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No. 62869-1-I

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

DAN CLAWSON.

Appellant,

v.

RANDY CORMAN; DENIS LAW; MARCI PALMER, and DON
PERSSON,

Respondents.

BRIEF OF APPELLANT

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Appellant pro se

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RCW 42.30.0206

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INTRODUCTION

This case arose from two separate incidents involving the same four members of the seven member Renton City Council, the Defendants in this action. The first incident concerned a vote taken on September 17, 2007 in which a proposed ordinance establishing certain design guidelines was voted down. The second incident, occurring in late 2006, concerned alleged discussions among the defendants regarding selection of Council President for the year 2007. CP 32-41. This appeal is directed toward the Council President incident only.

The Council President incident occurred in the run-up to a contentious mayoral election, in which Defendant Denis Law ran against the incumbent, Kathy Keolker. CP 103-04. The other three Defendants supported Mr. Law, and Plaintiff, Terri Briere, and Toni Nelson supported Ms. Keolker. *Id.* Remarks allegedly made by Defendants indicate that they did not feel that Ms. Nelson would represent them against the Mayor but would support her. CP 132, 146.

Word that Defendants had decided they would not support Toni Nelson as Council President got out, and Defendants were confronted by Ms. Nelson, Plaintiff, Renton citizen Ruthie Larson, and Kathy Keolker. CP 110, 132-33, 134, 144. The Defendants ultimately voted to elect Ms. Nelson as Council President for 2007 on November 13, 2006. CP 52.

ASSIGNMENT OF ERROR

The trial court erred in dismissing the Plaintiff's claims on summary judgment because issues of material fact were established as to all elements of an Open Public Meetings Act violation.

RESTATEMENT OF ISSUES ON PLAINTIFF'S APPEAL

1. Did the declarations put forward in Plaintiff's response to Defendants' Motion for Summary Judgment establish facts sufficient to establish a violation of the Open Public Meetings Act?

2. Does a meeting as defined by the Open Public Meetings Act occur where two subgroups of two members each of a seven member governing body meet separately to discuss public business, and then a single member of each subgroup meets with a single member of the other subgroup to discuss public business?

STATEMENT OF THE CASE

A. Procedural History

Plaintiff filed this lawsuit on September 18, 2007. CP 1. Leave to amend to add additional claims was granted on September 30, 2008. CP 32. Defendants moved for summary judgment dismissing Plaintiff's claims on November 14, 2008. CP 76. The motion was granted on December 12, 2008 by the Honorable Mary Yu. CP 177-79. There was no court reporter and no video or audio record of the hearing.

B. Defendants Don Persson and Randy Corman Discussed

Selection of 2007 Council President

Defendants acknowledge that conversations were held between Mr. Persson and Mr. Corman, regarding selection of 2007 Council President. CP 55, 63.

C. Defendants Marci Palmer and Denis Law Discussed Selection of 2007 Council President

Defendants acknowledge that conversations were held between Ms. Palmer and Mr. Law regarding selection of 2007 Council President. CP 52, 59-60.

D. A Material Fact Exists Regarding Whether, After the Persson/Corman and Palmer/Law Meetings, Randy Corman and Marci Palmer Discussed Selection of 2007 Council President

Mr. Corman acknowledges in a declaration dated November 10, 2008 that he “heard from Don Persson regarding his concerns with Toni Nelson serving as 2007 Council President.” CP 63. In the same declaration he stated that he may have spoken with Ms. Palmer about the subject, but did not recall. *Id.* Ms. Palmer denies in her declaration that she spoke with Mr. Corman about the election. CP 52.

But on December 5, 2007, almost a year earlier, Mr. Corman posted on his blog that “I phoned [Toni Nelson] to communicate some concerns so that she could address them. Some members appeared to be

concerned that she might not be able to adequately represent all council members, and we might therefore see some divisiveness during the year.” CP 146. On his blog entry dated January 4, 2008, Mr. Corman stated that “two separate council members had phoned me at different times with concerns about Toni Nelson holding this position.” CP 147.

In the November 10, 2008 declaration, Mr. Corman stated that he had not communicated with Denis Law about the matter. CP 63. Mr. Corman acknowledged that Don Persson was one of the Council Members who phoned him to oppose Ms. Nelson’s election, and if the other one was not Denis Law then it is logical to infer that the other Council Member would have been Marci Palmer. This conversation would have connected the two subgroups, involving a quorum in the discussion if not already involved.

ARGUMENT

A. The Series of Meetings Alleged Would Have Constituted a Serial Meeting in Violation of the Open Public Meetings Act

The elements of an OPMA violation are: (1) members of the governing body, (2) held a meeting, (3) where the governing body took action in violation of the OPMA, and (4) the members of the governing body had knowledge that the meeting violated the statute. Wood v. Battle

Ground School Dist., 107 Wn.App. 550, 107, 27 P.3d 1208 (2001)

Element (1) is not disputed – all Defendants were members of the Renton City Council. CP 49, 53, 57, 61.

Element (3) requires “action,” which RCW 42.30.020 (3) defines as follows:

"Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

If Plaintiff's allegations were proved, “action” would occur because the Defendants discussed selection of Council President, although these discussions did not result in “final action” since any decision to bypass Toni Nelson Council President was not carried through to the actual vote.

Regarding element (4), knowledge, Defendants concede that they were well-informed regarding the Open Public Meetings act. CP 49-50, 53-54, 57-58, 61-62. If, as alleged, the Defendants knew that a quorum of Council Members was involved in the discussions and voluntarily participated, element (4) would be established.

Element (2), whether a meeting occurred, is the focus of Defendants' motion for summary judgment. They claim that any

discussions among the Defendants took place in groups of two only, and therefore there was no “meeting” as defined by OPMA. CP 82-86. But the Court of Appeals, Division 2, has ruled that a “serial meeting” which does not consist of the entire quorum meeting simultaneously can violate OPMA. In Wood v. Battle Ground School Dist., 107 Wn.App. 550, 27 P.3d 1208 (2001) it reversed the trial court decision granting summary judgment for defendant board members of the Battle Ground School District where a quorum of board members participated in an email discussion of school board business.

Division 3 also reversed a summary judgment ruling for the OPMA defendants. Eugster v. City of Spokane, 110 Wn.App. 212, 39 P.3d 380 (2002). The court determined that a public announcement by the Council President that “I think we’ve resolved the differences with a majority of the Council” followed by a memo indicating a decision by a quorum of Council Members, the Council President’s failure to deny a charge of polling, and receipt of an email message by a Council Member who was out of the country raised sufficient issues of fact that a meeting of a quorum had occurred to avoid summary judgment. Id. at 110 Wn.App. 222-24, 39 P.3d 384-85.

On remand of Eugster, the trial court again granted summary judgment for defendants. The Court of Appeals this time affirmed, based

on additional facts developed since the first hearing conclusively establishing that one defendant had not participated and an admission by the plaintiff that there had been no meeting. Eugster v. City of Spokane, 128 Wn.App. 1, 3-8, 114 P.3d 1200, 1201-03 (2002). These circumstances do not exist in the case here, as there are issues of fact as to the discussions among the Defendants and the Plaintiff has made no admission.

B. The Summary Judgment Motion Should Have Been Denied

In considering a motion for summary judgment, the court must consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. Vasquez v. Hawthorne, 145 Wash.2d 103, 33 P.3d 735 (2001). In ruling on motion for summary judgment, court's function is not to resolve any existing factual issue, but to determine whether such genuine issue exists. Jolly v. Fossum, 59 Wash.2d 20, 365 P.2d 780 (1961). On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court.

Renner v. City of Marysville , 145 Wn.App. 443, 448, 187 P.3d 283, 286 (2008)

The order granting summary judgment does not state the reasoning behind the court's decision. CP 177-179. It would seem that the court either determined that the particular configuration of discussions alleged would not constitute a "meeting" for OPMA purposes, or did not find the inferences raised from the declarations to be sufficient to support the allegations.

There are few reported appellate opinions to clarify what constitutes a "meeting" for OPMA purposes. Wood, 107 Wn.App. at 560, 27 P.3d at 1208 (2001). Here, the Court of Appeals is asked to fill in some of the blanks, and should do so in a way that makes the OPMA effective. The OPMA is to be construed liberally. RCW 42.30.910. The statutory statement of purpose in the OPMA employs some of the strongest language used in any legislation. Equitable Shipyards, Inc. v. State, 93 Wash.2d 46, 482, 611 P.2d 396 (1980).

Defendants Corman and Palmer both acknowledged an awareness that other Defendants opposed election of Toni Nelson. Mr. Corman said on his blog that "[s]ome members appear to be concerned that [Toni Nelson] might not be able to adequately represent all council members,

and we might therefore see some divisiveness during the year.” CP 146. Ms. Palmer told Kathy Keolker in a telephone conversation that “other council members were also not going to be voting for [Toni Nelson].” CP 110. In response to Toni Nelson’s comment in a phone conversation that “I understand that you people aren’t going to elect me to council president on Monday night” Ms. Palmer responded “we don’t think you’d be very strong against Kathy as mayor.....we just think you’d go along with everything that she says.” CP 132. These statements strongly infer that discussions took place among the Defendants and in fact a consensus that Toni Nelson would not be elected was reached.

A further reason summary judgment should have been denied is that Defendants’ motion for summary judgment is based almost entirely on declarations of the Defendants regarding conversations for which there is no record an in which only they participated. Summary judgment is inappropriate here:

..... where material facts averred in an affidavit are particularly within the knowledge of the moving party, summary judgment should be denied. The matter should proceed to trial so that the opponent may attempt to disprove the alleged facts by cross-examination and by the demeanor of the witness while testifying. This exception to the summary judgment rules is not limited just to the moving party herself, but to her witnesses also.

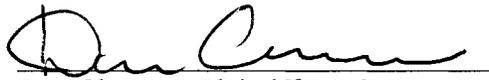
In re Estate of Black, 116 Wn.App. 476, 487, 66 P.3d 670, 675 -

676 (2003). The principal stated in Black is particularly applicable in Open Public Meetings Act cases, where the prohibited meetings are off the record and there are no announcements, notes, or public observation of the meetings. Only the participants may know what is said and who participates. Key facts such as whether Defendants Corman and Palmer had a conversation regarding the selection of Council should not be resolved based on declarations but through trial, where the witnesses can be examined and their demeanor observed.

CONCLUSION

Plaintiff has established issues of material fact sufficient to avoid summary judgment. The decision of the trial court granting summary judgment dismissing all claims should be reversed.

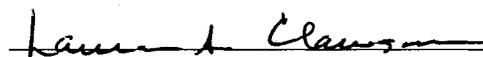
RESPECTFULLY SUBMITTED this July 7, 2009.


Dan Clawson, Plaintiff Pro Se

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CERTIFICATE OF SERVICE

I certify that on July 7, 2009 I delivered this document to Michael R. Kenyon, attorney for all defendants, at Kenyon Disend, PLLLC at 11 Front Street South, Issaquah, WA 98027-3820


Laura A. Clawson