83660-4

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
10 APR -2 PM 3:18
BY RONALD R. CARPENTER
CLERK

Supreme Court No. 83660

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife,

Plaintiffs/Respondents

v.

HAWKINS POE, INC., dba Coldwell Banker Hawkins-Poe Realtors,

Defendants/Petitioners

and

DAVID BORCHELT and ROBIN BORCHELT, husband and wife; HIMLIE REALTY, INC., VINCE HIMLIE, broker for Windermere Himlie Real Estate, real estate brokers, and ROBERT JOHNSON and JEFF CONKLIN, real estate agents,

Defendants.

RESPONDENTS HAWKINS POE, INC. AND JOHNSON'S STATEMENT OF ADDITIONAL AUTHORITY

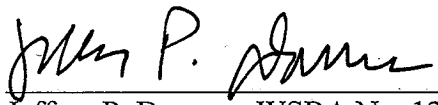
Jeffrey P. Downer
WSBA No. 12625
Of Attorneys for Petitioners
Hawkins Poe, Inc. and Johnson

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street, Suite 1800
Seattle, WA 98101-3929
(206) 624-7990

Defendants-Respondents Hawkins Poe, Inc. and Johnson, pursuant to RAP 10.8 offer the following additional authority: *Poulsbo Group, LLC v. Talon Dev., LLC*, No. 38984-3-II (Mar. 30, 2010). A copy of *Poulsbo Group* is attached.

RESPECTFULLY SUBMITTED this 14 day of April, 2010.

LEE SMART, P.S., INC.

By: 

Jeffrey P. Downer, WSBA No. 12625
Erin J. Varriano, WSBA No. 40572
Of Attorneys for Respondents
Hawkins Poe, Inc. and Johnson

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 APR -2 PM 3:18

BY RONALD R. CARPENTER

CLERK

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on April 1, 2010, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA U.S. MAIL

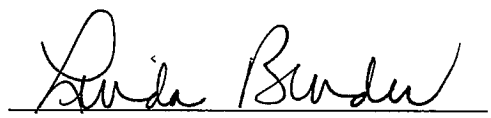
Mr. Jon E. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

Ms. Melanie A. Leary
Demco Law Firm, P.S.
5224 Wilson Ave. S., Ste. 200
Seattle, WA 98118

Mr. Robert W. Johnson
Settle & Johnson, PLLC
103 S. Fourth Street
P.O. Box 1400
Shelton, WA 98584-0919

K. Michael Fandel
Graham & Dunn, P.C.
2801 Alaskan Way, Ste. 300
Seattle, WA 98121-1128

Executed on April 1, 2010, in Seattle, WA.



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

POULSBO GROUP, LLC, Appellant, v. TALON DEVELOPMENT, LLC, Respondent.	No. 38984-3-II PART PUBLISHED OPINION

Van Deren, C.J. — Poulsbo Group, LLC appeals the trial court's order granting summary judgment in favor of Talon Development, LLC on Poulsbo Group's claims stemming from Poulsbo Group's agreement to purchase a subdivision plat from Talon. Poulsbo Group sued Talon for (1) intentional misrepresentation; (2) breach of contract; and (3) breach of the implied duty of good faith and fair dealing. The trial court granted summary judgment in favor of Talon on all of Poulsbo Group's claims and denied Poulsbo Group's cross motion for partial summary judgment against Talon on its breach of contract claim. We affirm the trial court's dismissal of Poulsbo Group's intentional misrepresentation claim based on the economic loss rule. We reverse the trial court's rulings dismissing Poulsbo Group's claims for breach of contract and the implied duty of good faith and fair dealing and its denial of Poulsbo Group's cross motion for summary judgment on its breach of contract claim and remand for further proceedings, including damages related to the breach of contract claim on which Poulsbo Group prevails.

FACTS

In 2006, Talon began subdivision work on a plat named Talon Glen in Poulsbo, Washington. At this same time, Snowberry Enterprises, LLC, was developing a neighboring plat. Part of Snowberry's development work included the construction of a number of water, sewer, and street improvements.

In August 2006, Talon and Snowberry communicated on several occasions about the possibility of sharing the costs of Snowberry's development improvements that could benefit Talon's property. Talon representatives exchanged e-mails and telephone calls with Holly White, a Snowberry project representative. Don Babineau, an engineer with C.E.S. NW Inc., who Talon hired, sent the following e-mail to White:

> What we would like to do is to have Olsen design the sewer and water stubs and have [Snowberry's] contractor install them so that we do not have to tear up the road once it is built. We also will need the main water connection point designed and installed. This connection point is located adjacent to the lot line between lots 17 and 18. The sewer stubs are for lots 7 through 11 and 14 and 15. The water stubs are for lots 7 & 8, 9 & 10, 11 & 14, and 15 & 16. Our client, Talon Development, will pay for the design and installation of the water main connection and the water and sewer stubs.

Clerk's Papers (CP) at 280. Talon sent another e-mail to Snowberry, which stated:

> I heard from CES (our design engineers) that your contractor is ready to install water and sewer lines. I understand that CES is designing the locations of connection points for these utilities to access some of the planned lots on our Talon Glen development.
>
> Can your contractor give us a cost estimate to make those connections with stubs out from under the road. [sic] (I'm assuming this would be water and sewer). We would prefer to delay payment of any main line cost sharing until we actual[l]y develop the parcel.

CP at 281. And C.E.S. engineers sent an e-mail to White soon thereafter:

> It [is] my understanding that your engineer is backed up and may not be able to make the changes. I am willing to have CES NW Inc. make the changes to the

> approved plans. However, I am not sure the city will accept revised plans from CES. In my opinion the best way is to handle this through a change order process. The changes in my opinion are rather minor. There are 7 sanitary service stubs at 50' long. In addition there are 10 water services that are needed. Please see the attached map (in PDF format) for specifics. I think the engineering work could be completed in 3-4 hours. I am sure my client will be in contact with you to discuss the cost associated with the engineering and construction of these improvements.

CP at 282. Despite these exchanges, Talon and Snowberry failed to reach an agreement to share costs, and Snowberry moved forward with the utility improvements.

On January 19, 2007, Talon and Poulsbo Group entered into a vacant land purchase and sale agreement (Agreement) for the future Talon Glen development. An optional clauses addendum required Talon to disclose all documents related to Talon Glen within three days.[1] And a feasibility contingency addendum gave Poulsbo Group 90 days to verify the suitability of the Talon Glen property for Poulsbo Group's intended purpose.[2] Talon also signed a seller disclosure

---

[1] The specific provision provided:

> Within 3 days after mutual agreement of the purchase and sale agreement the seller will provide to buyer all related documents of said property. This includes but is not limited to:
>
> 1. Soil reports
> 2. Environmental Studies
> 3. Alta Survey
> 4. Traffic Study
> 5. All meeting notes and memorandums relating to the property.
> 6. Al Engineering documents

CP at 341.

[2] The feasibility contingency provision in the Agreement itself provided:

> It is the Buyer's responsibility to verify before [the expiration of 90 days] whether or not the Property can be platted, developed and/or built on (now or in the future) and what it will cost to do this. BUYER SHOULD NOT RELY ON ANY ORAL STATEMENTS concerning this made by the Seller, Listing Agent, or Selling Licensee. Buyer should inquire at the city or county, and water, sewer or other special districts in which the Property is located. Buyer's inquiry should include, but not be limited to: building or development moratoriums applicable to or being considered for the Property; any special building requirements, including setbacks, height limits or restrictions on where buildings may be constructed on the

statement, in which it answered "no" to two questions: "Are there any encroachments, unrecorded boundary agreements, boundary disputes or claims by neighbors pertaining to the Property?" and "Are there any pending or existing assessments against the Property?" CP at 273.

Also on January 19, the city of Poulsbo (City) held a hearing on Talon's request for preliminary plat approval of Talon Glen. Tom Smith, a Talon member, and Craig Deaver, an engineer on the project, both attended the hearing. White also attended on Snowberry's behalf. No one from Poulsbo Group attended. White testified that Snowberry wanted a condition added to the Talon Glen plat approval, requiring that Talon Glen participate in a latecomer agreement,[3] regardless of whether the City could process the agreement before construction. The hearing examiner did not make the latecomer agreement a condition of preliminary plat approval, but he advised White to submit a latecomer agreement to the City so the City could facilitate

---

> Property; whether the property is affected by a flood zone, wetlands, shorelands or other environmentally sensitive area; road, school, fire and any other growth mitigation or impact fees that must be paid; the procedure and length of time necessary to obtain plat approval and/or a building permit; sufficient water, sewer and utility and any service connection charges; and all other charges that must be paid.

CP at 337.

A provision in the optional clauses addendum also gave Poulsbo Group 5 days after the delivery of final plat approval to terminate the agreement:

> Seller to provide plat approval before the expiration of feasibility study. If final plat approval is not complete the feasibility time period shall extend to a period of 5 days after final plat approval is delivered to purchaser. If plat approval is subjectively unsatisfactory to purchaser, then purchaser has the option to terminate this agreement.

CP at 341.

[3] Latecomer agreements allow property owners that have installed street or utility improvements to recover a portion of the costs of those improvements from other property owners who later develop property in the vicinity and use the improvements, as provided for in chapter 35.72 RCW (streets) and chapter 35.92 RCW (utilities). *See* Municipal Research and Services Center of Washington, Latecomers Agreements, http://www.mrsc.org/subjects/pubworks/latecomers.aspx (last updated November 2009) (last visited March 17, 2010).

enforcement. On February 23, Snowberry submitted a latecomer agreement application to the City.

Talon did not provide the e-mails or other documents related to Talon's discussions with Snowberry during the 90 days provided in the feasibility contingency period. Talon also told John Jack, a Poulsbo Group member, on multiple occasions that there would not be a latecomer assessment. In addition, several City documents relating to the Talon Group project stated that no latecomer agreements existed on the project. But the hearing examiner's plat approval decision, issued February 1, specifically referred to White's testimony about Snowberry's desire for a latecomer agreement. Jack apparently did not review the plat approval documents or the hearing examiner's decision during the feasibility period; instead, he relied on oral statements from Talon representatives that stated there would be no latecomer agreement assessment.

Poulsbo Group's purchase of Talon Glen closed on March 30. Poulsbo Group learned about the latecomer agreement assessment after closing. The City approved the latecomer agreement in October and the City assessed Poulsbo Group $85,849.19.

Poulsbo Group sued Talon for breach of contract, breach of the implied duty of good faith and fair dealing, and intentional misrepresentation. Talon successfully moved for summary judgment; and Poulsbo Group unsuccessfully sought a cross motion for partial summary judgment on its breach of contract claim.

Poulsbo Group appeals.

ANALYSIS

I. Standard of Review

We review summary judgment orders de novo. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). A trial court properly grants summary judgment when no genuine issues of material fact exist, thereby entitling the moving party to a judgment as a matter of law. CR 56(c). We draw all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). And questions of fact may be determined on summary judgment as a matter of law only where reasonable minds could reach but one conclusion. *Alexander v. County of Walla Walla*, 84 Wn. App. 687, 692, 929 P.2d 1182 (1997).

II. Intentional Misrepresentation—Economic Loss Rule

Poulsbo Group contends that the trial court erred in granting Talon's motion for summary judgment on its intentional misrepresentation claim. We disagree.

In order to prevail on a claim for intentional misrepresentation, Poulsbo Group must show: "(1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation, and (9) damages suffered by the plaintiff." *W. Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002). Each element must be established by "'clear, cogent and convincing evidence.'" *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996) (quoting *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967)).

Talon asserts that the economic loss rule bars Poulsbo Group's claim for intentional misrepresentation. The economic loss rule serves to limit parties to their contract remedies when a loss potentially implicates both tort and contract relief. *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007). The rule "'prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from contract'" because "'tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.'" *Alejandre*, 159 Wn.2d at 681-82 (internal quotations omitted) (quoting *Factory Mkt., Inc. v. Schuller Int'l, Inc.*, 987 F.Supp. 387, 395 (E.D.Pa. 1997)). Division One of this court held in *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008), *review granted in part by*, 166 Wn.2d 1015 (2009) that the economic loss rule, as pronounced in *Alejandre*, bars claims for intentional misrepresentation. *Carlile*, 147 Wn. App. at 205-07.

Poulsbo Group, however, asks us to hold, contrary to *Carlile*, that the economic loss rule does not bar intentional misrepresentation claims stemming from a contract dispute. Poulsbo Group cites *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009), *review granted*, 168 Wn.2d 1001 (2010) and *Steineke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008), *review denied*, 165 Wn.2d 1026 (2009) to support this. But *Jackowski* and *Steineke* did not consider whether intentional misrepresentation claims fall under the economic loss rule and are therefore not dispositive. The overarching rule in *Alejandre* guides us here: Parties should be limited to contract remedies when a loss potentially implicates contract and tort relief. 159 Wn.2d at 681. Thus, the economic loss rule bars Poulsbo Group's intentional misrepresentation claim because contract remedies exist.

A majority of the panel having determined that only the foregoing portion of this opinion

will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III. Waiver and Merger

Talon also asserts that Poulsbo Group waived its rights under the contract when it closed the sale even though Jack did not review the plat approval document. A waiver is a voluntary relinquishment of a known right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). There is nothing to suggest that Poulsbo Group voluntarily relinquished its right to receive "all related documents" from Talon under the contract simply by failing to review the plat approval document. Thus, Talon's waiver argument is meritless.

Talon further asserts that the merger doctrine bars Poulsbo Group's claims. "Under the [merger] doctrine, the terms of a real estate purchase and sales agreement merge into a deed." *Brown v. Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001). But certain purchase and sale agreement provisions do not merge into a deed when such provisions are collateral contract requirements that are not contained in or performed by the execution and delivery of the deed and are independent of the obligation to convey. *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 914, 146 P.3d 935 (2006). Thus, Talon's assertion that Poulsbo Group's claims are barred by merger is incorrect and it fails. We reverse the trial court's dismissal of Poulsbo Group's contract claims based on waiver and merger.

IV. Breach of Contract

Poulsbo Group contends that the trial court erred in granting Talon's motion for summary judgment and in denying Poulsbo Group's cross motion for partial summary judgment on the breach of contract claim. A breach of contract occurs when a party to a contract fails to comply

with a specific term therein. *See Owens v. Harrison*, 120 Wn. App. 909, 915-16, 86 P.3d 1266 (2004). And damages for breach of contract are recoverable for a loss that the breaching party could reasonably foresee as a probable result of the breach when the contract was made. 25 David K. DeWolf et al., Washington Practice: Contract Law and Practice § 14:4, at 332-33 (2d ed. 2007).

Poulsbo Group asserts that Talon failed to provide all documents related to Talon Glen, as the Agreement required. It is irrefutable, based on the record, that Talon failed to provide documents, including the three e-mails between White and Talon representatives. The Agreement explicitly required Talon to provide "all related documents" to Poulsbo Group. CP at 341. Thus, the trial court erred in granting Talon's summary judgment motion on Poulsbo Group's breach of contract claim and in denying Poulsbo Group's cross motion for summary judgment on the issue of production of documents, as the contract required.

On the issue of damages, however, Poulsbo Group asserts that, without Talon's breach, it would not have purchased Talon Glen. Talon counters that, even if it breached the contract's requirement to provide documents, Poulsbo Group's own decision not to review the hearing examiner decision or perform its due diligence, as required under the contract's feasibility provisions, caused the damage. Talon also counters that Poulsbo Group's damages were not foreseeable.

These arguments show that genuine issues of material fact remain on causation; due diligence; and the foreseeability, amount, and type of compensable damages, including whether Poulsbo Group incurred actual damages as the result of Talon's breach. Furthermore, there remains the issue of fact about what Poulsbo Group may have known about the latecomer

agreement from any other source. Thus, the trial court improperly granted Talon's summary judgment motion. Instead, the trial court should have exercised its authority under CR 56(d) to grant Poulsbo Group's cross motion on partial summary judgment—purely on breach of contract—and leave the damages issue for the fact finder.[4]

V. Breach of Implied Duty of Good Faith and Fair Dealing

Poulsbo Group next contends that the trial court erred in granting Talon's motion for summary judgment on Poulsbo Group's claim against Talon for breach of the implied duty of good faith and fair dealing. Every contract contains such a duty, which obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). But the duty does not inject substantive terms into the contract. *Badgett*, 116 Wn.2d at 569. It requires only that the parties perform the obligations imposed by their agreement in good faith. *Badgett*, 116 Wn.2d at 569.

Talon counters that Poulsbo Group's claim fails because Talon did not act in bad faith and its failure to provide any documents was inadvertent because Talon directed its engineer to provide all documents to Poulsbo Group. Whether Talon's failure to disclose documents was in bad faith and whether Talon's statements made to Poulsbo Group representatives regarding a

---

[4] CR 56(d) states:

> If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

latecomer agreement assessment were in bad faith are both material questions of fact on which reasonable minds could differ. The evidence of Talon's actions in the record, when taken in the light most favorable to Poulsbo Group, which we must, leaves the question unresolved about whether Talon acted in bad faith. *Hisle*, 151 Wn.2d at 860-61. And questions of fact may be determined on summary judgment as a matter of law only where reasonable minds could reach but one conclusion. *Alexander*, 84 Wn. App. at 692. Thus, the trial court erred in granting Talon's motion for summary judgment on Poulsbo Group's claim that Talon breached its duty of good faith and fair dealing.

VI. Attorney Fees

Both parties request attorney fees and costs under RAP 18.1. The parties' Agreement provides that "[i]f Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." CP at 336. Neither party, however, wholly prevails on appeal here. The determination of who is the prevailing party depends upon who is the substantially prevailing party, which depends on the extent of the relief afforded to each party. *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 8-9, 970 P.2d 343 (1999). Poulsbo Group prevailed on several claims and Talon prevailed on only one of its claims, but who ultimately prevails will be determined on remand. Thus, we do not award attorney fees and costs to either party.

We affirm in part, reverse in part, and remand.

Van Deren, C.J.

We concur:

No. 38984-3-II

Hunt, J.

Quinn-Brintnall, J.