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Court of Appeals
Division III
State of Washington
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NO. 36349-0-III
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

DANA BROWN,

Plaintiff/Appellant,

vs.

PRO-TECH AUTO, INC.,

Defendant/Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE BRUCE SPANNER

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR No. 1: The Trial Court Erred by entering the Order Granting Summary Judgment.

ISSUES PRESENTED

1. Did Ms. Brown's verified complaint create a genuine issue of material fact?

STATEMENT OF THE CASE

On November 9, 2017, the Complaint for Damages for Breach of Contract, Consumer Protection Act Violation (RCW 19.86) and for Writ of Replevin (the Complaint) was filed on behalf of Dana Brown. (CP 1-3)

The Complaint was verified by Ms. Brown in the following terms:

Dana Brown, being first duly sworn on oath, deposes and says:

I am the Plaintiff Dana Brown in the above-entitled action; I have read the foregoing Complaint, know the contents thereof and confirm said complaint to be true and correct to the best of my knowledge.

Ms. Brown's signature was notarized. (CP 3)

The Complaint alleged that Defendant Pro-Tech Auto, Inc., (Pro-Tech) had taken possession of Ms. Brown's 1931 Model A Ford for the purposes of performing a full restoration but had not completed the work.

The following statements were contained in paragraphs 7 and 8:

7. Defendant has failed to complete the restoration within the time and for the amount agreed upon between the parties. The Defendant is still in possession of the antique vehicle.

8. As a consequence of Defendant's failure to perform as agreed, Plaintiff has been damaged in an amount exceeding \$100,000, the exact amount of which shall be proved at trial.

(CP 2)

On July 19, 2018, Pro-Tech moved for summary judgment seeking dismissal of Ms. Brown's action on the basis that the parties had agreed that Pro-Tech would work on a time and materials basis. (CP 4-11) As the memorandum in support of the motion states:

This was a time and material contract. Plaintiff was billed for all work that was done, and payment was made in accordance with the agreement. Plaintiff stopped paying so no further work was complete.

All records reflect that the work done by the defendant was on a time and material basis. Nowhere is there any guarantee of cost, time, or nature of the work. The nature of the work was solely under the control of the plaintiff who failed to pay in a timely manner.

(CP 10) Its motion was supported by an affidavit given by Pro-Tech's principal, James Pentecost. In his affidavit, Mr. Pentecost stated that all work done by Pro-Tech is done on a "time and materials" basis; that Ms. Brown had been charged for work that had been done; that she had approved the work; that work would only be done when she paid for it;

that more than \$100,000.00 in charges had been incurred; and that the restoration had not been completed. (CP 12-14)

Inexplicably, no written response to this motion was filed on behalf of Ms. Brown.

On August 24, 2018, the trial court entered the Order Granting Summary Judgment. The order dismissed Ms. Brown's complaint with prejudice. The order contains the following statement, among other things:

THIS MATTER having regularly come before the above-entitled court for hearing on the Motion for Summary Judgment by the defendant, and, based on the records herein, there is no genuine issue of material fact; that the work done by the defendant on plaintiff's vehicle was on a time and material basis. . .

(CP 18-19) Ms. Brown subsequently appealed. (CP 20-22)

ARGUMENT

I. Standard of Review.

The appellate court reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. As CR 56(c) makes clear, a summary judgment motion can be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law.” In this context, a material fact is one upon which the outcome of the litigation depends in whole or in part. All facts and all reasonable inferences from those facts are viewed in the light most favorable to the nonmoving party. Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Rockrock Group, LLC v. Value Logic, LLC*, 194 Wn.App. 904, 913, 380 P.3d 545 (2016) When the evidence is disputed, a genuine issue of material fact exists, and summary judgment cannot be granted. See, e.g., *August v. U.S. Bancorp*, 146 Wn.App. 328, 346, 190 P.3d 86 (2008); *Reed v. ANM Health Care*, 148 Wn.App. 264, 273, 225 P.3d 1012 (2008)

These rules are in keeping with the notion that summary judgment is a drastic remedy which should be applied with caution. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 616, 949 P.2d 1260 (1997)

As will be discussed below, the record presented a genuine issue of material fact on the key issue between the parties—whether they agreed to a specific price to perform the restoration work or whether the work was to be done on a time and materials basis. Therefore, the trial court erred by granting Pro-Tech’s summary judgment motion and dismissing Ms. Brown’s action.

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II. The Verified Complaint Is an Affidavit.

A verified complaint amounts to an affidavit. Therefore, Ms. Brown's verified complaint was subject to consideration in connection with Pro-Tech's summary judgment motion.

Facts in a summary judgment proceeding are presented through affidavits. CR 56(a), (b) The affidavits must set out facts that would be admissible in evidence and show that the affiant is competent to testify. CR 56(e)

Ms. Brown's verification of the Complaint is an affidavit. An affidavit is defined as a sworn statement in writing made under an oath or on affirmation before an authorized officer. *Our Lady of Lourdes Hospital v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993) Ms. Brown's verification of the Complaint was sworn, in writing, and made under oath before an authorized officer, the notary. In it, she averred under oath that the statements made in the Complaint were true. It was therefore an affidavit subject to consideration as any other affidavit.

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Counsel’s research has not located a Washington decision directly addressing whether a verified complaint can serve as an affidavit in summary judgment proceedings.¹ However, Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of the Civil Rules. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)—applying this notion in the context of summary judgment procedure. And it is well settled in the federal system that a verified complaint may serve as an affidavit in summary judgment proceeding. 11 *Moore’s Federal Practice* § 56.94(2A); See also, *Colon v. Coughlin*, 58 F.3d 865, 872 (2nd Cir. 1995); *Baker v. Norman*, 651 F.2d 1107, 1114-15 (5th Cir. 1981); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985); *Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988) As such, it carries the same weight as any other affidavit in a summary judgment proceeding. *El Bey v. Roop*, 530 F.3d 407, 414 (6th Cir. 2008) Stated another way, asking a party to submit an affidavit when that party has already filed a verified complaint “would simply multiply the filing of

¹ Reference was made to verified complaints in two decisions counsel has been able to locate. In *Schaaf v. Highfield*, 127 Wn.2d 17, 30, 896 P.2d 655 (1995), the verified complaint was used to show that Plaintiff’s complaint had no merit. In *Duckworth v. Landland*, 95 Wn.App. 1, 7, 988 P.2d 967 (1998), the moving party argued that the Plaintiff could not create a genuine issue of fact that contradicted his verified complaint. The Court rejected that argument.

paper for no good purpose.” *Spear v. Dayton’s*, 733 F.2d 554, 555 (8th Cir. 1984)

The verification was also sufficient for the purposes of CR 56(e). That portion of CR 56 requires that the content of affidavits be admissible in evidence and show that the affiant is competent to testify. Ms. Brown stated in the verification that she had knowledge of the matters stated in the Complaint. She is also certainly competent to testify concerning the nature and terms of her agreement with Pro-Tech. She is the one who discussed the terms with Pro-Tech personnel. Mr. Pentecost’s affidavit would confirm that since it talks about discussions with Ms. Brown concerning the job.

In summary, the verified complaint was an affidavit that could be reviewed and considered in the summary judgment proceedings.

III. The Verified Complaint Creates a Genuine Issue of Material Fact.

Pro-Tech based its summary judgment motion on one issue—its contention that the arrangement between the parties was based on a time and materials as opposed to a lump sum for a restoration job.² The Complaint demonstrates a genuine issue of material fact on this point.

² “Time and materials” is understood to mean that labor will be charged at an hourly rate and that materials will also be charged. Under this method, there is no maximum or minimum charge for the work.

In his affidavit, Mr. Pentecost stated that Pro-Tech agreed to do the restoration work on a time and materials basis. Ms. Brown, however, stated in the verified Complaint that “Defendant has failed to complete the restoration within the time and for the amount agreed upon between the parties.” (CP 2) As noted above, this statement and all inferences to be drawn from this statement must be viewed in the light most favorable to Ms. Brown. The statements and the required inferences indicate that the parties entered into an agreement for an agreed amount and within a specific time. If, as the verified Complaint states, Pro-Tech had failed to complete the restoration within the time and for an agreed amount, there must have been an agreement in place to do the work within a specific time and for a lump sum. Taken together, the verified complaint and Mr. Pentecost’s affidavit show that Ms. Brown and Mr. Pentecost do not agree on the terms of Pro-Tech’s engagement. Therefore, there is a genuine issue of material fact that must be resolved at trial.

There is no evidence that the discussions that Ms. Brown and Mr. Pentecost may have had concerning the restoration project were ever reduced to writing. That requires a determination of what the terms of their oral contract might have been. Disputes over the existence of oral contracts are generally not appropriate for summary judgment because they depend on an understanding of surrounding circumstances, the intent

of the parties, and the credibility of witnesses. See, e.g., *Garbell v. Tall's Travel Shop*, 17 Wn.App. 352, 354, 563 P.2d 211 (1977)—genuine issue of fact concerning terms of oral bonus agreement; *Crown Plaza Corp., v. Synapse Software Systems, Inc.*, 87 Wn.App. 495, 500-501, 962 P.2d 824 (1997)—genuine issue of fact found as to the existence of an oral termination agreement; *Plese-Graham, LLC v. Loshbaugh*, 164 Wn.App. 530, 541, 269 P.3d 1038 (2011)—genuine issue of fact on whether developer orally agreed to execute a personal note or a corporate note; *Kilcullen v. Calbom Schwab, PSC*, 177 Wn.App. 195, 203, 312 P.3d 60 (2013)—genuine issue of fact on terms of loans made to a law firm by its members when those terms were not reduced to writing and assented to by the plaintiff. The absence of a written agreement between the parties further militates in favor of the finding of a genuine issue of material fact.

In short, the submissions show that there is a dispute on this basic and primary issue in this case—the terms of the parties' agreement. Since the evidence is disputed, there is a genuine issue of material fact. And since there is a genuine issue of material fact, the trial court erred by granting Pro-Tech's summary judgment motion.

IV. The Trial Court Was Required to Consider the Complaint.

Pro-Tech will likely argue that the arguments made above should not be considered at this juncture because no response was filed to its

summary judgment motion. That argument should be rejected for a number of reasons.

First of all, the summary judgment order, prepared on behalf of Pro-Tech, stated that the Court's decision was based on "the records herein." That language in the order indicates that the trial court did consider the Complaint since it is in the court file.

In any event, the trial court had an independent duty to review and consider what was in court's file regardless of what was or was not submitted. As CR 56(c) states, summary judgment can only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on filed, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." In this context, CR 56(c) must be read in conjunction with Benton and Franklin County Local Rule 7(b)(7)(G) which states in pertinent part:

The causes on the civil docket for each motion day will be called in order, and the moving party, if no one appears in opposition may take the order moved for upon proper proof of notice, unless the Court shall deem it unauthorized.

In other words, the trial court's Local Rules require independent consideration of the merits of each motion regardless of what may or may not be submitted by the parties. This independent consideration must, at a

minimum, require the Superior Court in Benton and Franklin counties to review file material to see if a given motion should be granted. Taken along CR 56(c)'s language that summary judgment can only be granted if documents including the pleadings show that there is no genuine issue of material fact, the local rule requires the Court to review the court file to see if summary judgment is appropriate.³

This Court addressed the issue recently in *Discover Bank v. Lemley*, 180 Wn.App. 121, 320 P.3d 205 (2014). In its opinion, the Court at least suggested that a trial court must consider any admissible evidence found in the court file when deciding a summary judgment motion. 180 Wn.App. at 135

The verified Complaint was in the court's file. It was admissible since it was based on Ms. Brown's knowledge as she stated. It serves to raise a genuine issue of material fact as to the nature of the parties' agreement—a critical factor in this case. The trial court should have considered it if it did not. Such consideration required the denial of Pro-Tech's summary judgment motion.

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³ Every experienced practitioner has had a court make a decision based on a point of law or fact that neither side raised. It is also not unheard of for a court to deny a motion that is unopposed because the motion lacks merit or seeks relief that cannot or should not be granted.

CONCLUSION

The trial court should have denied Pro-Tech's summary judgment motion because the pleadings on file demonstrated a genuine issue of material fact. The Court should therefore reverse the Order Granting Summary Judgment and remand the matter for further proceedings.

DATED this 20 day of December, 2018.



BEN SHAFTON WSB#6280
Of Attorneys for Plaintiff/Appellant

APPENDIX

CR 56(a), (b), (c), and (e)

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

(c) **Motion and proceedings.** The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary 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. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge,

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

DECLARATION OF MAILING

COMES NOW Anastasiya Zavrazhina and declares under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of her knowledge, information, and belief:

1. My name is Anastasiya Zavrazhina. I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, and not a party to this action.

2. On December 20th, 2018, into the mails of the United States of America, with first class postage prepaid, an envelope containing a copy of the Brief of Appellant addressed as follows:

John Schultz, Attorney at Law
2415 West Falls Ave.
Kennewick, WA 99336

DATED at Vancouver, Washington, this 20th day of December, 2018.



ANASTASIYA ZAVRAZHINA

CARON, COLVEN, ROBISON & SHAFTON PS

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