73705-8

Case No. 73705-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

KAREN S. POOLEY,

Appellant,

vs.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, INC., et. al.

Respondents.

BRIEF BY RESPONDENT McCARTHY & HOLTHUS, LLP

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Response Brief
M&H #: WA-14-647563-CV

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STATUTES

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I. INTRODUCTION

Appellant Karen Pooley sued respondent M&H as part of her anti-foreclosure agenda and to harass. Her claims against M&H – joint venture liability and civil conspiracy with the trustee – were meritless from the beginning and she never truly intended to prosecute the claims (she did not brief the elements for her claims in the superior court action, nor does she do so in her appellate brief). The superior court appropriately dismissed M&H from the case and awarded fees and costs under the frivolous lawsuit statute, RCW 4.84.185. This court should affirm both orders.

II. FACTS

M&H is a national law firm with an office in Seattle[1]. Certain M&H partners are also shareholders of co-respondent Quality Loan Service Corp. of Washington ("Quality"), a Washington corporation specializing in non-judicial foreclosures. While M&H and Quality have indices of small commonly-owned companies (e.g. shared office space, movement of employees between the companies, etc.), they are separately managed and operated and do different types of work[2].

The underlying case arises from a non-judicial foreclosure advanced by Quality against Ms. Pooley's property in Seattle. The foreclosure referral to

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[1] CP at 3539-40
[2] CP at 3539-40

Quality came from JPMorgan Chase Bank, N.A, successor-in-interest to the original mortgage lender Washington Mutual[3]. Ms. Pooley, an anti-foreclosure advocate, filed the suit against Quality to enjoin the trustee sale and for damages. As part of her broader anti-foreclosure agenda, and to harass and increase expenses for the owners of Quality, she later added M&H as a party defendant through an amended complaint,[4] and filed a bar complaint against M&H's managing attorney for the Washington office[5]. Her theories of liability against M&H were (1) joint venture with Quality in foreclosing her property, and (2) criminal / civil profiteering[6]. Both theories were patently frivolous from the outset, and M&H was appropriately dismissed from the case on summary judgment,[7] and the bar complaint against the firm's attorney was dismissed, as well.

Following dismissal from the case, M&H timely moved an award of attorney's fees and costs against Ms. Pooley under the frivolous lawsuit statute, RCW 4.84.185[8]. Most of the evidence submitted in opposition was found by Ms. Pooley *after* the sanction motion was filed in an attempt to retroactively show her

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[3] CP at 3577-80; 3584-85
[4] CP at 2482
[5] WSBA ODC file # 15-00774
[6] CP at 2482
[7] CP at 7074
[8] CP at 372

good faith in filing[9], but her new evidence still did not even remotely support a claim against M&H for joint venture or civil conspiracy liability in connection with Quality's foreclosure.

The superior court appropriately granted the sanction motion and entered judgment against Ms. Pooley for M&H's reasonable attorney's fees and costs[10]. For reasons discussed further below, this court should affirm the dismissal of M&H and the sanction award. This case is precisely the type that the frivolous lawsuit statute, RCW 4.84.185, was enacted to deter.

III. ARGUMENT

A. Claim 1 – Joint Venture.

The "joint venture" elements were not briefed by Ms. Pooley in the superior court or in her appellate brief. The elements are as follows:

> A joint adventure arises out of, and must have its origin in, a contract, express or implied, in which the parties thereto agree to enter into an undertaking in the performance of which they have a common purpose and in the objects or purposes of which they have a community of interest, and, further, a contract in which each of the parties has an equal right to a voice in the manner of its performance and an equal right of control over the agencies used in the performance. Thus, we note (1) a contract, (2) a common purpose, (3) a community of interest, (4) equal right to a voice, accompanied by an equal right of control.

Knisely v. Burke Concrete Accessories, 2 Wn. App. 533, 537 (Wash. Ct. App. 1970)

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[9] CP at 7321-7484
[10] CP at 7485

Ms. Pooley's claim that the foreclosure of her property by Quality was in "joint venture" with M&H was meritless, and none of the elements were even remotely close to be satisfied.

First, and most importantly, there was no contract between M&H and Quality to foreclose the property. The fundamental requirement of the "joint venture" is a contract that binds and obligates the parties to the action. *Wines v. Eng'rs Pipeline Co.*, 51 Wn.2d 487, 570 (Wash. 1957); *Korslund v. Troup*, 67 Wn.2d 773 (Wash. 1966) (joint venture failed where there was no binding contract between the parties).

Second, M&H did not share with Quality a "common purpose" or "interest" in foreclosing Plaintiff's home. The referral from Chase to process the foreclosure was to Quality, not M&H. While the common owners may ultimately benefit from the success of each individual company, that does not satisfy the common purpose test and create a joint venture between M&H and Quality to foreclose Ms. Pooley's home.

Third, M&H did not have an "equal right to control" over the foreclosure of the property. Quality was the one hired and appointed by Chase to foreclose, and was the only party with control over the foreclosure. Ms. Pooley failed to produce evidence demonstrating that M&H had an equal right of control over the foreclosure, nor could she.

Finally, M&H and Quality did not share profits and losses in connection with the foreclosure. Again, while the common owners of the companies certainly benefit from each companies' individual success, that is not the test. In order to show a joint venture between Quality and M&H to foreclose the home, Ms. Pooley needed to demonstrate sharing of profits and losses between those companies over the foreclosure, which she did not do, and cannot do.

Curiously, one of the cases cited by Ms. Pooley in response to summary judgment and in support of "joint venture" claim resulted in the court finding the elements were not met. *Knisely v. Burke Concrete Accessories*, 2 Wn. App. 533 (Wash. Ct. App. 1970). In *Knisely*, like the present case, there was no evidence that the parties were splitting profits and losses. *Id.* at 537 ("While the agreement here may in certain aspects resemble a joint venture arrangement, the essential element of shared profits and loses is missing.").

The second "joint venture" case cited by Ms. Pooley in response to summary judgment – *Refrigeration Eng'g Co. v. McKay*, 4 Wn. App. 963 (Wash. Ct. App. 1971) – involved two individuals who contracted with each other to develop a shopping center. *Id.* at 966. The individuals had an equal voice and roles in developing the center, and also had an agreement to share profits. *Id.* When one of the vendors on the project did not get paid, the court found the individuals to be jointly liable to the vendor on a theory of "join venture". All the

elements were satisfied, including "common purpose" and "community of interest", which was completing the center and making it profitable.

There is nothing similar between the facts in *Refrigeration Eng'g Co.* and the present case. M&H and Quality did not contract with each other to advance the foreclosure of Ms. Pooley's property. They were not sharing the trustee's fee. M&H had no "equal voice" or "control" over Quality, or over the advancement of the foreclosure. And M&H had no "common purpose" or "community of interest" in the foreclosure of the property. That the two companies – M&H and Quality – share a degree of common ownership and have indices of commonly owned small companies does make them a "joint venture" under the law. The claim against M&H for "joint venture" liability concerning the foreclosure was completely incompatible with the facts. But again, stating a viable claim was never Ms. Pooley's purpose for bringing M&H into the case, and whether the claim actually coincided with the facts was an afterthought.

B. <u>Claim 2 – Civil Conspiracy.</u>

Nothing in Ms. Pooley's briefing supports a claim for extortion, criminal profiteering, or unlawful debt collection implicating M&H. This was a civil matter involving a foreclosure. The foreclosure was advanced by the Quality, at the direction of Chase, because Ms. Pooley stopped paying her mortgage. Foreclosure is the remedy Ms. Pooley agreed-to when she took out the loan. Her

claim for civil conspiracy implicating M&H was similarly baseless and appropriately sanctioned, as discussed below.

C. Sanction Award Was Appropriate.

RCW 4.84.185 provides for an award of attorney's fees incurred in defending against a frivolous action:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The purpose of the statute is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases. *Suarez v. Newquist*, 70 Wn. App. 827, 832-833 (Wash. Ct. App. 1993).

Ms. Pooley's claims against M&H were frivolous and without reasonable cause. Ms. Pooley included M&H in the lawsuit out of spite, and for the purpose of harassment and increasing the litigation costs for the owners of Quality. As the lengthy record from the case abundantly demonstrates, this lawsuit is not just about Ms. Pooley being made whole for her alleged damages, but also part of her

broader agenda to battle Quality and its owners and employees on every level. M&H was included solely for the latter reason. M&H was not the trustee and did not advance a foreclosure of the property. Ms. Pooley never needed recourse to M&H for any of her relief related to the property, or to be made whole for damages. The reason for Ms. Pooley joined M&H to the lawsuit, and filed the bar complaint against its attorney was to harass and advance her agenda. This case is precisely the type that the frivolous lawsuit statute, RCW 4.84.185, was enacted to deter. The award of fees and costs to M&H was appropriate.

D. Ms. Pooley Mischaracterizes The Evidence Presented to Support Her "Commingling" Allegation.

Ms. Pooley alleges generally that Quality and M&H "commingle," and while this broad allegation is not germane to her specific joint venture and conspiracy claims that were before the court, the evidence she presents is mischaracterized and unpersuasive.

1. Ashley Hennesse.

Ms. Henneseee worked for M&H as an attorney until April of 2012, and she took a job in-house with Quality in May of 2012[11]. The California case cited by Ms. Pooley where Ms. Hennessee is withdrawing as M&H counsel in May of 2012 is consistent with her move to Quality that month[12]. That M&H did not

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[11] CP at 3540
[12] CP at 4756-4759

immediately update its website and remove Ms. Hennessee is not probative of "commingling".

2. Accounting "Inconsistencies"

The testimony from Quality's CR 30(b)(6) deponent that its "accounting" is handled at the same San Diego building where's M&H office is located does not mean that Quality is "operating" out of M&H's office[13]. It is plausible and probable that Quality contracts-out its accounting work (as many companies do) to someone located at that address. Furthermore, that M&H wrote the check for the phone bill at the Poulsbo office shared by the companies before they moved to Seattle is hardly evidence of widespread "commingling" and sharing of profits and losses, or of a "joint venture" to foreclose Ms. Pooley's home.

3. M&H Provides Legal Services to Quality

M&H provides Quality with various legal services, not just litigation support. Employees from each company work closely together[14]. It is not unusual for Quality to consult with M&H concerning a contested foreclosure and hire the firm to defend them in the lawsuit, as they did in this case. The fact that Quality consults with its attorneys on legal issues is not evidence of "commingling" with the law firm, and certainly not grounds to allege the existence of a "joint venture" to foreclose Ms. Pooley's home.

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[13] CP at 4573-74

[14] For example, Andrew Boylan, who is identified in Ms. Pooley's brief as an example of "commingling", is an M&H attorney who advises Quality on compliance matters.

E. M&H Should Be Awarded Its Costs and Fees on Appeal.

Under RAP 18.1(a), parties may recover reasonable attorney's fees and costs on appeal where permitted by applicable law. M&H's right to attorney's fees and costs arises under the frivolous lawsuit statute, RCW 4.84.185. M&H is entitled to its fees and costs in responding to Ms. Pooley's appeal, which arises from a frivolous case.

IV. CONCLUSION

The claims against M&H were frivolous and advanced without reasonable cause and were properly dismissed with an award of costs and fees under the frivolous lawsuit statute, RCW 4.84.185. This court should affirm, and also award M&H its fees and costs on appeal.

Dated: October 31, 2016

MCCARTHY & HOLTHUS, LLP

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CERTIFICATE OF MAILING

I certify that on October 31, 2016, I caused a copy of BRIEF BY RESPONDENT MCCARTHY & HOLTHUS, LLP to be served by legal messenger on the following specified below:

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I certify that on October 31, 2016, I caused a copy of BRIEF BY RESPONDENT MCCARTHY & HOLTHUS, LLP to be served by first class mail and email on the following specified below:

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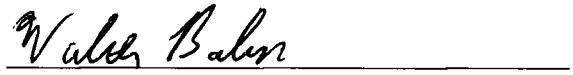
SIGNED this 31 day of October, 2016, at Seattle, Washington.



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