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COURT OF APPEALS
DIVISION III
SPokane, WA

COA No. 28717-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT L. PRATT and SHARON PRATT, husband and wife,

Respondents,

v.

JAMES DAVEY and DANA DAVEY, husband and wife,

Appellants.

BRIEF OF APPELLANTS

Kenneth H. Kato, WSBA #6400
Attorney for Appellants
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENTS OF ERROR

A. The court erred by granting summary judgment for loss of use when genuine issues of material fact existed.

B. The court erred by awarding damages for loss of rental value when nothing in the record reflects that the properties used by the court for determining the award were rentals..

C. The court erred by awarding reasonable attorney fees incurred at the Court of Appeals when the Pratts' request for such fees was later denied by that Court after this appeal was filed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err by failing to consider James Davey's declaration in opposition to the motion for judgment for loss of use? (Assignment of Error A).

2. Did the court err by granting summary judgment for loss of use when genuine issues of material fact existed? (Assignment of Error A).

3. Did the court err by awarding damages for loss of rental value when nothing in the record reflects that the properties used by the court for determining the award were rentals? (Assignment of Error B).

4. Did the court err by awarding the Pratts attorney fees at the Court of Appeals, when their request for such fees was later denied by that Court after this appeal was filed? (Assignment of Error C).

III. STATEMENT OF THE CASE.

This case is the second appeal in a real property dispute between the Pratts and the Daveys. The Pratts prevailed in the first. (CP 19, 33, 34). The present appeal is from a summary judgment order granting damages to the Pratts for loss of use of the property during the first appeal and awarding them attorney fees. (CP 102).

The summary judgment order at issue arises from a judgment against the Daveys that was entered on November 16, 2007. (CP 9). One item in the judgment awarded the Pratts \$100/day in damages for each day after November 15, 2007, until the date the deed conveying ownership of a residence at 3720 W. Rosamond in Spokane, Washington, from the Daveys was recorded at the Spokane County Auditor's. (CP 10).

On December 21, 2007, an Order Granting Motion for Relief from Judgment was entered providing that the \$100/day damages would continue only until the time the Daveys executed the deed

conveying the property to the Pratts, *i.e.*, November 30, 2007. (CP 12). This order also provided that “[t]he value to Plaintiffs for loss of use is reserved.” (CP 13).

After the first appeal was over, the Pratts moved for an order granting judgment for loss of use and seeking attorney fees. (CP 1). Counsel for both parties agreed that the motion was actually one for summary judgment and treated it as such. (RP 4). Finding no declaration “ that raised any competent issue of material fact,” the court granted the Pratts summary judgment for loss of use and awarded attorney fees. (RP 12; CP 102). The judgment related only to the monetary amount for loss of use and attorney fees. (RP 15). The interest awarded is not at issue. This appeal follows.

IV. ARGUMENT

A. The court erred by failing to consider James Davey’s declaration in opposition to the motion for judgment for loss of use.

CR 54(h) provides:

The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

The order here, however, does not comport with CR 54(h). It states only that the court reviewed ‘the records and files herein’

and “the Declaration of Robert L. Pratt.” (CP 102). James Davey’s declaration in opposition is not designated in the order as having been before the judge, although it had been filed prior to the hearing and was before the court. (CP 87). Indeed, it appears the court did not consider Mr. Davey’s declaration at all:

I frankly don’t see any material issues of fact that would require this matter be sent to an evidentiary hearing. There’s not been any declarations or affidavits filed that raise any competent issue of material fact. (RP 12).

The judge did not take into account Mr. Davey’s declaration when passing on summary judgment. The order cannot stand as his controverting declaration was clearly called to the attention of the court and was not considered by it. (CP 87). Accordingly, the summary judgment order should be reversed and the case remanded.

B. The court erred by granting summary judgment for loss of use when genuine issues of material fact existed.

Mr. Davey’s declaration demonstrated there were genuine issues of material fact precluding summary judgment for loss of use. (CP 87). The dispute was with the amounts requested by the Pratts as well as the reasonableness and necessity of certain items

requested. (RP 8). Mr. Davey controverted each of those certain items in his declaration so summary judgment was inappropriate.

CR 56(c) provides in part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

All facts must be viewed in a light most favorable to the party against whom summary judgment is sought. *Marincovich v.*

Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Moreover, if reasonable minds can differ, summary judgment is improper. *Id.*

Assuming for the sake of argument that loss of rental value is an appropriate measure of damages, Mr. Davey's declaration put into dispute the Pratts' claim for such loss. (CP 89). The Pratts offered the declaration of John Westover regarding loss of rental value:

That based upon the analysis conducted by me, the difference between the fair market rental value for the property located at 3720 W. Rosamond Avenue, Spokane, Washington would be Three Hundred Dollars (\$300) more than the fair market rental value for the property located at 5419 South Perry Street, Spokane, Washington. (CP 46).

The court awarded the Pratts \$7200 for the difference between the rental value of the Rosamond property and the Perry property then occupied by them. (CP 103).

Based on his personal knowledge, Mr. Davey set forth facts in his declaration that controverted the values used by Mr. Westover. In fact, living in the Rosamond home would cost the Pratts more than living in the Perry home. (CP 89). The amounts alluded to by Mr. Davey were based on Mr. Pratt's own declaration. *Id.* In these circumstances, there was clearly a factual dispute necessitating resolution at an evidentiary hearing. But the court made credibility determinations to support its award on summary judgment. This, it cannot do. *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 354-55, 563 P.2d 211 (1977).

Mr. Davey also controverted the propriety of awarding mileage expenses, claimed at the business rate of 55¢/mile, for commuting to work and transporting their oldest child to Lewis and Clark rather than Ferris. Again, the reasonableness and necessity of these expenses without an offset for mileage saved from living in the Perry home was disputed by Mr. Davey. (CP 89). These were factual inquiries necessitating an evidentiary hearing, but the court

instead found the facts to be undisputed. That determination is directly contrary to the evidence.

Damages must be established on a reasonable basis with reasonable certainty and exactness. *Cal. E. Airways, Inc. v. Alaska Airlines, Inc.*, 38 Wn.2d 378, 380, 229 P.2d 540 (1951). The Pratts did not do so here with respect to mileage expenses. Judge Austin did not even award such expenses in the November 15, 2007 order. (CP 10). The court erred by finding no genuine issue as to any material fact with respect to mileage expenses. An evidentiary hearing is necessary.

C. The court erred by awarding damages for loss of rental value when nothing in the record reflects that the properties used by it for determining the award were rentals.

RAP 8.1(c)(2), addressing supersedeas procedure on appeal in a decision affecting property, provides in pertinent part:

Ordinarily, the amount of loss [on a decision affecting property] will be equal to the reasonable value of the use of the property during review.

Although the court allowed damages for loss of rental value, nothing in the record reflects that the Rosamond or Perry homes were to be or were ever used as rentals. This was not a use of the property. As a matter of law, the loss of rental value therefore

could not be the amount of loss. RAP 8.1(c)(2). The court erred by awarding such damages.

D. The court erred by awarding reasonable attorney fees incurred at the Court of Appeals when the Pratts' request for such fees was later denied by that Court after this appeal was filed.

The court also awarded attorney fees of \$9,356.20 to the Pratts. Included in this amount was the sum of \$4,926.20 incurred by the Pratts at the Court of Appeals in the first appeal. (CP 66-68). But after this second appeal was filed, the Court of Appeals on February 3, 2010, denied the Pratts' request for reasonable attorney fees. (App. A-1 to A-2). The amount of attorney fees awarded should therefore be reduced by the \$4,926.20 denied by the Court of Appeals.

V. CONCLUSION

Based on the foregoing facts and authorities, appellants Davey respectfully urge this Court to reverse the summary judgment order on motion granting judgment for loss of use and remand for an evidentiary hearing. But at very minimum, the Daveys urge this Court to (1) reduce the amount of damages by the \$7,200 improperly awarded for loss of rental value and (2) reduce

the attorney fees awarded by \$4,926.20, the amount denied by the Court of Appeals.

DATED this 16th day of June, 2010.

Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Appellants
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

APPENDIX

The Court of Appeals
of the
State of Washington
Division 111

FILED

FEB -3 2010

COURT OF APPEALS
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STATE OF WASHINGTON

ROBERT L. PRATT, et ux.,)
)
 Respondents,)
)
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)
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 JAMES DAVEY, et ux.,)
)
 Appellants.)
 _____)

No. 26620-6-III

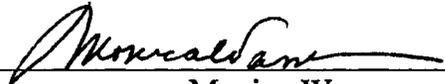
COMMISSIONER'S RULING

On Friday, November 21, 2008, the Court filed its unpublished ruling in the above entitled case, and affirmed the decision of the superior court on the merits. The ruling awarded the Pratts their reasonable attorney fees on appeal, contingent on their compliance with RAP 18.1(d). On Tuesday, December 2, 2008, the Pratts filed an untimely affidavit of fees, one day past the tenth day following the filing of the ruling. RAP 18.1(d) states that such affidavits "must" be filed in 10 days. Nor have the respondents presented any argument that the time should be enlarged "in order to serve the ends of justice." RAP 18.8(a). Accordingly,

No. 26620-6-III

IT IS ORDERED, the respondents are denied their request for fees.

February 3, 2010



Monica Wasson
Commissioner