No. 89612-7

THE SUPREME COURT OF THE STATE OF WASHINGTON

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES

Appellant,

v.

COLLIERS INTERNATIONAL REALTY ADVISORS (USA), INC., a California corporation and ARVIN VANDERVEEN and JANE DOE VANDERVEEN, and their marital community,

Respondents.

and

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES

Appellant,

v.

CITY OF SEATAC, a municipal corporation,

Respondents.

CITY OF SEATAC'S RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The City of SeaTac files this Response in Opposition to Petition for Review. The City was a defendant in Superior Court and a Respondent in the Court of Appeals.

II. INTRODUCTION

The issues raised in this petition are inadequate to reverse the Court of Appeals decision. A claim for tortious interference with business expectancy requires proof of each of five elements. The Court of Appeals decision affirmed the trial court's ruling that Petitioner could prove none of the elements. Nonetheless, Petitioner has challenged the decision with respect to only some of those elements. The Petitioner's failure to challenge the decision as to the other elements leaves the ultimate result unchanged, making the petition futile.

III. STATEMENT OF FACTS

This case arises out of a real estate listing agreement for commercial property located in the City of SeaTac. The Property was the sole asset of K&S. CP 436. K&S was owned by Mr. Kingen and Mr. Switzer.

Starting in approximately 2006, the Property had been listed for sale by Linc Properties ("Linc") and its owner, broker Brian Leibsohn. CP 457. Early on, the asking price was as much as $28,500,000. CP 461.

In 2008, K&S and Linc executed another listing agreement ("2008 Listing"). CP 464-67. The 2008 Listing set an asking price of $24,500,000 and provided for a commission to Linc of 4% of the sales price, up to a maximum of $490,000.

The Property was burdened by several debts secured by deeds of trust. By the end of 2009, in addition to default amounts on the debts, there were past due property taxes and mechanics liens burdening the Property. Much of the debt was secured by personal guarantees signed by Kingen and Switzer. The following chart shows the principal amounts of the obligations on the Property, the known default amounts and the eventual payoff amounts. The chart is derived from the Final Settlement Statement (CP 530-31), the foreclosure pleadings (CP 478), and the Avatar Loan Purchase Agreement (CP 555-56, 558).

Lender/Obligation	Principal Amount	Principal Plus Default Amounts and Fees	Eventual Payoff
Avatar	6,500,000	7,434,837.48	7,150,000
Centrum	4,500,000	7,840,643.72	4,000,000
Velocity	560,000	560,000 plus uncertain	100,000
Kirby	560,000	560,000 plus uncertain	100,000
Back Taxes	562,623.55	562,623.55	562,623.55
Mechanics Liens	26,021.71	26,021.71	26,021.71
Total:	12,708,645.26	16,984,126.46 plus uncertain	11,938,645.26

By May 2009, K&S was in default on its debt obligations and a foreclosure proceeding was started against the Property by Centrum Financial Services, Inc. ("Centrum") one of the lenders on the Property. CP 469-82. On approximately May 4, 2008, the City was served with a complaint in the foreclosure proceedings. *Id.* The City was named as a party in the foreclosure because the City had a code enforcement lien on the Property and the City's interest would be subject to foreclosure in the proceeding. *Id.* At that point, the City began working with its real estate advisors, Defendant Colliers International Reality Advisors Inc. ("Colliers") and one of Colliers' brokers, Defendant Arvin Vander Veen ("Vander Veen") to explore purchasing the interests of the lien holders and then acquiring the Property through a deed in lieu of foreclosure. In pursuit of this possibility, Vander Veen contacted the lenders.

After the foreclosure proceedings started, Linc prepared a new listing agreement, and sent it to K&S on August 18, 2009. CP 484-87. Linc's August 18 proposal would have changed the listing price on the Property to $14.5 million and would have extended Linc's listing to November 1, 2010. The August 18 proposal made no change in the commission structure. K&S did not accept the August 18 proposal and did not make a counter-proposal for several weeks. CP 447-48.

On September 28, 2009, K&S, Linc, and Centrum held meetings where K&S disclosed to Linc a proposal by Vander Veen through which Vander Veen would purchase the notes secured by the Property and then obtain a deed in lieu of foreclosure on behalf of an undisclosed principal. CP 429, 436-41.

On October 2, 2009, K&S made a counter-proposal ("October 2 Counter-Proposal") to Linc regarding Linc's August 18 proposal to change the listing agreement. CP 489-92. The October 2 Counter-Proposal extended the listing to November 1, 2010, and changed the commission structure for Linc so as to exclude the potential Vander Veen transaction. With respect to the commission, K&S added a hand-written exclusion clause ("Commission Exclusion") reading as follows:

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.

CP 490. At the time, Leibsohn believed the Commission Exclusion had been "crafted" by Vander Veen and was certain that the change in the fee structure had been prompted by Vander Veen's proposed transaction. CP 428-29, 435. Switzer told Leibsohn the Commission Exclusion was specifically intended to eliminate any commission on the proposed Vander Veen transaction.

> Attached is your signed fee agreement. I wrote in a fee exclusion for the proposed deed in lieu of transaction proposed through Tom Hazelrigg and Arvin Vander Veen.

CP 494. According to Leibsohn, Switzer was not only an owner of K&S, but also a partner with Tom Hazelrigg in another lender, Centurion Financial Group, LLC. CP 500. Switzer thus acted in several different capacities regarding the Property. Switzer went on to explain the rationale for the exclusion.

> This in our opinion is not a sale but a loss of the property. We have hung in there with you as our broker for over 2 years. We hope that you can pull the rabbit out of the hat and sell the property as a whole and get us out clean. Short of a sale by you, we will either lose the property to our lenders or lose it to our new note holders in exchange for the deed. We lose and are in a serious negative position unless you can come through. We would gladly pay you a fee for selling the property. We will not pay a fee [to] give up our property to our lenders, no matter who they may be.

CP 494 (bracketed language added).

Linc never had further communications with K&S regarding the Commission Exclusion. CP 430-31, 450-51, 456. However, Linc did communicate directly with Vander Veen by email on October 2, alleging the proposed transaction amounted to K&S and Vander Veen "going around" Linc without paying it a commission. CP 507.

Leibsohn did not add his initials to the October 2 Counter-Proposal immediately. CP 432-34, 455-56. He did not execute the

October 2 Counter-Proposal until November 23, 2009, at which point, he back-dated his initialing of the changes to October 2, 2009. *Id.* Nonetheless, Linc performed according to the agreement by sending out marketing materials advertising the newly-lowered price. CP 1449-50.

Before executing the October 2 Counter-Proposal, Leibsohn submitted a complaint to the Commercial Brokers Association ("CBA"), dated October 13, 2009, in which he alleged that Vander Veen had contacted the lenders with the intent "to purchase a Deed in Lieu of Foreclosure." CP 509-10. Notwithstanding his allegations, Leibsohn then executed the October 2 Counter-Proposal and eventually sent it to CBA as a supplement to his complaint. CP 442, 448-49.

By December 31, 2009 the Vander Veen deed-in-lieu transaction had proceeded to closing. Centrum and K&S signed a "Deed in Lieu of Foreclosure Agreement" on approximately December 24, 2009 through which K&S agreed to transfer the Property to Centrum or its assigns in exchange for release of the loans. The deal also required the release of Kingen and Switzer from most, but not all, of their personal guarantees. CP 512-28. The City received title to the Property through a deed in lieu of foreclosure executed by K&S. CP 537-40. K&S received no proceeds from the transaction. CP 530-31

Leibsohn asked K&S for a commission but was told that none was due because the transaction was a deed in lieu of foreclosure. CP 432, 452-54. K&S gave Linc a detailed explanation as to why no commission was due. CP 1147-48. The loss of its sole asset made K&S insolvent. CP 443.

On approximately March 1, 2011, Linc sued the City of SeaTac alleging a single cause of action for tortious interference with business expectancy. The case was eventually consolidated with Linc's previously filed lawsuit against Colliers, Vander Veen and others.

Defendants each brought motions for summary judgment on all claims, and Linc brought a motion for partial summary judgment to have the transaction declared a "sale," as opposed to a "deed in lieu of foreclosure." The Superior Court issued three orders on the motions. Two of the orders granted Defendants' motions without elaboration. CP 1660-64. The third denied Linc's motion, finding the transaction was a deed in lieu of foreclosure. CP 1655-57. The City had pointed out that jurisdiction over excise tax disputes resided exclusively with the Thurston County Superior Court. CP 1523. Consequently, in the order on Linc's motion, the Superior Court stated: "However, the court's decision takes no position on whether the transaction could be

interpreted by the Department of Revenue as a "sale" for purposes of collecting excise taxes under RCW 84.45.010." CP 1657.

The Court of Appeals affirmed the Superior Court ruling, holding that Linc was unable to prove any of the elements of tortious interference. Court of Appeals Decision ("Decision"), pp. 40-47.

IV. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. Linc cannot prove the elements of tortious interference.

1. Elements of tortious interference

A plaintiff must prove five elements in order to establish a prima facie case of intentional interference with contractual relations: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the contractual relationship on the part of the defendant; (3) intentional interference inducing or causing a breach or termination of the contractual relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) resulting damage to the party whose contractual relationship has been disrupted. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn.App. 203, 242 P.3d 1, (2010), *review denied*, 171 Wn.2d 1014, 249 P.3d 1029 (2011) (trial court properly dismissed claim when plaintiff failed to provide sufficient facts to prove defendant had improper motive); *Roger Crane &*

Associates, Inc. v. Felice, 74 Wn.App. 769, 875 P.2d 705 (1994) (affirming summary judgment – homeowner not liable to selling broker for loss of sales commission when relationship with new agent was established in good faith); *Calbom v. Knudtzon*, 65 Wn.2d 157, 162-63 (1964).

If the Plaintiff establishes these elements, the Defendant is entitled to justify the interference or show its actions were privileged. *Calbom*, 65 Wn.2d at 163; *Sintra v. Seattle*, 119 Wn.2d 1, 28 (1992). The privileges or justifications that a defendant can assert successfully are varied. *Plumbers and Steam Fitters Local 598 v. WPPSS*, 44 Wn.App. 906, 921 (1986) (WPPSS had a right both at common law and by statute to protect its own property and thus its interference was justified as an "absolute right equal or superior to the right which was invaded"); *Topline Equipment, Inc. v. Stan Witty Land, Inc.*, 31 Wn.App. 86, 93 (1982) (interference is justified as a matter of law if it involves the exercise of an absolute or superior right).

2. Linc cannot show a valid business expectancy or the City's knowledge of one.

The following undisputed facts made it impossible for Linc to validly expect a commission.

1. Given the foreclosure lawsuit and the heavy debt on the Property, neither K&S nor Linc had any expectation of controlling the disposition of the Property. As K&S stated, "we will either lose the property to our lenders or lose it to our new note holders." CP 494.

2. Linc had no agreements with the lenders on the Property, and had no expectation of controlling their actions.

3. Given the foreclosure lawsuit, the relevant subject of any transaction was the foreclosing loan, a type of "chattel paper." Linc was not in the business of brokering chattel paper and had no expectation that the customs and practices of real property brokerage would apply to chattel paper markets, nor did it expect that its listing agreement covered chattel paper. To address the distinction between real property and chattel paper, the City and Colliers needed to execute an agreement that specifically addressed chattel paper. CP 580-81.

4. After trying for several years, Linc still had not found a buyer and had no valid expectation that one would materialize to pay off the Property's debts in full before the foreclosure lawsuit was completed.

5. The Property was the sole asset of K&S, deeply burdened by debts. K&S had informed Linc that it needed a sale price of at least $14,500,000 for it to be able to pay Linc a commission. CP 1574-76. Linc had no valid expectation of receiving a commission at a lower price.

6. The Property was the sole asset of K&S. Linc had no expectation that it would receive a commission if K&S lost the Property through foreclosure or deed in lieu because K&S then would be insolvent.

7. Parties to a foreclosure action have a right to speak to each other. Linc had no valid expectation that it could control communications between the City, K&S, the lenders and the other lien holders.

8. The law does not recognize an agreement to agree. *Keystone Land and Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176 (2004). Until K&S and Linc reached a final meeting of the minds, Linc had no valid expectation of a future listing agreement. Consequently, Linc cannot argue that it would have obtained an extended listing agreement on the same terms as the expiring agreement. The foreclosure lawsuit changed everything, requiring K&S to take the position that "we will not pay a fee [to] give up our property to our lenders, no matter who they may be." CP 494.

9. The City had possession of the foreclosure lawsuit pleadings and materials, knowledge of the debt burdens on the Property, and knowledge of the greatly reduced market value of the Property, all of which showed that a sale of the Property was extremely unlikely. Consequently, the information possessed by the City gave it knowledge of the absence of any legitimate expectation that Linc would find a buyer and earn a commission.

10. Linc alleges the City and/or its agent Vander Veen, had possession of the October 2 Counter-Proposal executed by Linc. CP 394. Linc thus alleges that the City had knowledge not of Linc's right to a commission on the deed in lieu transaction, but instead had knowledge of Linc's contractual agreement to abandon any claim to such a commission. In short, the City was aware no valid expectancy existed.

The Court of Appeals held Linc had shown no basis for expecting its 2009 listing would continue on the same terms as the 2008 listing, recognizing that the foreclosure action had fundamentally changed the relationship among the owner, the broker and the lenders. "Leibsohn had no reasonable expectation that a client in foreclosure would agree to terms potentially requiring a commission for the logical consequences of the foreclosure." Decision, p. 45. Linc's petition does not challenge this ruling or provide any basis for doing so.

3. Linc cannot show an improper purpose or improper means.

For multiple reasons, there is nothing improper about the City attempting to purchase the loans on the Property so that it can step into the shoes of the foreclosing lenders. There are two overriding facts here. First, the debts on the Property were much greater than any purchase price that could be obtained. Therefore, the lenders controlled the fate of the

property, and it was likely to end up in the hands of the owner of one of the foreclosing loans. Second, the owners of K&S were able to retire some substantial debts on the Property and extricate themselves from the huge liabilities created by their personal guarantees of the largest loans. Despite years of trying, Linc was unable to produce an offer that similarly benefitted the owners – the market simply did not exist. Given this situation, there is nothing improper about an investor obtaining the Property by purchasing the foreclosing loans.

The loans in this case were the property of the various lenders, and Linc had no listing agreement with the lenders. Linc's listing agreement was with K&S. The fact that Switzer was both a part-owner of K&S and a partner of one of the lenders, Tom Hazelrigg (CP 1109), did not bar potential investors from talking with Hazelrigg and Switzer about the loans. The City engaged Colliers to purchase the chattel paper, directly paid Colliers a fee for its services, and specifically recognized in its agreement with Colliers that Linc had no commission agreement covering the chattel paper. CP 580-81. Colliers likewise acted properly when it paid a lender, Hazelrigg, a fee for arranging the payoff of millions of dollars of debt. There is nothing unusual or improper about the loans changing hands during the foreclosure process. The City was a party to the foreclosure lawsuit, and nothing prevents the City from talking to the lenders who

were involved in the foreclosure, or from buying out their interests. Consequently, the Court of Appeals agreed the City was well within the exercise of its legitimate public and economic interests when it sought to step into the shoes of the foreclosing lenders. Decision, pp. 45-46.

Linc challenges the Decision on this point only tangentially, alleging Colliers acted improperly by communicating with Switzer. Petition, p. 14. However, Linc offers no rebuttal to the Court of Appeals' specific ruling on this point.

> SeaTac was a party to the foreclosure and Leibsohn cites no law or rule preventing SeaTac from talking to the lenders or buying their interests. He also cites no rule preventing SeaTac from pursuing a financially advantageous transaction given that the property was in foreclosure. Leibsohn fails to establish a material issue of fact on this issue.

Decision, p. 46. Linc's failure to rebut this finding is fatal to its petition.

4. Linc has no proximately caused damages.

Damages which are remote and speculative cannot be recovered. *Larson v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677 (1964). Damages cannot be based on speculation or conjecture. *Topline Equip, Inc. v. Stan Witty Land, Inc.*, 31 Wn.App 86, 94, 639 P.2d 825 (1982). A plaintiff "must show that future opportunities and profits are a reasonable expectation and not based merely on wishful thinking." *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800,

805, 699 P.2d 217 (1985). Where it is highly speculative as to whether cause in fact exists between the claimed misconduct and the alleged damages, it follows that proximate cause has not been established. *Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn.App. 610, 622, 789 P.2d 792 (1990).

Under any scenario proposed by Linc, its damage claim is extremely speculative. To the extent Linc asserts it would have earned a commission on a regular sale of the Property to someone other than the City, Linc cannot identify the buyer, the price, or the timing of the transaction, and is particularly unable to show that the transaction would have closed prior to the foreclosure. To the extent Linc claims it could have gotten a commission from the City's deed in lieu transaction, Linc cannot identify the source of the money. As a single asset entity, K&S was insolvent after the deed in lieu. As for the City, even if it had put more money into the transaction, which it refused to do, it would all have been absorbed by the millions of dollars in unpaid debts and penalties that remained. Linc's only other possible source for a commission would then be the lenders themselves, but Linc had no agreement with them and can offer no evidence of their willingness to pay Linc $490,000 while incurring huge losses. K&S explained all this to Linc in emails prior to the transaction. CP 494, 1147-48.

The Court of Appeals specifically found Linc had offered no proof of damages.

> ...K&S was insolvent after the transaction. Leibsohn had no agreement with SeaTac or the lenders regarding a commission and presents no evidence of their willingness to pay him while incurring large losses. Leibsohn's claimed damages are speculative.

Decision, p. 47. Linc never even mentions this ruling, much less does it offer any rebuttal. Obviously, the failure to offer any proof of damages dooms Linc's tortious interference claim regardless of the status of the other elements of the cause of action.

B. Linc accepted the Commission Exclusion.

Linc's petition focuses on K&S proposing the Commission Exclusion, but never mentions the most prominent fact in this case – that Linc accepted the Commission Exclusion to the listing agreement in exactly the form set forth in the October 2 Counter-Proposal, signing the agreement and sending it to the CBA. CP 442, 448-49.

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.

CP 490. The new agreement created a valuable opportunity for Linc to list the Property at a drastically reduced price of $14,500,000, a price that still would generate some return to K&S, allowing it to pay Linc a

commission. Linc decided that, even with the looming foreclosure action, the opportunity to market the Property at a lower price was adequate consideration for waiving whatever claim there was to a commission on the possible Vander Veen deal.

The Court of Appeals expressly held Linc was bound by its acceptance of the Commission Exclusion. Decision, p. 42. While the Court properly couched its analysis in terms of the new agreement superseding the old, its analysis also endorses the waiver and estoppel arguments advanced by the City.

Waiver is the voluntary relinquishment of a known right. *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn.App. 899, 909, 247 P.3d 790 (2011). Equitable estoppel prevents a party from changing its position after others have acted in reliance on that position. *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).

Linc sat on the October 2 Counter-Proposal for more than seven weeks before signing it on November 23, 2009. By that date Linc believed the exclusion had been drafted by Vander Veen and specifically exempted the Vander Veen proposal from the commission agreement. Linc also had already lodged a complaint against Vander Veen with the CBA. Consequently, Linc was fully aware it was relinquishing a claim to a

commission on the Vander Veen proposal when it signed the October 2 Counter-Proposal. This is a classic waiver.

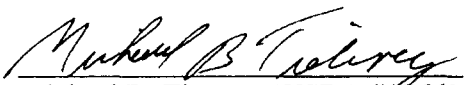
Estoppel exists because Linc sent the executed October 2 Counter-Proposal to CBA, knowing CBA would provide it to Vander Veen along with the other materials related to Linc's CBA complaint. Linc alleges Vander Veen told the City about the October 2 Counter-Proposal. CP 394. The plain language of the Commission Exclusion tells any reader that Linc has no claim to a commission on the Vander Veen transaction. Allowing Linc to change its position and later sue the City for a commission is precisely the sort of about-face that the doctrine of estoppel prevents.

V. CONCLUSION

Linc's petition leaves unchallenged several sufficient grounds for the Court of Appeals' Decision. This Court should thus deny the futile petition.

Dated this 27th day of December, 2013.

TIERNEY & BLAKNEY, PC

By: 

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Leibsohn Property Advisors Inc. v. Colliers International Realty Advisors, et. al.
Supreme Court No. 89612-7
Court of Appeals No. 69445-6-I

Enclosed please find Respondent City of SeaTac's Response to Appellant's Petition for Review and a Declaration of Service.

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