

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38426-4-II

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

JOHN H. KIM, MIN H. KIM, and EUGENE H. KIM, Appellants

v.

FRANK C. MOFFETT and "JANE DOE" MOFFETT, husband and wife,
and T.A.A., INCORPORATED, Respondents

REPLY BRIEF OF APPELLANTS

DOUGLAS SULKOSKY
WSBA # 7855
Attorney for Appellant
535 Dock Street
Suite 100
Tacoma, Washington 98402
(253)383-5346

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I. TABLE OF AUTHORITIES

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A. REPLY TO ARGUMENT

1. CHUL M. KIM IS A REAL PARTY IN INTEREST

Contrary to Respondent's argument, Chul M. Kim ("Kim") is a real party in interest. Kim signed the contract with Frank C. Moffett ("Moffett") and T.A.A. Incorporated ("T.A.A."). CP 107, 121, 134, 136.

Kim paid Moffett for services performed under the contract. CP 85, 86, 92, 93, 108. There is also evidence of damage suffered by Kim due to Moffett's breach of the contract. CP 109, 110, 151.

The Respondent has argued that the contract between Kim and Moffett can not be assigned due to the fact that it is a personal service contract. If that is the case, Kim is the only party that can enforce the contract.

2. DISMISSAL OF COMPLAINT IS NOT WARRANTED ON ALTERNATE GROUNDS.

The contract between Kim and Moffett required a written notice of resignation. CP 136. The resignation must be "for cause". CP 136. Moffett gave no written notice as required by the contract. CP 46. Further, Moffett never indicated any cause for resigning. There were no allegations of any wrongdoing by Kim or lack of

payment by Kim. In fact, Kim paid Moffett over \$9,000.00 for all the work performed by Moffett. CP 108.

Moffett did not substantially comply with the terms of the October 19, 2001 Agreement. According to the contract, Moffett was to provide the following services:

1. Structural design of concrete, pier and grate being foundations and a retaining walls, both residences.
2. Design modifications of both residences per your requirements acceptable to the city.
3. Structural design of superstructure, both residences.
4. Design development of residences.
5. Preparation of Construction documents for both residences to include drawings of specification: architectural, structural, mechanical electrical, preperational, more detail statement of probable cost for both residences.

CP 36, 37.

Moffett did not do the engineering for the concrete pier, grade beam foundations and retaining walls. CP 254. At the time Moffett turned the project over to Chan Sogge, most of the work on

the contract had not been done. A construction permit could not have been obtained based upon the work done by Mofett. CP 256.

From the above it can be seen that the Moffett has not substantially complied with the terms of the agreement. The most important failure, is the failure to provide a design modification acceptable to the city. CP 235-236.

There is not basis for dismissal based upon alternate grounds.

3. RESPONDENTS SHOULD NOT BE AWARDED ATTORNEY'S FEES AND COSTS ON APPEAL.

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Fay v. N.W Airlines, Inc.*, 115 Wn. 2d. 194, 200-201, 796 P. 2d. 412 (1990). In this case there are debatable issues upon which reasonable minds might differ. Those issues include whether or not Kim is a real party in interest, whether or not JME Limited Partnership ("JME") is a real party in interest, whether or not JME and Kim are third party beneficiaries under the contract and whether or not the Kim children may have a right to damages for breach of the contract as assignees. These are all debatable

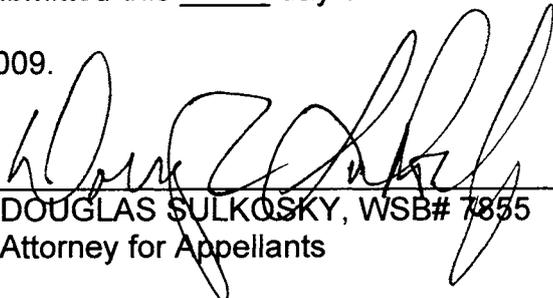
issues that have merit. Kim's appeal is not frivolous.

B. CONCLUSION

The decision of the trial court dismissing the claim of Kim because he was not a real party in interest should be reversed. The decision of the trial court in dismissing that claim of JME should be reversed as JME is a third party beneficiary. The decision of the trial court dismissing the claim of the Kim children should be reversed as the right to sue for damages for breach of contract is assignable.

There are no alternate grounds to affirm the decisions of the trial court. Moffett should not be awarded his costs and attorney's fees as there are debatable issues upon which reasonable minds might differ.

RESPECTFULLY submitted this 20th day of February, 2009.



DOUGLAS SULKOSKY, WSB# 7855
Attorney for Appellants

CERTIFICATE OF MAILING

I, EMILY FAIN, certify under penalty of perjury under the laws of the State of Washington that on the 20th day of February, 2009, I caused to be deposited in the US Mail, with postage prepaid, a copy of this document addressed to the following:

Paul H. Meyer
Attorney At Law
U.S. Bank Building, Suite 12
402 South Capitol Way
Olympia, WA 98501

DATED: 2/20/09

Emily Fain
EMILY FAIN, Legal Assistant

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