

COA No. 30014-5-III

FILED

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NOV 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

JAMES R. DAVEY and DANA DAVEY, husband and wife,

Appellants,

v.

WINDERMERE SERVICES CO., et al.,

Respondents.

BRIEF OF APPELLANTS

Kenneth H. Kato, WSBA # 6400
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Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

A. The trial court erred by granting summary judgment dismissal of the Daveys' complaint based on collateral estoppel.

Issue Pertaining to Assignment of Error

1. Did the trial court err by granting summary judgment dismissal of the Daveys' complaint based on collateral estoppel when the issues raised here were not identical to the issues decided in the prior litigation? (Assignment of Error A).

II. STATEMENT OF THE CASE

In *Pratt v. Davey*, Spokane County No. 07-2-04300-9, the Pratts filed a Complaint for Specific Performance of Real Estate Purchase and Sale Agreement with Earnest Money Provision (REPSA) against the Daveys on September 19, 2007. (CP 54) . The Daveys *pro se* defended on the ground that no binding agreement had been reached between the parties. (CP 76). The case proceeded to trial before the Honorable Robert D. Austin, who ordered specific performance. (CP 75-83). The issue before the court was the validity of the contract between the Daveys and the Pratts. It concluded:

As evidenced by the initials of Plaintiffs on the Agreement which was admitted as P1, Plaintiffs accepted the counteroffer presented by Defendants

and an Agreement was formed for the Plaintiffs' purchase of, and Sellers' sale of the property at 3720 W. Rosamond, Spokane, Washington, in accordance with the terms and conditions specified in document admitted as P1. (CP 81).

Contending certain requirements of the REPSA had not been met, the Daveys appealed the determination that a valid contract existed. The Court of Appeals Commissioner affirmed the trial court by finding waiver, a theory not before the trial court. (CP 89-102).

On July 27, 2010, the Daveys *pro se* brought an action against Windermere and its agents (Windermere) and others for violation of the Consumer Protection Act (CPA), breach of fiduciary duty, fraud, and intentional infliction of emotional distress (outrage). (CP 1-23). The Daveys voluntarily dismissed certain defendants. (CP 138-140).

Windermere moved for summary judgment dismissal of the Daveys' complaint based on collateral estoppel. (CP 24-110, 113-127; RP 12). The Daveys filed a memorandum with declarations in opposition to the summary judgment motion. (CP 242- 306, 307-324, 325-330). Windermere replied and filed another declaration. (CP 340-354, 355-537). Applying collateral estoppel, the trial court granted summary judgment dismissal of the Daveys' complaint.

(CP 538-540; RP 46-51). The court also mentioned there were insufficient facts, aside from the complaint's allegations, to support the Daveys' outrage, CPA, breach of fiduciary duty, and fraud claims. (RP 49-51). The Daveys appealed; Windermere cross appealed. (CP 541, 546).

III. SUMMARY OF ARGUMENT

Windermere moved for summary judgment dismissal of the Daveys' complaint based on collateral estoppel. Windermere claimed the facts necessary to support the Daveys' claims had already been decided against them in *Pratt v. Davey*, Spokane County Superior Court No. 07-2-04300-9, and affirmed on appeal in Court of Appeals No. 26620-6-III. But the doctrine of collateral estoppel does not apply because the issues decided in *Pratt v. Davey* were not identical to the issues raised here and application of the doctrine would work an injustice on the Daveys. Moreover, the court was premature in dismissing the outrage, CPA, breach of fiduciary duty, and fraud claims on summary judgment. Therefore, the trial court erred by granting summary judgment dismissal.

IV. ARGUMENT

A. Summary judgment standards

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007). When determining whether any genuine issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The appellate court engages in the same inquiry as the trial court and review is de novo. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

Windermere submitted no affidavits or declarations controverting the facts alleged in the Daveys' complaint. Indeed, Windermere could not present such facts at this stage of the proceedings in any event because it neither conducted discovery nor completed the discovery requested by the Daveys. (See RP 6-10, 12-13, 19). Although the trial court dismissed the complaint based on collateral estoppel, it also noted the Daveys did not

present evidence of the elements essential to their outrage, CPA, breach of fiduciary duty, and fraud claims. *In re Estate of Hansen*, 81 Wn. App. 270, 285, 914 P.2d 127, *review denied*, 130 Wn.2d 1008 (1996) (citing *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*. 484 U.S. 1066 (1988)).

The trial court incorrectly relied on *Celotex* as an additional ground to dismiss these claims. *Celotex* puts the burden on the defendant to demonstrate the plaintiffs are unable to establish a critical element of their claim. 477 U.S. at 322. Without discovery, a summary judgment motion is premature as it is more akin to a motion to dismiss for failure to state a claim. *See, e.g., Maki v. Aluminum Bldg. Prods.*, 73 Wn.2d 23, 26, 436 P.2d 186 (1968). When the evidence and all reasonable inferences from it are viewed in a light most favorable to the Daveys, summary judgment is improper as Windermere cannot demonstrate the absence of any genuine issues of material fact with the record as it now stands. *Reid*, 136 Wn.2d at 201.

Windermere's motion for summary judgment was based and granted on collateral estoppel, the application of which is a question of law. *State v. Mullin-Coston*, 152 Wn.2d 107, 114, 95 P.3d 321 (2004). Under the circumstances here, Windermere was not

entitled to judgment as a matter of law. CR 56. The summary judgment dismissal must be reversed.

B. The court erred by granting summary judgment dismissal of the Daveys' complaint because collateral estoppel is inapplicable.

Collateral estoppel works to prevent relitigation of issues that were resolved in a prior proceeding. Collateral estoppel requires (1) identical issues, (2) a final judgment on the merits, (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication, and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *City of Aberdeen v. Regan*, 170 Wn.2d 103, 239 P.3d 1102 (2010). The issues to be precluded must have been actually litigated and necessarily determined in the prior action. *Id.* at 108. The Daveys do not dispute there was a final judgment on the merits and they were parties in the prior case.

None of the Daveys' claims here, however, were before the court in the specific performance action. The present issues were neither actually litigated nor necessarily determined in the prior action with the Pratts. Those issues not being decided, the court's findings in *Pratt v. Davey* did not address breach of fiduciary duty,

fraud, CPA violations, outrage, and fraud. The only issue was the validity of the contract, which the Daveys do not contest. *Regan*, 170 Wn.2d at 108.

In *Pratt v. Davey*, Judge Austin found the contract was valid based on the evidence known at the time. In light of the telephone records produced by Qwest in this action, there is evidence that Windermere breached its fiduciary duty and committed fraud regarding the timeliness of the counteroffer's acceptance. (CP 242-306, 325-330). For purposes of summary judgment, the inferences from that evidence must be viewed in a light most favorable to the Daveys, the nonmoving party. See *Reid*, 136 Wn.2d at 201.

Despite their repeated requests to allow discovery in *Pratt v. Davey*, the trial court refused. (CP 369-370). They thus had no opportunity to discover evidence of Windermere's breach of fiduciary duty or fraud and it was never before the court. The issues now raised by the Daveys were not actually litigated and necessarily determined in *Pratt v. Davey*. *Regan*, 170 Wn.2d at 108.

Furthermore, the issue regarding the requirement of delivery/fax to the broker's office to determine acceptance was not

previously decided because Judge Austin stated the provision had no application:

There is no such requirement. In the law. Or in this contract . . . I'm telling you how the grammar in that paragraph would be written – should be read. They can deliver or send it by fax to the office. There is no requirement that you have to deliver it to the office. But you do have to give it to the agent. (CP 492).

Accordingly, his findings do not address the issue. The circumstances surrounding the breach of fiduciary duty and fraud by Windermere were not determined by Judge Austin. The issues were not identical and were not actually litigated or necessarily determined in the specific performance action. *Regan*, 170 Wn.2d at 108.

The doctrine of collateral estoppel is confined to ultimate facts (facts actually at issue upon which the claim rests) and does not extend to evidentiary facts (facts which may be in controversy but rest in evidence and are mainly collateral). *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 228, 588 P.2d 725 (1978).

Collateral estoppel prevents the Daveys from contesting the validity of the contract. But it does not preclude consideration of evidentiary facts supporting their claims of breach of fiduciary duty,

outrage, CPA violations, and fraud – issues neither raised nor considered in the prior litigation.

The party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issues in the prior proceedings. *Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The Daveys never had a full and fair opportunity to litigate the issues raised here. Judge Austin said the “delivery” provision did not mean what it said; Commissioner Wasson ignored everything found by Judge Austin and decided the case on waiver, a theory neither pleaded, argued, nor considered at trial in *Pratt v. Davey*.

Collateral estoppel does not apply where an ambiguous or indefinite decision makes it unclear whether the issue was previously determined. *Alishio v. Dept. of Soc. & Health Servs.*, 122 Wn. App. 1, 5-6, 91 P.3d 893 (2004), *review denied*, 153 Wn.2d 1013 (2005). At worst, Judge Austin’s decision ignored the “delivery” requirement; at best, his decision was ambiguous or indefinite on the contention. What is clear, however, is that the issue was not previously determined. Collateral estoppel does not apply.

Moreover, use of the same evidence in both proceedings is also not conclusive on whether collateral estoppel should apply. *Estate of Sly v. Linville*, 75 Wn. App. 431, 437, 878 P.2d 1241 (1994). The mere fact that some of the same evidence may be used in both cases does not mean the issues are identical. Here, they are not. If there is doubt as to whether collateral estoppel applies, the issues should be resolved in favor of granting the opportunity to litigate the issue. KARL B. TEGLAND, 14A WASH. PRACTICE: CIVIL PROCEDURE, §35.33 at 480 (1st ed. 2004).

The cases are quite clear that the issues have to be absolutely identical. If there is even a slight difference in the issues, collateral estoppel simply does not apply. See *Babcock v. State*, 112 Wn.2d 83, 94, 768 P.2d 481 (1989); *San Telmo Assoc. v. City of Seattle*, 108 Wn.2d 20, 22-23, 735 P.2d 673 (1987). Here, the issues in *Pratt v. Davey* and *Davey v. Windermere* are not identical. Collateral estoppel is inapplicable.

Another requirement for the doctrine is that its application must not work an injustice on the party against whom it is to be applied. *Regan*, 170 Wn.2d at 108. Application of collateral estoppel against the Daveys has worked an injustice because they did not litigate their breach of fiduciary duty, outrage, CPA, and

fraud claims in *Pratt v. Davey*. A greater injustice is that the Daveys are left without a remedy for Windermere's wrongful actions by the application of collateral estoppel.

The Daveys are not prevented by collateral estoppel from litigating the issues they raise here because the issues resolved in the prior litigation with the Pratts are not identical. Application of the doctrine would also work an injustice against the Daveys. This court should not compound the trial court's error by also applying the doctrine of collateral estoppel.

C. At this stage of the litigation, the Daveys were not required to present evidence to withstand summary judgment.

The trial court commented the Daveys had not presented evidence beyond mere allegations in their complaint as to any of their claims. To the contrary, they have alleged facts constituting CPA violations, a breach of fiduciary duty, fraud, and outrage by Windermere, which has failed to controvert any of those factual allegations. CR 56(e) requires Windermere to submit affidavits or declarations showing there are no genuine issues of material fact before it can rely on the principle that adverse parties cannot rest on mere allegations in their pleadings:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . .

Windermere only submitted declarations by their counsel with attached exhibits consisting of the record in *Pratt v. Davey*.

Windermere has submitted no other affidavits or declarations.

Furthermore, it has not completed discovery requested by the Daveys. No depositions have been taken. In these circumstances, Windermere failed to meet its burden to show the absence of any genuine issues of material fact and that it was entitled to judgment as a matter of law. Windermere's summary judgment motion was premature. The court erred by granting summary dismissal. See CR 56(f); *Maki*, 73 Wn.2d at 26.

D. CPA claim

To establish a CPA violation, the plaintiffs must prove five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) having an impact on the public interest, (4) and causes injury to the plaintiffs in their business or property,

and (5) the injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The CPA should be liberally construed. *Salois v. Mut. Of Omaha Ins. Co.*, 90 Wn.2d 355, 358, 581 P.2d 1349 (1978).

The unfair or deceptive acts alleged by the Daveys are the breach of fiduciary duty and fraud by Windermere relating to the timeliness of acceptance of the counteroffer. This occurred in trade or commerce – the real estate business. See *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). The Daveys' suit would serve the public interest because it is likely that additional plaintiffs have been or will be injured in exactly the same way by Windermere's acts and there is a real and substantial potential for repetition. *Hangman Ridge*, 105 Wn.2d at 790.

Windermere argues the Daveys have suffered no damage in any event. But they most certainly were damaged as a result of Windermere's breach of fiduciary duty and fraud and unfair or deceptive acts in that they lost their home and incurred attorney fees in appealing the decision in *Pratt v. Davey*.

As for attorney fees in another proceeding as an element of damages, such fees can be recovered when the defendant, who by

intentional and calculated action, leaves the plaintiff with only one course of action -- litigation. *Rorvig v. Douglas*, 123 Wn.2d 854, 862, 873 P.2d 492 (1994). The general rule is that attorney fees are not ordinarily recoverable except pursuant to statute, contractual obligation, or some well-recognized principle in equity. *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941).

But the exception permits an award of attorney fees as consequential damages when the natural and proximate consequences of a wrongful act of defendant involve plaintiff in litigation with others. See *Barrett v. Buchon Baking Co.*, 108 Wn.2d 405, 408, 738 P.2d 1056 (1987).

Three elements are necessary to create liability: (1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event, that is, the wrongful act or omission of A toward B. *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136, *review denied*, 86 Wn.2d 1001 (1975).

That is precisely the case here. The wrongful acts of Windermere against the Daveys involved them in litigation with the Pratts, who were not connected in any way with Windermere's wrongs. The attorney fees the Daveys expended in the prior litigation with the

Pratts are recoverable as consequential damages proximately caused by Windermere. *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882, 376 P.2d 664 (1962); *Choukas v. Severyns*, 3 Wn.2d 71, 82, 99 P.2d 942, 103 P.2d 1106 (1940).

E. Breach of fiduciary duty

Even Windermere acknowledges that, as real estate agents and brokers, they owe certain fiduciary duties to clients. Those clients include the Daveys, who are not precluded by collateral estoppel from now litigating the breach of fiduciary duty by Windermere. The issues have nothing to do with the validity of the contract or the timeliness of acceptance of the counteroffer. The trial court failed to recognize that Windermere's wrongful acts were not insulated by the decision in *Pratt v. Davey*. These acts have independent viability and do not involve the REPSA. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009).

Collateral estoppel does not bar the present suit.

In *Boguch*, the court stated an action sounds in contract for purposes of a contractual fee-shifting provision only if a party brings a claim on the contract, that is, only if the party seeks to recover under a specific contractual provision. 153 Wn. App. at 615. The Daveys do not seek to do so here. If the party alleges breach of a

duty imposed by an external source, such as a statute or common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of the contractual relationship. *Id.* (citing *Owens v. Harrison*, 120 Wn. App. 909, 915, 86 P.3d 1266 (2004)). The Daveys' claims therefore sound in tort, not contract.

A Realtor has a common law and statutory duty to exercise reasonable care in representing a seller's interests. RCW 18.86.030(1), RCW 18.86.040(1), RCW 18.86.060, RCW 18.86.110. This duty exists regardless of any contractual provision. *Boguch*, 153 Wn. App. at 619. Windermere's duties here were defined by statute and common law, not the REPSA. In these circumstances, collateral estoppel does not apply.

Windermere has also failed to controvert any of the Daveys' factual allegations detailing the breaches of fiduciary duty. Those wrongful acts proximately caused damage to the Daveys. The motion was premature and the grant of summary judgment improper. CR 56(f); *Maki*, 73 Wn.2d at 26.

F. Fraud

CR 9(b) provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind

of a person may be averred generally.

A complaint alleging fraud must cite specific fraudulent acts, but need not plead evidentiary matters. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 165-66, 744 P.2d 1032 (1987), *appeal dismissed*, 488 U.S. 805 (1988); *Trak Microcomputer Corp. v. Wearne Bros, Inc.*, 628 F. Supp. 1089, 1092-93 (N.D. Ill. 1985). A complaint adequately pleads fraud if it informs the defendant of who did what and describes the fraudulent actions and mechanisms. *Haberman*, 109 Wn.2d at 165-66. The Daveys' complaint does just that. (CP 8, 9, 10, 11).

Furthermore, in a fraud action, the failure to comply with special pleading rules is not remedied by dismissal of the action, but rather should be corrected by a motion for more definite statement or by the use of discovery. *Fondren v. Klickitat County*, 79 Wn. App. 850, 858 n.4, 905 P.2d 928, *review denied*, 104 Wn.2d 1015 (1995). Here, Windermere knows exactly the fraudulent acts it is accused of by the Daveys and the damage they suffered as a proximate result of those acts. The pleading is adequate. The court erred by granting summary judgment.

Windermere also claims the Daveys cannot offer evidence they were ignorant of the falsity of the representations or they relied

upon their truth. But Windermere has undertaken no discovery and merely speculates that its conclusion is what the evidence would show. The Daveys need not plead evidentiary matters. *Haberman*, 109 Wn.2d at 165-66, *Maki*, 73 Wn.2d at 26. Without any affidavit or declaration controverting the Daveys' factual allegations of fraudulent conduct, summary judgment dismissal cannot be granted. CR 56(e).

G. Intentional infliction of emotional distress (outrage)

Windermere claimed the Daveys were required to present evidence to withstand summary judgment. Again, the argument is premature as Windermere has not controverted any of the Daveys' factual allegations and no discovery has been undertaken. CR 56(f); *Maki*, 73 Wn.2d at 26.

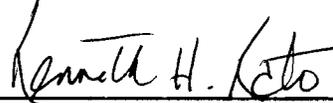
Summary judgment is subject to a burden-shifting scheme. "After the moving party submits adequate affidavits, the nonmoving party must set forth specific acts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Windermere has failed to trigger the burden-shifting scheme. Summary judgment dismissal is premature and inappropriate in these circumstances.

V. CONCLUSION

Based on the foregoing facts and authorities, the Daveys respectfully urge this Court to reverse the summary judgment dismissal of their complaint and remand for trial.

DATED this 7th day of November, 2011.

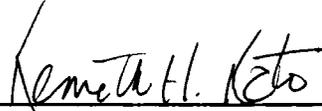
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on November 7, 2011, I served, by first class mail postage prepaid, a true and correct copy of the Brief of Appellants on William D. Symmes, Matthew W. Daley, and Michael J. Kapaun, Attorneys at Law, 422 W. Riverside, Ste 1100, Spokane, WA 99201-0300.



Kenneth H. Kato
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