

67969-4

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No. 67969-4-I

DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

COMMERCE BANK OF WASHINGTON,

Respondent,

vs.

STEPHEN GANDARA, ET AL.,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR KING COUNTY

Cause No. 11-2-18143-0 SEA

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

This matter stems from an initial agreement between the parties in November 2001, at which point the Commerce Bank formed a shell corporation, TCB Property Associates, LLC, in order to purchase a residence in Edgewood, Washington. The Edgewood property, owned and resided in by the Gandaras, was in a foreclosure action by Wells Fargo. Commerce Bank, and its shell corporation, purchased the property at the foreclosure sale in an attempt to protect the loans Commerce Bank had made on the property.

Commerce Bank agreed to lease the premise to the Gandaras, through TCB Property Associates, LLC, while Commerce Bank attempted to sell the property. Commerce Bank agreed to pay off the notes purchased from Wells Fargo with the sale of the property. At some point, the properties were sold, yet Commerce Bank claimed that the Gandaras still owed monies on the promissory notes.

Commerce Bank sued the Gandaras. The Gandaras believed that Commerce Bank had turned down several offers to purchase the Edgewood property that would have more than sufficed to pay off the promissory notes. Commerce Bank specifically represented that no such

offers were made. Based upon this representation, the Gandaras agreed to settle the lawsuit.

Commerce Bank now claimed that the Gandaras have breached the settlement agreement. Twelve months before the dispositive motions deadline, and eleven months before discovery cut-off, Commerce Bank sought summary judgment on its claim. The Gandaras asserted that material misrepresentations were made in order to induce the underlying settlement agreement. These material misrepresentations void the settlement agreement. The Gandaras also asserted that the relationship between Commerce Bank and TCB Property Associates was the product of an unlawful enterprise, designed to permit Commerce Bank to avoid certain laws pertaining to foreclosure actions. The settlement agreement was, therefore, unconscionable and in violation of public policy. With regard to each of the defenses asserted by the Gandaras, evidence to support the defenses would need to be collected from Commerce Bank through discovery processes. This was not permitted as eleven (11) months before the close of discovery, the trial court granted summary judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it granted Commerce Bank's Motion for Summary Judgment, denying the Gandara's request to continue the motion and permit discovery to occur and be completed before hearing the motion.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion when it granted Commerce Bank's Motion for Summary Judgment, denying the Gandara's request to continued the Motion in order for discovery to be conducted.

(Assignment of Error No. 1)

IV. STATEMENT OF THE CASE

A. Procedural History

On May 20, 2011, Commerca Bank filed a complaint against Stephen and Denise Gandara, serving the summons and complaint on May 31, 2011.

Based upon the case schedule established by King County Superior Court, discovery was open until September 17, 2012. With 11 months left in discovery, and no discovery yet conducted by either party, Commerce Bank filed a motion for summary.

The trial court denied the Gandara's request to continue the summary judgment motion until after discovery could be conducted on the asserted defenses. Summary Judgment was granted against the Gandara's, resulting in a judgment in the amount of \$342,277.22.

B. Facts

On November 9, 2001, TCB Property Associates, LLC acquired a property in Edgewood located at 12727 32nd Street East, Edgewood, Washington. CP 71-78. This property had previously been owned by and resided in by Stephen and Denise Gandara and their 11 children, including 9 then-foster children, each now adopted. CP 71-78. The property was

acquired by TCB Property Associates from a Wells Fargo foreclosure action, for \$1,161,715.04. (Wells Fargo held the first mortgage.) Commerce Bank also had promissory notes and other claims on the property, which they alleged totaled approximately \$1,600,000. CP 71-78.

TCB Property Associates was created by and wholly owned by Commerce Bank of Washington. According to Commerce Bank officers' communications to the Gandaras, TCB Property Associates was created solely and specifically for the purpose of acquiring the Edgewood property and leasing the same to the Gandaras while the property was thereafter offered for sale. CP 71-78. It turns out that the effect of this transaction enabled Commerce Bank to specifically acquire the property through TCB Property Associates and control the property without directly accepting the deed of the property and thereby satisfying the mortgage. CP 71-78. In short, Commerce Bank and TCB Property Associates conspired to be able to maintain the debt over the Gandaras and at the same time acquire the property while Commerce Bank avoided laws regarding mortgages and foreclosures.

TCB Property Associates leased the Edgewood property to the Gandaras for taxes and insurance premiums (approximately \$3,250 per month) plus maintenance and personal service while the property was being offered on the market for sale. CP 71-78. TCB Property Associates

obtained a property appraisal, which established that there was over \$1,000,000 in equity in the Edgewood property and later substantiated that value by filing IRS form 1099A with the Internal Revenue Service. CP 71-78. The lease agreement required TCB Property Associates to take the sale proceeds and pay off the promissory notes with Commerce Bank. All excess sale proceeds were to be paid to the Gandaras. CP 71-78.

TCB Property Associates sold the Edgewood property for a price such as to leave Commerce Bank claiming monies were still owed by the Gandaras on the promissory notes. Commerce Bank and TCB Property Associates filed a lawsuit against the Gandaras in King County Superior Court Cause Number 05-2-10138-5SEA (hereinafter the "First Litigation"). CP 71-78.

In the First Litigation, it was asserted by the Gandaras that TCB Property Associates had rejected two offers to purchase the Edgewood property at amounts that would have satisfied the amounts owed on the promissory notes. However, it was specifically represented by Commerce Bank and TCB Property Associates that the offer that was accepted for the sale of the property was the only offer made to purchase the property. CP 71-78.

Based upon the representation that there was only one offer to purchase the Edgewood property, the Gandaras withdrew their defenses

and counterclaims, and entered into a settlement agreement with Commerce Bank and TCB Property Associates. CP 71-78. The representation of one offer to purchase the property was a material basis for the Gandaras to enter into the settlement agreement.

In response to Commerce Bank's Motion for Summary Judgment, the Gandaras requested that the Court continue the Motion until after discovery could be conducted on the issue of whether the underlying contract, the Settlement Agreement, was improperly induced and, therefore, voidable. The trial court denied the motion, entering summary judgment against the Gandaras.

V. ARGUMENT

A. TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE GANDARAS REQUEST TO CONTINUE THE SUMMARY JUDGMENT UNTIL AFTER DISCOVERY WAS CONDUCTED.

The purpose of summary judgment is to avoid an unnecessary trial when there is no genuine issue of material fact. However, a trial is absolutely necessary if there is a genuine issue as to any material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980); *Jacobsen v. Stay*, 89 Wn.2d 1045 569 P.2d 1152 (1977). Thus, a court must be cautious in granting a summary judgment so that *worthwhile causes will not perish short of a determination of their true merit*. *Smith*

v. *Acne Paving Co.*, 16 Wn.App. 389, 558 P.2d 811 (1976). If a genuine issue of fact exists as to any material fact, a trial is not useless; rather it is necessary. *Lish v. Dickey*, 1 Wn.App. 112, 459 P.2d 810 (1969).

A genuine issue of material fact exists where reasonable minds could reach different factual conclusions after considering the evidence. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644 (1980). Furthermore, on a motion for summary judgment, a trial court is required to view all evidence, draw all reasonable inferences in favor of the nonmoving party, and deny the motion if the evidence and inferences create any question of material fact. *DeYoung v. Providence Med. Ctr.*, 136 Wash.2d 136, 140, 960 P.2d 919 (1998); *Scott v. Pacific West Mountain Resort*, 119 Wash.2d 484, 487, 834 P.2d 6 (1992).

A trial court should continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery. CR 56(f). The trial court may, however, deny a motion for continuance where: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Turner v. Kohler*, 54 Wash. App. 688, 693, 775 P.2d 474, 476-77 (1989); *Sternoff Metals*

Corp. v. Vertecs Corp., 39 Wash.App. 333, 341-342, 693 P.2d 175 (1984); *see also* 6 J. Moore, *Federal Practice* ¶ 56.24, at 56-817 to 56-821 (2d ed. 1988).

A trial court's decision on a request to continue the summary judgment for abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wash.App. 606, 615, 15 P.3d 210 (2001); *Coggle v. Snow*, 56 Wash.App. 499, 504, 784 P.2d 554 (1990). A trial court abuses its discretion if it bases its decision on untenable grounds or unreasonable grounds. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Denial of a continuance can be based on any one of the above three prongs. *Mossman v. Rowley*, 154 Wash. App. 735, 742, 229 P.3d 812, 817 (2009); *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash.App. 350, 356, 831 P.2d 1147 (1992).

The primary consideration in the trial court's decision on the motion for a continuance should be justice. *Butler v. Joy*, 116 Wash. App. 291, 299, 65 P.3d 671, 675 (2003) *citing* *Coggle v. Snow*, 56 Wash.App. 499, 508, 784 P.2d 554 (1990).

In the instant case, none of the three prongs supports a denial of Gandara's request that the Motion for Summary Judgment be continued so that discovery could be conducted regarding the asserted defenses.

First, there is no argument that there was any “delay” in obtaining evidence or discovery pertaining to the defenses. At the time Commerce Bank filed its Motion for Summary Judgment, there was eleven (11) months left in the discovery period, and over a year until trial. There was no “delay,” the case had really just begun. Commerce Bank filed its motion in early September 2011, with discovery cut-off on September 17, 2012, deadline for dispositive motions on October 22, 2012, and trial scheduled for November 5, 2012.

Second, the Gandaras did state to the trial court what evidence would be established through additional discovery. The Gandaras specifically stated in their request to continue the Motion for Summary Judgment that additional discovery was anticipated to establish evidence of misrepresentations in the inducement of the underlying settlement agreement, and evidence of improper action and procedures in the formation of the underlying settlement agreement. To those ends, the Gandaras specifically stated that they anticipated discovery regarding (1) all offers that were made on the subject property; (2) the formation of TCB Property Associates; (3) the ownership of TCB Property Associates; (4) all communications between Commerce Bank and TCB Property Associates pertaining to the Edgewood property; (5) communications between Commerce Bank and TCB Property Associates pertaining to

other property purchases, sales, and leases; (6) communications between Commerce Bank and TCB Property Associates pertaining to the First Litigation; (7) Any and all documents obtained, maintained, created, or collected regarding or relating to the sale, purchases, offers to purchase the Edgewood property; and (8) the collection and allocation of all monies relating to the Edgewood property

Third, in conjunction with outlining the evidence that the Gandaras believed needed to be sought regarding the asserted defenses, the Gandaras outlined for the trial court the law regarding each asserted defense, and how the evidence will raise a genuine issue of material fact. CP 60-70.

A settlement agreement is a contract. *In re Estate of Harford*, 86 Wn.App. 259, 262, 936 P.2d 48 (1997). Contracts are interpreted by placing it in context, viewing the contract as a whole, including the circumstances surrounding its formation. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 351-52, 103 P.2d 773 (2004).

Contracts, including settlement and releases, may be void if induced by fraud, misrepresentation. *Beaver v. Estate of Harris*, 67 Wn.2d 621, 626, 409 P.2d 143 (1965). Contracts can be deemed unenforceable when the contract is unconscionable, including abuses

during the process of forming a contract. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009).

Contracts may also be void as contrary to public policy, seriously offending law or public policy. *Keystone Masonry, Inc. v. Garco Construction, Inc.*, 135 Wn.App. 927, 933, 147 P.3d 610 (2006).

In *Ketchum v. Wood*, 73 Wash.2d 335, 438 P.2d 596 (1968), the plaintiff alleged an insurance adjuster visited her in the hospital, misrepresented the terms of the settlement and the documents she was signing, and persuaded her to execute a release of all claims, allegations which the defendant denied. In ruling upon a jury verdict in favor of the plaintiff, based upon a clear and convincing standard, the appellate court stated: "We believe that the foregoing evidence, contradicted by the defense, created a clear factual issue for the jury on the question of fraud in the procurement of the release of liability." *Ketchum*, 73 Wash.2d at 337, 438 P.2d 596.

A release may be actually be avoided on grounds less than those required for the avoidance of other contracts. In *Hooper v. Yakima County*, 79 Wash.App. 770, 904 P.2d 1193 (1995), the plaintiff stated he signed the release only after the adjuster represented it "would not apply to any injuries or medical expenses or wage losses after the thirty days and it was simply so that we could get a check to buy alternative

transportation....” *Id.* at 773. In ruling for the plaintiff and citing *Finch v. Carlton*, 84 Wash.2d 140, 524 P.2d 898 (1974), the court stated a release may be avoided on grounds less than those required for other contracts; the standard is that the release be fairly and knowingly made, and the plaintiff’s representations create genuine issues of material fact regarding the execution of the release. *Id.* 773-74.

Fraud is an intentional false representation of a matter of material fact, which is intended to deceive and does deceive. *Axtell v. MacRae*, 133 Wn. 490, 233 P. 924 (1925). Misrepresentation of an assertion that is not in accord with the facts. *Yakima County Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 254 (1993). A fraudulent misrepresentation may result in an option to void the contract by the innocent party, while a no-fraudulent misrepresentation could have consequences if it is material to the contract. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 994 P.2d 911 (2000).

The elements of fraudulent misrepresentation are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) speaker’s knowledge of its falsity; (5) intent of the speaker that it should be acted upon by other party; (6) other party’s ignorance of its falsity; (7) reliance upon the truth of the representation; (8) right to rely upon the

representation; and (9) damage as a result of reliance. *Stieneke v. Russi*, 145 Wn.App. 544, 564, 190 P.3d 60 (2008).

Void as unconscionable is a doctrine under which a contract may be denied enforcement based upon abuses during the process of forming the contract. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009). Unconscionability is anything with “affronts the sense of decency.” CALAMARI & PERILLO, *CONTRACTS* § 9-40, at 388 (5th Ed. 2003).

The doctrine of unconscionability is designed to prevent oppression and unfair surprise. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 237, 797 P.2d 477, 488, 797 P.2d 477 (1990). “Shocking to the conscience”, “monstrously harsh,” and “exceedingly calloused” are synonyms to unconscionable. *Montgomery Ward & Co., Inc. v. Annuity Bd. of Southern Baptist Convention*, 16 Wash.App. 439, 444, 556 P.2d 552 (1976).

Procedural unconscionability relates to the manner in which a contract is formed, when meaningful choice is eliminated in the bargaining process. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 210 P.3d (2009). All events surrounding the formation of the contract are reviewed, including the method of bargaining, whether any material facts were hidden, and prior course of dealings of the parties.

Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009); *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 544 P.2d 20 (1975). It is essential for the court to consider the overall circumstances when determining procedural unconscionability. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004).

Substantive unconscionability exists when a contract is one-sided, overly harsh, or includes a gross disparity. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009).

A contract provision is void as contrary to public policy if it seriously offends law or public policy. *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn.App. 927, 933, 147 P.3d 610 (2006). Public policy embraces all acts or contract which tend to clearly injure the public health, public moral, the public confidence in the purity of the administration of the law or to undermine the sense of security for individual rights, whether of personal liberty or private property. *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753-54, 845 P.2d 334 (1993).

The evidence that the Gandaras wished to collect in discovery would have raised genuine issues of material fact regarding each of the three defenses asserted by the Gandaras in the litigation: (1) void for fraudulent inducement; (2) void as unconscionable; and (3) void as violating public policy. In addition, evidence pertaining to each defense

DATED this 4th day of June, 2012.



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