

No. 42394-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
2012 JUN 15 PM 2:49
STATE OF WASHINGTON
BY _____
DEPUTY

TICOR TITLE,
Plaintiff

v.

SUMMIT UNISERV COUNCIL, a Washington Non-Profit corporation,
Respondent, and WILLIAM B. MOORE, Appellant

CROSS APPELLANT'S REPLY BRIEF

Mark R. Roberts
WSBA No. 18811
Attorneys for Respondent
and Cross Appellant,

ROBERTS JOHNS & HEMPHILL, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, Washington 98335
Telephone No. (253) 858-8606
Facsimile No. (253) 858-8646

 ORIGINAL

TABLE OF CONTENTS

1. The Court Erred By Requiring Summit To
Pay For Part of the Phase II Environmental
Assessment 1

2. The Trial Court Erred in Denying Prejudgment
Interest On the Liquidated Sums it Awarded
Summit 2

3. The Court Abused its Discretion In Awarding
Summit Less Than All of Its Attorney’s Fees
and Costs 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

<i>Brand v. Dept. of Labor & Indus.</i> , 91 Wash.App. 280, 288, 959 P.2d 133 (1998).....	5
<i>Crest Inc. v. Costco Wholesale Corp.</i> , 128 Wn. App. 760, 775, 115 P.3d 349, 357 (2005).....	4
<i>Forbes v. Am. Bldg. Maint. Co. W.</i> , 170 Wn.2d 157, 240 P.3d 790 (2010).....	2,3
<i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 114 Wash.2d 677, 689, 790 P.2d 604 (1990)	5
<i>Seattle-First Nat. Bank v. Washington Ins. Guar. Ass'n</i> , 94 Wn. App. 744, 972 P.2d 1282 (1999)	4,5

ARGUMENT

In this Reply Brief Cross Appellant Summit Uniserv Council ("Summit") will respond only to the arguments made in the Argument In Response To Cross Appeal section of Appellant William B. Moore's ("Moore") Reply Brief.

1. The Trial Court Erred By Requiring Summit To Pay For Part of the Phase II Environmental Assessment.

Moore asserts that Summit was obligated to reimburse him for the Phase II Environmental Site Assessment cost pursuant to Paragraph 7 of the Purchase and Sale Agreement for Tenth & East Main Commercial Condominium (the "PSA"), which provided that Summit "shall pay all costs associated with financing, including but not limited to, application, processing and closing costs thereof." Moore Reply Brief at 26.

First, this provision in no way obligated Summit to reimburse Moore for an environmental assessment he voluntarily commissioned because his property was purportedly contaminated limiting if not precluding him from ever selling it. Second and more importantly, the Trial Court expressly found that Summit terminated the PSA in July 2007 (CP 172 - FF No. 17) well prior to Moore obtaining the Phase II Assessment in August 2007. Consequently,

even if this provision in the PSA applied, it had been terminated. The Trial Court therefore erred when it required Summit to contribute to the cost Moore incurred in obtaining the Phase II Environmental Assessment.

2. The Trial Court Erred in Denying Prejudgment Interest On the Liquidated Sums it Awarded Summit.

Moore opposes Summit's request for prejudgment interest on the basis that the money was held as "security". Moore Reply Brief at 27. Moore fails, however, to explain how money withheld from Summit but characterized as "security" is not subject to prejudgment interest. In fact, in his two paragraph response Moore provides no statutory or case law to oppose Summit's request.

As Summit noted in its Response Brief, In Forbes v. Am. Bldg. Maint. Co. W., 170 Wn.2d 157, 167, footnote 6, 240 P.3d 790, 793-94 (2010), the Washington Supreme Court expressly stated that the fact that the funds are held in the Court registry rather than by the adverse party has no bearing on whether or not prejudgment interest should be awarded. The Supreme Court further stated that "where the claimed amount is liquidated, the rightful claimant of the funds should be compensated for the lost 'use value' of the money." Id. at 166.

Moore may be suggesting that Summit's claim was not liquidated because the Trial Court ruled that a portion of Summit's earnest money deposit should be applied to the cost of Moore's Phase II Environmental Assessment. As discussed in the preceding section, the Trial Court's decision regarding Summit's responsibility for a portion of the cost of Moore's Phase II Environmental Assessment was erroneous and should be reversed. However, whether Summit obtained all or a portion of its deposit is not relevant to the determination as to whether it is entitled to prejudgment interest on the sums it was awarded.

"A claim is liquidated when the amount of prejudgment interest can be computed with exactness from the evidence, without reliance on opinion or discretion. The fact that an amount is disputed does not render the amount unliquidated." Forbes, supra at 166. The Trial Court determined the amount of its award to Summit without reliance on opinion or discretion and thus Summit's claim was liquidated. The fact that Moore was partially successful on his own claim for recovery of the cost he incurred in obtaining the Phase II Environmental Assessment has no bearing on whether Summit's successful claim was liquidated.

Summit was deprived of the use of its funds from October 4, 2007 until the funds were released on July 22, 2011.¹ CP 503-506. Therefore, Summit is entitled to prejudgment interest at the statutory judgment interest rate² for the period of October 4, 2007 to July 22, 2011.

3. The Court Abused its Discretion In Awarding Summit Less Than All of Its Attorney's Fees and Costs.

Moore properly acknowledges that a trial court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. Moore Reply Brief at 27. Moore then opines that the Trial Court did not abuse her discretion because she could have considered several time entries, which he lists at page 28 of his brief, and on that basis decided to deduct more than \$13,000 in attorney's fees from its award. But the Trial Court never identified any instances, let alone the ones now provided by Moore, as a basis for reducing Summit's attorney's fees award. Moore makes no effort whatsoever to explain why the Trial Court did not award to Summit its costs in the amount of \$2,290.

¹ Prejudgment interest accrues from the date the claim arose to the date of judgment. Seattle-First Nat. Bank v. Washington Ins. Guar. Ass'n, 94 Wn. App. 744, 760, 972 P.2d 1282, 1291 (1999).

² See Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 775, 115 P.3d 349, 357 (2005).

As Summit noted in its brief, the Court of Appeals cannot sustain an award of attorney's fees if "the trial court exercised its discretion in a manifestly unreasonable manner or based its decision on untenable grounds", and the Court of Appeals "will reverse an award of attorney's fees if the record fails to mention the method the trial court used to calculate fees or if the court used an improper method." Seattle-First Nat. Bank v. Washington Ins. Guar. Ass'n, 94 Wn. App. 744, 761-62, 972 P.2d 1282, 1292 (1999)(citing Brand v. Dept. of Labor & Indus., 91 Wash.App. 280, 288, 959 P.2d 133 (1998); Progressive Animal Welfare Soc'y v. Univ. of Wash., 114 Wash.2d 677, 689, 790 P.2d 604 (1990)). Here, the Trial Court abused her discretion in discounting Summit's fees and not awarding any costs without providing any valid method or rationale for her decision.

The Trial Court properly noted that as the prevailing party Summit was entitled to an award of its reasonable attorney's fees pursuant to Paragraph 33 of the PSA. VRP 6/10/11 at 11. The Trial Court made no finding that the amount of fees requested by Summit was unreasonable, and certainly enunciated no basis for any such determination. Nor did the Trial Court provide any rationale for denying Summit an award of any of its costs.

The Trial Court therefore clearly abused her discretion in denying Summit the full amount of its attorney's fees and costs incurred in the litigation. This Court should reverse the Trial Court's failure to award to Summit all of its costs and attorney's fees.

CONCLUSION

For the reasons specified above, this Court should reverse the Trial Court's decision obligating Summit to pay for a portion of Moore's Phase II Environmental Assessment, the Trial Court's decision not to award prejudgment interest and the Trial Court's failure to award to Summit all of its costs and attorney's fees.

Respectfully submitted this 15th day June, 2012.

ROBERTS JOHNS & HEMPHILL, PLLC



MARK R. ROBERTS, WSBA #18811
Attorneys for Appellant
Summit Uniserv Council

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing CROSS APPELLANT'S REPLY BRIEF on the following individuals in the manner indicated:

Joe Gordon, Jr.
1201 Pacific Avenue, Suite 2200
Tacoma, Washington 98401-1157

- (XX) Via Email to JGordonJR@gth-law.com
- () Via U.S. Mail
- () Via Facsimile
- (XX) Via Hand Delivery
- () Via ECF
- () ABC Legal Services

FILED
 COURT OF APPEALS
 DIVISION II
 2012 JUN 15 PM 2:49
 STATE OF WASHINGTON
 BY  DEPUTY

SIGNED this 15th day of June, 2012 at Gig Harbor, Washington.



 Kristine R. Pyle