

65292-3

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NO. 65292-3-1

IN THE COURT OF APPEALS, DIVISION I
Of the State of Washington

MOHAMED ADEN and FADUMA ALI,
Defendants/Appellants

v.

HOUSING AUTHORITY OF THE CITY OF SEATTLE,
Plaintiff/Respondent

BRIEF OF APPELLANTS

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I.

(a) ASSIGNMENTS OF ERROR

No. 1. The trial court erred in entering an order denying Appellants' motions to dismiss the original and amended Complaints pursuant to CR 9(b).

No. 2. The trial court erred in entering the following Finding of Facts:

21. "When defendants failed to report increases in their household income to SHA...those failures were concealments of substantive facts that were made with intent to mislead..."

22. "The defendants' failure to report increases in their household income to SHA...constituted representations of material fact that were false, that the defendants knew were false, that the defendants intended SHA to act upon, that SHA did not know were false at the time they were made, that SHA justifiably relied upon, and that resulted in SHA making housing subsidy payments that were in violation of Section 8 program requirements.

No. 3. The trial court erred in entering the following Conclusions of Law:

1. "By failing to report increases in their household income...the defendants committed "fraud and abuse" under the definition of that term in 24 CFR §792.103.

2. "By failing to report increases in their household income...the defendants committed fraud under Washington law.

3. “The defendants' fraud was established by clear, cogent, and convincing evidence.

7. “As a result of the acts of defendants Aden and Ali, SHA was damaged by making housing subsidy payments...”

8. “As a result of the defendants' breach...are obligated to reimburse the benefits paid by SHA on their behalf in the amount of \$37,267.00.”

“Judgment should be entered in favor of SHA and against the defendants in the amount of \$37,267.00.”

(b) ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1 Does CR 9(b) require a party to state with particularity the circumstances constituting an alleged fraud and when that fraud is based on an allegation of unreported income under a Section 8 housing agreement, must the party identify the specific source of the unreported income, the specific amount of that income, and the specific time period when that income was earned?

No. 2 Can a party prevail in a complaint for fraud when the specific nature amount and circumstances of the fraud as alleged in the complaint is not proven by the evidence at trial?

II. STATEMENT OF THE CASE

A. Nature of Case and Proceedings Below

The Appellants, were participants in a Federal Section 8 voucher program administered by the Respondent from approximately 1999 to 2006.

At some point in time Respondent received an anonymous complaint that Appellants had unreported income, two families, and 16 children. **Report of Proceedings (“RP”) p.127, lines 20-22.** Based on this complaint Respondent began an investigation of Appellants which consisted mainly of online research **RP p.128 -129,** and staking out vehicle license plates in a Seattle a parking lot. RP p.130.

At the conclusion of the investigation Respondent filed an initial complaint, then several years later refiled a new complaint, in 2008, **Clerk's Papers (“CP”) pp. 9-13** and subsequently an amended complaint **CP pp. 50-56** Both complaints alleged fraud specifically relating to Appellants' ownership interest in two business; Crescent Custom Slaughtering and 21st Century Basic Human Services of and specifically alleged damages based on “ownership” of these business and unreported income from them in the amount of \$93,582. **CP p. 13.**

Prior to trial, Appellants moved to dismiss both the original and amended complaints pursuant to CR 9(b). **CP pp. 26-42, and 59-63.** Both motions where denied by the court finding there was sufficient particularity in the complaints in order for the Appellants to answer, prepare and defend against the specific allegations raised in the complaints. **CP pp. 57-58 and 64-65.**

At no time, during the trial, was there any competent evidence presented that either appellant owned or had an ownership interest in either of the two business entities alleged in the complaints. Additionally, at no time during the trial was there any competent testimony or other evidence presented by Respondent regarding the calculation of a specific damages amount as found by the trial court in the amount of \$37, 267. **RP 1-183**

III. ARGUMENT

Plaintiff alleged in its original Complaint the following allegations in support of its fraud claim:

General Allegations in original complaint:

- a) Crescent Custom Slaughtering, Inc. is a corporation doing business in Seattle, King County, Washington and is owned and/or operated by defendant Mohamed Aden and is the alter-ego of defendant Mohamed Aden. Complaint, paragraph 2.

- b) Defendants applied for and received a Section 8 voucher in 1994 and were awarded a Section 8 voucher in September, 1996. Defendants moved into a residence located at 3804 S. Orcas, Seattle, Washington, residing there from 2000 through 2006. Complaint, paragraph 7.

- c) In 2005, SHA received an anonymous complaint alleging certain acts of fraud on the part of the defendants including failure to report income and unauthorized residents living in the household. Complaint,

paragraph 8

d) Mr. Koransky learned that Defendant Aden was the owner of Crescent Custom Slaughtering, Inc., had an ownership interest in a business known as Seattle Fresh Meat Market and received a salary for services rendered to Muslim Housing Services. Complaint, paragraph 9.

e) “Mr. Koransky also learned that Defendant Ali received \$1,840 for providing care to Khadija Abdi and failed to report this income to SHA. Koransky Declaration. Additionally, Defendant Ali is employed in the business of Defendant Aden and this income was not reported to SHA.” Complaint, paragraph 10.

f) The defendants failed to report income to SHA resulting in the defendants receiving excess housing subsidy. Complaint, paragraph 12. **CP pp. 9-13**

Koransky Declaration’s Allegations:

a) Koransky learned Mohamed Aden is the owner of a business known as Crescent Custom Slaughtering and indicates that a true and correct copy of the Department of Revenue business record as Exhibit A is attached to his Declaration. Koransky Declaration, paragraph 3.

b) Koransky learned that Seattle Fresh Meats is owned by Mohamed Moalim and that Mohamed Moalim was the nephew of Mohamed Aden and observed Faduma Ali entering Seattle Fresh Meats and remaining there during the entire time of the surveillance. On other times a vehicle registered to Faduma Ali was parking in the

parking lot outside Seattle Fresh Meats.

c) Koransky spoke with Pearl McCauley, who told him that Mohamed Aden runs the Muslim Housing Services; that he has employees working for him; and that he bragged to her that he owns two businesses.

d) Koransky and Toni Manjarrez met with Mohamed Aden and questioned him about Seattle Fresh Meats, Crescent Custom Slaughtering and Muslim Housing Services and “Aden admitted that he is ‘on the board’ for the two businesses and is the Executive Director for Muslim Housing Services.” Aden further stated that Mohamed Moalim is the owner of Seattle Fresh Meats and that he is in the store daily to help out and Aden denied being paid for his services. When questioned about Muslim Housing Services Mohamed Aden did not provide any financial information except to indicate Muslim Housing Services received grants from the City of Seattle. Declaration Koransky, paragraph 7.

e) Based on Koransky’s investigation he concluded Mohamed Aden and Faduma Ali were concealing income from SHA. Declaration Koransky, paragraph 8. **CP pp. 21-25**

Manjarrez Declaration’s Allegations:

a) In 2005 Manjarrez became aware of an anonymous complaint alleging that “Mohamed Aden and Ali Faduma” had failed to report income from businesses they owned and had unauthorized residents living in the household. Declaration Manjarrez, paragraph 2.

b) Manjarrez sent letters requesting personal and business income tax returns and bank statements to “Defendants” and they “failed and refused to produce the requested information.”

Declaration Manjarrez, paragraph 3.

c) “Mr. Aden stated that he and defendant Ali Faduma worked at Seattle Fresh Meats on an almost daily basis but continued to state that they were merely helping out.” Declaration

Manjarrez, paragraph 5.

d) “Mr. Aden admitted that he was the Executive Director of Muslim Housing Services but would not discuss any financial relationship he might have with that organization.” Declaration Manjarrez, paragraph 5.

e) Manjarrez “reviewed the Housing Assistance Payment and the Utility Allowance Payments afforded the defendants in this matter and determined that the defendants had received \$93,582.00 in benefits.” Declaration Manjarrez, paragraph

8. CP pp. 14-20

The requirement of particularity under CR 9(b) as to fraud cases requires that a party plead the particular elements of a fraud (along with supporting factual allegations) which are: (1) the representation of an existing fact (2) which is material and (3) false and (4) by a person with knowledge of its falsity or ignorance of its truth and (5) with the intent that it be acted upon by a person who (6) reasonably (7) relies on the

misrepresentation (8) in ignorance of its falsity (9) to his or her detriment.

Sigman v. Stevens-,orton, Inc., 70 Wn.2d 915, 920, 425 P.2d 891 (1967). I

In order to meet the particularity requirement, the complaining party must plead both the elements and circumstances of fraudulent conduct. To determine whether allegations of fraud satisfy particularity requirements, the court will consider only the complaint and not additional allegations made in briefs. *Haberman v. Wash. Pub. Power Supply Sys.* 109 Wn.2d 107, 164-69, 744 P.2d 1032 (1987), *amended*, 750 p.2d 254 (1988). Although Plaintiff's complaint and declarations made general and conclusory statements that SHA was defrauded by Appellants, there is nowhere alleged with any specificity the circumstance or "the time, place and contents of the misrepresentation(s) upon which relied." *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir.1984). Respondent did not meet these minimum requirements. Although the complaint referred to various allegations of ownership and/or interest in businesses, the complaint was devoid of any specificity as to when , where, how and in what amounts defendants obtained any sums of unreported income that would even begin to come close to the \$93, 582.00 alleged in the Prayer for Relief.

The original complaint offered nothing more than bare conclusory statements. The paragraphs relating to the fraud allegations mentioned

"failure to report income" but no further details were provided as to how any quantifiable allegations of earnings was made, other than references in the Declaration of Koransky that he watched Ms. Ali entering Seattle Fresh Meats; saw her car there; and that he was told by Pearl McCauley that Mr. Aden bragged about owning businesses for example. The complaint was not plead with the required particularity of Rule 9(b) and therefore should have been dismissed with prejudice.

In its response arguing against dismissal Respondent filed an amended complaint. **CP pp. 50-56** filed an Amended Complaint. The Amended Complaint's had a section entitled, I. Jurisdiction and Venue, and consisted of paragraphs numbered 1. – 5., and the section entitled, II. Background Facts, consisted of paragraphs numbered 6. –14. There was no material change between the first 14 paragraphs of the original and amended documents other than the following:

- paragraph 9 of the Amended Complaint deletes the indication "Koransky Declaration" in reference to that document as the basis for the allegation contained in the paragraph, which had previously been indicated in the original Complaint.
- paragraph 12 of the original Complaint is changed from "The defendants failed to report income to SHA" to "The failure of Defendants Aden and Ali to truly and completely report income to SHA" in the Amended Complaint.
- paragraph 13 of the original Complaint is

changed from ‘This failure to report income’ to ‘This failure to truly and completely report income,’ in the Amended Complaint. -paragraph 13 of the original Complaint is changed from ‘No hearing was requested and the defendants were terminated’ to ‘The Defendants did not request a hearing, and they were terminated’ in the Amended Complaint.

The amended complaint actually contained less particulars than the original and it specifically excluded any additional supporting documents, such as the declarations previously filed, and there was no reference incorporating these documents to the amended complaint.

It was significant that the Amended Complaint no longer relied on any declarations of either Koransky or Manjarrez, making the document even more deficient as a pleading, for purposes of CR 9(b). As stated previously, while claims challenged by a motion to dismiss need not have detailed factual allegations, ‘a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’ *See Twombly*, 127 S.Ct. at 1955, 1974. The Amended Complaint in fact has less of a basis for the factual allegations than the original complaint by its deletion of any reference to the previously filed affidavits of Koransky and Manjarrez.

The Amended Complaint was more deficient in the basic pleading

requirements than the original. The allegations did not support a claim which would entitle Plaintiff to the relief requested and should have been dismissed.

If this Court finds that the complaints were sufficiently plead, then the alleged fraud claim under Washington law would have to be proved by clear, cogent, and convincing evidence. *Seggern v. Dep't of Soc. & Health Servs.*, 28 Wn. App. 332, 334 (1981), and must also comport specifically with the circumstances of the fraud allegations as alleged in the amended complaint.

In order to sufficiently establish fraud, each and every element must be established by the above stated standard of proof. Those elements are the following: (1) A representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, (9) his consequent damage. *Turner v. Enders*, 15 Wn. App. 875, 878, 552 P.2d 694 (1976).

Specifically, it was required that the fraud as alleged in the amended complaint which specifically identified Crescent Custom Slaughtering and 21st Century Basic Human Services as entities and

instrumentalities used to obtain over \$90,000 in unreported income.

However, at no time during the trial was there any showing that Appellants obtained any income or other monetary gain from the alleged business entities alleged in the original and amended complaints. There was no testimony or other evidence presented at trial for the court to determine that the allegations specified in the complaints as to ownership and income from Crescent Custom Slaughtering and 21st Century Basic Human Services ever occurred.

Although the allegation for which the Appellant had prepared a defense for was based on income from these two business entities, the case presented at trial by SHA was based on a state revenue income reporting document filed in the form of an “Amended Exhibit List,” only days before trial and not previously disclosed. **CP pp 75-77.**

Nowhere in the trial proceedings, in the trial courts findings of fact, or in the trial court's conclusions of law was there found to be a basis establishing income received from either of the two entity comports with the alleged fraud that was described and specified in both the original and amended complaints, and for which Appellants had prepared to defend at trial.

The very basis for requiring specificity in a fraud allegation is to accurately identify “the circumstances constituting fraud so that the

defendant can prepare an adequate answer from the allegations.” *Walling v. Beverly Enterprise*, 476 F.2d 393, 397 (9th Cir. 1973).

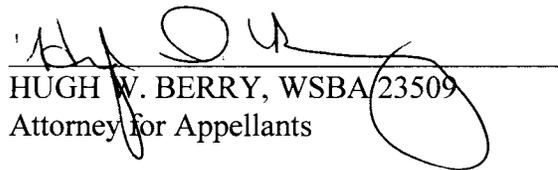
The initial claim for damages was alleged to be \$93,582, by the end of the trial no specified amount of damages was testified to or accurately calculated by Respondent. RP 1-183. Only at closing argument was a specified amount argued. There was no basis in the record for the Court to determine a loss amount of \$37,267. No witness testified to that amount as a calculated loss amount and no documentation was provided into evidence to support that amount as an accurate calculation of damages.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the findings of the trial court. and the judgment in favor of the Respondent

August 20, 2010.

Respectfully submitted



HUGH W. BERRY, WSBA 23509
Attorney for Appellants

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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

MOHAMED ADEN, and)
FADUMA ALI,)
Appellants,)
vs.)
HOUSING AUTHORITY OF THE)
CITY OF SEATTLE,)
Respondent.)

NO. 65292-3-I
DECLARATION OF SERVICE

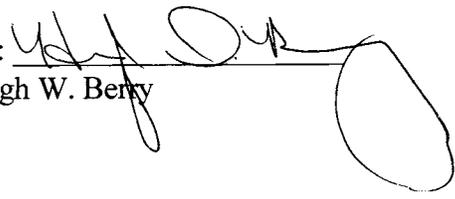
I declare, under penalty or perjury, that I have personal knowledge of the following state and that they are true and accurate to the best of my knowledge:

I mailed, or caused to be mailed, a copy of the foregoing APPEAL BRIEF postage prepaid, via U.S. Mail to the following counsel of record at the following address:

DONALD MEANS
Office of the General Counsel
Seattle Housing Authority
120 Sixth Avenue North
P.O. Box 19028
Seattle, Washington 98109

DATED this 20 day of August, 2010.

HWB-ESQ., PLLC

By: 
Hugh W. Berry