

No. 63217-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BELLINGHAM BSC, a Washington limited liability company,
Appellant,

v.

AMBULATORY RESOURCE CENTRES OF WASHINGTON INC;
ARC OF BELLINGHAM, LP, and SYMBION, INC

Respondents.

BELLINGHAM BSC'S REPLY BRIEF

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ORIGINAL

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ARGUMENT

RAP 10.3(b) states that the “brief of respondent should ... answer the brief of appellant.” In this case, not only has respondent failed to answer the most salient points of BSC’s brief, but respondents’ brief also repeatedly purports to respond to arguments that BSC never made,¹ claims that BSC did not raise certain arguments below when the record unambiguously show that the arguments were so raised, and completely ignores the main argument and key piece of evidence that shows that there was a mutual or unilateral mistake, and that respondent’s own course of conduct proves that such a mistake occurred.

Nowhere in its 35 page response does ARC address the May 18, 2007 letter from ARC attorney Mr. Rooney written to BSC, which states that ARC agreed that rent would be determined in accordance with Mr. Williams’ May 12, 2004 email, which was attached to the letter and which Mr. Rooney contended “explains the structure” (of the deal for the amendment). Mr. Rooney reiterated the parties’ agreement that “[f]or May 1, 2009 we would decide what FMV rent was or use the \$11,040, plus CPI increases

¹ For example, ARC repeatedly argues that BSC is claiming a right to the \$500,000 lump sum payment. BSC did not make that argument below and has not made it on appeal.

to establish the new rent.” (CP 141) The party admission in this letter was years after the amendment, is completely contrary to ARC’s present position in the litigation and completely consistent with BSC’s, and is the very heart of the case. ARC completely ignores it, which ought to tell this Court that it cannot confront it.

Mutual mistake turns on the intent of the parties.² The issue of the parties’ intent is one of fact.³ ARC’s response wrongly claims that contract interpretation is “always a question of law.” Rather, under Washington law, interpretation of the parties’ intent is a question of law and ripe for summary judgment only when (1) there is no relevant extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.⁴

ARC is also wrong to claim that there can be no mistake when the claimed mistake is “flatly contradicted by the contract itself.”⁵ Were the parties’ intent not contradicted by the contract there would be no claims of mutual or unilateral mistake.

² See Snyder v. Peterson, 62 Wn. App. 522, 814 P.2d 1204 (1991) (“Where both parties have an identical intention . . . and a writing executed by them is materially at variance with such intention, a court of equity will reform the writing so that it shall express their intention”).

³ See Paradise Orchards v. Fearing, 122 Wn. App. 507, 94 P.3d 372 (2004) (“Generally, what the parties intend is a question of fact.”); Kenney v. Read, 100 Wn. App. 467, 997 P.2d 455 (2000).

⁴ See Scott Galvanizing, 120 Wn.2d 573, 582, 844 P.2d 428 (1993) ; Spectrum Glass v. PUD of Snohomish County, 129 Wn.App. 303, 119 P.3d 854 (2005).

⁵ ARC Br. at p. 28.

Moreover, extrinsic evidence is admissible to show mistake, even if it contradicts the language of the lease.⁶

The mutual mistake in this case is that both parties intended that the rent on May 1, 2009, would be \$11,040 plus CPI, or fair market value.⁷ This is reflected in Mr. Williams' May 12, 2004 email, which includes the condition that the landlord will agree to the revised Fourth Amendment only if the landlord has the right to determine the 2009 rent will be \$11,040 plus CPI from 2004, or fair market value. (CP 137, 140)

The tenant's identical intent is evidenced by Mr. Rooney's 2007 letter, which states that ARC agreed that rent would be determined in accordance with Mr. Williams' May 12, 2004 email, and reiterated the parties' agreement that "[f]or May 1, 2009 we would decide what FMV rent was or use the \$11,040, plus CPI increases to establish the new rent." (CP 141) As the Washington Supreme Court has held, in "discerning the parties' intent, subsequent conduct of the contracting parties may be of aid."⁸

⁶ See Berg v. Hudesman, 115 Wn.2d 657, 669, 8901 P.2d 222 (1990), St. Regis, 93 Wn.2d 497, 501-502.

⁷ Although ARC's brief repeatedly claims that \$11,040 was the "unloaded" fair market rent, this is a disputed fact. See CP 187-88, 192. Thus, this Court must assume for purposes of summary judgment that in 2005, ARC was already paying market rent. See id.

⁸ Berg, 115 Wn.2d 657, 668.

Given Mr. Rooney's 2007 admission that the May 12 email from Mr. Williams set out the deal structure, and that in 2007 he was still intending that "on May 1 [2009] we would decide what FMV rent was or use the \$11,040 plus CPI increases to establish the new rent," there is a disputed material fact as to mutual mistake, and summary judgment was not appropriate.

Moreover, BSC is entitled to all reasonable inferences from the evidence. Ms. Schwindt knew that the fair market rent for the surgery center in 2004 was in excess of \$21,000 per month. (CP 187-88). It is thus a reasonable inference that she did not intend to extend the lease five years later, to start in 2009 at \$11,040 plus CPI, a rate that was almost half the 2004 fair market rental rate.⁹

In response to the argument, evidence, and inferences on mutual mistake, ARC makes three points. First, ARC claims that BSC "is under an unreasonable assumption that \$500,000 was to be paid back in 2004." What this argument is responding to is a total mystery, since BSC did not allege below, or on appeal, that the \$500,000 was supposed to be paid. It is also a total mystery what this has to do with mutual mistake.

⁹ Although ARC's brief repeatedly claims that \$11,040 was the "unloaded" fair market rent, this is a disputed fact. See CP 188-89; 192; 118-122.

ARC's second argument is that the landlord bore the risk of mistake.¹⁰ As evidence of this claim, ARC points out that the landlord's attorney drafted the contract, and that "any reasonable landlord would have complained five years ago about a missing one-half million dollar payment."¹¹ Again, it is a total mystery why ARC keeps raising the "missing \$500,000 argument" – the argument was never made by BSC. As for the risk of the mistake, ARC cites no law for this argument. Saying something is "obvious" does not meet this Court's requirement to provide legal authority for each argument. In any event, ARC is wrong. A mistake in expressing a written agreement does not mean the drafter bore the risk of mistake.¹²

ARC's third argument is that BSC's mistake argument is contradicted by the contract.¹³ The fact that a writing mistakenly contradicts the intended expression of the parties does not defeat a

¹⁰ ARC cites Denaxas v. Sandstone, 148 Wn.2d 654, 668, 63 P.3d 125 (2003), though otherwise does not expressly rely on that case. Denaxas does not apply here. Denaxas involved an alleged mistake about the size of the property being purchased, and not a mistake in drafting the terms agreed upon by the parties. This case involves the latter, an agreement that the new rent would be either "x" or "y", but the final writing "fail[ed] to express the agreement because of a mistake of both parties as to the contents or effect of the written agreement." Restatement (Second) Contracts §155.

¹¹ ARC Br. at p. 27-28.

¹² See Restatement (Second) Contracts, §§ 155 and 157.

¹³ Id. at p. 28.

claim to reformation based on mistake.¹⁴ Indeed, it is often the contradiction itself that is the very reason there is a mistake. Moreover, the lease does not contradict the parties' intent in this case. Rather, it mistakenly left out the other half of the rental equation, i.e. the "or fair market value" part of the deal.

A. DISPUTED FACTS AS TO UNILATERAL MISTAKE

Alternatively, there are also disputed material facts as to unilateral mistake. A party to a contract is entitled to reformation of the contract if one party is mistaken and the other party engaged in fraud or inequitable conduct. A party has engaged in fraud or inequitable conduct if it conceals a material fact from the other party, including where the parties reach a preliminary agreement during arms-length negotiations, and the party knows of the other party's mistake and fails to inform the other party.¹⁵ The other party's negligence in failing to read the final agreement is not a bar to reformation.¹⁶

¹⁴ See Restatement (Second) Contracts § 155; see also Biddle v. Wright, 4 Wn. App. 483, 484-85, 481 P.2d 938 (1971) ("where parties to a transaction have an identical intention as to the terms to be embodied in a proposed agreement ... and the writing executed by them is materially at variance with such intention, a court of equity will, upon appropriate application, reform the writing so that it will truly express the intention of the parties").

¹⁵ See Wash. Mutual v Hedreen, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994).

¹⁶ See Wash. Mutual, 125 Wn.2d 521, 529-31 (holding that reformation allowed even though "the bank was negligent in not carefully reading the lease to discover the discrepancy before signing").

As noted above, BSC's predecessor was mistaken about the contents of the Fourth Amendment. If, as ARC now claims, ARC was not mistaken, and it intended to only pay \$11,040 plus CPI and not fair market value, then there are disputed facts as to unilateral mistake by BSC's predecessor.

A preliminary agreement in this case is evidenced by the May 12, 2004 email from Williams, and the 2007 email from Mr. Rooney admitting that ARC agreed to Mr. Williams' email.¹⁷ If someone else at ARC discovered that the final draft was not consistent with this preliminary agreement, there is a reasonable inference that it knew (Mr. Rooney certainly knew, based on his 2007 letter) that BSC's predecessor was operating under a mistake as to the contents of the final draft, and did not disclose its understanding to Ms Schwindt or her attorney.¹⁸

ARC argues in response that "BSC never briefed the issue of unilateral mistake below."¹⁹ Again, ARC is wrong. BSC's

¹⁷ See Pioneer Resources v. D.R. Johnson, 187 Ore. App. 341, 367-68, 68 P.3d 233 (2003) (no requirement that preliminary agreement be an enforceable contract, or even signed by either party).

¹⁸ See Basin Paving v. Port of Moses Lake, 48 Wash. App. 180, 737 P.2d 1312 (1987); Simonson v. Fendel, 101 Wn.2d 88, 675 P.2d 1218 (1984).

¹⁹ ARC Resp. Br. at p. 29.

Opposition to Defendants' Motion for Summary Judgment raised the argument at pages 10-11.²⁰

ARC next argues that an assignee of a contract cannot raise the issue of mistake. ARC fails to provide any citations for this argument, and the argument is in fact without any merit.²¹

B. DISPUTED FACTS AS TO THE MEANING OF SECTION 4.3

The parties agree that the initial proposal, agreed upon in principle by both parties as of January 27, 2004, was for ARC to pay \$500,000 up front, and in exchange the Base Monthly Rent would be reduced to \$11,040 starting on May 1, 2004. The Base Monthly Rent would have stayed at that level until May 1, 2009, when it would then increase in accordance with the CPI index. Under this agreement in principle, if ARC failed to pay the \$500,000, its Base Monthly Rent would have stayed at the amount stated in the lease, \$20,795, plus CPI increases from 2001. That Base Rent of \$20,795 plus CPI increases would have applied all the way through December 31, 2013.²²

²⁰ CP 228-229.

²¹ See Restatement (Second) Contracts, 155 cmt e ("Reformation [based on mistake] may be granted at the request of any party to the contract, including an intended beneficiary, or of a party's successor in interest").

²² (CP 291, 298, 300)

The parties also agree that the reason this agreement in principle was changed, was to re-structure the deal so that there would be no need for the upfront \$500,000 payment.²³ Thus, one would expect the final deal to reflect that portion of the initial agreement in principle that addressed what would happen if the \$500,000 payment was not made.

So the question is between two competing interpretations. ARC's interpretation is that it avoided the \$500,000 upfront payment, and in exchange it continued to pay the existing rent of \$20,795 through April 30, 2009, and then its rent dropped to \$11,040 plus CPI increases (calculated from 2004) for the five year extension through 2013. This interpretation is drastically different from the initial agreement in principle, which, if the \$500,000 was not paid, had ARC paying the existing base rent (\$20,795) plus CPI for the entire five year extension through 2013. Under ARC's interpretation, the landlord, which had an agreement in principle, subsequently agreed to reduce the rent for the five year extension of the lease by over \$9,000 a month, in exchange for no concessions from the tenant. That is absurd.

²³ (CP 280-81)

It is also completely contrary to the previous communications from Mr. Williams that made it clear that his client was not going to agree to the reduced rent without consideration from ARC.²⁴

ARC's interpretation also cannot be squared with the last sentence of section 4.3, which specifically states that the rent on May 1, 2009, cannot be less than the rent on April 30, 2009. "In no event will the new Base Monthly Rent be less than the Base Monthly Rent in effect immediately prior to the Adjustment Date." (CP 268) The Adjustment Date, though capitalized, is not a defined term, but it cannot mean anything other than the date the rent is adjusted, i.e. every May 1 for the years 2009 - 2012. ARC even admits that the first "Adjustment Date" was May 1, 2009.²⁵

In sum, there is at best a conflict between two sections of the Lease, and the extrinsic evidence to interpret those sections is disputed. Summary judgment on interpretation of a contract is only allowed if there is no relevant extrinsic evidence, or if the extrinsic evidence is not disputed.²⁶ Summary judgment was not appropriate.

²⁴ See CP 284, 298-300.

²⁵ ARC Br. at p. 16.

²⁶ See Scott Galvanizing, 120 Wn.2d 573, 582, Spectrum Glass, 129 Wn. App. 303, 311.

In response, ARC ignores the issue, invents its own arguments to counter, and then argues against its fabricated arguments. BSC never argued or even implied that the lease should be construed against one party or the other. And, as mentioned, BSC never argued that “the \$500,000 should still be paid.”²⁷ Finally, the disputed facts regarding the interpretation of section 4.3 have nothing to do with Ms. Schwindt’s declaration or any allegedly “unexpressed impressions” as alleged by ARC. Rather, the disputed material facts arise from the expressed negotiations, the conflicting sections of the Fourth Amendment, and common sense that a landlord would not agree to a lease extension that starts four years later at half the current fair market rental rate.

C. CPI INCREASES BETWEEN JANUARY 1, 2005 AND JANUARY 1, 2009.

There is nothing in the record to reflect that the parties ever discussed, mentioned, or even referred to a change in the lease terms relating to CPI increases for 2005 to 2009. The original lease calls for CPI increases every two years between 2001 and 2009, and thus, absent the Fourth Amendment, there would have been CPI increases on January 1, 2003, 2005, 2007 and 2009.

²⁷ ARC Br. pp. 33-34.

Despite the fact that it was never negotiated or even mentioned during the negotiations, the 2004 Fourth Amendment ostensibly changes section 4.3 to start CPI increases on January 1, 2009, thus allegedly eliminating the CPI increases for January 1, 2005 and January 1, 2007.

ARC's Motion for Summary Judgment did not address this issue. Whether or not ARC owed CPI increases for 2005 – 2009 was not listed in the "Relief Requested," nor was it listed under "Issues Presented."²⁸ Moreover, ARC submitted a detailed order listing the relief being granted, and ARC's order contained no mention of this issue.²⁹ ARC may not now seek relief from this reviewing Court that it never sought, or obtained, from the trial court. ARC must be held to have abandoned its position about CPI adjustments.³⁰

CONCLUSION

Appellant BSC requests that this Court reverse the trial court and remand for a trial. There were disputed material facts regarding mutual and/or unilateral mistake, as well as the proper

²⁸ CP 235-36, 238.

²⁹ CP 326, 327, and CP 69-71.

³⁰ See Green v. Edleman, 137 Wn. App. 665; 687, 151 P.3d 1038 (2007) (An issue pled in a complaint but not raised in a motion for summary judgment may be deemed abandoned and may not be considered for the first time on appeal).

interpretation of the section 4.3, which states that the rent shall not be reduced on a rent adjustment date.

DATED this 13th day of August, 2009.

JAMESON BABBITT STITES
& LOMBARD, P.L.L.C.

By 
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CERTIFICATE OF SERVICE

I, Patty Schultz, declare as follows:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On August 13, 2009, I deposited with ABC Legal Messenger Service a copy of Bellingham BSC's Reply Brief to be served upon counsel for respondents at the following address:

James H. Jordan, Jr.
Miller Nash, LLP
4400 Two Union Square
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of August, 2009, at Seattle, Washington.



Patty Schultz

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