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ORIGINAL

No. 68547-3-1

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

COMMONWEALTH LAND TITLE INSURANCE COMPANY, a
Nebraska Insurance Company, and TRANSNATION TITLE
INSURANCE COMPANY, a Nebraska Insurance Company,

Appellants,

v.

DALE ALAN LAND DEVELOPMENT CO., LLC, a Washington limited
liability company and GREG A. NEWHALL and LAURIE J.
NEWHALL, husband and wife, and their marital community,

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This appeal raises the issue whether a dispute over the claimed breach of a settlement agreement can be resolved through a motion to enforce the settlement in the original settled action by a person no longer a party to that action or, instead, should be resolved through a separate breach of contract suit. Here, three years after a settlement was signed, one of the parties to the settlement Soundbuilt Northwest LLC (“Soundbuilt”),¹ brought a motion to enforce the settlement against the other parties to the settlement, Commonwealth Land Title Insurance Company and Transnation Title Insurance Company (collectively, “Commonwealth”). In connection with the execution of the settlement, Commonwealth had been substituted for Soundbuilt as a party. Simply put, the trial court had no authority to act on a motion to enforce in those circumstances. By doing so, the trial court deprived Commonwealth of the opportunity fully and fairly to defend against the claimed breach and to raise a counterclaim against Soundbuilt for Soundbuilt’s breach of the settlement. The trial court further erred by addressing Soundbuilt’s motion at a time it had no jurisdiction because this action was on appeal. Finally,

¹ Soundbuilt Northwest LLC is the successor by merger to Sound Built Homes, Inc., the entity which entered the settlement agreement at issue and originally commenced this action.

even assuming the trial court had jurisdiction to issue an order enforcing the settlement agreement, the trial court erred (1) in finding a breach on the merits and (2) in assessing late fees, penalty interest, and attorney's fees, when the trigger for payment had not yet been reached.

Accordingly, the trial court's order and judgment below should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Soundbuilt to litigate a claim for breach of a settlement agreement in the guise of a motion to enforce, where Commonwealth had also been substituted as a party in place of Soundbuilt.

2. The trial court erred in entering judgment against Commonwealth while this case was pending on appeal before this Court.

3. The trial court erred in finding Commonwealth in breach of the settlement agreement based on Commonwealth's assertion of its rights as a creditor in a separate bankruptcy proceeding.

4. The trial court erred in entering judgment against Commonwealth for a contingent settlement amount under the settlement agreement where the condition precedent triggering this payment obligation had not occurred.

5. The trial court erred in preemptively awarding Soundbuilt a two-percent late fee and interest at a default rate when the contract terms requiring payment of these amounts had not been triggered.

6. The trial court erred in awarding Soundbuilt its attorneys' fees in litigating before the bankruptcy court and in bringing improper motions before the trial court.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Could Soundbuilt, a non-party to this action, move to enforce the settlement agreement before the trial court after it had fully settled its claims in this case, had assigned all rights and interests in this action, and had been substituted for as a party by Commonwealth?

2. Should Soundbuilt have been required to bring a separate action for breach of contract?

3. Did the trial court lack jurisdiction to award Soundbuilt its requested relief while this case was pending on appeal before this Court?

4. Did the trial court err in finding Commonwealth in breach of the settlement agreement based on Commonwealth's reasonable assertion of its rights as a creditor in a separate bankruptcy proceeding, when those efforts were undertaken in good faith and to protect Commonwealth's interests?

5. Was the trial court's order finding Commonwealth liable for a contingent settlement amount under the settlement agreement erroneous when the condition precedent triggering that obligation had not yet occurred?

6. Was the trial court's award of the two-percent late fee and default interest in error when Commonwealth did not fail to pay any amounts due under the settlement agreement and the contract terms governing such amounts were not triggered?

7. Was the trial court's award of attorneys' fees to Soundbuilt in error when those fees were not incurred to enforce the terms of the settlement agreement at issue?

8. If Commonwealth prevails on appeal, should the Court award Commonwealth its attorneys' fees pursuant to the terms of the settlement agreement?

IV. STATEMENT OF THE CASE

A. Background and Terms of the Settlement Agreement

This case began as a breach of contract action between Soundbuilt and the Dale Alan Land Development Co., LLC ("DALD"). DALD and its principals, the Newhalls (collectively, "DALD/Newhall") agreed to sell certain real property to Soundbuilt, but then sold the property to a different land developer, Chelan Homes, Inc. ("Chelan"), for an increased price.

CP 217. Soundbuilt then sued DALD/Newhall for repudiation of the real estate purchase and sale agreement (the “PSA”), and recorded a lis pendens on the property. CP 217.

As part of the DALD/Chelan transaction, Chelan obtained a title insurance policy from Commonwealth. CP 515-16. Because Commonwealth was aware of the lis pendens on the subject property, it conditioned issuance of its title policy on the entry of an Agreement of Indemnification (“Indemnity Agreement”) with DALD/Newhall. CP 519-23; *see also* CP 516 (¶ 4). Under the Indemnity Agreement, DALD/Newhall agreed to indemnify Commonwealth and hold it harmless from any loss or liability arising out of the policy. *See* CP 519-23. Chelan developed and sold the property at issue to 22 homeowners, and Commonwealth agreed to insure title on behalf of these homeowners. CP 218-19.

Soundbuilt then prevailed on its contract repudiation claims against DALD/Newhall and obtained an order of specific performance, permitting it to take action against the 22 homeowners to obtain title to their homes. CP 218. DALD appealed the specific performance order to this Court, which approved the order. *Sound Built Homes, Inc. v. Dale Alan Land Dev. Co.*, 137 Wn. App. 1055 (2007) (unpublished opinion); CP 20-31.

After this Court upheld the specific performance order, Commonwealth moved for and was granted intervention on behalf of the insured homeowners. CP 516 (¶ 5). To protect its insureds' interests and prevent the execution of the specific performance order, Commonwealth entered a settlement agreement with Soundbuilt on July 29, 2008 (the "Settlement Agreement"). CP 38-42. Under the terms of the Settlement Agreement, Commonwealth agreed immediately to pay Soundbuilt \$5 million to resolve fully Soundbuilt's claims in this case, which amount Commonwealth timely paid. CP 38-39 (¶ 5.1). In exchange for this \$5 million payment, Soundbuilt agreed to transfer to Commonwealth "the right, title and interest" of Soundbuilt in the instant lawsuit, as well as the original PSA for the property at issue and the lis pendens Soundbuilt had issued on the property at the time it filed this suit. CP 39 (¶ 5.2).

The Settlement Agreement further provided that Commonwealth would seek a determination that DALD/Newhall were obligated under the Indemnity Agreement to indemnify Commonwealth for all settlement funds it paid to Soundbuilt under the Settlement Agreement. CP 39-40 (¶ 5.3). The Settlement Agreement also contained a conditional payment term requiring Commonwealth to pay Soundbuilt up to an additional \$3 million depending on the outcome of the litigation with DALD/Newhall to enforce the Indemnity Agreement ("Contingent Payment Term"). *Id.* In

particular, under the Contingent Payment Term, if Commonwealth obtained an indemnity judgment against DALD/Newhall for \$5 million or less, Commonwealth would owe no further amounts to Soundbuilt. *Id.* If DALD/Newhall were held liable to Commonwealth for more than \$5 million, however, Commonwealth could be obligated to remit that additional amount to Soundbuilt, up to a limit of \$3 million. *Id.* The payment of any additional sums under the Contingent Payment Term of the Settlement Agreement was expressly conditioned on the entry of a “final, non-appealable order of the Washington courts (including orders of dismissal)” against DALD/Newhall. CP 38-39 (¶ 5.1).

After entry of the Settlement Agreement, Soundbuilt and Commonwealth jointly presented an order to the trial court substituting Commonwealth in place of Soundbuilt as plaintiff in the instant suit (“Substitution Order”). CP 821-23. The Substitution Order expressly provided that Soundbuilt’s interest in the matter was limited only to obtaining a determination that the Settlement Agreement was reasonable. CP 822 (¶ 4). All other rights in this action were assigned to Commonwealth. CP 39 (¶ 5.2). After entry of the Substitution Order on September 23, 2008, Commonwealth’s name was substituted for Soundbuilt’s in the case caption. *Compare, e.g.,* CP 1 with CP 821 (reflecting change in caption).

B. Commonwealth's Litigation of Claims Against DALD/Newhall

Pursuant to the terms of the Settlement Agreement, Commonwealth moved promptly for summary judgment against DALD/Newhall, requesting an award of \$8 million under the Indemnity Agreement. CP 525-49. The \$8 million amount reflected both the original \$5 million payment to Soundbuilt under the Settlement Agreement, as well as the additional \$3 million that was potentially available to Soundbuilt under the Contingent Payment Term. CP 525-49. On November 18, 2008, the trial court issued a letter ruling finding that DALD/Newhall was obligated to pay Commonwealth the full indemnity amount of \$8 million, plus additional fees and costs. CP 865-866.

Shortly after this ruling, but before the trial court had entered a final order on DALD/Newhall's liability to Commonwealth, the Newhalls declared bankruptcy, automatically staying the instant litigation. *See, e.g.*, CP 507-13, 516 (¶ 7), 558-60.² Commonwealth moved for relief from stay to allow entry of a final order establishing DALD/Newhall's liability under the Indemnity Agreement. CP 507-13, 588-60. After relief from stay was granted, on March 14, 2009, the trial court entered a final order

² A detailed description of the proceedings in the Newhall bankruptcy is set forth in the Declaration of Jack Cullen, counsel for Commonwealth before the bankruptcy court. CP 486-793.

and judgment finding DALD/Newhall liable to Commonwealth for over \$8 million. CP 45-53.³ The Newhalls subsequently sought review in this Court of the trial court's order finding them liable to Commonwealth under the Indemnity Agreement (the "*Newhall* appeal").⁴ CP 351-64. The parties fully briefed the appeal, and oral argument was heard on September 6, 2011.

During the pendency of the *Newhall* appeal, Soundbuilt separately negotiated an agreement with the Newhall bankruptcy trustee to obtain the right to dismiss the *Newhall* appeal while it was pending before this Court ("Soundbuilt/Trustee Agreement"). CP 601-17. The apparently intended effect of such a dismissal would be the entry of final judgment in favor of Commonwealth against DALD/Newhall for over \$8 million, to then argue the trigger of the \$3 million Conditional Payment Term of the Settlement Agreement. CP 38-40 (¶¶ 5.1, 5.3). In exchange for obtaining the right to dismiss the appeal, Soundbuilt agreed to assign to the bankruptcy estate the first \$225,000 of the \$3 million contingent settlement payment that

³ Although the trial court entered summary judgment against DALD/Newhall on January 7, 2009, it was ineffective because it issued during the automatic bankruptcy stay. CP 551-56. Shortly after obtaining relief from the automatic stay, Commonwealth moved for reentry of this order, which the trial court granted on March 14, 2011. CP 45-53.

⁴ DALD did not join in the *Newhall* appeal. *See, e.g.*, CP 351-64 (notice of appeal).

Commonwealth would potentially be obligated to pay under the Settlement Agreement. CP 569, 609-12.

As a creditor in the *Newhall* estate, Commonwealth objected to the entry of the Soundbuilt/Trustee Agreement. CP 572-78, 592-97. In particular, Commonwealth objected to the settlement on the grounds that it did not satisfy the standards under either Bankruptcy Rule 9019 governing a “compromise of claim” in the bankruptcy court, or under the Bankruptcy Code, 11 U.S.C. §363 governing the sale of an asset of the bankruptcy estate. *Id.* Commonwealth further objected to the agreement because it did not satisfy the “fair and equitable” standard applicable to a compromise of claim under Bankruptcy Rule 9019. CP 594-95. With regard to the standards governing a sale of asset under §363, Commonwealth objected to the Soundbuilt/Trustee Agreement because the trustee had failed to show that this sale satisfied a sound business purpose as required by law. CP 595-96. On May 6, 2011 the bankruptcy court approved the Soundbuilt/Trustee Agreement over Commonwealth’s objections. CP 599-617.⁵

⁵ During the time the Soundbuilt/Trustee Agreement was under consideration, the trustee requested and obtained two continuances of the hearing to approve the agreement, thereby delaying the resolution of the motion to approve. CP 588, 590 (bankruptcy court docket entries noting continuances in proceedings from original setting of April 15, 2011 to the consideration of the motion to approve on May 6, 2011).

Commonwealth appealed this determination to the United States District Court and sought an emergency stay of the order pending appeal. CP 619-20, 622-23, 625, 627-39. Finding that Commonwealth had “shown a likelihood of success on the merits of its appeal contending that the bankruptcy court abused its discretion,” in approving the Soundbuilt/Trustee Agreement, the District Court granted Commonwealth’s motion for an emergency stay of that order. CP 641-49. As a result of the District Court’s stay, Soundbuilt and the trustee agreed to terminate the prior agreement and re-note a new agreement for the bankruptcy court’s consideration. CP 400.

Soundbuilt and the bankruptcy trustee presented a second agreement to authorize dismissal of the *Newhall* appeal (“Second Soundbuilt/Trustee Agreement”) on July 12, 2011. CP 651-55. Commonwealth objected to the trustee’s request for approval of the Second Soundbuilt/Trustee Agreement on the grounds that (1) the bankruptcy court lacked authority to hear the motion while the District Court appeal was still pending; and (2) the new agreement suffered from the same substantive flaws as the prior agreement – namely, that the standards under Rule 9019 and §363 were not and could not be met. CP 657-68.

In response to Commonwealth's jurisdictional argument, the trustee moved for and obtained an order vacating the District Court appeal. CP 673-74. The parties then moved forward with the proceedings to approve the agreement. CP 491. Although the motion to approve the Second Soundbuilt/Trustee Agreement was originally set for August 5, 2011, the trustee requested two continuances of its hearing. CP 676, 696 (continuing hearing to October 21, 2011). At the October 21, 2011 hearing, the trustee entered a request for an evidentiary hearing on approval of the agreement. CP 492. Although the trustee subsequently withdrew this request, CP 698, the bankruptcy court ordered an evidentiary hearing on its own initiative, and continued the matter until December 7, 2011. CP 702. After the evidentiary hearing, the bankruptcy court entered an order approving the new agreement on December 23, 2011. CP 724-36. Commonwealth did not appeal the bankruptcy court's order. CP 493.

After entry of the bankruptcy court's order, on January 13, 2012, the Newhalls filed a Motion for Voluntary Withdrawal of Review pursuant to RAP 18.2 asking that the Court dismiss the *Newhall* appeal. Commonwealth responded to this motion stating that the decision to dismiss the *Newhall* appeal was within this Court's discretion and that Commonwealth had an interest in the resolution of the *Newhall* appeal on

its merits. CP 807-10. On March 1, 2012, the Court Administrator issued a letter to the *Newhall* parties stating that the motion to withdraw the appeal had been granted and that the *Newhall* appeal had been dismissed. CP 870-71. The Court issued its mandate in the *Newhall* appeal on May 11, 2012. CP 868-69.

C. Soundbuilt's Motions to Enforce the Settlement Agreement

While Commonwealth's appeal of the first Soundbuilt/Trustee Agreement was still pending before the District Court, and while the instant case was before this Court on the *Newhall* appeal, Soundbuilt filed a Motion to Enforce Settlement Agreement before the trial court on June 3, 2011 ("Motion to Enforce"). CP 1-7. The Motion to Enforce alleged that Commonwealth's objections to the entry of the Soundbuilt/Trustee Agreement in the bankruptcy court were a breach of the Settlement Agreement. *Id.* Soundbuilt, therefore, argued that it was entitled to immediate payment of the contingent settlement amount without filing or adjudicating any claim for breach. CP 7. In the hearing on Soundbuilt's motion, the trial court declined to rule on Soundbuilt's motion given the pendency of both the *Newhall* appeal and the District Court appeal of the bankruptcy court's order. *See* VRP (June 29, 2011) 14:3-16:19, 23:23-

24:2. The trial court then denied the Motion to Enforce without prejudice and with leave to renew the motion after November 1, 2011. CP 185-86.

On December 5, 2011, Soundbuilt filed a Renewed Motion to Enforce Settlement Agreement (“Renewed Motion to Enforce”). CP 196-212. At the time of its filing, the *Newhall* appeal had been fully briefed and argued and was awaiting decision by this Court. Soundbuilt’s Renewed Motion to Enforce raised similar arguments to those in its original filing. In particular, Soundbuilt argued that Commonwealth’s actions in the bankruptcy court breached its implied duty of good faith and fair dealing under the Settlement Agreement, claiming that Commonwealth’s litigation in the bankruptcy court delayed improperly the entry of a final, non-appealable order regarding DALD/Newhall’s indemnity obligations. CP 202-09.

On March 16, 2012, over Commonwealth’s objection, the trial court granted the Renewed Motion to Enforce and entered judgment against Commonwealth in the amount of \$4,031,409.77. CP 813-16 (Order), 817-20 (Judgment). The trial court signed Soundbuilt’s form of order, which included an express “finding” that Commonwealth was in breach of the Settlement Agreement. CP 815 (¶ 1). In addition to the contingent settlement amount of \$3 million provided in the Settlement Agreement, the trial court also awarded Soundbuilt pre-default interest of

\$664,767.12, late fees of \$73,295.34, post-default interest of \$247,561.64, total costs of \$820.67, and attorneys' fees of \$44,409.77. CP 818. At the time the trial court entered its order and judgment, this Court had entered an order dismissing the *Newhall* appeal, but had not yet issued the mandate terminating review. CP 868-71. Commonwealth timely appealed the trial court's order and judgment.

V. ARGUMENT

A. The Court's Review is *De Novo*.

This matter seeks review of the trial court's order finding Commonwealth in breach of the Settlement Agreement. Because there was no evidentiary hearing, review of the trial court's order and judgment is *de novo*. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

B. The Trial Court Erred in Granting Soundbuilt Relief in the Instant Action Given Soundbuilt's Failure to Properly Bring its Claims Against Commonwealth.

The Settlement Agreement resolved all of Soundbuilt's claims in this action and expressly divested it of any right or interest in this case. Despite having resolved all its claims, Soundbuilt attempted to reinsert itself in the case years later by filing a motion before the trial court seeking a summary determination that Commonwealth had breached the Settlement Agreement. To pursue such relief, Soundbuilt was required to properly assert its claims in a separate legal action for breach.

Soundbuilt's efforts to side-step these requirements for its own expediency were improper and prejudicial to Commonwealth. The trial court erred in granting Soundbuilt's Renewed Motion to Enforce.

1. Soundbuilt was Required to Assert a Claim for Breach of Contract.

A "settlement agreement is a contract, and its construction is governed by the legal principles applicable to contracts." *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977). Here, Soundbuilt and Commonwealth executed a Settlement Agreement establishing each party's rights and responsibilities under the agreement. CP 38-42. The agreement terminated Soundbuilt's interests in this action and resolved all claims it asserted in this litigation. It reduced the terms of any dispute between Soundbuilt and Commonwealth in this action to the fully executed and integrated Settlement Agreement. *See, e.g., Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414, 36 P.3d 1065 (2001) ("a general settlement agreement embraces all existing claims arising from the underlying incident" and a "strong presumption attaches that the parties have considered and settled every existing difference").

To remedy any perceived breach of this Settlement Agreement, Soundbuilt was required to institute a new action and properly bring its claims for breach of the agreement against Commonwealth. Indeed, this is

the enforcement mechanism contemplated in the Settlement Agreement itself. CP 41 (¶ 5.16) (“Any action to enforce this Agreement shall be brought in the King County Superior Court.”).

Soundbuilt instead brought a motion before the trial court seeking a summary determination that Commonwealth was in breach of the Settlement Agreement. At the time it filed the motion, Soundbuilt had no pending claim against Commonwealth, nor was Soundbuilt a party in interest in the instant case, having assigned all of its rights in this action to Commonwealth. For the same reasons Soundbuilt could not appear and file motions in other pending litigation involving Commonwealth to which Soundbuilt was not a party and in which it had not asserted any claims, it was also foreclosed from doing so here.

Because Soundbuilt failed to bring a claim for breach of contract against Commonwealth, Commonwealth was unable fairly to defend Soundbuilt’s allegations of breach. Commonwealth was denied the opportunity to answer Soundbuilt’s claims, to raise affirmative defenses, to assert counterclaims of its own and to conduct discovery in this action. Instead, Commonwealth was obligated to defend against Soundbuilt’s claims on summary briefing and affidavits.

Commonwealth was specifically denied the opportunity to assert any claims of its own related to Soundbuilt’s conduct under the Settlement

Agreement. In particular, Commonwealth was unable to plead or litigate its claim that Soundbuilt breached the Settlement Agreement by appearing improperly before the bankruptcy court with the sole purpose of acquiring the right to dismiss the *Newhall* appeal. Soundbuilt's actions before the bankruptcy court were plainly counter to the parties' bargained for agreement under the Settlement Agreement, which expressly provided that any resolution of the DALD/*Newhall* indemnity obligation was to be made by the Washington courts. CP 39 (¶ 5.3) (stating that "Commonwealth shall seek a determination of the court that DALD and Greg Newhall are obligated to indemnify Commonwealth for sums paid to [Soundbuilt]", and that "[i]n the event the King County Superior Court fails to find that DALD and Newhall are liable", and further that "[i]n the event that DALD and Newhall's liability is later increased on appeal, the principal balance due [Soundbuilt] shall likewise be increased to conform with the appellate court's decision"). Indeed, it was only once "a final, non-appealable order of the Washington courts (including orders of dismissal) determining the liability of [DALD/*Newhall*]" issued that Commonwealth was obligated to pay any further amounts under the Settlement Agreement. CP 38 (¶ 5.1). Rather than permit this process to take its course as provided under the agreement, however, Soundbuilt intervened in the *Newhall* bankruptcy to obtain the right to dismiss the *Newhall* appeal in an effort to secure its

right to payment under the Settlement Agreement. Soundbuilt improperly took the determination of DALD/Newhall's liability out of the hands of the courts by striking a deal with the bankruptcy trustee. This was contrary to the letter, intent and spirit of the agreement. The outcome of the *Newhall* appeal could have fully eliminated any further payment obligation under the Settlement Agreement. *See, e.g., Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wn. 2d 577, 588, 167 P.3d 1125 (2007) (breach of a contractual condition may excuse other party's performance).

Soundbuilt thus breached its obligation under the Settlement Agreement. But because Soundbuilt did not properly bring a separate breach of contract claim, Commonwealth was foreclosed from asserting its counterclaims and defenses. It was substantially prejudiced as a result.

2. Soundbuilt Assigned Its Rights In this Action.

Even setting aside Soundbuilt's failure to bring a breach of contract claim against Commonwealth, Soundbuilt was precluded from filing its Motion to Enforce in the present case because it was no longer a party in interest in this case. Per the terms of the Settlement Agreement, Soundbuilt assigned all rights and interests in this action to Commonwealth as part of the parties agreed resolution of this case. CP 39 (¶ 5.2) (providing that "[u]pon deposit of the \$5,000,000.00 . . . the right,

title and interest of [Soundbuilt] in the PSA, the Lawsuit and the lis pendens shall transfer to Commonwealth”); *see also* CP 38 (¶ 2) (purpose of Settlement Agreement was to “state the terms and conditions of transfer by [Soundbuilt] to Commonwealth of all right, title and interest” of Soundbuilt in this matter). Consistent with this assignment, the trial court entered an order substituting Commonwealth for Soundbuilt in this case. CP 821-23. The Substitution Order expressly stated that Soundbuilt retained only the ability to seek “a determination of the reasonableness of the Settlement Agreement between [Soundbuilt] and Commonwealth.” CP 822 (¶ 4). All of Soundbuilt’s other rights in this action were expressly extinguished. CP 38-39 (§§ 2, 5.2); CP 821-23.

As a consequence of assignment, the assignor transfers the benefits and the burdens of the underlying cause of action to the assignee and relieves the assignor of both. *See, e.g., Puget Sound Nat’l Bank v. Dep’t of Revenue*, 123 Wn.2d 284, 290, 868 P.2d 127 (1994). The “assignee of a contract ‘steps into the shoes of the assignor, and has all of the rights of the assignor.’” *Id.* at 292 (quoting *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 844 P.2d 403 (1993)). Thus, as a result of the assignment, Soundbuilt was divested of its rights in this case and was no longer a party in interest in this case. *See Amende v. Town of Morton*, 40 Wn.2d 104, 107, 241 P.2d 445 (1952) (“If, as between the assignor and

assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest.”) (internal citation omitted).⁶

Soundbuilt does not dispute that its assignment of all right and interest in this case was valid. Instead, it claimed that it had retained party status sufficient to litigate new issues through motion practice. This is incorrect. The “sole” right Soundbuilt retained was to seek a reasonableness determination regarding the Settlement Agreement. CP 822 (§ 4). Its Motions to Enforce had nothing to do with such a determination.

Having divested itself of any interest in this case, Soundbuilt was foreclosed from seeking relief from the court. Non-parties cannot obtain relief simply by filing a motion. *See, e.g., River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (prospective intervenor lacked standing to make motion because he was not a “party” in the case). Soundbuilt’s assignment of all substantive rights in this lawsuit was absolute. Per the terms of the Settlement Agreement and Substitution

⁶ Consistent with this divestment, the Settlement Agreement provided that Soundbuilt’s counsel was entitled to review Commonwealth’s pleadings filed in its litigation against DALD/Newhall, but expressly stated that Soundbuilt had no “right . . . to direct the litigation.” CP 40 (§ 5.4).

Order, Soundbuilt could not seek the relief it did before the trial court.

The trial court's order should be reversed on this additional ground.

3. CR 2A Is Not a Substitute for a Breach of Contract Claim.

Soundbuilt argued below that its requested relief was justified under CR 2A. But CR 2A governs only disputes over the question of the existence or material terms of a settlement agreement. CR 2A (providing that “[n]o agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court” unless made in open court, in the minutes, or “in writing and subscribed by the attorneys denying the same.”); *Lavigne*, 106 Wn. App. at 17 (noting CR 2A applies when the “purport” of the agreement is in dispute and is intended to resolve questions related to the “existence or material terms of the agreement”); *In re Marriage of Ferree*, 71 Wn. App. 35, 40-41, 856 P.2d 706 (1993) (stating similarly).

Soundbuilt does not dispute that the Settlement Agreement was a written, executed and fully integrated contract containing Commonwealth and Soundbuilt's entire understanding regarding the terms and conditions of settlement. CP 41 (§ 5.11 stating that “[t]his Agreement contains the entire understanding and agreement among the parties in respect of the

subject matter of the Agreement.”). Accordingly, CR 2A has no application here.

Soundbuilt did not invoke CR 2A to establish either the existence or terms of this agreement. Instead, Soundbuilt sought an order declaring Commonwealth in breach of the Settlement Agreement. *See, e.g.*, CP 206 (“Commonwealth’s conduct here is clearly in breach of its obligations under the [Settlement] Agreement, including the implied covenant of good faith and fair dealing.”) (emphasis added); CP 814-15 (“This Court determines that there is no genuine issue of material fact that Commonwealth has breached the terms of the [Settlement] Agreement.”). CR 2A is not the proper mechanism for such relief. *See, e.g., Lavigne*, 106 Wn. App. at 17.

C. The Trial Court Lacked Jurisdiction to Hear Soundbuilt’s Motions to Enforce While the Case Was on Appeal.

The trial court’s order on Soundbuilt’s Motion to Enforce was also improper because at the time of entry, this case was pending before this Court on the *Newhall* appeal. Specifically, at the time the trial court granted Soundbuilt’s requested relief, the mandate had not yet issued, and the *Newhall* appeal had not been concluded. RAP 12.5(a) (“A ‘mandate’ is the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating

review.”); *Obert v. Env'tl. Research & Dev. Corp.*, 112 Wn.2d 323, 340, 771 P.2d 340 (1989) (“until the Court of Appeals issues its mandate pursuant to RAP 12.5, a decision of the Court of Appeals does not take effect”).

Given the pendency of the *Newhall* appeal, RAP 7.2 divested the trial court of its authority to act in this case except under the rule’s limited exceptions. RAP 7.2(a) (“After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule . . .”). This rule further demonstrates why Soundbuilt’s actions in this case were improper.

RAP 7.2 authorizes the trial court to take certain actions, including settling the record on review, acting on matters of supersedeas stays and bonds, and determining questions of a litigant’s indigency. RAP 7.2(b), (g), (h). In addition, the trial court may enter certain “postjudgment motions authorized by the civil rules” and enforce judgments that are not stayed on appeal. RAP 7.2(c), (e). Soundbuilt’s requested relief is beyond the scope of RAP 7.2.

Before the trial court, Soundbuilt claimed that its Motions to Enforce were authorized postjudgment motions brought under CR 2A. But as discussed above, this rule has no application here and does not provide a mechanism for Soundbuilt to seek the type of relief it did from

the trial court, especially while this case was pending on appeal. The issues raised in the *Newhall* appeal had a direct bearing on the issues before the trial court as both tribunals were deciding questions that could determine whether Commonwealth would be liable to Soundbuilt under the Contingent Payment Term and for how much. A final judgment on this issue was improper prior to the issuance of the mandate.

D. Commonwealth's Actions were not in Breach of the Settlement Agreement.

1. Commonwealth's Actions Before the Bankruptcy Court were Proper to Protect Its Interests as a Creditor of the Estate.

In addition to failing to properly bring an action for breach, Soundbuilt also failed to establish that Commonwealth's actions were in material breach of the Settlement Agreement. Soundbuilt's assertions of breach were based solely on its contention that Commonwealth's actions before the bankruptcy court were contrary to the implied covenant of good faith and fair dealing in the Settlement Agreement. CP 206. This argument lacks merit.

The implied duty of good faith and fair dealing is limited only to express obligations imposed by the relevant contract, here the Settlement Agreement. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569-570, 807 P.2d 356 (1991). The duty requires that the parties perform the specific obligations imposed by their agreement in good faith. *Id.* at 569. It does

not inject substantive terms into the parties' contract nor does it create a free-floating duty of good faith. *Id.* at 569–70. In short, “the duty arises only in connection with terms agreed to by the parties.” *Id.* at 569 (collecting cases).

Here, Soundbuilt asserted that Commonwealth breached its implied duty of good faith solely because Commonwealth objected to the entry of the Soundbuilt/Trustee Agreement before the bankruptcy court. CP 203-207. Specifically, Soundbuilt claimed that Commonwealth's objections violated its obligation to seek a determination of DALD/Newhall's liability “as soon as reasonably possible”. CP 335 (citing Settlement Agreement ¶ 5.3). Soundbuilt further argued that Commonwealth's conduct in the bankruptcy proceeding somehow violated the term providing that Commonwealth would not “seek continuances except as necessary to the prosecution of the indemnity claim.” CP 335 (citing Settlement Agreement ¶ 5.5). But Soundbuilt has failed to establish any basis for its claim that either of these terms precluded Commonwealth from protecting its rights as a creditor in the Newhall estate.

Indeed, given its creditor interests at stake in that action, Commonwealth was entitled to challenge the adequacy of any sales of the estate's assets or compromises of the estate's claims. *See, e.g., Bank. R.*

9019; 11 U.S.C. § 363. Consistent with this right, Commonwealth objected to the entry of the Soundbuilt/Trustee Agreement on the ground that it failed to meet the requirements under Bankruptcy Rule 9019, regarding the proper procedures for approving a compromise or settlement, or those of 11 U.S.C. § 363, governing the sale of property or assets of the estate. CP 665-68. In particular, Commonwealth argued that approval of the Soundbuilt/Trustee Agreement was improper because the trustee had failed to show that Soundbuilt's offer to pay \$225,000 was the best settlement available to the estate or that it would adequately compensate the estate for the right to dismiss the *Newhall* appeal. *Id.*; *see also* CP 593, 596. If the *Newhall* appeal was successful, the result would be the reversal of the \$8 million judgment against the Newhalls, substantially reducing the total claims against the bankrupt estate to the benefit of the creditors. *See* CP 678-79. On the other hand, only Soundbuilt stood directly to gain from the dismissal of the *Newhall* appeal, as it could then be entitled to collect an additional \$3 million from Commonwealth under the terms of the Settlement Agreement. The right to control this appeal plainly had value to both Soundbuilt and the estate. Commonwealth's objections were based on the trustee's failure appropriately to value those interests in reaching its settlement.

Commonwealth also objected to the Soundbuilt/Trustee Agreement on the grounds that the benefit to the estate's creditors was speculative because Soundbuilt agreed only to assign the first \$225,000 of its recovery from Commonwealth to the estate, rather than provide an upfront payment to acquire this claim. CP 667-68. Given the value to Soundbuilt of its interest in the *Newhall* appeal, there was no basis for the estate to accept this type of conditional payment. Rather, Commonwealth asserted that Soundbuilt should have been obligated to pay the settlement amount directly to the estate in exchange for acquiring this valuable right.

Regardless of the merits of these objections, as a creditor in the Newhall estate, Commonwealth was well within its rights to raise them. *See, e.g., In re A & C Properties*, 784 F.2d 1377, 1384 (9th Cir. 1986) (noting that "bankruptcy court is obligated to preserve the rights of the creditors" and that "[c]reditors' objections to a compromise must be afforded deference.") (internal citations omitted). The purpose of Commonwealth's objections to the Soundbuilt/Trustee Agreements was to ensure that any agreement to dispose of the estate's rights in the *Newhall* appeal was both procedurally and substantively proper. Its objections were narrowly tailored to this purpose. And, as the District Court found, Commonwealth's objections to the first Soundbuilt/Trustee Agreement were sound. CP 641-49 (finding the bankruptcy court applied the

incorrect standard).⁷ Nothing in the Settlement Agreement obligated Commonwealth to sacrifice its rights in the bankruptcy proceeding in the manner Soundbuilt suggests. CP 335 (“Commonwealth can choose to pursue its objection to the [Soundbuilt/Trustee] Agreement, but only at risk of a breach of its obligations under the [Settlement] Agreement.”).

2. The Bankruptcy Court’s Statements do not Support a Finding of Bad Faith.

Recognizing implicitly that Commonwealth was within its rights to object to these agreements, Soundbuilt based the substance of its bad faith claim on the bankruptcy court’s statements in the December 7 hearing on the motion to approve the Second Soundbuilt/Trustee Agreement. *See, e.g.*, CP 415-16, 463-64. But all the bankruptcy court noted in that hearing was that the denial of the Soundbuilt/Trustee Agreement would likely benefit Commonwealth more than the other creditors given Commonwealth’s agreement with Soundbuilt. CP 463-64. The bankruptcy court further noted that its role was to determine what was in the best interests of the estate, not a single creditor, regardless of that

⁷ Further, any delays in the consideration of the Soundbuilt/Trustee Agreements before the bankruptcy court were solely to accommodate either the trustee or the bankruptcy court itself. *See, e.g.*, CP 588, 590, 676, 696 (reflecting trustee’s requests to continue hearing to approve settlement); CP 698, 702 (reflecting delays from decision to hold evidentiary hearing, which hearing Commonwealth did not request). Commonwealth cannot be faulted for any delay in these proceedings.

creditor's stake in the estate. CP 464 ("But the factor in the ANC [sic] Properties standards is looking at creditors generally and not just the specific pocketbook of the objecting creditor."). The bankruptcy court did not state that Commonwealth was foreclosed from objecting and protecting its rights in the bankruptcy, nor did it find that Commonwealth was acting in bad faith. It simply made findings consistent with its role either to approve or reject the Soundbuilt/Trustee Agreement based on the relevant legal factors.

Moreover, the bankruptcy court's statements regarding Commonwealth's purported motives in objecting to the Soundbuilt/Trustee Agreement are immaterial because Commonwealth indisputably had a right to object. As set forth above, as a creditor of the estate, Commonwealth was entitled to raise objections to the adequacy and structure of the Soundbuilt/Trustee Agreement. That is what it did. Consistent with its duties, the bankruptcy court considered the Soundbuilt/Trustee Agreement to determine whether it was in the best interests of the estate and based on the sound business judgment of the trustee under Bankruptcy Rule 9019 and §363(b).

Although it has always been Commonwealth's position that Soundbuilt's actions in acquiring the right to dismiss the *Newhall* appeal were in breach of the Settlement Agreement, it did not raise those claims

before the bankruptcy court or otherwise argue that the court was foreclosed from approving a settlement provided it satisfied the relevant legal standards. Indeed, Commonwealth could not raise such arguments given the bankruptcy court's limited jurisdiction to decide only the specific bankruptcy-related issues that were before it. *See, e.g.*, 28 U.S.C. § 157 (setting forth bankruptcy court jurisdiction); *Stern v. Marshall*, 131 S. Ct. 2594, 2611, 180 L. Ed. 2d 475 (2011), *reh'g denied*, 132 S. Ct. 56, 180 L. Ed. 2d 924 (2011) (discussing limited nature of bankruptcy court's jurisdiction generally). And because Soundbuilt never asserted a breach of contract claim against Commonwealth, Commonwealth was likewise precluded from litigating counterclaims related to Soundbuilt's conduct before an appropriate tribunal. Soundbuilt's tactics substantially prejudiced Commonwealth in this regard.

Soundbuilt cannot dispute that Commonwealth diligently pursued its claims against DALD/Newhall, obtained an \$8 million judgment against them and vigorously defended that judgment on appeal. *See, e.g.*, CP 525-49, 551-56, 97-145. It complied fully with its obligations under the Settlement Agreement in this regard. *See* CP 39 (¶ 5.3). The Settlement Agreement did not, however, prevent Commonwealth from protecting its interests in the Newhall bankruptcy proceeding. The trial court's findings to the contrary were improper.

E. Soundbuilt’s “Enforcement” of the Settlement Agreement Was Premature Because the Condition Precedent to Payment under the Settlement Agreement had not been Triggered.

Pursuant to the express terms of the Settlement Agreement, Commonwealth’s obligation to pay Soundbuilt funds over the initial \$5 million payment was conditioned on the entry of a “final, non-appealable” order finding DALD/Newhall liable to Commonwealth for its payments under the Settlement Agreement. CP 38-39 (¶ 5.1). The entry of such an order was an express condition precedent to any further recovery by Soundbuilt under the Settlement Agreement. CP 39 (¶ 5.3); *see also Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964) (“Conditions precedent are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.”) (internal quotation omitted). Until that condition occurred, Soundbuilt was foreclosed from seeking its requested relief.

At the time Soundbuilt sought its requested relief, the condition precedent to payment had not been triggered. Indeed, under the Settlement Agreement, this term could only be triggered after this Court issued its mandate in the *Newhall* appeal, thereby issuing a “final, non-

appealable order” of the Washington courts. *Obert*, 112 Wn.2d at 340 (“until the Court of Appeals issues its mandate pursuant to RAP 12.5, a decision of the Court of Appeals does not take effect”); *see also* RAP 12.2 (appellate court may “reverse, affirm, or modify” a decision and the appellate court’s actions are effective and binding upon issuance of the mandate under RAP 12.5). This mandate did not issue until May 11, 2012. CP 868-71. The Contingent Payment Term under the Settlement Agreement was not triggered before that date. *CHG Intn’l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 515, 667 P.2d 1127 (1983) (“A condition must be exactly fulfilled or no liability arises on the promise which it qualifies.”) (citing 5 Williston, *Contracts* § 675, p. 184 (3d ed. 1961)).

Nor is there any merit to Soundbuilt’s claim that this condition precedent was excused by what it claims was Commonwealth’s bad faith. Once again, “covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract.” *Myers v. State*, 152 Wn. App. 823, 828, 218 P.3d 241 (2009). And “[a]s a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *Badgett*, 116 Wn.2d at 570. Here, the unambiguous terms of the Settlement Agreement premised any further payment obligation by Commonwealth on the entry of “a final, non-appealable order” declaring

DALD/Newhall liable. CP 38-39 (¶ 5.1). This was the agreement between Soundbuilt and Commonwealth. It was only Soundbuilt who breached the terms of this agreement when it intervened in the bankruptcy court to secure improperly the right to dismiss the *Newhall* appeal. Since it did so, Commonwealth was within its rights to protect its interests before that tribunal. And but for Soundbuilt's actions, it would never have been forced to do so.

F. The Trial Court Erred in Awarding Soundbuilt Late Fees, Default Interest and Attorneys' Fees for Litigating this Matter.

In addition to erring in awarding Soundbuilt funds under the Contingent Payment Term, the trial court also erred in granting Soundbuilt's request for other monetary relief tied to an earlier date of "breach". In particular, the trial court awarded Soundbuilt late fees of \$73,295.34, post-default interest of \$247,561.64, and attorney's fees of \$44,965.00. CP 818. The award of these amounts was improper.

First, the trial court erred in awarding Soundbuilt a "late fee" of two-percent of the base contingent settlement amount of \$3 million, an award which totaled \$73,295.34. CP 818. This award was contrary to the clear provisions of the Settlement Agreement providing that Soundbuilt is only entitled to this late fee "[i]f payment is not made within thirty (30) days of the date the sums described herein are due". CP 38 (¶ 5.1). By

applying this late fee before the expiration of the requisite thirty-day payment period, however, the trial court found effectively that Commonwealth would not pay Soundbuilt the settlement funds once they were owed. There was no basis for the trial court's preemptive determination that Commonwealth would not comply with its payment obligation once it came due. Under the plain terms of the Settlement Agreement, only if Commonwealth failed to pay the amounts owing once required to do so under the Settlement Agreement (or in this case, after entry of the trial court's judgment) could Soundbuilt recover any "late fees". CP 38-39 (§ 5.1).

The same is true for the trial court's award of post-default interest in the amount of \$247,561.34. CP 818. Again, under the terms of the Settlement Agreement, the default interest rate applies only "[i]f default be made in payment of this obligation". CP 39 (§ 5.1). For the same reasons that the assessment of the late fee was inappropriate, so too was the trial court's award of default interest dating back to May 2011 (the time the initial flawed Soundbuilt/Trustee Agreement was entered). There is no question that Soundbuilt's interests under the agreement as written were adequately protected. Indeed, the Settlement Agreement provided that the \$3 million contingent settlement amount would accrue interest at the rate of 8 percent while Commonwealth litigated its indemnity claims against

DALD/Newhall. CP 38-39 (¶5.1). The award of the default rate of 12 percent was inconsistent with the plain terms of the Settlement Agreement and should be reversed.

Finally, the trial court's award of attorneys' fees and costs was without basis. The attorneys' fee provision of the Settlement Agreement provides that the "prevailing party" is entitled to recover its fees only when it "takes action to enforce any of the terms of this Agreement". CP 41 (¶ 5.13). The trial court awarded Soundbuilt its fees both for its litigation before the trial court on its Motions to Enforce and also before the bankruptcy court in relation to the approval of the Soundbuilt/Trustee Agreements. Soundbuilt should not be entitled to recover these amounts.

First, the trial court awarded Soundbuilt attorney's fees and costs related to the bankruptcy proceeding. But in no way was its involvement in the bankruptcy proceeding "to enforce any of the terms" of the Settlement Agreement. Instead, these actions were intended to subvert the parties' bargained for exchange under their contract. Soundbuilt's actions before the bankruptcy court were a strategic litigation tactic intended to ensure that the *Newhall* appeal would not be decided on its merits. Any fees Soundbuilt incurred in doing so were solely in its own self-interest and cannot be said to have been for the purpose of declaring any of its rights under the Settlement Agreement. *See Burns v. McClinton*, 135 Wn.

App. 285, 309-10, 143 P.3d 630 (2006) (holding award attorney's fees improper when derived from disputes not central to the contract when the contract provides for award of attorney's fees only when the dispute arises from enforcing the contract). The trial court's award of these fees was in error.

Second, for the reasons stated above, Soundbuilt's Motions to Enforce were also fundamentally flawed. Soundbuilt improperly inserted itself into the instant action and sought affirmative relief regarding Commonwealth's actions without asserting an actual claim for breach. But in addition, Soundbuilt's Motions to Enforce were premature. Soundbuilt was required to wait for the issuance of this Court's mandate, before any obligation to pay under the Settlement Agreement would have come due. Instead of waiting for that process to take its course, however, Soundbuilt undertook the unnecessary effort of asking the trial court to declare that Commonwealth's obligations under the Settlement Agreement were prematurely due. It should not recover for these efforts.

In any event, if this Court finds in favor of Commonwealth in this appeal, it should reverse the trial court's award of Soundbuilt's attorneys' fees and related costs because it is no longer the "prevailing party." *See, e.g., Marassi v. Lau*, 71 Wn. App. 912, 915, 859 P.2d 605 (1993) ("In general, a prevailing party is one who receives an affirmative judgment in

its favor.”), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

G. Commonwealth is Entitled to an Award of Fees and Costs Incurred before the Trial Court and on Appeal.

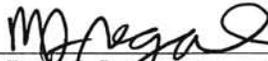
The Settlement Agreement provides that the prevailing party in any action to enforce the Settlement Agreement is entitled to its attorneys’ fees and costs. CP 41 (¶ 5.13). In the event of reversal of the trial court’s order and judgment, Commonwealth is entitled to its attorneys’ fees and costs incurred as a result of defending Soundbuilt’s improper Motions to Enforce before the trial court, as well as its fees and costs incurred in the instant appeal.

VI. CONCLUSION

For the reasons stated above, Commonwealth respectfully requests that the Court reverse the trial court’s order and judgment on review.

RESPECTFULLY SUBMITTED this 2nd day of July, 2012.

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