

NO. 63651-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

RICHARD PEDOWITZ,

Appellant,

v.

ABOVE ALL ROOFING SPECIALISTS, LLC.

Respondent,

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 NOV -2 AM 11:54

BRIEF OF RESPONDENT

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ORIGINAL

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I. ISSUES PRESENTED

1. Whether the trial court erred in applying a reasonable 18-month contractual limitation of action provision?
2. Whether filing and service are required to perfect commencement of a lawsuit within an 18-month contractual limitation of action provision?
3. Whether the trial court abused its discretion in awarding contractual attorney's fees to respondent as the prevailing party?

II. COUNTER STATEMENT OF THE CASE

This lawsuit arises out of a roofing job that occurred in January, 2006. As shown below, the trial court correctly dismissed this suit because Appellant Richard Pedowitz failed to perfect commencement of the action within the limitation of action provision contained in the written agreement between the parties.

At some point prior to December 12, 2005, Appellant Richard Pedowitz contacted Ryan Love, owner of Respondent Above All Roofing, LLC, and requested a bid for re-roofing his home, located at 1426 East

Valley Street, in Seattle, Washington. Mr. Pedowitz initiated contact with Above All. He had seen a house Above All had re-roofed and liked the work. (CP 33-34.)

On December 12, 2005, the parties entered into a written contract. (CP 36-37.) The contract called out a description of the work, including removal and disposal of the old roof, installation of 30 pound felt paper as vapor barrier, installation of drip edge and flashings and installation of laminate roofing material that would carry a lifetime warranty, all for the price of \$14,722.00. (*Id.*) Mr. Love directed Pedowitz to Stoneway Roofing Supply to select the style of roof. (CP 34.)

The second page of the two-page contract contained the “CONDITIONS OF PROPOSAL.” (CP 37.) The conditions were set out in nine separate paragraphs in standard-size font. The relevant conditions provide as follows:

1. Acceptance of this proposal by Customer shall be acceptance of all terms and conditions recited herein.

* * * *

4. In the event Contractor encounters concealed physical conditions or conditions materially from those ordinarily found to exist in projects of the character provided for in this agreement and these concealed or differing from site conditions cause an increase in Contractor’s cost or time required for performance of the work under this agreement, then the Contractor shall be entitled to additional

compensation based upon the additional costs plus twenty percent (20%) for Contractors overhead and profit or a mutually agreed lump sum amount.

* * * *

7. All workmanship is guaranteed against defects for a period of (5) years from the date of substantial completion. All manufacturers' materials warranties are hereby assigned to Customer as Customer's sole remedy for any defect or failure of materials. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE. Contractor's liability is limited to repair and/or replacement of defective work. Contractor will in no event be responsible for special, incidental or consequential damages. Any claim by either Contractor or Customer arising out of or in any way relating to the work performed under this Agreement, including warranty claims involving Contractor, must be filed within eighteen (18) months of substantial completion or the final invoice, whichever is sooner.

8. In the event legal action becomes necessary to enforce any provision of this Agreement, the prevailing party in any such action shall be entitled to reasonable attorneys fee and costs. Customer and Contractor agree that all disputes shall be resolved in the county where the project is located pursuant to the Mandatory Arbitration Rules of the Superior Court in said county, regardless of the amount of the dispute and whether equitable relief (such as a lien foreclosure) is involved.

(Id.)

The contract specified a start date of January 16, 2006. (CP 36.) By January 21, 2006, the old roof had been removed and substantial deterioration and rot had been discovered in the underlying substructure. (CP 34.) On January 21, 2006, the parties entered into a change order for the repairs, which added \$4,500.00 to the contract. (CP 38-39.) The change order contained the same Conditions of Proposal as the original contract. (CP 39.)

After discovery of the rotten roof substructure and after entering into the change order on January 21, 2006, the roofing work was completed expeditiously. The entire job took approximately ten days. (CP 34; CP 43.)

At the end of January, 2006, Mr. Love demanded full payment. (CP 34.) There was additional agreed work performed beyond the change order due to the extent of the rot. Mr. Pedowitz refused to pay additional amounts due, complaining of damage to his landscape. (CP 34.) On April 18, 2006, Above All filed a small claim action for the remaining amount it believed it was owed, which was \$4,000.00. (CP 40.) The small claims action was dismissed when Mr. Pedowitz raised numerous counterclaims asserting defective workmanship. (CP 41.) Dismissal of the small claims action occurred on May 18, 2006. (*Id.*)

On September 12, 2007, Mr. Pedowitz filed a complaint against Above All in King County Superior Court. (CP 11-12.) It is undisputed that the complaint was not served until April 2, 2008. (CP 35.) On May 15, 2009, Above All filed an answer and asserted a counterclaim for unpaid labor and materials. (CP 105-06.) Mr. Pedowitz filed an answer [reply] to the counterclaim, asserting the statute of limitations as an affirmative defense. (CP 109.)

This matter then proceeded to the King County Superior Court Mandatory Arbitration Department. On January 29, 2009, a hearing was held before the assigned arbitrator, Michel P. Stearn. Mr. Stearn concluded that both parties should have the right to amend their pleadings and essentially returned the case back to the court. (CP 30-31.)

On February 3, 2009, Mr. Pedowitz filed an amended complaint. (CP 18-23.) The original complaint contained only a breach of contract cause of action. (CP 11-12.) The amended complaint contained three causes of action: for breach of contract, for misrepresentation,¹ and for a declaration that Paragraph 7 of the Conditions was unconscionable and should not be enforced. (CP 18-23.)

¹ Although the motion below need not address the issue because it was based upon the limitation provision, the misrepresentation claim is barred by the economic loss rule. See, *Alejandre v. Bull*, 159 Wn.App. 674, 153 P.3d 864 (2007); *Carlile v. Harbor Homes, Inc.*, 147 Wn.App. 193, 194 P.3d 280 (2008); *Cox v. O'Brien*, 150 Wn.App. 24, 206 P.3d 682 (2009).

Above All answered the Amended Complaint on February 24, 2009. That answer did not contain a counterclaim because the contractual limitation period had expired. (CP 26-29.) Above All asserted the contractual limitation provision as an affirmative defense. (CP 28.)

On March 16, 2009, Above All filed a motion for summary judgment based upon the 18-month limitation of action provision. The hearing occurred on April 17, 2009. After hearing the parties, the Honorable Douglass North granted the motion. (CP 150; 151-152.)

On May 26, 2009, Above All filed its motion for entry of judgment and assessment of contractual attorney's fees. (CP 159-162.) Above All requested a total of 85.2 hours, at \$250.00 per hour, for a total of \$21,300.00 plus \$80.50 in costs. The request for fees and costs was supported by declaration, and counsel's summary of reasonable attorney's fees and time incurred was attached to his declaration. (CP 165-167.) Plaintiff responded opposing any award of fees or costs. (CP 172-183.) Above All filed a reply further justifying an award of fees. (CP 197-200.)

On June 18, 2009, Judge North entered the Final Judgment. (CP 205-207.) He granted fees to Above All, but reduced the requested hourly rate to \$200.00. Fees in the amount of \$17,120.50 were awarded. Judge North found the total time incurred of 85.2 hours to be reasonable and

necessary. (CP 206.) Judge North also awarded terms for a late filing and costs. (CP 206.) The final judgment amount was for \$17,820.50. (CP 207.)

Appellant thereafter timely appealed both the entry of the summary judgment order and the final judgment awarding attorney's fees.

III. ARGUMENT AND AUTHORITIES

A. *THE APPLICABLE STANDARD OF REVIEW*

Review of an order granting summary judgment is generally de-novo. *Skinner v. Holgate*, 141 Wn.App. 840, 173 P.3d 300 (2007); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006).

The record here shows that Above All established the absence of any genuine issue of material fact as to the timeliness of the filing of the action. Even assuming the most favorable date possible for Mr. Pedowitz, this action was not timely. The burden shifted to Pedowitz to come forward with evidence establishing that this action was timely. See, *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 818 P.2d 1056 (1991). He could not nakedly assert that there are unresolved issues of fact. *Bates v. Grace United Methodist Church*, 12 Wn.App. 111,

529 P.2d 466 (1974). Conclusory allegations, speculative statements or argumentative assertions of the existence of unresolved factual issues are legally insufficient to defeat summary judgment. *McMann v. Benton County*, 88 Wn.App. 737, 946 P.2d 1183 (1997). Absent disputed facts, the legal effect of a contract is a question of law to be reviewed de-novo. *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 991 P.2d 638 (1999).

An award of contractual attorney's fees is reviewed for abuse of discretion. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983); *Schmidt v. Cornerstone Inv.*, 115 Wn.2d 148, 795 P.2d 1143 (1990). When a decision or order of the trial court is a matter of discretion, it will not be disturbed on review except upon a clear showing of abuse of discretion, this is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Miller v. Campbell*, 137 Wn.App. 762, 155 P.3d 154 (2007), citing, *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). As shown below, there was no abuse of discretion in the trial court's award of attorney's fees.

B. THE CONTRACTUAL LIMITATION OF ACTION PROVISION IS VALID

Washington has long recognized that parties to a contract may agree to a reasonable period of time within which an action must be commenced to enforce claims arising from an agreement. *Southcenter View Condominium Owners Association v. Condominium Builders, Inc.*, 47 Wn.App. 767, 736 P.2d 1075 (1986), (citing numerous cases from around the country upholding the validity of contractual limitation of action provisions. *See, Southcenter* at 772-773, 736 P.2d at 1078-79.)

In *Southcenter*, the court analyzed a one year limitation of action provision contained in a condominium purchase and sale agreement. Appellant argues that *Southcenter* is distinguished because the limitation provision was noted as appearing six times in documents signed by the purchasers. The limitation provision appeared in the purchase and sale documents, warranty documents and in the condominium declarations. It was not a case where the limitation provision appeared six times in the same document. The *Southcenter* court upheld the parties' right to agree to a shorter period than the statutory limitation period, noting that

“[t]his is not a ‘fine print’ case. It is not a case of total exclusion of warranties or remedies. Rather this case turns upon the validity of a contract term

shortening the time to notify of defects or bring suit.”

Southcenter, supra at 771.

The *Southcenter* court cited to what it described as a leading case at that time, *Capeheart v. Heady*, 206 Cal.App. 2nd 386, 23 Cal. Rptr. 851, 6 a. A.L.R. 3rd 1190 (1962). In upholding a three-month limitation of action provision contained in a lease, the *Capeheart* court is cited for holding:

(1) a provision shortening a statute of limitations can be validly contracted if the period is not in itself unreasonable or is not so unreasonable as to show imposition or undue advantage. (2) It is a question of law whether the period in itself is unreasonable. The court then cited cases validating periods as short as 3 months and statutes as short as 1 month. (3) The determination of reasonableness is to be made as of the date of entering into the contract. (4) The fact that the contractual limitation operates upon the claims of only one party does not make the limitation unreasonable. (5) The fact that the agreement was drafted by the lessor and presented on a ‘take it or leave it’ basis is not material in judging its validity.

Southcenter, supra at 772.

The subject provision in the Pedowitz-Above All agreement provides:

Any claim by either contractor or customer arising out of or in any way relating to the work performed under this Agreement, including warranty claims

involving Contractor, must be filed within eighteen (18) months of substantial completion or the final invoice, whichever is sooner.

The parties agreed that any action would be filed within 18 months of substantial completion, and also that the prevailing party would recover attorney's fees and that the mandatory arbitration rules of the superior court of the county in which the action was filed would apply. These provisions are not vague or ambiguous, were not hidden in fine print but, rather, were set out in separate, clearly worded paragraphs. Washington courts, and courts from other jurisdictions, have upheld shorter contractual limitations periods. An 18-month period is reasonable. The provision in question goes both ways: limiting actions by Pedowitz and by Above All. Pedowitz produced no evidence whatsoever that the limitation of action provision was either substantively or procedurally unconscionable. The only evidence he submitted on this issue is that he and Mr. Love never discussed the word "filing" or that the case had to be "served". (Pedowitz Declaration; CP 90.)

Mr. Pedowitz failed to raise any issues of fact regarding the enforceability of the limitation of action provision. Indeed, Mr. Pedowitz asserted the statute of limitations as an affirmative defense to Above All's counterclaim. (Above All subsequently abandoned the counterclaim

because of the limitation of action provision. (CP 3)) As a matter of law, the 18-month period is reasonable.

C. APPELLANT'S ARGUMENTS AGAINST ENFORCEMENT OF THE LIMITATION OF ACTION PROVISION HAVE NO MERIT

The attack on the validity of the limitation of action provision can be separated into the following categories:

1. That the agreement is a contract of adhesion;
2. That the agreement did not comply with RCW 19.186.020;
3. That the word "filed" is ambiguous; and
4. That service was not explicitly required in the contract, and therefore this action did not need to be perfected by service within 90-days of filing.

These arguments are addressed in order.

1. THIS IS NOT A CONTRACT OF ADHESION

Appellant Pedowitz summarily concludes that the subject agreement was a contract of adhesion, without providing any supporting analysis. A transaction based on a contract containing a clause which limits certain remedies does not violate public policy when there is no

significant difference in the bargaining strengths of the parties. *American Nursery v. Indian Wells*, 115 Wn.2d 217, 797 P.2d 477 (1990). There was no evidence of any disparity of the bargaining strengths of the parties. Mr. Pedowitz could have rejected the conditions of the proposed contract or found another roofer to do the work. Thus, no contract of adhesion is involved here. *American Nursery, supra*.

Mr. Pedowitz also boldly asserts that the contract is in such small print as to make it unenforceable, when, as the court see, the font is standard size. (CP 38-39.)

The CONDITIONS are contained in nine separate paragraphs, not in one run-on paragraph. There is no haze of fine print. Mr. Pedowitz does not contend that he could not understand any of the paragraphs. This is not a case of procedural or substantive unconscionability.

Procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction, including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, or whether the important terms were hidden in fine print. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 210 P.3d 318 (2009).

Mr. Pedowitz failed to present any evidence below, and fails to argue here, that the circumstances of entering into the contract were in any

way unfair, that he was deprived of the opportunity to understand the contract conditions, or that the terms he complains of were hidden in fine print. This is not a case where there was a lack of meaningful choice.

Indeed, Mr. Pedowitz signed the original contract and the change order, both of which contained the CONDITIONS OF PROPOSAL. He agreed to the conditions in two separate agreements signed over a month apart.

Substantive unconscionability involves a clause or term in a contract that is overly one-sided or overly harsh. Such unfairness must truly stand out and be “shocking to the conscience,” “monstrously harsh” and “exceedingly calloused”. *Torgeson, supra* at 323, citing *Nelson v. McGoldrick*, 127 Wn.2d 124, 896 P.2d 1258 (1995), *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 16 Wn.App. 439, 556 P.2d 552 (1976).

Here, the limitation of action and limitation of remedies provisions in paragraph 7 are in the same size font as other key provisions. There are only 9 paragraphs in the entire “conditions” portion of the contract. The limitation provisions are not hidden in a maze of fine print, as, indeed, there is no fine print in this entire agreement.

In response to the summary judgment motion below, Pedowitz submitted that there were no discussions between the parties as to what

“filing” meant, or “about when things had to be ‘served’ or that filing included serving.” (CP 90.) This is not evidence of unconscionability. There is no evidence that he lacked any meaningful choice in entering into this agreement. The contract is not “shocking to the conscience,” or “monstrously harsh.”

A party to a contract that has been voluntarily signed will not be heard to argue that he did not read it or was ignorant of its contents. *Perry v. Cont’l. Ins. Co.*, 178 Wn. 2d, 33 P.2d 661 (1934). “One cannot, in the absence of fraud, deceit or coercion, be heard to repudiate his own signature voluntarily and knowing fixed to an instrument whose contents he is in law bound to understand. . . . The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.” *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912-913, 506 P.2d 20 (1973). “A party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding.” *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003), citing John D. Calamari & Joseph M. Perillo, *The Law of Contracts*, 376 (4th ed. 1988).

Appellant fails to set forth any facts or argument to support a conclusion that this was a contract of adhesion or that the agreement was unconscionable in any respect. There was no fraud, deceit or coercion in

this case. Mr. Pedowitz is bound by his signature on this contract, including the clear terms and provisions regarding the limitation of actions and remedies.

2. RCW 19.186.020 DOES NOT APPLY

In the trial court, Mr. Pedowitz did not assert that RCW 19.186.020 applies. (See, CP 72-85.) Arguments raised for the first time on appeal are generally not considered. See, e.g. *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983); RAP 2.5 (a).

Even if considered, RCW 19.186.020 does not apply. That statute specifically does not apply to the following contracts:

(e) Roofing or siding contracts in which the homeowner was not directly solicited by a roofing or siding contractor or salesperson.

RCW 19.186.010 (7)(a) defines “solicit” to mean

“to initiate contact with the homeowner for the purpose of selling or installing roofing or siding by one of the following methods:

- (i) Door-to-door contact;
- (ii) Telephone contact;
- (iii) Flyers left at residence; or

(iv) Other promotional advertisements which offer gifts, cash, or services if the homeowner contacts the roofing or siding contractor or salesperson, except for newspaper advertisements which offer a seasonal discount.

(b) "Solicit" does not include:

(i) Calls made in response to a request or inquiry by the homeowner; or

(ii) Calls made to homeowners who have prior business or personal contact with a residential roofing or siding contractor or salesperson.

It was Mr. Pedowitz who initiated contact with Above All Roofing, requesting a bid. (CP 33-34.) There was no direct, or indirect, solicitation by Above All. No evidence was submitted that Above All conducted any type of solicitation. Mr. Pedowitz's arguments that RCW 19.186.020 was not followed are meritless, as the statute clearly does not apply.

3. ***"FILED" IS NOT AMBIGUOUS***

Mr. Pedowitz also asserts that the word "filed" is ambiguous, but clearly it is not. He attempts to read ambiguity into this contract. Black's Law Dictionary defines "filed" as:

To deliver a legal document to the court clerk or record custodian for placement into the official record ... to commence a lawsuit.

Black's Law Dictionary (7th Ed. 1999).

Any claim by Pedowitz against Above All, or by Above All against Pedowitz, was required to be filed with a court clerk of record within 18 months of substantial completion. Mr. Pedowitz obviously knew how to file because he did so on September 12, 2007. But, filing only tentatively commenced the lawsuit, and, as discussed below, the action had to be perfected by service within 90 days of September 12, 2007. Mr. Pedowitz concedes that he failed to do so.

In Paragraph 8, the agreement contains provisions for an award of prevailing party attorney's fees, and for the application of the rules of mandatory arbitration. Those provisions would be rendered meaningless if "filed" is construed to mean filing with the Better Business Bureau or Attorney General's office, as Appellant suggests the word can be defined. Prevailing party fees cannot be obtained in such venues and the arbitration rules do not apply there. A court cannot disregard language used by the parties and construction of a contract giving effect to all provisions is preferred over one rendering one or more of the provisions meaningless. *See, Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007); *Agnew v. Lacey Co-Ply*, 33 Wn.App. 283, 654

P.2d 712 (1982). Mr. Pedowitz's interpretation of "filed" ignores the parties agreement and Black's definition of "filed," and would render Paragraph 8 totally meaningless. In general, a court will give the words of a written agreement their ordinary, usual and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005). The word "filed" is not ambiguous.

**4. SERVICE DID NOT NEED TO BE EXPLICITLY
REQUIRED IN THE CONTRACT BECAUSE SERVICE
AND FILING ARE REQUIRED TO PERFECT ANY
ACTION**

Mr. Pedowitz argues that, because the contract did not explicitly require service, service was not necessary to perfect this action. Whether set out in a contract or not, the rules for perfecting commencement of an action apply to all cases.

Appellant cites CR 3(a) in his opening brief as support for his argument that this action was properly commenced. That rule provides that an action is commenced by service of copies of the summons and complaint, or by filing of the complaint. However, Appellant omits the last sentence of this rule, which states:

An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170.

RCW 4.16.170 provides:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or the summons is served whichever occurs first. If service has not been had on the defendant prior to filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. **If following service, the complaint is not so filed, or filing following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.**

(Emphasis Supplied.)

Regardless of whether service is explicitly required in a contract limitation provision, if service is not made within 90 days after filing, the action is deemed to not have been commenced for the purpose of tolling any limitation period.

In *Wothers v. Farmers Insurance Company of Washington*, 101 Wn.App. 75, 5 P.3d 719 (2000), the court upheld a one year limitation of action provision contained in a Farmers insurance policy. *Wothers* filed suit one day prior to the expiration of the one-year period, but did not

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serve Farmers until 99 days later. *Wothers*, supra at 78. The court stated, at 79, as follows:

Washington courts have repeatedly held that the mere filing of a complaint alone does not constitute the commencement of an action for the purposes of tolling any applicable statute of limitation **whether statutory or by contract**. A person bringing suit must also serve the defendant within 90 days of the date of filing in order for the commencement to be complete. (fn.3) RCW 4.16.170 PROVIDES THAT either service or filing tentatively tolls the statute of limitation. If the additional step (service after filing or filing after service) is not accomplished within 90 days, the action is treated as if it had not been commenced. (fn.4)

Wothers argument that RCW 4.16.170 applies only to statutes of limitation and not contractual limitations is incorrect. 'A contract limitation prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable.' (fn.5) A statute of limitation cannot enlarge time for the commencement of an action when the time limitation therefore is fixed by contract. (fn.6)

Wothers, supra at 79-80. (Emphasis Supplied.)

No action is commenced for the purpose of tolling any limitation period, whether by contract or statutory, unless service occurs within 90 days of filing. Here, service did not occur until April 2, 2008, **203 days after filing**. The contractual limitation provision was not tolled on September 12, 2007, and it continued to run.

Mr. Pedowitz admits that he did not serve the summons and complaint until April 2, 2008, 203 days after filing. The action was thus

not commenced on September 12, 2007. Assuming any date offered by Pedowitz, this action is untimely.

D. *THERE ARE NO GENUINE ISSUES OF MATERIAL FACT REGARDING WHEN THE CONTRACT LIMITATION PERIOD BEGAN TO RUN*

Mr. Pedowitz argues that issues of fact exist that cannot be resolved on summary judgment. (Appellant's Brief, pg. 21-23.) He contends that there are issues concerning when "substantial completion" occurred and as to the interpretation of the word "filed." "Filed" is not ambiguous, and its interpretation is an issue of law for the court. *See, Litho-Color, supra.* No evidence was submitted below to raise any issue as to when "substantial completion" occurred. Moreover, even if there was an issue over when "substantial completion" occurred, the date most favorable to Mr. Pedowitz was assumed below. This action was untimely no matter what date is used.

The 18-month contractual limitation period commenced upon "substantial completion" or issuance of the final invoice, whichever was sooner. "Substantial completion" is not defined in the agreement, but is defined in the Washington construction statute of repose to mean "the

state of completion reached when an improvement upon real property may be used or occupied for its intended use.” RCW 4.16.310.

Both Ryan Love and his employee, Dale Sperrier, submitted declarations stating that the work was complete within ten days after commencement, or by January 31, 2007. (CP 34; CP 43.) The only evidence submitted in response, the declaration of Mr. Pedowitz, provided that he knew work continued into March, 2006, because he made progress payments, the last on March 17, 2006. Such testimony fails to dispute when “substantial completion” occurred, and does not dispute that the roof was being used for its intended purpose by the end of January, 2006. The roof’s intended purpose was to cover the house. The work was accomplished during rainy January, 2006. The roof has been used for its intended purpose for approaching 4 years now. There is no evidence that even suggests that the roof has not been used by the Pedowitzs for its intended purpose. Therefore, “substantial completion” occurred by January 31, 2006, and Pedowitz had until July 31, 2007 to file the lawsuit. He did not do so.

Mr. Pedowitz also claims that he made what he contends was the final contract payment on March 17, 2006. The date of final payment assumes that a “final invoice” had to have been issued. Clearly, Mr. Pedowitz would not have made what he contends was final payment

unless the job was substantially complete. If the date of final payment is used as the trigger for the running of the contractual limitation period, this action still was untimely. While the 18-month period would not have run until September 18, 2007 and the original complaint was filed six days before that deadline on September 12, 2007, Mr. Pedowitz failed to perfect the suit by serving within 90 days of filing. The limitation period was thus not tolled, and the action is treated as if it had never been commenced.

Wothers, supra.

The same result occurs using the date most favorable to Mr. Pedowitz, the date the small claims action was dismissed, May 18, 2006. Using this date ignores the trigger language of Paragraph 7, but, even assuming this date, the action still is untimely. From May 18, 2006, the 18-month period expired November 19, 2007. Filing in King County Superior Court on September 12, 2007 only tentatively tolled the limitation period, and, because service did not occur within 90 days of filing, the limitation period continued to run. Under RCW 4.16.170, Mr. Pedowitz was allowed until the 91st day after filing, or until December 13, 2007, to affect service. Service did not occur until April 2, 2008.

Mr. Pedowitz asserts that substantial completion never occurred. This ignores the definition of the term and the facts in this record. It is

uncontroverted that the roof has been put to its intended purpose since the end of January, 2006. There are no facts to the contrary.

This action is deemed not to have been commenced on September 12, 2007 because service did not occur until 203 days after filing. Any way that it is analyzed, Appellant failed to timely commence and perfect this lawsuit.

E. ATTORNEY'S FEES WERE PROPERLY AWARDED

The subject contract provides that the prevailing party is entitled to reasonable attorney's fees and costs. (CP 39.) Mr. Pedowitz acknowledges that review of the award of fees is for abuse of discretion. He failed to establish by clear evidence that the trial court exercised its discretion in a manifestly unreasonable way, or on untenable grounds or for untenable reasons. *Miller, supra*. Pedowitz made the same arguments to the trial court regarding the adequacy of the fee documentation and the reasonableness of fees. Judge North exercised his discretion, reducing the hourly rate requested and approving the hours expended. He concluded that the documentation established that the fees were justified and reasonable. He specifically found that the hours expended "are reasonable

and necessary as supported by defendant's summary of time expended and declaration." (CP 206.)

Mr. Pedowitz repeatedly argues that there was no segregation of fees expended pursuing the counterclaim from those defending against Pedowitz's claims. But, he fails to mention that Above All abandoned the counterclaim and did not assert it in its answer to the amended complaint. The abandoned counterclaim simply has no relevance to the fee analysis. (CP 26-29.)²

Mr. Pedowitz's argument that he was a "prevailing party" is frivolous. It is based upon the contention that Above All was awarded nothing on the counterclaim. Mr. Pedowitz cannot be heard to argue that he prevailed on a claim that was no longer in the case at the time summary judgment was granted. The response in opposition to Above All's summary judgment motion did not mention the counterclaim (CP 72-85.) Pedowitz sought no affirmative relief in response to the motion for summary judgment, and did not file a cross-motion. (*Id.*) The order on the summary judgment motion does not mention the counterclaim. (CP 151-152.) The final judgment issued June 18, 2009, likewise is silent as to a counterclaim, because no counterclaim existed. (CP 205-207.) How

² Above All actually abandoned all collection attempts when the 18-month statute of limitations from the date of substantial completion (January 31, 2006) expired on July 31, 2007. (CP 3.)

Pedowitz can possibly assert that he is a prevailing party, in any part, is a mystery. He can not.

In *Marine Enterprises, Inc. v. Security Pacific Trading, Corp.*, 50 Wn.App. 768; 750 P.2d 1290 (1988), the court stated:

RCW 4.84.330 provides that a prevailing party is entitled to attorney's fees if the contract which is the subject of the action authorizes such an award. Although, RCW 4.84.330, applies to contracts with unilateral attorney's fee provisions, *Herzog Aluminum, Inc. v. General Am. Window, Corp.*, 39 Wn.App. 188, 196-197, 692 P.2d 867 (1984), interprets RCW 4.84.330 as applying to bilateral provisions as well. In *Herzog*, the court permitted a defendant to recover attorney's fees pursuant to RCW 4.84.330 when he successfully defended a breach of contract action by proving that there was no enforceable contract. *Herzog* and its progeny stand for the proposition that where a purported contract allows attorney's fees to be awarded to a successful plaintiff, a successful defendant should be permitted to recover as well. *Park v. Ross Edwards, Inc.*, 41 Wn.App. 833, 706 P.2d 1097, *Review den'd*, 104 Wn.2d 1027 (1985).

The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties. *Rowe* at 535 n.4, 629 P.2d 925; see also *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983); *Tallman v. Durussel*, 44 Wn.App. 181, 185, 721 P.2d 985, *Review den'd*, 106 Wn.2d 1013 (1986).

Marine Enterprises, supra at 772-773.

Here, the relief granted was solely in favor of Respondent Above All. Appellant Pedowitz did not prevail on any issue, and obtained no relief. Mr. Pedowitz was not, by any stretch of the imagination, a prevailing party.

Judge North exercised his discretion and found that the documentation regarding the fee request was adequate and supported an award of fees and costs. The judgment recites that the agreement of the parties provided for such an award to the prevailing party, that the hourly rate charged was reasonable, that the hours expended were reasonable and necessary and that they were supported by the summary of time expended and counsel's declaration. Appellant has failed to show manifest abuse of discretion. The attorney's fee award should be upheld.

F. REQUEST FOR FEES UNDER RAP 18.1

Pursuant to RAP 18.1, Respondent Above All hereby requests an award of fees on this appeal.

Fees may be awarded as part of the cost of litigation when there is a contract, statute, or recognized ground in equity for awarding such fees. *West Coast Stationary Engr.'s Welfare Fund v. City of Kennewick*, 39 Wn.App. 466, 477, 694 P.2d 1101 (1985). "A contractual provision for an

award of attorney's fees at trial supports an award of attorney's on appeal under RAP 18.1." *West Coast Stationary Engineer's supra* at 477; see also *Landberg v. Carlson*, 108 Wn.App. 749, 333 P.3d 406 (2001), *review denied*, 146 Wn.2d 1008, 51 P.3d 86 (2002).

Paragraph 8 of the contract between Pedowitz and Above All allowed for an award of fees and costs below, and supports an award on appeal. Under the authorities cited above, Respondent Above All requests an award of reasonable attorney's fees and costs expended on appeal.

IV. CONCLUSION

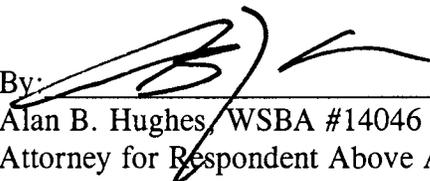
The 18-month limitation of action provision in the parties' agreement was reasonable and valid. Appellant failed to perfect commencement of his lawsuit within that period of time. The trial court correctly ruled that this lawsuit was time barred.

The trial court also correctly awarded attorney's fees to Respondent as the prevailing party, under the contract between the parties. The trial court exercised its discretion, which is supported by the findings of fact and conclusions of law contained in the final judgment. Appellant has failed to show that the trial court manifestly abused its discretion in awarding fees and costs.

The ruling of the trial court should be affirmed. Respondent Above All Roofing should be awarded fees and costs on appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 30th day of October, 2009.

ALAN B. HUGHES, P.S.

By: 
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NO. 63651-1-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

RICHARD PEDOWITZ,

Appellant,

v.

ABOVE ALL ROOFING SPECIALISTS, LLC.

Respondent,

CERTIFICATE OF SERVICE

Alan B. Hughes
WSBA #14046
Attorney for Respondent

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COURT OF APPEALS DIV. I
STATE OF WASHINGTON
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ORIGINAL

I, Nancy J. Schwalier, under penalty of perjury of the laws of the State of Washington, hereby certify and declare as follows:

2. That I make this declaration based upon personal knowledge and belief and am competent to testify to the facts set forth below.

3. On October 30, 2009, I placed a copy of *RESPONDENT'S BRIEF*, and this *CERTIFICATE OF SERVICE* into the mail, with the United States Postal Service, First Class Postage Prepaid, for delivery upon:

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Signed at Seattle, Washington, on October 30, 2009.

ALAN B. HUGHES, P.S.

By: 
Nancy J. Schwalier