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Court of Appeals
Division I
State of Washington
12/18/2020 3:01 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
12/21/2020
BY SUSAN L. CARLSON
CLERK

99338-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(COURT OF APPEALS NO. 80482-1)

JAMES B. NUTTER & CO.,

Appellant,

v.

ELLIOTT BAY ASSET SOLUTIONS, LLC, as Court Appointed General
Receiver over RCO Legal, P.S.,

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

IDENTIFICATION OF PETITIONER1

COURT OF APPEALS DECISION1

ISSUES PRESENTED FOR REVIEW1

STATEMENT OF THE CASE.....1

 A. Procedural History4

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....4

 I. The Court of Appeals’ decision contradicts well-settled authority from this Court and the Court of Appeals requiring a moving party to meet its initial burden of proof at summary judgment.5

 II. The Court of Appeals’ decision contradicts authority from this Court and the Court of Appeals by overstating the burden required by the nonmoving party.....8

CONCLUSION.....14

CERTIFICATE OF SERVICE15

Appendix..... A-1

Exhibit A..... A-1

Exhibit B A-10

TABLE OF AUTHORITIES

Cases

Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wash. 2d 506, 516, 799 P.2d 250, 257 (1990)..... 5, 8

Brisbon v. Brem-Air Disposal, Inc., 111 Wash. App. 1052 n.4 (2002)..... 9

DePhillips v. Zolt Const. Co., 136 Wash. 2d 26, 31, 959 P.2d 1104, 1107 (1998)..... 7

Discover Bank v. Bridges, 154 Wash. App. 722, 727, 226 P.3d 191, 194 (2010)..... 7

Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wash. 2d 912, 915, 757 P.2d 507, 508–09 (1988)..... 6

Leonard v. Shepler Const., Inc., 132 Wash. App. 1054 (2006)..... 9

Lybbert v. Grant Cty., State of Wash., 141 Wash. 2d 29, 39, 1 P.3d 1124, 1129 (2000)..... 13

Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wash. App. 350, 355, 831 P.2d 1147, 1150 (1992)..... 9

Shah v. Allstate Ins. Co., 129 Wash. App. 1020 (2005) 9

Verdon v. AIG Life Ins. Co., 118 Wash. App. 449, 457, 76 P.3d 283, 287 (2003)..... 9

Wilson v. Steinbach, 98 Wash. 2d 434, 437, 656 P.2d 1030, 1032 (1982) 6, 7, 8

Rules

RAP 13.4(b)(1)-(2) 4

IDENTIFICATION OF PETITIONER

Appellant James B. Nutter & Co. (“JBNC”) respectfully requests that the Court accept review of the Court of Appeals decision terminating review described below.

COURT OF APPEALS DECISION

JBNC seeks review of the Court of Appeals’ decision entered on October 5, 2020, affirming the trial court’s grant of summary judgment to Respondent Elliott Bay Asset Solutions, LLC (“Elliott Bay”). A copy of the decision is in the Appendix at pages A-1 through A-9. The Court of Appeals entered an order denying JBNC’s Motion for Reconsideration on November 18, 2020. A copy of the order is in the Appendix at page A-10.

ISSUES PRESENTED FOR REVIEW

1. Should the Court reverse the Court of Appeals’ decision affirming summary judgment for Elliott Bay on a breach-of-contract claim where Elliott Bay failed to produce the contract at issue and relied principally on a contested spreadsheet of invoices while JBNC produced evidence of potential breach by Elliott Bay that may have excused or altered JBNC’s performance?

STATEMENT OF THE CASE

Elliott Bay Asset Solutions, LLC (“Elliott Bay”) is the Court-Appointed General Receiver over RCO Legal, P.S. (“RCO”). CP 240. RCO

was a law firm providing nationwide servicing and foreclosure services to firms including JBNC, a mortgage banking company located in Missouri. CP 240, 386. The terms of JBNC's engagement with RCO are controlled by the engagement agreement between them that has not been submitted to the record of this case. CP 322.

Elliott Bay initiated this action for breach of contract, unjust enrichment, and account stated, asserting RCO performed certain legal services for JBNC, submitted invoices for those services, never received payment for those services under the parties' agreement, and is now owed those payments by JBNC. CP 2-4; RP 5:23-6:9. Elliott Bay did not produce the parties' actual agreement, relying principally on Exhibit A of its Complaint, a list of roughly 200 invoices including invoice number, amount, file number, and loan number but no description of tasks or indication as to whether the tasks were performed successfully. CP 5-9. Elliott Bay ultimately produced roughly fourteen invoices from the spreadsheet through an affidavit. CP 253. However, Elliott Bay admitted it "does not always have access to each different version or copy of individual invoices" and that it had "not reviewed each and every file to determine how much [JBNC] was actually reimbursed for the invoices that it has still not paid." CP 244-245. Elliott Bay otherwise relied on discovery responses

and documents produced by JBNC in support of its motion for summary judgment. CP 294-336.

JBNC pleaded that it is not liable to Elliott Bay or RCO because Elliott Bay has not adequately established or supported the elements of its claims, in particular its claim for breach of contract. CP 15; RP 16:10-20. JBNC produced several spreadsheets in which it itemized factual disputes with the invoices summarized in Elliott Bay's Exhibit A spreadsheet. CP 309-318, 320. JBNC argued it was relieved of any duty to pay RCO under the contract because RCO breached contractual obligations and harmed JBNC. CP 15; RP 21:14-16. Specifically, JBNC cited several transfer fees it incurred when RCO's insolvency forced the transfer of multiple loans. CP 248, 341. JBNC also asserted that RCO performed insufficient and incorrect work that forced JBNC to incur additional fees to correct. CP 249, 342, 358. Finally, JBNC claimed RCO's frequent delays and forced restarts of the foreclosure process resulted in curtailment of debenture interest, causing JBNC to incur charges otherwise borne by the government. CP 358, 369-379; RP 27:20-28:21 (explaining the debenture interest process and the mechanism by which JBNC incurs charges when foreclosures are delayed or restarted). JBNC submitted email correspondence between JBNC and the law firm McCarthy & Holthus, detailing issues with work on loans

previously handled by RCO. CP 380-385, 388-399, 400-412. Finally, JBNC submitted a self-authenticating Housing and Urban Development Mortgage Letter, detailing the process of debenture interest as it relates to foreclosure files such as those RCO would have handled for JBNC. CP 380-385.

A. Procedural History

The trial court granted summary judgment to Elliott Bay on all amounts pleaded in the Complaint. CP 425-27. It concluded that JBNC's evidence was not admissible and, regardless of its admissibility, did not create a genuine issue of material fact to preclude summary judgment. CP 426.

The Court of Appeals affirmed, holding "Elliott Bay met its burden to establish a prima facie breach of contract claim" because Elliott Bay's evidence was sufficient and JBNC either waived or admitted argument as to the Exhibit A spreadsheet and the elements of the claim. Appendix at A-9. The Court of Appeals further held JBNC failed to allege an affirmative defense of offset or provide sufficient evidence to defeat summary judgment. *Id.*

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(1)-(2) because the Court of Appeals' decision and supporting analysis conflicts with other

decisions of this Court and the Court of Appeals. More specifically, the Court of Appeals' upholding of summary judgment in favor of Elliott Bay contradicts longstanding approaches to summary judgment under Washington law that (I.) require a moving party at summary judgment to meet its initial burden of proof *before* the nonmoving party is held to a burden of production and (II.) require only that the nonmoving party establish a genuine issue of material fact to avoid judgment against it.

I. The Court of Appeals' decision contradicts well-settled authority from this Court and the Court of Appeals requiring a moving party to meet its initial burden of proof at summary judgment.

The Court of Appeals affirmed the district court's error and allowed Elliott Bay to obtain judgment in its favor without meeting the initial burden of proof required under Washington law. A party moving for summary judgment must "demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper." *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wash. 2d 506, 516, 799 P.2d 250, 257 (1990). This is intended to be a "strict standard," *id.* under which "reasonable persons could reach but one conclusion" when "all facts submitted and all reasonable inferences from the facts [are considered]" in the light most favorable to the nonmoving party." *Wilson v. Steinbach*, 98 Wash. 2d 434, 437, 656 P.2d 1030, 1032

(1982). “Only *after* the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact.” *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wash. 2d 912, 915, 757 P.2d 507, 508–09 (1988) (emphasis added). In other words, if the moving party’s evidence is insufficient, the nonmoving party’s evidence, if any, is irrelevant; “summary judgment should not be granted.” *Id.*

Viewed in light of this precedent, the Court of Appeals erred in finding Elliott Bay’s evidence sufficient to remove any and all factual disputes from the record.¹ As JBNC has argued from the beginning, Elliott Bay’s Exhibit A spreadsheet and conclusory descriptions of the parties’ relationship, without more, do not evidence the mutual assent required to enforce a valid contract. *See Discover Bank v. Bridges*, 154 Wash. App.

¹ The Court of Appeals found that JBNC had waived any argument as to the invoices or use of the Exhibit A spreadsheet. This was in error. JBNC admitted that the invoices *existed* but disputed “whether they’re all owed” and continued to challenge the appropriateness of summary judgment on a breach-of-contract claim when there was no contract presented. RP 18:22-19:9; *see also* CP 347 (“JBNC never admitted a failure to pay \$134,591.29 in invoices from RCO for specific legal services. To the contrary, it denied on several grounds the accuracy and validity of the invoices Plaintiff alleges in its complaint comprise \$134,591.29.”). Similarly, JBNC acknowledged that Elliott Bay was attempting to use Exhibit A to obtain summary judgment but denied Exhibit A was sufficient proof for Elliott Bay’s claim. JBNC’s summary judgment briefing directly argued that Elliott Bay’s evidence, including Exhibit A, was “conclusory, unauthenticated, and incomplete” and therefore insufficient proof of breach of contract. CP 345-346.

722, 727, 226 P.3d 191, 194 (2010) (reversing grant of summary judgment on a breach-of-contract claim due to insufficient evidence of mutual assent where the plaintiff failed to produce the agreement at issue and instead provided only a “generic summary” of the relevant account). Because JBNC’s evidence did not articulate the parties’ specific duties under the agreement, it could not indicate a breach of any of those duties. *See DePhillips v. Zolt Const. Co.*, 136 Wash. 2d 26, 31, 959 P.2d 1104, 1107 (1998) (the specific promises within a contract as well as its terms and conditions are “essential elements” of a written contract).

Viewing Elliott Bay’s evidence and argument, reasonable minds could reach more than one conclusion, *Wilson*, 98 Wash. 2d at 437, and finding for Elliott Bay required making logical and/or inferential leaps in favor of the moving party, in direct contravention of Washington’s summary judgment standard. The Court of Appeals stated “JBNC admitted it entered into an agreement to compensate RCO for performing legal services. It admitted it received the invoices for legal services contained in Exhibit A to the complaint.” Appendix at A-6. But this misses a critical distinction: because of the absence of evidence from Elliott Bay, JBNC could not admit that its legal services agreement with RCO actually covered all of the invoices in the Exhibit A spreadsheet. Nor could JBNC—or the

trier of fact—determine whether the invoices as listed by Elliott Bay accurately reflected the terms of the parties’ agreement. Contrary to the Court of Appeals’ statement that “[JBNC] admitted that it did not pay those invoices,” JBNC made no such admission and has consistently denied that it failed to pay the \$134,591.29 for specific legal services. *See* CP 347; RP 18:22-19:9. And even if JBNC had made such an admission, granting judgment to Elliott Bay also required the Court to assume that JBNC had breached the contract’s payment terms, which may or may not be accurate.

Elliott Bay’s breach-of-contract case as presented simply did not reach the “strict standard” required under Washington law. *Atherton Condo.*, 115 Wash. 2d at 516. Instead, to find for Elliott Bay, the lower courts construed the case’s limited facts and reasonable inferences from those facts in Elliott Bay’s favor. Doing so was error. This Court’s precedent requires that facts and inferences be viewed “in the light most favorable to the *nonmoving* party,” here JBNC. *Wilson*, 98 Wash. 2d at 437. Therefore, the Court of Appeals’ decision should be reversed.

II. The Court of Appeals’ decision contradicts authority from this Court and the Court of Appeals by overstating the burden required by the nonmoving party.

The lower courts erred in holding JBNC to an inflated standard of proof at summary judgment when the clear intention under longstanding

Washington law is to allow the nonmoving party to avoid summary judgment by producing a reasonable inference in support of its defenses. As the nonmoving party, JBNC need only have provided evidence sufficient to support a “reasonable inference” of its defenses. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash. App. 350, 355, 831 P.2d 1147, 1150 (1992). Formal testimony is not required to meet this standard. *See, e.g., Leonard v. Shepler Const., Inc.*, 132 Wash. App. 1054 (2006) (finding a genuine issue of material fact due to evidence in the form of a declarations); *Shah v. Allstate Ins. Co.*, 129 Wash. App. 1020 (2005) (same); *Verdon v. AIG Life Ins. Co.*, 118 Wash. App. 449, 457, 76 P.3d 283, 287 (2003) (finding genuine issue of material fact due to evidence in the form of corporate records). Contrary to Elliott Bay’s contention in its Motion for Summary Judgment, JBNC did not “bear[] the burden of proof to establish any offset” defense. CP 248; *Brisbon v. Brem-Air Disposal, Inc.*, 111 Wash. App. 1052 n.4 (2002) (“On a summary judgment motion, the nonmoving party has a burden of production, not proof.”).

The Court of Appeals stated it was “clear that the trial court considered all of the evidence and concluded it was insufficient to create a question of material fact regarding offset,” Appendix at A-8, but failed to acknowledge that, in reaching its conclusion, the trial court held JBNC to

an impermissibly-high evidentiary burden, faulting JBNC for not presenting a jury-ready case at summary judgment that included an explanation of “how or in what amounts JBNC incurred fees or losses that should be offset from any particular invoices.” CP 426; *see also* RP 23:19-24 (“Today’s the date when you have to have the evidence that you would be presenting to the jury. You haven’t given me the evidence that you would show a jury.”). The standard to defeat summary judgment in Washington does not require a trial-ready defense. JBNC need only have produced sufficient evidence to raise genuine issues of material fact as to whether the actions of RCO and/or Elliott Bay precluded their success on a breach-of-contract claim. It did so.

JBNC’s summary judgment briefing emphasized several evidentiary sources of factual disputes sufficient to raise a prima facie defense of RCO/Elliott Bay’s own breach, including Elliott Bay’s admission that JBNC retained transfer and duplicative fees and experienced curtailment of debenture interest, all of which may have constituted breach on RCO/Elliott Bay’s part. CP 350-352. JBNC also produced and cited evidence demonstrating specific loans in which foreclosure restarts resulted in debenture interest charges that are only incurred through delay by counsel (here, RCO). *See* RP 5:18-23 (admitting to RCO’s insolvency); CP 314-318 (chart detailing loans and incurred charges); CP 368-379 (Mortgage Letter

outlining “Reasonable Diligence timeframes” that result in debenture charges incurred by firms when their counsel delays foreclosure).

Further, JBNC emphasized throughout the case that it was hindered by Elliott Bay’s failure to meet its initial burden. *See* RP 25:10-17 (“We tried to put in sufficient evidence to demonstrate that there is an issue of fact, but with the receiver not putting in the summary, with the receiver not putting in any of the invoices, I mean, our position is that the motion is defective on its face. And so we have tried to illustrate that there are defenses here, but we’re sort of defending against a record that isn’t complete and that hasn’t been made.”) Discussing Elliott Bay’s email evidence discussing RCO’s insufficient and inaccurate legal work,² the Court of Appeals stated, “JBNC did not submit any evidence connecting the allegations of defective legal work to the invoices that are due and owing.” But here, too, the Court of Appeals did not note that JBNC’s ability to make such connections was inevitably tied to the sparse evidence from Elliott Bay surrounding the invoices themselves. Taken together, JBNC’s evidence and arguments raised at least a “reasonable inference” in support of JBNC’s argument that RCO/Elliott Bay’s own breach barred its contract claim.

² The Court of Appeals “assum[ed] that the records were admissible under the business records rule” in its analysis. JBNC has consistently contended the e-mail evidence submitted was admissible under Wash. Rev. Code Ann. § 5.45.020.

At the very least, JBNC responded in kind to Elliott Bay's evidence. Here, the trial court granted Elliott Bay summary judgment absent sufficient, or any, testimony in its favor, using an unauthenticated spreadsheet as its chief source of evidence, but at the same time, the trial court faulted JBNC for lacking testimony to avoid summary judgment, even where JBNC had produced significant evidence in support, including its own spreadsheets. CP 437. The Court of Appeals should not have affirmed this unfair application of the summary judgment standard.

Further, while the Court of Appeals found JBNC had waived any defense of offset, JBNC's defense of the case has been consistent. In its Answer, JBNC raised several relevant affirmative defenses, including stating the relief sought in the Complaint was barred "because Plaintiff and/or RCO breached its contractual obligations owed to Defendant" and "because Plaintiff and/or RCO failed to perform its contractual obligations owed to Defendant." CP 15. JBNC also raised the affirmative defense that, "Any injury or damage to Plaintiff and/or RCO was caused, and/or contributed to be caused by and through the carelessness, negligence, and/or fault of Plaintiff, RCO, . . . so as to bar and/or diminish any recovery by Plaintiff and/or RCO herein." CP 15. In its summary judgment briefing, JBNC did not have a singularly-worded "offset" defense but instead argued

that Plaintiff or RCO's breach or failure to perform justified JBNC's behavior, consistent with the affirmative defenses raised in its answer. CP 350-351. JBNC argued Elliott Bay's "position ignores the basic principles of breach, offset, and anticipatory repudiation, under which reasonable minds could easily conclude that RCO's compelled transfer was a breach of its agreement with JBNC, causing JBNC damages that could be offset against any amount owed to RCO." CP 351; RP 21:5-22:4.

This Court has stated that the purpose of the waiver doctrine is to prevent litigants from acting inconsistently and "to reduce the likelihood that the 'trial by ambush' style of advocacy . . . will be employed." *Lybbert v. Grant Cty., State of Wash.*, 141 Wash. 2d 29, 39, 1 P.3d 1124, 1129 (2000). The Court of Appeals' finding that JBNC waived its broader defense by excluding the word "offset" in its affirmative defenses is inconsistent with this intention. JBNC's arguments were not an "ambush," as JBNC has maintained from the beginning that actions by RCO and/or Elliott Bay barred the breach-of-contract claim. CP 15. Ultimately, the Court of Appeals should have found that JBNC produced sufficient evidence to preclude summary judgment against it.

CONCLUSION

For the aforementioned reasons, the Court should accept review of the Court of Appeals' decision.

DATED this 18th day of December, 2020.

Shook, Hardy & Bacon L.L.P.

By: /s/ Weston Dunn
Weston Dunn, WSBA #54385
Todd W. Ruskamp, Mo. #38625 (admitted
pro hac vice)
Attorneys for Defendant James B. Nutter &
Co.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on December 18, 2020, I caused service of the foregoing pleading on each and every attorney of record herein via electronic mail to the following individuals:

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Executed on the 18th day of December 2020, at Seattle, Washington.

/s/ Weston Dunn

Weston Dunn

Appendix

Exhibit A

FILED
10/5/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Receivership of NORTHWEST TRUSTEE SERVICES, INC. and RCO LEGAL, P.S. ELLIOTT BAY ASSET SOLUTIONS, LLC, as court appointed general receiver over RCO Legal, P.S., Respondent, v. JAMES B. NUTTER & CO., a Missouri corporation, Appellant.	No. 80482-1-I DIVISION ONE UNPUBLISHED OPINION
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APPELWICK, J. — In this collection action, Elliott Bay, acting as receiver for RCO, sued JBNC for breach of contract, unjust enrichment, and account stated. The trial court granted Elliott Bay's motion for summary judgment and entered judgment in its favor on invoices for legal services. Elliott Bay met its burden to establish breach of contract. JBNC's affirmative defense of offset was waived and, in any event, unsupported by sufficient evidence. We affirm.

FACTS

RCO Legal P.S. was a law firm in Washington that performed legal services in Washington and other jurisdictions. James B. Nutter & Co. (JBNC) is a mortgage banking

No. 80482-1-I/2

company located in Kansas City, Missouri. JBNC engaged RCO to provide legal services since at least 2012. When RCO became insolvent in March 2018, Elliott Bay Asset Solutions LLC took over as its general receiver. JBNC subsequently moved its cases to the law firm McCarthy & Holthus LLP (M&H).

During the terms of its engagement, RCO sent regular invoices to JBNC. It is undisputed that JBNC received the invoices and, with few exceptions, failed to pay them.

On November 28, 2018, Elliott Bay, acting as receiver for RCO, filed a complaint against JBNC for breach of contract, unjust enrichment, and account stated. The complaint alleged that JBNC's failure to pay for services rendered caused RCO to sustain damages of \$137,296.21—the total amount of the outstanding invoices— plus pre- and post-judgment interest at the rate of 12 percent per year and attorney fees and costs. A summary list of unpaid invoices was attached to the complaint as "Exhibit A." In its answer to Elliott Bay's complaint, JBNC admitted that it engaged RCO for legal services and that RCO provided legal services to JBNC, but it denied liability for payment on multiple grounds. JBNC's answer did not include an affirmative defense of offset.

At the same time it served the complaint, Elliott Bay also served an initial set of discovery requests seeking to elicit information and documentation necessary to establish JBNC's liability and reasons for not paying the invoices. On March 18, 2019, Elliott Bay filed a motion to compel responses, asserting that JBNC had failed to substantively respond to its discovery requests. The trial court granted the motion and ordered JBNC to respond within 10 days. After JBNC supplemented its discovery responses, Elliott Bay filed a motion for contempt, arguing that JBNC's responses remained largely incomplete in violation of the discovery order. The trial court granted the contempt motion in part,

No. 80482-1-I/3

finding that JBNC's discovery responses were deficient, evasive, and incomplete and were therefore to be treated as a failure to answer pursuant to CR 37(a)(3). The court specified in detail the ways in which JBNC was required to supplement its discovery responses, including an explanation of which invoices it disputes are due and owing and the reasons each invoice is disputed. In its response, JBNC admitted that a set of invoices totaling \$67,322.32 appear to be due and payable. JBNC further asserted that all invoices involving loans transferred to M&H were not due and owing "due to substantial costs JBNC has incurred as a result of RCO's actions with respect to said loans." Specifically, JBNC claimed it incurred three categories of costs with respect to these transferred loans: transfer fees, allegedly duplicative work, and curtailment of debenture interest.¹

On July 1, 2019, Elliott Bay filed a motion for summary judgment asserting that it was entitled to judgment as a matter of law because JBNC indisputably engaged RCO to perform legal services, received RCO's invoices, failed to pay them, and has asserted no valid defense to payment. The trial court granted Elliott Bay's motion for summary judgment and awarded a total of \$134,591.29 plus interest. Regarding invoices for matters not transferred to M&H, which JBNC admitted were due and owing, the court entered judgment in the amount of \$67,322.32. Regarding invoices for matters transferred to M&H, which JBNC disputed, the court ruled that JBNC offered no

¹ JBNC additionally claimed that certain invoices were not due and owing because they were paid in full or were submitted late. Elliott Bay waived any claim to payment on those invoices for purposes of summary judgment, and those amounts are not included in the judgment being appealed.

No. 80482-1-I/4

admissible evidence to establish its offset defense, and awarded judgment of \$67,268.97. JBNC appeals.

DISCUSSION

JBNC argues the trial court erred in granting Elliott Bay's motion for summary judgment and entering an award of judgment in Elliott Bay's favor. JBNC also argues that the trial court erred in ruling that it offered no admissible evidence demonstrating a genuine issue of material fact regarding the offset defenses it asserted in opposition to summary judgment.

We review de novo a trial court's decision to grant summary judgment. Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is affirmed if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The moving party has the burden of demonstrating that there is no genuine issue of material fact. Atherton Condo. Apartment-Owners Ass'n Bd. Of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." Id. All facts and reasonable inferences are drawn in the light most favorable to the nonmoving party. Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc., 125 Wn. App. 227, 232, 103 P.3d 1256 (2005). However, "[t]he nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain." Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 780, 133 P.3d 944 (2006) (citing Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999)). "[S]ummary judgment is

No. 80482-1-I/5

granted only if, from all of the evidence, reasonable persons could reach but one conclusion.” Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

JBNC contends that the trial court erred in ruling that Elliott Bay met its initial burden to establish entitlement to judgment as a matter of law on its breach of contract claim. JBNC argues Elliott Bay failed to support its claim with an actual contract or agreement between the parties. We disagree.²

JBNC asserts the trial court considered inadmissible evidence on summary judgment. A summary list of invoices was attached as Exhibit A to Elliott Bay’s complaint. JBNC argues this list was inadmissible pursuant to ER 1006. Under ER 1006, “the contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.” The rule requires that the originals, or duplicates, be made available for examination and/or copying at a reasonable time and place. At oral argument, JBNC asserted that Exhibit A was not part of the record. But, as the trial court noted, both parties referenced Exhibit A in their briefing and during discovery. And, JBNC admitted that it did not contest the existence of the invoices. Now on appeal, JBNC argues that the trial court erred in considering the summary document because JBNC disputed the authenticity and accuracy of the invoices underlying Exhibit A and the original documents had not been admitted. But, JBNC did not object below

² JBNC additionally contends that Elliott Bay failed to demonstrate that summary judgment was proper on the basis of unjust enrichment or account stated. Because we conclude that summary judgment was proper on Elliott Bay’s breach of contract claim, we need not address these arguments.

No. 80482-1-1/6

that Exhibit A was inadmissible on evidentiary grounds.³ A party's failure to raise an issue before the trial court generally precludes it from raising the issue on appeal. Mavis v. King County Pub. Hosp. No. 2, 159 Wn. App. 639, 651, 248 P.3d 558 (2011). JBNC has waived this argument on appeal.

JBNC admitted that it entered into an agreement to compensate RCO for performing legal services. It admitted that it received the invoices for legal services contained in Exhibit A to the complaint. And, it admitted that it did not pay those invoices. Elliott Bay met its burden to establish a prima facie breach of contract claim.

Elliott Bay's request for admissions required that JBNC provide detailed reasons for not admitting the allegations made. JBNC pointed to nothing in the agreement between the parties as conditioning the obligation to pay or as the basis for excusing payment of the invoices. JBNC objected that some invoices were late and others paid. Elliott Bay removed those invoices from its request for summary judgment.

As to the remaining invoices, JBNC denied that it owed the total balance of the invoices listed in Exhibit A because RCO's actions with respect to loans transferred to M&H caused JBNC to incur substantial costs including transfer fees, fees associated with duplicative work, and curtailment of debenture interest. JBNC contends that it demonstrated genuine issues of material fact regarding whether the costs it allegedly

³ In a footnote in its reply brief, JBNC suggests it objected in the form of a statement in its response to the motion for summary judgment. The precise statement was, "As in its defective breach of contract claim, Plaintiff's unauthenticated summary table attached to its complaint and piecemeal submission of select invoices . . . do not qualify as 'admissible evidentiary facts' to support summary judgment." But, JBNC provides no compelling authority that this vague and passing comment in its discussion of the account stated theory was a sufficient objection in the trial court.

incurred as a result of transferring RCO's cases to M&H constitute an offset. But, JBNC failed to plead any claim of offset.

Washington is a notice pleading state and requires that a party give the opposing party fair notice of the affirmative defense in its pleadings. See Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 23, 974 P.2d 847 (1999). CR 8(c) requires a party to set forth in its pleading any "matter constituting an avoidance or affirmative defense." "Accordingly, affirmative defenses are waived unless they are pleaded or tried with the parties' express or implied consent." Gunn v. Riely, 185 Wn. App. 517, 529, 344 P.3d 1225 (2015). JBNC's answer to Elliott Bay's complaint did not include offset among the affirmative defenses it asserted. Moreover, in its amended responses to Elliott Bay's requests for admission, JBNC admitted it was "not presently aware of any offset."⁴ JBNC did not assert offset as a defense to nonpayment until it submitted its amended responses following the trial court's contempt order. JBNC does not assert that the costs it allegedly incurred in the form of transfer fees, fees for duplicative work, or debenture interest fits within any affirmative defense it alleged. The trial court properly concluded that JBNC's failure to allege the affirmative defense of offset supports a grant of summary judgment to Elliott Bay.

JBNC also contends that the trial court erred in determining that it submitted no admissible evidence in support of its offset defense. JBNC appears to argue that the trial court excluded from consideration some of the evidence it presented below. Although

⁴ We note that JBNC's amended discovery responses following the trial court's contempt order included a reference to "offset." But, JBNC does not argue, and we are not convinced that such a belated and passing reference in an amended discovery response is adequate to assert an affirmative defense.

No. 80482-1-I/8

the trial court stated that the evidence was “not provided in the form of admissible testimony,” it is clear that the trial court considered all of the evidence and concluded that it was insufficient to create a question of material fact regarding offset.

First, JBNC submitted 23 pages of e-mail correspondence between itself and M&H that were attached to the affidavit of its business records custodian. JBNC asserts that these e-mails were admissible under the business records exception to the hearsay rule.⁵ JBNC further asserts that these e-mails indicate defective notice of default language for all loans transferred from RCO to M&H other than where the acceleration was due to the death of the borrower, thereby forcing JBNC to incur costs for legal work to correct the alleged problem. JBNC contends that this evidence establishes a reasonable inference that it is entitled to offset any amount owed under the parties' agreement. The trial court stated that while these e-mails were “not in the form of admissible testimony, the e[-]mails do not explain or document how or in what amounts JBNC incurred fees or losses that should be offset from any particular invoices. JBNC presents no testimony or evidence from which a jury could conclude that RCO failed to competently perform the work represented in any particular invoice.” Even assuming that the records were admissible under the business records rule, the trial court properly concluded that the evidence is insufficient to raise a genuine issue of material fact regarding offset. JBNC did not submit any evidence connecting the allegations of defective legal work to the invoices that are due and owing.

⁵ A business record is admissible as competent evidence “if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.” RCW 5.45.020.

JBNC similarly contends that the trial court improperly excluded a United States Department of Housing and Urban Development mortgagee letter that it asserts is relevant and admissible under the self-authentication rule. ER 902(b). But, Elliott Bay never raised any evidentiary objection to the document, and there is no indication that the trial court ruled on its admissibility. JBNC further asserts that this document explains the process by which JBNC incurred debenture interest charges resulting from substantial foreclosure delays caused by RCO. But, JBNC offered no evidence that RCO caused foreclosure delays or that the alleged delays caused damages. This evidence does not create a question of material fact regarding offset.

The trial court properly concluded that Elliott Bay met its burden to establish breach of contract, and that JBNC's affirmative defense of offset was both waived and not supported by sufficient evidence to overcome summary judgment.

Affirmed.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Brunner, J.", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "Appelwick, J.", written over a horizontal line.

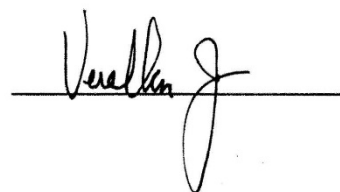
A handwritten signature in cursive script, appearing to read "Verellen, J.", written over a horizontal line.

Exhibit B

FILED
11/18/2020
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

In the Matter of the Receivership of
NORTHWEST TRUSTEE SERVICES,
INC. and RCO LEGAL, P.S.

ELLIOTT BAY ASSET SOLUTIONS,
LLC, as court appointed general
receiver over RCO Legal, P.S.,

Respondent,

v.

JAMES B. NUTTER & CO., a Missouri
corporation,

Appellant.

No. 80482-1-I

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, James B. Nutter & Company, filed a motion for reconsideration. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.


Judge

SHOOK, HARDY & BACON L.L.P.

December 18, 2020 - 3:01 PM

Transmittal Information

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Appellate Court Case Number: 80482-1
Appellate Court Case Title: Elliott Bay Asset Solutions, Respondent v. James B. Nutter & Co., Appellant

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