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COURT OF APPEALS

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No. 40219-0-II

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

JAMES BRETT CULPEPPER,
Plaintiff - Appellant,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY
and HOLLIS MITSUNAGA, a single individual,

Defendants - Respondents

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

THE HONORABLE THOMAS MCPHEE

BRIEF OF RESPONDENT HOLLIS MITSUNAGA

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I. INTRODUCTION

Plaintiff's statement of the case consists primarily of Mr. Culpepper's version of the facts of the case. It is of note that Judge McPhee who is in the best position to judge the credibility of the parties stated in his oral opinion at p. 310 (RP 310):

I'm now going to return to the second theme that runs throughout this case as regards the issue of the bona fide dispute. That is the theme that Ms. Mitsunaga had a right to receive some of the money received from the sale of the property by reason of her efforts in improving the property. In this regard particularly, I find Ms. Mitsunaga's testimony to be credible and Mr. Culpepper's testimony to be colored by his own self-interest in dealings with the property and in recovering the money he paid to Ms. Mitsunaga.

Further, Respondent's statement of the case omits the many e-mails documenting Mr. Culpepper and Ms. Mitsunaga's negotiations regarding her interest in the sale of the Olympia house. As Judge McPhee stated in his oral opinion, these negotiations must be viewed in context of a four (4) year relationship that was supposed to culminate in marriage. The parties were engaged to be married and had plans to move into the Olympia home (RP 310). These plans were terminated when the Plaintiff unilaterally

terminated the relationship and decided to sell the Olympia property. The negotiations were eventually reduced to a written agreement signed by both Mr. Culpepper and Ms. Mitsunaga. (Ex. 125)

This is a classic case of accord and satisfaction. The parties participated in many activities together, worked on Mr. Culpepper's boat, his home, Ms. Mitsunaga's home and the Olympia property over a four year period. When the relationship terminated Ms. Mitsunaga and Mr. Culpepper negotiated in a series of e-mails what Ms. Mitsunaga should net from the proceeds of the sale of the Olympia property. Ms. Mitsunaga received \$55,000 and Mr. Culpepper received \$260,894 (RP 116; Ex. 129). The e-mail negotiations were reduced to a signed written agreement (Ex. 125). This written agreement represents a compromise between the parties to resolve a bona fide dispute.

II. RESPONSE TO ASSIGNMENT OF ERROR

Ms. Mitsunaga disputes all six of Plaintiff's Assignments of Error. In particular, Plaintiff disputes assignments 1, 4, 5 and 6 which apply directly to Defendant Mitsunaga.

III. COUNTERSTATEMENT OF FACTS

Defendant Mitsunaga agrees that Plaintiff's Statement of Facts is an accurate statement of Mr. Culpepper's testimony. However, Defendant Mitsunaga has a number of factual points to add in this Counterstatement.

Mr. Culpepper testified he wasn't aware that title to the Olympia Budd Street property was held in both his name and Ms. Mitsunaga's until he listed it for sale in 2004. The Quit Claim Deed and the Title Insurance Policy were both mailed to the Budd Street Olympia address. (RP 52). These documents stated title was held in both parties' names.

Mr. Culpepper admitted that neither he nor Ms. Mitsunaga had any other relationships from 2002 to 2006. (RP 90). He described many trips they went on, sometimes with Ms. Mitsunaga's children. (RP 90-91). He admitted they had been engaged around Christmas 2004 and planned to be married. (RP 92). Ms. Mitsunaga believed they became engaged in the Fall of 2002 and announced the engagement to her parents at Christmas 2002. (RP 151).

Ms. Mitsunaga believed the relationship was "on" until March of 2006. In January 2006, Ms. Mitsunaga believed Mr. Culpepper was going to sell his Edmonds property and they were going to move into the Budd

Street property which was almost ready. (RP 152). The four year relationship was intimate and both parties helped each other when needed.

Mr. Culpepper had a home in Mukilteo which he sold during the four year relationship. Ms. Mitsunaga helped work on that house and with Jim Culpepper's mother packed it up and moved him to the Edmonds home. (RP 154).

Mr. Culpepper's father, who was partially disabled, would come with Jim Culpepper to visit Ms. Mitsunaga in Olympia. He would stay in Ms. Mitsunaga's oldest daughter's bedroom while her daughters double bunked. Mr. Culpepper would stay in Hollis' room. (RP 154).

The parties house hunted together for over a year prior to the purchase of the Budd Street property. They looked for homes in the Olympia School District so that Ms. Mitsunaga's children would not need to change school districts. Ms. Mitsunaga testified:

Q. Was Jim going to be the only one buying these properties?

A. No. We were engaged to be married, we were together, we were looking at houses together, we were looking at homes in the Olympia School District because of my kids so they wouldn't have to move. We -- the issue never came up. We signed everything together. We were together.
(RP 155).

When the Budd Street property was purchased all preliminary documents were signed by both parties, including the Real Estate Purchase and Sale Agreement. Immediately before closing the parties apparently initialed a document which stated title should be issued in Mr. Culpepper's name only. This document according to Mr. Culpepper was presented to Ms. Mitsunaga at her home. Ms. Mitsunaga had no recollection of initialing the document. (RP 157; Ex. 7).

The Budd Street property needed major remodeling. It was a 4500 square foot home with five acres of lawn. Ms. Mitsunaga weeded, trimmed, cleared out shrubbery, landscaped, took out a deck, repainted, and put parts of deck back in, and helped with wiring. She (and her girls) sanded and refinished the bedroom area. She painted the basement with rollers. She helped tear out the kitchen. She helped clean out the greenhouse. (RP 158-159). She helped sand drywall and stack kitchen tiles. (RP 231).

Ms. Mitsunaga was at the house almost every weekend from August 2004 to February 2006; sometimes on week days. After all, she believed it was going to be her home. (RP 160; 165). She established she spent approximately twenty hours per week at the Budd Street property. Mr. Culpepper disagreed, but did admit she spent more than five hours per

week for over one and one-half years on the Budd Street property. (RP 236).

Mr. Culpepper was aware that Ms. Mitsunaga was receiving a supplemental sum for maintenance and child support (\$7,500 per month) from her ex-husband who was a doctor. (RP 237).

Mr. Culpepper decided to terminate the relationship with Ms. Mitsunaga and sell the Budd Street property sometime in February or March 2006. It was purely his own decision. He decided to take a job in California and switch States as far as the location of jobs. He testified it was solely his decision. He also stated it was purely his choice to purchase a home in Monterey, California. It was his choice to put his Edmonds, Washington property up for sale. Mr. Culpepper admitted that the financial situation which resulted from making these choices was of his own doing. The need to sell the Budd Street Property was a creature of the choices he had made and was not contributed to by Ms. Mitsunaga. (RP 135-136).

After Mr. Culpepper made the decision to sell the Budd Street property the parties had many telephone discussions and e-mails regarding what part of the Budd Street property Ms. Mitsunaga should receive. Mr. Culpepper initially offered \$10,000.00 for "help with the home." (RP

101). Later on he offered monies from the house and stated Ms. Mitsunaga and her children were in his Will. "That is done" is what the e-mail stated. (RP 132-133). Ms. Mitsunaga wanted \$70,000. (RP 164). The parties eventually came to an agreement in a telephone discussion which was recaptured in an e-mail dated April 18, 2006 at 8:13. Ms Mitsunaga would receive \$55,000 if the house sold for over \$840,000. She would receive \$50,000 if the house sold for less than \$840,000. (RP 104; Ex. 103). Mr. Culpepper responded, "Yes, that is all fine. If the house sells for under \$700,000, then we redo this as I won't be able to afford to give you \$50,000 at that price. I doubt it will sell for under \$800,000 though. So we are done here." On April 18, 2006 at 9:50 a.m. (RP 105; Ex. 103). The house sold for \$849,000 (Ex. 129). This agreement was reduced to a written agreement signed by both parties on April 21, 2006. (RP 111-113; Ex. 125).

Ms. Mitsunaga executed the necessary papers to close the sale of the Budd Street property to the Hoffmans including signing the Statutory Warranty Deed. (RP 115 - 116; Ex. 130 & 131). She received the agreed upon \$55,000 and Mr. Culpepper received \$260,844.30 for the sale. (RP 116; Ex. 129).

Subsequently, over six months later, Mr. Culpepper sent an e-mail dated December 15, 2006 stating he gets “free legal counsel and plans to drag your ass thru extreme litigation.” (Ex. 101). He then filed this lawsuit February 29, 2008. (Clerk’s Papers 1).

IV. ARGUMENT

A. Ms. Mitsunaga will respond only to Appellant’s argument B and C. Appellant’s section A is wholly directed at Co-Respondent First American Title and they will respond to that argument.

B. Accord and Satisfaction. Mr. Culpepper’s continued pursuit of Ms. Mitsunaga at trial and now in the Court of Appeals is frivolous. Mr. Culpepper agreed that Ms. Mitsunaga should receive \$55,000 for the sale of the Budd Street house. Mt. Culpepper agreed that his financial motivation to sell the Budd Street house was a situation of his own making. The trial court weighed the testimony and found Mr. Culpepper’s testimony to be colored by his own self-interest in dealings with the property and Ms. Mitsunata’s testimony to be credible. (RP 310).

The facts as determined by the trial court support the Conclusions of Law and Findings of Fact will not be overturned if supported by

substantial evidence. In Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

An accord and satisfaction consists of: (1) a bona fide dispute; (2) an agreement to settle that dispute; and (3) performance of that agreement. Perez v. Pappas, 98 Wash.2d 835 at 843, 659 P.2d 475(1983). There can be no question a bona fide dispute between the parties existed. Mr. Culpepper repeatedly stated Ms. Mitsunaga was entitled to some monies for her work on the property. Mr. Culpepper offered \$10,000 initially. Ms. Mitsunaga first asked for a sum of \$70,000 for the work she performed on the house. The appellant had countered that with an offer from \$10,000 - \$12,000. Mr. Culpepper said he had put her and her children in his Will. There is also no dispute that the appellant agreed to the final settlement as he signed off on the terms of the agreement both in e-mail correspondence and written contract signed on April 21, 2006 for the amount of \$55,000 (Ex. 125). As the appellant stated in his e-mail after agreeing to the resolution of the dispute, "so we are done here". (Ex. 103), Finally, the agreement was performed when the appellant paid the debt of \$55,000 to Ms. Mitsunaga, thereby an accord and satisfaction was reached and Ms. Mitsunaga is entitled to have the trial court's decision affirmed.

Appellant has contended that the elements of an accord do not exist in this case citing State Dept. of Fisheries v. J-Z Sales Corp., 25 Wn. App. 671, 676, 610 P.2d 390 (1980), that “an accord is a contract between debtor and creditor to settle a claim by some performance other than that which is due.” Mr. Culpepper claims not to be a debtor and that Ms. Mitsunaga was not a creditor. A creditor is anyone who has performed a service and is entitled to be compensated for that service. In Perez, the matter was between an attorney and former clients involving a breach of fiduciary duty and the repayment of a fee the attorney received. 98 Wash.2d 835 at 836, 659 P.2d 475(1983). In Northwest Motors, Ltd. v. James, 118 Wash.2d 294, 822 P.2d 280, the matter involved an automotive repair shop and a car owner in a dispute over the invoice regarding the cost of repair. Both of these cases have a creditor where the debt owed is based upon services rendered. These fact patterns are similar to the present case where, Ms. Mitsunaga is owed a debt based on all the work she did on the Budd Street home and all the other services she performed over the course of the four year relationship. This includes packing up the appellant’s Mukilteo home to move him to his new home in Edmonds.

The appellant's citing of *In re Marriage of Chumble*, 150 Wn.2d 1, 74 P.3d 129 (2003) is irrelevant in this matter as the character of the property (community or separate) is irrelevant to our issue.

V. UNJUST ENRICHMENT

Mr. Culpepper's claim of unjust enrichment requires Ms. Mitsunaga to have forced the appellant to pay her (involuntary payment), and that she was not entitled to receive anything for her share of the Budd Street property. The appellant's theory is that he was financially coerced. Mr. Culpepper testified he could not afford to pay three mortgages, so he felt he was forced into giving Ms. Mitsunaga more than she deserved. However, Ms. Mitsunaga did not force the appellant to do anything. He is the one who changed course and decided to terminate the relationship. He is the one who decided not to move into the Budd Street home. He is the one who purchased property in California creating the financial strain.

The appellant cites *Clark v. Luepke*, 60 Wn. App. 848, 809 P.2d 752 (1991), which hold a payor may maintain an action to recover money paid involuntarily due to coercion, duress or compulsion, (citations omitted), if retention of the money would unjustly enrich the payee. *Pacific Coal & Lbr. Co. v. Pierce Cy.*, 133 Wash. 278, 281, 233 P. 953

(1925). Thus, when a payor sues for the restitution of an allegedly involuntary payment, the essential elements are (1) that payment was made, (2) that it was made involuntarily, and (3) that the payee would be unjustly enriched if allowed to retain the payment. Wendell's, Inc. v. Malmkar, 225 Neb. 341, 405 N.W.2d 562, 568 (1987). What the appellant fails to cite in Clark however, is that even though the payment was found to be involuntary because of Luepke's possessory lien on Clark's vehicle, there was no unjust enrichment because the he was entitled to payment for the work he did. Clark made. Clark supra, at 855. Ms. Mitsunaga was not unjustly enriched because (1) the payment was not coerced by her; and (2) she was entitled to payment for the work she did.

Mr. Culpepper signed an agreement (Ex. 125). He did not express his intent to renegotiate the agreement at a later date. The appellant did not state at the time of the execution of the agreement, which gave him approximately \$261,000 in proceeds and Ms. Mitsunaga \$55,000, that he was going to challenge it or bring a lawsuit later because he felt Ms. Mitsunaga got more than she deserved. The Supreme Court of Washington in Northwest Motors Ltd. v. James, 118 Wn. 2d 294, 822 P. 2d 280 (1992), first reiterated the "long adhered to objective manifestation theory of contracts". An individual's unexpressed intent to negotiate (or

renegotiate) a contract does not meet the objective manifestation test. Any defenses or claims the appellant had were lost and he is not entitled to raise the issue now. Then the Court further held at p. 304 that:

After accord and satisfaction, one may not raise... any defense on the merits to the items which were originally in dispute. That is fundamental.

VI. CONCLUSION

The trial court's rulings regarding the credibility of the witnesses, the statement of evidence and that an accord and satisfaction occurred should not be overturned.

Mr. Culpepper's appeal should be denied.

DATED this 23 day of July, 2010.

Respectfully submitted,


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