

72800-8

FILED
May 5, 2015
Court of Appeals
Division I
State of Washington

72800-8

No. 72800-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

SOHRAB MOSHIRI,

Respondent,

and

DELTA Y. MOSHIRI,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARIANE C. SPEARMAN

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant claims she should be awarded nearly \$70,000 more than the \$365,000 she is entitled to from the sale of an office building she and respondent ex-husband owned together after their divorce, arguing that she should receive 7.5% of the “gross proceeds” of sale even though their Tenancy in Common Agreement clearly provided for division of the “net proceeds.” Appellant does not and cannot seriously challenge the trial court’s decision on the merits, and instead bases her appeal on alleged procedural deficiencies.

It was within the trial court’s authority to decide this post-dissolution matter, and its decision was supported by the plain language of the Tenancy in Common Agreement. The trial court also properly ordered appellant to repay respondent \$30,000 from her share of the proceeds, based on appellant’s admission that she received the funds from respondent, and her attorney’s acknowledgment that those funds should be repaid. This Court should affirm and award respondent his fees on appeal.

II. RESTATEMENT OF FACTS

- A. When the parties divorced in 2009, the wife was awarded a \$1.9 million judgment secured by an office building awarded to the husband.**

Sohrab and Delta Moshiri were married for 32 years. (CP 15)

When they were divorced in January 2009 after a 4-day trial (CP 14), the trial court divided their \$14 million marital estate equally, and ordered Dr. Moshiri to pay over \$1.9 million cash as an equalizing judgment to Ms. Moshiri in three installments - \$1,099,899 by May 26, 2009, \$471,254 by December 31, 2010, and \$347,549 by December 31, 2016. (CP 10-11, 32) Each installment accrued interest at varying rates if not timely paid. (CP 10-11) The equalizing payments reflected in promissory notes was secured by a deed of trust on the most valuable asset awarded to Dr. Moshiri, a Bellevue office building with a gross value of \$6,360,000 and a net value of \$5,360,405. (CP 10-11, 27, 39) Dr. Moshiri also was ordered to pay Ms. Moshiri maintenance of \$6,000 per month for 92 months, concluding in September 2016 (CP 12) - a maintenance obligation that was modifiable upon a showing of a substantial change of circumstances. RCW 26.09.170.

B. In 2011, the husband could not timely pay the judgment. To avoid foreclosure, the husband agreed to give the wife a 7.5% interest in the office building, payable from the “net proceeds” of sale.

Shortly after the divorce, Dr. Moshiri’s dental practice lost a contract with DSHS that had accounted for more than two-thirds of his average gross annual receipts. (CP 38, 84) By June 2011, Dr. Moshiri was unable to pay any of the equalizing installment payment due under the decree and was falling behind on his interest payments. (CP 39, 84-85) Ms. Moshiri threatened to foreclose on the office building. (CP 85) She agreed to not immediately foreclose only if Dr. Moshiri gave her a 7.5% interest in the office building and agreed to make his maintenance obligation non-modifiable. (CP 85)

The parties entered into a Post Decree Agreement (“PDA”) reflecting these agreed modifications to the decree of dissolution, including the trade of certain real properties, in exchange for Ms. Moshiri’s agreement to extend the due date on the note owed to her to July 2018. (CP 111-16) The parties agreed that any disputes arising from the PDA would be subject to binding arbitration:

If any dispute, controversy or claim arises between the parties out of or in relation to this Agreement, or the breach, termination or invalidity thereof, both parties by mutual negotiation shall attempt to come to a reasonable settlement of the same as soon as possible. If no settlement is reached within thirty (30) days from the first notification of the same in writing by either party, the same shall be settled by binding arbitration before such dispute-resolution organization as parties may so agree, and if the parties cannot agree then by the Judicial Arbitration and Mediation Services, Inc. ("JAMS") located in Seattle Washington. The award rendered by the arbitration shall be final and binding upon both parties concerned, and judgment upon the award may be entered in any court having jurisdiction thereof.

(CP 114-15)

The parties entered into a second agreement, a Tenancy in Common Agreement ("TCA"), to establish the terms of Ms. Moshiri's 7.5% interest in the Bellevue office building. (CP 118-22) While the parties owned the building as tenants in common, the TCA gave Dr. Moshiri the use of the building and any net income, and required him to be responsible for all property taxes, insurance, and assessments for the building:

Financial Responsibilities. Sohrab Moshiri shall pay, when due, all property taxes, insurance premiums and assessments of any kind and nature affecting the Property. Sohrab Moshiri shall be responsible to maintain the Property and pay all repairs, improvements, and additions.

(CP 118) The TCA also required Dr. Moshiri to be responsible for any indebtedness secured by a lien on the property, and allowed him to obtain financing for the property “for the purpose of refinancing existing indebtedness and/or to make improvements to the property:”

Provisions for Financing. Sohrab Moshiri shall be solely responsible for any indebtedness secured by a lien on the Property. Sohrab Moshiri may obtain financing for the Property and place a lien on the Property to secure such lien provided the lien secures a bona fide loan obtained for the purpose of refinancing existing indebtedness and/or to make improvements to the Property. Delta Moshiri shall not be responsible to personally pay any loan secured by a lien on the Property, but agrees to consent to encumber her 7.5% interest to secure a bona fide loan to Sohrab Moshiri for the aforementioned purposes.

(CP 118)

Although Dr. Moshiri would be entirely responsible to pay the mortgage, taxes, and assessments on the building while owned by the parties, he received no credit for those payments when the building was sold. Instead, the TCA provides that when the building was sold, the parties would share the “net proceeds” based on their pro rata interest in the building (7.5% to Ms. Moshiri and 92.5% to Dr. Moshiri). (CP 119) The TCA defined “net proceeds” as the amount remaining after deducting “the costs of sale, including,

but not limited to, real estate commissions, prorated taxes, excise tax, title insurance, and required work orders (“Closing Costs”) and to pay off any liens on the Property not assumed by the purchaser:”

Sale of Property. If Sohrab Moshiri decides to sell the Property, Delta Moshiri’s interest shall be sold as well. Upon the bona fide sale of the Property by the Co-Owners to an unrelated third party, the proceeds from the sale of the Property shall be applied first to the costs of sale including, but not limited to, real estate commissions, prorated taxes, excise tax, title insurance, and required work orders (“Closing Costs”) and to pay off any liens on the Property not assumed by the purchaser. The remainder of the sale proceeds (“Net Proceeds”), if any, shall be distributed to the Co-Owners in accordance with their pro rata interest in the Property.

(CP 119)

Unlike the PDA, the TCA did not require the parties to submit to arbitration for any disputes. Instead, it contemplated court action, arbitration, or mediation. (See CP 120: “If any suit or other proceeding is instituted by either party to this Agreement arising out of or pertaining to this Agreement or the Property, including but not limited to filing suit or requesting arbitration, mediation, or other alternative dispute resolution process (collectively “Proceeding”).... Venue shall lie in King County”). The TCA also included a “prevailing party” attorney fee provision:

Attorneys Fees. If any suit or other proceeding is instituted by either party to this Agreement arising out of or pertaining to this Agreement or the Property, including but not limited to filing suit or requesting arbitration, mediation, or other alternative dispute resolution process (collectively "Proceeding"), and appeals and collateral actions relative to such a suit or Proceedings, the substantially prevailing party as determined by the court or in the Proceeding shall be entitled to recover its reasonable attorneys fees and all costs and expenses incurred relative to such suit or Proceeding from the substantially non-prevailing party, in addition to such other relief as may be awarded.

(CP 120)

C. The first attempted sale of the office building in 2013 was aborted because the wife refused to fully cooperate. The building was eventually sold in 2014 for a lower price than previously offered.

Dr. Moshiri moved to California for new employment in 2012, but the position he had intended to fill fell through. (CP 85) Without regular income, Dr. Moshiri used his savings to pay his own expenses, his continuing (now non-modifiable) maintenance obligation, the interest on the notes owed to Ms. Moshiri, and the monthly expenses on the Bellevue office building that he and Ms. Moshiri now owned as tenants in common. (CP 85)

Because of his financial situation, Dr. Moshiri decided to sell the Bellevue office building, his "last valuable asset with some equity." (CP 69, 85-86) After nine months of negotiations, Dr.

Moshiri reached an agreement with a buyer who offered to purchase the property for \$6.5 million - \$140,000 more than it was valued when the parties divorced. (CP 27, 69-70, 86)

Ms. Moshiri refused to sign the purchase and sale agreement, and Dr. Moshiri filed a motion in the dissolution action in the superior court on August 19, 2013 to enforce the TCA. (CP 68-70, 86) The trial court denied the motion “without prejudice” after Ms. Moshiri expressed concern with certain warranties in the agreement. (CP 74-75, 86) Meanwhile the buyer walked away. (CP 86)

In 2014, Dr. Moshiri once again sought to sell the office building. A second buyer offered over \$6.1 million - \$400,000 less than the previous buyer. (CP 86) This time Ms. Moshiri cooperated, and the sale closed on July 3, 2014. (CP 86, 124-25) Among the “disbursements paid” at the time the sale closed was the mortgage of \$870,379. (CP 124, 167) This was the same mortgage that Dr. Moshiri had been paying down since the building was awarded to him in the 2009 decree, when the encumbrance had been nearly \$1 million. (CP 27, 167)

D. The trial court concluded that under the plain language of the Tenancy in Common Agreement the wife was entitled to a 7.5% interest in the “net proceeds” from the sale, not “gross proceeds.”

A dispute arose between the parties as to how to divide the proceeds of sale. Contrary to the plain language of the TCA, which states that the parties are to take their percentage from the “net proceeds” - defined as the proceeds less closing costs, including but not limited to “any liens on the Property not assumed by the purchaser” - Ms. Moshiri alleged that she was entitled to approximately \$435,000 - 7.5% of the “gross proceeds.” (See CP 119, 139, 154)

Dr. Moshiri disputed Ms. Moshiri’s interpretation, asserting that except for a lien that his attorney had against the building for attorney fees incurred in the dissolution action, “all ‘liens’ are to be paid out prior to our both receiving the ‘net’ proceeds,” giving Ms. Moshiri approximately \$365,000 from the proceeds. (CP See 154, 167)

After more than two months of fruitless negotiation, Dr. Moshiri filed a second motion in the dissolution action in September 2014, asking the court to interpret the TCA and enforce its terms. (CP 80) Dr. Moshiri conceded that his attorney’s fee lien

should be paid from his proceeds alone, but asserted that all other liens, including the mortgage, should be paid out of the proceeds before they are distributed to the parties. (CP 167)

Dr. Moshiri also asked the court to order Ms. Moshiri to pay back a \$30,000 loan he had made to her in 2011, before his financial troubles, that Ms. Moshiri through her attorney had previously agreed should be repaid. (CP 80, 82, 87, 127; CP 172: “Delta confirmed the \$30,000 payment and said she agreed it should be deducted from the appropriate note.”) Finally, Dr. Moshiri asked to be awarded attorney fees under the TCA, which provides that if a “suit or other proceeding is instituted by either party,” the prevailing party “as determined by the court or in the proceeding shall be entitled to recover its attorney fees.” (CP 82, 120)

Although Ms. Moshiri had not objected to the superior court’s jurisdiction when Dr. Moshiri filed his earlier motion to enforce the TCA (*See* CP 74-75), she answered his present motion by claiming that interpretation of the TCA was subject to binding arbitration and could not be decided by the court at all. (*See* CP 129-31) Alternatively, while not seeking a continuance of the motion, Ms. Moshiri claimed that an evidentiary hearing was

required “to consider evidence and testimony bearing on the division of sale proceeds.” (CP 128, 131-33)

Other than these procedural demands, Ms. Moshiri made little effort to address the merits of Dr. Moshiri’s motion. (See CP 128-35, 137-39) Ms. Moshiri took the position that with the exception of real estate commissions, all other liens must be paid from Dr. Moshiri’s proceeds. (CP 154) With regard to the \$30,000 loan, Ms. Moshiri now questioned whether the funds were in fact “repayment of what [Dr. Moshiri] owed and not a loan” and claimed that she would need to “reconstruct her records” to determine whether the \$30,000 was still owed. (CP 139)

Because the TCA contemplated court action or arbitration (see CP 120), the trial court considered the merits of Dr. Moshiri’s motion. King County Superior Court Judge Marianne Spearman found that “pursuant to Section 7 of the parties’ 2011 Joint Tenancy in Common Agreement, Ms. Moshiri’s 7.5% interest in Mr. Moshiri’s building is a ‘net’ not ‘gross’ interest, and thus her payout from the building’s sale proceeds shall not be calculated until all of the property’s mortgage and liens have been taken into account.” (CP 191) The issue of the attorney fee lien was not addressed in the

court's order, because Dr. Moshiri already conceded that it was to be paid from his share of the proceeds. (CP 167)

The trial court also ruled that “now that Ms. Moshiri has received building sale proceeds and is able to pay, she shall pay Mr. Moshiri the \$30,000 that he loaned her.” (CP 191) Finally, the trial court awarded attorney fees to Dr. Moshiri as the prevailing party under the TCA, and because “case law also provides for attorney fees against an intransigent party to make whole the harmed party.” (CP 191)

Ms. Moshiri's motion for reconsideration was denied. (CP 192-93) Ms. Moshiri now appeals. (CP 187)

III. ARGUMENT

A. **The Tenancy in Common Agreement did not require binding arbitration.** (Response to App. Br. 18-21)

The parties were not required to submit their dispute regarding the division of the proceeds from the sale of the Bellevue office building to binding arbitration. Unlike the PDA, the TCA did not contain an arbitration clause. (*Compare* CP 114-15 *with* CP 120) Instead, the TCA specifically contemplated that the parties could pursue court intervention if there were a dispute “arising out of or pertaining to this Agreement or the Property,” and its attorney

fee provision provided that a party could “fil[e] suit *or* request[] arbitration, mediation, or other alternative dispute resolution process.” (CP 120) (emphasis added) In other words, the parties were not limited to “binding arbitration” under the TCA, which was a document separate and apart from the PDA.

The TCA indeed contemplated that if a party did seek court intervention, venue would lie in King County. (CP 120) *See Dougherty v. Dep't of Labor & Indus. for State of Washington*, 150 Wn.2d 310, 316, 76 P.3d 1183 (2003) (describing venue as the location where “a suit may or should be heard”). Venue would be irrelevant if the parties were subject to binding arbitration, as evidenced by the fact that the PDA, which indisputably requires binding arbitration, contains no venue clause. (*Compare* CP 115 (¶ 16) *with* CP 120 (¶ 16))

Ms. Moshiri also had previously recognized that disputes arising out of the TCA could be decided by the court. When Dr. Moshiri sought to have the TCA enforced in 2013 and asked the court to order Ms. Moshiri to sign the purchase and sale agreement for his first attempted sale of the Bellevue office building (*see* CP 68-70) Ms. Moshiri did not demand binding arbitration. (*See* CP 74-75; Supp. CP 194-202, Sub no. 122) Instead, she simply claimed

that the contract was “complex” and that there were still “a number of issues that [] need to be resolved” before she would consent to a sale. (CP 75)

Ms. Moshiri argues that this dispute “arises out of or in relation to the Post Decree Agreement.” (App Br. 18) But all the PDA provided was that Dr. Moshiri “agrees to convey to Delta Moshiri a 7.5% interest in the Bellevue office building. Such interest shall be evidenced by a Quit Claim Deed in the form of Exhibit A and a Tenan[cy] in Common Agreement in the form of Exhibit B.” (CP 113) The parties did not dispute Ms. Moshiri’s percentage interest in the building, or the form in which that interest was conveyed. Instead, the parties’ dispute arose from the interpretation of the TCA, an agreement separate from the PDA that separately governed how the parties would divide proceeds from sale of the building.¹ This dispute under the TCA was subject to court intervention, arbitration, or mediation. (See CP 120)

Whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate is decided by the court. RCW

¹ Appellant makes much over the fact that the PDA states that a “form” of the TCA is attached as an exhibit to the PDA to claim that any challenge under the TCA “arises” from the PDA (App. Br. 18), but each party submitted a copy of the PDA and neither copy attached a form of the TCA or copy of the executed TCA as an exhibit. (See CP 111-16, 141-46)

7.04A.060(2); *Davis v. Gen. Dynamics Land Sys.*, 152 Wn. App. 715, 719, ¶ 10, 217 P.3d 1191 (2009) (“trial court, not an arbitrator, generally determines the arbitrability of a dispute”), *rev. denied*, 168 Wn.2d 1022 (2010). Because the dispute arose out of the TCA and under its plain language, the trial court here properly rejected Ms. Moshiri’s demand for arbitration.

Finally, appellant cites no authority (and there is none), requiring reversal because the trial court failed to make formal findings regarding its decision to not subject the parties to binding arbitration. (App. Br. 21); *See* CR 52(a)(5)(B) (findings are unnecessary for decisions on motions). In any event, no factual findings were necessary in this case. Based on the plain language of the TCA, the trial court properly concluded that the TCA did not require binding arbitration.

B. The trial court has continuing jurisdiction to resolve disputes between former spouses. (Response to App. Br. 15-18)

Appellant’s alternate claim that Dr. Moshiri was required to commence a new action to resolve the parties’ dispute regarding the distribution of proceeds from the sale of a former community asset is also without merit. “Even after a decree of dissolution, the superior court acting as family court has authority to resolve

disputes between former spouses.” *Newlon v. Alexander*, 167 Wn. App. 195, 203-04, ¶¶ 16-17, 272 P.3d 903 (2012) (dissolution court had jurisdiction to address the former spouses’ dispute over the handling of the remains of their child, who died after their divorce).

“Having before it at the outset a cause cognizable in equity, the court retains jurisdiction over the subject matter and the parties to be affected by its decree for all purposes—to administer justice among the parties according to law or equity. [] Further, it has the authority to use any suitable process or mode of proceeding to settle disputes over which it has jurisdiction, provided no specific procedure is set forth by statute and the chosen procedure best conforms to the spirit of the law. Indeed, when the equitable jurisdiction of the court is invoked whatever relief the facts warrant will be granted.” *Marriage of Langham and Kolde*, 153 Wn.2d 553, 560, ¶ 15, 106 P.3d 212 (2005) (*citations omitted*) (dissolution court had authority to consider the former wife’s tort claims against husband arising from his post-decree conversion of property); see also *Newlon*, 167 Wn. App. at 204, ¶ 18.

Here, because the trial court had continuing jurisdiction to resolve disputes between former spouses, the trial court properly considered Dr. Moshiri’s motion for a determination on the division

of proceeds from the sale of former community property under the parties' post-decree TCA, including establishing that Ms. Moshiri's interest in the building was to be taken from the "net proceeds" and ordering that she should be required to repay a \$30,000 loan that her counsel had previously acknowledged in writing. (*See* CP 172)

Appellant inexplicably claims that Dr. Moshiri failed to set forth his "claim for relief" in a pleading. (App. Br. 15-16) His motion did exactly that. (CP 80-83) Civil Rule 7(b) provides that "an application to the court for an order shall be by motion which [] shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." Civil Rule 8(a), which Ms. Moshiri relies on, provides that "a pleading [] shall contain (1) a short and plain statement of the claim showing the pleader is entitled to relief and (2) a demand for judgment for the relief which he deems himself entitled." (App. Br. 15-16)

Here, Dr. Moshiri in his motion stated with "particularity [] the relief sought" (CR 7(b)), and his "demand for judgment for the relief which he deems himself entitled" (CR 8(a)) in the "relief requested" section of his motion:

Mr. Moshiri (Petitioner) requests that the Court review the parties' Tenancy in Common Agreement and find that Ms. Moshiri's 7.5% interest in the Mr. Moshiri's building was a "net" not "gross" interest and thus that her payout from the sale of the building must include all liens on the property.

Ms. Moshiri requests that the Court order Ms. Moshiri to return to him, as part of the building sale proceeds, the \$30,000 that he previously loaned to her.

Mr. Moshiri requests that he Court find no basis to Ms. Moshiri's contention that Ms. Moshiri has to pay all of her attorney fees incurred to date.

Last, Mr. Moshiri requests that Ms. Moshiri be ordered to pay his attorney fees and costs that he had to incur to bring this motion to court.

(CP 80) Likewise, Dr. Moshiri provided "a short and plain statement" (CR 8(a)) showing that he was entitled to relief in the "argument" section of his motion, where he set out the facts and authority to support his motion. (CP 81-83) Because the trial court had continuing jurisdiction over the parties, it properly considered Dr. Moshiri's motion, which satisfied the pleading requirements under CR 7 and CR 8.

C. Appellant's other procedural challenges are without merit, and a clear attempt to avoid a decision on the merits. (Response to App. Br. 21-30)

Appellant throws in "everything but the kitchen sink" in claiming procedural errors in an effort to avoid the merits of the

trial court's decision. Each of these procedural arguments is without merit:

Ms. Moshiri complains that the motion was brought on a 6-day calendar instead of as a CR 56 summary judgment motion on a 28-day calendar. (App. Br. 23-24) Ms. Moshiri also complains that had the motion been brought under CR 56, she would have been entitled to oral argument. (App. Br. 24) But Ms. Moshiri makes no serious argument as to how she was prejudiced by these alleged procedural errors. "Error without prejudice [] is not grounds for reversal." *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *rev. denied*, 104 Wn.2d 1008 (1985); *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (appellant must show that her case was materially prejudiced by a claimed error. Absent such proof, the error is harmless), *rev. denied*, 117 Wn.2d 1026 (1991).

Ms. Moshiri complains that because the motion was filed on 6-day calendar, she had only 4 days to respond. (App. Br. 24) But this ignores the fact that discussions regarding whether her interest was calculated from the "net" or "gross" proceeds had been ongoing since the sale closed two months earlier, and that when those negotiations failed counsel agreed on a hearing date to resolve the dispute in court. (See CP 8-876, 156, 169) It was appellant's "take

it or leave it” attitude asserting that she take her percentage from the gross proceeds that necessitated the motion. (CP 169)

The motion and its contents were no surprise, and in answering the motion Ms. Moshiri did not seriously claim she needed additional time to address the very narrow issues before the trial court. (See CP 128-35, 137-39) At best, with regard to the \$30,000 loan, Ms. Moshiri claimed she “would need to reconstruct [her] records to determine what was owed and when it was paid. Such an undertaking would take time and a great deal of effort.” (CP 139) But when Ms. Moshiri presented her motion for reconsideration nearly a month later, she still presented no evidence refuting her previous acknowledgment that she indeed received these funds, and her counsel’s acknowledgment that those funds should be repaid. (See CP 139, 172, 183-84)

Presumably if there was any evidence that could be presented supporting Ms. Moshiri’s claim that the \$30,000 she received was not a loan, she would have presented it in her motion for reconsideration, filed more than a month after Dr. Moshiri filed his initial motion. “[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so,

without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable.” *Henderson v. Tyrrell*, 80 Wn. App. 592, 606, 910 P.2d 522 (1996), *as amended on denial of reconsideration* (Mar. 14, 1996) (*quoting Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977)). Because Ms. Moshiri admitted she received the \$30,000 from Dr. Moshiri (CP 139), and her counsel acknowledged that those funds should be repaid when Dr. Moshiri made his first demand for payment in 2012 (CP 172), the trial court properly ordered repayment from Ms. Moshiri’s share of the sale proceeds. *See Nilson v. Castle Rock School Dist.*, 88 Wn. App. 627, 630, 945 P.2d 765 (1997) (oral loan agreements that do not provide a specific time or period for repayment are payable on demand).

Ms. Moshiri claims that an evidentiary hearing was warranted before the trial court could decide whether she would take from the “net” or “gross” proceeds. (App. Br. 25-30) But as Dr. Moshiri stated below, “I wouldn’t have anything further to say in an evidentiary trial.” (CP 166) Likewise, Ms. Moshiri never states, below or on appeal, what evidence she could provide to warrant an evidentiary hearing to assist the court in interpreting the TCA. The dispute merely required an interpretation of the plain

language of the TCA, which specifically provides that the parties each take their pro rata share interest from the “net proceeds,” defined as the proceeds less real estate commissions, prorated taxes, excise taxes, title insurance, and required work orders, and “to pay off any liens on the Property not assumed by the purchaser.” (CP 119) And in interpreting the TCA, the court must not “interpret what was intended to be written but what was written.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005) (citations omitted). Thus, no additional evidence was needed to decide “what was written” in the TCA.

Ms. Moshiri further claims that the trial court created an “obvious conflict” by interpreting the TCA based on its plain language to require that the parties take after the “pay off of any liens on the Property not assumed by the purchaser” upon the “bona fide sale of the Property” (CP 119), because the TCA also provides that Dr. Moshiri “shall be solely responsible for any indebtedness secured by a lien on the property.” (App. Br. 26, *citing* CP 118) But in interpreting an agreement, the court must “harmonize clauses that seem to conflict. [The] goal is to interpret the agreement in a manner that gives effect to all the contract’s provision.” *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841,

849, ¶ 15, 158 P.3d 1265 (2007), *rev. denied*, 163 Wn.2d 1020 (2008).

Here, the trial court properly interpreted the TCA to require Dr. Moshiri to be responsible for the indebtedness on the building, including paying the mortgage and property taxes while the parties owned the building, but once the building was sold, the parties would share in the proceeds remaining after any liens are paid. The trial court's interpretation "gives effect to all the contract's provisions," whereas appellant's interpretation would require the court to excise the provision in the TCA requiring that the parties takes from the proceeds after any liens are paid. This it cannot do. "Courts do not have the power, under the guise of interpretation, to rewrite contracts." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891, ¶ 37, 167 P.3d 610 (2007), *rev. denied*, 163 Wn.2d 1042 (2008). The trial court properly interpreted the TCA based on its plain language. Additional time, oral argument, or an evidentiary hearing would not have changed that decision.

D. This Court should award attorney fees to respondent for having to defend this appeal.

A prevailing party may recover attorney fees authorized by agreement. *Silverdale Hotel Associates v. Lomas & Nettleton Co.*,

36 Wn. App. 762, 773, 677 P.2d 773, *rev. denied*, 101 Wn.2d 1021 (1984). The TCA provides for an award of attorney fees to the prevailing party in any action arising out of the TCA, including any appeals. (CP 120) Respondent is entitled to fees incurred on appeal in defending the trial court's decision. *See* RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

IV. CONCLUSION

The TCA was not subject to binding arbitration, and the trial court's interpretation was properly based on the plain language of the TCA. The trial court's decision requiring appellant to repay the loan from respondent from her share of the proceeds was supported by substantial evidence. This Court should affirm and award attorney fees to respondent.

Dated this 8th day of May, 2015.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 8, 2015, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
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DATED at Seattle, Washington this 8th day of May, 2015.



Victoria K. Vigoren