

FILED

AUG 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305902-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CC&H INVESTMENTS, a partnership
Respondent

v.

RCS NORTHWEST, LLC, et al
Appellant

RESPONDENT'S BRIEF ON THE MERITS

Scott D. Gallina
Attorney for Respondent
WSBA No. 20423
P.O. Drawer 285
Lewiston, ID 83501

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ISSUE ONE

Did the Court err in ruling that Mr. Hewitt failed to raise a sufficient issue of material fact to withstand summary judgment?

ISSUE TWO

Did the Court ever rule that Unjust Enrichment was not available in a commercial transaction?

A. STATEMENT OF THE CASE

This is an action to judicially foreclose three Deeds of Trust on property located in Asotin County, Washington.(C.P 1). In late 2008, Dick Coles, acting as a partner in CC&H Investments (CC&H), was initially approached by Ron Stricklin, acting as a member of RCS Northwest, LLC (RCS), which had an option to purchase the land which is the subject matter of this dispute. (CP 93). There was speculation that Tri-State Memorial Hospital may be looking for a location to build a dialysis center at the time. (CP 93).

CC&H and RCS had a prior history of business dealings involving 8-9 transactions. CC&H acted solely as the lender on all prior occasions. (CP 93). Based upon its successful history with RCS, CC&H agreed to finance the purchase of the subject parcel and did so on **December 29,**

2008. (CP 93) Those loans are represented in the first 2 deeds of trust being foreclosed in this action.(CP 3) The initial \$275,000.00 was in line with the potential value of the property given the market at the time and the speculation regarding potential uses of the property. (CP 93).

The dialysis center did not pan out and RCS approached CC&H about advancing monies to develop the property into housing units. CC&H agreed and advanced another \$93,500.00 to RCS so that deposits could be made with various contractors and suppliers. (CP 94). That loan occurred on **February 23, 2010.**(CP 1). RCS did not use the funds for their intended purpose and, as a result, several liens were filed against the property.(CP 97).

On **October 18, 2010,** Charley Hewitt, d/b/a Hewitt Construction, recorded a Claim of Lien under Instrument No. 321384 against the real property that is subject to the deeds of trust alleging that his work began on **March 23, 2010.** (CP 99).

After suit was filed to foreclose the three (3) deeds of trust, and although CC&H had already paid Ron Stricklin over \$737,000.00 for the project including subcontractor improvements, Mr. Hewitt counterclaimed against CC&H alleging that CC&H would be unjustly enriched if it were

not ordered to pay for the improvements again. (CP 74-76). RCS filed for bankruptcy against all parties in this action requiring CC&H to seek stay relief in order to foreclose its liens. No allegations were made regarding detrimental reliance by Mr. Hewitt until he sought to avoid summary judgment. (CP 103).

B. ARGUMENT

Issue One

Unjust Enrichment/Fraud/Estoppel

CC&H's liens were correctly adjudicated to be senior in time to all other lien claims:

RCW 60.04.226 Financial encumbrances — Priorities.

Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.

No novel issues were raised below which would challenge the interpretation or application of this statute in this case. Several issues appear to have been abandoned on appeal.

- Hewitt does not claim that Habitat for Humanity was wrongfully dismissed from the suit.
- Hewitt does not assert any right to equitable subrogation on appeal.
- No error is alleged regarding the ranking of liens and no issue is raised regarding the propriety of the court below allowing the property to go to sale.

Plaintiffs who assigned error to finding of fact but presented “no argument in their opening brief on any claimed assignment” waived that assignment of error.); RAP 10.3(a)(4). *See Cowiche Canyon*, 118 Wash.2d 801, at 809, 828 P.2d 549 (1992).

Throughout the case below and now on appeal, Mr. Hewitt presents his arguments in disjointed pieces of theories, which if the whole were proven, may provide him relief. However, he cannot meet all of the elements of any one theory and therefore relies on all forms of insinuation an innuendo to create the impression that RCS and CC&H were working in concert to deprive him of payment for his labor. Lacking, however, is any form of evidence to support his claims. That is why summary judgment was appropriate below. Mr. Hewitt’s arguments fail to acknowledge some very basic facts. CC&H could not have had the

knowledge alleged by Mr. Hewitt in his counterclaim as the first deeds of trust predated Mr. Hewitt's first day on the project by nearly 15 months and the third by a month. No allegation was ever made that CC&H had anything to do with the hiring of Mr. Hewitt or even knew who he was or that he would be performing work for RCS. RCS retained all control over the manner and method of the prosecution of work on this project without consultation with CC&H and no assertion has ever been made to the contrary. Additionally, it was undisputed that CC&H was not responsible for the retention or payment of any monies to contractors associated with development in 2010 or any other time.

There was no dispute about the facts. There are some unsupported allegations made for the sole purpose of trying to avoid the fact that this is a straight forward foreclosure of a senior lien.

Is Mr. Hewitt Alleging Promissory Estoppel?

It is unclear. Equitable estoppel is based upon a representation of existing or past facts, while promissory estoppel requires the existence of a promise. *Hellbaum v. Burwell & Morford*, 1 Wash.App. 694, 700, 463 P.2d 225 (1969); Promissory estoppel can be used as a "sword" in a cause of action for damages. *Tiffany Incorporated v. W.M.K. Transit Mix, Inc.*,

16 Ariz.App. 415, 493 P.2d 1220, 1224 (1972); Promissory estoppel based on Restatement of Contracts section 90 (1932) has long been recognized in this state *Central Heat, Inc. v. The Daily Olympian, Inc.*, 74 Wash.2d 126, 443 P.2d 544 (1968); *Hill v. Corbett*, 33 Wash.2d 219, 204 P.2d 845 (1949)) and may serve as the basis for an action for damages.

Having so noted, Promissory Estoppel requires first and foremost, a promise. Mr. Hewitt's recitation of Dick Cole's statement to him is - **"I asked Mr. Coles what he knew about this guy, Ron Stricklin and point blank asked Dick Coles 'will I get paid'. I was assured by Dick Coles that Ron Stricklin was reliable or ok or words to that effect and that he was certain that I would get paid when the job was done"** - This alleged statement contains no promise. Rather, Mr Coles was asked for his **opinion** and gave an honest response. Obviously, based upon the undisputed history that CC&H had with RCS, Mr. Coles had every reason to believe that RCS was reliable. He also obviously believed everyone would get paid at the end of the job including CC&H or they would not have put so much money into the project. Mr. Hewitt would have this court believe that CC&H was somehow in league with RCS to steal his work despite the fact that CC&H had over \$737,000.00 invested in the

development at the time RCS declared bankruptcy against them seeking discharge of the debt in its entirety. There is no logic to Mr. Hewitt's claims. They are, very simply, unreasonable.

A party seeking recovery under a theory of promissory estoppel must prove five prerequisites: (1) A promise that (2) the promisor should reasonably expect to cause the promisee to change his position and (3) that does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. *Elliott Bay Seafoods, Inc. v. **984 Port of Seattle*, 124 Wash.App. 5, 13, 98 P.3d 491 (2004). Those elements are simply addressed in this case as follows:

(1) A promise that

As previously noted, there was no promise by CC&H;

(2) the promisor should reasonably expect to cause the promisee to change his position and

No testimony or evidence was ever presented that Mr. Hewitt had formally taken a position that he subsequently changed based upon Mr. Cole's statement;

(3) that does cause the promisee to change his position

Again, Mr. Hewitt has never stated that he had stopped work but changed his mind and decided to resume only after he spoke to Mr. Cole;

(4) justifiably relying upon the promise, in such a manner that

The trial court found that any claim of reliance on such a statement of opinion was unreasonable as a matter of law as it was not a promise upon which reliance could lie;

(5) injustice can be avoided only by enforcement of the promise.

Again, there was no promise to enforce.

Mr. Hewitt did not change his position in reliance on Mr. Cole's alleged statement to him. He attests in his own affidavit that the job was substantially completed but not quite finished at the time that conversation took place. (CP) "The conduct relied on to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced." *Peckham v. Milroy*, 104 Wash.App. 887, 892-93, 17 P.3d 1256 (2001).

Even assuming solely for academic argument that Mr. Hewitt was able to meet any or all of the above stated elements, the project was never

finished and a precondition to Mr. Cole's prediction of payment never came to pass. RCS went bankrupt - the county never accepted the project.

Stripped to its essential elements, a conversation could occur as follows:

Person 1 "What do you know about Paris?"

Person 2 "I 've been there many times. I think it's great."

Person 1 "Am I going to like it there?"

Person 2 "I'm confident that if you visit, you will like Paris."

Is there a case for promissory estoppel if person 1 hates Paris? The ridiculousness of this hypothetical is meant to illustrate and not to offend.

***Is Mr. Hewitt Alleging Fraud in the
Procurement of His Continuing Services?***

It is impossible to tell. It is not alleged in the complaint nor argued directly in his brief, though he continues to assert that there was some kind of concerted effort between the lender and the contractor to swindle him. A plaintiff claiming fraud must prove each of the following nine elements:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7)

plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wash.2d 486, 505, 925 P.2d 194 (1996). Each element of fraud must be established by clear, cogent, and convincing evidence.

Stiley, 130 Wash.2d at 505, 925 P.2d 194. Mr. Hewitt, while asserting fraud through innuendo, does not even try to meet his burden on this theory.

Was There a Case Presented for Unjust Enrichment?

The only real issue now remaining on appeal is whether or not Mr. Hewitt met his burden vis-a-vis his claim of unjust enrichment which is a wholly distinct and separate issue requiring a distinct factual showing.

It is undisputed that Mr. Hewitt's work has improved the property and did, at the time, confer a benefit to its owner RCS. However, that allegation, without more, does not create a right to equitable relief. *Town Concrete Pipe of Washington, Inc. v. Redford*, 43 Wash. App. 493, 499, 717 P.2d 1384, 1387 (Wash. Ct. App. 1986).

The mere fact of benefit alone is not enough. Liability only attaches where the circumstances of the benefit would make it unjust to retain it. *Chandler v. Washington Toll Bridge Auth.*, 17 Wash.2d 591, 601,

137 P.2d 97 (1943). The question before the trial court was whether a sufficient factual dispute existed as to whether the retention by **CC&H** of the improvements made by Mr. Hewitt to RCS' property would be unjust. This question must be evaluated in light of the fact that it was undisputed that CC&H had already paid RCS for its subcontractor's work on the project. It was RCS who did not pass the monies through to its subcontractor - Mr. Hewitt.

Was Any "Enrichment" Unjust?

The real question then is, on the basis of these facts in this case, is it unjust for CC&H to retain the benefit of the work done to date. The *Town Concrete* court went into the exact inquiry which must be undertaken by this court in reviewing to the undisputed facts of this case.

If a lender forecloses on a completed project the courts are more inclined to invoke the doctrine of unjust enrichment. In *Twin City Construction Co. v. ITT Industrial Credit Co.*, 358 N.W.2d 716 (Minn.App.1984), after completion of the entire project, the lender refused to make final payment under a construction contract claiming that the borrower was in default. The court allowed an unpaid contractor to collect from the lender on the basis of unjust enrichment. *Twin City, supra* at 719; *see also Gee v. Eberle*, 279 Pa.Super. 101, 420 A.2d 1050 (1980). The underlying rationale is that in

obtaining title to the completed property, the lender obtained the entire security for which he bargained. To enable him to retain this benefit without payment would, therefore, be unjust. *Morgen-Oswood and Associates v. Continental Mortgage Investors*, 323 So.2d 684 (Fla. Dist. Ct. App. 1975).

Were the project is incomplete at the time of foreclosure, as in the case sub judice, more must be shown to support the conclusion that the foreclosing lender is being unjustly enriched. If the lender has already disbursed the funds earmarked for the work done by the unpaid contractor, the courts generally do not find unjust enrichment. While the lender may have been enriched, it is not unjust under the circumstances since he has already paid for the benefits through the disbursement of the earmarked funds. *Jordan v. Lone Pines, Ltd.*, 41 Colo. App. 152, 580 P.2d 1273, 1274–75 (1978); *Myers-Macomber Engineers v. M.L.W. Construction Corp. and HNC Mortgage and Realty Investors*, 271 Pa. Super. 484, 414 A.2d 357, 360–61 (1979). **A lender does not have a duty to see that loan funds are properly disbursed to contractors.** *Reid v. Saul*, 146 Ga. App. 264 S.E.2d 121, 122 (1978). (Emphasis Added)

Town Concrete Pipe of Washington, Inc. v. Redford, 43 Wash. App. 493, 500-01, 717 P.2d 1384, 1388 (Wash. Ct. App. 1986).

No other theory is advanced to support Mr. Hewitt's claims of unjust enrichment. There is also no suggestion that CC&H ever ordered any work done or, in any way, had any authority or responsibility to direct the prosecution of work on the project. Likewise, CC&H did not retain the ability to direct the payment of funds once they were disbursed to RCS. Mr. Hewitt makes much to do about the fact that CC&H could have made inquiry or taken measures to insure that subs were being paid. However, Mr. Hewitt cites to no authority that CC&H had any affirmative obligation in that regard.

A more analogous, but still distinguishable, case is *Farwest Steel Corp v. Mainline Metalworks, Inc.*, 48 Wash.App. 719, 741 P.2d 58 (1987). There, Farwest supplied steel to Mainline, a steel fabricator, for a construction project in which Hensel was the prime contractor. Before the construction project was complete and before it could pay Farwest in full for the steel purchased, Mainline went into bankruptcy. Farwest then sued Hensel for unjust enrichment because Hensel failed to fully pay Mainline for the fabricated steel Hensel received and incorporated into the project. On appeal, Division I of the Court of Appeals held that even though Hensel was enriched because it received goods without paying for them,

the enrichment was not unjust under the circumstances. Hensel did not contribute to Farwest's loss because it was merely an “incidental beneficiary” of the contract between Farwest and Mainline, it did not acquiesce or encourage the contract with Farwest, and it did not mislead Farwest in any way. Therefore, Hensel was not unjustly enriched.

Of course this case is not on all fours with the present situation as CC&H *did* pay RCS for the materials and work performed. The general contractor/property owner simply did not pass payment on to his sub. Again, this was not CC&H’s responsibility and that undisputed fact was well recognized by the court below. Here, CC&H was also a “mere incidental beneficiary” of the agreement between RCS and Hewitt. There is no evidence that CC&H had anything to do with RCS’ employment of Mr. Hewitt on this job. CC&H did nothing to contribute in any fashion to the loss that Mr. Hewitt realized and, in fact, realized a much greater loss when RCS went bankrupt.

Mr. Hewitt’s Own Affidavit Belies His Claims

The truly undisputed and salient facts, are as follows:

1. Hewitt Construction was hired by RCS Northwest, LLC, through Ron Stricklin to furnish labor and materials for improvements on

the Highland Place Subdivision, which work commenced on March 23, 2010. (CP 99).

2. When he was not paid by RCS, he had to record a lien against the Highland Place Subdivision property in the sum of \$114,972. That lien was recorded on October 18, 2010 as Asotin County Auditor's Instrument No: 321384. (CP 99).
3. Mr. Hewitt did not check the public records for liens against the project until after he had completed his work, filed his lien, and was preparing to foreclose. (CP 100).
4. CC&H had already put \$737,000 into the property. (CP 100).
5. Mr. Hewitt believes that CC&H has already paid more than the property is worth, even with his improvements. (CP 100).
6. Mr. Hewitt acknowledges that CC&H did not retain control over payments to subcontractors though arguing they could have. (CP 102).
7. Most of Mr. Hewitt's work on the project had already been completed before he ever spoke to Mr. Coles. (CP 102).

8. At the time the conversation took place, Mr. Hewitt had no idea who Mr. Coles was or that he had any involvement in any capacity with project on which he was working. (CP 103).
9. Mr. Hewitt did not learn that Mr. Coles had any involvement until late in the project.
10. RCS misrepresented the amount of money CC&H had put into the project by telling Mr. Hewitt that his banker would not give him any money until the project was completed despite the fact that CC&H had already advanced over \$700,000 on the project.
11. Mr. Hewitt's belief was that he would not get paid until the county approved the project. (CP 103).

Application to this case

CC&H didn't hire Mr. Hewitt and had no control over his work or how he was paid. Mr. Hewitt claims detrimental reliance on a statement of opinion from a gentleman he does not know at time that his work is nearly completed. He claims that CC&H is unjustly enriched while stating that they have already invested more into the work than they can get back. He asks for restitution for the entire amount of his work while claiming a detrimental reliance theory to only a small portion of the work at the end

of the project. He understood that he would get paid when the county approved the project, an event which still has not occurred because of RCS' bankruptcy. The court was fully justified and authorized to enter summary judgment when Mr. Hewitt's case consisted entirely of accusations and conjecture unsupported by any evidence. Conclusory statements unsupported by facts admissible in evidence cannot be considered on a motion for summary judgment. *Mark v. Seattle Times*, 96 Wash.2d 473, 635 P.2d 1081 (1981). Mr. Hewitt's entire affidavit consists of just such statements. No material issues of fact were raised - only arguments.

Issue Two

Unjust Enrichment in a Commercial Setting

In its brief, appellant couches the second issue as "Is Unjust Enrichment Applicable in a Commercial Setting as Well as a Non-commercial Setting." This is a non-issue. Respondent has reviewed the Report of Proceedings and cannot find any ruling by the court below on this issue. The Court ruled, in pertinent part, as follows:

"This will be the ruling of the Court. This was a construction loan of a commercial nature. It was not your classic residential construction loan where, ah, Mr. and

Mrs. John Q., ah, Public go to their, ah, ABC Bank and take out a construction loan -- a bridge loan, if you will. And then the bank oversees construction of the project, approves draws to the contractor, approves -- makes sure that the contractor pays the subs by requiring the, ah, contractor to obtain lien releases from the subs before the next draw payment is given for work, ah, already, ah -- ah, done to date. Ah, this was a commercial transaction. The funds were released out of the gate. On that third deed of trust they were released out of the gate. No control was retained by CC&H Investments over how that money was to be distributed. It's a commercial deal. It's the way they're done lots of times." (RP 4).

Even under the most strained reading of the ruling, there is no mention by the court that an unjust enrichment action would not be available in a commercial transaction setting. This assignment of error is frivolous and there is no colorable argument that the court below made a ruling touching upon the issue let alone decided it erroneously. The Court's pronouncement was clearly that CC&H had not retained any control over how the loan monies were to be distributed thus discounting the notion that CC&H owed Mr. Hewitt any duty to monitor how RCS paid its subs. That is the only fair reading of that language.

Request for Attorney Fees

Pursuant to RAP 18.1 CC&H requests an award of fees on appeal. CC&H has been called upon to defend its lien priority as against Mr.

Hewitt's attempts to foreclose and be equitably subrogated. CC&H has legitimately incurred fees and cost in the defense of this matter and on appeal. RCW 60.04.181 provides, in part, as follows

“Rank of lien — Application of proceeds — Attorneys' fees.

- (1) In every case in which different construction liens are claimed against the same property, the court shall declare the rank of such lien or class of liens, which liens shall be in the following order: . . .
- . . . (3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.”

An award of fees at this time is appropriate and authorized. CC&H respectfully makes application for an award of fees on appeal.

C. CONCLUSION

Under the law of this state, Mr. Hewitt was required to set forth specific facts showing a genuine issue of material fact and could not rest on allegations or speculation alone to defeat summary judgment. *Kyreacos v. Smith*, 89 Wash.2d 425, 429, 572 P.2d 723 (1977). Speculation was the only type of argument presented by Mr. Hewitt, both below and now on appeal.

And that really is the problem with this type of scattergun argument. One is not sure how much or how little to address in response. Mr. Hewitt failed to establish, by competent evidence, a material factual dispute requiring resolution by trial. His allegations and speculation, no matter how colorfully stated, do not give rise to such an issue.

Respectfully submitted this 8th day of August, 2012.

CLARK AND FEENEY

A handwritten signature in black ink, appearing to read "Scott D. Gallina", written over a horizontal line.

Scott D. Gallina
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