

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

FEARGHAL MCCARTHY; FEARGHAL MCCARTHY and
CASTLETHORNE CAPITAL LLC, as nominal plaintiffs on
behalf of VENIA RE HOLDINGS LLC, VENIA
DEVELOPMENT LLC, VENIA ASSET MANAGEMENT LLC,
and VENIA HOLDINGS, INC.; and VENIA RE HOLDINGS
LLC, VENIA DEVELOPMENT LLC, and VENIA ASSET
MANAGEMENT LLC, by and through its manager, Fearghal
McCarthy,

Plaintiffs/Appellants,

v.

KEVIN DeFORD, et al,

Defendants,

and

VENIA RE HOLDINGS LLC, et al,

Nominal Defendants,

and

WEST PARK PARTNERS LLC,

Defendant/Respondent.

Appeal from the Superior Court of Clark County
Case No. 12-2-03111-1

APPELLANTS' AMENDED OPENING BRIEF

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I. INTRODUCTION

When Fearghal McCarthy, David Copenhaver and Kevin DeFord went into business together to pursue real estate development opportunities, they formed and jointly owned several entities, Venia Development LLC (“VDEV”), Venia RE Holdings LLC (“VREH”), and Venia Asset Management LLC (“VAM”) (collectively, the “Venia LLCs” or “Venia”). VREH’s LLC Agreement expressly prohibited the partitioning of company property and required that legal title to all VREH property be held in its company name.

Despite this requirement, Copenhaver and DeFord diverted work product, business opportunities and other assets belonging to Venia in breach of their fiduciary duties and VREH’s LLC Agreement. Work product developed by Venia included the business opportunity to acquire for redevelopment real property located at 610 Esther Street, Vancouver, Washington (the “Property”). Copenhaver and DeFord diverted from Venia the business opportunity to acquire the Property by causing another entity, West Park Partners LLC (“West Park”), to purchase the Property instead of Venia.

The Second Amended Complaint sought equitable relief to impose a constructive trust and to quiet title to the Property. In conjunction with this relief, the Venia LLCs filed a lis pendens on the Property. On a motion filed by West Park, the Trial Court cancelled the lis pendens and

dismissed Appellants' complaint to quiet title finding that "this lawsuit is not an action affecting title to real property." Appellants appeal.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by dismissing Appellants' claims to quiet title to the Property.
2. The Trial Court erred in granting West Park's motion to cancel the lis pendens filed on the Property.
3. The Trial Court erred in denying reconsideration of its Order to cancel the lis pendens filed on the Property.
4. The Trial Court erred in denying the motion to stay its Order granting West Park's motion to cancel the lis pendens on the Property.
5. The Trial Court erred in granting judgment for attorney's fees against Fearghal McCarthy in the amount of \$6,250.

Issues pertaining to Assignments of Error

- a. When viewing the facts in Appellants' Second Amended Complaint as true, together with Appellants' subsequent filings: did the Trial Court err in finding that "this lawsuit is not an action affecting title to real property within the meaning of RCW 4.28.320" and by dismissing Appellants' claim to quiet title to the Property based on the pleadings? (Assignment of Error 1).

- b. When viewing the facts stated in the Second Amended Complaint as true, together with Appellants' subsequent filings: are Appellants' entitled to seek equitable relief to impose a constructive trust and quiet title to the Property to Venia? (Assignment of Error 1).
- c. Does equitable relief seeking to impose a constructive trust on title to the Property affect title to real property within the meaning of RCW 4.28.320? (Assignment of Error 1).
- d. Did the Trial Court err in cancelling the lis pendens filed on the Property and by denying reconsideration of its Order cancelling the lis pendens when, viewing the facts stated in Appellants' Second Amended Complaint as true, together with Appellants' subsequent filings: Appellants sought equitable relief to declare a constructive trust on title and quiet title to Venia? (Assignments of Error 2 and 3).
- e. When viewing the facts stated in the Second Amended Complaint as true, together with Appellants' subsequent filings: did the Trial Court err by denying Appellants' motion to stay its order cancelling the lis pendens filed on the Property when this action has not been "settled, discontinued or abated" as required by RCW 4.28.320? (Assignment of Error 4).

f. Did the Trial Court err by granting judgment for attorney's fees against McCarthy when viewing the facts stated in Appellants' Second Amended Complaint as true, together with Appellants' subsequent filings: (1) this lawsuit affects title to the Property; and (2) judgment should not have been granted against McCarthy personally because McCarthy acted in his capacity as a manager of the Venia LLCs and is thus insulated from any personal liability by RCW 25.15.125 and RCW 25.15.155? (Assignment of Error 5).

III. STATEMENT OF THE CASE

A. Procedural History

On September 5, 2012, Appellants filed an Amended Complaint asserting in part that defendants Copenhaver and DeFord breached agreements and fiduciary duties owed to Venia, including but not limited to, diverting business opportunities from and converting property of Venia. CP 62-66. The Complaint was filed as a derivative action because defendants Copenhaver and DeFord held majority ownership and managerial control of the Venia LLCs. CP 65.

On July 14, 2014, with the permission of the court, Appellants filed a Second Amended Complaint. CP 76-88. The Second Amended Complaint added West Park as a defendant and stated that assets diverted and converted by the defendants included real property and contractual rights to real property located at 610 Esther Street, Vancouver, WA 98660.

On July 14, 2014, the Venia LLCs filed a Notice of Lis Pendens (the “Lis Pendens”) on the Property. CP 129-130.

On September 19, 2014, West Park filed a motion to cancel the Lis Pendens. CP 96. In support of its motion, West Park contended that Appellants failed to state a claim upon which equitable relief to quiet title could be granted. CP 101-102.

On September 26, 2014, the Court entered an Order Granting Motion to Cancel Lis Pendens. CP 215. The Trial Court made a conclusion of law that “this lawsuit is not an action affecting title to real property within the meaning of RCW 4.28.320.” CP 216.

Appellants filed a Motion for Reconsideration and Stay of Order Cancelling Lis Pendens. CP 217. On November 26, 2014, the Court entered an Order Denying Motion for Reconsideration that also denied Appellants’ Motion to Stay of Order Cancelling Lis Pendens. CP 280-281.

The Court entered Stipulated Findings in Support of Final Judgment on January 30, 2015.¹ CP 309-312. These findings stated that the Order Denying Motion for Reconsideration and Judgment Awarding Attorney’s Fees “dismisses Plaintiffs’ claims to quiet title to the Property as set forth in the Second Amended Complaint, as a matter of law”. CP 311, ¶7.

¹ On January 30, 2015, a Third Amended Complaint was filed by stipulation to correct a scrivener’s error so as to correctly state Acorn Acquisitions LLC as a defendant as correctly stated in the original Complaint and prior Amended Complaint.

B. Statement of Facts

a) Facts stated in the Second Amended Complaint.

The Second Amended Complaint states these facts:

- i) Copenhaver, DeFord and McCarthy are members, managers and officers of VREH, VDEV and VAM. VAM initially managed VREH and VDEV through the three principals, but VDEV and VREH then replaced VAM as their manager appointing Copenhaver, DeFord and McCarthy as their managers instead. Copenhaver and DeFord exclusively controlled the bank accounts of VREH and VDEV and acted in a managerial capacity for VREH, VDEV and VAM. CP 78-79.
- ii) Copenhaver is a member and manager of Acorn Acquisitions LLC. Acorn Acquisitions LLC is an alter-ego of Copenhaver. Acorn Capital LLC and Nex Generation LLC are members of VREH and VAM. Acorn Capital LLC is an alter-ego of Copenhaver. Nex Generation LLC is an alter-ego for DeFord. CP 79-80. VAM and Venia Holdings Inc (“VHI”) had no business activity or operations and were merely alter-egos for VDEV and VREH. CP 78-79. Copenhaver and DeFord are members and the managers of West Park. CP 81.
- iii) Copenhaver and DeFord breached agreements and fiduciary duties owed to VREH, VDEV, VAM and VHI. These breaches included converting property, assets, cash, project financing, investor opportunities, goodwill, confidential information and business opportunities belonging to the Venia LLCs. CP 82.

iv) Assets converted by Defendants includes contractual rights to acquire real property and title to real property located at the 610 Esther Street, Vancouver, WA 98660. CP 85.

v) The limited liability agreement of VREH provides that “*legal title to all Company Property shall be held in the name of the Company*” and that “*no member...shall have the right to partition any Company Property or any right to receive specific assets on any Distribution or on the winding up of the Company’s affairs.*” CP 85.

vi) Defendants Copenhaver and DeFord formed multiple entities to conceal and convert business opportunities belonging to VREH and VDEV. This includes entities that were not disclosed in response to Appellants’ discovery requests. CP 85. A conspiracy exists between Copenhaver, DeFord, West Park and the other defendants. CP 84.

vii) On June 3, 2014, Copenhaver and DeFord sent notice purporting to resign as managers and officers of the Venia LLCs. In spite of this notice, Copenhaver and DeFord continued to maintain exclusive managerial control over the Venia LLCs’ bank accounts, the converted business opportunities and other assets that belonged to the Venia LLCs. CP 83.

The Second Amended Complaint prays for relief with respect to the diversion and conversion from the Venia LLCs of real estate and contract rights to real estate: (1) “For a finding declaring the existence of a constructive trust....” and (2) “For an order quieting title on diverted real

property and diverted contract rights to acquire real property including such property and contract rights to property located at 610 Esther Street, Vancouver, WA 98660....” CP 86.

b) *The principals’ business agreement.*

In 2010, Copenhaver, DeFord and McCarthy agreed to become business partners and to pursue business opportunities together, primarily real estate opportunities. They agreed to form the Venia LLCs to provide a structure for their business partnership and to “jointly manage and operate the business” with equal one third ownership interests each. On June 2, 2010, VREH, VDEV and VAM were formed as manager-managed limited liabilities companies. Copenhaver, DeFord and McCarthy were the controlling members and “Member-Managers” of these LLCs. CP 124.

The Minutes of the Organizational Meeting provide that “the Principals have been jointly engaged in the business of real estate development and investment, and have agreed to form and use various group entities for the purpose of conducting the operations of the business” and that the three principals wish to jointly manage and operate the business. CP 7 ¶1-3. VDEV’s primary purpose was to be a real estate development company; and VREH’s primary purpose was to hold assets for investment periods expected to be greater than one year. CP 7, ¶2c), e).

As business partners, members and co-managers of the Venia LLCs, Copenhaver, DeFord and McCarthy further agreed that all new

business opportunities would be jointly pursued via the Venia LLCs and that they would not compete against the Venia LLCs. This was agreed by the three principals because they did not want any conflicts of interest arising from different projects competing with each other for time, tenants, capital and other resources - and they did not want to be bidding against each other to purchase the same real estate properties. CP 124.

The Limited Liability Company Agreement of VREH states that the Company was formed "for the purpose of acquiring and holding assets for the purposes of long-term...investment"; CP 195, ¶1.8; and specifically provides that "legal title to all Company Property shall be held in the name of the Company" and that no member, successor or assign of a member "*shall have any right, title or interest in any Company Property...or the right to partition Company Property.*" CP 198 ¶ 4.9.

Copenhaver, DeFord and McCarthy all worked as employees and co-managers of the Venia LLCs taking only nominal salaries of \$24,000 per year and investing their sweat equity into the business. The major assets of the Venia LLCs consisted of its work product developed by the three principals' joint efforts and sweat equity vis-a-vis the business opportunities that Venia and its three principals were actively developing and actively pursuing. CP 264, ¶ 11.

c) The business opportunity to acquire the real property at 610 Esther was work product that belonged to the Venia LLCs.

The business opportunity to acquire and redevelop the real property at 610 Esther Street, Vancouver, WA 98660 was the work product of the Venia LLCs. Venia was actively pursuing the Property and other similar properties in close proximity for redevelopment. CP 264, ¶12. But for the improper diversion of that work product, VREH would be the legal owner of the Property. CP 265, ¶12. Thus, the acquisition of the Property for development was under active consideration by the Venia LLCs. CP 125.

Copenhaver used Venia company funds to pay Mark Ickert for assisting Venia with its development opportunities. CP 5, ¶8.

d) The diversion of Venia's business opportunity and work product.

Acorn Acquisitions LLC is exclusively controlled by Copenhaver. CP 125. Copenhaver and his spouse own 100% of Acorn Acquisitions LLC and Copenhaver is the Managing Member. CP 126, ¶11; CP 185-186.

Instead of using VREH or one of the Venia entities to purchase the Property, Copenhaver executed a purchase and sale agreement in the name of Acorn Acquisitions LLC. CP 125. CP 131-182. The purchase agreement was executed on October 11, 2013. CP 131. The named buyer should have been one of the Venia LLCs, or more specifically, VREH because the LLC Agreement of VREH provides that "legal title to all Company Property is to be held in the name of the Company". CP 125.

Copenhaver, DeFord, Ickert and Acorn Acquisitions LLC are each named defendants in the Amended Complaint that was filed in this action on September 5, 2012. CP 62.

Lambeau Leap Investments LLC, Lambeau Leap Partners LLC and Gorge Capital Partners LLC are named as defendants. CP 62, CP 76.

West Park was formed on November 13, 2014. The executors to the Certificate of Formation for West Park are Copenhaver and DeFord. CP 189-190. Copenhaver, DeFord and Ickert are listed as members and the managers of West Park. CP 192-193.

On January 1, 2014, Copenhaver caused the contractual rights to purchase the Property to be assigned to West Park. CP 187, ¶3; CP 188. As a result, West Park is the title-holder to the Property. CP 310, ¶1.

Because Copenhaver, DeFord and Ickert are the managing members of West Park and are named defendants in the Amended Complaint, West Park had actual notice of this lawsuit and is not an innocent purchaser of the Property at 610 Esther Street. CP 126, ¶13-14.

On July 14, 2014, Appellants filed the Second Amended Complaint naming West Park as a defendant and praying for equitable relief to declare a constructive trust and to quiet title. CP 76, 86. The basis for Appellants' quiet title claim is that the beneficial ownership and legal title to the Property rightfully belong to VREH. CP 126, ¶16.

On July 14, 2014, the Venia LLCs filed the Lis Pendens on the Property to provide notice to third parties that legal title to the Property was disputed by the Venia LLCs and was the subject of this action. CP 126, ¶15, 17; CP 129-130. The Lis Pendens was filed by McCarthy in his capacity as manager and member of VDEV, VREH and VAM. CP 130.

IV. ARGUMENT

A. Summary of Argument

The Trial Court erred in concluding that “this lawsuit is not an action affecting title to real property with the meaning of RCW 4.28.320.” West Park’s contentions that (1) the Second Amended Complaint fails to state a claim to quiet title; RP 12-17; and (2) a request for relief to impress a constructive trust on real property does not affect title and thus Appellant’s claim to the Property “is akin is to a prejudgment writ of attachment”; CP 102, 9-12; are legally wrong and do not support the Trial Court’s conclusion. The Trial Court opined that the equitable remedy of quieting title is not available absent prior legal ownership of the subject Property or by seeking relief to impress a constructive trust. RP 11-19; 22-24; 32-39. This is error.

B. The standard of review is de novo.

The Trial Court dismissed Appellants’ quiet title action based on West Park’s contention that Appellants failed to state a claim upon which relief to quiet title could be granted (CP 101-102; RP 2 at 12-17); and the

Trial Court's conclusion that "this lawsuit is not an action affecting title to real property within the meaning of RCW 4.28.320." CP 216. Thus, dismissal of Appellant's quiet title claim was pursuant to CR 12(b)(6). A Trial Court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007), (citing *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)). Under de novo review, no deference is given to the Trial Court's ruling. *State v. Henjum* 136 Wn. App. 807, 810. 150 P.3d 1170 (2007).

C. **Absent findings that the allegations stated in the Complaint show some insuperable bar to relief, dismissal of the quiet title claim is error.**

Dismissal of a claim under CR 12(b)(6) is warranted only if the Court concludes the plaintiff cannot prove "any set of facts which would justify recovery." *Kinney v. Cook*, at 842, (citing *Tenore* at 330) (quoting *Hoffer v. State*, 110 Wn.2d 415 ,420, 755 P.2d 781 (1988)). If a plaintiff can prove any set of facts consistent with the complaint that would entitle him or her to relief, including hypothetical facts not in the formal record, then the claim should not be dismissed. *Rodriguez v. Perez*, 99 Wn. App. 439, 442, 994 P.2d 874 (2000) (citing *Hoffer* at 421). For the purposes of this analysis, the facts alleged in the complaint are presumed to be true. *Id.* (citing *Tenore* at 330). "A motion to dismiss is granted 'sparingly and with care' and, as a practical matter, 'only in the unusual case in which plaintiff includes allegations that show on the face of the

complaint that there is some insuperable bar to relief.' "Kinney at 842 (citing *Hoffer* at 420) (citing *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)) and (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1357, at 604 (1969)).

West Park acknowledges that the Second Amended Complaint (the “Complaint”) seeks relief to quiet title to the Property.² RP 2 at 12-15.

Appellants have not stated allegations that show on the face of the Complaint “that there is some insuperable bar to relief”. The Complaint sets forth the following facts and inferences:

(1) the business opportunity to purchase the Property at 610 Esther Street was developed and belonged to Venia (i.e. was the work product of Venia);

(2) Copenhaver and DeFord were managers and officers of the Venia LLCs and owed fiduciary duties to the Venia LLCs;

(3) VREH’s LLC Agreement executed by DeFord and Copenhaver required all company property, including the contractual rights to purchase the Property and legal title to the Property at 610 Esther Street, to be held in the name of VREH;

² The Second Amended Complaint also seeks damages for defendants’ other tortious acts; for example, unauthorized disbursements of cash; failure to repay personal loans made by the Venia LLCs, etc. The relief requested for the diversion of ownership of the Property at 610 Esther Street is to declare a constructive trust and to quiet title to Venia; and is not for damages.

(4) VREH's LLC Agreement prohibited Copenhaver from partitioning the contractual rights to purchase the Property and from partitioning legal title to the Property from VREH to West Park;

(5) Copenhaver diverted the business opportunity to acquire the Property from Venia to West Park in breach of his fiduciary duties;

(6) Copenhaver and DeFord diverted project financing developed by and belonging to Venia;

(7) Copenhaver and DeFord formed West Park and are managing members of West Park;

(8) West Park is not an innocent purchaser of the Property and had prior knowledge of this lawsuit;

(9) Acorn Acquisitions LLC is an alter-ego for Copenhaver; and

(10) a conspiracy existed between Copenhaver, DeFord and West Park to divert the business opportunity to purchase the Property from Venia to West Park.³ These factual assertions, presumed to be true for purposes of reviewing whether dismissal is error, support Appellants' claim that VREH is the rightful owner to the Property and that the remedy of quieting legal title to the Property to VREH is justified in equity.

³ Also before the Court is the hypothetical fact that but for the improper diversion of the contract rights to purchase the Property from VREH to West Park, the legal title holder of the Property would be VREH.

More importantly, none of these above factual assertions present “an insuperable bar to relief” that provides legal justification for dismissal of the remedy to quiet title. Notably, the Trial Court did not make factual findings as to the existence of any allegations on the face of the Complaint that show an “insuperable bar to relief” to declaring a constructive trust and quieting title to the Property. Thus, the Trial Court’s dismissal of Appellants’ claim to quiet title to the Property to VREH is error.

D. Prior legal ownership of the Property is not necessary to bring a quiet title action. A prior equitable interest is sufficient.

An action to quiet title resolves competing claims of ownership or the right of property possession. See *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). A quiet title action is an equitable action. *Id.* at 92. Quiet title proceedings are addressed to the equity jurisdiction of the court. *Michelson Bros. v. Baderman*, 4 Wn. App. 625, 627, 483 P.2d 859 (1971).

“Any person having a valid subsisting *interest* in real property” may bring an action to quiet title. RCW 7.28.010. Washington courts have interpreted this statute to include equitable interests in real property where the plaintiff has no prior legal ownership.

“This state is aligned with those jurisdictions which permit one who has only an equitable title to land to maintain an action to quiet title, even though out of possession. The superior title whether legal or equitable must prevail.” *Finch v. Matthews*, 74 Wn.2d 161, 166, 443 P.2d 833 (1968), (emphasis added, citations omitted) (citing *Rue v. Oregon & Washington R.R.*, 109 Wash. 436, 186 Pac. 1074 (1920)).

“It is clear that a plaintiff in quiet title must have an ‘interest’ in the land ... However, the plaintiff need not allege or prove fee simple title; ... Equitable title, such as title produced by the doctrine of equitable estoppel, will suffice, too.”
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WASHINGTON PRACTICE: REAL ESTATE:
TRANSACTIONS § 11.3 (2d ed. 2004).

A vendee to a real estate contract may contest a suit to quiet title. *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946). The highest bidder at a foreclosure sale who does not receive a deed of trust can successfully sue to quiet title. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 93, 154 P.3d 882 (2007). Thus, an equitable interest in real property, without prior legal ownership or possession, is sufficient grounds to bring a quiet title action.

E. Appellants need only claim “some interest” in the Property to bring an action to quiet title. Within the quiet title and lis pendens statutes, Washington courts interpret an “interest” in real property broadly.

RCW 7.28.010 codifies the equitable action to quiet title:

“Any person having *a valid subsisting interest* in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or *some interest therein*, and may have judgment in such action quieting or removing a cloud from plaintiff's title;” RCW 7.28.010. (Emphasis added).

The Washington Supreme Court applies a broad interpretation to the statutory requirement that a plaintiff have an interest in real property as set forth in RCW 7.28.010.

In *Symington v. Hudson*, 40 Wn.2d 331, 243 P.2d 484 (1952), plaintiff Symington was seeking to quiet title on the same real property for which he previously had been the defendant in a prior quiet title action. In its analysis, the Supreme Court held that:

“In an action to quiet title under our statutes, ‘claiming the title or some interest therein’ is as broad as “claiming or asserting *any* estate, right, title, interest in or claim or lien upon said real property.” Were it not thus, then a plaintiff in the same quiet-title action would have one remedy against a known defendant and another against an unknown defendant.” *Id.* at 336 (emphasis added).

In *Symington*, the Supreme Court held there was no difference between the determination as to whether Symington had “a valid subsisting interest” in the property as a plaintiff seeking to quiet title, and the Court’s prior determination as to whether he had “some interest” in the property as a defendant in the prior action. *Id.* at 338. Thus, the Supreme Court has held that the phrases “subsisting interest” and “some interest” in RCW 7.28.010 have the same meaning within the statute; and that both of these two phrases are to be interpreted broadly. Accordingly, Appellants need only assert “some interest” in the Property, which is to be interpreted broadly, so as to propound an equitable interest sufficient to satisfy the statutory requirement of RCW 7.28.010 and bring an action to quiet title. Prior legal ownership or possession is not required.

Analogous to the holding of the Supreme Court in *Symington*, is this Division's interpretation of the lis pendens statute, RCW 4.28.320. In *Schwab v. City of Seattle*, 64 Wn. App. 742, 826 P.2d 1089 (1992), Division II reviewed the history and purpose of the lis pendens statute, holding that the statute should be interpreted broadly in any action involving an adjudication of rights incident to title to real property.

“Interpreting a statute identical to Washington's ... the Arizona Court of Appeals has stated that the purpose behind the doctrine of lis pendens is best served by construing the statute to permit the filing of a notice of lis pendens in any action involving an adjudication of rights incident to title to real property. The purpose of the statute is twofold: the first is to provide notice to anyone interested in a particular piece of real property and who may be affected by the outcome of litigation involving that property; the second is to prevent ‘third persons from acquiring, during pendency of the litigation, interests in the property which would prevent the court from granting suitable relief or such as would vitiate a judgment subsequently rendered in the litigation.’ ” *Schwab* at 748; (citing *Tucson Estates, Inc. v. Superior Court*, 151 Ariz. 600, 604, 729 P.2d 954, 959 (Ct. App. 1986); (quoting *Mammoth Cave Prod. Credit Ass'n v. Gross*, 141 Ariz. 389, 391-92, 687 P.2d 397 (1984)).

“We are persuaded by the reasoning that the purpose of the lis pendens statute is best served by a broad interpretation of its language. Were we to adopt the narrower reading suggested by New West, potential buyers and encumbrancers would receive no notice of actions ... We cannot believe the Legislature intended such a result.” *Id.* at 750.

Appellant's Second Amended Complaint seeks an adjudication of rights incident to title to real property based on the factual assertions that Copenhaver and DeFord breached their fiduciary duties to Venia by converting the contract rights to purchase the Property. Applying a broad interpretation of the lis pendens and quiet title statutes, the Second Amended Complaint plainly demonstrates that Appellants have "some interest" in the Property to support equitable relief to quiet title.

F. A breach of fiduciary duty or trust relationship establishes sufficient grounds in equity for a plaintiff to bring an action to quiet title.

The Second Amended Complaint and Appellants' subsequent filings propound that: (1) Copenhaver and DeFord were employees, officers, managers and members of the Venia LLCs who owed fiduciary duties to the Venia LLCs and their members; (2) Venia developed the business opportunity and contract rights to purchase the Property for redevelopment pursuant to its line of business; (3) the contract rights and business opportunity to purchase the Property rightfully belonged to the Venia LLCs; and (4) Copenhaver and DeFord breached their fiduciary duties to the Venia LLCs by diverting from VREH the business opportunity and contracts rights to purchase the Property to West Park. This the first of two sets of factual grounds upon which Appellants seek relief to quiet title.

Managers and members of limited liability companies who act in a managerial capacity, such as Copenhaver and DeFord, owe fiduciary responsibility to the limited liability company and its members. *Dragt v. Dragt/De Tray, LLC*, 139 Wn. App. 560, 564-65, 161 P.3d 473 (2007). This duty includes the restriction on appropriating an opportunity within the company's line of business. *Noble v. Lubrin*, 114 Wn. App. 812, 60 P.3d 1224 (2003). A member's fiduciary duty to the LLC also arises by virtue of the parties' trust relationship. *Bishop of Victoria Corp. v. Corporate Business Park, LLC*, 138 Wn. App. 443, 457, 158 P.3d 1183 (2007) (quoting *Van Noy v. State Farm Mut. Auto Ins. Co.*, 142 Wn.2d 784, 797-98, 16 P.3d 574 (2001)). Directors, officers and shareholders in a closely held corporation are charged with the fiduciary duty of the utmost good faith and loyalty. *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 79 180 P.3d 874 (2008) (citing, *Wenzel v. Mathies*, 542 N.W.2d 634, 641 (Minn.App. 1996); 18B Am.Jur.2d §1460, at 445). The Venia LLC's are closely held companies.

Moreover, the limited liability company statute spells out that members and managers of limited liability companies have fiduciary duties not to self-deal; for example, not to divert or convert business opportunities and other confidential information.

“Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a

majority of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company from (a) any transaction connected with the conduct or winding up of the limited liability company or (b) ***any use by him or her of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to him or her as a result of his or her status as manager or member.***” RCW 25.15.155 (emphasis added).

The Washington Supreme Court has held that a breach of fiduciary duty is sufficient grounds to quiet title and rescind real estate contracts. See *Westerbeck v. Cannon*, 5 Wn.2d 106, 104 P.2d 918 (1940) (rescission of contract based on breach of fiduciary relationship); *Moon v. Phipps*, 67 Wn.2d 948, 955, 411 P.2d157 (1966), (“a fiduciary relationship and a breach of the fiduciary duty alone would be sufficient to warrant rescission and cancellation of the option by which [the defendant] obtained legal dominion over the realty.”); *Moss v. Vadman*, 77 Wn.2d 396, 397, 463 P.2d 159 (1969) (“the case turns on the issue of whether there was a breach of a fiduciary relationship between the plaintiffs and the defendant”).

In *Gustafson v. Gustafson*, 47 Wn. App. 272, 734 P.2d 949 (1987), the Court voided the sale of a property and ordered that title be quieted to real property finding that the general partner in the partnership breached his fiduciary duty because the conveyance of land did not benefit the partnership. Notably, the plaintiff in this case brought suit individually and

derivatively similar to this lawsuit. Plaintiff Gustafson had no prior legal claim to title individually and only claimed an indirect beneficial interest in the real property as a pledgee in stock in a corporation, which itself was a partner in the partnership that conveyed the property. The Court quieted title in order to protect the indirect beneficial interest of the plaintiff.

In *In re Marriage of Lutz*, 74 Wn. App. 356, 873 P.2d 566 (1994), a wife in a dissolution action sought to quiet title in a property that her husband purchased and then transferred title to his sister. The Court held that the husband breached his fiduciary duty to his wife by transferring legal title in order to prevent his wife from obtaining her equitable interest in the property. *Id.* at 369. Even though the wife never held prior legal ownership or title to the property herself, the Court recognized the wife's equitable interest, imposed a constructive trust and quieted title to the property holding that the sister-in-law was "merely a 'subsequent holder', not a bona fide purchaser." *Id.* at 370. Similarly, in this action, Copenhagen breached his fiduciary duties to the Venia LLCs and their members in order to prevent Appellants from obtaining their equitable interest in the Property; and, likewise, West Park is only a "subsequent holder" to legal title and not a bona fide purchaser.

In *White v. White*, 33 Wn. App. 364, 655 P.2d 1173 (1982), a mother brought an action to quiet title alleging that transfer of title of the family home to her son was the result of fraud. The Trial Court denied

quiet title relief and the mother appealed. The son was considered to be the trusted family figurehead. The son was the primary manager and steward of his family's intertwined business and financial affairs including his mother's checking account. Based on the fact that the son's relationship with his mother had developed into that of a fiduciary who owed duties of utmost good faith, the appeal Court reversed the Trial Court remanding for a new trial. Again, this case is apposite because Copenhaver and DeFord were fiduciaries of the Venia LLCs, had a trust relationship with the Appellants, and exercised managerial control over Venia's business operations as both officers and managers of the Venia LLCs.

G. Copenhaver's breach of the VREH LLC Agreement provides alternative grounds for Appellants to seek equitable relief and bring an action to quiet title.

The LLC Agreement of VREH specifically provides that "legal title to all Company Property shall be held in the name of the Company" and that no member, successor or assign of a member "*shall have any right, title or interest in any Company Property...or the right to partition Company Property.*" CP 198 ¶ 4.9. By executing the purchase agreement to acquire the Property at 610 Esther Street in the name of his alter-ego, Acorn Acquisitions LLC, Copenhaver partitioned the contract rights to acquire the Property from VREH in breach of the LLC Agreement.

Washington courts have held that equitable relief is appropriate for a breach of contract with regards to real property. This is because the

unique character of real property title can be of greater value than its monetary value. *Edmonson v. Popchoi*, 172 Wn.2d 272, 279-280, 256 P.3d 1223 (2011). See also *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 222, 242 P.3d 1 (2010) ("[B]ecause land is unique and difficult to value, specific performance is often the only adequate remedy for a breach of contract regarding real property.") Thus, Appellants are entitled to seek equitable relief as a matter of law. Because the Second Amended Complaint prays for equitable relief to quiet title and such relief is available to Appellants, the Trial Court's conclusion that "this lawsuit is not an action affecting title to real property" is error.

H. Washington courts recognize constructive trust theory as a basis to recover property and grant relief to quiet title.

"A constructive trust is an equitable remedy which arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it." *City of Lakewood v. Pierce Co.*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001). Constructive trusts may arise even if property is not acquired wrongfully because the concern is whether the enrichment is unjust. See *Brooke v. Robinson*, 125 Wn. App. 253, 257, 104 P.3d 674 (2004). "The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property." 76 Am.Jur.2d, Trusts, § 183 (2007) (citing *Anderson v. Bellino*, 265 Neb. 577 658 N.W.2d (2003)). The object

of the constructive trust is to restore to the rightful owner the property wrongfully withheld by the defendant. *Fix v. Fix*, 847 S.W.2d 762, 765[1] (Mo. 1993).

Washington courts have imposed a constructive trust where a defendant intentionally interfered with a plaintiff's business relationship and thereby acquired property that was the subject of that relationship. In *Scymanski v. Dufault*, 80 Wn.2d 77, 491 P.2d 1050 (1971), the Trial Court concluded that the actions of the defendant were not unconscionable, and declined to impose a constructive trust. The Appellate Court reversed, holding that a constructive trust may arise even though acquisition of the property was not wrongful as there was unjust enrichment.

“We have here a defendant who has intentionally interfered with another's business relationship and as a result of such interference has acquired the property that was the subject of that relationship. A constructive trust ... is the appropriate remedy.” *Id.* at 89.

Scymanski is analogous to this action where Copenhaver and DeFord interfered with Venia's business relationships by diverting contract rights rightfully belonging to Venia; and as a result of such interference caused West Park to acquire title to the Property instead of Venia.

The Washington Supreme Court has explained constructive trust theory:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, *taking advantage of one's weakness or*

necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same;... and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right ...” *Bangasser & Associates, Inc. v. Hedges*, 58 Wn.2d 514, 516-517, 364 P.2d 237 (1961), (underline emphasis added).⁴

“If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.” *Kausky v. Kosten*, 27 Wn.2d 721, 728, 179 P.2d 950 (1947) (quoting 1 JOHN NEWTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 155 at 210 (5th ed. 1941).

In *Proctor v. Forsythe*, 4 Wn. App. 238, 242, 480 P.2d 511 (1971),

the constructive trust doctrine is explained along with the title-holder’s duty to convey title to the property to the constructive beneficiary.

“A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. RESTATEMENT OF

⁴ Citing *Rozell v. Vansyckle*, 11 Wash. 79, 83, 39 Pac. 270 (1895); 2 POMEROY’S EQUITY JURISPRUDENCE, § 1053

RESTITUTION §160 (1937). Our court has noted that constructive trusts are those which arise purely by construction of equity and are entirely independent of any actual or presumed intention of the parties and are often directly contrary to such intention. They are entirely in invitum and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud.” (emphasis added) (citing, *Carkonen v. Alberts*, 196 Wash. 575, 83 P.2d 899, 135 A.L.R. 209 (1938)).

Washington has a long history of recognizing constructive trusts as an equitable remedy for plaintiffs to recover property and quiet title to real property. In *Rozell v. Vansyckle*, 11 Wash. 79, 83, 39 Pac. 270 (1895), the Supreme Court upheld the lower court’s decision to rescind two deeds to real property based on finding a constructive trust or trust *ex maleficio*. In *Parker v. Burwell*, 6g Wn. 386, 125 P.151 (1912), the Court affirmed the filing of a lis pendens in a constructive trust action finding that the lis pendens "imparted notice of [Plaintiff’s] rights to intending purchasers." *In re Marriage of Lutz*, 74 Wn. App. 356, the Court imposed a constructive trust upon real property held by a third party prior to quieting title to the husband and distributing the property in the dissolution action.

Numerous other courts have also held that a constructive trust affects title to real property and is therefore sufficient to support the filing of a lis pendens. See *Heck v. Adamson*, 941 A.2d 1028, 1030 (D.C. 2008) (finding that remedy of constructive trust was sufficient to support lis pendens); *Ross v. Specialty Risk Consultants, Inc.*, 240 Wis. 2d 23, 35, 621 N.W.2d 669

(Wis.App. 2000) (noting that “[a]n action seeking the imposition of a constructive trust may ultimately change legal title” and therefore is sufficient to support a lis pendens); *Polk v. Schwartz*, 166 N.J. Super. 292, 298, 399 A.2d 1001 (N.J. App. Div. 1979) (“There is no doubt that an action to impress a constructive trust on realty affects title to that property, so that a notice of Lis pendens may be filed under a statute such as ours.”); *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 824, 561 S.E.2d 578 (2002) (finding that a defendant’s breach of an oral partnership agreement and conversion of contract rights to purchase real estate was a valid basis to impress a constructive trust and file a lis pendens).

Thus, this case is precisely the type of situation where the remedy of a constructive trust is warranted. The purchase agreement to buy the Property was executed on October 11, 2013, prior to West Park even being formed. West Park paid no consideration to Venia for transfer of the contract rights to purchase the Property. All the elements pertaining to acquiring the Property that were developed by Venia over many months (re-development plans, tenants, project financing, etc) were diverted from Venia to West Park, a newly formed entity with no employees or material assets. In short, West Park obtained title to the Property "by violation of confidence or of fiduciary relations" by Copenhaver and DeFord and it would be inequitable for West Park to "retain the property which really belongs to another." See *Kausky v. Kosten*, 27 Wn.2d at 728.

In Washington, the imposition of a constructive trust on real property does “affect title to real property” because the title-holder is bound to convey the subject property to another. Should Appellants prevail, their equitable title in the Property will ripen into legal title. Because a constructive trust affects title to real property, the filing of a lis pendens is appropriate in a constructive trust action. Thus, the Trial Court erred by cancelling the Lis Pendens and concluding that the constructive trust sought by Appellants is not an equitable remedy that affects title to the Property.

I. The Trial Court erred in cancelling the Lis Pendens. The Trial Court’s conclusion that a lis pendens vests substantive rights similar to injunctive relief or a prejudgment writ of attachment is erroneous.

Underlying the Trial Court’s Orders to cancel the Lis Pendens, deny reconsideration, and deny Appellants’ motion to stay the order cancelling the Lis Pendens, was the Trial Court’s conclusion that a lis pendens functioned as a lien or restraint on real property similar to an order for injunctive relief or a prejudgment writ of attachment. RP 11-19; RP 22-24; RP 32-29; RP 50.

While the filing a notice of lis pendens and seeking injunctive relief are not mutually exclusive, these acts have two very different objectives with distinct legal effects. Injunctive relief seeks to restrain the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff. RCW 7.40.020. A motion for injunctive relief requests to restrain substantive rights pertaining

to the subject property that belong to the defendant. A prejudgment writ of attachment is similarly restrictive.

RCW 4.28.320 permits a plaintiff to file a notice of lis pendens. The purpose of the statute is twofold: (1) the first is to provide third parties with constructive notice of a pending lawsuit; (2) the second is to prevent "third persons from acquiring, during pendency of the litigation, interests in the property which would prevent the court from granting suitable relief or such as would vitiate a judgment subsequently rendered in the litigation." *Schwab v. Seattle*, 64 Wn. App. 742.

In sharp contrast, a "lis pendens has no effect on the substantive rights of the parties, but is merely a method of forcing a purchaser or encumbrancer under a subsequent recorded conveyance to either set up that claim in the action or be bound by the judgment therein." *R.O.I, Inc. v. Anderson*, 50 Wn. App. 459, 748 P.2d 1136, (1988) (quoting, *Merrick v. Pattison*, 85 Wash. 240, 245, 147 P. 1137 (1915)); *Pay 'N Save Corp. v. Eads*, 53 Wn. App. 443, (1989) (quoting *Blumenfeld v. R.M Shoemaker Co.* 286 Pa. Super. 540, 429 A.2d 654, 657-58 (1981) ("it is nevertheless clear that [a lis pendens] does not even establish a lien upon the affected property"); *Kritzer v. Collier*, 28 Wn.2d 356 (1947) (quoting *Merrick v. Pattison*, ("The notice of lis pendens, as we view it, has no practical effect on the substantive rights of the respective parties, but is only a method of forcing a purchaser, under a subsequently recorded conveyance, to set up

his claim of right in that action or have the decree therein."). "In Washington, lis pendens is procedural only; it does not create substantive rights in the person recording the notice." *Beers v. Ross*, 137 Wn. App. 566, 575, 154 P.3d 277 (2007). Thus, a lis pendens is also much less burdensome on a defendant than a writ of attachment or an injunction precisely because a lis pendens does not affect a defendant's substantive rights in a property.

Here, the Trial Court cancelled the Lis Pendens, denied reconsideration and denied Appellants' motion to stay cancellation of the Lis Pendens, based on its conclusion that the filing the Lis Pendens affected the substantive rights of the parties and was akin to obtaining a prejudgment writ of attachment or injunctive relief without court authority. This was error.

J. The Trial Court erred by not recognizing that Appellants brought their claims in equity. Appellants' equitable claims were not adjudicated.

The Trial Court opined that the appropriate remedy for Appellants instead of filing the Lis Pendens was to seek a prejudgment writ of attachment. RP 23. Thus, the Trial Court failed to recognize that Appellants had properly invoked the equity jurisdiction of the court.

Standing to assert a claim in equity resides in the party entitled to equitable relief; it is not dependent on the legal relationship of those parties." *Smith v. Monson*, 157 Wn. App. 443, 445, 236 P. 3d 991 (2010). The fact

that Venia did not have a legal relationship with West Park does not mean that Appellants lack standing to assert an equitable claim to quiet title to the Property. The contract rights to purchase the Property were diverted to West Park. But “real estate contracts are clearly transfers of an equitable interest in property.” *Chelan County v. Wilson*, 49 Wn. App. 628, 744 P.2d 1106 (1987) referencing *Bellingham First Fed Sav. Loan Ass 'n v. Garrison*, 87 Wn.2d 437, 438-39, 552 P.2d 1090 (1976). Thus, Appellants had a stated equitable interest in the Property arising from the diversion of VREH’s contract rights to purchase the Property.

Further, the equitable remedy of impressing a constructive trust is available for the tort of acquiring property by intentionally interfering with a parties’ business relationship or for usurping a corporation opportunity *Scymanski, supra; Anderson v. Bellino, supra*. A fiduciary’s breach of duty that causes the loss of real property or contract rights to real property also provides grounds for equitable relief to quiet title. ¶IV.F. above.

In the Second Amended Complaint, Appellants asked the Court for an adjudication of its claim that VREH’s equitable title to the Property is superior to the legal title acquired by West Park. Appellants, in seeking relief to declare a constructive trust and to quiet title, invoked the equity jurisdiction of the Court. As such, "the [quiet title] statute requires that all of the parties' rights be determined in such suit, and, since the Trial Court is one of general jurisdiction, equitable rights as well as legal rights are

adjudicated." *Witzel v. Tena*, 48 Wn.2d 628, 631, 295 P.2d 1115 (1956).

"It is the duty of the court ... to determine title when that issue is presented" *Id.* (quoting *Womach v. Sandygren*, 96 Wash. 12, 164 Pac. 600 (1917)); *Washington Pulp & Paper Corp. v. Robinson*, 166 Wash. 210, 6 P. (2d) 632 (1932). Simply put, the notion that Appellants failed to state an equitable interest in the Property because VREH did not have prior legal ownership of the Property prior to VREH's contract rights being converted is contrary to the law. The Court's failure to adjudicate whether VREH's equitable interest or West Park's legal title is superior is error.

K. The Second Amended Complaint meets the notice requirements of CR 8(a). Even if the Complaint was somehow deficient in stating a claim to quiet title, the proper remedy is to allow Appellants to amend their complaint.

"Washington is a notice pleading state and merely requires a simple, concise statement of the claim and the relief sought." *Pacific Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006); CR 8(a). The Second Amended Complaint satisfies the notice requirements of CR 8(a).

RCW 7.28.120 requires a plaintiff in a quiet title action to "set forth in his or her complaint the nature of his or her estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiffs' claims; and the superior title, whether legal or equitable, shall prevail." Appellants' Second Amended Complaint meets this standard.

The Complaint unequivocally prays for relief to declare a constructive trust and to quiet title to the Property at 610 Esther Street based on the claims that the contract rights to acquire the Property rightfully belonged to VREH and were diverted from VREH to West Park by Copenhaver and DeFord in breach of their fiduciary duties and in breach of the non-partition provisions of the VREH LLC Agreement.

Washington law regarding amendment of pleadings under CR 15(a) is liberal. A party may amend a pleading as a matter of right at any time before a responsive pleading is served, and is allowed to permissively amend its pleading thereafter by stipulation of the parties or by leave of Court, which "shall be freely given when justice so requires." CR 15(a). Washington Courts routinely grant leave to amend "except where prejudice to the opposing party would result." *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987) (citations omitted); *accord* (*Caruso v. Local Union 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) ("the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.")).

L. Judgment for attorney fees is error. Any judgment for attorney fees should be against the Venia LLCs and not against McCarthy personally.

The Trial Court awarded attorneys fees to West Park pursuant to RCW 4.28.328(2) based on the Court's conclusion "that this lawsuit is not an action affecting title to real property." Because the Court erred and this

lawsuit does in fact affect title to real property, the Trial Court's award of attorney's fees is error.

Claimants who file a lis pendens "may be liable for damages and attorney fees to a party who prevails in defense of the action, *unless the claimants establish a substantial justification for the filing.*" *South Kitsap Family Worship Center v. Weir*, 135 Wn. App. 900, 911-12, 146 P.3d 935 (2006) (emphasis added); RCW 4.28.328(3). Because Appellants in this action have provided a substantial justification for filing the lis pendens, an award of attorney fees is inappropriate under RCW 4.28.328(3). Thus, the Court should reverse the Trial Court's award of attorneys fees.

"Damages and fees are appropriate where the claimants provide *no evidence* of a legal right to the property." *South Kitsap*, 135 Wn. App. at 912 (citing *Richau v. Rayner*, 98 Wn. App. 190, 198, 988 P.2d 1052 (1999)). But, "where the claimants have a reasonable, good faith basis in fact or law for believing they have an interest in the property, a lis pendens is substantially justified." *Id.* (citing *Keystone Land Development Co. v. Xerox Corp.*, 353 F.3d 1070, 1075 (9th Cir. 2003) and *Udall v. TD Escrow Servs., Inc.*, *supra*).

On other grounds, judgment for attorney's fees entered against McCarthy personally was error. Any judgment for attorney's fees should be awarded against VREH and the Venia LLCs, and not McCarthy personally. This is because McCarthy filed the lis pendens solely in his

capacity as manager of the Venia LLCs. It would be improper to hold McCarthy personally responsible for an act he performed in his capacity as a manager of the Venia entities; as McCarthy was only fulfilling his fiduciary responsibility when he filed the lis pendens on behalf of the Venia LLCs in order to provide constructive notice and protect Plaintiffs' claim that VREH is the beneficial owner of Property at 610 Esther Street.

Moreover, the limited liability company statute provides that:

“... no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.” RCW 25.15.125

“A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company ... unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law.” RCW 25.15.155.

M. The Trial Court's denial of Appellants' Motion to Stay is error.

Appellant's moved the court to Stay the Order Cancelling Lis Pendens. CP 246. Appellants requested an initial stay of 30 days consistent with the time allowed by RAP 5.2(a) for Appellants to file a notice of appeal. The court denied Appellants' motion. CP 280-281. The lis pendens statute, RCW 4.28.320, permits the Court to cancel a notice of lis pendens only *after* an action has been "settled, discontinued or abated." This action was not settled, discontinued or abated prior to the Appellants'

filing of its notice of appeal. Accordingly, the trial court erred in denying Appellants' motion to stay the Order Cancelling Lis Pendens.

N. Appellants are entitled to costs on appeal.

Pursuant to RAP 18.1, Appellants requests attorney fees and expenses. Reasonable attorney fees may be claimed, however, where provided for by contract, statute, or recognized ground in equity. *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293,716 P.2d 959 (1986). In this case, Appellants' seek equitable relief and attorney's fees arising from breach of fiduciary duties by Copenhaver and DeFord, the controlling managers of the Venia LLCs who are also the managing members of West Park. Where a fiduciary's breach of duty is tantamount to constructive fraud, the injured party may be entitled to attorney fees. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976).

This action is a derivative action. The action is being prosecuted not only nominally by Appellant McCarthy, but is also being prosecuted directly on behalf of the Venia LLCs. Defendants Copenhaver, DeFord and their alter-egos, Acorn Capital LLC and Nex Generation LLC, are beneficiaries of this action because they hold membership interests in the plaintiff Venia LLC entities. Thus, Appellants are entitled to seek attorney fees because this action seeks to create or preserve the Property at 610 Esther Street as a common asset whereby defendants Copenhaver and DeFord will have continued beneficial ownership of the Property via their

membership interests in the Venia LLCs. The Property is leased-up and is generating cash. Thus a common fund will be created from the cash flow being generated from the Property. Where a litigant's actions create or preserve a common fund, fees may be awarded. *Grein v. Cavano*, 61 Wn.2d 498, 379 P.2d 209 (1963). The common fund basis for recovery of attorney fees includes situations where a litigant confers a substantial benefit on an ascertainable class, such as corporate stockholders. *Seattle Trust & Sav. Bank v. McCarthy*, 94 Wn.2d 605, 612-13, 617 P.2d 1023 (1980). Equity also requires that Appellant McCarthy be awarded his attorney fees in this action because (1) otherwise the Venia LLCs (as nominal defendants) together with its defendant members, would be unjustly enriched; and (2) reimbursement of expenses encourages meritorious derivative actions. *Interlake Porsche & Audi, Inc. v. Buchholz*, 45 Wn. App. 502, 521-522, 728 P.2d 597 (1986).

“An award against the corporation of the minority shareholder's counsel fees and costs in vindicating a corporate claim for relief rests upon the rationale that the plaintiff's efforts conferred on the corporation a benefit for which the corporation itself would otherwise have had to pay. *Id.* (citing, *Bailey v. Meister Brau, Inc.*, 535 F.2d 982, 995 (7th Cir.1976).

“Two important policies underlie this established practice: First, since all shareholders benefit from the plaintiff's efforts without contributing equally to the litigation expenses, to allow them to obtain full benefit from the plaintiff's efforts without contributing equally to the expenses would unjustly enrich them at the plaintiff's

expense. Second, reimbursement of expenses serves to encourage meritorious derivative actions by the small shareholder whose expenses would normally exceed any increase in the value of his holdings resulting from a successful litigation.” Id.

Attorney fees in this action are also allowable under RCW 4.84.190.

Expenses are allowable to a prevailing party as set forth in RCW 4.84.010.

In any action in the Superior Court of Washington, the prevailing party shall be entitled to his or her costs and disbursements. RCW 4.84.030.

Where a statute allows for the award of attorney fees to the prevailing party at trial it is interpreted to allow for the award of attorney fees to the prevailing party on review as well. *Puget Sound Plywood, Inc. v. Master*, 86 Wn.2d 135, 542 P.2d 756 (1975) Therefore, if Appellants prevail on this appeal, they are entitled to their costs and disbursements.

V. CONCLUSION

Appellants have sufficiently stated claims for equitable relief to declare a constructive trust and quiet title to the Property at 610 Esther Street. Prior legal ownership is not a prerequisite for a quiet title claim. Appellants need only state a claim to an equitable interest in the Property in order to obtain an adjudication of that claim. A broad interpretation is applied to what constitutes an equitable interest in real property for purposes of the quiet title and lis pendens statutes. “Some interest” is sufficient. The diversion and conversion of contract rights to the Property at 610 Esther Street by Copenhaver and DeFord in breach of their

fiduciary duties to the Venia LLC's and in breach of the non-partition clause of the VREH LLC Agreement is sufficient to establish an equitable interest to quiet title the Property. Quiet title may also be granted under a constructive trust theory. Washington courts have imposed a constructive trust where a defendant intentionally interfered with a plaintiff's business relationship and acquired property that was the subject of that relationship. Such is the case here in this action.

Because this lawsuit is an action that affects title to real property, specifically the Property at 610 Esther Street, the trial court erred by cancelling the Lis Pendens filed on behalf of the Venia LLCs, by awarding attorney fees to West Park, and by denying Appellants' motion to stay the Order Cancelling Lis Pendens. Appellants request reversal and remand.

RESPECTFULLY SUBMITTED ON THIS 28th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANTS' AMENDED
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DATED this 28th day of May, 2015.

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