of Appeals
Division II
State of Washington
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No. 53687-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JAMES BROOKS

Respondent

vs.

JOHN E. NORD, Successor Trustee of
the David I. Huffman and Lois P. Huffman
Living Trust Dated September 22, 2006

Appellant

RESPONDENT'S BRIEF

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I. INTRODUCTION.

The question in this case is whether attorney fees are available under a fully integrated Residential Purchase & Sale Agreement (REPSA) for a claim based solely on a failure to disclose a defect in a Form 17 Disclosure Form (Form 17), where, by statute Form 17 is not part of the written contract, and Form 17 is not made an addendum to the REPSA? The answer as set forth below is no.

II. RESPONSE TO ASSIGNMENT OF ERROR.

The trial court properly denied the Appellant's motion for attorney fees because, under RCW 64.06.020, Form 17 disclosures are "not intended to be a part of the written statement between the Buyer and Seller."

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

Does a claim based solely on a failure to disclose a defect in Form 17 trigger attorney fees under the REPSA where Form 17 is not part of any written agreement between the Buyer and Seller, and Form 17 was not made an addendum to the REPSA?

IV. STATEMENT OF THE CASE.

The Respondent purchased residential property from the Appellant on January 7, 2016. Some time later a portion

of the floor in the atrium collapsed. An inspection revealed that prior to the sale several repairs were made to the underlying structure of the atrium. The only owner of the house since it was built was David and Lois Huffman. At the time of the sale to the Respondent, Mr. Huffman was deceased and Ms. Huffman suffered from dementia. Their daughter and successor trustee, Erin Moore, sold the house to the Respondent.¹

As part of the sale process, Ms. Moore completed a Form 17 Disclosure Statement required by RCW 64.06.020. To the questions regarding defects in the house, Ms. Moore checked "Don't know."² Following discovery of the defects, the Plaintiff sued based on a misrepresentation in the Disclosure Statement. In its Motion for Summary Judgment, the Appellant concedes that, "The crux of the complaint is that certain alleged defects relating to the sunroom and back deck were not disclosed by Ms. Moore in the Disclosure Statement."³

The Appellant argued that under RCW 64.06.050, there could be no liability for an error, inaccuracy, or omission in the Disclosure because the Seller had no "actual

1 CP 1.
2 CP 54.
3 CP 70.

knowledge.”

Appellant also argued that the Respondent was precluded from raising any common law duty claims:

“Based on Plaintiff’s Complaint, Defendant anticipates Plaintiff will argue that his claims are no barred because they are based on some ‘common law duty’ to disclose. But, this argument would also ignore the clear language of the statute and would subvert the legislative’s intent on passing it.

The legislature closed the door to such arguments in RCW 64.06.070, which states in pertinent part: ‘Except as provided in RCW 64.06.050, nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate against the seller...existing pursuant to common law, statute or contract....’ While the plaintiff would like the court to focus on the latter half of this sentence, it cannot be divorced from the clause preceding the entire sentence – ‘Except as provided in RCW 64.06.050.’ By making specific reference to the section that limits the liability of sellers for alleged errors, inaccuracies, or omissions in disclosure statement, the legislature further made clear its intention to shield sellers from liability in all cases except when the seller has “actual knowledge” of the alleged error, inaccuracy, or omission.”⁴

In granting the Motion for Summary Judgment, and applying the standard in RCW 64.06.050, the court found that because Mr. Huffman was deceased, Ms. Huffman had dementia, and Ms. Moore had no knowledge, there was no person able to testify who had actual knowledge of the condition of the house.

Thereafter, the Appellant requested attorney fees

4 CP 79-80.

under paragraph “q” in the REPSA.⁵ The trial court denied the request holding that the Form 17 disclosure is not part of the written REPSA between the parties.⁶

V. ARGUMENT.

A. The Form 17 Disclosure Statement is Not Part of the Written Agreement.

RCW 64.06.020(3) states:

“The Seller Disclosure Statement shall be for disclosure only, and shall not be considered part of any written agreement between the buyer and seller of residential property.”

In Austin v. Ettl⁷ the parties executed a REPSA. In addition, the Seller provided the Purchaser with a Form 17 Real Property Transfer Disclosure Statement. The Purchaser later sued for negligent misrepresentation and unjust enrichment due to a failure to disclose the potential costs of an LID assessment.

The trial court granted the Sellers CR12(b)(6) motion. Thereafter, the Sellers moved for attorney fees under RCW 4.84.330 and the REPSA. The court granted statutory costs only.

“Moreover, we grant the Ettl’s statutory attorney fees and costs pursuant to RAP 18.1,

5 CP 228.

6 CP 290-291.

7 171 Wash. App. 82, 286 P.3d 85 (2012)

RCW 4.84.030 and 4.84.080(2).⁸

The court explained the ruling as follows:

“The Ettl’s also requested attorney fees pursuant to RCW 4.84.330 which allows parties to receive attorney fees when they are forced to enforce the provisions of a contract that has an attorney fee provision. Although the parties’ REPSA has such a provision, the dispute that is the subject of this appeal involved Form 17 Disclosure Statement. As we previously stated above, the disclosure is not part of the parties’ REPSA. Accordingly, the Ettl’s are not entitled to attorney fees stemming from the attorney fee provision of the REPSA.”⁹

In Ettl, the Plaintiff brought two tort claims, negligent misrepresentation and unjust enrichment. The court did not apply the Brown v. Johnson,¹⁰ analysis, however, but found that a negligent misrepresentation claim based on an alleged failure to disclose on Form 17 did not implicate the REPSA attorney fee clause.

This was not the first time that Division II of the Court of Appeal held Form 17 was not part of the written REPSA. In Stieneke v. Russi,¹¹ the Defendant argued that the integration clause in the REPSA prevented the Form 17 Disclosure Statement from

8 171 Wash. App. at 93.

9 171 Wash. App. at 93, footnote 11.

10 109 Wash. App. 56, 34 P.3d 1233 (2001).

11 145 Wash. App. 544, 190 P.3d 60 (2008).

becoming part of the REPSA. The trial court found in Conclusion of Law 8 that “the Disclosure Statement was part of the agreement [REPSA] between the Russis and the Stienekes, pursuant to its terms and pursuant to the circumstances surrounding the formation of the agreement.”¹² The trial court further concluded that “Russi’s misrepresentation regarding the roof in Form 17 constituted a material breach of the REPSA...”¹³ Relying, in part, on RCW 64.06.020(3) that Form 17 was “for disclosure only and [not to be considered] part of any written agreement between the Buyer and the Seller”,¹⁴ the Court of Appeal reversed, finding “substantial evidence does not support the trial court’s finding that Form 17 became part of the REPSA.”¹⁵

The cases cited by the Appellant can be distinguished. In Brown v. Johnson, supra, the buyer sued for alleged misrepresentations. The buyer prevailed and was awarded attorney fees. The Seller appealed arguing the disclosure statement was not part of the REPSA. The Court of Appeal upheld the

12 145 Wash. App. at 568.

13 145 Wash. App. at 568.

14 145 Wash. App. at 567.

15 145 Wash. App. at 568.

fee award, while specifically recognizing the claim was not limited to the disclosure statement.

“Johnson’s contention that Brown’s claim arises solely out of the Disclosure Statement is not accurate. In fact, the action is a common law action for misrepresentation of which Johnson’s failure to disclose on the disclosure statement was but one act among several acts and omissions by Johnson culminating in the jury’s verdict for Brown.”¹⁶

By logical extension, Brown recognizes that if there are no “several acts” and the claim arises solely out of the disclosure statement, attorney fees would not be available under the REPSA.

In this case, there are no “several acts.” The sole factual basis of Respondent’s claim is limited to a failure to disclose in the Form 17 disclosure. Further, the Appellant argued that under 64.06.050, the Respondent was precluded from making a common law claim when the allegation was a failure to disclose in Form 17.

In Borish v. Russell,¹⁷ a Division II case decided prior to Ettl, the Plaintiff sued for alleged misrepresentations made in the Form 17 Disclosure Statement. The trial court dismissed the

¹⁶ 109 Wash. App. at 59, footnote 5.
¹⁷ 155 Wash. App. 892, 230 P.3d 646 (2010).

misrepresentation claims against the Seller under the economic loss rule. The Court of Appeal affirmed and awarded attorney fees to the Defendant because the claim was defeated by the application of the economic loss rule to the parties' REPSA.

The Olsons requested attorney fees on appeal under RAP 18.1. Under RCW 4.84.330, parties can enter agreement that allow the prevailing party to recover attorney fees in disputes arising from the agreement. And, tort claims are based on a contract when they arise from the contract and the contract is central to the dispute. Here, the Borishes' claim against the Olsons is defeated by application of the economic loss rule to the parties' REPSA, and the Borishes' lawsuit arises out of the contractual relationship they had with the Olsons."¹⁸

The defense in Borish was that the economic loss rule precluded that Plaintiff's claim. That defense necessarily implicates the contract. The claim in Ettl, on the other hand, was limited to an alleged breach of the Disclosure Statement, which, the same court held only two years after Borish, does not implicate the REPSA attorney fee provision.

The recent case of Woodcock v. Conover,¹⁹ further supports Respondent's argument that a claim based solely on a failure to disclose in Form 17 does

18 155 Wash. App. at 907.
19 2019 WL 4262091.

not implicate the REPSA attorney fee provision. In addressing the Form 17 argument, the court stated:

“Finally, we note that Donna’s misrepresentation claim was based on a statement in the Form 17 that the home was ‘connected’ to the public sewer. Yet, this same representation is contained in the REPSA. Paragraph 5 of the optional clauses addendum provided that ‘[t]o the best of Seller’s knowledge, Seller represents that the property is connect to a...public sewer main;...” Although Form 17 did not become part of the REPSA, the representation regarding the connection to the sewer main explicitly did because it appears in the optional clauses addendum.”²⁰

The implication of the court’s decision in Conover is that in the absence of a representation in the REPSA, attorney fees would not be available because “Form 17 did not become a part of the REPSA.”

In these cases there was evidence of a misrepresentation in addition to that made in the disclosure statement. In this case, the sole claim of misrepresentation relates to the Form 17 disclosure. There were no oral statements from the Seller and there is no claim of a separate representation in the REPSA. The Appellant argued successfully that under RCW 64.06.050 the Respondent had to prove

“actual knowledge” in order to prevail. While the Respondent ultimately could not make that showing, the imposition of the statutory requirement underscores that Respondent’s claim arose solely out of a breach of the Form 17 disclosure. Because the Form 17 disclosure is not part of the REPSA, attorney fees cannot be awarded under paragraph “q” of the REPSA.

B. Form 17 is Not an Addendum to the REPSA.

In Stieneke, supra, the court found the integration clause of the REPSA prevented the Form 17 disclosure from becoming part of the REPSA.

“The record lacks any evidence indicating that Griffin, the Russis, or the Stienekes understood or intended that Form 17 would or did become a part of the parties’ purchase and sale agreement.

In addition, the terms of both Form 17 and the REPSA fail to provide evidence that Form 17 became part of the contract. First, the REPSA’s integration clause explicitly provided ‘This Agreement constitutes the entire understanding between the parties... No modification of the Agreement shall be effective unless agreed in writing and signed by Buyer and Seller.’ The Stienekes’ argument that Form 17, which was in writing, was signed by both parties, and is thus a modification, is tenuous. The evidence fails to demonstrate that the parties intended for Form 17 to operate

as such.”²¹

In this case, paragraph “n” of the REPSA contains the identical integration language as in Stieneke.²² The REPSA was dated October 27, 2015.²³ The Disclosure Statement was dated October 29, 2015.²⁴ There is no reference to Form 17 in the REPSA, and there is no reference to the REPSA in Form 17. Several addendums to the REPSA refer to the main agreement, stating:

“The following is part of the Purchase and Sale Agreement dated October 27, 2015.”²⁵

No such language exists on Form 17.

In addition to the statutory language providing that Form 17 is not part of any written agreement, the integration clause of the REPSA prevents Form 17 from being considered part of the REPSA.

VI. CONCLUSION.

The trial court’s decision denying the request for attorney fees under paragraph “q” of the REPSA must be affirmed under RCW 64.06.020, and the integration clause in the REPSA. The claim of misrepresentation in this case is

²¹ 145 Wash. App. at 567.

²² CP 20

²³ CP 18

²⁴ CP 58

²⁵ CP 22

based solely on the Form 17 disclosure. This court's holding in Ettl that attorney fees are not available for a claim based solely on a Form 17 disclosure should be followed. The Respondent requests the court dismiss this appeal.

DATED this 23rd day of January,
2020.

NELSON LAW FIRM, PLLC

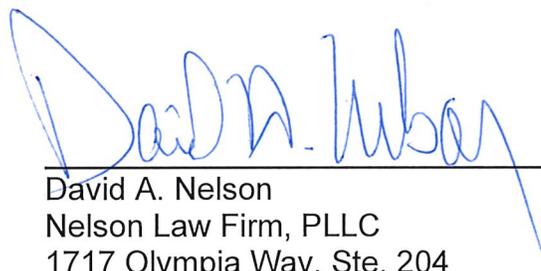


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