

No. 66411-5-I

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

In re the Marriage of
JEFFREY P. MANIPON

Respondent

and

RANIE MANIPON

Appellant

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 29 PM 2:41

ON REVIEW OF THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

PHILLIP B. NAVARRO
Attorney for Appellant
114 2nd Avenue South, Suite 101
Edmonds, WA 98020
(425) 712-0279

TABLE OF CONTENTS

I. ARGUMENT	1
A. THE STANDARD OF REVIEW	1
B. TRIAL COURT ABUSED ITS DISCRETION	2
C. EVIDENCE SHOULD BE REVIEWED IN LIGHT MOST FAVORABLE TO APPELLANT.....	3
D. SUBSTANTIAL JUSTICE	5
E. TRIAL COURT IMPROPERLY AWARDED FEES.....	6
II. CONCLUSION	7

I. ARGUMENT

A. STANDARD OF REVIEW

As acknowledged in Respondent's Brief, Respondent, as the moving party seeking to enforce the agreement, carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement. *See* Brief of Respondent at 5. However, Respondent fails to cite the continuation of the standard of review set out in *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696-97, 994 P.2d 911 (2000), which states:

The court must read the parties' submissions in the light most favorable to the nonmoving party [Appellant] and determine whether reasonable minds could reach but one conclusion.

Id.

Addressing the standard of review issue, the Court in *Brinkerhoff* concluded that summary judgment standards are applicable to motions to enforce settlement agreements:

and if the non-moving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed fact.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN GRATING RESPONDENT'S MOTION TO ENFORCE THE DISSOLUTION DECREE

In this case, a genuine issue of material fact existed as to whether Appellant's late mortgage payment constitutes a "failure" to make a mortgage payment under the terms of the Settlement Agreement. *See* CP at 64, Declaration of Ranie Manipon. Exhibit B attached to the Declaration of Ranie Manipon shows that a payment for the October 2010 mortgage was credited to her account on November 2, 2010, eight days before the trial court hearing. Whether the trial court was aware or even considered that the October 2010 payment was late is unclear from the record as the trial court did not enter conclusions of law or findings of fact.

Respondent would like this court to believe that the trial court did consider the delinquency-failure of mortgage payment issue. *See* Brief of Respondent at 5-7. However, Respondent cannot cite to any court statement or record that concludes, holds or determines a late mortgage payment constitutes a "failure" to make a mortgage payment under the Settlement Agreement.

The underlying Order and Judgment to Enforce the Decree of Dissolution were entered without oral argument and without conducting an evidentiary hearing to resolve the disputed fact as to whether a tardy payment constitutes a "failed" payment under the Settlement Agreement.

As a result, the trial court abused its discretion in granting Respondent's Motion. See *Brinkerhoff v. Campbell*, 99 Wn. App. at 697.

C. THE APPELLANT'S SUBMISSIONS SHOULD HAVE BEEN REVIEWED IN A LIGHT MOST FAVORABLE TO HER

Whether the intent of the parties were considered by the trial court is unclear as, again, the record is absent of any findings of fact or conclusions of law. Respondent states "the trial court disagreed" with Appellant's argument that a *late* payment does not mean she *failed* to make a payment. However, Respondent's statement is unsupported without findings of fact or conclusions of law entered by the trial court. At best, Respondent is guessing and leading this court astray.

Appellant's submissions should be considered in a light in her favor. *Brinkerhoff*, at 696-97. The Declaration of Ranie Manipon, Exhibit B, shows that although the October 2010 mortgage payment was paid late, no late fees were assessed against the account and therefore Respondent's credit was not negatively affected.

Moreover, Respondent's argument regarding the parties' intent to protect Respondent's credit is undermined by the fact the Settlement Agreement does not expressly grant Respondent the right to take the power and authority from Appellant to list the property for whatever value he deems appropriate. *Emphasis added*. The Settlement Agreement states:

If the Wife fails to make the mortgage payments on the real property awarded to her, Husband may make the payments

and receive reimbursement and/or *at his option require that the real property be listed for sale immediate.*

CP at 28.

The Settlement Agreement, at most, allows Respondent to obtain an ordering requiring Appellant to immediately list the property for sale. It does not state that Respondent has the right to act as Appellant's agent and list the property at a "fire sale price." The intent of the parties was to give Appellant sufficient time to remove Respondent from the mortgages: Nothing more. Respondent reads far too much between the lines when he states that the parties intended to protect the husband's credit and from liability arising from the properties. If Respondent was truly concerned about his credit, then why would he attempt to "short-sale" the properties?

Following Respondent's same logic, Appellant could similarly argue that the parties' intent is to protect Appellant's equity interest (Appellant inherited the condominium and used money from her inheritance as a down payment on the marital home) in the properties could be gleaned from the language and structure of the Settlement Agreement. The Settlement Agreement gives both real properties to the Appellant and grants her a period of 2 years to being the process of selling or refinancing the marital home and 3 years to begin the process of selling or refinancing the condominium. In acknowledging Appellant's equity interest, the Settlement Agreement grants Appellant the power and authority to refinance or list the property at a sale price she determines reasonable so

she can recoup as much equity as possible from the two homes.

Appellant desires to retain any equity she may have in the condominium, unlike Respondent who has no interest in the condominium.

The evidence should have been viewed in the light most favorable to Appellant. Evidence viewed in a light favorable to Appellant necessitates reversal of the trial court's order to enforce the dissolution decree.

D. UPHOLING THE TRIAL COURT'S DECISION WOULD DO VIOLENCE TO THE PRINCIPAL OF SUBSTANTIAL JUSTICE

Respondent cites *Salutee-Mashersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 848, 22 P.3d 804 (2001) for the proposition that “[a] payment due by a certain date if not paid is a failure to pay.” That case, however, does not stand for the proposition cited by Respondent. *Salutee-Mashersky* dealt with an oral contract between a borrower and lender to modify the payment schedule. The court in *Salutee-Mashersky* never addressed the issue whether a late payment constitutes a failure to pay. There are, however, a line of cases that have dealt with late mortgage payments.

In Washington, forfeitures are not favored in law and never enforced in equity unless the right thereto is so clear as to permit no denial. *Dill v. Zilke*, 26 Wn.2d 246, 252-253, 173 P.2d 977 (1946). Courts have recognized a hardship that results in a strict enforcement of a forfeiture provision. *See id.* Although this rule has been applied to cases involving real estate executory contracts, the principal of law may also be extended

to this case, which similarly involves a potential loss of real estate due to a delinquent payment.

Washington courts will relieve a party from default in payment under a real estate contract by extending him a “period of grace” to make such payments. *See id.* Similar to *Dill*, Appellant made her mortgage payment after the due date, which caused Respondent to file his Motion and obtain, from the trial court order, the power to strip Appellant of her authority over the property and to immediately list and sell the property for whatever price he determines. Appellant, like the vendee in *Dill*, suffers a great hardship from strict enforcement of the forfeiture provision in the Settlement Agreement. Therefore, this court may apply equitable principals of law to this case and extend a similar relief to Appellant as the court did in *Dill*.

E. RESPONDENT FAILED TO SUPPORT HIS REQUEST FOR ATTORNEYS’ FEES WITH A SUPPORTING DECLARATON FROM HIS COUNSEL

In Washington, attorney fees are generally calculated using the loadstar method. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 171, 157 P.3d 831 (2007). Under this method, when calculating fees, a trial court should exclude time spent on unsuccessful theories or claims, duplicated or wasted effort, or otherwise unproductive time. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). A trial court abuses its discretion when it awards attorney fees on the basis that no reasonable person would take, when it applies the wrong legal

standard, or when it relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

In this case, the trial court awarded attorney fees to Respondent without his counsel's declaration in support of his request for attorney fees. Counsel admits it failed to provide a fee declaration to support Respondent's request for attorney fees. Brief of Respondent at 12. Without such, it would have been impossible for the trial court to properly comply with the loadstar requirements. As a result, the trial court abused its discretion and its award for all attorney's fees should be reversed, which includes all court orders entered November 15, 2010.

Appellant request this court deny Respondent's motion for attorney's fees for this appeal as it is not entitled to an award should this court reverse the trial court's November 15, 2010 order.

II. CONCLUSION

Based on the foregoing arguments, Appellant respectfully request the court reverse the trial court's order enforcing the decree and awarding fees, and deny Respondent's request for attorney's fees for this appeal.

Dated this 29th of July 2011.

RESPECTFULLY SUBMITTED



PHILLIP B. NAVARRO, #31544
Attorney for Appellant

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

In re the Marriage of:

JEFFREY PAUL MANIPON

Respondent,

vs.

RANIE MANIPON,

Appellant.

No. 66411-5-I

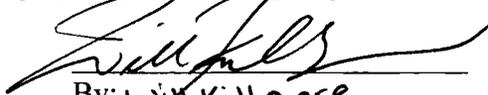
DECLARATION OF SERVICE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 29 PM 2:40

Will Killgore certifies as follows:

On July 29, 2011, I personally served copies of the Reply Brief of Appellant and this Declaration on Patricia Novotny at her office located at 3418 NE 65th Street, Suite A, Seattle, Washington 98115.

I certify under penalty of perjury that the foregoing is true and correct.



By: Will Killgore
Gary's Process Service
14973 Interurban Avenue South, Ste. 201
(206) 431-5699