

No. 696122
COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Alex Ravikovich, Appellant

v.

V-SQUARED, LLC, Respondent

REPLY BRIEF OF APPELLANT RAVIKOVICH

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COURT OF APPEALS
STATE OF WASHINGTON
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Ravikovich's Reply Brief

Respondent V-Squared, LLC, in its brief tortures the facts so badly that correcting each misstatement and material omission would be a herculean task. This is evident from V-Squared counsel's efforts to persuade this Court to "extract" some additional facts and legal theories, so as to defeat Ravikovich's CPA claim. Such attempt reflects less than noble intentions on the part of the counsel for V-Squared. Appellant Ravikovich lacks the space necessary to completely correct the record and will instead concentrate on those areas where the respondent most twists the facts in service of its argument.

a. Collateral Estoppel Was *NOT* Properly Applied by the Trial Court

When V-Squared commenced legal action, it claimed a lien foreclosure and breach of contract against Ravikovich. [Respondent's Brief p. 5]. At the time of arbitration, the arbitrator did not consider any issues with relation to Ravikovich's present CPA claim. This is simply because the V-Squared's pleadings established its legal theory to recover damages against Ravikovich. "[I]t is hornbook law that a party cannot recover for a cause of action not pleaded."¹ "Questions which merely lurk in the record, but are neither brought to a court's attention nor ruled upon,

¹ *Citibank S.D. v. Miller*, 222 S.W.3d 318, 322 (2008).

are not considered to have been decided.”² Here, the arbitrator’s introductory paragraph specifically reflects the issues submitted for resolution into arbitration between Ravikovich and V-Squared:

“The case involves a dispute between the Claimant, a home builder, V-Squared, LLC (“V-Squared”), the president of which is Vadim Tsemekhmant, and the property Owner, Alexander Ravikovich (“Mr. Ravikovich”), the Cross-claimant, over amounts allegedly due the parties for construction of a house for Mr. Ravikovich. *Both entitlement and quantum are to be decided.*” (Emphasis added). (CP 13).

Hence, the arbitrator’s ruling would be directly related to the claims asserted by V-Squared and only on the theory delineated in V-Squared pleadings. Naturally, arbitrator did not make any findings with relation to Ravikovich’s present CPA claim and any related issues to such. All V-Squared counsel’s efforts to “extract” the finding in the arbitrator’s award with regards to Ravikovich’s CPA issues are absolutely not persuasive.

The issues addressed in arbitration were clearly with relation to V-Squared’s claims and Ravikovich’s defenses and the arbitrator made very clear record of those. Thus, the arbitrator specifically focuses his

² *Berschauer/Phillips Construction Co., v. Seattle School Dist. No. 1*, 124 Wash.2d 816, 824, 881 P.2d 986 (1994).

discussion on V-Squared's registration issue per RCW 18.27.080 (CP 14-15); the elevation problem and the change orders (CP 16); change order process (CP 20); excessive lien (CP 23); and quantum (CP 24). There is no record or mentioning of Ravikovich's issues with relation to his present CPA claim against V-Squared.

What is more the record clearly shows that the issue of removal of the structure came into existence only after the arbitration was concluded when Mr. Long commenced legal proceedings against Ravikovich. (CP 100-103). As a matter of fact, at the time of arbitration there was no mentioning that Mr. Long intended any legal action. Mr. Long was not a party to arbitration between Ravikovich and V-Squared. Mr. Long's limited appearance at arbitration was only related to his testimony as a witness. For this reason it was factually impossible for Ravikovich to know in advance as to what particular course of action Mr. Long was planning to take. (CP 100-103). Ravikovich was very specific in his declaration when he testified that Mr. Long commenced legal action only after the arbitration was concluded. In his lawsuit against Ravikovich, Mr. Longs demanded that Ravikovich demolish the whole structure, not only the driveway (CP 100-103). Hence, the set of facts giving rise to Ravikovich's present CPA claim against V-Squared came into existence only *after* Mr. Long commenced his legal action against Ravikovich. Such

facts did not exist at the time of arbitration between Ravikovich and V-Squared.

b. The Issues are NOT Identical.

Respondent cites *Dunlap v. Wild*, 22 Wash.App. 583, 590-91, 591 P.2d 834 (1979). However, the Court in *Dunlap* noted that: “Clearly, this issue was resolved by the arbiter, as the portion of his opinion quoted above shows.” Not in this case. There is nothing in the arbitrator’s brief that would clearly show that Ravikovich’s issue with relation to his CPA claim was resolved. On the contrary, as appears from the arbitrator’s brief, there was no mentioning made regarding any issues with relation to Ravikovich’s present CPA claim. This is because Ravikovich’s CPA claim is separate from the contract itself with V-Squared. In his present action, Ravikovich is not seeking to enforce the contract. Rather Ravikovich is asserting a claim under the Washington Consumer Protection Act.

Respondent V-Squared further makes an attempt to confuse the issue of easement with Ravikovich’s present CPA claim when respondent attempts to draw similarities between absolutely distinct legal theories with dissimilar issues. [Respondent’s Brief p. 5-14]. The issue of easement and Ravikovich’s present CPA claim are absolutely distinct legal theories that have no common elements of legal action or similarities of issues. The fact that the arbitrator ruled that V-Squared had no responsibility to make

arrangements regarding easement with Mr. Long, does not equal with that V-Squared was not legally responsible in its professional capacity as contractor for its failure to comply with building codes and properly position the structure so, that Ravikovich would not have to make any easement arrangements with Mr. Long in the first place and face Long's lawsuit. The present CPA issue is whether contractor's liability for its failure to inform the owner that erecting the structure, as it was done by V-Squared, would be in violation of its professional duties under the CPA and whether V-Squared is liable to the owner for its mistake the CPA. Whereas the issue of easement addressed at the arbitration focused merely on who was responsible to arrange easement Ravikovich or V-Squared. Thus, Ravikovich's present CPA claim alleges that independently from its dealings with Mr. Long, V-Squared had its direct obligations under the CPA as a professional in construction business to Ravikovich. This is because Ravikovich retained V-Squared services as a general contractor and expected that V-Squared would provide such services in professional capacity. It is hard to imagine that a contractor chooses to build a structure as his convenience dictates and later claims lack of liability because it does not have to apply for easement. Consequently, the scope of the Ravikovich's present action directly relates to the issue of improperly positioning the structure and contractor's liability, not the easement.

In its response brief V-Squared conveniently fails to see the difference between the issue of easement, which was decided in arbitration, and the issue of liability of V-Squared as a general contractor to Ravikovich for improperly positioning the structure irrespectively of easement.

Because Ravikovich's statutory CPA claim is wholly separate from any action or remedy for breach of the underlying construction contract between Ravikovich and V-Squared, Ravikovich should be allowed to proceed with his CPA claim against V-Squared.

c. NO Final Judgment.

The respondent conveniently omitted relevant portions of the legal analysis made by the Washington Supreme Court in *Shoemaker v. Bremerton*, 109 Wash.2d 504, 507-508, 745 P.2d 858 (1987). Specifically, in *Shoemaker* the Supreme Court made the following analysis: "In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded. In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action" *Shoemaker v. Bremerton*, 109 Wash.2d 504, 507-508, 745 P.2d 858 (1987).

Although in arbitration, the arbitrator ruled that V-Squared had no duty to apply for easements, there was no ruling made that V-Squared had

no other legal obligations when it improperly positioned and erected the structure that encroached on adjacent neighbor's property next to Ravikovich. It is for this reason that Ravikovich commenced his CPA claim against V-Squared because it is Ravikovich's position that properly erecting the structure so that no easements would be required was V-Squared's direct responsibility as a contractor. V-Squared was not free to build the house as its own convenience dictated. On the contrary, V-Squared was absolutely obligated to build the house, so that the owner of the house would not be damaged as Ravikovich was in this instance. The arbitrator did not rule that V-Squared could not be held liable on other legal theory for mistakenly positioning the house on Ravhivovich's neighbor's property.

d. **Dismissing Ravikovich's CPA Claim Will Cause Injustice.**

The term "Injustice" defined as "the withholding or denial of justice. *Black's Law Dictionary* 925 (4th ed. 1951).

Respondent also cites in its brief *Robinson v. Hamed*, 62 Wash., App. 92, 96-97, 813 P.2d 171 (1991). The *Robinson* Court said that: "it is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for collateral estoppel or issue preclusion in a subsequent judicial trial. (Emphasis added). *Robinson v. Hamed*, 62

Wash., App. 92, 96-97, 813 P.2d 171 (1991). Thus, the *Robinson* Court clearly meant that collateral estopped does not apply in all cases, rather only in appropriate cases. In arbitration between V-Squared and Ravikovich, the arbitrator did not make any ruling as to who would be responsible for removing the improperly positioned structure only Ravikovich, V-Squared or both. In this present action, Ravikovich is not re-litigating the issue of V-Squared's liability for procuring or arranging easement with Mr. Long. Instead, Ravikovich's present CPA claim addresses V-Squared liability for its failure to properly position the structures of which Mr. Long demands demolition and removal. Consequently, because Mr. Ravikovich's present CPA claim does not have similar issues with relation to easement claim, Mr. Ravikovich should be permitted to prosecute his CPA claim against V-Squared.


Hence, the justice requires determination of the issue as to whether V-Squared is liable for its own mistakes in professional capacity as a contractor to Ravikovich.

CONCLUSION

Ravikovich's present CPA claim has not similarities of issues and such were not decided in the arbitration between Ravikovich and V-

Squared. For this reason, the trial court's dismissal of Ravikovich's CPA claim should be reversed and remanded for further proceedings.

Dated: August 5, 2013

A handwritten signature in black ink, appearing to read "B. Petrenko", written over a horizontal line.

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**COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON**

ALEX RAVIKOVICH,)
Appellant)
vs.)
ROBERT LONG and JANE DOE LONG,)
And their marital community composed)
Thereof; and V-SQUARED LLC, a)
Washington Limited Company,)
Respondent(s))

No. 696122
DECLARATION OF MAILING

I am legal assistant at Petrenko Law Firm; under penalty of perjury under the laws of the State of Washington declare:

That on this day, I, Lyuba Aulova, I hand delivered the following REPLY BRIEF OF APPELLANT RAVIKOVICH to the

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Containing a true copy of the document to which this declaration is attached.

Dated at Bellevue, Washington this 6th day of August, 2013.



Lyuba Aulova