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NO. 71867-3-I

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

RED LETTER MINISTRIES,

Appellant/Cross-Respondent,

v.

CITY OF NORTH BEND,

Respondent/Cross-Appellant.

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COURT OF APPEALS
DIVISION I
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REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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ORIGINAL

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I. INTRODUCTION

In its Reply Brief, Red Letter Ministries (“RLM”) entirely fails to address the standing argument raised by the City of North Bend (“City” or “North Bend”) in its Brief of Respondent. On this record, no factual or legal dispute exists - RLM did not exist at the time of the claimed oral agreement. It had no standing below, and it has no standing to pursue this appeal.

RLM next claims that the City failed to assign error to the trial court’s findings of fact. This matter was decided on summary judgment below. No findings of fact were entered, and any such findings would be purely superfluous in the required de novo review on appeal of summary judgment.

RLM also claims that the City’s cross-appeal here of the 2013 trial court orders was untimely under RAP 5.2(a). Neither of the 2013 orders constituted a final appealable order under RAP 2.2(a) at the time, and both orders were only properly appealable here.

In this case, no dispute exists regarding the material terms of the claimed verbal agreement between Salli DeBoer and Mayor Hearing. The parties agree on the material terms, so no credibility issues exist. Summary judgment on a claimed oral agreement is proper in such case.

RLM's appeal is moot. The house has been demolished, and RLM sought no damages below. The City agrees that RLM pled a cause of action for breach of contract, but the sole remedy claimed was specific performance. Any new argument seeking a remedy of money damages at this late stage is not properly before this Court.

Finally, RLM also offers a new argument that the City is "attempting to pierce the religious veil" of RLM. RLM has never been registered with the State of Washington as a separate legal entity, or as a charitable organization authorized to solicit donations. RLM is effectively Salli DeBoer's sole proprietorship. RLM is not a separate legal entity.

The trial court's order dismissing all of RLM's claims and granting judgment to the City on its claims should be affirmed. The trial court's order denying the City its attorney fees should be reversed.

II. ARGUMENT IN REPLY

A. RLM Did Not Exist at the Time of the Claimed Oral Agreement. It Had No Standing to Pursue the Lawsuit or This Appeal.

Since RLM did not exist at the time of the claimed verbal agreement between the Mayor and Salli DeBoer on behalf of Network Services/RLPH, RLM had no standing to bring the underlying lawsuit or this appeal. See, Brief of Respondent at 11 - 16. RLM offered no contrary factual evidence or legal argument in its Brief of Appellant or in

its Reply Brief.

RLM has abandoned any argument that it has standing. No alleged error will be considered on appeal unless clearly set forth in the “assignments of error” in appellant’s brief. State v. Tanzymore, 54 Wn.2d 290, 292, 340 P.2d 178 (1959). “An assignment of error not addressed in the appellant’s brief is deemed abandoned.” Zabka v. Bank of Am. Corp., 131 Wn. App. 167, 174, 127 P.3d 722 (2005), published with modifications (Jan. 19, 2006). RLM has not contested, or even addressed, standing in its Brief of Appellant or in its Reply Brief.

B. This Is an Appeal of a Summary Judgment of Dismissal. The Trial Court Did Not Enter Findings of Fact.

In its Reply Brief, RLM contends that there is “no assignment of error alleged by North Bend as to any factual holding in the course of the summary judgment decision, and North Bend has raised no appeal of that decision.” Appellant’s Reply Brief at 7. This matter was decided on summary judgment. Neither the 2013 nor the 2014 orders at issue in this appeal include findings of fact to which the City could have assigned error. CP 830 - 838; CP 839 - 841.

Moreover, even if the trial court had entered findings of fact on summary judgment, such findings are superfluous on appeal. Appellate court review of summary judgment motions is de novo, with this court

engaging in the same inquiry as the trial court. Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn. 2d 168, 177, 125 P.3d 119 (2005). Because the court's review is de novo, findings of fact and conclusions of law are not necessary on summary judgment and if made, are superfluous and will not be considered by the appellate court. Donald v. City of Vancouver, 43 Wn. App. 880, 883, 719 P.2d 966 (1986), citing Duckworth v. Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

C. City Timely Appealed the Lower Court's August 27, 2013 and September 16, 2013 Orders on Summary Judgment and Reconsideration.

RLM claims that the City failed to comply with RAP 5.2(a), rendering the City's cross-appeal of the 2013 orders untimely. Reply Brief at 5. RLM's argument fails to distinguish between a final judgment and an interlocutory order.

Under RAP 2.2(a)(1), a party may only appeal from a "final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs." A court determination constitutes a "final judgment" when it settles all of the issues of the case, even though it may leave the details of its implementation to be resolved later. Rhodes v. D & D Enterprises, Inc., 16 Wn. App. 175, 177-78, 554 P.2d 390 (1976). The denial of a summary judgment motion is not a final order that can be appealed.

Zimny v. Lovric, 59 Wn. App. 737, 739, 801 P.2d 259 (1990); Roth v. Bell, 24 Wn. App. 92, 104, 600 P.2d 602 (1979). Only final judgments are appealable. See RAP 2.2(a). A ruling that is not appealable is not a final judgment. Zimny, 59 Wn. App. at 739.

Under RAP 5.2(a), the 30-day deadline to file a timely appeal begins to run from the date of final judgment. Here, the lower court's 2013 orders granted in part and denied in part the City's motion for summary judgment, and denied a related motion for reconsideration. They were not final judgments, did not resolve all of the issues in the case, and could not have been appealed then. CP 830 - 838. The City did not seek discretionary review under RAP 2.3 at that time, and chose instead to file a timely cross-appeal here. CP 830 - 841.

The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive arguments of the parties. "A notice of appeal must . . . designate the decision or part of decision which the party wants reviewed" RAP 5.3(a). "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(a), (g). When the notice of appeal properly designates the decision or part of the decision that a party wants reviewed, this designation also subjects to potential review any related order that prejudicially affected the

designated decision and was entered before review was accepted. Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd., 177 Wn. 2d 136, 144-45, 298 P.3d 704 (2013). Here, the City properly and timely appealed the 2013 orders, as well as the 2014 order regarding attorney fees.

D. No Material Terms Are in Dispute Regarding the Claimed Verbal Agreement. RLM Then Repudiated the Verbal Agreement by Proposing Material New Terms Regarding Use of the House for Administrative Purposes and by Failing to Perform Its Promise to the City to Provide Family Services in the House.

RLM cites Garbell v. Tall's Travel Shop as its primary authority for the proposition that summary judgment was improper because RLM claimed an oral contract and not a written contract. Reply Brief at 4, 11, citing 17 Wn. App. 352, 563 P.2d 211 (1977); Crown Plaza Corp. v. Synapse Software Syst., 87 Wn. App. 495, 962 P.2d 824 (1997).

In the cases cited by RLM, however, the parties disagreed over material facts, and resolution of the disputes necessarily turned on the credibility of the witnesses. See Garbell, 17 Wn. App. at 355; Crown Plaza, 87 Wn. App. at 501. Here, in stark contrast, the parties completely agree on the material terms of the claimed verbal agreement – sale of the house and grant of ground lease by City, and provision of family services by Network Services/RLPH. CP 46 at ¶¶ 8, 12; CP 364 at ¶ 3.

Nothing prohibits summary judgment on oral contracts when material facts are not in dispute. Hadaller v. Port of Chehalis, 97 Wn. App. 750, 755-58, 986 P.2d 836 (1999). The general rule on summary judgment remains applicable - bare assertions of ultimate facts and conclusions of law are alone insufficient to defeat summary judgment. Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn. App. 846, 851-52, 22 P.3d 804 (2001).

Salli DeBoer testified that the claimed verbal agreement has only three material terms which she accepted – sale of the house, grant of a five year ground lease, and use of the house for a program to serve homeless families. CP 46. The City agrees. CP 364 at ¶ 3. However, in September 2010, months after formation of the undisputed verbal agreement and without having even begun to renovate the house and provide the promised family services, Salli DeBoer for the first time proposed a new term, seeking to use the house “for administrative purposes associated with the Buyer’s non-profit business.” CP 248 at ¶ 4.1; CP 252 at ¶ 6. Again, using RLM’s own undisputed evidence, RLM made this “administrative purposes” proposal due to RLM’s own grant funding obligations with King County, and not due to any agreement (or even discussion) with the City. CP 204 at ¶ 17; CP 258 (second paragraph of text, regarding Sale Agreement) and at CP 259 (first paragraph of text,

regarding Ground Lease).

Network Services declined to perform its sole obligation under the verbal agreement to provide the promised family services at the house, and proposed instead to use the house for “administrative purposes.” Once the City rejected this new term, RLM simply walked away. CP 545 at ¶ 4; CP 366 at ¶¶ 11, 13; CP 382; CP 384.

E. RLM Cannot Claim Damages for the First Time on Appeal. RLM Sought Only Specific Performance Below. Since the House Has Been Demolished, the Court Cannot Grant RLM Its Sole Requested Relief and this Case is Now Moot.

RLM appears to claim that its cause of action for breach of contract similarly constitutes a request that the trial court award the remedy of money damages. Reply Brief at 13.

Such is not the case, and a reading of RLM’s Complaint removes any doubt – RLM did not seek the remedy of money damages for the claimed breach of contract, and instead sought only the remedy of specific performance (“injustice can only be avoided by specific enforcement” of the verbal promise). CP 3 at ¶ 15; see, CP 4 at ¶ 18.

RLM claims that moving of the house constitutes part performance justifying a claim for damages, citing to Powers v. Hastings, 20 Wn. App. 837, 845, 582 P.2d 897 (1978). For that to be the case, though, a plaintiff must actually request damages in its complaint. In Powers, plaintiffs

actually did so, and “obtained a verdict for damages.” Powers, 20 Wn. App at 839. RLM did not do so here and only requested equitable relief. CP 4-5.

RLM further argues that “a positive refusal to perform a contract before performance is due may be regarded as a breach and the injured party can bring an action without delay.” Reply Brief at 14, citing Highlands Plaza, Inc. v. Viking Inv. Corp., 72 Wn.2d 865, 435 P.2d 669 (1967).

Initially, of course, RLM did “bring an action without delay.” That action was dismissed and is now the subject of this appeal, but it under no circumstances includes a claim for money damages. Even so, RLM’s cited authority is distinguishable from the case at bar. Under Salli DeBoer’s own testimony, relocation of the house is completely absent from the material terms of the Mayor’s verbal “express offer” which DeBoer then “immediately accepted.” CP 46 at ¶¶ 8, 12. Relocation of the house cannot constitute part performance of a contract to which that very relocation was not a material term.

Network Services declined to provide the promised family services, and instead proposed a material new term allowing for use of the house for “administrative purposes.” Summary judgment of dismissal was proper in this case.

F. City is Not Trying to “Pierce the Religious Veil” Because RLM is Not Now, and Has Never Been, Registered with the State of Washington as a Separate Legal Entity.

Citing to 26 U.S.C. § 508(a), RLM claims that the City seeks to “pierce [RLM’s claimed] religious veil,” based on an assumption by the City regarding RLM’s tax status. Reply at 8-9.

While the City doubts the legitimacy of RLM as a religious entity, RLM’s status under the Internal Revenue Code is wholly irrelevant to this appeal. RLM’s tax status under the Internal Revenue Code is separate and independent from its status as a recognized legal entity under Washington state law. Ms. DeBoer now claims that she is immune from liability because RLM is the sole plaintiff here, but RLM is nothing more than Salli DeBoer’s sole proprietorship. While RLM calls itself an “unincorporated religious association” (CP 1, 2), no such legal entity exists in Washington - an “unincorporated religious association” is not a legal entity, non-profit or otherwise. See generally, RCW 24.

G. City’s Subsequent Acts and Conduct Indicate It Did Not Intend to Abandon the Alleged Contract.

RLM cites to Berg v. Hudesman, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990), for the proposition that “subsequent acts and conduct of the parties to the contract are admissible to assist in ascertaining their intent.” Respondent’s Brief at 16. The City would agree – assuming that

RLM had standing to sue, its subsequent acts and conduct in failing to renovate the house, failing to provide the promised family services, and proposing to materially change the agreement and use the house for its own “administrative purposes” would surely be probative of its intent to repudiate and breach its agreement.

In this appeal, however, Berg is distinguishable because it involved the interpretation of the terms of a written lease agreement and not an alleged oral agreement. 115 Wn.2d 657, 659-63.¹

The trial court dismissed RLM’s claims regarding written contracts in 2013. CP 664. RLM never appealed that order. CP 822 - 823.

Even if the Court was to consider the subsequent acts and conduct of the parties in order to ascertain their intent, the facts fully support the City’s position. Salli Deboer testified that the claimed verbal agreement has three and only three material terms – sale of the house, provision of a five-year ground lease, and use of the house and lease by Network Services to provide a program for homeless families. CP 46 at ¶ 8. Up until the day that the house was demolished, RLM had taken no steps to renovate the house and provide the promised family services.

¹ This analytic framework for interpreting written contract language has been called the “context rule.” Berg, at 667 (emphasis added). “[T]he reasonableness of the parties’ respective interpretations may also be a factor in interpreting a written contract.” Id. at 668 (emphasis added).

H. City Cannot be Held Liable Under a Theory of Vicarious Liability.

RLM next asserts a theory that North Bend is vicariously liable. Reply Brief at 16. Citing Niece v. Elmview Grp. Home, 131 Wn. 2d 39, 48, 929 P.2d 420, 425-26 (1997), RLM notes that vicarious liability can serve to impose liability on an employer for the torts of an employee who is acting on the employer's behalf. In this case, RLM alleges no tort – only breach of contract. CP 1 - 5. See also, Brief of Respondent/Cross-Appellant at 40 - 46.

III. CONCLUSION

RLM has no standing to pursue this appeal. The house has been demolished, and this appeal is moot.

The City properly and timely appealed the 2013 orders. There were no findings of fact to which the City could have assigned error, and doing so in the context of an appeal of a summary judgment is superfluous in any event. No material terms are in dispute regarding the claimed verbal agreement, and RLM cannot here allege for the first time a claim for damages.

The trial court's order dismissing all of RLM's claims and granting judgment to the City on its claims should be affirmed. The trial court's order denying the City its attorney fees should be reversed.

RESPECTFULLY SUBMITTED this 20 day of February, 2015.

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DECLARATION OF SERVICE

I, Mary Swan, declare and state that:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 20th day of February, 2015, I served a true copy of the foregoing *Reply Brief of Respondent/Cross-Appellant* on the following counsel of record using the method of service indicated below:

<p><i>Attorneys for Appellants/Cross-Respondents:</i></p> <p>Stephen Pidgeon Attorney at Law, P.S. 3002 Colby Avenue, Suite 306 Everett, WA 98201</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid</p> <p><input type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> Overnight Delivery</p> <p><input type="checkbox"/> Facsimile</p> <p><input checked="" type="checkbox"/> E-Mail: stephen.pidgeon@comcast.net</p>
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 STATE OF WASHINGTON
 COUNTY OF SNOHOMISH

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

DATED this 20th day of February, 2015, at Issaquah, Washington.


 Mary Swan