

FILED

AUG 30 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 315860

WHITMAN COUNTY CAUSE NO. 11-2-00145-6

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

SARA G. ARROYO,
Respondent/Plaintiff

v.

GLORIA J. FISCHER,
Appellant/Defendant

RESPONDENT'S BRIEF

Will Ferguson, WSBA 40978
Of Attorneys for Respondent
LIBEY & ENSLEY, PLLC

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III. STATEMENT OF THE CASE

Appellant Gloria Fischer (“Appellant”) and Respondent Sara Arroyo (“Respondent”) (collectively the “Parties”) were in a committed intimate domestic relationship from 1972 until around November 1983. Clerk’s Papers (“CP”) 48. In 1978, the Parties acquired a house in Kennewick, Washington (the “Kennewick house”). CP 49. The Kennewick house was purchased as joint tenants with right of survivorship. Plaintiff’s Exhibit 4. The Parties entered into a contract (the “Agreement”) and the Respondent executed a note (the “Note”), regarding the payment of the purchase price on the Kennewick house. Plaintiff’s Exhibit 5; Plaintiff’s Exhibit 6. The Note and Agreement were to address who would pay certain portions of the Kennewick house purchase price. Report of Proceedings (“RP”) 70-72. The Agreement also set forth how the Kennewick House would be financed. Plaintiff’s Exhibit 5; Plaintiff’s Exhibit 6. According to the Agreement, if the house sold before all of Respondent’s payments, the proceeds of the sale were to be split proportionally to each party’s contribution. Plaintiff’s Exhibit 5. Appellant was to provide the \$11,250.00 down payment and \$1,186.26 for the closing costs. Ibid. The parties were also to jointly assume the existing mortgage in the amount of \$31,743.57 at 9% interest for 25 years. Id. Respondent was to pay the monthly payments until either the house was

sold or until Respondent's payment to principal totaled \$11,605.00, at which time the remaining payments would be split evenly between Respondent and Appellant. Id. The mortgage was paid off in 1997 and Respondent never made any payments on the Note. RP 83, Lines 8-13. Respondent never received a copy of the Note. RP 83, Line 9. In fact, just like Appellant, Respondent forgot about the Note. RP 83, Lines 9-10. The Parties never fulfilled the Agreement and Note. RP 142, Lines 21-27. Respondent made at least 10 or 11 mortgage payments but made no payments on the Note. RP 93, Lines 11-13; RP 83, Line 8; CP 49.

In 1982, the Parties acquired property in Pullman, Washington (the "Pullman property"). CP 49. The purchase price on the Pullman property was \$9,600.00. Id. Appellant later sold the Pullman property without Respondent's knowledge. RP 86, Lines 7-23. Respondent received none of the sale proceeds. Id. A signature purporting to be Respondent's appeared on a quitclaim deed ("Pullman Quitclaim") from Respondent to Appellant. Plaintiff's Exhibit 16. The Pullman Quitclaim was notarized by a former partner and friend of Appellant's. Plaintiff's Exhibit 16; RP 30-31, Lines 17-27, 1-22.

The Parties separated in 1983. CP 48. Appellant made the mortgage payments on the Kennewick house from 1979 through 2010 and managed the house, including finding tenants and doing routine

maintenance, and received the benefits from management and renting. CP 59-60. Appellant deprived Respondent of the monetary benefits of the Kennewick house. CP 47.

Appellant provided inconsistent testimony at trial. RP 12-16. At trial, Appellant claimed she remembered the Agreement, but at her deposition, Appellant couldn't recall the Agreement. Id. Appellant also testified that the Agreement was "irrelevant" and that it was for circumstances that never occurred. RP 124-25, Lines 10-27, 1-21. Appellant testified she simply forgot about the Agreement. RP 13, Lines 9-10; RP 16-17. Lines 4-27, 1-12. Appellant never attempted to enforce the Agreement and Note against the Respondent. RP 17-18, Lines 23-26, 13-17.

The Superior Court of Whitman County (the "Superior Court") found that the Respondent's signature on the Pullman Quitclaim was "very clearly...forged." RP 145, Line 9. The signature was examined by Erin Jenkins, a handwriting expert. Plaintiff's Exhibit 24 RP 102-103, Lines 23-27, 1-4. Mr. Jenkins concluded that the signature appearing on the Pullman Quitclaim was likely not the signature of Respondent. RP 110, Lines 3-9. Appellant's explanation of the forgery was that the Pullman Quitclaim simply appeared in the mail one day. RP 26-27, Lines 14-27, 1-

7. The Superior Court concluded that “[Appellant] participated [in the forgery] and certainly knew about it.” RP 145, Lines 10-12.

At the conclusion of the evidence, the Superior Court applied principles of equity, rejected Respondent’s theory of winding up the partnership, and instead found that the Appellant and Respondent had lived in a committed, intimate relationship. RP 141-42, Lines 9-12, 23-24, 20-27. The Superior Court ultimately equitably divided the Kennewick house proceeds and the value of the Pullman property. RP 144, Lines 11-20. Finally, the Superior Court awarded attorney fees and costs, based on equitable principles and domestic relations law. RP 145, Lines 6-21.

IV. STATEMENT OF THE ISSUES

- I. Did the Superior Court err by finding that the Kennewick Property proceeds should be divided equitably between the Parties, regardless of an Agreement that was clearly abandoned by both Parties?
- II. Did the Superior Court err by awarding \$18,419.26 in fees and costs when it relied upon a Declaration of Attorney Fees and Costs and did not award prejudgment interest?

V. SUMMARY OF THE ARGUMENT

The Superior Court did not err when it found that the Parties had abandoned the Agreement. Whether the Parties were domestic partners or not, the Agreement was interpreted under basic contract law and the conclusion reached by the Superior Court was correct because the facts of the case show that the Agreement was abandoned by both Parties.

The Superior Court did not award prejudgment interest. A review of the Declaration of Gary J. Libey Requesting Decision and in

Support of Award for Attorney Fees and Costs and of the Superior Court's Findings of Fact and Conclusions of Law, clearly indicate that no pre-judgment interest was awarded.

VI. STANDARD OF REVIEW

A finding that a contract has been abandoned is reviewed for substantial evidence. Monroe v. Fetzer, 56 Wash.2d 39, 42, 350 P.2d 1012 (1960). See also Martinson v. Publishers Forest Products Co., 11 Wash. App. 42, 49, 521 P.2d 233, 237 (1974). The amount of allowable attorney fees is within the discretion of the trial court and is reviewed for manifest abuse of discretion. Hsu Ying Li v. Tang, 87 Wash.2d 796, 801, 557 P.2d 342 (1976).

VII. ARGUMENT

A. **The Superior Court did not Err When it Found That the Parties had Abandoned the Agreement and That no Setoff Should be Permitted.**

The Superior Court found that the Agreement entered on August 30, 1978, was essentially abandoned at the outset. RP 142, Lines 22-27. The doctrine of "abandonment" is analogous to the mutual rescission of a contract by the consent of both parties. Schoneman v. Wilson, 56 Wash. App. 776, 781, 785 P.2d 845, 847 (1990). The doctrine of abandonment provides that:

The parties to an express contract may abandon it and are released from their contractual obligations if the conduct of one party is inconsistent with the continued existence of the contract and that conduct is known to and acquiesced in by the other party.... In order for rescission to be legally operative, all parties to the contract must consent to rescission by words or objective conduct.

Id. at 781. Determination that a contract has been abandoned is a factual inquiry. Martinson v. Publishers Forest Products Co., 11 Wash. App. 42, 49, 521 P.2d 233, 237 (1974).

In Martinson, the plaintiffs operated a logging company and contracted with the defendants to deliver logs. Id. at 43. The plaintiffs sued the defendants to recover funds held by the defendant as security for performance on the logging contract. Id. The defendants counterclaimed, alleging that the plaintiffs had breached the logging contract by not delivering the logs as promised. Id. At trial, the plaintiffs proved that the defendant's agents had in fact told the plaintiffs to stop delivering logs. Id. at 46. Additionally, the plaintiffs proved that they and the defendant had entered into a subsequent agreement to start cutting cedar poles on a different parcel of property, thereby shifting production away from the original contract. Id. The trial court found that the parties had abandoned the initial contract. Id. at 51-52.

The Court of Appeals affirmed the trial court and stated that "the existence of abandonment depends upon intent and may be implied from

the facts of the parties.” Id. at 50. A finding of abandonment will be upheld if supported by substantial evidence. Id. at 51. After a brief discussion about the concepts of contract abandonment and rescission, the Court of Appeals concluded by quoting Corbin on contracts:

if one of the contracting parties assents to the abandonment of the contract by the other party, there has been a rescission of the contract. Both parties are then restored to the status they occupied prior to the contract, and neither can sue the other on the contract. . . . Abandonment, . . . is a unilateral act. Rescission is a bilateral action.

Id. at 50-51 (quoting 5A Corbin, Contracts, s 1236, at 533).

Appellant provides no argument as to why the Agreement between the Parties should be declared a community property agreement, rather than just a contract between two individuals. But regardless of whether the contract is a community property agreement between domestic partners or a contract between two individuals, the outcome is the same and the Agreement in this case is to be interpreted under general contract law. Higgins v. Stafford, 123 Wash. 2d 160, 165, 866 P.2d 31, 34 (1994).

Substantial evidence supports the Superior Court’s finding of abandonment. Here, the Superior Court found more than just unilateral action by the Respondent; the Superior Court found bilateral action: “...it is very clear because of the personal nature of your relationship here you never followed it, you never lived by it, you never recognized it. I think

for the most part until this dispute came about both of you forgot it.” RP 142, Lines 24-27. The evidence showed that almost as soon as the Parties created the Agreement on August 30, 1978, they immediately abandoned it. The abandonment was clearly bilateral; neither Party followed the terms or took action on the Agreement or Note. Appellant testified, after multiple inconsistencies between her deposition testimony and her trial testimony, that the Agreement and Note were “irrelevant” and that the Agreement contemplated events that just didn’t “occur”. RP 124, Lines 15-19. Respondent testified that she made 10-12 mortgage payments on the Kennewick house. RP 90, Lines 24-26. Appellant never attempted to enforce the Agreement and Note against the Respondent. RP 17-18, Lines 23-26, 13-17. Respondent never received a copy of the Note. RP 83, Line 9.

This Court should affirm the Superior Court’s conclusion that the Agreement and Note were abandoned and that the proceeds of the sale of the Kennewick House should be divided equitably between Respondent and Appellant.

B. The Superior Court did not Award Prejudgment Interest when it Awarded Costs and Attorney Fees to the Respondent.

Appellant’s second and final assignment of error appears not to be that the Superior Court improperly awarded attorney fees and costs, but

that it miscalculated the amount of the attorney fees and costs. Brief of Appellant at 14.

Court's may award attorney fees under contract, statute, or a recognized ground of equity. Hsu Ying Li v. Tang, 87 Wash.2d 796, 797-98 (1976). "A court may award attorney fees if the losing party's conduct constitutes bad faith or wantonness." Id. at 798 (citing Public Util. Dist. No. 1 v. Kottsick, 86 Wash.2d 388, 390, 545 P.2d 1 (1976)).

The Superior Court in this case is awarded attorney fees and costs based on several factors, all of which related to the Appellant's misconduct and egregious behavior. CP 47, RP 154, Lines 6-21. Appellant does not appear to argue that the Superior Court erred in awarding any attorney fees and costs to Respondent. Instead, Appellant argues that the Superior Court awarded pre-judgment interest and shouldn't have done so. Appellant's confusion regarding the calculation of attorney fees is easily answered by consulting the combination of the Memorandum Decision and the Declaration of Gary J. Libey. In the Memorandum Decision, the Superior Court stated "[b]ecause no evidence was presented to assist the court in quantifying these factors, the court deems it appropriate to make an adjustment in its oral ruling and to award [Respondent] the *full amount* of her attorney fees and costs to date of

\$18,419.26.” CP 47 (emphasis added). The Superior Court further explained its rationale for the amount of fees and costs by stating:

After trial, the court announced that it would make an award of attorney’s fees in favor of Arroyo because of Fischer’s dishonesty relating to the forged deed to the Pullman property. The court felt that reimbursement for a portion of her attorney fees was appropriate in this equitable action given the egregious nature of Fischer’s conduct. The court has since reviewed the time and costs records of Arroyo’s attorneys, and it finds these charges and expenditures reasonable.

CP 47. Turning to the records referred to by the Superior Court, above, one sees that the attorney fees and costs awarded by the Superior Court are the same as stated in the Declaration of Gary J. Libey Requesting Decision and in Support of Award for Attorneys’ Fees and Costs. In his Declaration, Mr. Libey stated that he billed \$7,667.50 for his services, \$6,100.00 for Mr. Ferguson’s services, and \$4,651.76 in costs (including expert witness fees, establishing that the Respondent’s signature on the Pullman property deed had been forged), for a total of \$18,419.26. CP 10. \$18,419.26 is the same amount awarded by the Superior Court. CP 47, 61.

The basis for the award and the amount of attorney fees was not as Appellant argues at page 14 of her Brief. The Superior Court did not award fees based on a calculation of prejudgment interest, it awarded the full fees and costs because of the “egregious nature of [Appellant’s] conduct.” CP 47. The Superior Court based its award of the full attorney

fees and costs on several factors, including Appellant's egregious conduct and the fact that Respondent had been wrongly denied the financial benefits of the Kennewick House. CP 47. No prejudgment interest was awarded. The only amount awarded by the Superior Court were attorneys fees, costs, including expert witness fees.

C. Respondent Should be Awarded Attorney Fees on Appeal.

Attorney fees should be awarded to Respondent as the prevailing party in this appeal. "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1(a). "In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties." Thompson v. Lennox, 151 Wash.App. 479, 484, 212 P.3d 597 (2009). "Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well." Id. "In general, a prevailing party is one who receives an affirmative judgment in his or her favor." Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wash.App. 64, 68, 975 P.2d 532 (1999). The prevailing party on appeal is

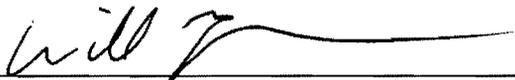
entitled to attorney fees. Kofmehl v. Steelman, 80 Wash.App. 279, 286, 908 P.2d 391 (1996).

Attorney fees are available to the Respondent in this case under the same equitable principles that guided the Superior Court and led to its award of attorney fees and costs to Respondent. The equitable principles that led the Superior Court to award attorney fees and costs to Respondent were the doctrine of unclean hands and Appellant's egregious behavior. CP 47, RP 145, Lines 6-21. Those same equitable principles available to the Superior Court are available to support an award of attorney fees from this Court.

VIII. CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the Superior Court's decisions be affirmed and Appellant's appeal be dismissed. Respondent also respectfully requests attorney fees on appeal.

DATED this 29th day of August, 2013.



Will Ferguson, WSBA 40978
Libey & Ensley, PLLC
Of Attorneys for Respondent Dr. Sara Arroyo

CERTIFICATE OF SERVICE

I, WILL FERGUSON, do declare that on August 29, 2013, I caused to be served a copy of the foregoing Brief of Respondent to the following party via U.S. Mail (in duplicate) and facsimile:

Roger Sandberg
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Dated this 29th day of August, 2013.

A handwritten signature in cursive script that reads "Will Ferguson". The signature is written in black ink and is positioned above a horizontal line.

WILL FERGUSON