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II. INTRODUCTION

Appellant MARK OLLA (“Olla”) flagrantly violated his own settlement agreement with respondent ROBERT H. WAGNER (“Wagner”) by initiating this litigation in Kitsap County Superior Court. In October of 2008, Olla knowingly and voluntarily entered into a settlement agreement with Wagner wherein Wagner forgave over \$2.1 million in defaulted loans and gave \$165,000 in cash in exchange for Olla giving two deeds in lieu of foreclosure and waiving all claims against Wagner.

After giving the deeds and taking Wagner’s settlement money, Olla brazenly breached the settlement agreement by filing suit. Recognizing this, the trial court wisely dismissed all of Olla’s claims after a three day trial. The trial court also determined that Olla’s allegations were frivolous because Olla negotiated the settlement in bad faith, planning in advance to use the settlement funds to fund this litigation.¹

This appeal wholly lacks merit. All of the trial court’s findings against Olla are well supported by the substantial evidence. Olla’s bombastic legal arguments are outlandish and should be summarily dismissed.

¹ Olla does not appear to contest the trial court’s findings that he acted in bad faith.

III. STATEMENT OF THE CASE

In July of 2007, Olla wished to sell his property located in Malibu, California (the “Malibu property”) and relocate in Kitsap County, Washington. He found the perfect property in Indianola (the “Indianola property”), and made an offer to purchase it.² However, he was too impatient to wait until his Malibu property sold. He therefore sought a “bridge loan”. A bridge loan would give him the capital to purchase the Indianola property, and then would be repaid quickly after his Malibu property sold.³

For this purpose Olla was referred to Wagner, who made private loans out of his pension fund.⁴ In September of 2007, Wagner flew to Malibu to meet with Olla, and the parties negotiated or acknowledged the following details for a bridge loan:⁵

- The purchase price for the Indianola property would be \$1.35 million.⁶
- The amount of the bridge loan would be \$1.7 million, allowing Olla extra cash for moving expenses.⁷

² RP at 486-87.

³ RP at 487, 517.

⁴ RP at 486-88.

⁵ RP at 488-91, 497-98.

⁶ RP at 422-23; Ex. 183, tab 3.

⁷ Originally Olla requested \$1.65 million, but he later requested an additional \$50,000.

- Because the loan amount exceeded the value of the Indianola property, the bridge loan was to be secured by deeds of trust on both the Indianola and Malibu properties.⁸
- The current listing price on Olla's Malibu property was \$6.5 million.⁹
- The deed of trust securing the bridge loan on the Malibu property would be in "second position", behind a Washington Mutual loan of approximately \$2.5 million.¹⁰
- The bridge loan would be repaid in one year or earlier, with interest payments due monthly, and the first six months of interest payments would be taken out of the loan proceeds.¹¹

At Wagner's request, Olla provided him with a recent loan application for his Washington Mutual loan, which disclosed his financial situation.¹²

Unbeknownst to Wagner, that loan application (which was signed under penalty of perjury) falsely stated that his employment income was \$40,000 per month.¹³ Olla also told Wagner that his mother was worth \$50 million, that he received \$75,000 every three months from a trust fund,

RP at 491.

⁸ RP at 422-23; Ex. 183, tab 3.

⁹ RP at 190.

¹⁰ Ex. 183, tab 4.

¹¹ Ex. 183, tabs 2-7.

¹² Ex. 183, tab 1; RP at 492.

¹³ RP at 11, 417-19, 492.

and that his mother would pay the bridge loan if he got into trouble.¹⁴ Olla and his agent also explained that the Malibu property should sell for no lower than \$6.2 million.¹⁵ Satisfied with these disclosures, Wagner agreed to loan the money.¹⁶

After Olla purchased the Indianola property and moved to Washington, he requested another \$150,000 loan from Wagner, which he explained was needed to make additional “improvements” to the Indianola property, even though Olla had already received \$207,000 in cash from the first loan.¹⁷ The parties then negotiated the details of this second loan, as follows:

- This second \$150,000 loan would be payable in monthly interest only installments and due in full in September of 2008.
- A new deed of trust securing this second loan would be recorded in third position on the Malibu property.

Olla then executed the required loan documents on November 6 and 7, 2007.¹⁸

In late February or early March of 2008, Olla called Wagner in desperation and requested another loan. Olla stated that he had run out of

¹⁴ RP at 492-93.

¹⁵ RP at 191-92.

¹⁶ Because the Malibu property appeared to have at least \$3.7 million in equity, it appeared that the loan was adequately secured.

¹⁷ RP at 502-04.

¹⁸ Ex. 183, tabs 12-16.

money and could no longer make payments on the Washington Mutual loan secured in first position on the Malibu property. (By this time Olla had received about \$340,000 in cash from Wagner.) Olla also explained that his family had stopped paying him money, and that his business income “wasn’t available any more.”¹⁹ Fearing that Washington Mutual would foreclose, Wagner consented to issue a third loan to Olla, with these negotiated terms:

- This third \$160,000 loan would be due in full in September of 2008.
- This third loan would be secured by a new deed of trust in fourth position on the Malibu property.
- The terms of the prior two loans would be modified so no monthly payments would become due until August of 2008.
- This loan would be used to pay overdue property taxes on the Malibu property.²⁰

Unfortunately, Wagner was not aware of the fact that Olla was not using reasonable efforts to sell the Malibu property at market price. In fact, Olla had hired and fired about eleven real estate agents over a period of six or seven years while the Malibu property was listed for sale. During

¹⁹ RP at 504-05.

²⁰ RP at 506-10; Ex. 183, tabs 16-20, 57.

this time, the listing price changed about twenty times.²¹ In general, Olla exhibited paranoid suspicions about the motives of his agents, and he had an unrealistic expectation about the value of his Malibu property.²²

In the summer and fall of 2008, the real estate market began to crash, especially as it pertained to higher priced properties. Olla, already with unrealistic expectations, could not admit the obvious and refused to consider reducing the listing price of the Malibu property.²³ This problem, along with the fact that the three loans were now becoming due and Olla was not paying on them, led to significant conflict between Wagner and Olla.²⁴ This finally culminated in a September 18, 2008 telephone conversation. During this conversation, Olla refused to consider the possibility of selling the Malibu property at a price suggested by his own agent, stating “my house is worth every bit of 6 million when the market turns around.”²⁵ Then Olla threatened Wagner: “You don't know who you're dealing with. I'm going to get you.”²⁶

A couple of hours after their telephone conversation, Olla's friend and business partner, Joe Privitera,²⁷ submitted a settlement offer on

²¹ RP at 510-11; Ex. 183, tab 53.

²² RP at 513-17.

²³ RP at 519-21.

²⁴ RP at 525-28.

²⁵ RP at 530-31.

²⁶ RP at 533.

²⁷ RP at 83.

behalf of Olla to “sell both houses” to Wagner for payment of \$350,000. In response, Wagner countered to pay Olla \$50,000.²⁸ Shortly thereafter, Olla issued Wagner an email rejecting that offer, and instead requested “at least five hundred thousand dollars.”²⁹ Then, over the next few weeks and with the help of Olla’s brother in law, Robert Freedman, who acted as agent for Olla, the parties eventually negotiated a resolution which provided that Olla would issue deeds in lieu of foreclosure for both properties in exchange for payment of \$150,000. Another phone call from Mr. Privitera resulted in the increase of that purchase price to \$165,000.³⁰

After the parties agreed on a purchase price, Wagner retained a Seattle attorney to draft a settlement agreement. Wagner then emailed the first draft to Mr. Freedman on October 2, 2008.³¹

The terms of this proposed settlement agreement remained largely intact throughout the negotiations.³² In its final form, it acknowledged the three Wagner loans, that Olla was in default in an amount of over \$2.1 million, and that the combined equity in both the Malibu and Indianola properties was less than the amount owed to Wagner. Hence, in exchange

²⁸ RP at 533.

²⁹ Ex. 183, tab 37.

³⁰ RP at 536.

³¹ RP at 538; Ex. 183, tab 60.

³² See executed copy at Ex. 183, tab 44. Although titled “Real Estate Purchase and Sale Agreement”, it is in fact a settlement agreement since it settled all issues between the parties and released their respective claims.

for the forgiveness of the indebtedness and payment of \$165,000, Olla committed to immediately convey the Malibu property to Wagner, and then convey the Indianola property no later than 45 days later. (Although not specified in the settlement agreement, Wagner also agreed to continue paying the Washington Mutual debt and pay all other expenses related to the Malibu property until it sold.)³³ But most importantly, the agreement contained the following mutual release clause, which remained unaltered:

9. Release of Buyer. As additional consideration for the provisions of this agreement, Seller hereby releases and forever discharges Buyer, Buyer's agents, attorneys, successors and assigns from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever which Seller might now have or claim to have against Buyer, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way concerning, arising out of or founded on the Loan Documents or the Loans, including without implied limitation, all such loss or damage of any kind heretofore sustained or that might arise as a consequence of the dealings between the parties.³⁴

The day after Wagner emailed Mr. Freedman the first draft of the settlement agreement, Olla acknowledged receipt and indicated there was an attorney reviewing it.³⁵ Then, one week later, on October 10, 2008, Olla issued another email to Wagner addressing specific questions and issues about the terms of the draft settlement agreement. In addition, Olla acknowledged the fact that the settlement agreement contained a mutual

³³ Ex. 183, tab 41; RP at 397-98.

³⁴ Id. at p. 4, ¶ 9.

³⁵ Ex. 183, tab 38.

release:

Finally, I assume the agreement effectively terminates all obligations that you and I have to each other directly with finality save your obligation to pay the WAMU loan payments until you sell or make other future transfer of the Malibu house to the third party. Could you please confirm this.³⁶

Four days later, on October 14, 2008, Wagner issued an email responding to each of the concerns and questions raised by Olla. In particular, this email discussed Wagner's commitment to continue paying the Washington Mutual loan and all other Malibu property expenses until that property sold. This email also enclosed a new draft settlement agreement which accommodated two minor changes requested by Olla.³⁷ Throughout the negotiations, Olla never requested any changes in the mutual release clause in the agreement, so that section remained intact.³⁸

Then, three days later, on October 17, 2008, Olla signed the settlement agreement.³⁹ Yet before mailing the signed agreement, Olla issued another email to Wagner with another question.⁴⁰ The next day, Wagner provided an answer. Satisfied with his answer, Olla mailed the signed agreement.⁴¹

After execution of the agreement, Olla cooperated in transferring

³⁶ Ex. 183, tab 39; RP at 541-42.

³⁷ Ex. 183, tab 41; RP at 397-98.

³⁸ RP at 399, 543; Ex. 183, tab 44 (p. 4 ¶ 9).

³⁹ Ex. 183, tab 44.

⁴⁰ Ex. 183, tab 42.

⁴¹ Ex. 183, tab 43.

title to the Malibu and Indianola properties to Wagner. Wagner likewise cooperated in paying Olla the agreed \$165,000 combined purchase price, and began assuming the Washington Mutual payment obligations.⁴²

Because Olla failed to disclose that his check for the September payment on the Washington Mutual loan had bounced, Wagner was also forced to make that payment.⁴³

Unbeknownst to Wagner, when Olla signed the settlement agreement, *he intended to sue Wagner and raise the very claims he released through settlement agreement.* In fact, he confided in his friend and former fiancée, Ms. Virginia Vassallo, that he intended to take the settlement money from Wagner and use it to fund litigation against him, despite the terms of the mutual release clause, which Olla and Ms. Vassallo specifically discussed.⁴⁴

In accordance with his preconceived plan, after Wagner accepted the deeds in lieu of foreclosure, Olla initiated a campaign of frivolous litigation. First, Olla filed a lawsuit against Wagner in Los Angeles County in early 2009 seeking the rescission of the settlement agreement and the return of the two properties to Olla. Olla also simultaneously recorded a lis pendens against the Malibu property. In fact, three times

⁴² RP at 544-45.

⁴³ RP at 546-47.

⁴⁴ RP at 79-80.

Olla recorded lis pendens, and three times the Los Angeles County Superior Court expunged these and imposed monetary sanctions, which were never paid.⁴⁵

It was one of these unlawful lis pendens that shipwrecked a pending purchase and sale agreement between Wagner and a buyer to purchase the Malibu property for \$3,744,000.⁴⁶ Since that time, no other viable offers had been received. At the time of trial, the Malibu property was listed for \$3,495,000,⁴⁷ and the Indianola property was listed for \$839,000.⁴⁸ At trial, Wagner demonstrated that even if the Malibu and Indianola properties sold for their current listing price, Wagner was expected to lose around \$1.5 million as a result of his dealings with Olla, not including his attorney's fees defending Olla's frivolous litigation.⁴⁹

In February of 2009, Olla's litigation efforts reached Washington when he recorded a lis pendens against the Indianola property without filing a lawsuit in Washington.⁵⁰ The Los Angeles County Superior Court then expunged this lis pendens following a hearing on June 25, 2009.⁵¹

Olla then initiated another almost identical lawsuit in Kitsap

⁴⁵ RP at 551-53; Ex. 183, tabs 70-71, 73.

⁴⁶ RP at 553-54. Wagner's counterclaims arising from these actions are still pending trial in Kitsap County Superior Court. CP at 161-63.

⁴⁷ RP at 551.

⁴⁸ RP at 555.

⁴⁹ RP at 555-58; Ex. 183, tab 75.

⁵⁰ Ex. 183, tab 72.

⁵¹ Ex. 183, tab 73.

County Superior Court on the same day the Los Angeles County Superior Court decided to expunge his Indianola lis pendens.⁵² Olla also simultaneously recorded a new lis pendens against the Indianola property.⁵³ On August 21, 2009, the Kitsap County Superior Court granted Wagner's motion to bifurcate trial and scheduled an expedited trial to determine the enforceability of the parties' settlement agreement.⁵⁴ After a three day trial on the merits, the trial court issued specific findings of fact and conclusions of law declaring the parties' settlement agreement enforceable and finding that Olla's allegations were frivolous.⁵⁵ The trial court also entered a judgment dismissing all of Olla's claims and awarding a judgment attorney's fees and costs against Olla in the amount of \$45,503.⁵⁶ It is from this decision that Olla now appeals.

IV. ARGUMENT

A. THE TRIAL COURT CLEARLY HAD SUBJECT MATTER JURISDICTION

Olla's argument that the trial court lacked subject matter jurisdiction patently lacks merit and is not worthy of serious consideration. First, it is important to note that Olla was the one to initiate this litigation the Superior Court of Kitsap County. Now, after losing at trial on the

⁵² CP at 2.

⁵³ Ex. 183, tab 74.

⁵⁴ CP at 226-27.

⁵⁵ CP at 538-53; RP at 635-45.

⁵⁶ CP at 554-56.

merits, Olla conveniently raises a subject matter jurisdiction claim.

In a nutshell, Olla argues that because the “three subject installment loan notes” contained California choice-of-law clauses, the trial court had no subject matter jurisdiction.⁵⁷ This argument is not only flawed, it has absolutely no merit.

First, the three promissory notes signed by Olla simply state that the notes “shall be construed in accordance with the laws of the State of California.”⁵⁸ They do not contain choice-of-venue clauses which would state that any dispute arising between the parties must be resolved in a California jurisdiction. Olla mistakenly construes these clauses to mean that only California courts can adjudicate issues arising out of these notes.

Second, Olla’s focus on these three choice-of-law clauses is a red herring. Neither party sought to enforce the terms of the three promissory notes at trial. The sole issue at trial was “the enforceability of the parties’ settlement agreement executed on October 16, 2008.”⁵⁹ Because that settlement agreement provided that Olla’s obligations arising out of the three promissory notes were discharged, the terms of the promissory notes became irrelevant.

Third, *even if* the trial court was required to apply California law

⁵⁷ Brief of appellant at 21.

⁵⁸ Ex. 183, tabs 5, 14 and 18.

⁵⁹ CP at 226.

when determining the enforceability of the three promissory notes, the trial court still had subject matter jurisdiction. Washington Superior Courts are not stripped of their subject matter jurisdiction simply because they are required to apply the laws of other jurisdictions. This principle is so axiomatic that no further elaboration is necessary.

Finally, if Olla challenges the trial court's decision to use Washington law to interpret the parties' settlement agreement,⁶⁰ that argument was never made to the trial court and hence should not be considered on appeal. See RAP 2.5(a); Torgerson v. One Lincoln Tower, LLC, 166 Wash.2d 510, 524, 210 P.3d 318, 325 (2009). Even if this argument is considered, the record supports the trial court's decision to use Washington law. "In the absence of an effective choice of law by the parties, the validity and effect of a contract are governed by the law of the state having the most significant relationship with the contract." Mulcahy v. Farmers Ins. Co. of Washington, 152 Wn.2d 92, 100, 95 P.3d 313, 317 (2004). These factors are as follows: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the situs of the subject matter of the contract, (5) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (6) the place under whose local law the contract will be most effective.

⁶⁰ Whether this argument is actually made is debatable. See brief of appellant at 21-23.

See Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wn.2d 893, 901, 425 P.2d 623, 628 (1967). In this case, Washington had the most significant contacts. This is because:

- Olla was residing in Kitsap County, Washington when he negotiated the settlement agreement.⁶¹
- Olla signed the settlement agreement in Kitsap County.⁶²
- The settlement agreement dealt with the transfer of title to the Indianola property, which was located in Kitsap County.⁶³
- The settlement agreement was drafted by Washington counsel.⁶⁴

For these reasons, Olla's lack of jurisdiction and choice of law arguments should be summarily dismissed.

B. THE EVIDENCE OVERWHELMINGLY SUPPORTS THE TRIAL COURT'S FINDING THAT OLLA KNOWINGLY AND VOLUNTARILY RELEASED HIS CLAIMS

Olla next argues that signing the settlement agreement did not release his claims against Wagner because he did not know that he had claims to release.⁶⁵ The evidence at trial stands in firm opposition to this position. The release of claims clause in the settlement agreement covered

⁶¹ Ex. 183, tab 44 (p. 5).

⁶² Id.

⁶³ Id. at p. 1, ¶ A.

⁶⁴ RP at 538.

⁶⁵ Brief of appellant at 36-37.

both known and unknown claims:

9. Release of Buyer. As additional consideration for the provisions of this agreement, Seller hereby releases and forever discharges Buyer, Buyer's agents, attorneys, successors and assigns from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever which Seller might now have or claim to have against Buyer, *whether presently known or unknown*, and of every nature and extent whatsoever on account of or in any way concerning, arising out of or founded on the Loan Documents or the Loans, including without implied limitation, all such loss or damage of any kind heretofore sustained or that might arise as a consequence of the dealings between the parties.⁶⁶

The so-called "unknown" claims are alleged violations of Regulation Z (12 C.F.R. § 226.23) and the federal truth in lending act.⁶⁷ But Olla cannot credibly argue these were truly "unknown" claims. Being a retired lawyer with a noteworthy education,⁶⁸ and with real estate experience,⁶⁹ Olla could have simply reviewed all of the loan documents and discovered these alleged violations prior to signing the settlement agreement.

Second, even if these were truly "unknown" claims, Washington law favors the voluntary release of claims in settlement. "[T]he law . . . favors private settlement of disputes. Releases are therefore given great weight to support the finality of those settlements." Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 187, 840 P.2d 851, 856 (1992). When

⁶⁶ Ex. 183, tab 44 (p. 4) (emphasis added).

⁶⁷ Brief of appellant at 36-37, 15, 32-33 and 54.

⁶⁸ RP at 415-16.

⁶⁹ RP at 192.

it comes to unknown claims, Washington follows the majority of jurisdictions that do not “permit the avoidance of a release merely because of the discovery of a previously unknown injury, but instead allows an inquiry into whether the release was fairly and knowingly made.” Finch v. Carlton, 84 Wn.2d 140, 146, 524 P.2d 898, 901 (1974) (citations omitted).

In this case, the record is clear that the release was fairly and knowingly made by Olla. Olla’s October 10, 2008 email to Wagner sets forth several issues and concerns he had regarding the terms of the settlement agreement. This email was issued seven days after receiving the first draft of the settlement agreement,⁷⁰ and reveals a sophisticated understanding.⁷¹ Toward the end of this email, Olla acknowledges the effect of the release language, as follows:

Finally, I assume the agreement effectively terminates all obligations that you and I have to each other directly with finality save your obligation to pay the WAMU loan payments until you sell or make other future transfer of the Malibu house to the third party. Could you please confirm this.⁷²

There is no better example demonstrating Olla’s understanding that the settlement agreement included a full release of claims.

Third, Olla’s reliance on certain California statutes is misplaced.⁷³

⁷⁰ Ex. 183, tabs 60, 38; RP at 538-39.

⁷¹ Ex. 183, tab 39.

⁷² Ex. 183, tab 39; RP at 541-42.

⁷³ Brief of appellant at 36-37. Olla also misunderstands these statutes. For example, Olla’s citation to California Civil Code § 1542 is inapplicable because Olla was not a

The settlement agreement was, as demonstrated above, drafted in Washington by Washington counsel, negotiated by Olla in Washington, and signed by Olla in Washington while he was a Washington resident. Because Washington has the most significant contacts, the trial court did not abuse its discretion in using Washington law. Mulcahy at 100, 95 P.3d at 317.

Finally, Olla illogically argues that because the three loans were allegedly “not legal”, the parties’ subsequent settlement agreement must also be “void”.⁷⁴ Olla fails to provide any legal authority, and the argument is not logical. Further, Olla’s argument contradicts his signed acknowledgement that all notices were properly provided, that he was in default under the three loans, and that he was indebted to Wagner to pay them back:

The Loans are in default under the Loan Documents The aggregate unpaid balance of principal and interest due under the Loans as of September 28, 2008 was approximately \$2,141,723. All notice provisions have been complied with and all grace periods have either expired or have been waived by Seller, and Buyer has declared the Loans and all indebtedness under the Loan Documents due and payable.⁷⁵

Ironically, after the settlement agreement was fully consummated, Olla

“creditor”.

⁷⁴ Brief of appellant at 28.

⁷⁵ Ex. 183, tab 44 (p. 1, ¶ B).

attempted to “rescind” the loans.⁷⁶ However, Olla does not understand that rescission means that the parties are to be put back in the position they were *before* the loans were made, thus necessitating that he return the borrowed money (and the \$165,000 settlement money). “[R]escission contemplates full restoration of the parties to their pre-contract position, insofar as is practicable.” Vacova Co. v. Farrell, 62 Wn. App. 386, 404, 814 P.2d 255, 265 (1991).

Olla honestly believes that after taking about \$2.1 million of Wagner’s money and not making one single payment on the loans, that he should not only be entitled keep that money, but he should have been entitled to *more* money from Wagner in the form of unspecified “damages”. The trial court understandably rejected these assertions and left Olla in the position he bargained for.

C. BECAUSE OF HIS PREMEDITATED INTENT TO SUE, OLLA IS ESTOPPED FROM ARGUING THE RELEASE OF CLAIMS CLAUSE DOES NOT APPLY

Finally, Olla is estopped from arguing that the claims release clause is unenforceable. This is because Olla had a premeditated plan to sue Wagner before signing the settlement agreement.⁷⁷ First, Olla expressed to his friend, Virginia Vassallo, that he intended to sue Wagner as soon as he received the settlement money from Wagner, and they even

⁷⁶ Brief of appellant at 35.

⁷⁷ CP at 550, ¶ 37.

discussed the fact that such action would violate the release of claims clause.⁷⁸ Olla expressed this same intent to sue in another email to Ms. Vassallo a few weeks before executing the settlement agreement.⁷⁹ Then, pursuant to his plan, Olla used this settlement money to hire an attorney to sue Wagner.⁸⁰ The trial court record contains other examples of bad faith as well.⁸¹ For these reasons, the trial court was on firm evidentiary grounds for making the following conclusion of law:

8. Because it was Olla's plan to initiate litigation against Wagner when he entered into the settlement agreement despite his knowledge that the settlement agreement contained full mutual releases, Olla is estopped from advancing any and all of his claims against Wagner. Further, all of Olla's claims against Wagner are frivolous and advanced without reasonable cause pursuant to RCW 4.84.185, and his allegations have been brought for an improper purpose and contain allegations not well grounded in fact in violation of Civil Rule 11.⁸²

D. THE RECORD SUPPORTS THE TRIAL COURT'S DETERMINATION THAT THE SETTLEMENT AGREEMENT WAS NOT UNCONSCIONABLE

Olla next argues that the settlement agreement was unconscionable because it did not eliminate the risk that Washington Mutual could still foreclose on the Malibu property. Olla argues as follows:

If one of the bases for OLLA to have signed at all was to avoid foreclosure why on earth would OLLA sign a document that could

⁷⁸ RP at 79-80.

⁷⁹ Ex. 183, tab 36.

⁸⁰ RP at 454.

⁸¹ See, e.g., Ex. 183, tabs 69-71, 73.

⁸² CP at 553, ¶ 8.

potentially put him at risk of foreclosure by Washington Mutual Bank, because OLLA finally chose to sign after having been made by the WAGNER Defendants to believe signing would avoid foreclosure. . . . The Real Estate Purchase and Sale Agreement was a procedurally unconscionable contract because of such impropriety during the formation process resulted in one of the parties not having a meaningful choice as to whether to enter into the contract.⁸³

Olla correctly states that one motivation for entering into the settlement agreement was to avoid foreclosure. But the failure of the settlement agreement to completely eliminate the risk of foreclosure does not amount to unconscionability, and ignores the context of the settlement negotiations.

Regardless of whether Olla believes this, his settlement with Wagner was one of the best things that happened to him. When Olla was actively negotiating the settlement agreement in October of 2008, he could not make his past month's mortgage payment with Washington Mutual, and could no longer pay on the loan.⁸⁴ Olla's situation was in fact much worse:

- He was unemployed.⁸⁵
- He was removed as family executor and his family stopped supporting him.⁸⁶

⁸³ Brief of appellant at 45-46.

⁸⁴ Ex. 184, tab 26; RP at 442.

⁸⁵ RP at 11, 417-19, 492.

⁸⁶ RP at 433-35, 472-73; Ex. 183, tab 29 (¶ 8: "my brother in law tells me my 'party is

- He could not pay the past due property taxes.⁸⁷
- He owed his uncle \$40,000 and his sister \$30,000.⁸⁸
- He was in default on the three Wagner loans.⁸⁹
- His monthly expenses exceeded \$22,000.⁹⁰
- He needed his brother in law to pay his Indianola utility bills and BMW car loans.⁹¹
- He needed Wagner to pay his Malibu water and electrical bills.⁹²

In short, Olla was in grave financial trouble and foreclosure of the Malibu property was imminent. In contrast, the proposed settlement agreement was a Godsend for Olla. It offered him the following:

- \$165,000 in cash to pay off his debts.⁹³
- A full release from the Wagner loans, which exceeded \$2.1 million in debt.⁹⁴
- Relief from the overdue property taxes⁹⁵ and Washington Mutual loan payments.⁹⁶

over, no more cash coming my way . . .”)

⁸⁷ RP at 473.

⁸⁸ RP at 431-33, 473.

⁸⁹ Ex. 183, tab 57; RP at 473, 534.

⁹⁰ Ex. 183, tab 24; RP at 435.

⁹¹ RP at 445, 472-74; Ex. 183, tab 57.

⁹² RP at 539-40; Ex. 183, tab 61.

⁹³ Ex. 183, tab 44 (p. 2 ¶ 2); RP at 475-76.

⁹⁴ *Id.* (p. 1 ¶ C); Ex. 183, tab 75; RP at 474.

⁹⁵ RP at 443, 547; Ex. 183, tab 75.

⁹⁶ RP at 546-47; Ex. 183, tab 75.

- A commitment from Wagner to pay all future Malibu property and Washington Mutual loan obligations until the Malibu property could be sold.⁹⁷

In light of all these circumstances, it is ludicrous for Olla to argue a hypothetical risk of foreclosure made the settlement agreement unconscionable.

It should also be pointed out that Olla had the advantage of legal advice when he was negotiating the terms of the settlement agreement. After talking to an attorney approximately one week before signing the settlement agreement, Olla learned in particular about the “contractual cause of action for any remainder unpaid . . . on the note . . .”,⁹⁸ which was no doubt a reference to the Washington Mutual promissory note. Hence, Olla was fully informed about the risks of proceeding with the settlement in light of his ongoing Washington Mutual obligation and the risks of foreclosure.⁹⁹ Yet Olla chose to proceed with the settlement. This situation presents not even the merest trifle of unconscionability.

E. OLLA WAS IN DEFAULT ON THE WAGNER LOANS AND IN DANGER OF FORECLOSURE

After receiving all the benefits the settlement agreement offered, Olla now argues that he was never in default on the Wagner loans, and

⁹⁷ Ex. 186, tab 41; RP at 364.

⁹⁸ Ex. 183, tab 33; RP at 450-52.

⁹⁹ RP at 540-41; Ex. 183, tab 38.

that Wagner did not have foreclosure rights.¹⁰⁰ Again, this argument is at odds with the overwhelming evidence. First, it cannot be contested that the balloon payments on all three Wagner loans became due in the month prior to the execution of the settlement agreement: on September 10, 19 and 27 of 2008.¹⁰¹ Second, Olla signed the settlement agreement specifically stating that the loans were in default.¹⁰² Third, Olla admitted as much during cross examination.¹⁰³

In light of this default, Wagner had foreclosure rights. He was aware that he had two choices: either sue on the notes and seek judicial foreclosure, or initiate a nonjudicial foreclosure process, starting with the filing of a notice of default.¹⁰⁴ If Wagner intended to foreclose on the Malibu property, naturally California law would apply. Under California law, a Notice of Default must first be issued, and then a party in default has three months to cure defaults before a Notice of Sale can be issued. CA Civil Code § 2924(a)(2). Then, the foreclosure sale must occur at least 20 days later. CA Civil Code §2924f(b)(1).

Olla further argues that Wagner misrepresented to Olla that he was

¹⁰⁰ Brief of appellant at 54-56, 59.

¹⁰¹ Ex. 183, tab 57; RP at 525-27. The underlying promissory notes and loan disclosure statement are found at Ex. 183, tabs 5, 11, 14 and 18.

¹⁰² Ex. 183, tab 44 (p. 1, ¶ C).

¹⁰³ RP at 423-24.

¹⁰⁴ RP at 534.

in default.¹⁰⁵ Naturally, Olla could easily have examined the language in his own promissory notes to determine whether he was default, and he had no reason to rely upon Wagner's own interpretations. There was therefore no justifiable reliance, even if there was a misrepresentation. Yet Wagner did in fact inform Olla that he was in default, and that he would file a formal Notice of Default.¹⁰⁶ The fact that Wagner had also, in the context of settlement negotiations, suggested he would forgo demand of the balloon payments if interest payments were made,¹⁰⁷ does not change the fact that Olla was still in default by the end of September.

F. THE RECORD SUPPORTS THE TRIAL COURT'S
CONCLUSIONS REGARDING THE FAIR MARKET VALUES
OF THE MALIBU AND INDIANOLA PROPERTIES

Olla next argues that the trial court erred in concluding that, at the time the settlement agreement was executed, the Malibu property was worth \$3.65 million, and the Indianola property was worth \$1 million.¹⁰⁸ In fact, the trial court adopted these valuations directly from the expert testimony of two credentialed real estate appraisers who testified at trial.¹⁰⁹ In contrast, Olla submitted (after trial as "newly discovered evidence") some evidence of a tax assessed valuation for the Malibu

¹⁰⁵ Brief of appellant at 55.

¹⁰⁶ RP at 574-75.

¹⁰⁷ RP at 526-27.

¹⁰⁸ CP at 549 (¶¶ 33-34).

¹⁰⁹ RP at 329-34, 350-54; Ex. 183, tabs 50-52.

property, and a comparative market analysis by Olla's own real estate agent.¹¹⁰ Yet it was entirely within the sound discretion of the trial court to accept the valuations of credentialed appraisers as superior evidence of market value over evidence of a tax assessed value and a real estate agent's opinion.

G. THE RECORD SUPPORTS THE TRIAL COURT'S
CONCLUSION THAT JOSEPH PRIVITERA ACTED AS
OLLA'S NEGOTIATING AGENT

The record supports the trial court's finding that Olla's business partner Joseph Privitera and brother in law Robert Freedman acted as negotiating agents for Olla. Wagner testified in detail how both of these men negotiated terms of settlement on Olla's behalf after Wagner and Olla could not deal directly with each other following a heated argument. At first, Mr. Privitera negotiated the initial amount of the cash payment to Olla. Then Mr. Freedman negotiated the remaining terms.¹¹¹ Then, on October 10, 2008, Olla directly adopted and ratified these negotiations by issuing the following statement to Wagner:

Given the fact that we are on the eve of signing our agreement to transfer the Sea Star house of mine in Malibu and the Indianola house back to you for the prespecified [sic] agreed price of \$165,000- net to me *as negotiated with you on my behalf by my brother-in-law Robert Freedman*, I have two legitimate concerns/questions.¹¹²

¹¹⁰ Brief of appellant at 56-58.

¹¹¹ RP at 535-38.

¹¹² Ex. 183, tab 39 (emphasis added).

This evidence provided ample basis for the trial court to conclude that these two individuals acted as agents on behalf of Olla in negotiating the agreement terms.¹¹³

H. THE TRIAL COURT PROPERLY REJECTED OLLA'S "NEWLY DISCOVERED EVIDENCE" BECAUSE IT WAS NOT NEW AND CHANGED NOTHING

Olla next argues that the trial court erred by refusing to consider certain alleged "newly discovered evidence".¹¹⁴ This "newly discovered evidence" is proof of the existence of a due-on-sale clause in the Washington Mutual deed of trust in first position on the Malibu property, which was attached to one of his briefs following trial.¹¹⁵ In fact, this "evidence" was not new, and had no logical bearing on the trial outcome.¹¹⁶

Upon proper motion, Olla would only have been entitled to relief from the judgment if he could prove, , that the alleged newly discovered evidence (1) would probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. Go2Net, Inc. v. C I Host, Inc., 115 Wn. App.

¹¹³ CP at 544-45 (¶¶ 17-18); CP at 552 (¶ 2).

¹¹⁴ Brief of appellant at 39-45.

¹¹⁵ CP at 516-537.

¹¹⁶ The trial court summarily denied Olla's motion for reconsideration. CP at 515.

73, 88, 60 P.3d 1245, 1254 (2003). The trial court's decision to reject Olla's "newly discovered evidence" was not error for three reasons.

First, Olla failed to *bring a motion* to set aside the trial court's judgment based on "newly discovered evidence", as required by CR 59(a) or CR 60(b). Olla only sought to introduce his "newly discovered evidence" as an attachment to a brief submitted in response to the defendant's motion for presentation of orders after the trial court issued its oral ruling.¹¹⁷

Second, the existence of a due on sale clause could not logically affect the outcome of the case. This due on sale clause states as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender *may* require immediate payment in full of all sums secured by this Security Instrument.¹¹⁸

On the basis of this language, Olla first argues that "no rational person would have signed purportedly in avoidance of foreclosure and avoiding blemish to his credit where instead he was actually thereby signing [sic] potentially triggering foreclosure."¹¹⁹ In other words, Olla appears to argue that since this clause allowed Washington Mutual to accelerate the

¹¹⁷ CP at 532.

¹¹⁸ CP at 532 (italics added). Olla appears to also argue that this language "specifically barred" the transfer of title from Olla to Wagner. Brief of appellant at 30. Yet the plain language of this clause does no such thing; it could only trigger an acceleration of the debt.

¹¹⁹ Brief of appellant at 49.

debt after Wagner obtained the Malibu property, the agreement was unconscionable.¹²⁰

This argument ignores fact that Olla was satisfied with Wagner's commitment to continue making payments on the Washington Mutual loan until he could sell the Malibu property to a third party.¹²¹ This made the chances of Washington Mutual accelerating the debt and initiating foreclosure proceedings highly unlikely. This is evident in the following email exchange. First, six days before executing the settlement agreement, Olla addressed this issue to Wagner as follows:

[T]here is no language in the agreement that there will be a release to me of all liability under the first loan on the Malibu house to Washington Mutual, i.e. that you are not assuming the loan but that you will be making scheduled payments and that when you sell the house the loan to WAMU as a matter of law will be paid off first ofcourse [sic]. . . . I must be entitled to protect against the eventuality of acts of God if the mortgage remains my legal liability until you sell the house in Malibu.¹²²

Then, two days before Olla executed the settlement agreement, Wagner responded as follows:

Washington Mutual loan- although I am not directly assuming your loan, but taking the house subject to the WAMU loan, any remaining equity that I have left in the Malibu house is at stake if I don't keep WAMU happy as they have the power to foreclose me out of my position since they are first above me. If I let anything

¹²⁰ *Id.* It is somewhat unclear from Olla's appellant brief whether he presents an unconscionability argument.

¹²¹ Ex. 186, tabs 39, 41; RP at 364.

¹²² Ex. 186, tab 39 (¶ 6).

happen to the WAMU loan I am really hurting myself.¹²³

This reasonable explanation from Wagner plainly satisfied Olla, since he then signed the settlement agreement.¹²⁴ Hence, the evidence demonstrates that Olla fully appreciated the risk of a future foreclosure, and decided to accept that minimal risk during negotiations. This decision was entirely reasonable considering the fact that at the time, Olla could not make the prior month's mortgage payment and was *already* in grave danger of foreclosure.¹²⁵

Finally, this alleged “newly discovered evidence” was not new. For Olla to now, after trial, feign surprise that there was a due on sale clause in the Washington Mutual deed of trust stretches credibility too far. Olla would have, of course, signed the deed of trust, and by doing so, he would have knowledge of the presence of such a clause. Olla also testified that the parties had previously discussed the possible presence of a due on sale clause during their earlier negotiations.¹²⁶ Olla also cross examined Wagner on this issue at trial,¹²⁷ and acknowledged the presence of that due on sale clause prior to trial in his Complaint.¹²⁸

For these reasons, the trial court committed no error in rejecting

¹²³ Ex. 186, tab 41; RP at 364.

¹²⁴ Ex. 186, tab 44.

¹²⁵ RP at 473.

¹²⁶ RP at 8.

¹²⁷ RP at 391.

¹²⁸ CP at 54, ¶ 52; Brief of appellant at 47.

Olla's "newly discovered evidence" of a due on sale clause.

I. A DEED IN LIEU OF FORECLOSURE DOES NOT HAVE TO BE "OFFERED BY THE BORROWER"

Without any legal support whatsoever, Olla next argues that the trial court "failed to make determination of voluntariness and heed to the long-standing rule that a deed in lieu of foreclosure must be offered by the borrower."¹²⁹ Further, without any reference to the record, Olla opines that "most title companies will only insure a deed in lieu of foreclosure if there is proof that the borrower drafted such"¹³⁰ This argument has no basis in law. The record is clear that the parties negotiated at arm's length about the details of the settlement, that Olla consulted with legal counsel, and was fully apprised of the risks and benefits of the settlement agreement before executing it.

Finally, Olla's arguments that the settlement agreement and deeds in lieu of foreclosure were essentially forced on him by Wagner flatly contradict his own statements made under penalty of perjury. When Olla signed the deeds in lieu of foreclosure, he also signed affidavits stating, that in the execution and delivery of the deeds in lieu of foreclosure, Olla was "not acting under any misapprehension as to the effect thereof, and acted freely and voluntarily and [was] not acting under coercion or

¹²⁹ Brief of appellant at 52.

¹³⁰ Brief of appellant at 53.

duress”.¹³¹

J. WAGNER WAS NOT REQUIRED TO BE A LICENSED WASHINGTON MORTGAGE BROKER

Olla next argues that Wagner was required to be a licensed Washington mortgage broker in order to issue the three loans to Olla, pursuant to RCW 19.146.¹³² This argument was never presented to the trial court and should therefore be disregarded. RAP 2.5(a); Torgerson at 524, 210 P.3d at 325. Further, respondent is not clear on how this argument is relevant, since through the settlement agreement, Olla released all claims against Wagner anyway. Nevertheless, Wagner did not fall under the auspices of RCW 19.146 because he was not a “mortgage broker” as defined by RCW 19.146.010(14).

K. WAGNER WAS NOT REQUIRED TO COMPLY WITH NEW “LOAN WORKOUT” REQUIREMENTS

In an example of how Olla shifts between using Washington and California laws whenever it suits his purposes, Olla next argues that Wagner was required, before issuing a Notice of Default as the first step in the foreclosure process, to issue a certified letter and set up an initial meeting pursuant to RCW 61.24.031. Again, this argument was never presented to the trial court, and therefore should be disregarded. RAP 2.5(a); Torgerson at 524, 210 P.3d at 325. Further, the cited requirements

¹³¹ Ex. 183, tabs 47, 49.

¹³² Brief of appellant at 70-71.

of RCW 61.24 had not yet been enacted into law at the time Olla was in default. Further, since the parties successfully negotiated a settlement agreement, Wagner never needed to initiate the foreclosure process.

L. WAGNER IS ENTITLED TO ATTORNEY'S FEES AND EXPENSES ON APPEAL

There are two reasons why Wagner is entitled to attorney's fees and expenses incurred in this appeal pursuant to RAP 18.1. First, the parties' settlement agreement states that "[i]f legal action is required to enforce the provisions of this agreement, the prevailing party is entitled to recover its attorneys' fees and costs from the nonprevailing party."¹³³ Second, attorney's fees and costs are allowed pursuant to CR 11 and RCW 4.84.185 because Olla's claims are frivolous in nature, as reasonably determined by the trial court,¹³⁴ and as supported by the evidence discussed above.¹³⁵

¹³³ Ex. 183, tab 44 (p. 5, ¶ 11).

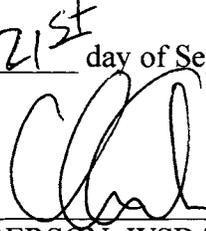
¹³⁴ CP at 553-54.

¹³⁵ RP at 79-80.

V. CONCLUSION

For the reasons explained above, Wagner respectfully requests that this Court sustain the trial court's decision dismissing all of Olla's claims.

RESPECTFULLY SUBMITTED this 21st day of September,
2010.



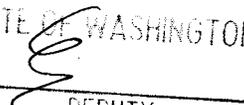
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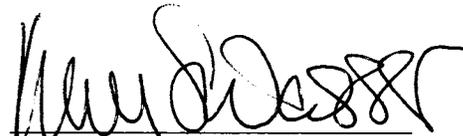
Kimberly Wasser declares and states as follows:

1. On the 21st day of September, 2010, I caused to be served or filed true and correct copies of the respondents' brief to the following recipients by mailing the same to the following recipients:

Mark Olla, Appellant (Pro Se)
PO Box 1626
Florence, OR 97439

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

SIGNED this 21st day of September, 2010 in Poulsbo, Washington.



Kimberly Wasser