

NO. 34920-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SUZANNE G. KUNDA,

Appellant,

vs.

AMERICAN CONTRACTORS INDEMNITY COMPANY,

Respondent.

RESPONDENT'S APPEAL BRIEF

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I. INTRODUCTION AND RELIEF REQUESTED

Respondent American Contractors Indemnity Company (“ACIC”) files this Appeal Brief in response to Appellant Suzanne Kunda’s (“Plaintiff”) appeal of the trial court’s Order Denying Plaintiff’s Motion for Summary Judgment and Order Granting Defendant ACIC’s Motion to Dismiss. This appeal arises out of Plaintiff’s failure to present her claim against ACIC to the jury or trial court on the scheduled trial date of January 26, 2016. Pursuant to CR 40(d) and applicable Washington law, Plaintiff’s failure to prosecute her claim against ACIC on the scheduled trial date required the trial court to dismiss Plaintiff’s claims against ACIC with prejudice. Accordingly, the trial court properly denied Plaintiff’s post-trial Motion for Summary Judgment and granted ACIC’s Motion to Dismiss.

As such, ACIC respectfully requests this Court to affirm the following trial court orders: (1) Order Denying Plaintiff’s Motion for Summary Judgment and (2) Order Granting ACIC’s Motion to Dismiss. Finally, ACIC should be awarded reasonable attorney fees and costs on appeal.

II. STATEMENT OF THE CASE

On September 10, 2012, Plaintiff Suzanne Kunda filed suit against Mickey Shaul and Michelle Shaul, husband and wife, doing business as Mick Shaul Construction (“Mick Shaul”) and ACIC, who issued a Contractors Registration Act surety bond (“Bond”) on behalf of Mick Shaul, as required by RCW 18.27.040. *Amended Index to Clerk’s Papers (“CP”) 35-42*. On October 10, 2012, Defendants Mick Shaul and ACIC appeared by and through counsel, Arthur Klym. On October 22, 2012, Mr. Klym filed Defendants Mick Shaul and ACIC’s Amended Answer, Affirmative Defenses, and Counterclaim. *CP 43-53*. The Amended Answer and Affirmative Defenses denied the allegations in Plaintiff’s Complaint and requested dismissal of Plaintiff’s claims. *Id.*; *see also Vebatim Report of Proceedings (“VRP”) 4-5*. Specifically, in response to Plaintiff’s allegation that ACIC “is liable for Defendant Mick Saul Construction’s breach pursuant to the terms of bond no. 100124722,” ACIC answered as follows: “Deny.” *See CP 35-42 (Plaintiff’s Complaint at ¶ 3.7); CP 45-53 (ACIC’s Amended Answer at ¶ 3.7)*.

The trial date was originally set for October 28, 2013. *CP 7*. On August 16, 2013, the Court entered an order striking the October 28, 2013 trial date. *Id.* On October 3, 2014, the Clerk filed a Clerk’s Motion to

Dismiss for Want of Prosecution. *Id.* On July 9, 2015, the Court issued a Notice of Jury Trial date of January 26, 2016. *Id.*

Beginning on January 26, 2016, Plaintiff presented her claims against Mick Shaul to a jury over a one week period. On February 2, 2016, the jury entered verdicts in favor of Plaintiff and against Mick Shaul on Plaintiff's claims for breach of contract, unjust enrichment, and conversion. *CP 20-33.* The jury also entered a verdict against Mick Shaul on the counterclaim against Plaintiff. *Id.* Neither the jury nor the trial court issued any findings or determination of liability as against ACIC. *Id.* On March 30, 2016, the trial court entered a final judgment against Mick Shaul in the total amount of \$153,251.80. *CP 1-3.*

While Plaintiff presented and prevailed on her claims against Mick Shaul at trial, Plaintiff did not prosecute her claims against ACIC. *VRP 6-7.* There is no record that any evidence, claims, or instructions as against ACIC were submitted to the jury or the trial court. *Id.* The jury did not enter any verdict against ACIC and the jury was dismissed without any finding of liability against ACIC. *Id.* Similarly, Plaintiff did not present any issues or claims against ACIC to the trial court. Plaintiff did not seek a continuance of her claims against ACIC, did not seek to reset the trial date, and did not file any post-trial motions to enter judgment against ACIC consistent with the jury verdict. Plaintiff has not sought a new trial

or filed a motion to re-open the trial to present her claim against ACIC to the jury or the trial court.

On August 26, 2016, Plaintiff filed a Motion for Summary Judgment against ACIC under the theory that Plaintiff's jury verdict against Mick Shaul Construction warranted a post-trial motion for summary judgment against ACIC. *CP 6-9*. On October 6, 2016, ACIC opposed Plaintiff's Motion for Summary Judgment and simultaneously moved to dismiss Plaintiff's claims against ACIC. *CP 6-10*. On November 7, 2016, the trial court denied Plaintiff's Motion for Summary Judgment and granted ACIC's Motion to Dismiss. *CP 64-65; VRP 15*. On December 7, 2016, Plaintiff appealed the trial court's Order Denying Plaintiff's Motion for Summary Judgment and Order Granting ACIC's Motion to Dismiss. *CP 66-71*.

III. STANDARD OF REVIEW

1. Plaintiff's Motion for Summary Judgment.

When reviewing a trial court's summary judgment ruling, the appellate court engages in the same inquiry as the trial court. *Halleran v. Nu W., Inc.*, 123 Wash.App. 701, 709, 98 P.3d 52 (2004). The appellate court must affirm a ruling granting summary judgment if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c).

2. ACIC's Motion to Dismiss.

Application of court rules to the facts is a question of law reviewed de novo on appeal. *Russell v. Maas*, 166 Wash. App. 885, 889, 272 P.3d 273, review denied, 174 Wash. 2d 1016, 281 P.3d 687 (2012).

Accordingly, both the trial court's Order Denying Plaintiff's Motion for Summary Judgment and Order Granting ACIC's Motion to Dismiss are reviewed de novo.

IV. ARGUMENT

1. The trial court properly denied Plaintiff's Motion for Summary Judgment because it was untimely under CR 56(c).

Under CR 56(c), "[s]ummary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise." (emphasis added). In this case, Plaintiff did not request leave of court, as required by CR 56(c), to file her motion for summary judgment 6 months *after* trial. On this basis alone, the trial court properly denied Plaintiff's untimely motion for summary judgment.

Here, the proper post-trial procedure would have been a CR 59 motion for new trial or motion to amend judgment. However, a motion for new trial or motion to amend judgment must be filed within 10 days after the entry of judgment. See CR 59. In this case, judgment was entered on

March 30, 2016. *CP 1-3*. Plaintiff's motion for summary judgment against ACIC was not filed until August 29, 2016 – 5 months after entry of judgment. *CP 6-9*. Regardless of what type of motion plaintiff filed to revive her claim against ACIC, it was untimely.

2. Pursuant to CR 40(d), the trial court was required to dismiss Plaintiff's claims against ACIC.

Even if the trial court considered Plaintiff's untimely summary judgment motion, it was equally untimely under CR 40(d). CR 40(d) provides that when a case is scheduled and called for trial, it "shall" be tried or dismissed, unless good cause is shown for a continuance. The rule permits the court, in a proper case and upon terms, to reschedule. "In other words, CR 40(d) provides four options: trial, continuance for good cause, resetting the trial, or dismissal." *Dewitt v. Mullen*, 193 Wash. App. 548, 555, 375 P.3d 694, 698 (2016). "Therefore, if trial, continuance, and reset are not available options, *the trial court must dismiss the case.*" *Id.* (emphasis added); See also *Wagner v. McDonald*, 10 Wash.App. 213, 217, 516 P.2d 1051 (1973) (The Court is required to dismiss when a cause is neither tried, continued or reset).

For reasons that Plaintiff does not explain, Plaintiff did not present her claim against ACIC to the jury. Similarly, Plaintiff did not request that her claim against ACIC be tried – apart from those claims presented

to the jury – separately by the trial court, pursuant to CR 38(c) or RCW 4.40.050. As a result, Plaintiff’s claim against ACIC was neither presented to the jury nor the trial court.

Under Washington law, “when a case is called for trial, the rule states that it *shall* be tried or dismissed unless good cause is shown for a continuance or the trial court decides to reset the trial.” *Dewitt v. Mullen*, 193 Wash. App. at 555. It is well-settled that the word “shall” is mandatory, as opposed to “may” which is permissive. *Case v. Dundom*, 115 Wn.App. 199, 202, 58 P.3d 919 (2002). Here, it is undisputed that the case was not tried, continued, or reset as to ACIC – thus, the only option was dismissal. *Dewitt v. Mullen*, 193 Wash. App. at 556 (When a case is not tried, continued, or reset, “the only remaining option under CR 40(d) [is] dismissal.”) Under CR 40(d), the trial court was required to dismiss the case. As such, the trial court’s Order Denying Plaintiff’s Motion for Summary Judgment and Order Granting Defendant ACIC’s Motion to Dismiss should be affirmed.

3. Plaintiff’s Judgment against Mick Shaul does not automatically warrant entry of judgment against ACIC.

Plaintiff presents no authority (and ACIC is aware of none) which holds that a judgment against a bond principal automatically triggers liability against the Bond. ACIC is a party defendant, whose liability is

dictated by the terms of the Bond and the governing statute, RCW 18.27.040. Thus, it was incumbent upon Plaintiff to present her claim against ACIC to the jury or the trial court and obtain a jury verdict or court ordered determination of ACIC's liability under the Bond and RCW 18.27.040. Here, the scheduled trial date of January 26, 2016, came and went without Plaintiff presenting her claims against ACIC to either the jury or the trial court. The trial court never entered findings of fact or conclusions of law as to ACIC and Plaintiff never petitioned the trial court for a finding of liability against ACIC premised upon the jury verdict against Mick Shaul. Although Plaintiff prevailed at trial against Mick Shaul, Plaintiff never prosecuted her claim against ACIC. The current Judgment does not include ACIC as a judgment debtor. To date, neither the trial court nor the jury has entered any finding of liability or award of damages against ACIC.

Since litigation commenced, ACIC has denied liability and maintained that it is not liable to Plaintiff. ACIC never conceded liability at any stage of the litigation. Indeed, in response to Plaintiff's allegation that ACIC "is liable for Defendant Mick Saul Construction's breach pursuant to the terms of bond no. 100124722," ACIC answered as follows: "Deny." See *CP 35-42* (Plaintiff's Complaint at ¶ 3.7); *CP 45-53 (ACIC's Amended Answer at ¶ 3.7)*.

Plaintiff erroneously asserts that ACIC's admission that it issued a bond is tantamount to admitting liability under the Bond. *Plaintiff's Brief* at 8. This assertion is false and unsupported by any legal authority whatsoever. While ACIC admitted that it issued a bond, it certainly did not admit that the Bond was liable to Plaintiff. Again, in response to Plaintiff's allegation that ACIC "is liable for Defendant Mick Saul Construction's breach pursuant to the terms of bond no. 100124722," ACIC answered as follows: "Deny." See *CP 24* (Plaintiff's Complaint at ¶ 3.7); *CP 46* (*ACIC's Amended Answer* at ¶ 3.7). As such, Plaintiff bore the burden of presenting her claim against ACIC to the jury or the trial court. Plaintiff's failure to do so required to dismiss Plaintiff's claim against ACIC under CR 40(d).

Under Washington law, a judgment against a bond principal does not automatically bind a surety who furnishes a bond pursuant to RCW 18.27.040. *Ward v. LaMonico*, 47 Wn.App. 373, 380, 735 P.2d 92 (1987) ("[A] statutory contractors registration bond does not require the surety to... respond to any judgment or to pay all amounts adjudged against its principal."). This is consistent with the *Restatement (Third) of Suretyship* § 67, comment b, which states that a surety may raise defenses that are independent of the principal obligor's liability and to deny liability on a judgment already rendered against the principal obligor.

Independent of Mick Shaul's liability, is ACIC's defense that the time period within which Plaintiff was legally authorized to prosecute her claim against ACIC expired under CR 40(d). There is no mechanism to enforce a judgment against a non-judgment debtor – ACIC – after the scheduled trial date has passed and the case has not been continued or reset as required by CR 40(d). To date, Plaintiff has failed to cite a single Washington case, statute, or court rule, that would authorize the trial court to disregard the clear procedural requirements of CR 40(d). “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none.” *State v. Logan*, 102 Wn.App. 907, 911, 10 P.3d 504 (2000). Pursuant to CR 40(d), the trial court was required to dismiss Plaintiff's claim and grant summary judgment in favor of ACIC.

4. Plaintiff bore the burden of proving and presenting her claim against ACIC at trial.

Plaintiff never presented any issues of fact or law regarding ACIC's liability to the jury or trial court for consideration. As such, any such issues regarding ACIC's liability were abandoned and the trial court properly dismissed Plaintiff's claim against ACIC pursuant to CR 40(d).

In an effort to divert attention from Plaintiff's failure to submit a proper jury instruction or present her claim to the trial court, Plaintiff

argues that “ACIC presented no defenses and no evidence at trial that would preclude entry of judgment as a matter of law.” *Plaintiff’s Brief* at 1. However, it is a basic principal of civil litigation that “[t]he burden of proof lies upon the plaintiff to establish [her] cause of action, and there are no circumstances which excuse [her] from this obligation and impose the duty upon a defendant of proving that the alleged cause of action did not exist.” *McFarland v. Commercial Boiler Works*, 10 Wash. 2d 81, 98, 116 P.2d 288 (1941) quoting *Jones on Evidence*, 2d. Ed., pp. 178, 179, § 104. “The defendant in a civil action always has the privilege, from the very nature of a proceeding at law, of not introducing any evidence whatsoever, but relying entirely upon the weakness of the plaintiff’s [case.]” *Id.*; see also *Cashmere State Bank v. Richardson*, 105 Wash. 105, 108, 177 P. 727, 728 (1919) (“The plaintiff must establish his case before the defendant is obligated to offer any evidence in defense, and the mere fact that the defendants offered no testimony can have no bearing, if in fact plaintiff failed to satisfactorily sustain its necessary burden of proof.”). The trial court correctly determined that Plaintiff – not ACIC – had the burden of proving her claim at trial and that her failure to do so required dismissal under CR 40(d).

If Plaintiff wanted the trial court – not the jury – to decide her claim against ACIC, it was Plaintiff’s responsibility to so specify under

CR 38(c) and to present the legal issues regarding ACIC's potential liability to the trial court. "[O]therwise the party shall be deemed to have demanded trial by jury for all the issues so triable." *Id.* (emphasis added). Because Plaintiff did not present any claims or issues regarding ACIC's liability to the trial court, all triable issues were submitted to the jury. *Id.*

"The burden is on the parties to a lawsuit to propose jury instructions covering their respective theories." *Browne v. Cassidy*, 46 Wash. App. 267, 270, 728 P.2d 1388 (1986). "In general, a party requesting an instruction...must propose the instruction in writing." CR 51(d)(1); *Gorman v. Pierce Cty.*, 176 Wash. App. 63, 86, 307 P.3d 795 (2013). A party is bound by the legal theories pleaded and argued before the jury renders a verdict. *Cf. Teratron Gen. v. Institutional Investors Trust*, 18 Wash.App. 481, 489-90, 569 P.2d 1198 (1977) (where the court held that a party could not urge new theories for the first time over a month after the trial court's oral decision, in a bench trial). Plaintiff's inexplicable failure to present her claims against ACIC to the trial court or request a jury instruction as to her claim against ACIC's resulted in no verdict or judgment against ACIC. Under CR 40(d), Plaintiff's failure to present her case to the jury or trial court required the trial court to dismiss her claim against ACIC.

5. The trial court properly dismissed Plaintiff's claims with prejudice.

Civil Rule 41(b)(3) states in part, in discussing the effect of an involuntary dismissal:

[A]ny dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Because a dismissal under CR 40(d) is not a dismissal provided for under CR 41, it operates, pursuant to CR 41(b)(3), as an adjudication upon the merits. It is notable that the federal rule comparable to CR 41(b)(3), FRCP 41(b), has been interpreted to support a dismissal with prejudice by the trial court acting sua sponte where the plaintiff failed to appear on the date set for trial. *Wagner v. McDonald*, 10 Wash.App. at 217 citing *Holcomb v. Holcomb*, 93 U.S.App.D.C. 242, 209 F.2d 794 (1954). In this case, a dismissal with prejudice was required under CR 40(d) and CR 41(b)(3). As such, the trial court's Order Denying Plaintiff's Motion for Summary Judgment and Order Granting ACIC's Motion to Dismiss should be affirmed.

6. Plaintiff's arguments regarding CR 54(e) are not at issue on appeal.

Plaintiff devotes an entire section of her brief to attack "ACIC's argument that untimeliness under CR 54(e) requires dismissal with

prejudice.” *Plaintiff’s Brief* at 12-15. Plaintiff’s argument with respect to CR 54(e) is odd, as ACIC never advanced any argument that CR 54(e) required the trial court to dismiss Plaintiff’s bond claim. Simply put, there is no reference whatsoever of CR 54(e) in ACIC’s Opposition to Plaintiff’s Motion for Summary Judgment, ACIC’s Motion to Dismiss, or ACIC’s Reply in Support of Motion to Dismiss. Similarly, neither ACIC nor the trial court mentioned CR 54(e) at any point during oral argument. Because CR 54(e) was never raised by ACIC or the trial court as a basis for denial of Plaintiff’s Motion for Summary Judgment or dismissal of Plaintiff’s bond claim, CR 54(e) is not relevant or at issue on appeal. As such, ACIC will not respond to Plaintiff’s arguments and authorities regarding CR 54(e).

V. CONCLUSION

ACIC respectfully requests this Court to affirm the trial court’s (1) Order Denying Plaintiff’s Motion for Summary Judgment and (2) Order Granting ACIC’s Motion to Dismiss. The undisputed evidence shows that Plaintiff failed to present any claims against ACIC to the jury or the trial court on the scheduled trial date or prior to entry of final judgment. *CR 1-3*. Plaintiff offers no Washington authority that would authorize the trial court to disregard the clear procedural requirements of CR 40(d). Pursuant to CR 40(d), Plaintiff’s failure to prosecute her claim against

ACIC on the scheduled trial date required the trial court to dismiss Plaintiff's claims against ACIC with prejudice. *Dewitt v. Mullen*, 193 Wash. App. at 555. The trial court had no discretion to act otherwise. *Id.* Accordingly, the trial court properly denied Plaintiff's Motion for Summary Judgment and granted ACIC's Motion to Dismiss. The trial court's orders in this regard should be affirmed.

VI. ATTORNEY FEES AND COSTS

Under RAP 14.2, this Court may award costs to the prevailing party on appeal. ACIC respectfully requests an award of its costs incurred on this Appeal. Furthermore, pursuant to RAP 18.1, this Court may award reasonable attorney's fees or expenses on review. ACIC is entitled to attorney fees under RCW 18.27.040(6) because this is a claim involving a residential homeowner. RCW 18.27.040(6) provides as follows:

The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees.

(emphasis added). Accordingly, ACIC respectfully requests an award of its attorney's fees, costs, and expenses incurred on this Appeal should it prevail.

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DATED this 24 day of May, 2017.

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DECLARATION OF SERVICE

Vanessa Stoneburner declares:

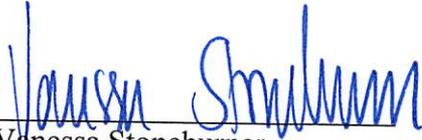
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I declare under penalty of perjury under the laws of
the State of Washington that the foregoing is true and
correct.

EXECUTED THIS 24th day of May, 2016, at

Seattle, Washington.


Vanessa Stoneburner

WILLIAMS KASTNER & GIBBS, PLLC

May 24, 2017 - 11:35 AM

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