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STATE OF WASHINGTON
NO. 36458-1-II-07

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HARRIS STOCKARD and PAMA STOCKARD,
husband and wife,

Respondents,

v.

JOHN HARER and JANE DOE HARER,
husband and wife, d/b/a AZALEA GARDENS, LLC; and
COMMONWEALTH PROPERTY MANAGEMENT
SERVICES COMPANY, an Oregon corporation, d/b/a
COMMONWEALTH REAL ESTATE SERVICES,

Appellants,

CHRISTINA MAYS and JOHN DOE MAYS,
wife and husband,

Defendants.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The brief submitted by the Stockards in response to the opening brief of Azalea Gardens LLC (“LLC”), the Harers, and Commonwealth Property Management Services Co. d/b/a Commonwealth Real Estate Services (“Commonwealth”) ignores the facts and the actual arguments made by the LLC, the Harers, and Commonwealth, and instead attempts to transmute the Stockards’ arguments they advanced below into something entirely new.

Based on RCW 59.20.070(2), paragraph 15 of the lease, and the Azalea Gardens rules and regulations, the LLC had the right to refuse approval of the Stockards’ large addition to their mobile home on the LLC’s property. The LLC was entitled to disapprove the Stockards’ addition, and there is absolutely no evidence the LLC’s decision was unreasonable or made in bad faith. Even if there were such evidence, at best, the Stockards created a *question of fact* for the trier of fact on that issue.

Moreover, under Washington’s LLC statute and general principles of agency law, any responsibility for enforcement of the lease rested with the LLC and the trial court plainly erred in failing to dismiss the Harers and Commonwealth.

B. RESPONSE TO COUNTER-STATEMENT OF THE CASE

The Stockards' statement of the case largely parallels that provided by the LLC in its brief with a few notable exceptions. They *concede* paragraph 15 required prior written approval of any addition to an Azalea Gardens tenant's premises. Br. of Resp'ts at 4.

The "sewing room" the Stockards claim they wanted to add to their premises is 18 feet by 38 feet, or 586 square feet and included a patio and storage space. CP 117. The drawings for the "sewing room" look more like those for an added bedroom. *Id.* Their "sewing room" even included fancy transoms. *Id.*

The Stockards infer that David Omoth, Commonwealth's on-site manager, approved their addition. Br. of Resp'ts at 4-5. They assert they relied on his "preliminary review." *Id.* at 5. They omit the critical portion of Omoth's testimony that he had to submit any addition request to the LLC for approval. CP 122. They *concede* such approval was needed when they note they gave their request to Omoth for submission to the LLC owner "for approval." Br. of Resp'ts at 5.

The Stockards further concede that the LLC *twice* rejected their request for an addition in writing. *Id.* at 5-6. The second rejection was in response to a threatening letter from the Stockards' attorney who demanded:

immediate approval of their proposed addition or a statement setting forth the specific reasons for a disapproval within two weeks of the date of this letter. We will otherwise interpret lack of a timely response as acquiescence and Mr. and Mrs. Stockard will proceed with their project.

CP 115.¹

The Stockards then admit that although they had no written approval of their addition from the LLC, as required by paragraph 15 and the Azalea Gardens rules, they went to a *sales agent*, and, based on statements he allegedly made to them, they went ahead with construction, describing it euphemistically as “preliminary ground work for the addition.” Br. of Resp’ts at 2. That sales agent, Pat Loomis, told the Stockards he had no authority regarding the day-to-day operation of Azalea Gardens. CP 197.

Finally, the Stockards make an elaborate argument to justify their failure to comply with the notice requirements of CR 56(c) for their cross-motion for summary judgment. Although the LLC plainly objected to the lack of notice for the cross-motion, as the Stockards concede, br. of resp’ts at 9, citing CP 140, the Stockards argue that the LLC somehow “waived” the inadequate notice for the Stockards’ cross-motion when the LLC

¹ The Stockards argue in their statement of the case that the LLC was required to articulate reasons for its disapproval of their addition. Br. of Resp’ts at 5-6. Nothing in the lease or rules and regulations required this.

argued its own motion for summary judgment and waited to raise concerns about the notice issue until it argued its own motion. Br. of Resp'ts at 9-10. This contention is disingenuous, as no lawyer worth his or her salt would argue the opponent's case first.

Similarly, the Stockards contend the LLC somehow waived its position on CR 56(f) after its counsel specifically raised that rule. Br. of Resp'ts at 10. Again, the LLC's counsel clearly argued the applicability of CR 56(f). CP 166; RP 29.

C. ARGUMENT

The Stockards *concede* the LLC has correctly articulated the standard of review on summary judgment.

(1) The Trial Court Erred in Permitting the Stockards to Submit an Untimely Cross-Motion for Summary Judgment

The Stockards contend the trial court properly allowed them to submit an untimely cross-motion for summary judgment in violation of CR 56(c) because the LLC allegedly was not prejudiced by their untimely motion. Br. of Resp'ts at 15-21.

First, the Stockards assert that the trial court could have granted summary judgment *sua sponte*. *Id.* at 15-16.² They are wrong. As the cases they cite indicate, such a motion may be granted by a court if there is

² The Stockards raise this argument for the first time on appeal in violation of RAP 2.5(a).

no disputed issue of fact. See, e.g., Impecoven v. Dep't of Revenue, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (summary judgment for nonmoving party *if the facts are undisputed*). There is no question but that the Stockards' cross-motion raised a potential question of fact: did the LLC act unreasonably or in bad faith in denying approval of the Stockards' addition? Because the Stockards' cross-motion raised a potential question of fact, the LLC was entitled to the time allowed by CR 56(c) to gather declarations demonstrating why the Stockards' contentions involved a genuine issue of material fact.

Second, the Stockards' next claim that the LLC somehow "waived" the lack of notice for the cross-motion, citing CR 6(d) and cases arising under it. Br. of Resp'ts at 16-17. This contention borders on the frivolous. The LLC objected to the lack of notice in its pleadings, CP 140, 165-66, and in argument before the trial court. RP 20-21.

Third, continuing on their theme of CR 6(d), the Stockards claim that lack of notice under CR 6(b) is not "jurisdictional" and the LLC must demonstrate it was prejudiced by a lack of proper notice. Br. of Resp'ts at 18-20.³ But motions under CR 6(b) are *not* analogous to summary

³ This argument by analogy to CR 6(b) was never made below by the Stockards. RAP 2.5(a).

judgment motions. CR 6(b) pertains to general motions practice. It generally does not pertain to dispositive motions on the merits like CR 56.

The principal case offered by the Stockards in support of their analogy to CR 6(d) is *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 88 P.3d 375 (2004). In that case, the Supreme Court held that the nonmoving party in a motion for summary judgment was not prejudiced by the trial court granting an order to shorten time. In assessing whether that party was prejudiced, the Court looked to whether the party had ample notice and time to prepare. *Id.* at 236. Unlike the short time afforded the LLC here, the nonmoving party in that case had ample notice the State would be issuing debt based on tolls from the Tacoma Narrows Bridge, a major subject of the State's summary judgment motion:

Here, EHB 2723 became effective on June 13, 2002. Thus, it had been clear for three months before the September 13, 2002 hearing that the toll revenues would reimburse the motor vehicle fund and that the motor vehicle fund would pay off the Referendum 49 bonds financing the Tacoma Narrows Bridge project. Additionally, on July 11, 2002, CAT sent a letter to the attorney general that pointed out alleged violations of various state laws and the State Constitution, including the issue of failing to comply with the state bidding laws. The Design-Build Agreement and the amended UIW agreement were executed on July 16, 2002, nearly two months before the State's motion was heard.

Id. at 238.

Additionally, the Court concluded the nonmoving party had ample time to prepare, rejecting the ostensible reasons it offered to claim prejudice. *Id.* at 238-39. For example, the Court noted the nonmoving party could not have been prejudiced by not having declarations from key legislators because such declarations were inadmissible on legislative intent. *Id.* at 238.

Fourth, the Stockards assert that the LLC was not prejudiced by the lack of notice and, even if prejudiced by the lack of notice, the LLC's prejudice was "cured" by its motion for reconsideration where it presented evidence to the trial court. Br. of Resp'ts at 19-21. The Stockards are plainly wrong.

The notice requirements of CR 56(c) afford a nonmoving party on summary judgment at least 17 days to obtain and submit responsive evidence to demonstrate the existence of a genuine issue of material fact. By contrast, the Stockards' untimely motion afforded the LLC and its counsel a mere five business days in which to obtain declarations responsive to their cross-motion. A CR 56 motion is dispositive. This length of time is essential to permit a party to respond.⁴ This Court should

⁴ As Justice Sanders observed in *Citizens Against Tolls*:

Summary judgment carried a judicial determination that one litigant has no evidence or legal entitlement to support its claim. *See Babcock v. State*, 116 Wash.2d 596, 599, 809 P.2d 143 (1991) ("Summary

not permit trial courts to blithely disregard the clear mandates of CR 56(c) to suit their fancy.

The availability of a motion for reconsideration does not cure lack of notice because the admission of new evidence and the granting of such a motion is *discretionary* with the trial court. A party forced to rely on such a motion is prejudiced by the burdens built into CR 59 to sustain such a motion. A party must show the evidence is “newly discovered,” that is, it could not have been obtained for the motion on summary judgment. CR 59(a)(4); *Coggle v. Snow*, 56 Wn. App. 499, 509 n.3, 784 P.2d 554 (1990); *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988). A trial court has discretion as to whether it will even receive such new

judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial.”), *quoted in City of Seattle v. State*, 136 Wash.2d 693, 697, 965 P.2d 619 (1998). A litigant has at least 17 days to file briefing and affidavits in opposition to a motion for summary judgment. CR 56(c). This time frame is greater than that applicable to other motions, *cf.* CR 6(d)-properly so, considering the inherent dispositive effect of summary judgment. And the rule expressly provides that response time may be *extended*. See CR 56(f).

I posit when a litigant faces the potential summary dismissal of his or her claim the trial court must be ever vigilant in its duty to ensure each claim is properly decided on its merits. This is especially true with a citizen’s lawsuit against the government’s unlawful use of taxpayer dollars. In such a case I reject the claim the trial court has the discretionary authority to fast forward the proceedings to the finish line just to make the State “feel” better. This suggests an overt judicial partiality which favors the State over the private citizen litigant corrosive to public support and confidence in an independent judiciary.

151 Wn.2d at 254 (Sanders, J., dissenting).

evidence at all. *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612, review denied, 133 Wn.2d 1020 (1997).⁵

Finally, the Stockards neglect to address the LLC's argument that the trial court abused its discretion in failing to grant a continuance under CR 56(f). *See Cofer v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973). Br. of Appellants at 11. In the absence of any argument on this issue, the Stockards have effectively conceded the error and the Court may rule on it based on the argument in Azalea Gardens' opening brief and the record. *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995).

In sum, the trial court erred in permitting the Stockards to argue a cross-motion for summary judgment for which they failed to give proper notice to the LLC.

(2) The Trial Court Erred in Failing to Dismiss the Harers and Commonwealth

The only response the Stockards offer to the argument by the LLC that the Harers should have been dismissed from this action under Washington LLC law, and Commonwealth should have been dismissed under agency principles is that the Harers and Commonwealth were within

⁵ The Stockards, in fact, argued the trial court should not consider the LLC's "new evidence." CP 234-35.

the general definition of a “landlord” under RCW 59.20.030(2). Br. of Resp’ts at 28-29. This argument borders on the frivolous.⁶

It is undisputed that any tort claims by the Stockards against the LLC, the Harers, or Commonwealth were dismissed by the trial court. CP 160, 306. The Stockards did not seek cross-review on such a dismissal. Similarly, Christina Mays, a Commonwealth employee, was dismissed from this action, CP 306, and the Stockards did not seek cross-review on that dismissal. The only remaining issue is whether the landlord, the LLC, properly withheld approval of the Stockards’ addition. Under the lease, *only the LLC is the landlord*, CP 51 (¶ 23), not the Harers or Commonwealth. The Harers and Commonwealth were not parties to the lease agreement. CP 48-52. Only the LLC is properly a party in this lease action.

For the Court to adopt the Stockards’ argument, it would have to turn LLC and agency law on their ear. Parties create LLCs, for example, precisely for the purpose of exonerating the principals from personal liability. RCW 25.15.125(1) is absolutely unambiguous on the legal effect of an LLC. Agency law is similarly clear, and confirms that an agent is not liable for acts undertaken in a representative capacity. Br. of Appellants at 14.

⁶ Again, the Stockards never made this argument to the trial court. RAP 2.5(a).

The trial court erred in failing to dismiss the Harers and Commonwealth from this case.

(3) The Trial Court Erred in Failing to Enforce Paragraph 15 According to its Terms

After downplaying the LLC's authority under RCW 59.20.070(2), paragraph 15 of the lease, and the Azalea Gardens rules to deny approval of the Stockards' addition, contending the LLC arbitrarily withheld its consent, CP 129-39, the Stockards now *concede* the LLC had such authority. Br. of Resp'ts at 22. However, they now argue for the first time on appeal that the LLC acted unreasonably and in bad faith because it did not specify in detail to them *why* it was denying approval. *Id.* at 22-28. The Stockards also engage in *pure speculation*, without any basis in the record, that the LLC did not "investigate" their request, assess other projects, or do anything other than simply review the Stockards' drawings. *Id.* at 25-27.⁷ They also argue for the first time that they were denied a "full hearing" to respond to the LLC's denial of the addition.

The Stockards' rank speculation, without citation to the record about the LLC's alleged lack of investigation, and newly created theories, do not alter the legal principle that whether the grantor or an architectural

⁷ The Stockards even make the disingenuous statement that they were never told *by Mays* why their project was rejected. Br. of Resp'ts at 26. But Pat Loomis specifically told them their addition was overly large, disproportionate to structures in

committee acted unreasonably or in bad faith is a *question of fact*. Br. of Appellants at 20-21. They do not anywhere in their brief deny that principle, nor do they even discuss the cases like *Green v. Normandy Park, Rivera Section, Community Club*, 137 Wn. App. 665, 693, 151 P.3d 1038 (2007) or *Heath v. Uraga*, 106 Wn. App. 506, 24 P.3d 413 (2001), *review denied*, 145 Wn.2d 1016 (2002).

Contrary to their contention in their brief at 24 that this issue can be decided as a matter of law, the trial court erred in doing so. The lease here did not require the LLC to specify its reasons for denial of approval. CP 51. Similarly, the Azalea Gardens rules did not require a specification of reasons or a hearing process as to tenant improvements *on the LLC's property*. CP 59-66. Neither document required a “full hearing” on denial. *Id.* Moreover, the LLC had ample reasons for rejecting the Stockards’ addition as disproportionate to the rest of Azalea Gardens. CP 173-95. At a minimum, the LLC was entitled to a trial on whether it withheld approval of the Stockards’ additions “unreasonably” or in “bad faith.”

Azalea Gardens. CP 197. They admitted below that they knew the reason for this denial. CP 236.

(4) The Stockards Are Not Entitled to Attorney Fees at Trial

Because the Stockards should not have prevailed below, this Court should reverse the trial court ruling allowing for an award of fees.

(5) The LLC, the Harers and Commonwealth Are Entitled to Fees on Appeal

The appellants should recover their fees on appeal. Br. of Appellants at 23.

D. CONCLUSION

Nothing in the Stockards' brief should dissuade this Court from reversing the trial court's summary judgment in favor of the Stockards and directing that judgment be entered in favor of the LLC on the basis of paragraph 15 of the agreement. Similarly, the Court should direct that the Harers and Commonwealth be dismissed from the case on remand. In the alternative, the summary judgment should be reversed, and a trial should be ordered on the LLC's decision not to approve the addition. Costs on appeal, including reasonable attorney fees, should be awarded to the LLC, the Harers and Commonwealth.

DATED this 28th day of November, 2007.

Respectfully submitted,

A handwritten signature in black ink that reads "Philip A. Talmadge". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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DECLARATION OF SERVICE

On said day below I deposited in the U. S. mail a true and accurate copy of the following document: Reply Brief of Appellants, Court of Appeals Cause No. 36458-1-II, to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 29, 2007, at Tukwila, Washington.

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