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No. 70322-6

King County Superior Court No. 12-2-07660-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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ADAM ZACKS and LYNN RESNICK-ZACKS, husband and wife, and the
marital community thereof composed,

Appellants,

v.

RAINIER ROOFING & REMODELING, LLC, a Washington limited
liability company; OSSES CONTRACTORS INC., a Washington
corporation; and PANELMASTERS, LLC, a Washington limited liability
company,

Appellees.

REVIEW FROM THE SUPERIOR COURT
FOR KING COUNTY THE HONORABLE KEN SCHUBERT

APPELLANTS ADAM ZACKS AND LYNN RESNICK-ZACKS'
APPELLATE BRIEF

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A. DECISION BELOW AND RELIEF REQUESTED.

The Appellants are Adam Zacks and Lynn Resnick-Zacks (the Zacks), a married couple, residing at 2441 N. Queen Anne Ave, Seattle, Washington.

The Zacks are appealing the Superior Court's order dismissing Appellee, Arden Drywall and Texture, LLC (Arden). A copy of the April 12, 2013, Order Dismissing Arden is designated as CP 332-334. The Zacks respectfully ask this Court to reverse the Superior Court's Order.

B. ASSIGNMENTS OF ERROR.

1. The Superior Court erred in finding that Arden was not subject to the amendments of the Limited Liability Act, which took effect in July of 2009 and June of 2010, prior to Arden's cancellation.

2. The Superior Court erred in dismissing Arden, given that the Zacks sued Arden prior to Arden's cancellation.

C. STATEMENT OF THE CASE.

This lawsuit concerns construction defects in a private residence owned by the Zacks, located at 2441 Queen Anne Avenue North, Seattle, Washington (Residence). CP 1-8. The Residence is a three-story contemporary home, with a stucco exterior and flat roof. CP 189-305. The Residence was substantially completed on December 28, 2006. CP 189-305.

The Zacks purchased the Residence in June of 2011. CP 189-305. Within a month of the purchase, the ceiling on the upper floor of the Residence began to swell and discolor due to accumulated water in the ceiling cavity. CP 306-307. Subsequent investigations of the Residence revealed that the roof is completely rotten, windows are failing, and the wall assemblies are also rotting, due to moisture and water intrusion. The Zacks's experts issued a scope of repair on October 19, 2012, calling for complete replacement of the roof and third floor walls, which will necessitate an entire exterior re-clad of the home. CP 189-305.

As a result, the Zacks filed this lawsuit in March of 2012, alleging causes of action for negligence against the designer of the Residence, PB Elemental (PB), the general contractor, Lead Construction, LLC (Lead), the managing member of PB, Christopher Pardo (Pardo), and the roofing subcontractor, Rainier Roofing (Rainier). CP 1-8. The first party defendants, Pardo, Lead and PB, then asserted claims against subcontractors Osses Contractors, Inc., Exterior Stucco, Inc., Skyline Windows, Inc. and Panelmasters, LLC, on May 16, 2012. CP 9-23.

Pursuant to an agreement dated August 23, 2012, PB, Pardo and Lead agreed to assign to the Zacks all contracts between them and the named third-party defendants, as well as the contract between Lead and Arden (Contract). CP 189-305. They also agreed to assign to the Zacks

any and all claims they had, or could have, against the third-party defendants and Arden. By virtue of the assignment, the Zacks added Arden as a party on August 15, 2012. *Id.* The Zacks stepped into the shoes of PB, Pardo and Lead, and amended their complaint on September 17, 2012, to dismiss the first party defendants and assert claims directly against the other third-party defendants. CP 61-70.

Pursuant to its Contract with Lead, Arden was to supply all supervision, labor, materials and equipment for a complete drywall installation, to include window wrapping, for a contract price of \$15,600. CP 189-305. Third-party defendant Rainier has indicated that it believes the damage to the Residence was caused by Arden's failure to apply a vapor barrier to the walls prior to hanging the drywall, allowing vapor and moisture to intrude and get trapped in the roof.

On March 12, 2013, Arden filed a motion for summary judgment seeking dismissal of all claims against Arden. CP 133-144. Arden asserted four grounds for dismissal, including that the action against it was barred because Arden was a dissolved or cancelled LLC. The Zacks timely responded on April 1, 2013, asserting that Arden was not yet cancelled pursuant to amendments to the Limited Liability Act, which took effect during Arden's dissolution, but prior to its cancellation, and that the amendments were remedial and therefore retroactive. CP 173-

188. On April 12, 2013, the Superior Court granted the motion, finding that Arden was a canceled LLC, and therefore unable to be sued at the time the Zacks' claims were filed. The Court did not rule on the other issues in Arden's motion. CP 332-334.

This Court granted Discretionary Review on August 27, 2013, finding that "it was probably error for the trial court to dismiss Arden from the suit based on the 2006 version of the statute," and that the "trial court's probable error in failing to apply the amended statute substantially changed the status quo." *Exhibit 1* Order Granting Discretionary Review.

Trial in this matter was scheduled for August 5, 2013; the Superior Court has entered a stay pending the outcome of this appeal.

D. ARGUMENT WHY THE ORDER DISMISSING ARDEN SHOULD BE REVERSED.

The applicability of the Limited Liability Act (the Act) amendments to Arden is a pure question of law. LLC's are subject to the Act until their cancellation, when they cease to exist. The Superior Court erred in finding that the amendments to the Act did not apply to Arden, despite the fact Arden was not yet cancelled when the amendments were enacted.

1. An administratively dissolved company is able to be sued until its cancellation.

An LLC can be dissolved in several ways: by provision in the limited liability agreement, by decision of its members, by judicial decree or via administrative dissolution by the Office of the Secretary of State if the LLC fails to comply with reporting requirements. RCW 25.15.270; 25.15.280. A dissolved LLC is distinct from a cancelled LLC. A dissolved LLC continues its existence so that it can wind up its activities, including discharging debts, distributing assets, etc. RCW 25.15.295. A cancelled LLC ceases to exist in its entirety. Importantly, a dissolved LLC can sue and be sued, while a cancelled LLC cannot. RCW 25.15.303.

Arden was administratively dissolved on September 2, 2008. CP 169-172, Ex. A. At that time, the Washington Revised Code (the Code) stated that an administratively dissolved LLC would be cancelled two years after its administrative dissolution if the LLC did not seek reinstatement. Former RCW 25.15.290, amended by LAWS OF 2009, ch. 437, § 2 and the LAWS OF 2010, ch. 196, § 7. The Code also stated that LLC's which were dissolved by consent of their members would be cancelled when the LLC filed a certificate of cancellation after completing the winding up process. Former RCW 25.15.080, amended by LAWS OF 2010, ch. 196, § 14.

In 2009, the Supreme Court, *en banc*, issued its decision in *Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009). In *Chadwick*, a homeowner association sued the defendant, FHC, for construction defects. The lawsuit was asserted against FHC after it was dissolved, but before its certification of cancellation was filed. The Court found that the rights and liabilities of a dissolved LLC were different than a cancelled LLC. *Id.* The Court held that once an LLC's certificate of formation was cancelled it could no longer sue or be sued, but that a dissolved LLC remained subject to suit until it was automatically cancelled by the Secretary of state, or its members filed a certificate of cancellation. *Id.*

The Legislature amended the Act after the *Chadwick Farms* decision, first in July of 2009 and then in June of 2010. CP 189-305, Ex. I. The 2009 amendment lengthened the time period between the administrative dissolution of an LLC and its automatic cancellation. Pursuant to the amendment, an administratively dissolved LLC now remains subject to suit for *five* years after its administrative dissolution, rather than the two

year period previously provided. RCW 25.15.290.¹ After the five-year dissolution period, the LLC is automatically cancelled. *Id.*

The 2010 amendment to the Act changed the manner by which an LLC can invoke the statutory limitation on claims. The amendment eliminated the concept of filing a certificate of cancellation entirely, and now provides for a *certificate of dissolution*, which an LLC can file when it begins its winding up activities. The filing of a certificate of dissolution with the Secretary of State commences a three-year survival period, during

¹ (1) A limited liability company that has been administratively dissolved under RCW 25.15.285 may apply to the secretary of state for reinstatement within five years after the effective date of dissolution. The application must be delivered to the secretary of state for filing and state: (a) The name of the limited liability company and the effective date of its administrative dissolution; (b) That the ground or grounds for dissolution either did not exist or have been eliminated; and (c) That the limited liability company's name satisfies the requirements of RCW 25.15.010. (2) If the secretary of state determines that an application contains the information required by subsection (1) of this section and that the name is available, the secretary of state shall reinstate the limited liability company and give the limited liability company written notice, as provided in RCW 25.15.285(1), of the reinstatement that recites the effective date of reinstatement. If the name is not available, the limited liability company must file with its application for reinstatement an amendment to its certificate of formation reflecting a change of name. (3) When reinstatement becomes effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company may resume carrying on its activities as if the administrative dissolution had never occurred. RCW 25.15.290.

which claims may be brought against or by the LLC. RCW 25.15.273²; RCW 25.15.303³. After the three-year period has expired, the LLC is cancelled and no longer subject to suit. RCW 25.15.303

Importantly, administrative dissolution (as applicable to Arden) does **not** trigger the three-year survival period, without the LLC taking the additional step of filing a certificate of dissolution. RCW 25.15.303.

2. Arden is subject to the Limited Liability Act, and its amendments, until it is cancelled.

Arden was administratively dissolved in September of 2008. Under the law at the time, Arden would not have been cancelled until two years later, in September 2010. It was therefore a **dissolved** LLC at the time the Act was amended in 2009 and 2010. It did not at any time file a certificate of cancellation prior to the amendment of the Act. It therefore remained a dissolved LLC when this lawsuit was filed in August, 2012.

² (1) After dissolution occurs under RCW 25.15.270, the limited liability company may deliver to the secretary of state for filing a certificate of dissolution signed in accordance with RCW 25.15.085. (2) A certificate of dissolution filed under subsection (1) of this section must set forth: (a) The name of the limited liability company; and (b) A statement that the limited liability company is dissolved under RCW 25.15.270. RCW 25.15.273.

³ Except as provided in RCW 25.15.298, the dissolution of a limited liability company does not take away or impair any remedy available to or against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless the limited liability company has filed a certificate of dissolution under RCW 25.15.273, that has not been revoked under RCW 25.15.293, and an action or other proceeding thereon is not commenced within three years after the filing of the certificate of dissolution. Such an action or proceeding by or against the limited liability company may be prosecuted or defended by the limited liability company in its own name. RCW 25.15.303.

An administratively dissolved LLC continues its existence for the purpose of winding up and liquidating its business and affairs. RCW 25.15.285(3) (in effect in 2006). It can, during the dissolution period, prosecute and defend suits, make provision for the LLC's liabilities and distribute assets. Former RCW 25.15.295(2) (2006), amended by LAWS OF 2010, ch. 196, § 9. During that time, as this Court acknowledged in its Order granting Discretionary Review, the LLC can apply to the Secretary of State for reinstatement, and when granted, conduct its business as if the administrative dissolution had never occurred.

The Superior Court erroneously found that the 2009 and 2010 amendments to the Limited Liability Act do not apply to Arden. LLCs are subject to the Act, and its amendments, for as long as they remain in existence, which includes the period of dissolution. The Supreme Court affirmed in *Chadwick* that it is not the date of dissolution, but rather the date of cancellation, on which an LLC ceases to exist as a legal entity. *Chadwick Farms Owners Ass'n*, 166 Wn.2d at 191. As this Court recognized in its Order granting Discretionary Review, Arden was not yet cancelled at the time the amendments were enacted, and could have filed for reinstatement, continuing on with its business as though it had never been dissolved. As a result, Arden remained subject to the Act, and its amendments, as any other legally recognized LLC was and is. This

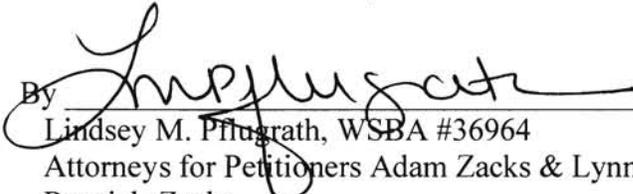
lawsuit was timely filed in 2012, prior to Arden's cancellation and in accordance with RCW 25.15.303. The Superior Court erred in finding that the amendments did not apply to Arden, and its dismissal should be reversed.

E. CONCLUSION.

For all of the foregoing reasons, the Zacks respectfully ask this Court to reverse the Superior Court's Order dismissing Arden.

DATED this 7th day of November, 2013.

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