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Division I
State of Washington

74011-3

No. 74011-3-I

**Court of Appeals, Div. I,
of the State of Washington**

Harmony Nason,

Appellant,

v.

Hoban and Associates, Inc., et al.,

Respondents.

Brief of Appellant

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1. Introduction

Harmony Nason was a pro se plaintiff. Her complaint raised nine causes of action against the owners and operators of federally subsidized housing for the mentally ill, arising from their failure to provide required support services and refusal to provide reasonable accommodations for Nason's disabilities. The defendants failed to follow the program, leaving their mentally ill residents to fend for themselves in a group home setting without any support.

Before responding to discovery, the defendants brought a motion for summary judgment. Nason requested a continuance under CR 56(f) to obtain defendants' responses to discovery. The trial court denied Nason's motion and granted summary judgment dismissal. However, the record in the case reveals disputed material facts on at least some of Nason's causes of action, making summary judgment improper. This Court should reverse.

2. Assignments of Error

Assignments of Error

1. The trial court erred in granting summary judgment dismissal of all nine of Nason's causes of action.

Issues Pertaining to Assignments of Error

1. The moving party on summary judgment bears the burden of showing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Coast and Harmony House East failed to address six of Nason's causes of action and their underlying factual basis. The factual basis of the remaining claims was disputed by earlier declarations. Did the trial court err in granting summary judgment dismissal? (assignment of error #1)

3. Statement of the Case

Harmony Nason suffers from Post-Traumatic Stress Disorder, Anxiety Disorder, and Depression. CP 115, 169. These mental impairments qualify her as disabled under federal and state programs. CP 115. Nason experiences extreme fear and distrust of strangers and becomes very anxious and nervous when in close quarters with people she doesn't know well. *Id.*

Nason was homeless in 2006 when her counselor at Compass Health convinced her to apply for Section 811 and Section 202 housing for low-income persons with chronic mental illness. CP 114. Compass promised Nason that even though it was a group home, there was a support services plan in place to help manage the home and mitigate any problems. CP 115.

Harmony House East Association is the owner of affordable housing units known as Harmony House East in Monroe, Washington. CP 151, 169. Harmony House is subsidized

by the federal Department of Housing and Urban Development (“HUD”) under the Section 811 Supportive Housing for Persons with Disabilities program. *Id.*

Nason qualified under the program and was placed in Harmony House Powell in August 2007. CP 6, 52. Harmony House Powell is a three-bedroom home. CP 151. Each bedroom is rented separately to qualifying individuals and the rest of the home (kitchen, bathroom, living room, den, and garage) is a shared, common area. *Id.* No supportive services have been offered to residents of Harmony House since 2008. CP 115.

Hoban & Associates, d/b/a Coast Real Estate Services, provided property management services for Harmony House from 2010-14. CP 496-97. Coast does not provide social services to residents. CP 151. Coast makes regular visits to the property to inspect and provide maintenance that the disabled residents might be unable to provide themselves. CP 151-52.

Coast had a policy of entering the common areas without advance notice to the residents. *See* CP 167. Nason objected to this practice as a violation of the Landlord-Tenant Act. CP 116-17, 170. Due to her anxiety and PTSD, Nason was extremely uncomfortable with maintenance men showing up unannounced while she was alone in the home. *See* CP 93-94, 124, 131, 153. In March 2011, Nason made a formal request for reasonable accommodation for her mental disabilities. CP 91-95, 117, 153.

Specifically, Nason requested written 48-hour notice prior to any entry by the landlord or its agents, specifying a one-hour window for arrival, and that Nason could temporarily refuse entry by written notice within 24 hours specifying an alternate date for entry. CP 94, 117, 153.

Coast refused and proposed an alternative arrangement. CP 153. Nason complained to the Washington Human Rights Commission. CP 122. After some further negotiation, the parties finally agreed that Coast would limit its maintenance visits to two per month; would provide written 48-hour notice prior to entry, specifying a three-hour window for arrival; and would confirm the visit by phone with Nason no later than 10 a.m. the day of the scheduled visit. *Id.* The Human Rights Commission found this to be a reasonable accommodation and closed the case. *Id.*; CP 174.

Coast abided by the promised reasonable accommodation from December 2012 to March 2013. CP 122. Each month from June to September 2013, Coast provided notices for twice-monthly visits, but then failed to make the confirmation call and failed to show up. CP 122-23. On each of those days, Nason made arrangements for a friend to be present at the house with her for support and waited all day for Coast to show up. CP 131.

Coast's notice for October 2013 arrived on Oct. 2, notifying Nason of entry on Oct. 3. CP 123. When Coast's representative

arrived, Nason refused entry because Coast had failed to provide 48-hour notice. *Id.* Nason was forced to call the police to get Coast's representative to accept her refusal. *Id.*; CP 131. As Coast's representative left, he yelled, angrily, "This isn't the end. We aren't done with this yet." CP 131.

After this incident, Coast changed its policy, issuing monthly notices for weekly maintenance during a four-hour window. CP 123. Coast did not confirm or show up for any of these visits in November or December. *Id.* During that same period, Coast ignored Nason's requests for maintenance. *Id.*

Nason filed her complaint against Coast, Harmony House East Association, and Compass Health in December 2013. CP 1-113. Nason raised nine causes of action arising from the defendants' failure to provide support services and refusal of reasonable accommodations: 1) Violation of the Washington Law Against Discrimination; 2) violation of the Federal Fair Housing Act; 3) violation of the Supportive Housing for Persons with Disabilities Act; 4) violation of Section 504 of the 1973 Rehabilitation Act; 5) violation of the Consumer Protection Act; 6) breach of contract; 7) fraud; 8) violation of the Landlord-Tenant Act, specifically RCW 59.18.150(6); and 9) violation of the Landlord-Tenant Act, specifically RCW 59.18.240. CP 12-20. The complaint attached many pages of exhibits to support the allegations. CP 22-113.

Nason moved for a preliminary injunction, supporting her motion with numerous declarations. CP 114-24 (Declaration of Harmony Nason), 125-28 (Declaration of Erik Abelsen), 129-32 (Declaration of Cheryl Minnick), 133-36 (Declaration of David Hutton).¹ The trial court granted the preliminary injunction. CP 243-45.

Compass Health moved to dismiss, arguing that it did not own, manage, or control the property and had no obligations to provide case management or support services for Harmony House. CP 177-90. Nason requested a continuance, informing the court of evidence that suggested a formal relationship between Compass and Harmony House. RP, June 6, 2014, at 6:18-24. Nason requested an opportunity to discover the relationship between Compass and Harmony House or HUD. *Id.* at 10:8-10. The trial court denied the request, finding that Nason was “fishing.” *Id.* at 10:11-20. The trial court granted Compass’s motion and dismissed it from the case. *Id.* at 11:10, 11:18-19.

Nason propounded discovery requests to Coast and Harmony House East. *See* CP 527. The defendants never responded. CP 527-28.

¹ The motion itself appears to be missing from the record, but Coast’s response (CP 137-49) and Nason’s reply (CP 194-200) are included.

Coast moved for summary judgment dismissal of all claims, arguing that Nason could not produce evidence to support the elements of her claims. CP 475-95. Nason filed a motion for continuance, arguing that she needed the defendants' discovery responses in order to fully respond to the summary judgment motion. CP 527-36. The trial court granted the summary judgment motion, "for failure to respond to the motion and/or properly plead CR 56(f)." CP 523-26.

Throughout the process, Nason has been overwhelmed and intimidated by the proceedings and has had difficulty focusing her thoughts to be able to formulate arguments and convey them to the court or in deposition. *See, e.g.*, CP 406, 508-09, RP, Aug. 28, 2015, at 10:1-2. The trial court recognized that Nason did not fully understand the meaning and proper application of the court rules. *E.g.*, RP, Aug. 28, 2015, at 10:19-25.

4. Summary of Argument

The summary judgment motion of defendants Coast and Harmony House East was deficient. The focus of the motion was an assertion that Nason could not prove that Coast had refused her request for reasonable accommodations. The motion failed to recognize or sufficiently challenge five of the nine causes of action, which were based on the undisputed fact that Coast and

Harmony House East failed to provide required mental health support services. Additionally, there was evidence on file with the court that demonstrated a genuine issue of fact as to whether Coast violated the reasonable accommodation in 2013, supporting Nason's other causes of action. Where the pleadings and declarations on file demonstrated genuine issues of material fact, the trial court erred in granting summary judgment, despite procedural deficiencies in Nason's response.

5. Argument

5.1 The trial court erred in granting Coast and Harmony House East's motion for summary judgment.

5.1.1 Summary judgment decisions are reviewed de novo.

This Court reviews summary judgment orders de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This Court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008). Summary judgment must be denied if reasonable persons can reach more than one conclusion from the all of the evidence. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). This Court should reverse dismissal of Nason's claims because there are genuine issues of material fact. *See* CR 56(c).

5.1.2 The motion failed to address five of Nason’s causes of action or Nason’s assertion that the defendants failed to provide mental health support services.

Summary Judgment follows a burden-shifting analysis.

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). The moving party bears the initial burden of demonstrating that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Only after the moving party meets its burden does the nonmoving party have an obligation to respond. CR 56(e).

The defendants’ motion for summary judgment failed to demonstrate that they were entitled to dismissal of Nason’s claims as a matter of law. Although the motion identified all nine causes of action (CP 487-88), it analyzed them only by lumping them into two general categories: claims related to refusal of reasonable accommodation (CP 488-90) and “other claims” (CP 490-92).

The category of “other claims” was actually the first category of claims identified by Nason in her deposition:

Q: ... by filing this lawsuit, what is it exactly that you are asking for?

A: I’m going to answer that question the best I can without representation, without an attorney; so it might be brief. It’s hard for me to answer the question. This is a complex issue, and I don’t think one answer is appropriate. **I know I want to have**

the parties held accountable for the state the program is in...

CP 505 (at 20:15-22, emphasis added).

The motion correctly concludes that “the program” refers to the housing program under which Harmony House was operated, but then incorrectly asserts that this “does not appear to relate to any of the specific causes of action filed by [Nason].” CP 491. In fact, six of the nine claims set forth in the complaint refer specifically to the defendants’ failure to provide the support services required by the program. *See* CP 14-18.

Nason’s complaint alleged that the Section 811 housing program required the provision of mental health support services to the residents, including a minimum of ten hours of case management services per month provided by licensed mental health professionals. CP 5. Nason further alleged that no support services have been provided to Harmony House residents since August 2007. CP 7.

Nason’s first cause of action alleged that defendants’ failure to provide support services constituted discrimination in housing on the basis of mental disability, under RCW 49.60.222. CP 12-13. Nason’s third cause of action alleged that defendants’ continued denial of services constitute violations of the Supportive Housing for Persons with Disabilities Act. CP 14. Nason’s fourth cause of action alleged that defendants’ denial of

both support services and reasonable accommodations violated Section 504 of the 1973 Rehabilitation Act. CP 14-15. Nason's fifth cause of action alleged that defendants' portrayal of Harmony House as supportive housing for persons with mental disabilities, without providing the promised supportive services, is an unfair or deceptive practice in violation of the Consumer Protection Act. CP 15-16. Nason's sixth cause of action alleged that Nason was an intended beneficiary of the contract between defendants and HUD to provide mental health support services to the residents of Harmony House in exchange for HUD funding, and was therefore entitled to recover damages for defendants' failure to provide the services. CP 16-17. Nason's seventh cause of action alleged that defendants committed fraud by representing to her and others that Harmony House was a group home with supportive services, even though defendants have never provided the services. CP 17-18.

There is no excuse for defendants' failure to understand the complaint. Defendants admitted that Harmony House was operated under the program. *E.g.*, CP 151. Nason's testimony that no support services have been provided at Harmony House since 2008 (CP 115-16) was undisputed. *E.g.*, CP 151 ("Coast provides property management services to the HHE property. It does not provide social services to the residents of HHE."). By failing to recognize the nature of Nason's "support services"

claims or to attack their factual basis, defendants failed to meet their initial burden on their motion for summary judgment. Because defendants' motion failed to address these six claims (causes of action 1 and 3-7), the trial court erred in dismissing them. This Court should reverse.

5.1.3 The pleadings and declarations on file with the court presented genuine issues of material fact.

The motion for summary judgment made essentially a single, factual argument: that Nason could not prove her claims because Coast complied with the reasonable accommodation. However, this fact was actually in dispute. With the basis of the motion in dispute, Coast and Harmony House East were not entitled to judgment as a matter of law.

Under CR 56(c), the court is under a charge to consider all of the evidence of which it has been made aware to determine whether there is a genuine issue as to any material fact.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). By the time of the summary judgment motion, the trial court had already been made aware of many material facts, by way of declarations submitted by both parties related to Nason's

motion for preliminary injunction, Compass's early motion to dismiss, and other motions reflected in the record. Many of these earlier declarations were referenced in the motion itself. *See, e.g.*, CP 478.

As a *pro se* plaintiff, Nason could not be expected to understand the formalities of how lawyers typically respond to a motion for summary judgment. The Rule refers to documents "on file." Where Nason had already filed declarations in support of her case, she could have reasonably interpreted the Rule as requiring the court to review those declarations that were already "on file" with the court. The trial court should have given Nason the benefit of the doubt and reviewed her earlier-filed declarations in addition to those referenced by defendants. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) ("In civil rights cases, where the plaintiff is *pro se*, we have an obligation to construe the pleadings liberally and to afford the plaintiff the benefit of any doubt."). This is particularly so where the declaration on which defendants most heavily relied—the January 2014 Declaration of Leslie Hodson—was originally submitted to controvert the declarations Nason submitted in connection with her motion for preliminary injunction.

Defendants' declarations established that Harmony House was operated under HUD's Section 811 program for supportive housing. *E.g.*, CP 151. They admitted that defendants did not

provide any supportive services. *Id.* Defendants' declarations established that Nason and Coast agreed to a set of reasonable accommodations by the end of 2012. CP 174. They assert that Coast attempted to provide the required notice throughout 2013. CP 157. However, Nason's declarations detail Coast's failure to follow through on all of the requirements in June through September 2013 (CP 122-23); Coast's retaliatory change in practice in October 2013 in violation of the reasonable accommodation (CP 123, 131); and the damage she suffered as a result (CP 124). These facts were before the court and should have been considered. They create a genuine issue of material fact as to the bases for all of Nason's claims. The trial court erred in granting summary judgment dismissal.

5.1.4 The presence of genuine issues of material fact requires denial of the summary judgment motion, even in the absence of a substantive response.

The trial court granted the motion for summary judgment in part for Nason's failure to file a written response to the motion. However, even in the absence of a substantive, written response, the trial court must still determine whether there are any genuine issues of material fact and can only grant summary judgment if there are no material issues of fact.

Genuine issues of material fact are the touchstone of a summary judgment analysis. As noted above, the court can only

grant summary judgment if the evidence on file shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). After the moving party meets its burden, the adverse party is required to respond, setting forth specific facts showing that there is a genuine issue for trial. CR 56(e). The rule prescribes that if the adverse party “does not so respond, summary judgment, **if appropriate**, shall be entered against him.” *Id.* (emphasis added). That small phrase, “if appropriate” means that the court must still find, in accordance with CR 56(c), “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The court cannot simply grant summary judgment as a default for the adverse party’s failure to respond. Particularly where, as here, there are declarations and affidavits on file that show there are material facts in dispute, the trial court should not blind itself to those facts. Where there are material facts in dispute, the trial court should not grant summary judgment over the honest, even if deficient, efforts of a pro se plaintiff. As shown above, there were genuine issues of material fact. The trial court erred in granting summary judgment. This Court should reverse.

6. Conclusion

Coast and Harmony House East failed to meet their burden on summary judgment. The motion failed to demonstrate that defendants were entitled to judgment as a matter of law because it failed to address six of Nason's nine claims, which were based on defendants' undisputed failure to provide mental health supportive services. The other key fact in the motion—Coast's alleged compliance with the terms of the reasonable accommodation—was disputed by Nason's prior declarations. Where Coast and Harmony House East failed to meet their burden, the trial court erred in granting summary judgment. This Court should reverse.

Respectfully submitted this 3th day of October, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 3, 2016, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

Court of Appeals, Division I 600 University Street Seattle, WA 98101	___ U.S. Mail, Postage Prepaid ___ Legal Messenger ___ Overnight Mail ___ Facsimile <u>XX</u> Electronic Mail
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