

FILED
Court of Appeals
Division III
State of Washington
1/8/2020 2:56 PM

COA No. 36852-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MARK WILLIAMS and MARIAN NUNER, husband and wife,

Respondents,

v.

PAUL and SUSAN DANA, husband and wife, and DANA LIVING
TRUST,

Appellants,

and

KENNETH L. WERNER, et ux, et al.,

Defendants.

BRIEF OF APPELLANTS

Kenneth H. Kato, WSBA # 6400
Attorney for Appellants
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

 A. The court erred by entering its Order Awarding Fees and Costs to Mark Williams and Marian Nuner.....1

Issues Pertaining to Assignments of Error

 1. Did the court err by entering its Order Awarding Fees and Costs to Williams for enforcing the mediated agreement when Williams did not seek to enforce that valid agreement, but instead sought to enforce his proposed mutual release and settlement agreement, which did not comport with the mediated agreement? (Assignment of Error A).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....4

 A. The court erred by awarding fees for enforcement of the December 21, 2018 mediated agreement.....4

 B. The Danas should be awarded attorney fees on appeal under the attorney fee provision in the mediated agreement.....8

IV. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

Austin v. Ettl, 171 Wn. App. 82, 286 P.3d 85 (2012).....8

Blue Mt. Constr. Co. v. Grant Cy Sch. Dist. 105-204, 49 Wn.2d 685, 306 P.2d 209 (1957).....6, 7

Dragt v. Dragt/DeTray LLC, 139 Wn. App. 560, 161 P.3d 473 (2007), *review denied*, 163 Wn.2d 1042 (2008).....7

Seaborn Pile Driving Co. v. Glew, 132 Wn. App. 261, 131 P.3d 910 (2006).....8

Sea-Van Assocs. v. Hamilton, 125 Wn.2d 120, 881 P.2d 1035 (1994).....6

I. ASSIGNMENT OF ERROR

A. The court erred by entering its Order Awarding Fees and Costs to Mark Williams and Marian Nuner (hereinafter Williams).

Issues Pertaining to Assignments of Error

1. Did the court err by entering its Order Awarding Fees and Costs to Williams for enforcing the mediated agreement when Williams did not seek to enforce that valid agreement, but instead sought to enforce his proposed mutual release and settlement agreement, which did not comport with the mediated agreement? (Assignment of Error A).

II. STATEMENT OF THE CASE

In this real property dispute, Williams filed a complaint against the Danas and others for declaratory judgment; damages and injunctive relief regarding trespass, timber trespass, and waste; fraud; and professional negligence. (CP 37). The parties went to mediation on December 21, 2018. (CP 273, 380). An agreement was made that day. The document, entitled tentative agreement in mediation, provided:

Paul and Susan Dana (and on behalf of the Dana Living Trust), and Mark Williams and Marian Nuner, by their attorney Steven Schneider, have tentatively agreed as follows, subject to direct approval by Mark Williams and Marian Nuner:

- 1) The parties agree to a 15-foot easement on each side of the property line.
- 2) Paul and Susan will move or remove the fence within one year onto the parties' property outside of the easement.
- 3) Mark and Marian will not cause the trees within the easement to be cut.
- 4) Release of all claims Williams/Nuner have against the Danas and the trust with prejudice.
- 5) Mutual non-disturbance agreement – not verbally or physically harass each other (no harassment as defined in statutory harassment orders).
- 6) If either party must enforcement of the settlement agreement, prevailing party gets attorney fees.
- 7) Mark will remove the slash pile.
- 8) Steve will prepare the legal paperwork and his clients will pay for the filing.
- 9) Release of lis pendens. (CP 273).

The mediated agreement was signed by the Danas and Steven Schneider on behalf of Williams. (*Id.*). After the mediation, a mutual release and settlement agreement drafted by Williams' counsel was presented to the Danas, who did not sign because it contained several changes to the provisions of the mediated agreement that were not agreed to. (CP 244).

Williams subsequently filed a Motion to Enforce Mediated Agreement and Show Cause Order for Contempt. (CP 224). The court heard the motion on January 18, 2019, and determined the December 21, 2018 tentative agreement was the valid mediated agreement. (RP 90; CP 328). The Danas were not held in contempt. (RP 91).

With respect to the unsigned mutual release and settlement agreement, the court noted:

Now, the second issue is the mutual release and settlement agreement. And I think what I hear Mr. Schneider saying is that he is willing to drop anything he has attempted to add to the formal documents in favor of getting this matter done. And I understand the Danas have certain objections to some of the matters that may not have been agreed upon at the mediation. Now, some of those additional items may not be material; and there may be valid reasons to include them in a document. But again, I think I hear Mr. Schneider saying that he would forego any of those changes and just simply stick with whatever this agreement is. (RP 90).

Williams' counsel acknowledged in his argument that he had "clarified," "elaborated for clarification," and/or "extrapolated" beyond the terms of the tentative agreement in mediation in his mutual release and settlement agreement. (RP 83-86). Counsel

finally stated:

And like I said, I'd be happy to agree to that agreement verbatim if that will solve the problem. (RP 85-86).

After finding the mediated agreement valid, the court indicated it would consider attorney fees under the fee provision in item 6 for presentment without oral argument. (RP 93). Asking the court a question, Mr. Dana stated:

When we were talking about this either party enforcement and the attorney's fees, Mr. Williams and Ms. Nuner did sign to this stuff. They had Mr. Schneider draw up a whole new set of – of papers that had all these added things to it, which, because of all the additions, is why we didn't sign it. (RP 93).

The court replied:

Mm-hm. And that's what you're going to argue to me when you respond after he asks for attorney's fees. . .

That's why I'm not making a ruling today, and you can respond in that fashion if you like. (RP 93-94).

The Danas made that argument. (RP 372). Nonetheless, the court awarded Williams attorney's fees of \$2700. (CP 382).

The Danas appealed. (CP 385).

III. ARGUMENT

A. The court erred by awarding fees for enforcement of

the December 21, 2018 mediated agreement.

It is undisputed that the Danas signed the tentative agreement in mediation, which the court determined was indeed the mediated agreement and valid. The Danas do not challenge the validity of the December 21, 2018 mediated agreement on appeal. Rather, the Danas declined to sign the later-drafted mutual release and settlement agreement because it did not comport with the mediated agreement. (RP 93).

Williams' counsel acknowledged to the court that his mutual release and settlement agreement did not mirror the mediated agreement and opted not to enforce his propose document. (RP 83-86). In its decision finding the December 21, 2018 mediated agreement valid, the court thus noted counsel indicated he would "drop anything that he has attempted to add to the formal documents in favor of getting this matter done." (RP 90). The court also indicated "the Danas had certain objections to some of the matters that may not have been agreed upon at the mediation." (*Id.*). It understood Williams' counsel was "saying that he would forego any of those changes and just simply stick with whatever

this agreement is.” (*Id.*). And counsel had so advised the court on the record:

And like I said, I’d be happy to agree to that [December 21, 2018 mediated] agreement verbatim if that will solve the problem. (RP 85-86).

The Williams’ mutual release and settlement agreement containing changes not agreed to by the Danas were admittedly not contained in the mediated agreement and was therefore an attempt at modification of the valid original agreement. *Blue Mt. Constr. Co. v. Grant Cy Sch. Dist.* 105-204, 49 Wn.2d 685, 688, 306 P.2d 209 (1957). The acceptance of an offer is always required to be identical with the offer or there is no meeting of the minds and no agreement. *Id.* The court found the December 21, 2018 mediated agreement was the operative one. (RP 90; CP 328). It had been accepted by Williams and the Danas. Williams’ additions and changes, not agreed to by the Danas, in the subsequent mutual release and settlement agreement were not identical to the valid mediation agreement and were just a counteroffer or proposed modification, neither of which was accepted by the Danas. *Sea-Van Assocs. v. Hamilton*, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994). The only valid agreement was thus the mediated one, as

properly found by the court. *Blue Mtn. Constr. Co.*, 49 Wn.2d at 688.

Modification of a contract by subsequent agreement of the parties arises out of the parties' intention and requires a meeting of the minds. *Dragt v. Dragt/DeTray LLC*, 139 Wn. App. 560, 571, 161 P.3d 473 (2007), *review denied*, 163 Wn.2d 1042 (2008). There was no mutual intention and no meeting of the minds as to the proposed mutual release and settlement agreement. (CP 226-39, 243-45, 246,-63). There was also no separate consideration for the modification so the mutual release and settlement agreement was invalid and the only agreement was the December 21, 2018 mediated agreement. *Dragt*, 139 Wn. App. at 571.

The valid mediated agreement contained an attorney fee provision, item 6, permitting fees to be awarded to the prevailing party if either party had to enforce the settlement agreement. (CP 273). Williams did not seek enforcement of the December 21, 2018 mediated agreement. Instead, he sought to enforce the mutual release and settlement agreement, which contained additions and changes not agreed to in the December 21, 2018 mediated agreement. (RP 83-86). The court determined the mediated agreement was valid, not the proposed mutual release and

settlement agreement. (RP 90; CP 328). By counsel's concession he would forego any additions or changes he made to the mediated agreement, Williams was so bound and clearly did not attempt to enforce the valid mediated agreement. Accordingly, attorney fees should not have been awarded to Williams under item 6 as they were not incurred in enforcing the December 12, 2018 mediated agreement containing the fee provision. *Austin v. Ettl*, 171 Wn. App. 82, 93 n.11, 286 P.3d 85 (2012). The trial court erred and the award of fees must be reversed.

B. The Danas should be awarded attorney fees on appeal under the attorney fee provision in the valid mediated agreement.

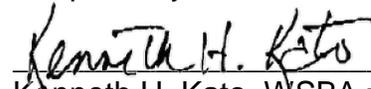
The Danas are entitled to an award of attorney fees on appeal under the attorney fee provision in the mediated agreement as they seek its enforcement as written and as prevailing parties. *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 273, 131 P.3d 910 (2006).

IV. CONCLUSION

Based on the foregoing facts and authorities, the Danas urge this court to reverse the Order Awarding Fees and Costs and to award them attorney fees on appeal under item 6 of the December 21, 2018 mediated agreement.

DATED this 8th day of January, 2020.

Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Appellants
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on January 8, 2020, I served a copy of the Brief of Appellants through the eFiling portal on Steven Schneider at his email address.



January 08, 2020 - 2:56 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36852-1
Appellate Court Case Title: Mark Williams, et ux v. Paul Dana, et ux, et al
Superior Court Case Number: 17-2-02914-3

The following documents have been uploaded:

- 368521_Briefs_20200108145503D3368990_6007.pdf
This File Contains:
Briefs - Appellants
The Original File Name was dana brief 368521.pdf

A copy of the uploaded files will be sent to:

- ss@stevenschneiderlaw.com

Comments:

Sender Name: Kenneth Kato - Email: khkato@comcast.net
Address:
1020 N WASHINGTON ST
SPOKANE, WA, 99201-2237
Phone: 509-220-2237

Note: The Filing Id is 20200108145503D3368990