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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 34714-8-II

WACHOVIA SBA LENDING, INC., d/b/a
WACHOVIA SMALL BUSINESS CAPITAL,
a Washington corporation,

Plaintiff/Respondent,

v.

DEANNA D. KRAFT, individually,

Defendant/Appellant.

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

On Appeal from the Superior Court of the State of Washington
In and for the County of Pierce
Superior Court Docket Number 05-2-11846-1

BRIEF OF RESPONDENT

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A. STATEMENT OF THE ISSUE

Whether the trial court abused its discretion when it considered and denied Kraft's request for an award of her attorneys' fees after the trial court granted Wachovia's Motion for Voluntary Dismissal Without Prejudice. (Kraft's Assignment of Error No. 1)

B. STATEMENT OF THE CASE

The Plaintiff in the action giving rise to this appeal, Wachovia SBA Lending, Inc. ("**Wachovia**"), is the legal holder of a U.S. Small Business Administration Promissory Note dated June 30, 1997 in the principal amount of \$172,000.00 ("**Note**"). CP 19. Randolph S. Kraft, Defendant/Appellant Deanna M. Kraft's ("**Kraft**") ex-husband, executed the Note. CP 19. The Note secured a commercial loan in the principal amount of \$172,000.00 with an interest rate of the prime rate plus 2.5% per annum, payable in regular installments ("**Loan**"). Id. The Note was secured by a Deed of Trust on the Krafts' real property in North Carolina ("**Property**"), the state in which they previously lived. Id.

The Note and Deed of Trust provide that in the event the holder of these instruments forecloses on the Deed of Trust and sells the Property, Randolph and Deanna Kraft will be liable for any deficiency balance. CP 20. The stated purpose of the Loan was for Mr. Kraft's veterinary clinic, which was located on the Property. Id. Kraft is also a veterinarian. CP 75, 83.

Kraft executed a Small Business Administration Guaranty in connection with the Note and Loan on June 30, 1997 ("**Guaranty**"). CP 10-13, 20. Wachovia is the legal holder of the Guaranty. CP 20. Per the Guaranty, Kraft absolutely and unconditionally guaranteed to pay the holder of the Note and Guaranty in accordance with the terms set forth

therein. CP 10-13. The Guaranty further provides that, upon demand, Kraft shall furnish to Wachovia a financial statement setting forth in reasonable detail her assets, liabilities, and net worth. Id. The Guaranty also provides that Kraft will pay Wachovia's costs and attorney's fees in the event Wachovia must hire an attorney to collect on the Guaranty. Id.

Because both Wachovia and the Small Business Administration ("SBA") have rights regarding the Loan, the SBA has the right to enforce the Note and Guaranty in the event Wachovia chooses not to do so. See CP 81-101. Wachovia is also obligated to obtain SBA approval in the event a borrower makes a settlement offer on an SBA loan that lies below a particular threshold. Id.

Randolph S. Kraft filed an individual voluntary Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Washington at Tacoma under Case Number 03-50941 on September 29, 2003 ("**Kraft Bankruptcy**"). CP 20. Mr. Kraft received his Order Granting Discharge on January 28, 2004. Id. Mr. Kraft's obligations under the Note were discharged in the Kraft Bankruptcy. Id.

Wachovia obtained an order granting its Motion for Relief From Stay in the Kraft Bankruptcy on February 11, 2004. CP 20. Per this order, Wachovia foreclosed its Deed of Trust on the Property and sold the Property at a foreclosure sale. See CP 10-11, 20. After applying these proceeds to the outstanding Kraft indebtedness, approximately \$78,196.77 was due and owing under the Guaranty, not including Wachovia's costs and attorney's fees. CP 20. No payment has been received on the Loan since December 22, 2004, and the Loan and Guaranty are in default. CP 82.

Wachovia filed its Complaint for Judgment on Guaranty and

Unjust Enrichment against Kraft in Pierce County Superior Court Case No. 05-2-11846-1 on September 19, 2005. CP 4. Kraft retained two Washington attorneys, Douglas Kiger and Desa Conniff, and a North Carolina attorney to represent her with respect to Wachovia's claims. See RP 12. Ms. Kraft filed her Answer and Affirmative Defenses on October 10, 2005, which did not include any counterclaim against Wachovia. CP 10-13. The Answer did not assert the statute of limitations as a defense to either of Wachovia's claims. Id.

After numerous discussions regarding a possible settlement, it appeared the parties herein reached an impasse. RP 7. Accordingly, Wachovia filed its Motion for Summary Judgment on January 26, 2006, in which Wachovia sought the entry of summary judgment against Kraft on its claims for breach of guaranty and unjust enrichment. CP 45-49.

After Kraft filed her Affidavit of Prejudice, the Honorable Linda Lee was assigned to this case, and it was Judge Lee who presided over the hearing on Plaintiff's Motion for Summary Judgment on March 3, 2006. See RP 10. After hearing argument from counsel, the trial court denied Plaintiff's Motion for Summary Judgment in part because of a concern as to whether Washington or North Carolina law applied in this case. RP 10; CP 104-05. The trial court stated this issue would have to be briefed by the parties, and it did not make any factual findings or legal conclusions in this case. CP 105.

Trial was set for March 20, 2006 at 9:00 a.m. CP 1. As seen from the summary judgment pleadings, neither party conducted any discovery in this case. CP 45-49; CP 66-73.

In the hope of settling this case short of trial, the parties agreed to split the cost of an appraisal of Kraft's home, which has considerable

equity that could be used to settle Wachovia's claims even after taking Kraft's \$40,000.00 homestead exemption into account. See RP 7. At this time, based largely on an analysis of what Wachovia would receive in the event Kraft filed a chapter 7 bankruptcy, Kraft offered to settle Wachovia's claims against her for \$16,882.00. Id. Wachovia's counsel made clear that both Wachovia *and* the SBA would have to approve a settlement in this amount because said amount is approximately 20% of the principal amount owing under the Guaranty. See RP 7; CP 81-101.

Because it could take approximately two (2) weeks to receive word back from the SBA as to whether this proposal would be acceptable, Wachovia's counsel suggested continuing the March 20 trial date until word could be received both from Wachovia and the SBA; Kraft refused to continue the trial date. See RP 7.

Wachovia then notified Kraft and the trial court of Wachovia's intention to voluntarily dismiss this action without prejudice and without costs, which Kraft objected to. See RP 4. After a hearing several days later on March 20, 2006 (the original trial date in this case), the trial court entered an order granting Wachovia's Motion for Voluntary Dismissal Without Prejudice ("**Order**"), thereby dismissing this lawsuit without prejudice and causing Wachovia and Kraft to bear their own costs and attorneys' fees. CP 108-9.

The trial court correctly noted at this hearing that because it had not determined whether the statute of limitations had expired on Wachovia's two claims, the lawsuit should be dismissed without prejudice as opposed to with prejudice. RP 7. The trial court also considered Kraft's request for her costs and attorneys' fees at this time, and concluded, after hearing argument from counsel and analyzing CR 41(a)

and applicable case law, that each party should bear its own costs and fees.
RP 13; CP 108-9

Although Wachovia made clear that it remained amenable to discuss settling this case after the trial court dismissed this action without prejudice, Kraft filed her Notice of Appeal of the Order on April 17, 2006. CP 110-12. After this Court considered briefing on the issue of whether this appeal was properly before the Court, the Court Clerk advised counsel by letter dated June 9, 2006 that the Order is appealable to the extent that it did not grant Kraft's request for attorneys' fees.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING KRAFT'S REQUEST FOR ATTORNEYS' FEES UNDER CR 41(a) AND RCW 4.84.330.

The awarding of attorney's fees and costs to the defendant, where there is a voluntary nonsuit, is within the discretion of the trial court, and is not reviewable unless there is a manifest abuse of discretion. E.g., Andersen v. Gold Seal Vineyards, Inc., 81 Wn.2d 863, 865, 505 P.2d 790, 792 (1973) (citing In re Estate of Frye, 198 Wn. 406, 88 P.2d 576 (1939)); Van Alstine v. Gray, 71 Wn. 607, 129 P. 106 (1913). "Voluntary nonsuits may come shortly after service, before discovery even starts, or may come after days of trial before a jury. The decision as to whether a particular voluntary nonsuit should trigger attorney fees should be left to the discretion of the trial judge in light of the circumstances of the particular case, whether interpreting a contract clause or statute." Walji v. Candyco, Inc., 57 Wn. App. 284, 290, 787 P.2d 946, 949 (Div. I 1990); Hawk v. Branjes, 97 Wn. App. 776, 986 P.2d 841 (Div. I 1999).

A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or

reasons. Beckman v. Wilcox, 96 Wn. App. 355, 367, 979 P.2d 890, 896-97 (Div. II 1999). In awarding attorney fees, the trial court must exercise its discretion in light of the particular circumstances of each case. Id. Further, even “[w]here a party seeking fees meets the requirements of the statute allowing for fees, the trial court *may* [or may not] award fees even after a voluntary dismissal.” Id. at 362, 979 P.2d at 894. (Emphasis added.)

In this case, there are several reasons why the trial court did not abuse its discretion in allowing the parties to bear their own attorneys’ fees and costs. The first reason is the unresolved choice of law question. As seen from the verbatim report of proceedings regarding the March 20, 2006 hearing on Wachovia’s Motion for Voluntary Dismissal Without Prejudice, the trial court never determined whether Washington law or North Carolina law applied in this case. RP 10; CP 104-05. In fact, as seen from the Order, the trial court specifically refused to decide the choice of law question by entering the Order only after instructing Kraft’s counsel to strike line 5 on page 2, which originally provided “Washington / North Carolina law applies to this case.” CP 105.

The fact that the choice of law question was never resolved is important because even though attorney’s fees clauses in contracts are deemed reciprocal under *Washington* law pursuant to RCW 4.84.330, it is unknown whether such clauses are deemed reciprocal under *North Carolina* law. Thus, one reason why the trial court did not abuse its discretion by not awarding Kraft her attorneys’ fees under RCW 4.84.330 is because it never determined if Washington law applied in this case. After all, the trial court might have concluded North Carolina law — which appears to be without a bilateral attorney’s fees statute like RCW

4.84.330 — should be applied herein. This result would have been in line with Kraft's Answer and Affirmative Defenses, in which Kraft asserted that the trial court did not have venue and jurisdiction over this case. CP 10. Had the trial court elected to apply North Carolina law, the attorney's fees issue would have been resolved under that state's framework even though Kraft moved to Washington. See Seattle-First Nat'l. Bank v. Schriber, 51 Or. App. 441, 625 P.2d 1370 (Or. App. 1981) (holding Oregon trial court did not err in applying RCW 4.84.330 to decide availability of attorney's fees when debtors moved to Oregon from Washington after making their contract with plaintiff in Washington).

Had the trial court concluded North Carolina law applied to this case, Kraft would have had no visible claim for attorneys' fees under RCW 4.84.330. Nevertheless, even if the trial court applied Washington law herein, and even if the trial court found Kraft received a "final judgment" under this statute, the question of whether Kraft would then receive an award of attorneys' fees after a voluntary nonsuit would be within the trial court's discretion under CR 41(a). Andersen, 81 Wn.2d at 865, 505 P.2d at 792. In light of the unresolved choice of law question, the trial court's decision to allow each side to bear its own attorney's fees and costs can hardly be said to be a "manifest abuse of discretion."

Kraft's claim that she was denied the opportunity to request an award of attorneys' fees at the March 20, 2006 hearing is flat-out wrong. The record makes clear that the trial court exercised its discretion by determining, after hearing argument from counsel, that each party would bear its own attorney's fees and costs in accordance with CR 41(a) and applicable case law. RP 12-13; CP 108-9. The trial court considered Kraft's request for attorneys' fees and costs, and it properly denied this

request in light of the particular circumstances of this case.

Other than the choice of law question, the trial court's decision to allow each party to bear their own attorney's fees and costs was also likely influenced by other unresolved legal issues and unresolved factual issues in this case. In Kraft's Memorandum of Law in Opposition to Motion for Summary Judgment (CP 66-73), Kraft argued that the trial court should not enter summary judgment in favor of Wachovia because of (1) the choice of law question; (2) the alleged unavailability of a deficiency judgment under Washington law; (3) Kraft's alleged failure to receive any proceeds from the Loan; and (4) the claimed existence of genuine issues of material fact regarding (a) Wachovia's right to enforce the Guaranty, and (b) the commercial nature of the Loan.

Given this combination of unresolved legal and factual issues, the trial court likely determined fairness and justice was best served by allowing each side to bear their own attorney's fees and costs while the parties continued their settlement discussions based on the appraisal of Kraft's home, which the parties jointly paid for.

The case law cited in Kraft's Appellant's Brief provides little (if any) support for her claim that the trial court abused its discretion in not awarding her attorneys' fees. Kraft first cites Allahayari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (Div. I 1995) in support of her position. Allahayari involved a disgruntled vehicle owner's attempt to recover \$5,500.00 in damages from a car dealership for its alleged breach of an oral agreement to repair a car. Id. Because plaintiff Allahayari sought damages in an amount less than \$10,000.00, RCW 4.84.250, entitled "Attorney's fees as costs in damage actions of ten thousand dollars or less – Allowed to prevailing party" provided Allahayari with a basis to recover

his attorney's fees in the event he prevailed in the lawsuit. See RCW 4.84.250.

Ultimately, the Allahayari court held that the trial court erred in not awarding the prevailing Subaru dealership its attorney's fees under RCW 4.84.250 because Allahayari took nothing by voluntarily dismissing his suit, thereby making Subaru a "prevailing party" under RCW 4.84.270. Id. at 524, 897 P.2d at 15-16. ¹

In determining Subaru was entitled to recover its attorney's fees under RCW 4.84.250, Allahayari rejected the third requirement for recovering fees under this statute articulated by Division Three of the Washington Court of Appeals in Cork Insulation Sales Co., Inc. v. Torgeson, 54 Wn. App. 702, 775 P.2d 970 (1989). Cork Insulation held that in order to trigger the operation of RCW 4.84.250, (1) the damages sought must be less than \$10,000.00; (2) the party seeking to recover attorney fees and costs must be deemed the prevailing party; *and* (3) *a judgment must be entered before the offer of settlement is opened.* Allahayari, 78 Wn. App. at 523, 897 P.2d at 415 (discussing Cork Insulation) (emphasis added). Allahayari concluded that in an action for damages for \$10,000.00 or less, the defendant is the prevailing party for purposes of an award of attorney fees under RCW 4.84.250 if the plaintiff voluntarily dismisses all of its claims, even when no final judgment has been entered. Id.

Importantly, RCW 4.84.250 – RCW 4.84.300 do not specifically

¹ RCW 4.84.270, entitled "Attorney's fees as costs in damage actions of ten thousand dollars or less – When defendant deemed prevailing party," states it applies to RCW 4.84.250, *not* RCW 4.84.330, the statute at issue herein.

require a “prevailing party” to obtain a final judgment before seeking its attorney’s fees. In contrast, the statute at issue herein, RCW 4.84.330, states “[a]s used in *this* section ‘prevailing party’ means the party in whose favor *final judgment is rendered*.” (Emphasis added).

The trial court did not abuse its discretion by not paying heed to Allahayari. Even if Allahayari was binding on the trial court, the case at bar does not involve a damage action of \$10,000.00 or less. Further, this case never resulted in a “final judgment” because it was dismissed *without prejudice*. CP 104-5. Hence, RCW 4.84.250 – RCW 4.84.300 do not apply to this case, nor does Allahayari. See Beckman, 96 Wn. App. at 361, 979 P.2d at 894 (citing Cork Insulation and noting “[b]ecause there can be no ‘prevailing party’ as that term is used in RCW 4.84.250 and RCW 4.84.270 until after entry of judgment, a pretrial voluntary dismissal makes the attorney fee provision inapplicable”); Hubbard v. Scroggin, 68 Wn. App. 883, 846 P.2d 580 (Div. III 1993) (determining voluntary dismissal not a “final judgment” and refusing to award attorney’s fees to defendant as prevailing party).²

Kraft’s reliance on Marassi v. Lau, 71 Wn. App. 912, 859 P.2d 605 (Div. I 1995), In re the Marriage of Low, 44 Wn. App. 6, 720 P.2d 850 (Div. I 1986), and In the Matter of the Guardianship of Freitas, 58 Wn.2d 400, 363 P.2d 385 (1961) is similarly misplaced. Marassi held that after a trial in which the plaintiffs obtained an affirmative judgment on only two of their original twelve claims, the defendant was a prevailing party

² CR 41 is based on RCW 4.56.120, entitled “Judgment of dismissal or nonsuit, grounds, effect – other judgments on merits.” This statute makes clear that a voluntary nonsuit does not result in a “final judgment” by providing that “[w]hen judgment of nonsuit is given, the action is dismissed, *but such judgment shall not have the effect to bar another action for the same cause*.” RCW 4.56.120(8) (emphasis added).

entitled to recover its attorney's fees under the fee provision in the parties' contract and RCW 4.84.330. 71 Wn. App. at 916-17, 859 P.2d at 607. Marassi is inapplicable to this case because the trial court herein never entered a final judgment, which is a prerequisite to even *requesting* attorney's fees under RCW 4.84.330.³

Low held that an award of attorney's fees in a dissolution proceeding rests within the sound discretion of the trial court given RCW 26.09.140, RCW 26.09.260(2), and CR 41(a). Obviously, the case at hand does not involve a dissolution proceeding, nor does it involve the statutes at issue in Low.

Freitas simply concluded that the trial court abused its discretion in not awarding costs and attorney's fees under the precursor to CR 41(a), Rule 41.08W, which provided that attorney's fees and costs could be awarded "in the sound discretion of the trial court."

In reality, Kraft has failed to even come *close* to showing the trial court abused its discretion by not awarding her costs and attorneys' fees. The trial court entertained Kraft's request for attorneys' fees, heard argument from counsel on this subject, and concluded that Kraft's request was not warranted under the particular circumstances of this case. RP 11-13; CP 108-9. As such, the trial court did not act in a manifestly unreasonable manner.

Because the trial court never determined whether RCW 4.84.330 applied to this case, and because the trial court never entered a final

³ As this Court indicated in Beckman, *even if* Kraft had met the requirements of the statute allowing for fees, the trial court *still* had the discretion as to whether it would award fees after a voluntary dismissal of Wachovia's lawsuit. 96 Wn. App. at 362, 979 P.2d at 894; *see* RCW 4.56.120; CR 41.

judgment herein, Kraft has no legitimate reason to complain about the trial court's refusal to award her attorneys' fees. As seen above, even if the trial court had entered a "final judgment" by dismissing Wachovia's Complaint with prejudice, the trial court still had the discretion as to whether it would award Kraft her attorneys' fees under CR 41 and applicable case law. Kraft has failed to show that the trial court abused this discretion.

II. ANY AWARD OF ATTORNEY'S FEES ON APPEAL SHOULD BE MADE IN FAVOR OF WACHOVIA.

Attorney's fees on appeal can be awarded if applicable law permits an award of fees. RAP 18.1(a).

Kraft has no basis in law to recover her fees on appeal because she has no basis to recover them under applicable law, namely, RCW 4.84.330. Even if Kraft had received a "final judgment" that might otherwise allow her to recover fees under this statute, she cannot show that the trial court abused its discretion in not awarding her attorneys' fees in light of CR 41, RCW 4.56.120, and applicable case law.

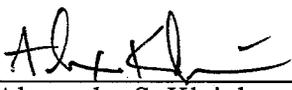
By filing her Notice of Appeal, Kraft has asked this Court to apply RCW 4.84.330 to this case. If Wachovia prevails on appeal, Wachovia will receive a final judgment on the attorney's fees issue within the meaning of RCW 4.84.330. In such an event, Wachovia respectfully requests an award of its attorney's fees and costs as a prevailing party under RCW 4.84.330 and the loan documents at issue. Wachovia maintains this result is warranted under applicable law, and is in harmony with principles of fundamental fairness and equitable considerations given the particular circumstances of this case.

D. CONCLUSION

The trial court did not abuse its discretion by refusing to award Kraft her attorneys' fees. The trial court properly considered Kraft's request at the March 20, 2006 hearing on Wachovia's Motion for Voluntary Dismissal Without Prejudice. Although Kraft never received a "final judgment" in her favor under RCW 4.84.330 and Beckman, even if she had, the trial court *still* had the discretion to determine whether an award of attorney's fees was appropriate in this particular case under CR 41, RCW 4.56.120, and applicable case law.

Because the outcome of this appeal will constitute a final judgment within the meaning of RCW 4.84.330 as to the attorney's fees issue, in the event it prevails herein, Wachovia respectfully requests an award of its attorney's fees incurred on appeal.

RESPECTFULLY SUBMITTED this 23rd day of August, 2006.

By: 
Alexander S. Kleinberg, WSBA # 34449
Attorneys for Wachovia

I, Susan L. Moss, am a legal assistant with the firm of Eisenhower & Carlson, PLLC, and am competent to be a witness herein. On August 23, 2006, at Tacoma, Washington, I caused a true and correct copy of Wachovia's Brief to be served upon the following in the manner indicated below:

KRAFT	
Douglas N. Kiger Attorney for Kraft Blado, Stratton & Kiger, P.S. 3408 S. 23 rd St. Tacoma, WA 98405	<ul style="list-style-type: none">■ by Facsimile and■ e-mail in .PDF format doug@bladostrattonkiger.com■ by Legal Messenger

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

DATED this 23rd day of August, 2006, at Tacoma, Washington.



Susan L. Moss

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