

NO. 37556-7-II

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

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DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

KENNETH BRACKETT and DAYNA BRACKETT,
Husband and Wife,

Appellants,

vs.

RICHARD E. WALSH and LINDA M. WALSH,
Husband and Wife,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 07-2-01383-8

BRIEF OF APPELLANT (CORRECTED)

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Defendants/ Respondents' Motion for Summary Judgment.
2. The trial court erred in finding that the terms of the Settlement Agreement between the parties were unambiguous, and that the Defendants/ Respondents had complied with the terms of the Settlement Agreement, as a matter of law.
3. The trial court erred in refusing to consider extrinsic evidence as to the intent and understanding of the parties in the execution of the Settlement Agreement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are the terms of the Settlement Agreement, and specifically the provision requiring the Defendants/Respondents to immediately list their home for sale and "vacate" their "residence" no later than May 31, 2007, ambiguous? (Assignments of Error Nos. 1-3).
2. Was the Court entitled to consider extrinsic evidence as to the intent, understanding, and circumstances of the parties in executing the Settlement Agreement? (Assignments of Error Nos. 1-3).

C. STATEMENT OF THE CASE

On July 13, 2007, the Appellants/Plaintiffs Brackett filed a Complaint against the Respondents/Defendants Walsh, alleging breach of a Settlement Agreement previously executed between the parties to resolve on ongoing dispute between the parties. CP 4-24. The Settlement Agreement at issue was attached to the Complaint as Exhibit A. CP 7-10. Specifically, the Appellants alleged in their Complaint that the Respondents had breached the provision of the Settlement Agreement which read as follows: "The Walshes shall immediately list their property for sale. The Walshes agree to vacate their residence next

door to the Bracketts not later than May 31, 2007.” CP 5. The Complaint sought (a) specific performance of the Settlement Agreement, by ordering the Walshes to vacate and sell their property, (b) relief to the Bracketts of performing their obligations under the Agreement, and (c) an award of costs, attorney’s fees, and damages. CP 6.

On November 15, 2007, Appellants filed a Motion for Summary Judgment and a Declaration of Appellant Dayna Brackett in support thereof. CP 29-36. Ms. Brackett’s Declaration recited that the Respondents Walsh had “vacated their residence” (i.e., had moved to Arizona) and had listed their property for sale, pursuant to the terms of the Settlement Agreement, but that they had returned from Arizona on June 19, 2007, and had resumed living in the residence, in breach of the terms of the Settlement Agreement that the Walshes “vacate“ the premises not later than May 31, 2007. CP 35-36.

In response to the Appellants’ motion for summary judgment, the Respondents filed several documents:

1. A Declaration by the Defendants which recited, among other things, the fact that despondent did list their home for sale and did move to Arizona. The Declaration went on to state that when their house did not sell, they were unable to maintain payments on both residences (i.e. Arizona and Washington), and that they then “cancelled the listing and returned to our home.” In other words, the Respondents listed their home for sale, moved temporarily to Arizona, and then cancelled the sales listing in Washington and moved back into the house which they had agreed to vacate. CP 45-66.

2. Declaration by Margo Street, attaching documents indicating that the Respondent’s home was listed for sale on April 29, 2007, and that the listing was cancelled on June 11, 2007. CP 37-44.

3. A Legal Memorandum of Authorities in Opposition to the Motion for Summary Judgment (CP 129-139) which, interestingly enough, contains a section entitled **“CONTRACT INTERPRETATION RAISES AN ISSUE OF MIXED FACT AND LAW WHICH SHOULD BE DETERMINED AT TRIAL”**. The discussion and argument by Respondent’s counsel in this section and in a later section of the Memorandum argues that the intent and the understandings of the parties at the time the contract was executed are relevant issues in such a lawsuit and, as such, are issues of fact which should result in the denial of the Appellants’ motion for summary judgment.

There followed a Reply by the Plaintiffs to the Defendants’ Memorandum which addressed, paragraph by paragraph, the Defendants’ position as stated in their Memorandum. CP 67-81.

The matter came on for hearing on December 21, 2007, before the Honorable Judge Gary R. Tabor of the Thurston County Superior Court. RP 12/21/07, pp. 1-18. Counsel for the Appellants argued that the Respondents had breached the Settlement Agreement by temporarily moving to Arizona and then moving back roughly one month later, and that they had thus not truly “vacated” their residence, as required by the Settlement Agreement. RP 12/21/07 pp. 5-6.

Counsel for the Respondents argued that the matter should proceed to trial. He specifically argued as follows:

Your Honor knows and I think it’s understood by both counsel, you read a contract in context of the circumstances of the parties. It’s our argument that this contract should be read in light of all the testimony of the parties in trial with all the circumstances explained, that it’s not appropriate in a summary judgment hearing to decide and determine, well, what was the purpose, what were the circumstances and what

were the parties thinking; what was their intent when the contract was signed. That's out first and I say primary argument. **This case should be heard in trial.**

The court should listen to and be allowed to hear the testimony of all the parties and the circumstances, including the broker for the defendants who was attempting to sell the house, and her explanation of why this house wasn't more successfully marketed.

RP 12/21/07, p. 11. (Emphasis added). After arguments of counsel, the Court denied the Motion for Summary Judgment brought by the Appellants. RP 12/21/07, p. 18; CP 82-83.

On January 4, 2008, Respondents filed a Cross Motion for Judgment of Dismissal, arguing that the language of the Settlement Agreement was unambiguous, and that the Respondents had complied with their obligations under that Agreement by moving to Arizona for 30 days, even though they then returned to the Washington property and resumed residency there. CP 84-97.

The Appellants, in response, filed several documents:

1. A Declaration of counsel for the Appellants, attaching several letters exchanged between himself and between prior counsel for the respondents, relative to the negotiations of the parties leading up to the execution of the Settlement Agreement at issue. CP 109-118.
2. A Declaration by Appellant Dayna Brackett setting forth the times lines and the actions of the Respondents in listing and unlisting their property for sale. CP 107-108.
3. A Plaintiffs' Response to Defendants' Cross Motion for Judgment of Dismissal. CP 102-106.

The Respondents' counsel then filed a Reply Brief to the Plaintiffs' Response,

arguing against consideration by the court of any extrinsic evidence as to the parties' intent, and stating that the contract is in no way ambiguous. CP 140-145. The Appellants' counsel then filed a Reply to the Respondents' Reply. CP 146-150.

Argument on the Respondent's motion was held on February 15, 2008, again before judge Gary R. Tabor. RP 2/15/08, pp. 1-15. After argument of counsel, the Court granted the Respondent's Motion for Summary Judgment, ruling that the contract was "clear on its face", and that the Respondents had both listed their property for sale and had vacated the property, as required by the property. RP 2/15/08, p. 10. The judge did not consider any matters outside of the terms of the contract as to the parties' intent. RP 2/15/08, p. 10. An award of attorney's fees in the amount of \$6,000 was made to Respondent's counsel. RP 2/15/08, p. 14. An Order on Defendants' Motion for Summary Judgment and for Award of Attorney's Fees was entered on March 10, 2008. CP 119-121.

Timely Notice of Appeal to the Court of Appeals was filed on April 4, 2008. CP 122-126.

D. ARGUMENT

The issues in this appeal are relatively straight forward. The hearing judge found that the Respondents had fully complied with the terms of the Settlement Agreement, and thus granted summary judgment, for that reason, against the Appellants. The root of the hearing judge's ruling was that the language of the Settlement Agreement, to the effect that the Respondents "shall immediately list their property for sale" and that the Respondents "agree to **vacate** their **residence** next door to the Bracketts not later than May 31, 2007" was not ambiguous, and that the Respondents were in complete compliance with those terms of the Settlement Agreement. In so ruling, the hearing judge

refused to consider any extrinsic or parol evidence concerning the understanding, intent, and circumstances of the parties to the Settlement Agreement.

It is submitted by the Appellants as follows: (1) The term “vacate” in the Settlement Agreement is, at the very least ambiguous (if not unambiguous in a sense favorable to the Appellants’ position), and that the use of this term presented a valid and compelling issue of fact as to what the parties meant and intended by the use of this term. Such issues are properly decided in the context of a trial, where the trier of fact has the unique ability to hear testimony, examine documents, and reach an understanding as to the parties’ intent in using this term; and (2) The ambiguous nature of the term “vacate”, and/or general case law concerning statutory construction, allows and encourages the Court to consider extrinsic and parol evidence as to the parties’ intentions and understandings at the time the Settlement Agreement was executed, and the hearing court’s refusal to consider such evidence was clear error.

Framework for Analysis

On an appeal from the grant of a summary judgment, the appellate court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn. 2d 853, 860-61, 93 P. 3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn. 2d 715, 722, 853 P. 2d 1373 (1993)). The standard of review is *de novo*.

Summary judgment is appropriate only 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). All facts and reasonable inferences therefrom are to be construed in the light most favorable to the nonmoving party. *Vallandigham v.*

Clover Park Sch. Dist. No. 400, 154 Wn. 2d 16, 26, 109 P. 3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn. 2d 506, 516, 799 P. 2d 250 (1990)). However, “bare assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence.” *Trimble v. Wash. State Univ.*, 140 Wn. 2d 88, 93, 993 P. 2d 259 (2000).

It cannot be said, as a matter of law, that the Respondents were in full compliance with the terms of the Settlement Agreement, and it was error to have granted a summary judgment to the Respondents in this matter.

The facts surrounding this most basic argument are simple:

1. The Respondents were bound by the terms of the Settlement Agreement to “immediately list their property for sale” and to “vacate their residence next door to the Brackets not later than May 31, 2007.”
2. The Respondents did list their property for sale on April 29, 2007, though they removed their property from the market on June 11, 2007.
3. The Respondents moved from their property to Arizona for roughly thirty days, but returned to occupy and reside at their property in June, 2007.

There are several problems with the Court’s ruling in granting summary judgment to the Respondents, and in doing so, essentially finding that they were in full and complete compliance, as a matter of law, with the terms of the Settlement Agreement. There problems revolve around two of the words in the specific section of the Settlement Agreement at issue. Those words are “vacate” and “residence”. The presence of either of these words in the Settlement Agreement creates issues of fact which, when viewed in the light most favorable to the nonmoving party (i.e., the Appellants), clearly demonstrate

that summary judgment was erroneously granted in this case.

“Vacate”

Counsel for Appellants, in his argument before the court, presented the dictionary definition of the term “vacate” as “to surrender occupancy or possession.” In the context of this dispute, which was a longstanding dispute between neighbors, which was well documented in the record, the question necessarily arises as to the meaning of the term “vacate” as used in the Agreement.

The term “vacate” is subject to many interpretations. If the term is understood to mean simply leaving a particular premises, it can be as simple as leaving one’s home to go to the grocery store for an hour-long shopping trip. Can one be said to have “vacated” one’s home under those circumstances? Certainly. If one goes on a one night trip to another town and stays in a hotel, can one be said to have vacated one’s home under those circumstances? Certainly. If one is what is popularly known as a “snowbird, I.e. those who spend the winter in sunny climes and the summer in more temperate climes, can one be said to have vacated one’s home in the sunny clime for the temperate clime, and *vice versa*? Of course. Thus, the word “vacate” has many meanings, and its particular use in this case, and in the Settlement Agreement executed by the parties, is subject to not interpretation as a matter of law, but should be subjected to the full scrutiny of a fact-finding trial to determine compliance and breach issues.

The hearing judge focused in on one fact, and one fact only - that the Respondents had left their Washington home and had moved, albeit temporarily, to Arizona. Thus, he found, they had “vacated” their home, and were in compliance with the terms of the Settlement Agreement, as a matter of law. What if they had been gone only two weeks?

What if they had spent a couple of nights at a relative's house and then moved back in? What if they had left the house for a half day to travel to Seattle to see a movie? Under the Court's strained analysis, under any one of those circumstances, they would be deemed to have "vacated" their home, and would be in full compliance with the terms of the Settlement Agreement. Such a result is absurd, and is contrary to the terms, and the very spirit of, the Settlement Agreement itself. As stated by Judge Armstrong in the case of *Forest Marketing Enterprises, Inc. v. State Department of Natural Resources*, 125 Wn. App. 126, 104 P. 3d 40 (2005):

[the court] must read [a contract] "as the average person would read it; it should be given a 'practical and reasonable rather than a literal interpretation', and not a 'strained or forced construction' tending to absurd results."

Given the very nature of this Settlement Agreement, and the clear animosity which had existed between the parties (which had been well summarized in the pleadings before the Court), it is inconceivable that the use of the term "vacate" meant anything other than a total, complete and **permanent** surrender of the property in question. Yetm the hearing court's ruling would give credibility to the theory that the Respondents, after signing that Settlement Agreement, were free to temporarily leave the property, and then return with impunity to again live on the property. Keeping in mind the standard of review that all inferences are to be made in favor of the nonmoving party, such an absurd result cannot stand.

"Residence"

Given that the standard of review is *de novo*, another argument can be made. Considering the language of the Settlement Agreement as written, the Respondents were

obligated to “vacate their residence”. These terms must be viewed in conjunction to give true meaning to the Agreement, and to the respective obligations of the parties under the explicit terms of the Agreement.

The term “residence” has been defined many times in Washington case law. It has been defined as “the act...of abiding or dwelling in a place for some time: an act of making one’s home in a place...the place where one actually lives or has his home distinguished from his technical domicile...a temporary or permanent dwelling place, abode, or habitation **to which one intends to return as distinguished from a place of temporary sojourn or transient visit...**” *State v. Vant*, 145 Wn. App. 592, 186 P. 3d 1149 (2008).

The significance of this is clear. The Respondents were obligated to “vacate” their “residence” under the clear terms of the Settlement Agreement. The term “residence”, as set forth above, contemplates a place of permanency, not a “place of temporary sojourn or transient visit”, such as a month in Arizona. Viewed in the context even of the clear language of the Agreement, can it be said, as a matter of law, that by moving to Arizona for a month and then moving back into the subject property, the Respondents were, as a matter of law, in full compliance with the Settlement Agreement? The answer is obvious, particularly given the presumption of all inferences being made in favor of the nonmoving party in such matters.

Perhaps the most compelling argument in this regard is what is clearly the Respondent’s initial intention, viz. to move on a permanent basis to Arizona. That this was their clear intent is evident from the pleadings in this case. The fact that poor economic choices and forces made their initial intent a doomed one in no way detracts

from the fact that, by their very actions, they have confirmed that the clear understanding and intent of the parties to this Agreement was that they would vacate their home and relocate, on a permanent basis, to another place.

Under **any** reasonable analysis of the terms on the Settlement Agreement and the facts presented to the Court by the pleadings submitted, it cannot be said that, taking all inferences in the light most favorable to the Appellants, the Respondents were entitled to judgment as a matter of law. Given the commonly understood, as well as the dictionary definitions of “vacate” and “residence”, there were significant questions of fact concerning compliance with the terms of the Agreement, and those issues should have been, and should be now, presented to a tried of fact.

It was appropriate and necessary for the Court to have considered extrinsic evidence to determine the meaning of certain terms in the Settlement Agreement.

As evidenced by the list of pleadings considered by the Court in making its ruling CP 121, the Court declined to consider any extrinsic evidence, in the form of letters between plaintiff’s attorney and defendants’ attorney regarding the details and intentions of the settlement, relying instead upon the “clear and unambiguous” language of the Agreement itself, an aspect of the court’s ruling which has been discussed and challenged above.

Counsel for Appellants, in his pleadings, cited to the case of *Berg v. Hudesman*, 115 Wn. 2d 657, 801 P. 2d 222 (1990), for the proposition that extrinsic of parol evidence may be considered in the interpretation of contracts, regardless of whether the terms of the contract are ambiguous or not. The *Berg* case was routinely cited for the proposition that extrinsic evidence can **always** be considered by a court in construing and interpreting

a contract. The *Berg* holding was limited, in response to its being continually cited for this proposition, in the case of *Hearst Communications, Inc., et al. v. Seattle Times Co., et al.*, 154 Wn. 2d 493, 115 P. 3d 262 (2005). In that case, the Washington Supreme Court discussed the holding of *Berg*, and the limitations placed upon it as follows:

Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule announced in *Berg* has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state. *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 693, 974 P. 2d 836 (1999) (citations omitted). Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of specific words and terms used’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’ *Id.*, at 695-96 (emphasis added). See also *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn. 2d 565, 571, 919 P. 2d 594 (1990) (court’s intention in adopting the ‘context rule’ was not ‘to allow such evidence to be employed to emasculate the written expression of the meaning of the contract’s terms’); *In re Marriage of Schweitzer*, 132 Wn. 2d 318, 327, 937 P. 2d 1062 (1997) (‘context rule’ cannot be used to show intention independent of the instrument); *Go2Net, Inc., v. C I Host, Inc.*, 115 Wn. App. 73, 60 P. 3d 1245 (2003) (admissible extrinsic evidence does not include evidence of a party’s unilateral or subjective intent as to contract’s meaning).

In the instant case, there is no attempt to utilize extrinsic evidence to “emasculate the written words of the contract”, to “show intention independent of the instrument”, or to show one party’s “unilateral or subjective intent”. Rather, the extrinsic evidence presented by Appellant’s counsel was simply to explain and educate the Court as to the meaning of the word “vacate”, as that term was used in the Settlement Agreement. The hearing court’s refusal to consider such evidence, both in terms of its decision to grant a

summary judgment, and in terms of its reasoning in granting said summary judgment, was clear error. Such extrinsic evidence would have shown (a) the fact that the term “vacate” was subject to different interpretation, thus defeating the summary judgment motion altogether, and (b) the fact that the Respondents were in clear breach of the Settlement Agreement, thus clearly defeating their summary judgment motion and, arguably, entitling the Appellants to their own judgment as a matter of law. In any case, the refusal of the hearing court to even consider such evidence in ruling upon the Respondent’s Summary judgment motion was clear error.

E. CONCLUSION

For the reasons stated herein, this court should reverse and dismiss the summary judgment and award of attorney’s fees made to the Respondents in this matter and should either (a) remand the case for trial on the merits or (b) award a summary judgment to the Appellants herein, in view of the clear breach of the Settlement Agreement by the Respondents.

DATED: October 29, 2008.

Respectfully submitted,



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CERTIFICATE

I certify that I mailed a copy of the Brief of Appellant (Corrected) by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

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DATED this 30th day of October, 2008.



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