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THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
NO. 68522-8-1

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.,

Respondents,

v.

MARX/OKUBO, LTD., a Washington corporation,

Appellant

REPLY BRIEF OF APPELLANT MARX/OKUBO, LTD.

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I. REPLY TO PLAINTIFFS' STATEMENT OF THE CASE

Most of plaintiffs' Statement of the Case is not pertinent on this appeal. The factual underpinnings of the dispute between plaintiffs and Marx/Okubo are addressed in Appeal No. 68127-3-1. Except to point out a significant inaccuracy, the facts will not be addressed here.

Plaintiffs assert Marx/Okubo contracted with Evans Development to prepare a property report and reserve study required by the Washington Condominium Act. The assertion is not accurate. Marx/ Okubo contracted with Evans Development to prepare a pre-purchase condition assessment for Evans Development; Marx/Okubo authorized Evans Development to use information contained within its condition assessment when Evans Development prepared its own statutorily required disclosure statement. (CP 116-7, 122) Marx/ Okubo prepared its Reserve Study for Evans Development to use in setting its own capital improvement reserves. (CP 118)

II. REPLY TO PLAINTIFFS' ARGUMENTS

A. Marx/Okubo is Entitled to an Award of Prevailing Party Attorney's Fees.

1. Marx/Okubo is entitled to attorney's fees under RCW 4.84.330.

Plaintiffs argue Marx/Okubo is not entitled to an award of attorney's fees because they did not assert a breach of contract claim against Marx/Okubo. The argument has no merit. The decisions

applying RCW §4.84.330 make clear attorney's fees are available on non-contract claims where the contract containing the attorney's fees provision is central to the dispute.

The facts in Deep Water Brewing, LLC v. Fairway Resources, Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009), are analogous to those presented here. In Deep Water, the court held a homeowners association and its president liable in tort for interfering with agreements to preserve a view corridor entered between the plats developer and a neighbor. The trial court awarded attorney's fees against the homeowners association and its president based upon the attorney's fees provision in the prior owner's agreement to preserve the view corridor. The homeowners association and its president argued they were not liable for attorney's fees because they were not parties to the contract and the recovery against them was in tort rather on the contract. The court rejected the argument:

> The court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements. . . .
>
> Here, enforcement of the agreements and the claims that followed their breach is the essence of the . . . tortious interference with contract claim against Mr. Johnson and the Homeowners Association. . . .
>
> We conclude, then, based on the fee provisions set out in the agreements that the court properly awarded fees . . . .

Deep Water, supra, 152 Wn. App. at 279-80. See, also, Brown v. Johnson, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001) ("If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees.").

The essence of the dispute before this Court is enforcement of Marx/Okubo's duties to perform a property assessment and prepare a reserve funding study relating to the Forest Village Apartments. Absent the agreement between Evans Development and Marx/Okubo, Marx/Okubo would have had no obligation to perform any services with respect to the Forest Village Apartments. It is impossible to determine whether or not Marx/Okubo satisfied its duties without referencing the contract, because only the contract defined what tasks Marx/Okubo was obligated to perform. Therefore, Marx/Okubo's contract with Evans Development was central to the dispute and plaintiffs' claims were "on the contract" under RCW 4.84.330.

Plaintiffs' reliance on Boguch v. Landover Corp., 153 Wn. App. 595, 224 P.3d 795 (2009), is misplaced for several reasons. First, to the extent the decision holds that attorney's fees are not recoverable on claims premised upon duties independent from contract duties, the decision is inconsistent with the supreme court's holding in Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 241 P.3d 1256 (2010). In Eastwood the court, citing RCW

4.84.330, awarded attorney's fees to plaintiff against parties to the lease agreement containing an attorney's fee provision and against non-parties to the lease. Id. at 401-2 ("Eastwood seeks attorneys fees. The lease agreement provided that Horse Harbor would pay Eastwood reasonable attorneys' fees if Eastwood were to sue Horse Harbor to enforce her rights. . . . The waste statute also provides for an award of reasonable attorneys fees. RCW 64.12.020. We grant Eastwood's requests. See RAP 18.1; RCW 4.84.330; . . . ."). The plaintiffs in Eastwood were prevailing parties based upon enforcement of independent tort and statutory duties rather than duties arising from the lease. The fact that plaintiff in Eastwood recovered on a basis other than breach of contract did not preclude an award of attorney's fees under RCW 4.84.330. To the extent Boguch holds attorney's fees are not recoverable pursuant to RCW 4.84.330 if plaintiffs' claims sound in tort, it has been overruled by Eastwood.

Second, Boguch is distinguishable on its facts. The case involved a very narrow attorney's fees provision. Attorney's fees were only recoverable "in any action to enforce the terms of the agreement." Id. at 615. Plaintiff in Boguch did not seek to enforce a term of the agreement; rather, he sought to enforce independent duties. Therefore, the attorneys' fees provision was inapplicable by its terms. Marx/Okubo's attorney's fees provision, on the other hand, applies to

any "dispute or disagreement." (CP 768) Boguch is distinguishable on its facts because Marx/Okubo's attorney's fees provision is much broader than the provision in Boguch. Contract language similar to that contained in Marx/Okubo's contract was before this Court in Western Stud Welding, Inc. v. Omark Industries, Inc., 43 Wn. App. 293, 297, 716 P.2d 959 (1986) ("'In the event of a dispute between the parties hereto, . . . the prevailing party shall be entitled to reasonable attorney's fees . . . .'"). The provision in Western Stud Welding was utilized to award attorney's fees on a tort claim. See also Brown v. Johnson, supra, 109 Wn. App. at 59, where attorney's fees were awarded on tort claims under an attorney's fee provision that was triggered when a party "institutes suit."

Marx/Okubo's contract with Evans Development was central to the dispute between plaintiffs and Marx/Okubo. Plaintiffs sought to impose on Marx/Okubo common law and statutory duties to perform with care services Marx/Okubo agreed to perform in its contract with Evans Development. Marx/Okubo's contract established and defined the services Marx/Okubo was to perform. The contract was at the heart of the dispute, even if plaintiffs sought to overlay the contractual duties with common law or statutory duties. On these facts, plaintiffs' claims were "on a contract" as the phrase is used in conjunction with

RCW 4.84.330. Therefore, Marx/Okubo was entitled to an award of attorney's fees.

2. Marx/Okubo is entitled to attorney's fees under the doctrine of equitable estoppel.

Under the doctrine of equitable estoppel plaintiffs cannot assert entitlement to benefits flowing from Marx/Okubo's contract with Evans Development while simultaneously denying less desirable contract provisions apply to them. It is undisputed Marx/Okubo had no obligation to perform services with respect to the Forest Village Apartments other than those it agreed to perform in its contract with Evans Development. It is undisputed plaintiffs argued Marx/Okubo contractually "warranted that it would not be negligent in carrying out the work in its proposal." (CP 908) Plaintiffs claimed entitlement to benefits of Marx/Okubo's contract with Evans Development. Plaintiffs cannot simultaneously avoid the prevailing party attorney's fees burden that contract imposes. Townsend v. Quadrant Corp., 173 Wn.2d 451, 461, 268 P.3d 917 (2012) ("Equitable estoppel 'precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.'").

Plaintiffs argue Townsend is inapplicable because their claims sound in tort not contract. However, in Townsend both tort claims and contract claims of nonsignatory plaintiffs were found to be subject to an arbitration clause because the tort claims arose out of duties

assumed in the contract. See Townsend v. Quadrant, 153 Wn. App. 870, 888, 224 P.3d 818 (2009) ("Although some of the children's claims sound in tort, the source of the duty of care Quadrant owed the Homeowners and their children arises from the sale of the home. The claims relate to the PSA [Purchase and Sale Agreement]."), affirmed, 173 Wn.2d 451 (2012).

Plaintiffs argue Townsend is distinguishable because it dealt with an arbitration clause and arbitration is favored in Washington. However, by imposing a duty to arbitrate on non-signatories to an arbitration clause, the Townsend court abrogated those parties' rights to a jury trial. Washington courts narrowly construe any waiver of the right to a jury trial. Wilson v. Horsley, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) ("The Washington State Constitution unequivocally guarantees that '[t]he right of trial by jury shall remain inviolate' . . . . [A]ny waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right."). The fact that Townsend dealt with an arbitration clause rather than an attorney's fees clause does not diminish its precedential value here.

Plaintiffs asserted tort claims against Marx/Okubo premised upon duties arising out of Marx/Okubo's contract with Evans Development. Under Townsend they are equitably estopped from avoiding the attorney's fees provision contained in that contract.

Finally, plaintiffs' attempt to distinguish Townsend because they asserted claims against defendants other than Marx/Okubo. The argument makes no sense. All 57 plaintiffs asserted identical claims against Marx/Okubo premised upon alleged deficiencies in services Marx/Okubo performed under its contract with Evans Development. The fact that plaintiffs also asserted claims against third parties is immaterial.

3. The language of Marx/Okubo's contract does not preclude an award of fees pursuant to RCW 4.84.330.

Plaintiffs argue the attorney's fee provision contained in Marx/Okubo's contract cannot be applied to them because it refers to "Marx/Okubo" and "client," not to plaintiffs. Plaintiffs' argument misses the purpose underlying RCW 4.84.330. The statute specifically requires courts to ignore the parties named in the attorney's fees clause: "[T]he prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees . . . ." (Emphasis added.)

Plaintiffs' argument that attorney's fees are only recoverable in arbitration proceedings is premised upon an incomplete quotation of the contract language. The attorney's fees clause states: "The substantially prevailing party in any arbitration, or other final binding dispute proceeding upon which the parties may agree, shall be entitled to recover . . . reasonable attorney fees." (CP 131. Emphasis

added.) The intent of the provision is clear: attorney's fees are recoverable in any binding dispute resolution proceeding.

Finally, plaintiffs' argument that RCW §4.84.330 is inapplicable because Marx/Okubo's contract is governed by Colorado law fails because RCW §4.84.330 is a procedural statute not a substantive statute. Courts apply their own procedural law even if the law of another state governs the merits of the case. See 15 WASH. PRAC. CIVIL PROCEDURE §54:3 (2011). See also RESTATEMENT (SECOND) CONFLICTS OF LAWS §122 (1971) ("[A] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."); and Smith v. American Mail Line Ltd., 58 Wn.2d 361 (1961). Section 4.84.330 is contained in Title 4 of the Washington Code, which is entitled "Civil Procedure." It is a subpart of Chapter 4.84 of Title 4, which is entitled "Costs." The statute provides for an award of attorney's fees as an element of costs. Clearly, the statute is procedural. Therefore, RCW §4.84.330 is applicable, regardless of the choice of law provision.

Based upon the authority cited above, Marx/Okubo is entitled to an award of attorney's fees under both RCW 4.84.330 and the doctrine of equitable estoppel. Therefore, the trial court's order denying Marx/Okubo's attorney's fees request should be reversed.

B. CR 11 Sanctions Should Have Been Imposed on Those Plaintiffs Who Knowingly Pursued a Negligent Misrepresentation Claim That Was Factually Unsupportable.

Plaintiffs' opposition misses the point of Marx/Okubo's request for CR 11 sanctions. Plaintiffs' Second Amended Complaint asserted "Misrepresentation Claims Against Okubo" premised upon Marx/ Okubo's property condition assessment and reserve study. (CP 12) Plaintiffs alleged Marx/Okubo "failed to properly investigate the conditions at the Project, and disclose the severe defects and deficiencies at the Project" and "Okubo knew or should have known the amounts identified in its reserve study to replace the siding and other components were insufficient." (CP 12-13) To establish a misrepresentation claim plaintiffs were required to show they relied on a false statement of existing fact made by Marx/Okubo. Schaaf v. Highland, 127 Wn.2d 17, 30-1, 896 P.2d 665 (1995). Twenty plaintiffs (Carter, Crettol, Rockey, Winkler, Dannenberg, Berry, Jones, Gresette, Peterson, Octave, Harrison, Trujillo, Fidler, Perry, Fuller, Berven, Miller, Donaldson, White and Fassler) testified by deposition or in discovery responses they did not review or rely upon the Property Condition Assessment and/or the Reserve Study. After their testimony, these plaintiffs filed a Third Amended Complaint asserting misrepresentation claims against Marx/Okubo. Because they had already admitted they did not directly rely on representations from Marx/Okubo, these plaintiffs knew they could not establish an

essential element of their misrepresentation claims against Marx/ Okubo when they filed their Third Amended Complaint. These plaintiffs should not have reasserted the meritless claims.

The only communications by Marx/Okubo pertinent to plaintiffs' negligent misrepresentation claims were contained in its Property Condition Assessment and Reserve Study. To support their claims against Marx/Okubo, each plaintiff was required to demonstrate he or she directly relied upon false statements made by Marx/Okubo in one of the two documents; reliance on the alleged "effects" of Marx/ Okubo's work product cannot support a negligent misrepresentation claim. See Schaaf, supra, 127 Wn.2d at 30-1 ("Even more compelling evidence that Schaaf did not rely on the appraiser's report is his admission . . . he did not even see the appraisal report until 1991, more than a year after he bought the house . . . . Therefore he could not possibly have directly relied on the report at the time of purchase."). Twenty plaintiffs testified in responses to discovery requests or deposition questions they had not read one or both of the reports prior to purchasing their unit, yet they asserted claims premised upon deficiencies in both reports. As in Schaaf, these 20 plaintiffs "could not possibly have directly relied on the report at the time of purchase." Schaaf, supra, 127 Wn.2d at 30-1. These plaintiffs

asserted clearly meritless claims in their Third Amended Complaint, and CR 11 sanctions are appropriate.

C. Sanctions Should Be Imposed Under CR 26(g) on Those Plaintiffs Who Provided False Responses to Written Discovery Requests.

Marx/Okubo sought to determine the validity of plaintiffs' negligent misrepresentation claims through written discovery requests. Essential elements of the claims included false statements of existing fact made by Marx/Okubo, which plaintiffs relied upon to their detriment. Nine plaintiffs (Fuller, Crettol, Miller, Jones, Donaldson, White, Fidler, Perry and Fassler) falsely asserted in responses to Marx/Okubo's written discovery requests they had relied upon Marx/Okubo's Property Condition Assessment prior to purchasing their units. These plaintiffs admitted in deposition testimony their written testimony was not accurate. Under CR 26(g) discovery sanctions should have been imposed on these plaintiffs.

Plaintiffs' argument that Marx/Okubo's questions were confusing because of a perceived difference between the date of "purchase" and the date of "closing" is meritless. The interrogatory and deposition testimony (quoted at length in Marx/Okubo's opening brief) unambiguously demonstrates these plaintiffs testified in responses to discovery requests they read and relied upon Marx/Okubo's report.

The same plaintiffs' deposition testimony establishes the discovery responses were false.

Plaintiffs' references to "findings" of the trial court are not supported by the record. Plaintiffs state the trial court "noted many if not all the responses were due to Okubo's deposition strategy." Brief of Respondent, p.21. Plaintiffs also state "the trial court properly determined Respondents' testimony could not be categorized as 'false' . . . ." Id. at p.22. And, plaintiffs represent to this Court the trial court found "the discrepancy between answers to interrogatories and answers in deposition, if any, was hardly grounds to accuse Respondents of giving false testimony." Id. at 23. These statements are inaccurate. The trial court simply denied Marx/Okubo's motion; the court gave no indication of why the motion was denied. (CP 878)

Plaintiffs suggest a change in testimony such as that at issue here "happens all the time; it is just that counsel is generally very cautious to seek terms and fees for it." Brief of Respondent, p.23. This is not a case where a single plaintiff made an inadvertent misstatement in a discovery response. Here, nine plaintiffs falsely testified to the existence of the exact same essential element of their negligent misrepresentation claims. Neither counsel nor the judiciary should turn a blind eye to such a pattern of misconduct. Our judicial system "assumes that litigants, lawyers, and witnesses have but one

common goal – the ascertainment of truth." Matter of Stroh, 97 Wn.2d 289, 295, 644 P.2d 1161 (1982). False discovery responses thwart the primary goal of our system. The conduct should not be tolerated, even when sought to be justified by stress, emotion or confusion. CR 26(g) sanctions should have been imposed on nine plaintiffs.

III. CONCLUSION

Marx/Okubo is entitled to an award of attorney's fees pursuant to RCW 4.84.330 and the doctrine of equitable estoppel. Sanctions should have been imposed on plaintiffs who knowingly asserted factually unsupportable misrepresentation claims against Marx/ Okubo. Sanctions should also be imposed on plaintiffs who provided false responses to discovery requests. The trial court's order denying Marx/Okubo's motion for attorney's fees and sanctions should be reversed, and the matter should be remanded to the trial court for determination of an appropriate attorney's fee award and sanctions.

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DATED this 31st day of July, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I served in the manner noted below, a true and correct copy of the foregoing document on the following:

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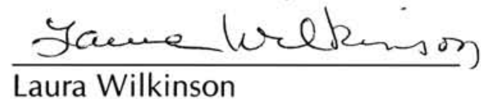
DATED this 31st day of July, 2012, at Seattle, Washington.



Laura Wilkinson