

**FILED**

JUL 12 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO: 305902-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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CC&H INVESTMENTS, a partnership  
Respondents

vs.

RCS NORTHWEST, LLC, et al.  
Appellant

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BRIEF OF APPELLANT CHARLEY HEWITT

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## **I. INTRODUCTION**

This is an appeal by a contractor, Charley Hewitt, of a Summary Judgment Order of the trial court, dismissing Hewitt's unjust enrichment counterclaim. CP 127-129.

Mr. Hewitt appeals the trial court ruling that the representations made to Hewitt by one of the lender's members could not be relied on by the contractor, because of the commercial nature of the construction loan. RP 5-6.

## **II. ISSUES PRESENTED**

A. SHOULD SUMMARY JUDGMENT HAVE BEEN DENIED WHERE THERE WERE FACTUAL ISSUES AS TO WHETHER THE PLAINTIFF WOULD BE UNJUSTLY ENRICHED.

B. IS UNJUST ENRICHMENT APPLICABLE IN A COMMERCIAL SETTING AS WELL AS A NON-COMMERCIAL SETTING.

## **III. STATEMENT OF THE CASE**

This action involves a housing development on Highland Street in Clarkston, Washington known as Highland Place Subdivision. CP 99. The project, being constructed by RCS Northwest, LLC, consisted of 23 single family home sites. CP 99. Defendant Hewitt Construction was a contractor hired by RCS Northwest, LLC, to construct the major infrastructure for the

entire project including sewer lines, manholes, water lines, sewer stubs, drainage ditches and all of the streets for the subdivision. CP 99. Hewitt has properly performed all work required under the contract and to the engineer's specification. CP 99. Nothing had to be redone, CP 99. All the work was inspected and passed all inspections. CP 99. After credit for all payments made by RCS Northwest, Hewitt is owed \$114,972. CP 101. When Hewitt was not paid by RCS Northwest, LLC, Hewitt had to record a lien against the Highland Place subdivision property in the sum of \$114,972. CP 99. That lien was recorded on October 18, 2010 as Asotin County Auditor's Instrument No: 321384. CP 99. A copy of the claim of lien of Charley Hewitt is attached as Exhibit 4 to the Complaint of CC&H Investment for foreclosure. CP 55-57.

Hewitt construction commenced work on the project on March 23, 2010. CP 99. At that time there were three Deeds of Trust recorded of record on the Highland Place subdivision property, totaling \$368,500. CP 100. All three were from RCS Northwest to CC&H Investments, a partnership. The first two were dated December 29, 2008 and secured \$275,000. CP 100. The third Deed of Trust was recorded February 25, 2010, to secure an additional \$93,500. CP 100.

After Hewitt had commenced work, but before the work was completed, three more Deeds of Trust were recorded on the property. CP

100. Those three additional Deeds of Trust were for a total of \$368,500, for a total of \$737,00 in Deeds of Trust to CC&H Investments. CP 100.

Charley Hewitt became concerned because he was not being paid for the work of Hewitt Construction. CP 100. In October of 2010, while Hewitt's work was still going on, Charley Hewitt texted Ron Stricklin of RCS Northwest, telling him that Hewitt was concerned about getting paid and was going to put a lien on the property. CP 100. Immediately after those concerns were expressed to Ron Stricklin, CC&H suddenly released it's Deeds of Trust, all of those referred to above, on Lots 19, 20, 21, 22, and 23 and a Deed to those lots was given to Lewiston Clarkston Partners Habitat for Humanity. CP 100-101

Unknown to Charley Hewitt was the fact that Dick Coles was one of the principals, a partner of CC&H Investments, the partnership that was financing RCS Northwest. CP 103. In fact, Dick Coles, one of the two partners of CC&H, acknowledged that CC&H had been involved with RCS Northwest, with 8 to 9 prior transactions. CP 93. Ron Stricklin would locate properties and CC&H would act as the lender, loaning RCS monies to purchase the property. CP 93. RCS would develop the properties, sell them and pay back CC&H. CC&H acted as "the bank" for RCS projects. CP 93.

When Hewitt was well along with his work on the project, but wasn't completely done, he had a conversation with Dick Coles. CP 102.

The two were talking about another unrelated project when the Highland Place project came up. CP 103. Although he was one of the partners of CC&H Investments, Dick Coles did not disclose any connection with CC&H to Charley Hewitt, and Hewitt had no idea that Dick Coles was one of the investors in CC&H. CP 103.

In the conversation with Dick Coles, Mr. Coles emphasized to Charley Hewitt that he needed to get the project done and get it done soon. CP 102. Dick Coles kept asking Charley Hewitt when the project would be done. CP 102. Mr. Hewitt asked Dick Coles what he knew about the developer, Ron Stricklin, and point blank asked Dick Coles "will I get paid". CP 103. Mr. Hewitt was assured by Dick Coles that Ron Stricklin was reliable or ok or words to that effect and that he, Dick Coles, was certain that Hewitt would get paid as soon as the job was done. CP 103. Prior to the meeting with Dick Coles, Ron Stricklin had conversations with Mr. Hewitt and made promises that checks would be coming from RCS' "bankers" with both names on them. CP 102. Ron Stricklin had been very secretive about who his "banker" was during those earlier conversations. CP 103. After Charley Hewitt had the conversation with Dick Coles and was assured that he would get paid, Hewitt asked Ron Stricklin about Dick Coles. CP 103. Mr. Stricklin told Charley Hewitt that Dick Coles was his friend and was the "money guy". CP 103. Ron Stricklin also assured

Charley Hewitt that Hewitt would get paid when the county approved the job and that CC&H/Coles were financing the whole thing. CP 103.

After Charley Hewitt had the conversation with Dick Coles and then learned from Ron Stricklin that Dick Coles was involved with the project and was the "banker", that caused Hewitt to continue on with the job in reliance on the statements made by Dick Coles. CP 103. Hewitt continued to do work because of the statements by Dick Coles and Ron Stricklin that there was money to pay for his improvements and that he would get paid if he could just get the job done so the county would give approval. CP 103.

Instead of making sure that Hewitt got paid, RCS and CC&H worked together to suddenly release five lots from the layers of Deeds of Trust without making sure that bills for the job got paid. CP 103. RCS could not have sold those lots to Habitat for Humanity without getting the liens released. CP 103. CC&H released the liens on those five lots at a time they knew or should have known that Stricklin did not have enough money to pay everyone and that there would be even less security for those Deeds of Trust on the remaining lots. CP 103.

CC&H Investments filed its complaint on February 18, 2011. CP 1. CC&H sought to foreclose its first three Deeds of Trust and named Hewitt, asking that Hewitt's lien "be adjudged inferior and subordinate to

plaintiff's Deed of Trust liens and before foreclosed except only for the statutory right of redemption". CP 7.

Hewitt filed an answer and counterclaim on May 9, 2011. CP 70-76. The counterclaim against CC&H Investment alleges that plaintiff CC&H was attempting to retain or accept the benefit to the property placed by defendant Hewitt under such circumstances as to make it inequitable for the plaintiff to retain the benefit without the payment of its value. CP 75. Hewitt alleged that CC&H Investments would be unjustly enriched by keeping the improvements to the real property placed there at defendant Hewitt's expense, without payment therefore. CP 75.

CC&H filed a Motion for Summary Judgment on June 9, 2011. CP 82-83. The affidavit of Dick Coles alleged that CC&H was never involved in the development aspect of the property, that they were simply "the bank". CP 93. The affidavit of Charley Hewitt in opposition to Summary Judgment set forth the representations made by Dick Coles and his reliance on those declarations. CP 102-103.

The trial court in its summary judgment ruling made a distinction between construction loans of a commercial nature versus those where a bank would oversee construction of a project. RP 4. The court held that he was required by law to take everything Mr. Hewitt alleged Mr. Cole to have said to be true. RP 4. Despite the court assuming that all of the

representations by Mr. Cole were exactly as Mr. Hewitt said, the court ruled that the statements that Mr. Hewitt was going to get paid did not rise to the level of any guarantee to Hewitt. RP 4. The court ruled that on the claim of unjust enrichment and detrimental reliance, the facts did not give enough to allow a trial on that issue. RP 5.

Summary judgment having been granted, the case proceeded to sheriff's sale, with the sheriff's return on sale being filed on December 22, 2011. CP 138-139. On January 23, 2012 the matter came on for an Order Confirming Sale of Real Property. RP 22. There being no irregularities in the sheriff's sale procedures, an order confirming sale was entered. RP 22-23. This appeal followed on January 31, 2012. CP 150-151.

#### **IV. ARGUMENT**

A. SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WHERE THERE WERE FACTUAL ISSUES AS TO WHETHER THE PLAINTIFF WOULD BE UNJUSTLY ENRICHED.

Dick Coles of CC&H Investments, knew or had to know that a Deed of Trust securing an additional \$93,500 and then three other deeds of trust were being put on the property by his partnership after Hewitt had commenced work. Dick Coles also had to know that all six of the Deeds of Trust of CC&H were being released so that lots could be sold to Habitat for Humanity. The action of selling those lots took \$140,000 of the land value out of the security for the liens.

Dick Coles knew that Ron Stricklin/RCS Northwest was borrowing money when there were insufficient security in the land to cover it. At that same time Mr. Coles was encouraging Hewitt to stay working and complete the job. Without revealing that he was the "banker", Dick Coles encouraged Hewitt to keep working for RCS and assured Hewitt that he was certain Hewitt would get paid when the job was done. Since Dick Coles had advanced the additional \$93,500 related to the February 25, 2010 Deed of Trust, without providing for contractors to be paid from those funds, he could not make that assurance. Dick Coles also knew, late in the project and when Hewitt was being encouraged to finish the job, that the five lots had been sold out from under the Deeds of Trust to Habitat for Humanity.

Although Hewitt had commenced work before the transfer of the lots to Habitat for Humanity, Hewitt's priority of lien under RCW 60.04.061 applies only to any lien, mortgage, Deed of Trust or other encumbrance which attached to the land after, or was unrecorded at the time of commencement of labor or first delivery of materials or equipment. Habitat is a purchaser for value and has a deed, rather than a lien, mortgage, deed of trust or other encumbrance. After the sale to Habitat for Humanity. There was \$140,000 less security for the lien and \$93,500 additional owed to CC&H since the time that Hewitt commenced work.

Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008), citing Bailie Commc'ns, Ltd v. Trend Bus. Sys. Inc., 61 Wn. App. 151, 160, 810 P.2d 12 (1991) ("Unjust enrichment occurs when one obtains money or benefits which in justice and equity belong to another").

In Young, supra, Jim and Shannon Young made substantial improvements on a run-down piece of property owned by Judith Young. As a result of conversations with Judith, Jim reasonably believed Judith would pay him for his improvements to the property. Young, supra at 481.

In such situations a quasi contract is said to exist between the parties. Bill v. Gattavara, 34 Wn.2d 645, 650, 208 P.2d 457 (1949) (stating, "the terms restitution and unjust enrichment are the modern designations for the older doctrine of quasi contracts"); State v. Cont'l Baking Co., 72 Wn. 2d 138, 143, 431 P.2d 993 (1967):

"If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract.."

In the present case, Hewitt was encourage to complete all of the roads and other infrastructure of Highland Place Subdivision so that the county

would give approval and the lots would be saleable. Hewitt did just that, at the request of Ron Stricklin and Dick Coles at a time when Coles knew that Stricklin did not have the ability to pay Hewitt and was not going to pay Hewitt. CC&H now wants to retain all of those roads and other improvements to the detriment of Hewitt.

Three elements must be established in order to sustain a claim based on unjust enrichment: (1) a benefit conferred upon defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. Bailie Commc'ns., 61 Wn. App. at 159 to 60, Young v. Young, 164 Wn. 2d 477 at 484.

In the present case, all three elements are established. Hewitt certainly conferred a benefit upon the plaintiff. CC&H, if it forecloses on the property of RCS, has all of the roads and infrastructure built by Hewitt, without paying anything for those improvements. CC&H certainly knew that the benefit was being incurred and, according to Hewitt, Dick Coles encouraged him to finish the work and assured him that Hewitt would be paid.

Finally, the retention of the roads and other benefits by CC&H would be inequitable to retain without payment of its value. The enrichment of the plaintiff must be unjust and the defendant cannot be a mere volunteer.

Charley Hewitt states that there was a conversation with Dick Coles where Coles assured him that Ron Stricklin was "ok" and that Charley Hewitt would get paid. A factual question exists because Dick Coles admits there was a conversation, but denies making any assurances or guarantees that Charley Hewitt "would get paid". See Supplemental Declaration of Dick Coles, paragraph 7. CP 107. Mr. Coles further denies the statements attributed to him by Mr. Hewitt that he should try to complete the project and was prompted to get the job done and the county approval. See Supplemental Declaration of Dick Coles, paragraph 9. CP 107.

There is a huge difference between Mr. Coles merely saying that Ron Stricklin was "ok" and Mr. Coles assuring Mr. Hewitt that if he continued to work on the project and finished, he would get paid.

Mr. Coles says that his conversation with Mr. Hewitt was only "off the cuff comments". CP 107. Mr. Hewitt's recollection is that he was given an assurance of being paid. CP 102-103.

In considering a summary judgment motion, the court must consider all facts submitted and all reasonable inference from the facts in the light most favorable to the non-moving party. Yakima Fruit and Cold Storage Co. v. Central Heating and Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1972); Barber v. Bankers Life and Cas. Co., 81 Wn.2d 140, 142, 500 P.2d 88 (1972). While the trial court stated that he was required by law to take

everything Mr. Hewitt alleged Mr. Cole to have said to be true for the sake of argument, RP 4, if he had actually done so, he would have had to deny the summary judgment motion.

B. UNJUST ENRICHMENT IS APPLICABLE IN COMMERCIAL, AS WELL AS NON-COMMERCIAL SETTINGS.

Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another, whether a commercial transaction or otherwise. Bailie Commc'ns, Ltd v. Trend Bus. Sys. Inc., 61 Wn. App. 151, 160, 810 P.2d 12 (1991). In Bailie, the Bailies assigned their one-third interest in a Hawaiian condominium to Suburban Investment Corporation, which already owned the remaining two-thirds. Harold Wosepka, president of Trend Colleges, Inc., guaranteed Suburban's payment obligation in a letter on Trend's letterhead and signed by Harold Wosepka as president. But in the text of his letter, Wosepka wrote that he would personally guarantee Suburban's obligation. Bailie, supra at 153.

The court at 154 to 155 found that although Wosepka's guarantee did not bind Trend, Trend knowingly benefitted from the fraud and Trend had been unjustly enriched. Trend was not allowed to dispute the representations made by Wosepka. In the present case, CC&H Investments should not be able to repudiated the representations made by one of it's partners, Dick Coles. The corporation in Bailie Communications was subject to the doctrine of

unjust enrichment, just as an individual would have been. Bailie, supra at 155.

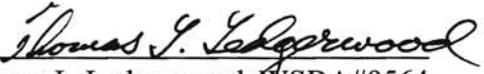
At 160 the Bailie court noted that Trend had knowledge through its sole stockholder Wosepka, that \$175,000 was to be paid to the Bailies. Trends retention of that money was wrongful. Bailie, at 160. In the present case, Dick Coles had knowledge of the continuing financial problems of RCS Northwest and additional \$93,500 and other loans to them, as well as the sale of 5 of the lots that were released from CC&H's Deeds of Trust. It would be unjust for CC&H to retain the roads, sewers and other infrastructure without paying Charley Hewitt for those benefits.

While the trial court was corrected that in many construction loans, the bank oversees construction of the project and makes sure that the contractor pays the subcontractor by requiring the contractor to obtain lien releases from the sub, RP 4, the case law does not limit unjust enrichment in non-banking situations. CC&H did not retain control over how the money was to be distributed, but Dick Coles of CC&H did know, from his conversation with Charley Hewitt, that Hewitt had not been paid and was concerned about it. Coles got Hewitt to finish the job by assuring him that payment was forthcoming. The elements of unjust enrichment are met. Unjust enrichment applies to a broad category of cases. Bailie, supra at 160.

V. CONCLUSION

CC&H would be unjustly enriched under the circumstances by keeping all of the infrastructure without paying for it. Summary judgment should have been denied.

Respectively submitted this 11<sup>th</sup> day of July, 2012.

  
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