

COURT OF APPEALS
DIVISION II

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No. 41421-0-II
Pierce County No.: 10-2-06523-2

STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RACEWAY PARK, INC., a Washington corporation; and T & S
PROPERTIES, LLC, a Washington limited liability company,

Appellants,

and

CORLISS SUNRISE APARTMENTS, LLC, a Washington limited
liability company,

Plaintiff

v.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability
company; ECT MERIDIAN PARTNERS, LLC, a Washington limited
liability company; JUNCTION 192 LLC, a Washington limited liability
company; ECT BONNEY LAKE PARTNERS LLC, a Washington
limited liability company; INVESTCO FINANCIAL CORPORATION,
a Washington corporation; MICHAEL J. CORLISS; and MARTIN D.
WAISS,

Defendants.

MERIDIAN SUNRISE VILLAGE, LLC, a Washington limited liability
company, ECT MERIDIAN PARTNERS, LLC, a Washington limited
liability company; JUNCTION 192 LLC, a Washington limited liability
company; ECT BONNEY LAKE PARTNERS LLC, a Washington
limited liability company; INVESTCO FINANCIAL CORPORATION,
a Washington corporation, and MARTIN D. WAISS, an individual,

Defendants/Counter Plaintiffs,

ORIGINAL

v.

RACEWAY PARK, INC., a Washington corporation; and T & S
PROPERTIES, LLC, a Washington limited liability company,

Appellants.

and

CORLISS SUNRISE APARTMENTS, LLC, a Washington limited
liability company,

Plaintiff.

EVERGREEN CAPITAL TRUST, a Washington grantor trust,

Respondent,

v.

T & S PROPERTIES, LLC, a Washington limited liability company, and
RACEWAY PARK, INC., a Washington corporation,

Appellant.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The trial court erred in ruling on summary judgment that Evergreen Capital Trust (“ECT”) wields a Veto Power as Primary Guarantor.

ECT is not a Member of Meridian Sunrise Village, LLC or Junction 192, LLC (collectively, the “Project LLCs”), and being a Member of the Project LLC is one of the contractual requirements of being a Primary Guarantor. At the very least (and as tacitly admitted by ECT), the Operating Agreements are ambiguous on whether a Primary Guarantor must be a Member.

Given the requirement that a Primary Guarantor be a Member or (at best for ECT) the Operating Agreements’ ambiguity on this point, the trial court erred in declaring on summary judgment that ECT is a Primary Guarantor. ECT’s agent, Investco, drafted the Primary Guarantor definition that is at issue in this appeal, which means the Court must construe the ambiguity against ECT. Additionally, ECT was the moving party below, which requires that all inferences must be taken in favor of Appellants T&S Properties, LLC (“T&S”) and Raceway Park, Inc. (“Raceway”) (collectively “T&S/Raceway”). The trial court took the opposite approach and erroneously credited ECT’s strained interpretation.

Finally, ECT lacks standing here, as it is not a party to the Project LLCs' Operating Agreements, and there is no justiciable controversy on this issue between ECT, on the one hand, and T&S/Raceway, on the other.

The trial court's order should be reversed.

II. ARGUMENT

A. ECT, a non-Member, Does not Meet the Contractual Definition of Primary Guarantor.

The trial court erred in granting summary judgment because ECT does not meet the definition of Primary Guarantor. ECT admits that it is not a Member of the Project LLCs and that it has no direct ownership interest in the Project LLCs. ECT's Br. at 1. ECT's non-membership is fatal to its claim because one of the requirements of being a Primary Guarantor is that the guaranty provided is an amount "greater than such *Member's* percentage interest in the Company." CP 66; CP 111 (emphasis added). This language makes clear that only a *Member* can be the Primary Guarantor. And only the Primary Guarantor may exercise the Veto Power to override the votes of the other Members of the Project LLCs. ECT, a non-Member, cannot be the Primary Guarantor and does not possess the Veto Power.

At the very least, the trial court erred in granting summary judgment because the definition of Primary Guarantor is ambiguous, and

ECT's wholly-owned agent is responsible for that ambiguity. A contract is ambiguous when its terms are susceptible to more than one reasonable meaning. *Dice v. Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006). Even setting aside that any ambiguity must be construed against ECT, in reviewing the summary judgment order, this Court must draw all reasonable inferences from the pleadings, affidavits, depositions, and admissions in the light most favorable to T&S/Raceway, the nonmoving parties. *See Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991).

ECT admits that the definition of Primary Guarantor lacks “clarity” and “could have been drafted more clearly.” ECT’s Br. at 17. ECT even suggests changes to the language in the contract to reach the result it desires. *Id.* But that language is not in the contract. As tacitly admitted by ECT, its suggested interpretation requires the Court to read additional terms into the definition that are not actually there. More importantly, in accepting ECT’s proposed interpretation, the trial court failed to take all reasonable inferences in T&S/Raceway’s favor, as the non-moving parties.

ECT admits that its interpretation requires the Court to add the words, “if the Person is a Member” to the last clause of the Primary Guarantor definition in order for its proposed reading to make sense. *Id.*

ECT then argues that these absent words are akin to a missing semicolon or mis-placed comma. *Id.* at 17-18. The addition of these six words is not merely a mistake in punctuation or grammar. ECT's proposed reading requires the Court to make substantive changes to the definition of Primary Guarantor. Conversely, T&S/Raceway's interpretation of that term does not require the addition of any words to the Primary Guarantor definition. Instead, the Court need only look to the written definition to find that there are two requirements to be a Primary Guarantor: (1) that the guaranty provided "represents (in the aggregate) an amount that is greater than fifty percent (50%) of the outstanding liabilities of the Company," **and** (2) that the guaranty is "greater than such *Member's* percentage interest in the Company." CP 66; CP 111 (emphasis added). Contrary to ECT's suggestion, T&S/Raceway's definition does not require one to "ignore" the phrase "any Person"; rather, "Person" is simply limited by the additional requirements that the Primary Guarantor be a Member that guarantees both more than 50% of the Company's liabilities and more than the Member's percentage interest in the Company.

ECT's argument as to the parties' intent with respect to the Primary Guarantor definition is devoid of support. ECT presented no evidence of T&S/Raceway's intent with respect to the proper interpretation of the Primary Guarantor definition, and the other evidence

reveals an intention that only other Members could be a Primary Guarantor. CP 321-22, 332-33.

That T&S/Raceway worked with ECT for four years before this dispute arose does *not* show that T&S/Raceway agreed with ECT's interpretation. Rather, ECT *had never attempted to exercise the Veto Power or assert that it was Primary Guarantor* prior to the present dispute arising. CP 348. Thus, T&S/Raceway certainly did not "know" or "understand" that ECT was the Primary Guarantor, as ECT alleges.

B. ECT is Responsible for any Ambiguity in the Primary Guarantor Definition and all Reasonable Inferences Must be Drawn in T&S/Raceway's Favor.

Because ECT effectively drafted the ambiguous Primary Guarantor definition, the Court must construe it against ECT. *Hanson Indus., Inc. v. County of Spokane*, 114 Wn. App. 523, 531, 58 P.3d 910 (2002) (ambiguous contracts are construed against the drafter); *see also Guy Stickney v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966). There is no dispute that the Michael Corliss entities drafted the Operating Agreements. Michael Corliss is the sole trustee and beneficiary of ECT, which in turn is the sole shareholder of Investco, the manager of the Project LLCs. CP 319, 321. Thus, the Michael Corliss entities are directly responsible for the ambiguity in the Primary Guarantor definition. Accordingly, the Court must construe the definition of Primary Guarantor

against ECT because it is ambiguous, and there is insufficient evidence in the record to determine the parties' intent with respect to this definition. (Further, as explained below, the little evidence in the record relevant to the parties' intent supports T&S/Raceway's interpretation.)

Attempting to escape this long-established contract construction principle, ECT cites a case in which an attorney for *both* parties drafted a provision that was later found to be ambiguous. ECT's Br. at 19-20 (citing *Drumheller v. Bird*, 170 Wash. 14, 23, 15 P.2d 260 (1932)). That is a far cry from the facts here, where the Michael Corliss entities drafted the ambiguous provision. This case is more akin to *Guy Stickney, Inc.*, 67 Wn.2d at 827, in which the court held that a provision must be construed against the party whose attorney drafted it. In these circumstances, Investco (owned and control by ECT, which is controlled by Michael Corliss), is akin to an attorney working on behalf of his or her client (in this case, ECT). *See id.*; *see also, e.g., In re Fields*, 449 B.R. 387, 395 (D. Min. Bankr. 2011) (“[A]mbiguity is to be construed against the Plaintiff, as the party that procured the drafting of the [contract] through its related entity.”). For all practical purposes, ECT drafted the ambiguous definition at issue.

ECT's disregard of corporate identities argument is a red herring. *See* ECT's Br. at 20-21. The Court need not disregard the corporate

identities or pierce the corporate veil to acknowledge the practical reality of who was responsible for drafting the Primary Guarantor definition: ECT. CP 319-20.

The trial court's order that a Primary Guarantor need not be a Member must be reversed for the additional reason that trial court did not take all reasonable inferences in favor of T&S/Raceway, the non-moving parties. For the reasons described above, interpreting the Operating Agreements to require that a Primary Guarantor be a Member is a reasonable inference from the contractual definition of Primary Guarantor. Instead, the trial court (erroneously) took the opposite approach and credited ECT's strained reading of the Primary Guarantor term, finding that ECT is a "Primary Guarantor" that can exercise the Veto Power. Because ECT moved for summary judgment, the trial court was required to read the language of the contract in the light most favorable to T&S/Raceway in determining whether a factual issue existed. *See Foote v. Viking Ins. Co. of Wisconsin*, 57 Wn. App. 831, 836, 790 P.2d 659 (1990). Because the definition is ambiguous (at best), the trial court erred in granting ECT summary judgment.

Finally, contrary to ECT's suggestions, T&S/Raceway do not take the position that ECT could not be a Primary Guarantor *because* it entered into the Guarantor Fee and Indemnity Agreements. Rather, ECT cannot

be the Primary Guarantor because it is not a Member of the Project LLCs, and accordingly does not meet the requirements in the definition of Primary Guarantor in the Operating Agreements. Likewise, ECT's argument that it is "unclear" whether the Project LLCs could have conferred a Veto Power in the Guarantor Fee and Indemnity Agreements has no bearing on whether ECT meets the definition of Primary Guarantor in the Operating Agreements.¹

C. ECT Lacks Standing Under the Operating Agreements Because It Is Not A Party To Them.

ECT's standing argument depends entirely on the Court's acceptance of its contention that it meets the Primary Guarantor definition – specifically, the Court must find that ECT is the Primary Guarantor in order for ECT to have standing, under the argument that ECT advances. ECT's Br. at 22-23. If the Court (properly) rejects the premise that ECT is the Primary Guarantor, ECT necessarily lacks standing to sue under the Operating Agreements to which it is not a party. If ECT is not the Primary

¹ On page 22 of its brief, ECT states that "*as explained above*, it is unclear whether" the parties could give ECT a Veto Power in the Guarantor Fee and Indemnity Agreements under the Washington LLC Act (emphasis added). However, ECT does not explain how or why the Washington LLC Act could have prevented the parties from giving ECT such a power in the Guarantor Fee and Indemnity Agreements, nor does ECT even cite purportedly applicable provisions in the Washington LLC Act. Therefore, ECT's argument as to the alleged impact the Washington LLC Act had in drafting the Primary Guarantor definition is unsupported both factually and legally, and the Court should disregard it.

Guarantor, it has no interest in the Operating Agreements and therefore no standing.

Article 17.10 of the Operating Agreements explicitly prohibits third parties like ECT from claiming benefits under them. CP 94, 139. “Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.” *Seattle-First Nat. Bank v. Westlake Park Assoc.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). Yet, this is exactly what ECT asks the Court to do with respect to Article 17.10 of the Operating Agreement. Article 17.10 explicitly prohibits ECT from having standing here, but the trial court disregarded that provision.

ECT argues that the parties’ “intent” regarding the Primary Guarantor is “evident,” but it cites no evidence regarding the parties’ intent other than the very language that is in dispute. ECT’s Br. at 23-24. Tellingly, Martin Waiss, president of Investco, stated in his declaration that the Operating Agreement contain the Primary Guarantor and Veto Power terms so that, in the event that “*one member*” was called on to guaranty an amount that was “disproportionate” to its interest in the company, the member “provid[ing] a disproportionate credit enhancement” (*i.e.*, guaranty) would have a Veto Power as Primary Guarantor. CP 321-22 (emphasis added). Nowhere does Martin Waiss

state that the Project LLC members included the Primary Guarantor definition for the benefit of ECT, a non-Member. CP 318-25. Likewise, Michael Corliss, sole beneficiary and a trustee of ECT, states that his practice when investing in real estate is to create “Real Estate LLCs” and to include a provision in the operating agreement allowing “any *member* . . . who meets the terms of the definition of Primary Guarantor . . . [to exercise] the Veto Power.” CP 332-33 (emphasis added). This further supports T&S/Raceway’s understanding and interpretation: the Primary Guarantor must be a Member, and Section 17.10 prevents third parties like ECT from having standing under the Operating Agreements.

ECT argues that because Article 17.10 is in the section with the heading “Miscellaneous,” Article 17.10 must be interpreted as a “general” term that must yield to the more “specific” Primary Guarantor definition. ECT’s Br. at 25-26. However, Section 17.5 of the Operating Agreements specifically states that the headings within the Operating Agreements are *not* to affect the interpretation of the document. CP 94, 139. Moreover, the alleged “inconsistency” between the Primary Guarantor definition and Article 17.10 exists only *if ECT’s meaning of the definition of Primary Guarantor is credited* – that is, a meaning whereby a non-Member and non-party to the agreement could exercise a Veto Power. If T&S/Raceway’s common sense interpretation of the term “Primary

Guarantor” is credited – that is, a Primary Guarantor must be a Member of the Project LLC – then there is no conflict with Article 17.10. Under T&S/Raceway’s interpretation, any Primary Guarantor would have standing to enforce its Veto Power under Article 17.10 because that Primary Guarantor would necessarily be a Member and party to the agreement. The contract should be read to avoid an unnecessary conflict between its terms, and the Court should not disregard the clear prohibition of Article 17.10 that denies ECT standing to bring its claim for declaratory relief.

D. The Trial Court Erred in Granting ECT Declaratory Relief.

The trial court abused its discretion in finding that there was a justiciable controversy relating to ECT’s guaranty sufficient to grant ECT declaratory relief. First, there simply is no present dispute regarding the loan guaranty between T&S/Raceway and ECT – rather, there is a hypothetical dispute manufactured by ECT’s claim for declaratory relief. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416-18, 27 P.3d 1149 (2001). ECT’s rights and duties as a guarantor of the Project LLCs’ loans are set forth in the Guarantor Fee and Indemnity Agreements, which no one alleges have been breached by any party. Disputes that are not ripe fail to meet the justiciability test. *Id.*

As to the second and third factors of the justiciability test, ECT's argument shows that what it obtained from the trial court is a (prohibited) advisory opinion regarding a contract to which it is not a party and in which it has no interests. Despite the fact that ECT's rights and responsibilities as a guarantor for the Project LLCs is fully set forth in the Guarantor Fee and Indemnity Agreements, ECT argues, in essence, that it might want to use the Veto Power in the future on some unknown issue, and it therefore has an "interest" that is "direct and substantial." This is exactly the type of "potential, theoretical, abstract or academic" advisory opinion that the justiciable controversy standard prohibits. *Id.* at 410-11.

Finally, ECT offers no reason why the trial court's order is "final and conclusive," thereby implicitly conceding that the fourth factor of the justiciability standard is not met here.

III. CONCLUSION

For the reasons set forth above, T&S/Raceway respectfully request that the Court reverse the trial court's decision granting ECT summary judgment, holding that ECT is a Primary Guarantor that can exercise the Veto Power under the Project LLCs' operating agreements. Likewise, T&S/Raceway respectfully request that the Court reverse the trial court's related decision that ECT had standing under the operating agreements

and RCW 7.24 to seek relief under the Project LLCs' operating agreements.

Dated: October 14, 2011.

Respectfully submitted,

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STATE OF WASHINGTON

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CERTIFICATE OF SERVICE

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

Dated: October 14, 2011 at Seattle, Washington.

A handwritten signature in cursive script, appearing to read "Colette Saunders", written over a horizontal line.

Colette Saunders
Legal Assistant