

64038-1

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NO. 64038-1-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOINT VENTURE FOURPLAY,

Plaintiff/Appellant

v.

VERONIKA E. LOISTL,

Defendant/Respondent/Cross-Appellant

BRIEF OF RESPONDENT/CROSS-APPELLANT

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COURT OF APPEALS
DIVISION I
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ORIGINAL

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APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not err in Conclusion of Law number 4 in concluding that there was no prevailing party and therefore no award of attorney's fees.
2. The trial court did not abuse its discretion in admitting out of court statements made by Frank Colacurcio as an admission against interest of the Plaintiff, of which Mr. Colacurcio was a partner.
3. The trial court did not err in making Finding of Fact number 4 regarding promises of Frank Colacurcio to help and assist the Defendant as the unrebutted testimony of Defendant was the basis for this Finding of Fact.
4. The trial court did not err in making Finding of Fact number 4 to the extent that it found "The rest of the terms are, at best, ambiguous, such as how, if and when profits would be divided."
5. The trial court did not err in making Finding of Fact number 6 to the extent that it found "The remaining terms of the agreement are beyond repair by this court due to the very poor drafting of the original agreement."

6. The trial court did not err in Conclusion of Law number 1 to the extent it concluded that the agreement between Plaintiff and Defendant was ambiguous and construed the contract against Plaintiff.
7. The trial court erred in Conclusion of Law number 3 to the extent that it concluded Plaintiff was entitled to any relief, but did not err that Plaintiff was not entitled to relief beyond principal and accrued interest.
8. The trial court did not err in making Finding of Fact number 7 to the extent it found that Plaintiff attempted to refinance her home in 2006 and pay Plaintiff and that Plaintiff would not cooperate or provide a payoff amount.

RESPONDENT/CROSS-APPELLANT'S ASSIGNMENTS OF
ERROR

9. Should this court agree with Appellant's arguments that Appellant is entitled to a profit of \$125,702.32 as set forth on page 33 of Appellant's Brief, in addition to its investment and six percent interest, the loan made by Appellant to Respondent is usurious and Respondent is entitled to the usury penalties set forth in RCW 19.52 et. seq.

10. The trial court erred in Conclusion of Law number 3 to the extent it found that any amount is currently due and owing from Defendant to Plaintiff.
11. Should this court agree with Respondent/Cross-Appellant's Assignment of Error number 10, above, the Respondent would be the prevailing party in this action and this court should remand to the trial court for an award of costs and reasonable attorney's fees to the Respondent.
12. The trial court erred in entering judgment which included a post judgment interest rate of twelve percent per annum when the contract rate is six percent per annum.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As the trial court did not grant complete relief to either party, based upon its Findings of Fact and Conclusions of Law, the court was correct in its determination not to award attorney's fees to either party.
2. As the Plaintiff in this action is a joint venture, which by its very definition grants an equal to a voice, accompanied by an equal right to control, and all partners in the joint venture signed the contract documents, and the Defendant testified that

the only person she spoke with regarding the terms of the agreement was Frank Colacurcio, and the fact that the Plaintiff could have had Mr. Colacurcio testify if any of the Defendant's statements were untrue, the trial court did not abuse its discretion in admitting Mr. Colacurcio's statements to the Defendant.

3. Given the fact that the Plaintiff's attorney drafted the contract documents, that the contract documents were, at best, ambiguous, that after execution of the documents the Plaintiff, at no time, demanded that Defendant sell her home, that the Complaint (CP 3-7) did not contain an allegation regarding the sale of the home and the Defendant's testimony that at no time did she consider that she was being forced to sell the home; the court did not err in concluding that Plaintiff was not entitled to relief over and above the principal and interest. It is Respondent/Cross-Appellant's contention that as there was no due date on any of the contract documents and that, at this time, the Promissory Note is not due and there is nothing currently owing from the Defendant to the Plaintiff.

4. The undisputed testimony of the Defendant was that she had loans in place to payoff the Plaintiff after receiving a demand for payment (CP 7, Exhibit 50) but that the loans could not proceed because the Plaintiff would not provide a payoff figure, despite requests, therefore, the court did not err in finding that the Plaintiff would not cooperate or provide a payoff amount.
5. As the Promissory Note contained no specific due date, only that the loan would be paid off when the house was sold, combined with the fact that the Note was prepared by Plaintiff's attorney, and further that the Court made no Findings of Fact regarding a due date, the trial court erred in Conclusion of Law number 3 in determining that the Note is presently due and payable.
6. The court erred in setting the post judgment interest rate at twelve percent as opposed to the contract rate of six percent which is mandated by RCW 4.46.110(1).

STATEMENT OF THE CASE

Defendant in this action is a single mother with very little experience in real estate matters. I RP at 10-11. She had entered into an adjustable rate mortgage and when the interest rate increased, so did the payments. The payments increased to the point where she was unable to make her monthly payments and by early 2003 her home was in foreclosure. I RP at 35.

Ms. Loistl had worked in the travel industry and made travel arrangements for the partners of Plaintiff and their various businesses. I RP at 40-41. She knew Frank Colacurcio, Sr. to be a sophisticated business man from her dealings with him over the years, so she spoke to him about her problem. I RP at 41-42. Mr. Colacurcio referred her to one of his lawyers for assistance. I RP at 112-114. Mr. Colacurcio further assured Defendant that he would help her. I RP at 89.

After speaking with Mr. Colacurcio on a few occasions about her problem, the Defendant received a call from the Plaintiff's bookkeeper who informed her that the mortgage was going to be paid off. Defendant thought it was going to be a loan from Mr. Colacurcio. I RP at 91-92. When Defendant went in to sign the documents, she was surprised to see that there were other names on the documents that were set forth as

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partners of the Plaintiff. I RP at 92. Although one of Plaintiff's partners, David Ebert, testified otherwise, Defendant's testimony is that the first time she saw the documents is when they were presented to her for signature. I RP at 92. Defendant felt a sense of urgency given the fact that her home was in foreclosure and also received a sense of urgency from the Plaintiff's bookkeeper. I RP at 92-93.

Defendant executed a Promissory Note in the amount of \$173,144.81 (Exhibit 21), a Deed of Trust against her home (Exhibit 18) and a Contract for Improvement of Property (Exhibit 19) for advances which Plaintiff was to make for property improvements.

The Promissory Note called for interest at six percent per annum on the unpaid balance with terms as follows: "Said sum will be paid in the following manner: 1) From proceeds received by the borrower from the sale of the property, which will consist of fifty percent of the proceeds. No periodic payments by borrower are required during the life of this Note, with the exception that borrower's portion of the proceeds from any sale must be used to payoff any balance on this Note prior to receipt by the borrower."

The Note further states “No modification by any holder hereof shall be binding unless in writing and agreed upon by the parties.” The Note was then guaranteed by each of the partners of the Plaintiff.

Defendant and each of the partners of the Plaintiff executed the Contract for Improvement of Property, referred to above. Article III of this Agreement indicates that it is a fully integrated document, that any alteration of the Agreement may be made only by mutual agreement of the parties and that the term of the Agreement will run with the Promissory Note.

Nowhere in any of these documents is there a requirement that Defendant sell the property within a specified time. Defendant did not agree to make repairs and immediately market her house. I RP at 100. It was Defendant’s intention to stay in her home and the only person with whom she had a conversation was Mr. Colacurcio whom she told of her intention to stay in the home. She had informed Mr. Colacurcio that she had a child in the school district and that she wanted to allow her child to graduate in the same school district. I RP at 101.

Plaintiff presented no evidence of any demand that was ever made to Plaintiff to sell her home. In May of 2006, Plaintiff sent a demand for payment of the Promissory Note, which demand failed to even notify the

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Defendant of the amount being demanded. CP 7, Exhibit 50. The Complaint filed by Plaintiffs herein, also did not demand sale of the home, but requested judgment for the amount owed on the Promissory Note. Nowhere in the Complaint is there a demand that Defendant sell her home or that Plaintiff is entitled to fifty percent of the proceeds of the sale of the home. CP 3-5.

Furthermore, Defendant's unrebutted testimony is that after she received the demand for payment, she spoke with Mr. Colacurcio who indicated that Plaintiff's concern was that the house was currently vacant and there was concern that the home would deteriorate and wanted the Defendant to get the repairs finished and move back into the home. I RP at 106.

Defendant's attempts to refinance her home to payoff the Plaintiff fell through when the Plaintiff refused to provide a payoff figure as to the amount Plaintiff was owed. I RP at 108, 116.

ARGUMENT

A. Standard of Review.

Challenged Findings of Fact made by the trial court will not be disturbed if supported by substantial evidence. “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 913 (1986). The trial court’s Conclusions of Law are reviewed de novo. Dempere v. Nelson, 76 Wn. App. 403, 406, 886 P.2d 219 (1994). Admission of evidence lies within the discretion of the trial court. “An abuse of discretion occurs only where ‘exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.’” Goodwin v. Bacon VI, 127 Wn.2d 50, 54, 896 P.2d 673 (1995). Quoting Davis v. Globe Mach Mfg. Co., 102 Wn.2d 68, 76, 684 P.2d 692 (1984).

B. The trial court erred in determining in Conclusion of Law 3 that the Promissory Note signed by Defendant is now due.

In the instant case, the court was asked to interpret written agreements which were prepared by counsel for Plaintiff whose partners are sophisticated businesspersons and which were signed by an unsophisticated single mother. The Plaintiff asked the court to add a term

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to the Promissory Note, which was drafted by Plaintiff's counsel, to insert a due date, which is not included in the written document.

Initially, courts are not at liberty under the guise of construing a contract, to disregard contract language or revise the contract. Essentially, courts will not rewrite contracts or add items which were not contained therein. See eg. Speca v. Boeing Company, 92 Wn. App. 214, 221, 963 P.2d 204 (1998); Willis v. Champlain Cable Corp., 109 Wn.2d 747, 758, 748 P.2d 621 (1988).

Here, Plaintiff asked the court to rewrite the written contract to insert a term to which the parties did not place in the Promissory Note, Deed of Trust or Contract for Improvement of Property which they executed. The trial court did insert a due date, which it concluded was the date it entered its Findings of Fact and Conclusions of Law. This was error and should be reversed.

Additionally, parol evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous and not affected accident, fraud or mistake. Berg v. Hudesman, 115 Wn.2d 657, 670, 801 P.2d 222 (1990). Here Plaintiff seeks to add a term to the written contract which was not contained therein and not agreed to by the parties. Both the

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Promissory Note and the Contract for Improvement of Property contained a clause that the contract may not be modified without a subsequent written agreement. Parol evidence is simply not admissible to add a term to a contract which is not contained therein.

Furthermore, if the court found that the Promissory Note was ambiguous, as it did, it is hornbook law that all ambiguities are to be construed against the drafter. See eg. Luna v. Gillingham, 57 Wn. App. 574, 581, 789 P.2d 801 (1990). In the instant case, it is undisputed that the contract was drafted by Plaintiff's counsel, that Plaintiff's principals were sophisticated businessmen and that Defendant is a single mother with very little real estate knowledge and no legal counsel. If the terms of the Promissory Note are ambiguous, as found by the trial court, any ambiguities in the Note must be construed against Plaintiff.

Here, the trial court added a term to the Note, that being a due date, which was not contained within the Note. Simply put, the Note is not due until the sale of Plaintiff's house and there is no date upon which she must sell the house. If the Plaintiff had intended to put a due date into the Note and it was not done so by Plaintiff's counsel, Plaintiff must seek recourse against its counsel for failure to include the term. The court is not

allowed, under the guise of interpreting the contract, to insert a term that was not there.

For the reasons set forth, above, this court should reverse the trial court in its Conclusion of Law number 3 to the extent that it found that the Promissory Note is currently due. This court should remand to the trial court for a Conclusion of Law that the Promissory Note is not currently due.

C. The court did not err in allowing the Defendant to testify as to statements made to her by Frank Colacurcio, Sr.

As set forth in paragraph 1.1 of Plaintiff's Complaint, the Plaintiff is a joint venture between several persons, including Frank Colacurcio. CP 3. A joint venture is in the nature of a partnership. Penick v. Employment Security Department, 82 Wn. App. 30, 40, 917 P.2d 136 (1999). One of the essential elements of a joint venture is "An equal to a voice, accompanied by an equal right to control." Paulson v. County of Pierce, 99 Wn.2d 645, 654, 664 P.2d 1202 (1983). Therefore, despite Mr. Ebert's testimony that he was "more or less in charge", all members of a joint venture have an equal right to a voice and control. As Mr. Colacurcio had an equal right to a voice or control of the Plaintiff, any statements he made to Defendant were not hearsay, but were admissions

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by a party opponent pursuant to ER 801(d)(2). Plaintiff's attempts to construe Mr. Colacurcio as an agent of the Plaintiff ignores the fact that as a member he has an equal right to a voice in the joint venture. As such he is speaking in a representative capacity for the Plaintiff, as a joint venture or partnership may only speak through its joint venturers or partners. The trial court's use of the term "speaking agent" confuses the issue as Mr. Colacurcio was not an outside agent speaking for a principal, but a representative of the joint venture, speaking on behalf of the Plaintiff.

Furthermore, if the Plaintiff felt that the statements made by the Defendant were inaccurate, it could simply have called Mr. Colacurcio to the stand to dispute those statements. It chose not to do so and cannot now be heard to complain about Defendant's un rebutted testimony. The court did not err in allowing this testimony.

D. The trial court did not err in finding that the Plaintiff would not cooperate when the Defendant tried to refinance in 2006.

The trial court's Finding of Fact that Plaintiff failed to cooperate when Defendant attempted to refinance and payoff the Plaintiff in 2006 is supported by Defendant's un rebutted testimony that she had one or more loans in place and that they could not be completed due to the fact that Plaintiff refused to supply a payoff figure. This Finding of Fact is

supported by substantial evidence and Plaintiff failed to present any evidence in response to Defendant's testimony on this subject. As such, the trial court's finding on this issue should be upheld.

E. Plaintiff is not entitled to judgment for its recovery of lost profits allegedly resulting from a breach of duty to sell the property at a commercially reasonable time by the Defendant.

As set forth in the argument in section B, above, none of the contractual documents executed by the parties set forth any time frame in which Defendant's home was to be sold. Plaintiff argues that, in hindsight, the court should have imposed a January 2006 date of sale, which would have been the highest market value for the property between the date of the loan (April 2003) and the date of trial. What Plaintiff in effect is arguing is that the Defendant was responsible to determine at what point the market would peak and was required to sell the home on that date. Again, nowhere in the documents that were executed by the parties is this burden placed upon the Defendant.

In addition, Plaintiff's Complaint (CP 3-5) does not request this relief. The only relief requested in the Complaint is a judgment on the Promissory Note, together with interest and amounts that Plaintiff

expended on improvements to the property. For this reason alone, Plaintiff has no ability to obtain this relief.

Furthermore, there is no evidence that Plaintiff ever demanded that Defendant sell her home. Plaintiff only demanded repayment of the money lent, plus interest, in a demand for payment which was sent in May of 2006. CP 7, Exhibit 50. Therefore, Plaintiff's own actions contradict the position Plaintiff now takes that it is entitled to profit based upon a potential sale price at the peak of the local real estate market.

Furthermore, any contract for the sale of real property must be in writing pursuant to the Statute of Frauds. RCW 19.36 et. seq. Here there was no written contract requiring the Defendant to sell her home and therefore there can be no enforceable agreement requiring the sale of Defendant's home.

For the reasons set forth herein and in Defendant's argument, section B, above, Plaintiff is not entitled to recover its alleged profit.

F. If this court were to agree with Plaintiff's argument that it is entitled to recover its lost profit, the loan transaction that was entered into by the parties is usurious.

Plaintiff claims that the property should have been sold in January of 2006, which is less than three years from the date of the original loan.

The principal amount, as determined by the trial court, and not disputed by the Plaintiff was \$178,702.95. According to the Plaintiff's Appellate Brief, the Plaintiff should have received in January of 2006 a total of \$313,497.67. Appellant's Brief at 17-18. This would mean that Plaintiff would have received back its principal balance together with interest in the amount of \$134,794.72 in a period of less than three years. This would be an interest rate in excess of twenty five percent per annum.

The maximum interest rate allowed by the Washington State Usury Statute (RCW 19.52.020) is twelve percent per annum. Therefore, if the court were to be swayed by the Plaintiff's argument regarding the amount of return it should have received, the loan would be violative of the Usury Act and the Plaintiff would only be entitled to the principal loan amount less double the interest that Defendant has already paid in the amount of \$20,776.00 and less Defendant's costs and reasonable attorney's fees incurred in this action. RCW 19.52.030.

G. The court erred in setting post-judgment interest at twelve percent per annum.

Even if this court were to affirm the trial court's rulings, the court applied the wrong post-judgment interest rate. The interest rate on judgments is set forth in RCW 4.56.110. For judgments founded on
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written contracts the interest rate is that specified in the contract. RCW 4.46.110(1). The interest rate on the Promissory Note in this matter is six percent per annum. Therefore, the judgment interest rate should have been set at six percent per annum.

H. Attorney's fees.

If this court agrees with Respondent/Cross-Appellant that the Promissory Note is not due, she should be awarded her attorney's fees pursuant to the attorney's fees provision in the Promissory Note as the prevailing party. If this court finds that the contracts herein violate the Washington State Usury Law (RCW 19.52 et. seq.) Defendant should be awarded her attorney's fees and costs as an offset to any amounts she owes to Plaintiff on the Promissory Note. RCW 19.52.030.

If this court affirms the decision of the trial court in all respects, it should also affirm the trial court's decision that there was no prevailing party and therefore no attorney's fee award. The trial court's decision granted affirmative relief to the Plaintiff as to principal and interest on the Promissory Note, but found in favor of the Defendant on the issue of lost profits. As such, each party prevailed on a major issue at trial. If both parties prevail on major issues there is no prevailing party. Smith v.

Okanogan County, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). Therefore, the trial court was correct in its finding of no prevailing party.

CONCLUSION

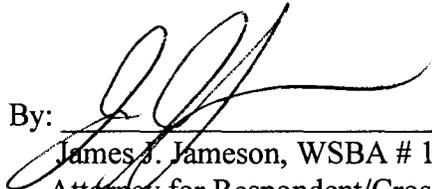
For the reasons set forth, above, Respondent/Cross-Appellant hereby requests this court to reverse the trial court's conclusion of law that the Promissory Note is now due and remand to the trial court for an award of attorney's fees at trial and on appeal.

Alternatively, the Defendant requests this court to affirm the trial court decision, in all respects, with the exception of post-judgment interest which should be set at six percent per annum pursuant to the contract.

As a second alternative, if the court agrees with the Plaintiff that it is entitled to recover lost profits, Defendant requests this court to find that the contracts executed by the parties are usurious and to apply the usury penalties set forth in RCW 19.52.030.

DATED: FEBRUARY 25, 2010

RESPECTFULLY SUBMITTED:

By: 
James J. Jameson, WSBA # 11490
Attorney for Respondent/Cross-Appellant

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NO. 64038-1-I

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I, Marjory Herdeck, deposited in the United States mail, postage pre-paid, an envelope directed to T. Jeffrey Keane, Attorney for Plaintiff/Appellant at the address set forth below, on February 26, 2010, a copy of Brief of Respondent.

The address to which said document was mailed is:

Mr. T. Jeffrey Keane
Keane Law Offices
100 NE Northlake Way, Ste. 200
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DATED: 2/25/10

PLACE: Everett, WA



Marjory Herdeck, Legal Secretary

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