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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.

No. 359956

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SVN CORNERSTONE, LLC, a Washington Limited Liability Company,

Appellant,

v.

N. 807 INCORPORATED, a Washington corporation, d/b/a BERKSHIRE HATHAWAY HOMESERVICES FIRST LOOK REAL ESTATE; KENNETH M. LEWIS AND MICHELLE S. LEWIS, and the marital community composed thereto; HENRY SEIPP AND JANE DOE SEIPP, and the marital community composed thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In 2016, Cornerstone filed suit against the Respondents N. 807 Incorporated d/b/a Berkshire Hathaway HomeServices First Look Real Estate, Kenneth M. Lewis, and Henry Seipp (collectively "Seipp") after Henry Seipp, a commercial real estate broker, left Cornerstone to work for another brokerage firm, Berkshire Hathaway HomeServices First Look Real Estate ("Berkshire Hathaway"). Cornerstone asserted that Seipp took the sale of an apartment complex commonly known as the Timber Court Apartments from Cornerstone to Berkshire Hathaway. However, only Berkshire Hathaway had an exclusive listing agreement with the buyer. Seipp did not assert any counterclaims against Cornerstone. Instead, Seipp brought a motion to dismiss the lawsuit because Cornerstone failed to submit its claims to mandatory Commercial Brokers Association ("CBA") arbitration[1] pursuant to CBA's bylaws.[2] On appeal, this Court held that Cornerstone's claims for commission were subject to mandatory arbitration and that it was "*conceivable that some claims for relief will not be arbitrarable . . . the court must bear in mind that Washington*

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[1] All parties to the present appeal are members of the Commercial Brokers Association, a voluntary organization that requires its members to submit all disputes concerning commission to CBA arbitration.

[2] SVN Cornerstone, LLC v. N. 807 Incorporated, 199 Wn. App. 1010 (2017).

courts apply a strong presumption in favor of arbitrability and doubts should be resolved in favor of coverage."[3] The parties settled the first lawsuit while Cornerstone's appeal of this court's decision was pending before the Washington State Supreme Court. The parties negotiated a one-sided release wherein only Cornerstone released its claims against Seipp. Seipp did not waive or release any claims it had, may have had, or would have in the future against Cornerstone. The parties then stipulated to the dismissal of the lawsuit, without an award of attorney's fees or costs to either side.

Cornerstone filed a second lawsuit against Seipp, after Seipp, *pro se*, filed a CBA Arbitration Complaint against Cornerstone. The gravamen of the Arbitration Complaint is that Cornerstone tortiously interfered with Seipp's business expectancies (future commissions of sales entirely unrelated to the Timber Court Apartments sale at issue in Cornerstone's first lawsuit). Cornerstone then notified Seipp that it objected to his inclusion of a request for attorney's fees and costs arising from the first lawsuit as damages in the Arbitration Complaint. Immediately upon learning of Cornerstone's objection, Seipp began to revise his Arbitration

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[3] Id.

Complaint to remove that request. Before he could serve Cornerstone with his amended Arbitration Complaint, Cornerstone filed the second lawsuit that contained only one cause of action: breach of contract. Cornerstone immediately filed for summary judgment on its breach of contract claim. One week later, Seipp moved to dismiss the entire lawsuit as Cornerstone was utilizing one minor technical breach of contract that Seipp immediately remedied in an effort to prevent Seipp's arbitration proceeding from moving forward.

The trial court denied Cornerstone's request for injunctive relief and made explicit findings of fact and conclusions of law supporting its denial thereof. However, the trial court granted summary judgment on Cornerstone's technical breach of contract claim based upon Seipp's request for attorney fees arising from the first lawsuit, even though Seipp immediately removed the request. The trial court then dismissed the entirety of Cornerstone's lawsuit — including the requests for relief at issue before this court based upon the doctrine of res judicata and compulsory counterclaim. The trial court's rulings dismissing the remainder of Cornerstone's requests for relief and denying Cornerstone's motion for injunctive relief were proper and should be affirmed.

I. STATEMENT OF THE ISSUES

1. Whether the trial court properly dismissed Cornerstone's request for the application of res judicata when Seipp's claims asserted in the Arbitration Complaint did not accrue until August 28, 2017, after the parties executed a Settlement Agreement on July 31, 2017, the first lawsuit was dismissed on August 22, 2017, and the claims asserted did not arise out of the same transaction or occurrence and involved separate and distinct subject matter.

2. Whether the trial court properly dismissed Cornerstone's request for a finding that Seipp's Arbitration Complaint alleged claims that were compulsory counterclaims in the first lawsuit when Seipp's claims asserted in the Arbitration Complaint did not exist until after the first lawsuit was dismissed and Washington law explicitly holds that malicious prosecution is not a compulsory counterclaim.

3. Whether the trial court properly dismissed Cornerstone's request that the trial court enjoin CBA arbitration from proceeding when Cornerstone is not entitled to equitable relief because its alleged injury is solely monetary and Cornerstone failed to establish a clear legal or equitable right, failed to establish a well-grounded fear of invasion of any legal or equitable right, and failed to establish that the acts complained would result in actual or substantial injury.

II. STATEMENT OF THE CASE

On or about September 20, 2017, Seipp filed an Arbitration Complaint with CBA against Cornerstone, *pro se*, and without any consultation from legal counsel. (CP 21-30; 172-268). He brought his claim for commission before CBA because all of the parties to the present action are members of CBA. Id. The CBA bylaws explicitly provide that, "*[i]t is the duty of the members of CBA*

(and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration by CBA pursuant to its then current arbitration rules and policies, rather than to bring a suit to law." Id. CBA's Arbitration Rules provide that, "*[a] complainant for arbitration shall be barred unless received by CBA within three (3) months of whichever of the following is applicable: (i) closing of the sale; (ii) the due date of the commission or other payment; or (iii) discovery of the claim by the member, where it is concealed (whether intentionally or not) by the other member.*" Id.

As set forth in the Amended Arbitration Complaint, Seipp is currently seeking to recover for commission lost, as a result of the actions of Cornerstone, from the sale of a large condominium complex that closed on August 28, 2017. (CP 172-268; 727; 941-42). Cornerstone's prior lawsuit against Berkshire Hathaway (Spokane County Superior Court Case No. 16-2-01638-8) sought to obtain a commission for the sale of the Timber Court Apartments that Berkshire Hathaway and Seipp rightfully earned. (CP 172-268). As a result of Cornerstone's attempt to take the commission Berkshire Hathaway and Seipp earned, other sellers of real property, specifically Diamond Rock Construction, Inc.

("Diamond Rock") and its principal, Dennis Crapo, chose not to list commercial real property with Seipp because they feared that Cornerstone would embroil them in litigation as Cornerstone had done to the seller of the Timber Court Apartments at issue in the prior lawsuit Cornerstone filed against Berkshire Hathaway. (CP 172-268; CP 413-417).

Looking back, shortly after Mr. Seipp left Cornerstone in April 2016 to work for Berkshire Hathaway, Cornerstone filed suit against Berkshire Hathaway and Mr. Seipp claiming that it was entitled to commission for the Timber Court Apartments deal that Berkshire Hathaway closed for a seller who had an exclusive listing agreement with Berkshire Hathaway, not Cornerstone. (CP 172-268). The gravamen of the complaint was entitlement to the commission; however, Cornerstone also claimed that Berkshire Hathaway and Mr. Seipp had breached Mr. Seipp's independent contractor agreement, engaged in tortious interference, converted its property, violated the Uniform Trade Secrets Act, and breached Mr. Seipp's purported fiduciary duties to Cornerstone. Id. Seipp then moved to dismiss Cornerstone's Complaint because the gravamen of the complaint was a dispute over commission and as a CBA member, Cornerstone was required to submit that

dispute to binding CBA arbitration. Id. On July 26, 2016, the Spokane County Superior Court denied Seipp's Motion to Dismiss. Id. Seipp filed a Notice of Appeal on August 18, 2016, appealing the trial court's denial of its Motion to Dismiss. Id.

This Court explicitly directed "*the trial court to compel arbitration of all of Cornerstone's claims for relief that seek to determine or recover commissions, or commissions or fees lost as a result of the acts of the defendants, it is conceivable that some claims for relief will not be arbitrable—for example, a request for an injunction against use of trade secrets or for the court-ordered return of Cornerstone's property would not be. In making the determination, the court must bear in mind that Washington courts apply a strong presumption in favor of arbitrability, and doubts should be resolved in favor of coverage.*" SVN Cornerstone LLC v. N. 807 Incorporated, 199 Wn. App. 1010, *6 (May 23, 2017) (quoting Council of County & City Emps. v. Spokane County, 32 Wn. App. 422, 424-25 (1982) (internal quotations and citations omitted).

Months later, on July 31, 2017, the parties to the present litigation entered into a Settlement Agreement & Release ("Settlement Agreement"). (CP 172-268). Seipp specifically

negotiated a one-way release wherein only Cornerstone released its claims against Seipp and Berkshire Hathaway. Id. Neither Berkshire Hathaway nor Seipp released any of their claims against Cornerstone. Id. The only release in the agreement is found on pages 2 and 3 of the Settlement Agreement. That release provides:

> *Except for conditions precedent set forth in Paragraph 1 of this Agreement and the rights and claims under or expressly granted in or preserved by this Agreement, Cornerstone and its respective successors and assigns hereby full, finally, and forever releases, acquits, and discharges Berkshire Hathaway, Mr. and Mrs. Lewis and Mr. Seipp and their successors and assigns, of and from, any claims, causes of action, suits, debts, liens, obligations, liabilities, demands, losses, costs, expenses (including attorneys' fees), and damages of any kind, character or nature whatsoever, known or unknown, fixed or contingent that Cornerstone may have or claim to have now or which may hereafter arise out of, or be connected with, the Spokane County Case or the I.C. Agreement.*

Id.

After the Settlement Agreement was executed on July 31, 2017, Cornerstone dismissed its lawsuit against Berkshire Hathaway on August 22, 2017. Id. About a week later, the sale of Mr. Crapo's large condominium complex closed on August 28, 2017. (CP 172-268; 727; 941-42). Mr. Seipp has worked with Diamond Rock for many years. (CP 172-268; 413-17). In January of 2017, he spoke with Dennis Crapo, governor of Diamond Rock,

about listing its duplex portfolio valued at $32,000,000. Id. Mr. Crapo told Mr. Seipp that Diamond Rock wanted to list the duplex portfolio with Berkshire Hathaway, but did not because Diamond Rock feared it would become embroiled in a dispute over the commission with Cornerstone. Id. Cornerstone based its fear on the lawsuit Cornerstone filed against Berkshire Hathaway and Mr. Seipp over commission on the sale of the Timber Court Apartments in 2016. Id. Had Cornerstone filed an Arbitration Complaint over the commission dispute, rather than a lawsuit, as required by the CBA arbitration bylaws, Mr. Crapo would have listed the duplex portfolio with Seipp. Id. Seipp was not certain that Diamond Rock would not list the property with him until the deal closed with another broker on August 28, 2017. (CP 172-268; 727; 941-42).

As a pro se litigant, Seipp did his best to explain how Cornerstone harmed him in the Arbitration Complaint; however, Mr. Seipp has no legal training. (CP 172-268). In the Prayer for Relief, Berkshire Hathaway prayed for relief against Cornerstone, as follows:

> *1. Judgment in favor of Berkshire Hathaway and against the respondent Cornerstone for damages incurred as a result of the wrongful acts alleged herein in the amount to be proven in Arbitration,*

plus all pre-judgment interest at the highest amount permitted by Washington law, plus all fees and costs including attorney's fees and costs as allowed by the law including RCW 19.108;

2. Berkshire Hathaway be awarded past and future profits;

3. Berkshire Hathaway be awarded damages incurred as a result of respondents unjust enrichment and other wrongful acts.

4. Berkshire Hathaway to be awarded ***punitive damages*** *caused by Cornerstones alleged violations.*

5. Berkshire Hathaway to be awarded Compensatory damages due to income and future work lost as a result of Cornerstones conduct.

6. Berkshire Hathaway to be awarded costs and reasonable fees as allowed in equity at law and by statute, including but not limited to RCW et seq and RCW 19.108.040, and as recognized grounds in equity, including but not limited to, as a result of Respondent's breach of fiduciary duties;

7. Respondents to provide such additional information as may be requested by Berkshire Hathaway and order by this Court;

8. For leave to amend this complaint as discovery progresses; and

9. For such other and further relief in favor of Claimant as may be just and equitable.

10. If any part of this claim is found to not be arbitrable the remainder of the claim will remain in effect with the claim found not to be arbitrable to be severed from the claim and allowed for piecemeal litigation.

> *11. Total Claimed to be $1,920,000.00 in lost commission plus* ***$60,000.00 for attorney's fees*** *to defend the illegal lawsuit filed by Cornerstone for a grand total of $1,980,000.00.*

Id. (emphasis added).

Cornerstone took issue with the items in bold. Id. On or about November 10, 2017, the CBA served Cornerstone with Berkshire Hathaway's Arbitration Complaint. Id. Cornerstone had 10 business days to respond to the Arbitration Complaint pursuant to CBA's Arbitration Rules. Id. On November 16, 2017, Mr. Ries, then counsel for Cornerstone, called Mr. Kovarik, Berkshire Hathaway's attorney in the first lawsuit, to ask about the Arbitration Complaint and to make him aware of Cornerstone's issues with the Arbitration Complaint. (CP 144-162). Mr. Kovarik informed Mr. Ries that Piskel Yahne Kovarik, PLLC was not involved with the arbitration, but that he would talk to Seipp regarding his intentions. Id.

Then, Mr. Kovarik called Mr. Seipp regarding the Arbitration Complaint. (CP 172-268). On behalf of Berkshire Hathaway, Mr. Seipp informed Mr. Kovarik that Berkshire Hathaway intended to proceed with CBA arbitration, *pro se*. Id. Mr. Kovarik advised Mr. Seipp that Cornerstone, and its attorney Matthew Ries, took issue with Berkshire Hathaway's request for

punitive damages and attorney's fees in the amount of $60,000. Id.

Mr. Seipp then began to amend the Arbitration Complaint to remove the request for punitive damages and attorney's fees. Id. On November 20, 2017, Mr. Kovarik emailed Mr. Ries letting him know that Mr. Seipp intended to proceed with the arbitration, *pro se*. (CP 144-162). On December 1, 2017, Mr. Seipp signed the Amended Arbitration Complaint and filed it with CBA. (CP 172-268). Upon information and belief, the Amended Arbitration Complaint was served on Cornerstone on December 6, 2017. Id.

Pursuant to Cornerstone's explicit request, Seipp removed the request for punitive damages and attorney's fees and costs. Id. In the Amended Arbitration Complaint, Seipp prayed for relief against Cornerstone, as follows:

> *1. Judgement [sic] in favor of Berkshire Hathaway and against respondent Cornerstone for the loss of commission incurred as a result of the wrongful acts alleged herein in the amount of $1,920,000.00 to be proven in Arbitration, plus all pre-judgment interest at the highest amount permitted by Washington law, plus all fees and costs including attorney's fees and costs as allowed by the law including RCW 19.108;*
>
> *2. Berkshire Hathaway be awarded past and future profits;*
>
> *3. Berkshire Hathaway to be awarded costs and reasonable fees as allowed in equity at law and by*

> *statute, including but not limited to RCW et seq and RCW 19.108.040, and as recognized grounds in equity, including but not limited to, as a result of Respondent's breach of fiduciary duties;*
>
> *4. Respondents to provide such additional information as may be requested by Berkshire Hathaway and ordered by this Arbitration;*
>
> *5. For leave to amend this complaint as discovery progresses; and*
>
> *6. For such other and further relief in favor of the Claimant as may be just and equitable.*
>
> *7. If any part of this claim is found to not be arbitratable the remainder of the claim will remain in effect with the claim found not to be arbitratable to be severed from the claim and allowed for piecemeal litigation.*
>
> *8. Total Claimed to be $1,920,000.00 in lost commissions.*

Id. Noticeably absent from the Prayer for Relief in the Amended Arbitration Complaint are the requests for punitive damages and attorneys fees and costs. Id. Yet, on November 27, 2017, before Seipp could get his Amended Arbitration Complaint out, Cornerstone filed a lawsuit against Seipp, knowing that he was proceeding *pro se* and had just been advised of its dispute over the request for punitive damages and attorneys fees. Id.

Less than 10 days after Cornerstone filed suit, Cornerstone was served with the Amended Arbitration Complaint that

removed the request for an award of punitive damages and attorney's fees and costs. Id. On December 11, 2017, Mr. Seipp emailed Mr. Ries, Cornerstone's former counsel, asking him why he would not dismiss Cornerstone's lawsuit as he had amended the Arbitration Complaint as Mr. Ries requested. Id. Mr. Ries never responded. Id. Likewise, Berkshire Hathaway never received a response from Cornerstone. Id.

On January 5, 2018, Cornerstone moved for summary judgment asking that the trial court find Seipp liable for breach of the Settlement Agreement, that Seipp's arbitration claims are barred by the doctrine of res judicata, that Seipp's claims are barred because they were compulsory counterclaims, and to enjoin him from pursuing CBA arbitration over commission on the Diamond Rock sale that closed on August 28, 2017. (CP 46-77). Notably, Cornerstone entirely failed to address the fact that Mr. Seipp promptly amended the Arbitration Complaint, removing his request for attorney fees and costs, and punitive damages. Id. Rather, it proceeded as if Seipp was still seeking to recover attorney's fees and costs and punitive damages from Cornerstone. Id.

Cornerstone prayed for damages, attorney fees and costs, and injunctive relief preventing Berkshire Hathaway from "*arbitrating claims that were dismissed from the Lawsuit . . .*" (CP 3-30). However, Berkshire Hathaway did not assert any claims in the prior lawsuit. (CP 144-171). Rather, the parties entered into a Settlement Agreement wherein Cornerstone released its claims against Berkshire Hathaway, and Cornerstone's lawsuit against Berkshire Hathaway was dismissed with prejudice. (CP 4-30). Furthermore, Cornerstone's release was one-sided; Berkshire Hathaway did not release any claims against Cornerstone. Id. Cornerstone later amended its complaint to incorporate its requests for relief in the form of a declaratory judgment asking the trial court to bar Seipp's claims pursuant to its compulsory counterclaim argument and res judicata argument. (CP 473-499).

The trial court entered findings of fact and conclusions of law denying Cornerstone's request for injunctive relief. (CP 1185-1190). The trial court granted Cornerstone's Motion for Summary Judgment solely on Cornerstone's breach of contract claim finding that Seipp's request for attorney fee's and costs contained in the original Arbitration Complaint was a breach of the

Settlement Agreement and that Cornerstone was entitled to reasonable attorney's fees and costs pursuant to the Settlement Agreement. (CP 1194-1197).

On January 12, 2018, Seipp moved to dismiss Cornerstone's Complaint and Amended Complaint for failure to state a claim pursuant to Civil Rule 12(b)(6). (CP 121-142). The trial court granted Seipp's Motion to Dismiss Cornerstone's Amended Complaint due to the lack of factual and legal support for Cornerstone's claims that Seipp's new claims were compulsory counterclaims and that Seipp's claims were barred by the doctrine of res judicata. (CP 1198-1201).

Thereafter, Cornerstone timely filed the present appeal on April 17, 2018, appealing the trial court's Order Partially Granting Plaintiff SVN Cornerstone, LLC's Motion for Summary Judgment, entered on March 23, 2018, the Order Granting Defendant's Motion to Dismiss, entered on March 23, 2018, and the Order Denying Plaintiff's Request for Injunctive Relief, entered on March 23, 2018. (CP 1323-1339).

III. ARGUMENT

A. De Novo Review.

This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court by independently examining all of the evidence presented to the trial court. Keck v. Collins, 181 Wn. App. 67, 78-81 (2014). The appellate court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to the nonmoving party. Id. at 79. The appellate court must disregard evidence and issues not called to the attention of the trial court. Id.

Pursuant to CR 12(b)(6), a court must dismiss an action for failure to state a claim where "*it appears beyond a doubt that the claimant can prove no set of facts consistent with the complaint that justifies recovery.*" Yeakey v. Hearst Commc'ns, Inc., 156 Wn. App. 787, 791 (2010). A motion to dismiss for failure to state a claim converts into a motion for summary judgment when the court "*considers matters outside the pleadings.*" Kelley v. Pierce Cty., 179 Wn. App. 566, 573 (2014).

Summary judgment is proper where "*the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact, and the moving*

party is entitled to judgment as a matter of law." Id. A "*material fact*" is a fact that determines the outcome of a lawsuit. Id. The court must "*construe all facts and reasonable inferences in the light most favorable to the nonmoving party.*" Id. The nonmoving party "*must set forth specific facts that sufficiently rebut the moving party's contentions*" and "*may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.*" Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13 (1986).

Here, the trial court properly denied Cornerstone's Motion for Summary Judgment requesting injunctive relief because Cornerstone's alleged harm was solely the cost of litigating Seipp's Arbitration Complaint before a CBA arbitration panel. (CP 1185-1190). Cornerstone failed to establish a clear legal or equitable right to avoid arbitration, failed to establish an imminent threat of invasion of a legal right, and failed to establish that it would suffer actual or substantial injury. Id. Cornerstone's only injury complained of was the cost of having to defend Seipp's Arbitration Complaint and potentially having to pay an award of commission to Seipp. Id.

Furthermore, the trial court properly denied Cornerstone's Motion for Summary Judgment requesting that the trial court find that CR 13(a) and/or the doctrine of res judicata bar Seipp's arbitration claims because the claims asserted by Seipp in the Arbitration Complaint arose after the prior lawsuit was dismissed and arise out of an entirely separate and distinct transaction unrelated to the first lawsuit. Consequently, this Court should affirm the trial court's rulings and hold that Cornerstone fails to establish entitlement to injunctive relief that would prevent CBA arbitration from moving forward, that CR 13(a) and the doctrine of res judicata do not bar Seipp's claims, and that Cornerstone's lawsuit was properly dismissed.

B. The Trial Court Properly Dismissed Cornerstone's Request for the Application of the Doctrine of Res Judicata.

Res judicata does not bar Seipp's current claims against Cornerstone, as set forth in the Amended Arbitration Complaint, because the subject matter and causes of action are not concurrent or duplicitous. A simple review and comparison of Cornerstone's Complaint (and Seipp's Answer thereto), with Seipp's Amended Arbitration Complaint, reveals that the same claims were not involved, nor were the same claims actually adjudicated. (CP 144-268).

"*Under the doctrine of res judicata, a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action.*" Kuhlman v. Thomas, 78 Wn. App. 115, 120 (1995). The party asserting the defense of res judicata has the burden of proving that the claim was decided in the prior adjudication. Ruefner v. Scott, 46 Wn.2d 240, 245 (1955). Where it does not appear from the record that the matter was necessarily adjudicated in the former action, a person relying upon the doctrine of res judicata bears the burden of proving that such issue was involved and actually determined Id. "*The doctrine of res judicata requires a concurrence of identity in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.*" Schoeman, 106 Wn.2d at 858. All four elements must be met in order for the doctrine to apply. Id.

Parties are allowed to litigate matters that could not have been properly included in a prior action. Id. at 859. Res judicata "*does not bar claims which arise out of a transaction separate and apart from the issue previously litigated*" and it is not intended to deny a litigant its day in court. Id. at 860.

a. Cornerstone fails to establish the same subject matter.

Res judicata requires the same subject matter in both actions. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763 (1995). Cornerstone asserts that "*the subject matter is met because Seipp's arbitration action centers on the same subject matter as the First Lawsuit, naming the I.C. agreement, Seipp's subsequent actions upon leaving Cornerstone's agency, and Cornerstone's allegations set forth in the First Lawsuit.*" (Brief of Appellant, pp. 24-25). While both actions involve commission from the sales of property, the properties at issue are entirely separate and unrelated. (CP 172-268). Furthermore, only the first litigation involved the Independent Contractor Agreement. Id. Seipp does not assert any cause of action or request for relief under Cornerstone and Mr. Seipp's former Independent Contractor Agreement. Id. The same subject matter does not exist. Id.

From the face of Seipp's Amended Arbitration Complaint it is clear that Seipp is requesting relief arising from Cornerstone's tortious interference and Cornerstone's failure to follow CBA's bylaws. Id. Whether or not Cornerstone tortiously interfered with Seipp selling Mr. Crapo's large condominium

complex and whether or not Cornerstone's first lawsuit constituted malicious prosecution were not adjudicated in Cornerstone's prior lawsuit. Id.

b. Cornerstone fails to establish the same cause of action.

Res judicata requires identity in the cause of action. Loveridge, 125 Wn.2d at 763. While there is no specific test for determining identity of the causes of action, courts consider the following criteria:

> *(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.*

Kuhlman, 78 Wn. App. at 122 (quoting Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir.), cert. denied, 459 U.S. 1087 (1982)). First, there are no rights or interests established in the prior order dismissing the first lawsuit or the Settlement Agreement that would be destroyed or impaired by Seipp's prosecution of his current claims against Cornerstone. Cornerstone dismissed its first lawsuit against Seipp with prejudice. Furthermore, the Settlement Agreement defines the

only rights established in the prior action. (CP 473-499). Seipp specifically negotiated for a one-sided release, wherein he did not release any of his claims against Cornerstone. (CP 172-286). Only Cornerstone released its claims against Berkshire Hathaway. (CP 473-499).

Second, substantially the same evidence will not be presented in the two actions. Not only was the first action resolved prior to conducting any discovery, but Berkshire Hathaway is seeking commission arising from an entirely separate transaction than the transaction at issue in the first lawsuit. (CP 172-286). In the first lawsuit, Cornerstone sued Seipp claiming that it was entitled to the commission earned by Seipp arising from the sale of the Timber Court Apartments. Id. Cornerstone alleged it was entitled to the commission arising from that sale as Cornerstone was allegedly working with the seller of that property during Mr. Seipp's transition from Cornerstone to Berkshire Hathaway. Id. Conversely, Seipp's current claims against Cornerstone arise from a commission lost to an entirely separate commercial real estate transaction, involving an entirely different seller. Id. Therefore, even if evidence had been presented during the first lawsuit, the

evidence presented before the CBA arbitrators will focus on the sale of Mr. Crapo's condominium complex, not the sale of the Timber Court Apartments. Id.

Third, the two lawsuits do not involve the infringement of the same right. Id. In the first lawsuit Cornerstone asserted a myriad of causes of action against Mr. Seipp, individually, and Berkshire Hathaway. Id. At that time, Berkshire Hathaway did not assert any claims against Cornerstone. Id. To the contrary, in the amended Arbitration Complaint, Seipp is asserting that Cornerstone caused him to lose commission on the sale of an entirely unrelated property. Id.

Fourth, the two lawsuits do not arise out of the same transactional nucleus of facts. The first lawsuit arose over the sale of the Timber Court Apartments and Mr. Seipp's alleged breaches of his duties to Cornerstone. (CP 172-268). The second litigation arose over Mr. Seipp losing a commission from Diamond Rock's condominium portfolio — an entirely separate and unrelated commercial real property. Id.

Cornerstone entirely fails to establish that the same cause of action is at issue. Cornerstone argues that "*in the First Lawsuit, Seipp explicitly brought forth his claim that*

Cornerstone failed to arbitrate, asserting that the trial court must compel arbitration." (Brief of Appellant, p. 25). While Seipp specifically asserted an affirmative defense regarding arbitration, Seipp did not assert any counterclaims in the first lawsuit. (CP 144-171). As Cornerstone astutely points out, the remedy Seipp sought was for the trial court to compel arbitration of all claims asserted in Cornerstone's first lawsuit — he did not seek any affirmative relief or monetary damages. (Brief of Appellant, p. 25). In the currently pending CBA arbitration action, Seipp explicitly seeks monetary compensation as a result of Cornerstone's tortious interference with the sale of Crapo's condominium portfolio. (CP 172-268). Consequently, Cornerstone fails to establish the existence of the same cause of action, a requisite component of its res judicata defense.

c. *The same persons and parties are present.*

Seipp does not dispute the concurrence of identity in persons or parties.

d. *The quality of the persons for or against whom the claim is made is the same as Cornerstone's first lawsuit against Berkshire Hathaway.*

Seipp does not dispute that the quality of the persons for or against whom the claim is made is identical to Cornerstone's

first lawsuit against them. However, Cornerstone's defense of res judicata fails as a matter of law because it cannot meet all four of the requisite elements.

More importantly, the claims Seipp asserts against Cornerstone in the Amended Arbitration Complaint did not accrue until after the parties' executed the Settlement Agreement and Cornerstone dismissed its prior lawsuit against Berkshire Hathaway. (CP 172-268; 727; 941-42). Cornerstone fails to overcome its burden to establish the four elements of res judicata.

C. The Trial Court Properly Dismissed Cornerstone's Request for a Finding that Seipp's Arbitration Claims Were Compulsory Counterclaims.

Cornerstone asserts that "*Seipp's tortious interference claim should have been brought forth in the First Lawsuit.*" (Brief of Appellant, p. 32). However, Seipp could not have asserted his current claims against Cornerstone in Cornerstone's first lawsuit because its current claims did not accrue until after the parties settled the prior action and Cornerstone dismissed it with prejudice. (CP 172-268). A claim accrues when a party has the right to apply to a court for relief. 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 575-76 (2006). A cause of action is not mature until all of its elements are capable of being asserted

and proved by the plaintiff. See e.g., Schoeman v. New York Life Ins. Co., 106 Wn.2d 855 (1986); Chee Chew v. Lord, 143 Wn. App. 807 (2008).

The failure to assert a compulsory counterclaim bars a later action on that claim. Schoeman, 106 Wn.2d at 863. CR 13(a) provides:

> *A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the pleader's claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.*

CR 13(a). A compulsory counterclaim arises out of the same "*transaction of occurrence*" as the original claim if the two are logically related. Chukri v. Stalfort, 200 Wn. App. 870, 874 (2017). The considerations underlying the compulsory counterclaim rule include judicial economy, fairness, and convenience. Id. at 875. By contrast, a permissive counterclaim is "*any claim against an opposing party not arising out of the*

transaction or occurrence that is the subject matter of the opposing party's claim." Atlas Supply, Inc. v. Realm, Inc., 170 Wn. App. 234, 238 (2012). "*Permissive counterclaims do not affect, nor are they affected by, the outcome of the original claim.*" Id. (internal quotations omitted).

Cornerstone asserts that Seipp's tortious interference claim was a compulsory counterclaim that should have been asserted in the first lawsuit. (Brief of Appellant, p. 32). However, the claims Berkshire Hathaway asserted in its Amended Arbitration Complaint against Cornerstone did not arise until after the first lawsuit had been dismissed with prejudice. (CP 172-268). The lawsuit was dismissed on August 22, 2017, and the sale of the Property at issue in the Amended Arbitration Complaint closed on or about August 28, 2017. Id. Consequently, contrary to Cornerstone's assertion that Seipp knew of his claim prior to closing and that he should have brought the claim in the first lawsuit, Seipp could not have brought his tortious interference claim in the first lawsuit because his claims did not accrue until after the first lawsuit was dismissed. Id. Had Mr. Seipp brought his claim in the first lawsuit, he would have had no damages to assert as the sale of Crapo's property had not closed and there

was no guarantee that the sale would close at all. Id.

i. Malicious Prosecution is Not a Compulsory Counterclaim.

Specifically, "*a claim for malicious prosecution cannot be a compulsory counterclaim in the allegedly wrongfully prosecuted action.*" 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1411, at 82-83 (2d ed. 1990) (footnotes omitted); see also Alexander v. Petty, 35 Del. Ch. 5 108 A.2d 575 (1954); Hunter v. Milhous, 305 N.E.2d 448 (Ind. 1973); Yaklevich v. Kemp, Schaeffer & Rowe Company, 626 N.E.2d 114 (1994); Eon Laboratories, Inc. v. Smithkline Beecham Corp., 298 F. Supp. 2d 175 (D. Mass. 2003). Washington law provides that "*[i]n an action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages* ***may be litigated*** *in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.*" RCW 4.24.350(1) (emphasis added).

Furthermore, the elements of malicious prosecution in a

civil case are: *(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4)* ***that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned****; (5) that the plaintiff suffered injury or damage as a result of the prosecution. . . . (6) arrest or seizure of property; and (7) special injury.*" Clark, 150 Wn.2d at 911-12 (emphasis added). An essential element of the claim is that the proceedings terminated. Id. Consequently, at best, a claim for malicious prosecution is a permissive counterclaim, not a compulsory counterclaim.

As for Seipp's claims for "*perverting the court*" and "*failure to arbitrate cornerstone*" these claims appear to be similar, if not identical, to his claim for malicious prosecution. (CP 172-268). Likewise, Seipp's claim for tortious interference was not a compulsory counterclaim as the claim did not accrue until August 28, 2017, a month after the Settlement Agreement was signed. Id.

Here, Seipp's current claims against Cornerstone did not

accrue until he had a right to apply for relief. Seipp did not have a right to apply for relief until the sale of the real property closed, and he lost the commission at issue. (CP 172-268). Prior to the closing of the sale, Seipp had no right to apply for relief as he had not lost the commission. (CP 172-268).

The CBA Arbitration Rules are explicit: "*a complainant for arbitration shall be barred unless received by CBA within three (3) months of whichever of the following is applicable: (i) closing of the sale; (ii) the due date of the commission or other payment; or (iii) discovery of the claim by the member, where it is concealed (whether intentionally or not) by the other member.*" Id. Consequently, CR 13(a) is inapplicable because Seipp's claims against Cornerstone did not arise out of the same transaction or occurrence, did not accrue until after the parties settled the first lawsuit, and did not accrue until after Cornerstone dismissed its prior lawsuit against Berkshire Hathaway. (CP 172-268).

D. The Trial Court Properly Denied Cornerstone's Request to Enjoin CBA Arbitration.

Cornerstone cannot meet the elements necessary for injunctive relief. "*An injunction is distinctly an equitable remedy and is a remedy which should not be lightly indulged in, but*

should be used sparingly and only in a clear and plain case." Kucera v. State, 140 Wn.2d 200, 209 (2000) (internal quotations omitted) (citing 42 Am. Jur. 2d Injunctions § 2, at 728 (1969)). "*Accordingly, injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law.*" Id. (citing State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 312 (1976)). RCW 7.40.020 provides:

> *When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual... an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion.*

RCW 7.40.020. A party seeking a preliminary injunction must establish the likelihood that it will ultimately prevail on the merits by showing: "*(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either have or will result in actual and*

substantial injury." San Juan County v. No New Gas Tax, 160 Wn.2d 141, 153 (2007).

The plaintiff need not prove, and the trial court does not reach or resolve, the merits of the issues underlying the requirements for permanent injunctive relief. Id. "*A preliminary injunction serves the same purpose as a temporary restraining order – to preserve the status quo until the trial court can conduct a full hearing on the merits of the complaint.*" Northwest Gas Ass'n. v. Washington Utilities and Transp. Com'n, 141 Wn. App. 98, 115-16 (2007). An injunction, by its very nature, is directed at continuing conduct. Larsen v. Town of Colton, 94 Wn. App. 383, 391-92 (1999). "*To establish a clear legal or equitable right . . . the moving party must show that it is likely to prevail on the merits.*" San Juan County, 160 Wn.2d at 154.

This showing must be examined in light of equity including balancing the interests of the parties. Kucera, 140 Wn.2d at 203. "*If a party seeking a preliminary injunction fails to establish any one of these requirements, the requested relief must be denied.*" Kucera, 140 Wn.2d at 210 (citing Washington Fed'n v. State, 99 Wn.2d 878, 888 (1983)). Furthermore, in deciding whether to grant injunctive relief, the court may consider a number of

circumstances including the adequacy of other remedies, the misconduct of the party seeking injunctive relief, and the relative hardship to the parties resulting from the grant or denial of injunctive relief. Hollis v. Garwall, Inc., 88 Wn. App. 10, 16 (1997).

Cornerstone has an adequate remedy at law: monetary damages. Therefore, it cannot demonstrate that it is entitled to the extraordinary remedy of injunctive relief. Kucera, 140 Wn.2d at 69. Cornerstone asserts that, "*[g]iven Seipp's claims in his arbitration action are barred by the doctrine of res judicata and CR 13(a), Cornerstone has a right to seek that Seipp's arbitration action be enjoined.*" (Brief of Appellant, p. 43). However, as set forth above, Cornerstone fails to establish that CR 13(a) or the doctrine of res judicata apply to Seipp's arbitration claims. Even if Cornerstone was successful in establishing that either CR 13(a) or the doctrine of res judicata applied, which it is not, Cornerstone cannot establish that proceeding with CBA arbitration will result in actual or substantial injury.

Cornerstone asserts that it "*faces the prospect of having to spend considerable time and resources defending Seipp's arbitration action.*" (Brief of Appellant, p. 47). The risk of having

to expend funds on attorney's fees to defend an arbitration action does not give rise to an actual and substantial injury that would warrant equitable, injunctive relief. No judgment has been entered against Cornerstone; therefore, its hypothetical discussion of the effects of a potential judgment in an unknown amount demonstrates that there is no imminent fear of harm. This also establishes that the alleged injury is likewise unknown and monetary in nature. Consequently, the trial court properly denied Cornerstone's request for an order enjoining CBA arbitration.

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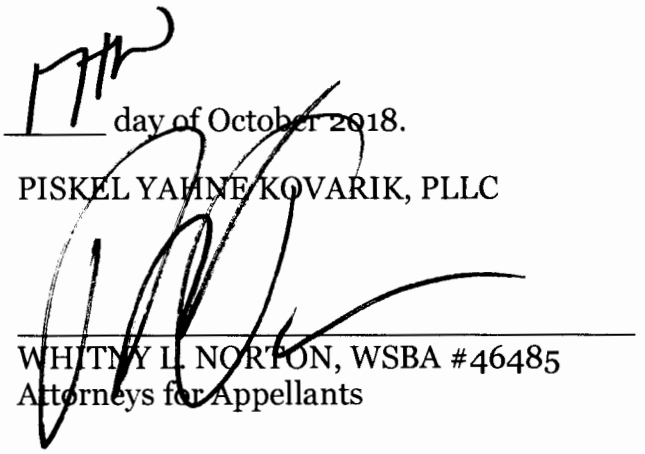
IV. CONCLUSION

Pursuant to the foregoing, the following orders entered by the trial court on March 23, 2018 should be affirmed: Order Partially Granting Plaintiff SVN Cornerstone, LLC's Motion for Summary Judgment, Order Granting Defendants' Motion to Dismiss, and Order Denying Plaintiff's Request for Injunctive Relief.

DATED this 17th day of October 2018.

PISKEL YAHNE KOVARIK, PLLC



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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October 2018, a true and correct copy of the foregoing document was served by hand delivery to:

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