

FILED

MAR 12 2012

COURT OF APPEALS
DIVISION III

COA No. 30014-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants/Cross-Respondents,

v.

WINDERMERE SERVICES CO., et al.,

Respondents/Cross-Appellants.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

Kenneth H. Kato, WSBA # 6400
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I. COUNTER-STATEMENT OF ISSUE ON CROSS APPEAL

A. The trial court properly denied attorney fees to Windermere as the Daveys' action did not arise out of the Real Estate Purchase and Sale Agreement (REPSA), thus making the attorney fee provision inapplicable.

II. COUNTER-STATEMENT OF THE CASE ON CROSS APPEAL

The trial court denied Windermere's request for attorney fees and costs. (Respondents' brief, p. 17). The court ruled:

I deny the attorney fees, Counsel. I have in mind there is a statute on a frivolous claim. I don't make that finding. And in fact, counsel for the plaintiffs are – have been appropriately creative in their approach to this matter. Insofar as attorney fees emanating from the contract, the answer would be no, that's not – there's no linkage there. So we're not under a contract at all. These claims rise or fall just on their own merit.

So I don't see any other statutory, equitable, or contractual basis to grant fees, so I deny that, Counsel. (RP 51-52).

The provision for attorney fees in the proposed order on summary judgment was thus stricken and fees denied. (CP 539; RP 52).

III. ARGUMENT

A. The trial court properly denied attorney fees and costs to Windermere because this action did not involve any dispute relating to the REPSA.

Windermere claims it is entitled to attorney fees under the REPSA. Whether a party is entitled to such an award is a question of law reviewed de novo. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009). Contrary to Windermere's claim, this action does not involve "any dispute relating to any aspect of this transaction or this Agreement." (CP 63). The Daveys neither dispute the validity of the contract nor the transaction as those issues were decided in *Pratt v. Davey*. Rather, this action involves Windermere's wrongful acts as a fiduciary and for fraud against the Daveys. These acts have independent viability and do not involve the REPSA. Indeed, claims of breach of professional duty, as here, are not an action on the contract. 153 Wn. App. at 618-19.

As noted in the Daveys' opening brief, the *Boguch* 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, *i.e.*, only if the party seeks to recover under a specific contractual provision. 153 Wn. App. at 615. The Daveys, however, seek no recovery under any REPSA provision. If breach of a duty imposed by an external source, such as a statute or common law, is alleged, the party does not bring an action on the contract, even if there would be no duty 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 involve breaches of duty arising from statute and common law. They therefore sound in tort, not contract.

Realtors have a common law and statutory duty to exercise reasonable care in representing a seller's interests. See 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 duty was defined by statute and common law, not the REPSA. *Boguch* is dispositive and precludes an award of attorney fees and costs to Windermere. The trial court did not err by denying them.

Windermere is also not entitled to attorney fees on appeal for the same reasons supporting their denial in the trial court. (See RP 51-52). No basis exists for awarding fees to Windermere under the REPSA. *Boguch, supra*.

B. The trial court erred by granting summary judgment dismissal of the Daveys' action.

Windermere argues that after it showed the absence of a genuine issue of material fact, the Daveys did not come forward with evidence to support their claims. See *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). The flaw in its

argument is that it failed to meet its initial burden, which can be met by showing there is an absence of evidence supporting the nonmoving party's case. 477 U.S. at 325. But to carry its burden, Windermere must still identify "those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it claims demonstrates the absence of any genuine issue of material fact." *Baldwin v. Sisters of Providence, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

Relying solely on the record in *Pratt v. Davey*, Windermere did not make the requisite showing that no genuine issues of material fact existed. The burden thus never shifted to the Daveys. The record provided by Windermere was directed to the collateral estoppel issue, not any *Celotex* standards. When the moving party fails to meet its initial burden, as here, summary judgment cannot be entered, regardless of whether the opposing submitted responding materials. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 810 P.2d 4 (1991). The court erred by granting summary judgment dismissal.

Even so, the Daveys did not merely make conclusory allegations of CPA violations, a breach of fiduciary duty, fraud, and outrage. In the complaint, they properly alleged material facts

prima facie supporting their claims. Windermere did not satisfy CR 56(e), requiring the moving party to support its motion with affidavits/declarations showing there were no genuine issues of material fact. It failed to meet its initial burden under the rule and could not since it chose to forego any factual discovery.

In support of its summary judgment motion, Windermere submitted only its counsels' declarations with exhibits consisting of the *Pratt v. Davey* record, a matter within the pleadings. Its motion for summary judgment was in essence a CR 12(b)(6) motion to dismiss for failure to state a claim. The only question, then, for the court is whether it can be said there is no conceivable set of facts plaintiffs could prove which would entitle them to relief on their claims; in deciding, the court must accept the factual allegations of plaintiffs' complaint as true. *Grimsby v. Samson*, 85 Wn.2d 53, 55, 530 P.2d 291 (1975). Under these standards, the Daveys' complaint is also sufficient to withstand a CR 12(b)(6) motion.

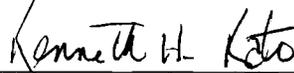
In further reply to Windermere's responses, the Daveys rest on their opening brief in urging this Court to reverse the summary judgment dismissal because not only is collateral estoppel inapplicable, but Windermere also failed to satisfy its initial burden under *Celotex*.

IV. CONCLUSION

Based on the foregoing facts and authorities, the Daveys respectfully urge this Court to reverse the summary judgment dismissal of their claims, to affirm the denial of attorney fees and costs to Windermere below, and to deny such fees and costs to Windermere on appeal.

DATED this 12th day of March, 2012.

Respectfully submitted,



Kenneth H. Kato, WSBA # 6400

CERTIFICATE OF SERVICE

I certify that on March 12, 2012, I served by first class mail, postage prepaid, a true and correct copy of the reply brief of appellants/cross-respondents on William D. Symmes, Matthew W. Daley, and Michael J. Kapaun, Attorneys at Law, 422 W. Riverside, Ste 1100, Spokane, WA 99201-0300.

