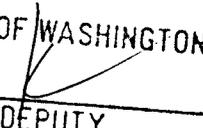


FILED
COURT OF APPEALS
DIVISION II

2016 JAN 13 PM 2:48

STATE OF WASHINGTON

BY 
DEPUTY

No. 47924-9-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

SHAWNEE K. LAZZARI, Appellant,

v.

FREDIA DELORES SZETO, Respondent.

REPLY BRIEF OF APPELLANT

Michael G. Sanders
Attorney for Appellant

Mix Sanders Thompson, PLLC
1420 Fifth Avenue, Ste 2200
Seattle, WA 98101
WSBA #33881

TABLE OF CONTENTS

Reply

(Headings enumerated to match those in the Brief of Respondent)

B. Respondent Szeto erroneously claims that she attached evidence to her motion to dismiss, and her argument in favor of attaching documents other than instruments to a pleading is not supported by the law.....1

C. Respondent Szeto has failed to establish the required elements for application of the doctrine of collateral estoppel.....7

 1. The issues decided were not identical.....7

 2. Final Judgment on the merits.....9

 3. Identical parties.....9

 4. The injustice of being dragged a second time through the mud with frivolous allegations that have already been released, and not even being afforded an opportunity to respond to the same with rebutting evidence, is evident.....10

D. Ms. Szeto’s attempt to redefine and substantially narrow the definition of “Claim” as provided in the Settlement Agreement is misguided.....11

E. Ms. Szeto’s argument in favor of dismissing Ms. Lazzari’s Unjust Enrichment claim under the doctrine of election of remedies is contrary to Washington law.....12

Conclusion.....14

TABLE OF AUTHORITIES

Table of Cases

Washington Supreme Court

PE Systems, LLC v. CPI Corp., 176 Wn.2d 198, 289 P.3d 638 (2012).....1, 2

Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968).....6

Foote v. Hayes, 64 Wn.2d 277, 391 P.2d 551 (1964).....6

Federal Signal Corp. v. Safety Factors, Inc., 125 Wn.2d
413, 428-429, 886 P.2d 172 (1994).....8

Snowflake Laundry Co. v. MacDowell, 52 Wn. 2d 662,
674, 328 P.2d 684, 691 (1958).....8

Barber v. Rochester, 52 Wn.2d 691, 694-695, 328 P.2d 711 (1958).....13

Washington Courts of Appeal

Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838,
347 P.3d 487 (Div. 1, 2015).....1, 2, 3, 4, 5, 6

Bly v. Pilchuck Tribe No. 42, Improved Order of Red Men,
5 Wn. App. 606, 607, 489 P.2d 937, 938 (Div. 3, 1971).....6

Statutes

RCW 62A.2-715.....8

Chapter 10.14 RCW.....4

Regulations and Rules

CR 12.....1, 2, 3, 5, 6

CR 56.....1, 4, 5, 6, 10

ER 201.....3

ER 1101.....4, 9

Secondary Authorities

14A Wa. Prac., Civil Procedure § 35:32 (2d ed.).....9

14A Wa. Prac., Civil Procedure §35:56 (2d Ed.).....13

Reply

(Headings enumerated to match those in the Brief of Respondent)

B. Respondent Szeto erroneously claims that she attached evidence to her motion to dismiss, and her argument in favor of attaching documents other than instruments to a pleading is not supported by the law.

Upon review of her responsive brief, it now appears that Ms. Szeto would like the evidence she attached to her Answer to be instead treated as exhibits to her CR 12(c) motion so that she can take advantage of her interpretation of Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 347 P.3d 487 (Div. 1, 2015). This maneuver appears to be in recognition that PE Systems, LLC v. CPI Corp.¹ does not, as previously argued by Ms. Szeto, support the propriety of attaching affidavits and other evidence to an Answer as exhibits, hitching them to a contemporaneous “six-day motion,” and skirting the notice requirements of CR 12 and CR 56. Having abandoned that argument, Ms. Szeto now argues that the same evidence is tantamount to self-authenticating documents, and that the trial court was free to ignore Ms. Lazzari’s request to convert the motion to a summary judgment motion and proffer rebutting evidence on that basis.

Before abandoning PE Systems, LLC entirely, Ms. Szeto makes a final attempt to justify her prior use of it. In doing so, however, Ms. Szeto offers no rebuttal to Ms. Lazzari’s analysis of the case in the Brief of Appellant,

¹ 176 Wn.2d 198, 289 P.3d 638 (2012).

including the Supreme Court's statement that "[E]xhibits that stretch the definition of a 'written instrument,' such as affidavits, are extrinsic evidence that may not be considered as part of the pleadings." PE Systems, LLC, 176 Wn.2d at 205. Instead, Ms. Szeto simply reiterates her prior unfounded conclusions about what the case stands for. Ms. Szeto's position is explicitly rejected by the Court in PE Systems, LLC.

In backing away from PE Systems, LLC, Ms. Szeto turns to Jackson. Ms. Szeto now relies heavily on this authority for the proposition that attaching 52 pages worth of affidavits, deposition testimony, photographs, correspondence, and court orders from a District Court Anti-Harassment Petition to a CR 12(c) motion in Superior Court is acceptable. According to Ms. Szeto's interpretation of Jackson, the mere fact that a document was filed in another case stamps it with the imprimatur of reliability as a self-authenticating document. Ms. Szeto then takes the interpretation one step further, submitting that once judicial notice is taken of the evidence, Ms. Szeto is entitled to a ruling on her motion without the bother of rebuttal evidence and affidavits submitted by the nonmoving party. Jackson, of course, says no such thing.

Jackson involved a lawsuit that was brought to challenge the validity of a pending foreclosure on real estate. Plaintiff/Appellant Sandra Shelley Jackson defaulted after refinancing her home in Seattle. 186 Wn. App. at 841-842. Before the foreclosure proceedings were carried out, Jackson filed suit against

several entities that had been involved in the various elements of the transaction and collection efforts. Id. at 842-843. Jackson's lawsuit alleged violations of the Washington Deeds of Trust Act, the Consumer Protection Act, and the Washington Constitution, in addition to alleging breach of contract and claims sounding in negligence and equity, and seeking to quiet title. Id. at 843. In her Complaint, Jackson alleged that her claims were premised on language in an adjustable rate note, prepayment penalty addendum, and an allonge. Id. at 844. Although she repeatedly referenced these instruments, Jackson failed to attach them to her Complaint. Id. at 844-845. One of the defendants in the action, U.S. Bank, attached those instruments to its CR 12(b)(6) motion to dismiss and sought to have the trial court take judicial notice of them. Id. at 845. The trial court's decision to take judicial notice of these instruments was approved by the Court of Appeals citing to ER 201(b)(2), as the authenticity of the documents could not be reasonably be disputed. Id.

In the present case, Ms. Szeto seeks to apply Division One's rationale to the act of attaching 52 pages of evidence submitted in a District Court Anti-Harassment Petition and response. Ms. Szeto suggests that the mere fact of filing a thing in a separate proceeding makes that thing a self-authenticating item subject to judicial notice ("Lazzari cannot contest the authenticity of her own declarations or the authenticity of publically available records within the

district court file.” Br. of Respondent, p. 15). In making this logical leap from the language of Jackson, Ms. Szeto offers no reasoning that would support the notion that the documents submitted in the course of the Anti-Harassment Petition proceedings are even admissible, let alone self-authenticating. She simply suggests that once a document is filed in any case (under any evidentiary standard), that document is automatically authenticated for all future matters. Neither Jackson nor any known authority supports this proposition.

While inviting the Court to blaze a new procedural trail designed to bypass the procedural requirements of CR 56, Ms. Szeto makes no attempt to even address the evidentiary standards in District Court Anti-Harassment Petitions maintained under Chapter 10.14 RCW. This is baffling, as Ms. Szeto is no doubt aware that the rules of evidence do not apply in that forum. As ER 1101(c) states:

(c) When Rules Need Not Be Applied. The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations:

...

(4) Applications for Protection Orders. Protection order proceedings under RCW 7.90, 7.92, 10.14, 26.50 and 74.34.

Had Ms. Szeto originally sought to have the trial court take judicial notice of the 52 pages of evidence at issue in this matter, this analysis would have taken

place sooner and perhaps the trial court would have been better able to avoid committing reversible error. Ms. Szeto's pivot to this argument at this stage demonstrates an awareness of the procedural defects at issue. Nevertheless, the claim that her evidence dump is allowable under Jackson is similarly unavailing.

Ms. Szeto offers no defense of hers and the trial court's refusal to allow Ms. Lazzari the opportunity to present responsive materials under the normal 28-day schedule provided under CR 56. Despite timely raising the objection and making the request for more than three business days to respond via affidavit (CP 83-84) (and in the response brief to Ms. Szeto's motion), both Ms. Szeto and the trial court refused to convert the motion to a CR 56 motion without any attempt to justify the decision. Ms. Szeto has continued to be silent on this issue in the Brief of Respondent. In both CR 12(b) and CR 12(c), the rule states that "[I]f... matters outside the pleadings are presented to and not excluded by the court, the motion **shall be** treated as one for summary judgment and disposed of as provided in rule 56, and all parties **shall be** given reasonable opportunity to present all material made pertinent to such a motion by rule 56." CR 12(b); CR 12(c) (emphasis added). Jackson does not limit the clear language of the court rules in this regard; rather, it simply states that if one party relies on a portion of a self-authenticating document in a pleading, the opposing party's reliance on the same document in a motion to dismiss

does not automatically convert the motion to a CR 56 motion. Rather, Jackson is silent on this issue, and provides no analysis of whether, even under those distinguishable circumstances, the Court should convert the motion to a 28-day motion if the nonmoving party timely requests the opportunity to rebut the materials offered with additional materials outside of the pleadings.

The failure to allow the nonmoving party to present materials in response to a motion to dismiss that includes documents outside of the pleadings has been treated as a failure by the moving party to satisfy her burden of showing the nonexistence of a material fact as needed to justify dismissal:

Defendant's motion to dismiss, whether it be based upon CR 12(b)(6) or 12(c), required the court to consider matters outside the pleadings and thereby became one for summary judgment under CR 56. Thus, plaintiff was entitled to a reasonable opportunity to present pertinent material in response thereto...[T]herefore, we...base our reversal...upon defendant's failure to satisfy the burden of showing the nonexistence of an issue of material fact necessary to plaintiff's case.

Bly v. Pilchuck Tribe No. 42, Improved Order of Red Men, 5 Wn. App. 606, 607, 489 P.2d 937, 938 (Div. 3, 1971); citing Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968); Foote v. Hayes, 64 Wn.2d 277, 391 P.2d 551 (1964).

It is clear that Ms. Lazzari was entitled to an opportunity to respond to Ms. Szeto's motion with responsive evidence. The plain language of CR 12 states

as much. Ms. Szeto's attempts to stretch case authority beyond the bounds of credibility to suggest otherwise are misguided and must be rejected out of hand.

C. Respondent Szeto has failed to establish the required elements for application of the doctrine of collateral estoppel.

1. The issues decided were not identical.

Ms. Szeto continues to argue that the issue presented in the context of her petition for an anti-harassment order in District Court was identical to the issue presented in the instant lawsuit. This argument lacks merit. The issue being argued in the Anti-Harassment Petition was evidentiary, i.e., whether the Judge Pro Tempore could rely on evidence of settled claims in order to determine a "course of conduct" by Ms. Lazzari. As discussed above, in considering a Petition for Anti-Harassment Order brought under Chapter 10.14 RCW, the District Court Judge Pro Tempore was not required to determine whether the information being presented was even admissible, let alone whether it was being offered in breach of a settlement agreement.

Ms. Szeto urges that the decision by the District Court to consider evidence of claims that were resolved by Settlement Agreement and Release was tantamount to a declaratory judgment that no breach of the Settlement Agreement occurred. This argument must be rejected. Whether a Judge Pro

Tempore in District Court, unrestrained even by the rules of evidence, elects to consider information proffered in violation of a valid Settlement Agreement has nothing to do with whether the party offering the information has breached the terms of that Settlement Agreement.

Ms. Szeto goes on to argue that because Ms. Lazzari sought to prevent Ms. Szeto from breaching the Settlement Agreement in context of the Anti-Harassment Petition, she is precluded from bringing an action for breach in the event that she is unable to stop the improper dissemination of information. Put another way, Ms. Szeto urges this Court to rule that reasonable attempts by a nonbreaching party to mitigate her damages flowing from the breach collaterally estops her from maintaining a subsequent action for breach. No authority is offered by Ms. Szeto in support of this argument, but there is abundant authority demonstrating that Ms. Szeto's position is untenable. See, e.g., RCW 62A.2-715; Federal Signal Corp. v. Safety Factors, Inc., 125 Wn.2d 413, 428-429, 886 P.2d 172 (1994); Snowflake Laundry Co. v. MacDowell, 52 Wn. 2d 662, 674, 328 P.2d 684, 691 (1958).

Ms. Szeto's implicit argument is even more ridiculous. By arguing that the issue of breach was adjudicated in the context of the Anti-Harassment Petition, Ms. Szeto necessarily proposes that the District Court Judge Pro Tempore, during a civil anti-harassment docket (and again without being burdened by the rules of evidence), could in theory have found that Ms. Szeto

was in breach of the Settlement Agreement and awarded damages to Ms. Lazzari. “The doctrine of collateral estoppel operates only as to issues that were actually litigated and determined in the prior lawsuit. Unlike *res judicata*, collateral estoppel does not bar re-litigation of issues that could have been raised in the first lawsuit, but were not.” 14A Wa. Prac., Civil Procedure § 35:32 (2d ed.).

Ms. Szeto offers only conclusory statements that the District Court must have considered the breach allegation on the merits and found it wanting in order to consider the released claims. Again, no explanation of how this conclusion “necessarily” follows from the materials in the record (and in view of ER 1101(c)) is given. Ms. Szeto cannot establish that the issues addressed in the context of the Anti-Harassment Petition are identical to those presented in the instant suit. Collateral estoppel is therefore inapplicable.

2. Final Judgment on the merits

In view of the authorities presented by Ms. Szeto in the Brief of Respondent, Ms. Lazzari is willing to concede that the final Anti-Harassment Order entered in District Court met the definitional requirement of a judgment for purposes of a collateral estoppel analysis.

3. Identical parties

Ms. Lazzari has never disputed that the parties to both actions were the same.

4. *The injustice of being dragged a second time through the mud with frivolous allegations that have already been released, and not even being afforded an opportunity to respond to the same with rebutting evidence, is evident.*

Ms. Szeto signed a release and accepted nuisance money to abandon spurious and retaliatory allegations of indecent behavior on Ms. Lazzari's part. Ms. Szeto then ignored her obligations under the Settlement Agreement and recycled the same allegations in a forum where the rules of evidence are not applicable. In the final insult, Ms. Lazzari was subsequently deprived of an opportunity to be heard in the proper forum on her grievance flowing from Ms. Szeto's evident breach. Ms. Szeto's attempt to now argue that Ms. Lazzari had a "full and fair opportunity to litigate" the issue is utterly disingenuous.

The trial court failed Ms. Lazzari in preempting her right to be heard. This was presumably because it was pre-disposed to rule against Ms. Lazzari based solely on ugly "dog whistle" allegations that Ms. Szeto will never be able to prove. Had the trial court's analysis been predicated on any legally founded principles, the motion would have been denied outright, or at the very least converted to a CR 56 motion and denied 28 days later. Ms. Szeto's aim was to inject poisonous allegations into her pleadings and convince the trial court to ignore the law. She succeeded, probably beyond her own expectations. The trial court ruled on her motion after hearing her attorney's oral arguments

but before even allowing Ms. Lazzari's attorney to respond. See RP 8, Line 7-RP 9, Line 16.

Ms. Lazzari and the rule of law both suffered a substantial injustice as a direct result of the above. Denial of a fair opportunity to meet Ms. Szeto's evidence with evidence of her own, followed by the denial of Ms. Lazzari's opportunity to be heard in oral argument before ruling, provide about as clear and egregious an example of denial of due process as could fairly be imagined, at least in civil law. In view of these circumstances (individually as well as in concert with one another), Ms. Szeto cannot demonstrate the absence of substantial injustice to Ms. Lazzari. As such, she cannot satisfy this necessary element in establishing that collateral estoppel applies.

D. Ms. Szeto's attempt to redefine and substantially narrow the definition of "Claim" as provided in the Settlement Agreement is misguided.

Ms. Szeto asserts that it is acceptable to recycle released claims as long as the releasing party alleges that they are part of a "course of conduct." First, it must be noted that Ms. Szeto offers no legal authority that would allow her to be entitled to her version of facts at this procedural phase. Rather, Ms. Szeto simply offers her set of facts as though established beyond question, and launches into another effort to disguise untenable arguments as legitimate by citing to a string of cases that do little more than state legal axioms. Ms.

Szeto's allegations with regard to a December 3, 2014 incident are unproven, and in this de novo review, she is not entitled to the benefit of an inference that any incident took place on that date. To simply conclude that the incident she describes occurred as she described it, and then to bootstrap her entire argument regarding "course of conduct" onto that conclusion, is contrary to the standard that should be applied in determining whether dismissal of the instant suit was appropriate.

None of the authority cited to by Ms. Szeto supports reviving released claims in the name of bolstering subsequent naked allegations. They certainly do not support turning the law on its head and conferring the benefit of all alleged supporting facts and reasonable inferences to the *moving* party in the context of a motion to dismiss at the pleading phase. Ms. Szeto's argument on this point is without merit.

E. Ms. Szeto's argument in favor of dismissing Ms. Lazzari's Unjust Enrichment claim under the doctrine of election of remedies is contrary to Washington law.

Ms. Szeto argues that the trial court's dismissal of the entire lawsuit without addressing the unjust enrichment claim was proper, since the remedy sought thereby is inconsistent with that of breach of contract. In other words, Ms. Szeto urges this Court to uphold dismissal of the claim—at the initial pleading phase—under the doctrine of election of remedies.

Dating back to 1958, the Supreme Court in Washington found that “Election of remedies at best is a harsh and obsolete rule, the scope of which ought not to be extended.” Barber v. Rochester, 52 Wn.2d 691, 694-695, 328 P.2d 711 (1958). Fast-forwarding to the current millennium, the Washington Practice Manual on Civil Procedure (2^d Edition) stated that “The doctrine is further diminished by modern rules of pleading, which allow alternative and inconsistent pleadings, and which liberally allow amendments to the pleadings. A respected team of federal commentators has concluded that the doctrine of election of remedies has, in effect, been abolished, at least at the pleading level.” 14A Wa. Prac., Civil Procedure §35:56 (2d Ed.). It is difficult to believe that even a cursory examination of the law by Ms. Szeto would have allowed for this argument to be put forth in good faith.

Viewing this another way, Ms. Szeto argues on one hand that she should be allowed to reach back into released claims to support a “course of conduct” theory. Then, almost in the same breath, she argues that she cannot have been unjustly enriched because the contract that she supposedly did not breach provides the sole available remedy for Ms. Lazzari. Again, even if this did not smack of gamesmanship, the only legal argument Ms. Szeto can provide in support of the trial court’s dismissal of the unjust enrichment claim is that it offends a legal principle that has been abrogated for the better part of a century in this jurisdiction. Suffice to say there remains no viable theory

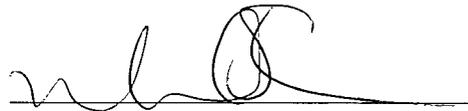
under which the dismissal of the unjust enrichment claim by the trial court was legally supportable.

Conclusion

Based on the foregoing and the Brief of Appellant, Ms. Lazzari respectfully reiterates her request that the trial court's order of dismissal in this matter be vacated, and for the matter to be remanded to Pierce County Superior Court with instructions to strike everything attached to Ms. Szeto's Answer from the case record, and to issue a new case schedule. Ms. Lazzari also reiterates her request for reasonable attorney's fees and costs as the substantially prevailing party in this matter, both under Title 14 of the Rules of Appellate Procedure, and under the terms of the Settlement Agreement.

Respectfully submitted this 13th day of January, 2016.

MIX SANDERS THOMPSON, PLLC

A handwritten signature in black ink, appearing to read "Michael G. Sanders", written over a horizontal line.

Michael G. Sanders, WSBA #33881
Attorney for Appellant Shawnee Lazzari

FILED
COURT OF APPEALS
DIVISION II
2016 JAN 13 PM 2:50
STATE OF WASHINGTON
BY _____
DEPUTY

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

SHAWNEE K. LAZZARI,

Appellant,
v.
FREDIA DELORES SZETO,

Respondent.

No. 47924-9-II

CERTIFICATE OF SERVICE

TO: CLERK OF THE COURT OF APPEALS, DIVISION II; and
TO: ALL COUNSEL.

I, MICHAEL G. SANDERS, declare under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, I am over the age of eighteen years old I am not a party to this matter. I further declare that on this 13th day of January 2016, I caused a copy of the Reply Brief of Appellant in this action to be served via hand delivery on the following:

Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

Russell A. Knight
Attorney for Respondent
1501 Dock Street
Tacoma WA 98402

Executed at Tacoma, Pierce County, Washington this 13th day of January,
2016.

A handwritten signature in black ink, appearing to read 'M. Sanders', written over a horizontal line.

Michael G. Sanders, WSBA #33881
Mix Sanders Thompson, PLLC
1420 5th Ave, Ste 2200
Seattle, WA 98101
Attorney for Appellant Lazzari