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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NOS. 333329 and 338258-III (CONSOLIDATED)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WATER WORKS PROPERTIES, L.L.C.,

Appellant,

v.

WILLIAM DAN COX . et ux

Respondents.

**REPLY BRIEF OF APPELLANT
WATER WORKS PROPERTIES, L.L.C.**

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I. ARGUMENT IN REGARD TO CROSS APPEAL

Defendants/Third-Party Plaintiffs assign error to the Trial Court's refusal to award attorney's fees to the Defendants/Third-Party Plaintiffs. This case involved the significant relationship of the parties beginning in 2006, and continuing through 2013 and involved a long list of claims, counterclaims and third-party claims, some of which were resolved by the Trial Court on summary judgment, but the majority of which were tried to the Trial Court. Further, the majority of the claims, counterclaims and third-party claims had no statutory or contractual basis for an award of reasonable attorney's fees.

One of the issues involved a \$150,000.00 promissory note signed by the Defendants Cox in favor of the Plaintiff, Water Works Properties, which promissory note contained an attorney's fees provision. While the Plaintiff, Water Works Properties, prevailed on the promissory note claim, the Defendants/Third-Party Plaintiffs argue on cross appeal that they were the prevailing party and therefore entitled to their attorney's fees under the terms of the attorney's fees provision contained in the promissory note.

There was also involved in this case an orchard lease and a real estate contract that contained attorney's fees provisions. Defendants and Third-Party Plaintiffs claim these agreements provide the basis for an

award of attorney's fees regarding all of the work in regard to all of the claims, counterclaims and third-party claims involved in this lawsuit. This issue was pursued by the Defendants/Third-Party Plaintiffs at the Trial Court on a number of occasions. The Trial Court first decided the issue in its written decision dated February 27, 2015 (CP 188). In that decision, the court said as follows:

This matter involved numerous exhibits and allegations of significant sums due from one party to the other. Both parties prevailed on some of the issues, but neither prevailed on a major portion of the issues. The Coxes presented this court with a proposed settlement agreement submitted by Water Works Properties prior to this litigation. Although the court believed this to be relevant and the settlement proposal to be a far cry from what relief was awarded to Water Works Properties, the court does not have any kind of counteroffer from the Coxes. The Coxes requested approximately \$2,000,000.00 at trial. As far as this court know, the Coxes' settlement position was just as far from reality as was Water Work Properties. Each party will be responsible for their own costs and attorney's fees

At trial, the Plaintiff and Third-Party Defendants filed a joint pretrial statement (CP 104). That pretrial statement identified a laundry list of issues to be considered by the Trial Court. Similarly, the Defendants/Third-Party Plaintiffs filed a pretrial statement (CP 113) which identified an even greater laundry list of issues. Also, the

Defendants/Third-Party Plaintiffs filed a list of special claimed damages totaling \$2,053,161.00 (CP 111). In its brief, that Defendants/Third-Party Plaintiffs argue the only issue the Plaintiff, Water Works Properties, prevailed on was the \$150,000.00 promissory note. That argument fails to recognize the claims of the Defendants/Third-Party Plaintiffs against the Plaintiff and the Third-Party Defendants, including a claim for breach of fiduciary duty, a claim the Plaintiff and Third-Party Defendants violated the Consumer Loan Act and the Consumer Protection Act, a claim that the Plaintiff and John McQuaig personally promised to satisfy the obligations of the Defendants/Third-Party Plaintiffs to North Cascades National Bank and Farm Service Association, which claims approached \$1,000,000.00, and claims of emotional distress. The Plaintiff, Water Works Properties and the Third-Party Defendants prevailed on all of these issues. In addition, one of the other major claims of the Defendants/Third-Party Plaintiffs was that the Plaintiff and John McQuaig personally promised to satisfy the obligations of the Defendants/Third-Party Plaintiffs to North Cascades National Bank and Farm Service Association which claims approached \$1,000,000.00. The Plaintiff and McQuaig prevailed on these issues as well.

As the Trial Court properly recognized, both parties to this litigation prevailed on a number of issues and neither the Plaintiff, Water

Works Properties, L.L.C. or the Defendants, Cox, were substantially prevailing parties.

The court reaffirmed its February 27, 2015, decision in regard to attorney's fees as set out above, again on March 10, 2015, in Conclusion of Law No. 15 indicating, "in the exercise of the court's discretion as set out in its decision of February 27, 2015, no party shall receive costs, fees or reasonable attorney's fees."

After the entry of the Findings of Fact, Conclusions of Law and Judgments in March of 2015, both parties moved for reconsideration. The Defendants/Third-Party Plaintiffs sought reconsideration of the court's determination in regard to an award of reasonable attorney's fees. The court once again found there was no substantially prevailing party and declined to award reasonable attorney's fees (CP 228).

The Defendants/Third-Party Plaintiffs argue the law with respect to an award of fees pursuant to RCW 4.84.330 in a contract action provides the net affirmative judgment determines the prevailing party. Defendants cite the case of Phillips Bld. Co v. AN, 81 Wn.App 696, 701-703, 915 P.2d 1146 (1996). However, Phillips does not stand for this proposition. Rather, Phillips states:

In cases where both parties are awarded relief, the net affirmative judgment may determine the prevailing party.

Phillips at 701 (emphasis added), citing Moritzky v. Heberline, 40 Wn.App. 81, 183, 697 P.2d 1023 (1985).

Accordingly, it is in the court's discretion whether to apply the net affirmative judgment rule to determine whether there has been a prevailing party in a contract action with a unilateral fee provision. The Trial Court in this case exercised its discretion, having visited the issue on numerous occasions, and declined to award fees to either party. The Defendants/Third Party Plaintiffs also rely on the orchard lease entered into between the parties (Exhibit 63) and the real estate contract entered into between the Plaintiff and Twin W Orchards, Inc. (Exhibit 66) as bilateral attorney's fees agreements upon which to support an award of attorney's fee to the Defendants/Third Party Plaintiffs.

As indicated above, this litigation involved a myriad of issues and claims. The issues surrounding the orchard lease and the real estate contract were but a few of the issues tried to and decided by the court.

When the entire litigation between the parties is reviewed, it is clear that both parties prevailed on a variety of issues and there was no substantially prevailing parties upon which to support an award of reasonable attorney's fees.

It is respectfully submitted the Trial Court in this case exercised its discretion appropriately on a number of occasions and denied an award of reasonable attorney's fees to the Defendants/Third Party Plaintiffs.

II. PLAINTIFF'S REPLY

1. Boundary Issue. At trial, the record is absolutely clear the Plaintiff, Water Works Properties, accepted the surveyed legal descriptions that were contained in the recorded real estate contract. RP, Page 785, Lines 10-15 and as stated in the Plaintiff's trial brief (CP 124).

The Plaintiff believes the Trial Court's Finding of Fact No. 39 stating the parties agreed the boundary lines in regard to the real estate contract would "follow the water lines" to be in error. Certainly that was the testimony of the Defendant, Dan Cox. However, an agreement to that effect was specifically denied in the testimony of John McQuaig. Similarly, the Plaintiff believes the Conclusion of Law No. 7 entered by the Trial Court on March 10, 2015 was in error in concluding that the property lines should be reformed consistent with the intent of the parties. Plaintiff suggests the real estate contract and the legal descriptions contained in said written agreement are the appropriate legal descriptions and are binding upon the parties. The Plaintiff, Water Works Properties, also suggests Finding of Fact No. 59 contained in the court's Supplemental Findings of Fact and Conclusions of Law entered October 5,

2015 and the Supplemental Conclusion of Law No. 18 are in error based upon the foregoing and based upon the arguments of the Plaintiff in regard to the boundary issue set forth in the Brief of Appellant.

The Defendants argue the parties treated the boundary lines as claimed by the Defendants. However, it is undisputed that when the Plaintiff took possession of the orchard in the spring of 2010, Mr. Cox was retained through his limited partnership, Sixth Generation, LP, to manage the orchards. That management relationship continued through the end of 2012, and Mr. Cox was in complete control of the entire orchard property, both that portion owned by the Plaintiff and the portion purchased by the Defendant, Twin W Orchards, Inc. on the real estate contract (Exhibit 66). It was not until after that management relationship was terminated that the Plaintiff discovered the Defendant's claims in regard to the boundary lines.

The Defendants reliance on RCW 58.04.020 is misplaced. That statute is entitled "Suit To Establish Lost Or Uncertain Boundaries – Mediation May Be Required." Subsection (1) provides as follows:

Whenever the boundaries of lands between two or more adjoining proprietors have been lost, or by time, accident or any other cause, have become obscure, or uncertain, . . .

There is absolutely no evidence whatsoever in this case that the boundaries between the orchard properties of the parties were lost, or by time, accident or other cause become obscure or uncertain. Contrary, the evidence is clear in this case the boundaries between these parcels were specifically determined by surveyors, legal descriptions generated, and a real estate contract with specific legal descriptions entered into by and between the parties. It is respectfully suggested RCW 58.04.020 does not apply to this case in any fashion whatsoever.

Plaintiff respectfully suggests the legal descriptions contained in the real estate contract agreed to by the parties in said contract must prevail on this litigation.

2. Breach of Lease Issues. The Defendant, Twin W Orchards, Inc., and the Plaintiff, Water Works Properties, L.L.C., entered into an orchard lease (Exhibit 63) which agreement is dated May 27, 2011, and was for the initial term beginning June 1, 2011 through October 31, 2011. The lease provided that the Plaintiff had the option to renew the lease on the same terms and conditions for five consecutive years. It further provided the lessor, Twin W, would receive the net returns from the fruit harvested after payment of expenses.

The Trial Court, in its original decision, found that the Plaintiff had breached this lease by placing a lien on the fruit proceeds due Twin W

under the terms of the lease and as a consequence of said breach, awarded damages to the Defendants for a claimed lost bonus from Monson Fruit, the warehouse that processed and sold the fruit harvested under the lease.

The record is quite clear there was no claimed lien by the Plaintiff, which fact Defendants' brief recognizes but now characterizes the court's determination of breach by the Plaintiff as a failure to subordinate its crop lien, which was granted to the Plaintiff, Water Works, under the terms of the lease in Paragraph 2.15. However, the record is clear that in fact Water Works Properties agreed to subordinate its crop lien when requested to do so by Monson Fruit Company. (See Exhibits 68 and 69.)

The record is also clear that Monson Fruit Company was holding the proceeds of the 2012 crop generated under the lease (Exhibit 63) and what the Defendants wanted of Water Works Properties in the spring of 2013 was a release of any claim by Water Works Properties to any of the proceeds from that 2012 crop. However, it is undisputed that there was still money owed Water Works Properties from the crop proceeds to cover Water Works' costs of raising that crop and in addition Water Works believed it had a claim against those proceeds relating to its fruit theft loss allegations. There was simply a dispute between Twin W and Water Works with regard to the monies held by Monson Fruit but there was no breach of the lease. The evidence is undisputed Water Works did not

place a lien on the crop as found by the court. Further, there is no evidence that Water Works Properties failed to subordinate its crop lien created under the terms of the lease and to the contrary, the evidence establishes Water Works did in fact subordinate as required under the terms of the lease.

There simply is no evidence to establish a breach of the lease (Exhibit 63) by Water Works Properties.

As the Plaintiff has addressed in its initial brief, there is no evidence to support the court's award of the lost bonus damages as there is a complete lack of evidence to indicate the Defendant would have been paid the bonus but for the conduct of the Plaintiff. The Plaintiff suggests the court's Findings of Fact No. 43, 44 and 54 and Conclusion of Law No. 6 were in error in regard to the orchard lease breach issue and the Monson bonus claim.

3. Chelan Fruit and Tree Top Checks. The Plaintiff believes the Trial Court's Finding of Fact No. 25 "None of the parties' written agreements entitled Water Works Properties to any dividend checks" is in error. This finding related to the checks from Chelan Fruit totaling \$43,584.63 which were patronage dividends from the cooperative company.

However, the record is quite clear Water Works Properties had a security interest in the Trout (Chelan Fruit) and Tree Top retainages, including the patronage dividends. (See Security Agreements in Exhibit 9, Subsections 6-9). The Trial Court's Finding of Fact No. 39 with regard to the Tree Top check is similarly in error.

The documents entered into by the parties, which were substantial in this case, clearly contemplated the parties expected the Chelan Fruit and Tree Top checks would be the property of Water Works Properties. The Forbearance Agreement (Exhibit 20) specifically provides that the Defendants would execute documents conveying to Water Works Properties "all of the real and personal property collateral pledged to secure the notes." (Exhibit 20) The Security Agreements executed by the Defendants specifically identified the Chelan Fruit and Tree Top assets.

The evidence is undisputed that the Chelan Fruit and Tree Top checks came from their makers to the Defendant, Dan Cox, who then voluntarily endorsed and delivered to Water Works Properties the checks. If it was not the intent and expectation of the Defendants that those proceeds would be the property of Water Works Properties, why endorse and deliver the checks to Water Works. The checks were never an issue between the parties until this litigation.

The Amended Bill of Sale (Exhibit 44) covered all crops and farm products, together with proceeds thereof. Clearly, the Chelan Fruit and Tree Top checks were crop proceeds. It was not unexpected or unintended by the parties, including the Defendants, that the Chelan Fruit and Tree Top checks and the proceeds thereof, would be the property of Water Works Properties.

4. Equipment. The Plaintiff believes the court's Finding of Fact No. 45 in regard to the equipment and personal property was in error. Similarly, the Supplemental Findings of Fact No. 55 and the Supplemental Conclusion of Law No. 17 are in error. The Defendants/Third Party Plaintiffs argue, "here, the Trial Court determined that the party's intent was to transfer ownership of only those items listed in the depreciation schedule attached to the Bill of Sale." (See Defendant's Brief, Page 32). However, the Plaintiff suggests there is absolutely nothing in the record to support this proposition. Neither of the parties or any of the witnesses regarding this issue testified to this effect, nor is there anything in the Bill of Sale itself to so indicate. The Bill of Sale (Exhibit 49) itself transfers to Water Works Properties the following:

(1) all payments received by Debtor under Douglas County Superior Court Cause No. 08-2-00201-0; (2) any amount due debtor from funds now in or to be put in the registry of the court in said suit; (3) the

personal property located on or associated with the use of the real property described on attached Exhibit A and incorporated herein by this referenced; (4) all crops and farm products grown, growing or to be grown in Washington State and the harvest and proceeds of harvest of such crops or such harvested crops and the products thereof, together with all proceeds of said collateral; (5) chattel paper; (6) warehouse receipts; (7) accounts receivable; (8) contract rights; (9) crop insurance proceeds; (10) all cash and noncash proceeds; and (11) the personal property and truck and trailers listed on the attached Exhibit B.

Defendant's position that the Bill of Sale identified above only transferred ownership of the items listed on the depreciation schedule as Exhibit B is unsupported by the evidence. It is undisputed all of the personal property listed in Finding of Fact No. 45 was located on or associated with the use of the real property described on Exhibit A. All of that property was specifically included in the Bill of Sale by its terms.

The evidence is clear and undisputed that the depreciation schedule attached as Exhibit B to the Bill of Sale was a convenience to the parties and was the only actual listing of the equipment the parties were able to identify at the time the Bill of Sale as to be executed. It did not, however, in any fashion, limit what was transferred under the terms of the Bill of Sale.

In addition, as set out in the Plaintiff's initial Appellate Brief, there are a number of items listed in Finding of Fact No. 45 that are not equipment and should not have been addressed in determining what assets were transferred to Water Works Properties by the Defendants pursuant to the security interests and the Bills of Sale.

5. Attorney's Fees Award. After the supplemental hearing held June 1, 2015, the Trial Court awarded reasonable attorney's fees to the Defendants in regard to the supplemental proceedings. Plaintiff submits the Supplemental Findings of Fact No. 62 was in error. There is no evidence to support Water Works post-trial positions to have been frivolous and devoid of merit. Similarly, the Trial Court's Conclusion of Law No. 19 indicating Twin W and Cox were entitled to recover post-trial fees and costs of \$80,000.00 was in error. The issues in the supplemental hearing held June 1, 2015, related to the boundary lines and to the equipment identified in Finding of Fact No. 45. Plaintiff believes its position in regard to the boundary line and the equipment had merit and were not frivolous. Those positions in regard to both issues are set out in this appeal, and the Plaintiff believes it was in error for the Trial Court to award attorney's fees to the Defendants Cox and Twin W in regard to either the boundary line or the equipment issues.

The boundary line issue would be an issue under the real estate contract, which does contain an attorney's fees provision. Plaintiff points out the court never entered an order reopening the boundary line issue and the Plaintiff suggests there was no basis for the court to do so. The boundary line issue should not have been a part of the supplemental hearing conducted June 1, 2015.

There is no contractual basis upon which to award reasonable attorney's fees in regard to the equipment issues upon which the Defendants made a claim of conversion. Unless the attorney's fees award is based upon a determination that the Plaintiff's position was frivolous, which Plaintiff suggests is totally unsupported by the record.

III. CONCLUSION

The Trial Court's initial decisions in regard to an award of reasonable attorney's fees should be affirmed as both parties prevailed on a variety of substantial issues. The Trial Court appropriately exercised its discretion and determined the parties should bear their reasonable attorney's fees. However, the Court's award of reasonable attorney's fees to the Defendants/Third-Party Plaintiffs in regard to the supplemental hearing was in error. There was no basis whatsoever to award reasonable attorney's fees in regard to the equipment issue, one of the two issues considered in the supplemental hearing, which was a conversion claim.

The other issue in the supplemental hearing was the boundary line issue which the Plaintiff suggests should not have been included in the supplement hearing because there was no basis to modify the boundaries contained in the legal descriptions in the real estate contract executed by the parties and there was no order ever entered by the court or determination made to reopen the issue of the boundary lines after the close of the trial of the case.

The Plaintiff suggests the Trial Court's determination in regard to the boundary lines should be reversed and the legal descriptions contained in the contract and agreed to by the parties should be reinstated. The only evidence to support revising the boundary lines was the testimony of Dan Cox indicating the legal descriptions in the Real Estate Contract were not the boundaries the parties had agreed to. That cannot be a basis upon which to rewrite the contract that was executed by the parties. If so there can be no contract safe from challenge.

The Trial Court's award of damages to the Defendants in regard to the claimed lost Monson Fruit bonus is unsupported by the evidence presented in this case and should be reversed. There simply is no evidence to support the Court's determination that the Plaintiff, Water Works Properties, breached the lease entered into by the Plaintiff and Twin W Orchards and there is therefore no basis upon which to award damages for

said claimed breach. Similarly, the Plaintiff believes the Trial Court was in error in regard to the award of damages to the Defendants concerning the Chelan Fruit and Tree Top checks and the prejudgment interest awarded by the court in regard to those checks. Remember, the Defendants had defaulted in regard to payment of substantial sums of monies owed to the Plaintiff under the terms of the various promissory notes, all of which are included in the record. The parties conducted themselves with regard to the Chelan Fruit and Tree Top checks consistent with the expectation that those funds would be the property of the Plaintiff. Plaintiff further suggests the contractual documents entered into by the parties and in evidence in this case clearly indicate those checks and the proceeds of those checks were to be the property of the Plaintiff.

Plaintiff also suggests the award by the court in regard to the equipment, both the order of the court the Plaintiff return certain items of the equipment from the list which is contained in Finding of Fact No. 45 in the Findings of Fact and Conclusions of Law entered by the Trial Court on March 10, 2015, and the items for which the Court awarded damages to the Defendants at the conclusion of the supplemental hearing are not supported by the evidence or the documents entered into between the parties which are part of the record in this case. The Bill of Sale (Exhibit 49) executed by the Defendants clearly transferred to the Plaintiff all of

the personal property located on or associated with the use of the real property described on Exhibit A. The orchard property was fully described on Exhibit A. All of the equipment listed in Finding of Fact No. 45 was without argument located on the real property described on Exhibit A. It was clearly conveyed and transferred to the Plaintiff. Further, Plaintiff suggests the Bill of Sale was not necessary to transfer ownership of the personal property collateral to the Plaintiff. The record is undisputed the Plaintiff took possession of the orchard property and all of the personal property after the Deed In Lieu of Foreclosure was recorded. The Trial Court's order in regard to requiring the Plaintiff deliver to the Defendants items listed in Finding of Fact No. 45 and the Trial Court's award of damages with regard to items identified in Finding of Fact No. 45 not returned to the Defendants should be reversed.

Finally, the Trial Court's award of attorney's fees to the Defendants regarding the supplemental hearing should be reversed.

RESPECTFULLY SUBMITTED this 15 day of March, 2016.

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