

64242-1

64242-1

No. 64242-1-I

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

GLOBAL TRANSPORTATION SERVICES, INC.,

Appellant,

v.

KITA NAKLIYAT SAN. VE. TIC. A.S.,

Respondent.

APPELLANT GLOBAL TRANSPORTATION SERVICES INC.'S
OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR..... 3

III. STATEMENT OF THE CASE 6

 A. Procedural Facts. 6

 B. Substantive Facts. 7

IV. ARGUMENT..... 10

 A. Pursuant to RAP 10.4(d), Appellant Global Moves for an Order Holding That the Order and Judgment Fails to Comply with CR 54(b), That the Judgment Should Not Have Been Entered, and Is Not Yet Final or Appealable at This Time..... 10

 B. The Trial Court Erred When It Treated the Acknowledgment of Debt as an Independent, Substantive Contract..... 13

 C. The Trial Court’s Granting of Summary Judgment on Kita’s Breach of Contract Claim, and the Order and Judgment Entered Thereon, Was Error Because Questions of Material Fact Precluded Summary Judgment. 14

 D. The Trial Court Erred When It Refused To Grant Global’s Request for a CR 56(f) Continuance..... 19

 E. The Trial Court Erred When It Granted Summary Judgment and Entered the Order and Judgment Thereon in the Amount of \$280,200.76 Because the Amount of Any Liability That Global May Have Had to Kita Was Subject to Offset by Any Award to Global on Global’s Counterclaim, Which Remains Pending..... 20

V. CONCLUSION 22

TABLE OF AUTHORITIES

STATE CASES

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990)..... 15

Bingham v. Lechner, 111 Wn. App. 118, 45 P.3d 562 (2002) 21

Crown Plaza Corp. v. Synapse Software System, Inc., 87 Wn. App.
495, 962 P.2d 824 (1997) 15

Fluor Enterprises, Inc. v. Walter Construction, Ltd., 141 Wn. App.
761, 172 P.3d 368 (2007) 2, 11-12

Griffin v. Lear, 123 Wash. 191, 212 P.2d 71 (1923)..... 13

Hollis v. Garwall, Inc., 137 Wn.2d 683, 974 P.2d 836 (1999)..... 15

Jewell v. Long, 74 Wn. App. 854, 876 P.2d 473 (1994)*passim*

Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 100 P.2d 791
(2004)..... 17-18

Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 82 P.3d 1199 (2004)... 12, 21

Scott Galvanizing, Inc. v. Nw EnviroServices, Inc., 120 Wn.2d
573, 844 P.2d 428 (1993) 15

U.S. Life Credit Life Insurance Co. v. Williams, 129 Wn.2d 565,
919 P.2d 594 (1996) 14-15

Vant Leven v. Kretzler, 56 Wn. App. 349, 783 P.2d 611 (1989)..... 19

*Western Washington Corp. of Seventh-Day Adventists v.
Ferrellgas, Inc.*, 102 Wn. App. 488, 7 P.3d 861 (2000)..... 14

STATUTES AND RULES

RCW 19.36.100 17-18

RCW 19.36.110 17-18

CR 54(b) 11

CR 56(f)..... 19
CR 58..... 11
RAP 2.2(d).....2, 12
RAP 10.4(d).....*passim*

DOCKETED CASES

*Kita Nakliyat San. VE. TIC. A.S., v. Global Transportation
Services Inc., Case No. 09-2-17387-7SEA..... 6*

I. INTRODUCTION

Appellant, Global Transportation Services (“Global”), and respondent, Kita Nakliyat San. (“Kita”), engaged in a number of joint ventures in Turkey, Russia, and several other countries relating to the transportation and shipment of equipment for large international projects (for example, G.E. generators and the like). Kita brought this action seeking payment on a debt related to the parties’ joint ventures. Global counterclaimed for tortious interference with its contractual relationships and business expectancies.

Three primary issues are raised on appeal. First, this Court must decide whether the Order and Judgment on Plaintiff’s Motion for Summary Judgment (“Order and Judgment”) appealed from is a final judgment or not. This case involved Kita’s breach of contract claim against Global, and Global’s counterclaims for tortious interference and conspiracy against Kita. In the underlying proceedings, Kita moved by separate motions (a) to dismiss Global’s tort counterclaim and (b) for summary judgment on its claim for breach of contract. The trial court granted Kita’s motion for summary judgment on its claim but denied Kita’s motion to dismiss Global’s counterclaims, and Global’s counterclaims remain pending before the trial court. Nevertheless, the trial court entered judgment on Kita’s claim. Despite Global’s objection

at oral argument on the motion for summary judgment, and despite Global's subsequent motion for reconsideration on the matter, Kita did not move, and the court did not enter findings under CR 54(b). Believing it had a final judgment despite the pendency of Global's counterclaim, Kita immediately began enforcement actions on its partial judgment, filing writs of garnishment on Global's bank account. Global appealed the partial judgment in order to preserve any appeal that it might have. However, it is appellant Global's belief that the partial judgment entered by the court, because it did not conform to CR 54(b), is not final, enforceable, or appealable at this time under this Court's decision in Fluor Enterprises, Inc. v. Walter Construction, Ltd., 141 Wn. App. 761, 172 P.3d 368 (2007). See also RAP 2.2(d). The trial court erred when it entered a partial judgment that did not conform to CR 54(b) and, pursuant to RAP 10.4(d), Global moves the Court for an order holding that the Order and Judgment appealed from should not have been entered and is not yet final or appealable at this time because the requirements of CR 54(b) have not been met.

In the event the Court finds that the Order and Judgment appealed from is final and appealable even though the requirements of CR 54(b) have not been met, then the Court must determine whether the trial court erred in entering summary judgment because questions of fact

prevented the court from finding as a matter of law that Global was liable on the alleged debt. In addition, and regardless of whether liability on the alleged debt could be determined as a matter of law, this Court must also determine whether the trial court erred by granting summary judgment on the amount of the alleged debt since that amount was subject to offset by any amount that a jury awards in favor of Global and against Kita on Global's counterclaims—claims that remained pending at the time the trial court entered summary judgment and are still pending before the trial court. Because Global's counterclaims remain pending, the amount of Kita's claim remains subject to offset. Therefore, summary judgment in the full amount of Kita's claim was improper until Global's counterclaim is decided and any resulting offset is applied.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: Global assigns error to the trial court's Order and Judgment and to the Order denying Reconsideration on the grounds that the Order and Judgment failed to meet or conform to the requirements of CR 54(b). The issue pertaining to this assignment of error is whether the Order granting summary judgment in favor of Kita and the Judgment entered thereon was required to conform to CR 54(b) because at the time summary judgment was granted and Judgment was entered, Global's counterclaims remained pending. Because the

requirements of CR 54(b) applied to the Order and Judgment, and because those requirements were not met, pursuant to RAP 10.4(d), Global moves the Court for an order holding that the Order and Judgment should not have been entered and is not yet final or appealable at this time.

Assignment of Error No. 2: Global assigns error to the trial court's Order and Judgment on the grounds that the trial court erroneously treated the Acknowledgment of Debt on which Kita relied as a separate and independent contract, contrary to Jewell v. Long, 74 Wn. App. 854, 856, 876 P.2d 473 (1994). The issue related to this assignment of error is whether summary judgment on a breach of contract claim can be entered solely on the basis of an Acknowledgment of Debt which, under Jewell, does not create a new or substantive contract when (a) the Acknowledgment itself did not include any of the terms or conditions of payment to which the parties had agreed (in their underlying substantive contract), and (b) the material terms of the underlying substantive contract were never presented to the Court and are disputed.

Assignment of Error No. 3: Global assigns error to the trial court's Order and Judgment on the grounds that questions of material fact existed as to the terms and conditions of the parties' agreement,

questions of fact existed as to whether Kita fraudulently obtained the Acknowledgement of Debt on which it relied (or otherwise made misrepresentations in the course of obtaining the Acknowledgment), and that these questions of fact required the issue of Global's liability on the alleged debt to go to the jury.

Assignment of Error No. 4: Global assigns error to the trial court's Order and Judgment on the grounds that the trial court erroneously refused to grant Global's CR 56(f) request to conduct discovery and obtain material facts relating to the substance of the parties' underlying contractual agreements, facts that were material to Kita's breach of contract claim and were disputed, and which were not contained in the Acknowledgment of Debt relied upon by Kita and the court in entering summary judgment. The issue pertaining to this assignment of error is whether Global was entitled to conduct discovery before summary judgment could be granted in favor of Kita.

Assignment of Error No. 5: Global assigns error to the trial court's Order and Judgment and to the trial court's Order denying Reconsideration on the grounds that regardless of Global's liability on any alleged debt, the *amount* of the debt and the *amount* of any judgment thereon was subject to offset by any award in favor of Global on Global's counterclaims against Kita. Since Global's counterclaims were

pending at the time of the Order and Judgment (and still remain pending before the trial court at this time), the trial court erred when it granted summary judgment on the full amount of the debt claimed by Kita. The issue pertaining to this assignment of error is whether the *amount* of liability on a claim cannot be determined on summary judgment, and judgment cannot be entered thereon, when the *amount* of any liability is subject to offset by a counterclaim that remains pending and undecided as of the time a partial judgment is entered.

III. STATEMENT OF THE CASE

A. Procedural Facts.

Kita is the plaintiff and Global is the defendant and counterclaimant in an action that remains pending before the King County Superior Court (Kita Nakliyat San. VE. TIC. A.S., v. Global Transportation Services Inc., Case No. 09-2-17387-7 SEA).

Kita's Complaint asserted a claim for breach of contract against Global. CP 3-4. Kita claimed that Global had breached a contract with Kita by failing to pay \$280,200.76. CP 3-5. Global answered and asserted counterclaims for tortious interference with a contract, misappropriation of trade secrets, and civil conspiracy. CP 6-13.

Kita moved for summary judgment on its breach of contract claim, which the Court granted. Global moved for reconsideration, CP

162-165, which the Court denied. CP 170. Kita also moved to dismiss Global's counterclaims, which the Court denied. CP 157. Consequently, the action between Kita and Global remains pending before the King County Superior Court.

At the time of the summary judgment hearing, Kita asked that judgment be entered on its claim. However, Kita did not request, and the Court never entered, any findings under CR 54(b). At the hearing, counsel for Global objected to entry of judgment on the grounds the requirements of CR 54(b) had not been met. The Court invited Reconsideration on the issue, which it then denied. CP 167-170.

The court entered the Order and Judgment, CP 160-61, despite that Global's counterclaims remained pending and the requirements of CR 54(b) had not been met. Kita immediately treated the Order and Judgment as final and is actively seeking to enforce it by obtaining writs of garnishment on Global's bank account.

B. Substantive Facts.

Defendant Global is engaged in the business of international freight forwarding and related services. CP 105, 112. Global's services include warehousing, shipping and transportation, customs and legal services related to international shipping, back office documentation and

processing, arranging necessary vendor and supplier services, and provision of ground carrier networks for heavy cargo projects. Id.

Approximately five years ago, Global entered into a business relationship, and engaged in several specific international cargo transportation ventures, with Kita, a Turkish freight forwarding company. The joint projects of Global and Kita were primarily in Turkey, as well as in other countries such as Russia and Pakistan. CP 105-06, at ¶ 3.

Working together, Global and Kita developed a database of sales targets and together engaged in sales and marketing efforts. CP 106, at ¶ 4. These joint efforts ultimately resulted in several cargo projects, including a project for the shipment of G.E. power plants to Russia. Id. For all the various cargo projects that Kita and Global engaged in together, including the Russian power plant project, Global arranged and provided all export and transportation services, developed a ground carrier network, identified and developed relationships with vendors and suppliers, and provided all of the logistics, including back office processing, documentation, customs and legal services, and specific business processes. Id. at ¶ 5. Kita provided sales support along with Global. Id.

Global also financed all of the joint projects, including the Russian power plant project, requiring Global to advance significant amounts of capital to finance each project, paying vendors, shipping costs, and other overhead. Id. at ¶ 6. Global would then be responsible for collecting payments from customers. Id. As a project proceeded, the accounts for the project would be reconciled to completion of the project. Id.

With regard to the Russian power plant project, following reconciliation of project accounts, Global and Kita agreed that Kita's share of the profits would be approximately \$280,000. CP 106-107, at ¶ 7. Global and Kita further agreed that both parties' profits from this and other projects would be used to finance ongoing and future ventures, and that Kita's portion of the profits from the Russian project would be paid to Kita out of the proceeds of other joint activities when those projects began to pay off. Id.

In the meantime, Kita requested that Global execute an "Acknowledgment of Debt" to be used by Kita so that it could obtain a line of credit from its bank. Id. It was discussed and agreed that the amount represented by the Acknowledgment was to be reinvested and was not currently payable to Kita. Id. Global's execution of the Acknowledgment of Debt did not alter or affect Kita's agreement that

the amounts “owed” would be used to finance ongoing ventures; it was provided pursuant to the parties’ express understanding that Kita would be “repaid” out of the profits generated by the parties’ ongoing joint business activities. Id.

What Kita told the banks about the Acknowledgment was, at the time of the summary judgment hearing, the subject of pending discovery. See CP 111-119. It is assumed, of course, that the documents will show that Kita fully disclosed the circumstances of the Acknowledgment, including the reinvestment agreement. Regardless, almost immediately following Global’s execution of the Acknowledgment of Debt, Kita ceased doing business with Global, cut Global out of the parties’ ongoing and planned projects and the profits generated by them, and breached the parties’ understanding and agreement with respect to reinstatement and payment of the proceeds from the Russian power plant project. CP 107, at ¶¶ 8,9.

IV. ARGUMENT

A. Pursuant to RAP 10.4(d), Appellant Global Moves for an Order Holding That the Order and Judgment Fails to Comply with CR 54(b), That the Judgment Should Not Have Been Entered, and Is Not Yet Final or Appealable at This Time.

Under RAP 10.4(d), a party may include in a brief a motion which, if granted, would preclude hearing the case on the merits. Here,

Global moves the Court for an order determining the finality, or lack thereof, of the Order and Judgment that was entered on Kita's motion for summary judgment on its breach of contract claim.

At the time the trial court entered the Order and Judgment, Global's counterclaims against Kita remained pending. See CP 8, 157. They still remain pending and are set for jury trial on October 18, 2010. Thus, the Order and Judgment was a partial judgment in a case that involved multiple claims, some of which remain pending. Accordingly, in order to be "entered" as a final, enforceable and appealable judgment under CR 58, the Order and Judgment was required to conform to the provisions of CR 54(b). See CR 58; CR 54(b). It is undisputed that the Order and Judgment does not meet the requirements of CR 54(b). See CP 160-61. See also CR 54(b) (stating that the requirements of CR 54(b) must be set forth in writing in the judgment itself).

The fact that the Order and Judgment does not meet the requirements of CR 54(b) is dispositive on the issue of whether the Order and Judgment could be "entered" under CR 58 as a final, enforceable, and appealable judgment. The issue is controlled by this Court's decision in Fluor Enterprises, Inc. v. Walter Construction, Ltd., 141 Wn. App. 761, 172 P.3d 368 (2007). In Fluor, this Court expressly held that even where a partial judgment has been entered by the trial court, it is

not final, and is, therefore, neither enforceable nor appealable if the requirements of CR 54(b) have not been met. See Fluor, 141 Wn. App. at 766-67. Accord, e.g., Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 693-94, 82 P.3d 1199 (2004). Because an order or judgment that does not conform to CR 54(b) is not final or enforceable, it is also not appealable. See RAP 2.2(d).

Despite the foregoing controlling rule of law, the court erroneously entered the Order and Judgment, and Kita has treated it as final and enforceable. Indeed, Kita has already obtained writs of garnishment based upon the Order and Judgment *even though the controlling rule of law clearly holds that the Order and Judgment is not final, enforceable or appealable at this time*. Kita apparently believes that because Global, as a precaution, appealed the Order and Judgment, Global's appeal makes the Order and Judgment final. This is incorrect. Global's appeal was taken as a precautionary measure to ensure that it did not lose any right of appeal that it might have. Global's appeal, however, does not change the fact that the Order and Judgment did not resolve the action below, that the action below included multiple claims, and that the requirements of CR 54(b) have not been met. Accordingly, pursuant to RAP 10.4(d), Global moves this Court for an order holding that the Order and Judgment on plaintiff (Kita's) motion for summary

judgment should not have been, and could not be, entered under CR 58 and is not final, enforceable or appealable at this time because the requirements of CR 54(b) have not been met.

B. The Trial Court Erred When It Treated the Acknowledgment of Debt as an Independent, Substantive Contract.

Kita's motion for summary judgment was predicated solely on the Acknowledgment of Debt. Kita argued that the Acknowledgment required Global to immediately pay Kita the amount identified in the document. However, the Acknowledgment does not constitute an independent contract. See, e.g., Jewell v. Long, 74 Wn. App. 854, 856, 876 P.2d 473 (1994) (when an acknowledgment of debt is provided before the statute of limitations runs on the original contract, the acknowledgment does not create a new and substantive contract, but is to be merely evidence of an existing liability) (citing Griffin v. Lear, 123 Wash. 191, 198, 212 P. 271 (1923)). Here, Global's obligations to Kita arose from the parties' underlying agreements, not from the Acknowledgment itself. See id. But, Kita provided no evidence related to the parties' substantive agreement. Therefore, Kita failed to prove a breach of contract. It was, therefore, error for the court to grant summary judgment predicated on the Acknowledgment, particularly where the Acknowledgment contained no terms, the circumstances under

which it was obtained and its purpose were disputed, see CP 106-07, and the parties' underlying business relationship—essentially a joint venture—under which the alleged debt arose and was to be reinvested, were not before the court and were disputed.

C. **The Trial Court's Grant of Summary Judgment on Kita's Breach of Contract Claim, and the Order and Judgment Entered Thereon, Was Error Because Questions of Material Fact Precluded Summary Judgment.**

The Acknowledgment did not form an independent contract and, at best, provided evidence only of a pre-existing agreement between the parties. Jewell, 74 Wn. App at 856. The material terms of the underlying agreement, however, were disputed. Global offered Mr. Totah's declaration evidencing the parties' agreement that the money referenced in the Acknowledgment arose from the parties' joint projects and was to be reinvested in other joint endeavors and that the Acknowledgment did not constitute an unconditional promise to pay. See CP 106-07, at ¶¶ 7-9. Rather, the Acknowledgment was requested by Kita, and given by Global, solely to assist Kita in obtaining a line of credit as the parties' joint ventures proceeded. See id. at ¶ 7.

The goal of contract interpretation is to ascertain the parties' intent. W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 7 P.3d 861 (2000) (citing U.S. Life Credit Life Ins.

Co. v. Williams, 129 Wn.2d 565, 569, 919 P.2d 594 (1996)).

Washington courts use the “context rule” of interpretation. Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Under this rule, extrinsic evidence is admissible to give meaning to the contract language. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999) (extrinsic evidence illuminates what was written, not what was intended to be written). Thus, Washington Courts determine intent “not only from the actual language of the agreement, but also from ‘viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’” Scott Galvanizing, Inc. v. Nw EnviroServices, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993) (quoting Berg, 115 Wn.2d at 667).

Here, Global provided relevant extrinsic evidence concerning both the parties’ underlying agreements and the facts and circumstances related to the execution of the Debt Acknowledgment.¹ Mr. Totah’s

¹ Because the underlying agreements regarding the proceeds of their joint business endeavors are predominantly oral, summary judgment is particularly inapt. Washington courts are reluctant to grant summary judgment in disputes over the existence and terms of oral agreements. See Crown Plaza Corp. v. Synapse Software Sys., Inc., 87 Wn. App. 495, 500-01, 962 P.2d 824 (1997) (disputes about oral agreements

testimony demonstrates that the Acknowledgment did not create (and was never intended to create) an unconditional promise on Global's behalf to pay the amount listed in the Acknowledgment. Instead, the parties understood and expressly agreed that the Acknowledgment was being provided solely for the purpose of assisting Kita in obtaining a line of credit; it did not supersede or otherwise alter the parties' actual agreement as to how the proceeds from their joint business activities would be utilized. Proceeds from the Russian power plant project (the same dollars identified in the Acknowledgment) would be reinvested in additional joint business ventures, and profits generated from those additional projects would eventually be used to pay down the "debt" identified in the Acknowledgment. See CP 106-107, at ¶ 7.

Conversely, Kita offered no evidence, much less undisputed evidence, regarding the terms and conditions of the parties' underlying agreement, nor any evidence regarding the purposes or circumstances under which the Acknowledgement was provided, with regard to all of which the material facts were disputed.

Under Jewell, 74 Wn. App. at 856, the Acknowledgement was not an independent contract, but merely evidence of an underlying

depend a great deal on the credibility of the witnesses and thus are not appropriately decided on summary judgment).

agreement. In addition, the Acknowledgment was not supported by independent consideration and was not independently enforceable. See id. See also Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834, 100 P.2d 791 (2004) (subsequent agreement requires new and independent consideration). Moreover, the Acknowledgment contained no terms or conditions with regard to repayment. At two critical levels, it thus failed to provide a basis on which to premise summary judgment.

On summary judgment, Kita argued, and the court apparently accepted, that the evidence offered by Global was immaterial and could not prevent summary judgment under the Statute of Frauds. See CP 128. See also RCW 19.36.100 & .110. The court's apparent reliance on the Statute of Frauds was error.

In applying the Statute of Frauds to the Acknowledgment of Debt, the court erroneously treated the Acknowledgment as an independently-enforceable contract to unconditionally pay the sum (\$280,000) in question. This was error, both because the Acknowledgment was not an independently-enforceable contract, see Jewell, 74 Wn. App. at 856, and was not supported by consideration. See Labriola, 152 Wn.2d at 834. This alone requires reversal.

The court treated Global's position as claiming the right to a "forbearance" with respect to payment of a debt, which therefore had to

be in writing. See RCW 19.36.100 & .110. This put the cart before the horse, treating the Acknowledgment as a pre-existing independently-enforceable agreement to unconditionally pay the sum in question, and Global's evidence regarding the parties' underlying business arrangements as a *subsequent* agreement to forbear.

In fact, the reverse was true. The underlying agreement regarding the money at issue pre-existed the Acknowledgment. Without knowing the original agreement of the parties, it was impossible to say whether there was any "forbearance" and thus impossible to know whether the Statute of Frauds even applied. The evidence offered by Global was not evidence of a *subsequent* agreement to forbear, but evidence of the original agreement—the terms of which the Acknowledgment did not and could not alter.

Moreover, if Kita obtained the Acknowledgment by misrepresenting the purpose for which it was to be used (the evidence was that the Acknowledgment was only to be used to assist Kita in obtaining a line of credit), then Global had a defense to its enforcement regardless of the Statute of Frauds. But the facts related to any misrepresentation by Kita were disputed. See CP 106-107, at ¶ 7.

In sum, only if the court concluded that there existed an unconditional promise to pay would summary judgment have been

proper. Since the Acknowledgment was not itself independently enforceable, was unsupported by consideration, and itself contained no terms or conditions of payment, evidence of the parties' original agreement was essential. Since the only evidence in this regard was offered in opposition by Global, summary judgment was improper.

D. The Trial Court Erred When It Refused To Grant Global's Request for a CR 56(f) Continuance.

A continuance of a summary judgment hearing is proper if the nonmoving party shows a need for additional time to conduct discovery. See CR 56(f). Before ruling on a motion for summary judgment, the court should provide the nonmoving party with a reasonable opportunity to complete the record. Vant Leven v. Kretzler, 56 Wn. App. 349, 352, 783 P.2d 611 (1989).

Kita filed its motion for summary judgment shortly after Global filed its answer and counterclaims and before the parties had an opportunity to conduct any discovery. Global propounded highly relevant requests for documents and interrogatories; the responses remain outstanding. See CP 111-123. For example, Global requested all documents related to the creation and execution of the Debt Acknowledgment, all communications between Kita and its bank regarding the Debt Acknowledgment, all documents related to the

Russian power plant construction and other business ventures between the parties, and all documents relating to reinvestment or use of the proceeds from the Russian power plant project. See id. These documents will undoubtedly provide further evidence showing the broader agreement of the parties and the purpose and intent of the Debt Acknowledgment. Likewise, Global's interrogatories are targeted at identifying relevant fact witnesses for purposes of obtaining deposition testimony. It was error for the trial court to deny Global the opportunity to obtain evidence that went directly to the heart of the purpose of the Acknowledgment and to the parties' underlying agreement. Had Kita's own documents confirmed the limited purpose of the Acknowledgment and confirmed Global's assertions with regard to the parties' actual agreement, summary judgment would have been impossible. The trial court erred by granting summary judgment without allowing Global to obtain responses to its discovery.

E. The Trial Court Erred When It Granted Summary Judgment and Entered the Order and Judgment Thereon in the Amount of \$280,200.76 Because the Amount of Any Liability That Global May Have Had to Kita Was Subject to Offset by Any Award to Global on Global's Counterclaim, Which Remains Pending.

If Global is successful on its counterclaims (all of which remain pending), Global will be entitled to reduce or offset the amount of Kita's

claim against Global. In addition to a stand-alone counterclaim, setoff is also a defense in any action. This is true regardless of the enforceability of the debt in the first instance. Thus, even assuming that Global is indebted to Kita in the amount of \$280,000, Global is entitled at trial to put on evidence regarding Kita's misappropriation of the parties' joint business ventures and Kita's interference with Global's contractual relations with its former employee, Oktay Bayramcavus. To the extent Global is successful on its counterclaims, Kita's entitlement to the \$280,000 would be reduced or set off by any amounts the jury concluded were in fact misappropriated by Kita and by any other damages the jury concluded were suffered by Global. See Bingham v. Lechner, 111 Wn. App. 118, 132-33, 45 P.3d 562 (2002). In general, setoff is an issue that is decided in the same action as a counterclaim or by way of a defense precisely so that competing claims between the same parties are offset against each other, and a single judgment on the remaining amount can be entered. See Bingham, 111 Wn. App at 132-33. Accord, e.g., Loeffelholz, 119 Wn. App. at 693-94.

In Loeffelholz, this Court held that when counterclaims are pending that would set off the original claim by the plaintiff, partial judgment should not be entered. See id. The same rationale applies here.

Even assuming Global was indebted to Kita, the *amount* of the debt was subject to offset. Thus, it was error for the Court to enter summary judgment on the entire debt. A single judgment, with any offsets to which Global may be entitled, is required. Thus, even if this Court concludes that the Order and Judgment is final and enforceable, reversal is required because the *amount* of any debt is subject to offset, thus preventing summary judgment in the full amount claimed by Kita, which may yet be fully or partially subject to offset.

V. CONCLUSION

Pursuant to RAP 10.4(d), this Court should enter an order holding that the Order and Judgment on plaintiff's motion for partial summary judgment could not be and should not have been entered by the trial court under CR 58 and is not final, enforceable, or appealable at this time. In the alternative, if this Court finds that the Order and Judgment is final and appealable, then this Court should reverse the trial court's grant of summary judgment and vacate the Order and Judgment on one or all of the grounds set forth herein.

DATED this 14th day of December, 2009.

BYRNES & KELLER LLP

By



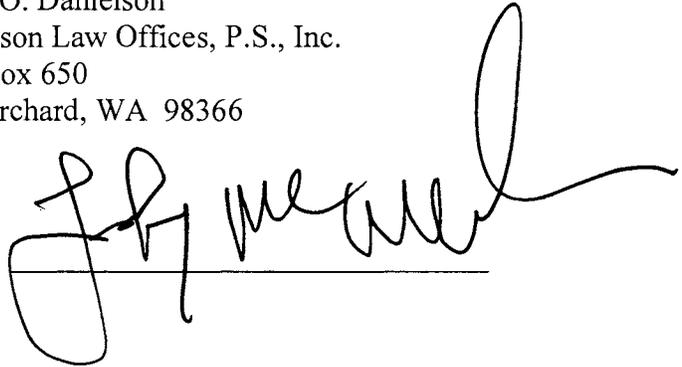
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 14th day of December, 2009, a true copy of the foregoing pleading was served upon the following counsel:

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A handwritten signature in black ink, appearing to read "Bruce O. Danielson", written over a horizontal line.

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