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No. 34301-1-II

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STATE OF WASHINGTON

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DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

FLOOR EXPRESS, INC., a Washington corporation,

Respondent,

v.

MARGARET P. DALY, and "JOHN DOE" DALY, wife and husband, dba
MARGARETANGELO INTERIORS,

Appellants

COLONIAL AMERICAN CASUALTY & SURETY COMPANY, a Maryland
corporation,

Defendants.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY

BRIEF OF RESPONDENT FLOOR EXPRESS, INC.

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ORIGINAL

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I. COUNTER STATEMENT OF THE ISSUE

Did the Trial Court correctly dismiss the Counterclaims of Defendant Margaret Daly when Daly failed to demonstrate she is subject to any claims from the owner as a result of the work performed by Plaintiff Floor Express and when the Court allowed Daly thirty-nine (39) days and two separate opportunities to cure any deficiency in standing?

II. COUNTER STATEMENT OF THE CASE

A. Material Facts

Margaret Daly subcontracted with Floor Express to provide and install flooring materials at the Providence Mother Joseph Care Center. Floor Express installed flooring in five rooms, including the main dining room, and was paid for this work by Margaret Daly. (CP 162-165, 567-568).

Margaret Daly, personally, met with representatives of the flooring manufacturer and after discussion with these individuals selected and ordered the specific flooring product. (CP 122-125). Representatives of the manufacturer provided the Mother Joseph staff with specific training on how to clean the product. (CP 122-125). Despite this training the staff at Mother Joseph has not followed the recommendations of the manufacturer on how to clean the floor and instead has wet-mopped the floors. (CP123-124). This cleaning method has caused excess moisture in the floors. (CP 121).

Margaret Daly employee Richard Nelsen punctured a water pipe while working at the Mother Joseph facility causing extensive damage to the newly installed flooring in the main dining room. (CP 166-167, 567-568).

On or about March 19, 2003, Margaret Daly ordered materials and installation of flooring for the main dining room at the Providence Mother Joseph Care Center to repair and replace flooring materials previously installed by Floor Express but damaged by water as a result of the puncture of a water pipe by one of Ms. Daly's employees. (CP 166-167). Margaret Daly, not Mother Joseph, was responsible for the cost of this replacement.

Margaret Daly required Floor Express to complete the replacement of this flooring under moisture conditions which did not meet the manufacturer's specifications. Floor Express requested, and Margaret Daly signed, a Waiver and Release of Liability, acknowledging the installation was not consistent with manufacturer's specifications and holding Floor Express harmless of any subsequent failure or dissatisfaction. (CP 300 & 647).

Floor Express installed the new flooring, replacing the damaged floor, and billed Margaret Daly \$4,158.78. Margaret Daly did not pay this invoice. (CP 162-165, 567-568). Margaret Daly subsequently unilaterally

cancelled two invoices with Floor Express and was charged a re-stocking fee on each invoice. The total of these charges was \$2,003.70. Margaret Daly did not pay these invoices. (CP 567-568).

Margaret Daly has offered no evidence and has never contended that it was not paid in full by Mother Joseph for the flooring work performed by Floor Express. Margaret Daly has also offered no evidence Mother Joseph specifically requested any repair or replacement of the work completed by Floor Express.

Floor Express has installed six (6) floors at the Mother Joseph facility and been paid for five (5) of the installations. Daly's has been fully paid by Mother Joseph for all that Daly's was owed for the work completed by Floor Express. The floors installed continue to be in place in the facility having been neither repaired nor replaced to date, some four (4) years and 80% of the manufacturer's warranted life since installation.

B. Procedural History

Floor Express filed a Complaint for Money Due and Against Bond naming Margaret Daly, et. al., as Defendants on April 12, 2004. (CP 7-10). Margaret Daly filed an Answer, denying money was due and asserting a Counterclaim alleging the product installed did not meet "the specific and unique needs of Providence Mother Joseph Care Center" and that the floor had "failed". (CP 17). The Counterclaim asserts that

Margaret Daly has suffered damages known to exceed \$35,000.00. (CP 18).

The matter was called to trial in Thurston County Superior Court on November 7, 2005. The trial court heard pre-trial matters raised by both parties. Among those matters was the question of Daly's standing to pursue the Counterclaim set forth in her Answer to the Complaint. This issue was raised in Plaintiff's Memorandum for Trial filed the morning of the first day of trial. (CP 296-302).

The Court heard oral argument on the issue and reviewed, in camera, a "Joint Defense and Prosecution Agreement" between Margaret Daly and Mother Joseph. Counsel for Margaret Daly had previously refused to disclose a copy of this agreement claiming privilege. The Court redacted portions of the agreement and required its production. (CP 657-659).

After review of the document and further argument, the Court ruled from the bench that Daly had no standing to pursue her Counterclaim for Mother Joseph's alleged damages because Mother Joseph had not asserted a claim against Daly, and the Joint Defense and Prosecution Agreement was insufficient to bestow standing upon Daly to pursue those claims. (CP 660-677).

The Court struck the trial and provided Daly the opportunity to cure the deficiency in standing to pursue the counterclaim. The Court required Daly to arrange for Mother Joseph to be joined to assert her claims for damages, if any, or secure an agreement by which Mother Joseph specifically asserted claims against Daly for damages respecting the floors installed by Floor Express. (CP 678-691). Daly subsequently produced a document entitled Addendum to the Joint Defense and Prosecution Agreement dated November 11, 2005. (CP 434-435).

A hearing was held on December 2, 2005, twenty-five (25) days after Daly was given the opportunity to cure the standing deficiency. Following that hearing the Court entered the Order on Defendant, Margaret Daly's Standing to Pursue Counterclaim, on December 9, 2005. (CP 612-614). The Court in this Order concluded Daly was not the real party in interest with respect to the Counterclaim she had asserted and the Joint Defense and Prosecution Agreement, and the Addendum thereto, did not qualify Daly as the real party in interest or for any exceptions to the real party in interest rule outlined in CR 17(a). (CP 613-614).

The Court ordered the Defendant Margaret Daly's Counterclaim dismissed unless Providence Mother Joseph Care Center was joined as a party in the proceeding on or before the close of business December 16, 2005. (CP 613). Mother Joseph was not joined and the Counterclaim was

dismissed, thirty-nine (39) days after the Court's initial oral ruling on standing and after Daly had been given two (2) opportunities to cure the deficiency in standing. Instead, Margaret Daly initiated this appeal.

III. ARGUMENT

A. Dismissal Under Civil Rule 17(a) Was Appropriate.

Although the Order entered December 9, 2005, by the Court references the term "real party in interest", this is truly a standing issue. It was asserted as a standing issue and the Court understood it was a standing issue. A challenge to standing can be raised at any time. Branson v. Port of Seattle, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004). Even under Civil Rule 17(a) the timing of the action is well within the time frames appropriate. See, 3A, Orland and Tegland, Wash. Prac.: Civil Rule 17, at p. 421. Some courts have also allowed a challenge under CR 17(a) to be brought at trial or after. See, Walter Implement, Inc. v. Focht, 42 Wn. App. 104, 107, 709 P.2d 1215 (1985), rev'd on other grounds, 107 Wn.2d 553 (1987); Fox v. Sackman, 22 Wn. App. 707, 591 P.2d 855 (1979). In Fox, the defendant brought forth his real party in interest objection after trial in a Motion for Reconsideration.

Civil Rule 17(a) states:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for

ratification or commencement of the action by, or joinder or substitution of, the real party in interest.

The Court allowed Daly with reasonable time and opportunity to cure the deficiency regarding the real party in interest. The initial objection was raised by Floor Express during Motion argument on November 7, 2005. (CP 297-298). Twenty-Five (25) days later, on December 2, 2005, the issue was addressed again by the Court after Daly secured an addendum to the original Joint Defense and Prosecution Agreement. The Court determined the Addendum was also not adequate under the Rule. Despite Daly's unwillingness to follow the direction of the Court, the Order entered allowed an additional fourteen (14) days for Daly to cure the deficiency. The Counterclaim was not formally dismissed until Daly was given two opportunities and thirty-nine (39) days to cure the deficiency determined by the Court pursuant to CR 17(a).

B. Mother Joseph Had No Claim To Assign and no Ability to Ratify Daly's Action.

The rule in Washington is that "a property owner is generally not a third-party beneficiary of a contract between the general contractor and a subcontractor." Warner v. Design and Build Homes, Inc., 128 Wn. App. 34, 43, 114 P.3d 664 (2005). Such contracts

Are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted. The installation of plumbing

fixtures or the construction of cement floors by a subcontractor is not a discharge of the principal contractor's duty to the owner to deliver a finished building containing those items; and if after their installation the undelivered building is destroyed by fire, the principal contractor must replace them for the owner, even though he must pay the subcontractor in full and has no right that the latter shall replace them. It seems, therefore, that the owner has no right against the subcontractor, in the absence of clear words to the contrary. The owner is neither a creditor beneficiary nor a donee beneficiary; the benefit that he receives from performance must be regarded as merely incidental. Warner, 128 Wn. App. At 43 (quoting 9 Arthur L. Corbin, CORBIN ON CONTRACTS § 779D (1979)).

Because Mother Joseph, as the owner, is not a third party beneficiary to the contract Daly does not qualify for any of the exceptions outlined in CR 17(a).

Margaret Daly has consistently acknowledged that Mother Joseph has no right of action against Floor Express. *See, Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994); Warner v. Design & Build Homes, 128 Wn. App. 34, 43-44, 114 P. 3d 664 (2005). For this reason Mother Joseph has no claim to assign and no ability to ratify Daly's action.

A litigant cannot bring an action to recover someone else's damage, i.e., the damages alleged must be damages suffered by the claiming litigant. *See, WEA v. Shelton School District No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980); In re Farrow's Estate, 53 Wn.2d 84, 86,

330 P.2d 1012 (1958); Triplett v. Dairyland Ins. Co., 12 Wn. App. 912, 915, 532 P.2d 1177 (1975). In the present case, Daly is alleging that Floor Express sold her the wrong materials for the Mother Joseph project and then proceeded to install the products improperly. Daly alleges the floors have “failed.” However, the floors installed by Floor Express are still in place at the Mother Joseph facility and have not been taken out of service or “repaired” at any point since their installation in late 2002 and early 2003. (CP 120-121). Daly has not been required by Mother Joseph to take any action with respect to the floors and has not paid Mother Joseph any money for their alleged failure. Mother Joseph has not commenced any action against Daly for any alleged defects and has not even threatened to do so. *See*, Joint Defense and Prosecution Agreement, Addendum, (CP 434-435).

Accordingly, the Trial Court concluded that Daly could not demonstrate she had suffered any damages as a result of Floor Express’ work and the real party in interest respecting claims about deficiencies in the floor, if any exist, was Mother Joseph, not Daly. (CP 612-614).

Daly has asserted the Joint Defense and Prosecution Agreement, as supplemented by the Addendum thereto; either makes Daly the real party in interest with respect to alleged deficiencies in Mother Joseph’s floors or

entitles her to the protection of one of the exceptions to the real party in interest rule of CR 17(a).

The Trial Court thoroughly reviewed the documents and noted the Joint Defense and Prosecution Agreement did not articulate Mother Joseph was asserting a claim against Daly for alleged deficiencies in the floors. (CP 660-677). The Court went on to require some documentation that “Mother Joseph has a claim that they have intended to pursue against Ms. Daly. Because if they don’t have a claim to pursue against Ms. Daly, she has no damages to bring against the Plaintiff.” (CP 690).

In response to the Court’s instruction, Daly and Mother Joseph entered into the Addendum, (CP 434-435), which specifically indicated Mother Joseph “did not want” to join the litigation. (CP 434).

C. Public Policy Supports The Trial Court Decision.

Courts have frequently outlined the purpose of Civil Rule 17(a). “The rule is not intended as a method by which the trial court may sanction dilatory plaintiffs; rather, it is meant to insure that the real party in interest will be made a party to the suit at a time when the interests of the defendants will be protected.” Rinke v. Johns-Manville Corp., 47 Wn. App. 222, 226, 734 P.2d 533 (1987).

All of the leading cases in Washington concerning Civil Rule 17(a) have a similar fact pattern in which the real party in interest is joined once

a CR 17(a) concern is raised. For example, in Rinke v. Johns-Manville, a wrongful death action, the widow filed the complaint suing in both her own name and as personal representative. However, at the time the suit was filed, Mrs. Rinke had not actually been appointed personal representative of her husband's estate. Id.

The defendants answered the complaint and asserted the plaintiff lacked the necessary legal capacity to initiate the lawsuit. After some delay Mrs. Rinke was actually appointed personal representative and in that capacity approved and ratified the filing of the complaint. Id.

The defendants moved for dismissal for lack of a personal representative and the trial court dismissed because of the amount of time that had passed between the defendant's assertion of the standing issue and the appointment. The Court of Appeals remanded, concluding: "Dismissal under the rule is appropriate only when the trial court has allowed the plaintiff a reasonable time to bring the real party in interest into the suit and joinder, substitution, or ratification cannot be effected." Id. at 227-8.

Based on this standard, dismissal is appropriate in the present case. Mother Joseph, as the real party in interest, has effectively and consistently indicated they do not wish to participate in this legal

proceeding. Without her participation the counterclaims of Daly can not go forward.

“The purpose of CR 17(a) is to protect the defendant against a subsequent action by the party actually entitled to recover and to expedite litigation by not permitting technical or narrow constructions to interfere with the merits of legitimate controversies.” Kommavongsa v. Haskell, 149 Wn.2d 288, 315, 67 P.3d 1068 (2003).

Again the fact pattern in Kommavongsa is similar, once the real party in interest issue is raised; the real party joins the litigation and ratifies the lawsuit. Once the court determined it would not allow an assignment of a legal malpractice claim, they allowed the proper party to substitute and allowed the substitution to relate back. The trial court in the present case attempted to do the same. The trial court allowed Daly’s counsel two opportunities to join Mother Joseph or effectively indicate her ratification of the lawsuit.

Mother Joseph refused to participate in the litigation, the Addendum to the Joint Defense and Prosecution Agreement, (CP 434-435), specifically states she “did not want” to join the litigation. As anyone involved in the legal system can understand, there can be numerous legitimate reasons why a potential litigant does not wish to pursue possible claims. These can range from potential expense to time

constraints to publicity issues, to name only a few. Whatever the reason, Mother Joseph has been given the opportunity to join this litigation and assert her alleged claims; she has consistently declined to do so. However, if Mother Joseph is unwilling to assert an alleged claim against Daly regarding the floors, then it is clear that Daly has no damage and hence no counterclaim to assert against Floor Express. For this reason, the trial court's dismissal of the counterclaim should be affirmed.

D. The Joint Defense Agreement is Insufficient to Satisfy CR 17(a).

Daly and the Amicus both assert the type of pass through agreement the Joint Defense and Prosecution Agreement purports to be are common in the construction industry. Amicus admits these types of agreements typically work in the other direction when a subcontractor seeks to pursue recovery through the general contractor against an owner. Both Daly and Amicus assert the reverse should be true when an owner has a claim against a subcontractor's performance. *See*, Amicus Curiae Brief, p. 5.

Neither Daly nor the Amicus offer any authority to support their contention pass through agreements such as this are, or should be, valid. In the example provided the agreement is used to leave out the middle-man in the litigation, the General Contractor. In the purported agreement, between Daly and Mother Joseph, the only party able to truly assert

damages through the counterclaim, Mother Joseph, is left out of the litigation.

Whether pass through agreements in the construction industry are, or should be, used is immaterial to this particular litigation. Neither the Joint Defense and Prosecution Agreement nor the Addendum specifically indicate Mother Joseph is requiring Daly to replace or repair the work performed by Floor Express. Neither the Agreement nor the Addendum specifically indicates Mother Joseph is demanding anything from Daly as a result of the work performed by Floor Express.

The general rule governing damages for breach of contract is “that the aggrieved party should be put in the same economic position it would have attained had the contract been performed.” Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 764, 115 P.3d 349 (2005). As the Court in Crest explains, Daly’s had “a protected expectation interest in attaining the benefit of its bargain, and must be put in as good a position as it would have been had [Floor Express] properly performed.” Id.

That is exactly where Daly finds herself today. She has been paid by the owner, Mother Joseph, for all the work performed by Floor Express. She faces no litigation, or even threat of litigation, because of the work performed by Floor Express. The only reason Daly is involved in

this litigation is because she has refused to pay the sum she owes to Floor Express for the work done for her, and her alone, by Floor Express to replace the floor she ruined in the main dining room, incidentally with the identical flooring material. (CP 567-569).

The lawsuit was filed by Floor Express on April 12, 2004. (CP 7-10). Daly's answered and asserted her counterclaim on June 3, 2004. (CP 15-18). The original Joint Defense and Prosecution Agreement was not signed until November 30, 2004. (CP 434). This sequence of events, particularly when Daly has not produced a single document which confirms Mother Joseph has asserted a claim against Daly which gives substance to her Counterclaim, clearly suggests the Counterclaim was filed without sufficient support under CR 17(a).

The extent to which Mother Joseph has gone to specifically **NOT** assert a claim against Daly can be found in the Declaration of John Whipple, Senior Attorney for Providence Health System, including Providence Mother Joseph Care Center. The Declaration of John Whipple Regarding Joint Defense and Prosecution Agreement, unsigned, was filed with the Superior Court on November 10, 2005. (CP 327-330). The signed, and drastically changed, Declaration was filed on November 22, 2005. (CP 426-427). The differences between the Declarations are enlightening.

These differences are highlighted on the tracked version of the unsigned Whipple Declaration attached to the Affidavit of Catherine Hitchman. (CP 570-575). Among those matters deleted from the unsigned Declaration of Mr. Whipple, inferentially, by Mr. Whipple himself, are the following:

In Paragraph (3): “. . . because one of the things Mother Joseph had bargained for and obtained in our agreement with Margaret Daly was to not be included in the litigation, so as to avoid fees and costs.”

All of Paragraph (4): “I understand some question has arisen as to whether Margaret Daly is exposed to liability for the bad floors she provided to Mother Joseph through her subcontractor, Floor Express. The answer is yes, she does, to the full extent of Mother Joseph’s damages.”

All of Paragraph (6): “Margaret Daly installed five floors, but Vivian Curry, then Administrator of Mother Joseph, was dissatisfied with the floors, and cancelled the sixth floor before it was installed. Vivian Curry also declined to pay for the fifth floor until the problems she had identified were corrected.”

In Paragraph (8): “Since the expert report showed that the floors were the wrong floors, installed the wrong way. Mother Joseph had a substantial claim against Margaret Daly.”

The clear implication to be taken from these deletions is Mother Joseph is not representing it recognized, or asserted, a claim against Daly respecting the work of Floor Express. Therefore, the Joint Defense and Prosecution Agreement, even as supplemented by the Addendum, does not satisfy the Trial Court's, or CR 17(a), requirements for authorizing Daly to seek recovery of Mother Joseph's alleged damages.

IV. FLOOR EXPRESS INC. IS ENTITLED TO FEES

Pursuant to RAP 18.1 Respondent Floor Express, Inc. requests an award of attorney's fees incurred on appeal. The contract in question provides an attorney's fees clause under RCW 4.84.330 allowing the prevailing party to recover fees. Floor Express, Inc. is entitled to recover its fees on appeal and requests such fees.

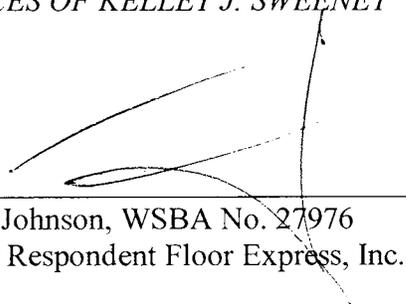
V. CONCLUSION

The Trial Court correctly dismissed the counterclaims of Defendant Margaret Daly because Daly has no standing to pursue those claims on her own. Daly can not adequately demonstrate any damage related to its contract with Floor Express. Daly was given an appropriate opportunity to join the owner, Mother Joseph, the real party in interest relative to the counterclaims. Daly did not, or could not, persuade Mother Joseph to join the litigation. Because Daly is not the real party in interest relative to the counterclaims, dismissal was appropriate and the ruling of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 18th day of December, 2006.

LAW OFFICES OF KELLEY J. SWEENEY

By:

A handwritten signature in black ink, appearing to read 'Matthew G. Johnson', is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

Matthew G. Johnson, WSBA No. 27976
Attorney for Respondent Floor Express, Inc.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of December, 2006, I caused a true and correct copy of Respondent Floor Express, Inc.'s Brief to be served on the following in the manner indicated below:

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