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DIVISION II

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STATE OF WASHINGTON
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No. 40623-3-II

The Court of Appeals, Division II

State of Washington

SHERRI LYNN TANSON, MONKEY BEAN, LLC, Appellants

vs.

DUGOUT BROTHERS, INC., BRAD CARPENTER AND
LUCINDA (CINDY) CARPENTER, Respondents

RESPONDENT'S REPLY BRIEF

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I. STATEMENT OF THE CASE

This case involves an action by a franchisee seeking damages from her franchisor for alleged misrepresentation and fraud in the sale of a Forza Coffee Company franchise to her in Lakewood, Washington on or about September 20, 2006.

Sherri Lynn Tanson (“Ms. Tanson”) purchased a Forza Coffee Company franchise from Brad Carpenter (“Carpenter”) who was the president of Dugout Brothers, Inc, a Washington corporation (“Dugout Brothers”).

Dugout Brothers did business as Forza Coffee Company with various franchises located around Puget Sound.

Ms. Tanson’s initial complaint named Dugout Brothers as well as Brad Carpenter and his wife as defendants. Ms. Tanson later amended her complaint and named Robert Hutchins, an attorney in Tacoma and legal counsel for Dugout Brothers, as an additional defendant. All of the claims against Mr. Hutchins have either been dismissed by way of summary judgment or voluntarily stricken by Ms. Tanson.

The trial of this action against Dugout Brothers and Mr. and Ms. Carpenter was set to begin on April 12, 2010 before the Hon. Susan K. Serko. On the day of trial, Judge Serko was in the middle of another trial

and required the parties herein to remain in attendance to see if the case could be transferred to another department. RP April 12, 2010, 1-10.

Because of the uncertainty of keeping their trial date, the parties agreed to submit the case to a trial before a referee. RCW 4.48 *et. seq.* Accordingly, an agreed order was entered providing, *inter alia* that “all issues shall be reviewable upon appeal pursuant to the Civil Rules and Rules of Appellate Procedure.” CP 1-2.

The next day, on April 13, 2010, the parties were advised by Judge Serko’s judicial assistant that the judge, upon further review of the above order, did not believe that the parties would have the appeal rights that they intended and that she was going to re-note the case for trial in her department.

On April 15, 2010 Ms. Tanson filed a Motion for Order Enforcing the agreed order to submit the case to a referee. CP 3-44.

At a hearing scheduled by the court on April 16, 2010, Judge Serko informed the parties that she believed that there was a limited right of appeal from a referee’s decision and that she should not have signed the order under the circumstances.

As a result of Judge Serko’s concerns, counsel for Mr. and Ms. Carpenter informed the court that given her reservations regarding trial to

a referee, that Dugout Brothers and the Carpenters were withdrawing their consent to such a proceeding. RP April 16, 2010, 1-15.

At the conclusion of the above hearing, a Memorandum of Journal Entry was entered by Judge Serko's judicial assistant noting that Judge Serko had set the case for trial beginning on January 31, 2011. CP 47.

On April 22, 2010 Ms. Tanson filed a Notice of Appeal based upon the journal entry. CP 48-49.

On April 28, 2010 David Ponzoha, clerk of the court herein, wrote to Ms. Tanson counsel that there could not be an appeal from a journal entry.

On May 7, 2010, in response to Mr. Ponzoha's letter, Ms. Tanson entered an Order Denying Plaintiffs Motion for Order Enforcing Agreement to Submit To Trial Before Referee. CR 59-60.

Ms. Tanson basis her appeal to this court upon the entry of this order in lieu of her previous reliance on the journal entry. CP 48-49.

II. STATEMENT OF THE ISSUES

1. Does a superior court judge have the inherent power to strike an order transferring a case to trial before referee if the parties have stipulated to such referral?

2. Do Mr. and Ms. Carpenter have the power to rescind said stipulation based upon misgivings regarding their ability to appeal as expressed by Judge Serko?

3. Did the stipulated order create a contract between Ms. Tanson and Mr. and Ms. Carpenter which, then breached by withdrawing their consent to said trial.

III. ARGUMENT

1. Superior court judges have inherent power to administer cases assigned to them.

As a superior court judge, Judge Serko has been granted express powers to try both cases at law and equity as well as to issue various extraordinary writs. Washington State Constitution, Article IV, § 6.

By this constitutional grant of power to her, Judge Serko has the inherent power to administer her court in a way that provides justice to the public. RCW 2.28.010 states:

Every court of justice has power – (1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process and to the orders of a judge out of court, in an action, suit or proceeding pending therein ...

It is a generally accepted rule that “courts have the inherent authority to regulate their own proceedings. *In re Marriage of Hermson*, 27 Wn. App. 318, 323 fn. 4, 617 P.2d 462 (1980).

In this case, the parties had agreed to have their case tried to a referee. Judge Serko entered an order transferring the case from her department to a referee that the parties were to choose.

Within a day of signing the order transferring the case, Judge Serko consulted with another superior court judge and was advised that the rights of appeal of the parties may not exist.

Judge Serko summarized her reasons for striking her order and setting the case for trial as follows:

THE COURT: Absolutely. I signed it. You handed it in and I signed it.

MR. BUNDY: Okay.

THE COURT: But I guess I’m going to, you know, fall on the sword a little bit further and tell you this is my error. This is not your error or the parties error, this is my error. It was handed up to me and my initial reaction to it was, great, there’s some kind of a binding arbitration that these parties are to be referred to. When I looked at it more carefully, I again had concerns that, as you know with all the counties, but in particular Pierce County is undergoing severe economic crisis. We used to have a great pro tem program where we would bring judges in and they would use staff and you would have rights of appeal.

There was also a process which I used to do as a judge pro tem outside the context of the courthouse, which was you

agree on someone to try your case, you hire a court reporter, you use exhibits and then you have rights of appeal. That is gone, that process is gone as well as our judge pro tem program is gone. And part of the issue was not just economic, part of the issue was the Court of Appeals, I think, discouraging that outside the courthouse making a record.

So with, I mean, and I appreciate that you want to talk to me about this Mr. Bundy, in great detail, but that's the whole background of when I get handed this order in the middle of a very complex case, I look at it briefly and think, hmmm, trial by referee, well, some form of binding arbitration and I sign it and it was my fault. What I should have done was I should have had you both come back in and make a record as to exactly what you wanted to do and then question you about whether or not truly you have a right of appeal. That's the whole key to this whole thing. Both parties want that right, I'm presuming.

...

THE COURT: You're missing my point. We're going down parallel paths here. My point is I wouldn't have signed this. I would not have signed this and that is my fault, that is my mistake.

MR. BUNDY: Your Honor –

THE COURT: If I had known what the concerns of the parties were in terms of appeal. It became clear to me on Tuesday that there was a concern about appellate rights. And I'm not satisfied, having read 4.48, that there are absolute appellate rights that would emanate from a trial by referee.

RP April 16, 2010 pp. 5-7

THE COURT: Mr. Misner

MR. MISNER: Briefly your honor. I indicated my client's concerns after I relayed to them the Court's concerns. I requested at that time that in light of the concerns that my clients had with regards to the appellate rights awarded to them under trial before a referee that we would prefer that the matter be withdrawn and that we get a trial date, and that's what I'm requesting at this time. And my understanding is that the Court felt that there was an opportunity to set it in February or March of 2011 and I think we should do that today and be done with it.

THE COURT: That's what I am going to do. So relief as requested by the plaintiff is being denied...

RP April 16, 2010 pp.11-12

Under the circumstances, Judge Serko properly exercised her sound discretion in ordering the case to be tried on January 31, 2010.

2. Does a party to a stipulation to a trial before referee have the power to rescind said stipulation based upon misgivings regarding the parties' ability to appeal as expressed by the trial court?

Once the respondents were informed of Judge Serko's reservations, they withdrew their consent to the transfer of the case from her department. Given Judge Serko's reservations, the respondent's shared reservations are reasonable and they should be permitted to withdraw any consent previously granted to try the case before a referee:

Parties to an agreement may expressly or impliedly waive a dispute resolution provision by failing to invoke the provision when an action is commenced, or by conduct inconsistent with any other intention but to forego the right to dispute resolution. (Cases cited).

Harting v. Barton, 101 Wn. App. 954, 962, 6 P. 3d 91 (2000).

By rescinding her order and placing the case on her trial schedule, Judge Serko exercised inherent powers granted her in the sound exercise of judicial discretion:

Broadly stated, the judicial discretion of a judge is the right or power to choose between the doing and not doing of a thing which cannot be demanded, as an absolute right of the party asking that it be done, or the exercise of the right legally to determine between two or more courses of action. The valid exercise of judicial discretion connotes direction by the judge's reason and conscience, taking into account the law and the particular circumstances of the case ... The judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or just result in matters submitted the disposition through the judicial system...

A judge is charged with expediting the business of the judge's court and has all the powers reasonably required to efficiently run the court, including the power of contempt. In order to assure the fullest effectiveness in the use of resources consistent with interests of justice, a judge may give procedural direction to a case, rather than merely acquiesce in the procedural posture posed by the parties. However, the trial judge's duty to expedite court business should not be performed in a manner which prejudices a party in the fair and orderly presentation of the party's case or defense.

41 *Corpus Juris Secundum*, Judges, §151 -152, pp. 523 -524.

Returning the case to her trial schedule is not without precedent in the administration of a superior court trial calendar. For example, even if

a party objects, a trial court can return a case from Mandatory Arbitration and place it back on its trial calendar:

MAR 2.2 provides that the court may, on its own motion or on motion of a party, determine whether a case is actually subject to arbitration and may order a case transferred to or from the arbitration calendar. After an assignment to an arbitrator, a case will be returned from the arbitration calendar to the trial calendar only in “extraordinary circumstances.” MAR 2.2 (a).

Washington Practice, *Handbook on Civil Procedure*, Chapter 2, §77.2 p. 606 (2009-2010). See also, 4A Rules Practice, *Washington Practice Series*, MAR 2.2, p. 17 (2008).

A superior court judge has broad discretion in administering the alternative dispute resolution process:

MAR 2.2 as a general rule, provides the trial Court with discretion to determine whether a Case is actually subject to arbitration under RCW 7.06.020. The judicial council has said That MAR 2.2 ‘gives the judge authority to deal with maneuvers designed to keep a case out of the arbitration system.’(Citations omitted). RCW 7.06, authorizing mandatory arbitration in certain civil cases is intended primarily to alleviate court congestion and reduce delay in hearing cases. (Citation Omitted).

Fernandez v. Mockridge, 75 Wn. App. 207, 211, 877 P.2d 719 (1994).

In essence, Judge Serko has determined that her court has jurisdiction over this case and that it will not be transferred to alternative dispute resolution if there is any doubt as to the appellate rights of the parties.

3. The withdrawal by Mr. and Ms. Carpenter of their consent to trial by referee is not a breach of contract.

There is nothing in fact or law which holds that the stipulated order to try the case before a referee was a contract between the parties. Rather, the stipulation was an agreement to utilize an alternative dispute resolution to avoid having the trial of this case “bumped” from the court’s calendar and that all appellate rights would remain available to the parties.

When judge Serko expressed her concerns regarding the parties’ appellate rights, Mr. and Ms. Carpenter then withdrew their consent to the stipulation. Assuming, *argundo* that contract law applies to this case the potential loss of all appellate rights would be similar to a failure of consideration in a breach of contract case. *Barber v. Rochester*, 52 Wn.2d 691, 328 P.2d 711 (1958).

The elements of a contract include subject matter, parties, the promise, terms and price or consideration. *Zapel v. Bogle Gates*, 121 Wn. App. 444, 90 P.3d 703 (2004). None of those elements are present in this case since there was no contract in the first place.

Judge Serko confirmed that this trial will take place on January 31, 2011 when she stated, “You will not be transferred to Administration, trust me.” RP, April 16, 2010, p. 12.

Contract law and its remedies does not apply to this case. There is no breach of a contract, since a contract never existed between the parties.

IV. ATTORNEY FEES

RAP 18.9 provides for the awarding of attorney fees if this court deems an appeal to be frivolous. A frivolous appeal is one which is devoid of merit and without any chance of reversal. *Fidelity Mortgage Corp. v. Seattle Times Co.* 131 Wn. App. 462, 128 P.3d 621 (2005).

V. CONCLUSION

Because of a concern that the parties' trial would not take place on April 12, 2010, they entered into a stipulated order that the case could be tried before a referee and Judge Susan Serko entered an order to that effect.

On April 13, 2010, judge Serko's judicial assistant called counsel for both parties and informed them that the judge had second thoughts about the propriety of the order and that she wanted both parties in court as soon as possible.

On April 15, 2010, judge Serko informed the parties that she did not think that the appellate rights that they sought to preserve in the stipulation were available to them by trying the case to a referee.

Based upon the judge's reservations regarding appeal, Mr. and Ms. Carpenter withdrew their consent to the stipulation.

Judge Serko accepted responsibility for the entry of the order telling both parties that the entry of said order was her mistake and one that she would not have done if she had been more thorough.

Judge Serko noted the case for trial which is presently set for January 31, 2011 and advised the parties that their case would not be "bumped" again.

Judge Serko had the inherent power to strike the order and set the matter for trial. In this regard, she can only be reversed if she did not exercise sound discretion by striking the previous order.

There was no contract, expressed or implied, between the parties regarding the trial before referee. Even if there were a "contract" it would fail because the predicate upon which the "contract" was executed was that both parties would have full rights of appeal. Once judge Serko stated that she did not feel that those appellate rights existed, Mr. and Ms. Carpenter were well within their rights to withdraw their consent to trial before referee and prepare for trial on January 31, 2011.

Ms. Tanson's appeal is frivolous and Mr. and Ms. Carpenter should be awarded their attorney fees on appeal.

Respectfully submitted this 8th day of January, 2010

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SHERRI LYNN TANSON, MONKEY BEAN,
LLC, a Washington corporation,

Plaintiffs,

vs.

DUGOUT BROTHERS, INC., a Washington
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LUCINDA (CINDY) CARPENTER, husband
and wife, et al.,

Defendants.

COURT OF APPEALS NO. 40623-3-II

PIERCE COUNTY CAUSE
NO. 08-2-05436-1

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010 at 3:28 p.m. that I delivered by facsimile a true and correct copy of the Respondent's Reply Brief in the above cause of action to Howard Bundy attorney for Sherri Lynn Tanson at 5400 Carillon Point, Bldg. 5000, 4th Floor, Kirkland, WA 98033, fax no. 206-770-6130.

DATED this 8th day of November, 2010.



Lisa Lefebvre