

64806-3

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No. 64806-3

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

ZECO DEVELOPMENT, INC,

Appellant,

v.

COLDWELL BANKER
AMERICAN TRADITION,
INC.

Respondents.

No. 64806-3

BRIEF OF APPELLANTS

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I. INTRODUCTION

This is an appeal from a summary judgment order concerning a tolling agreement. Under the Tolling Agreement, appellant Zeco Development, Inc, (“Zeco”) dismissed its pending action, but had the right “to reinstate only those causes of action that it was maintaining at the signing of this Agreement.” Zeco later filed another complaint asserting the same legal theory (negligence) concerning the same transaction, but identifying a different agent of the corporate defendant as the negligent actor. Respondent Coldwell Banker American Tradition, Inc. (“Coldwell Banker”) moved for summary judgment on the grounds that the new complaint did not assert the same cause of action. The trial court agreed and granted summary judgment. Zeco requests that the Court reverse that order and remand for trial.

II. ASSIGNMENT OF ERROR

1. The trial court erred when it granted the motion of Coldwell Banker American Tradition, Inc. for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. When a tolling agreement permits a party to refile “those causes of action that it was maintaining at the signing,” may the party assert the same legal theories concerning the same transaction but identifying a different agent of the defendant as the negligent actor?

2. Does a real estate agent representing a seller owe any duty to the buyer?

3. Is a party to a tolling agreement with a third party collaterally estopped by a trial court's findings of fact from a lawsuit concerning the same transaction but in which the third party does not participate?

IV. FACTUAL BACKGROUND

In 2004, Carl Loeb ("Loeb") informed Ron Halterman ("Halterman"), a real estate agent with Coldwell Banker American Tradition, Inc. ("Coldwell Banker"), that his Burlington property was available for sale. CP 67 at ¶¶ 13-15. Loeb owned a contiguous group of parcels on College Way consisting of a retail nursery (the "Retail Parcel") and unimproved land that was leased to Color Spot Nurseries, Inc. (the "Color Spot Parcels"). CP 65, 66 at ¶¶ 3, 5, 9.

Loeb intended to sell only the Color Spot Parcels, but Halterman understood that the entire property was for sale. CP 68 at ¶ 19. Loeb did not list the property, but instead agreed to pay Halterman a commission if Halterman located a purchaser. CP 67 at ¶ 15.

Halterman then marketed the property for sale to other agents. CP 68 at ¶ 17. Another agent in Halterman's office, Terri Heyntsen ("Heyntsen"), knew that Zeco Development, Inc. ("Zeco") was looking for

development property in the area and informed Zeco's principal, Corey Zembruski ("Zembruski") that it was available. CP 68 at ¶¶ 17-18.

Heyntsen then prepared an offer for Zeco to purchase the property. CP 69 at ¶ 30. The offer included all of the property, including the Retail parcel. CP 69-70 at ¶¶ 30-33. Halterman was out of the office when the offer was executed, and Heyntsen left the offer on his desk at the Coldwell Banker office. CP 70 at ¶ 34.

The following morning, Halterman met with Loeb, who responded with a signed counteroffer. CP 71 at ¶ 41-44, 47-49. Zeco executed the counteroffer that day. CP 72-73 at ¶¶ 47-49.

Within days, the misunderstanding about what property was included in the sale came to light. CP 73-74 at ¶¶ 50-52. Loeb maintained that the retail parcel had never been for sale, while Zeco maintained that it was included in the executed purchase and sale agreement. CP 74 at ¶¶ 56-57. When the parties were unable to reach an agreement, Loeb sued Zeco for a declaratory judgment that the parties did not have an agreement. CP 42-47. Zeco counterclaimed for specific performance. CP 48-56.

Zeco believed that the legal descriptions had been presented to Loeb because they were part of the agreement that Zeco had signed. CP 70 at ¶ 33. If Loeb's version of the events was accurate, then the legal

descriptions somehow had not been presented to Loeb. Zeco therefore filed a lawsuit against Coldwell Banker asserting in the alternative to its counterclaim against Loeb that the legal descriptions had not been presented to Loeb. CP 35-41. In light of Halterman and Loeb's insistence that the legal descriptions had not been attached, the Complaint asserted that Heyntsen did not include the legal description with the offer that was left on Halterman's desk. CP 3-12. The two lawsuits were later consolidated. CP 64 (consolidated caption).

Zeco continued to believe that it was more likely that Heyntsen had attached the legal descriptions, and that Loeb either had not paid attention to them or had changed his mind about including the Retail Parcel after the agreement was executed. To streamline the trial, Zeco entered into a tolling agreement with the Coldwell Banker defendants under which it dismissed the claims against them without prejudice and retained the right to refile them after the trial against Loeb (the "Tolling Agreement"). CP 59-63.

The agreement limits Zeco's renewal rights to the "causes of action" that Zeco was asserting in the pending lawsuit. The relevant portions of the agreement provide:

Recitals

* * * *

2. The purpose of this agreement is to allow the lawsuit filed by Zeco Development Group Inc., against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten, to be dismissed without prejudice, reserving to Zeco a limited right to refile the action against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten, during a limited period of time following the resolution of the suit between Zeco Development Group me. and Summersun Greenhouse Corp. filed in Skagit County Superior Court cause No. 04-2-00837-1.

* * * *

Agreement:

* * * *

2. Prospective Tolling of Statutes of Limitations. Zeco Development Group Inc., will dismiss all claims against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten without prejudice and without costs no later than April 18, 2008. Subject to the terms and conditions of this Agreement, any and all statutes of limitations and contractual limitations periods relating to the claims asserted by Zeco in its first Amended Complaint filed March 14, 2007, shall be suspended or tolled during the effective period of this Agreement, as defined herein. The passage of time during the effective period of this Agreement, but not before nor after, shall not be asserted or relied upon in any way as a defense to any claim brought by one party to this Agreement against another party to this Agreement, nor shall such passage of time be used as a basis for calculating any legal or equitable defense. **This Agreement permits Zeco to reinstate only those causes**

of action that it was maintaining at the signing of this Agreement. Nothing contained herein shall constitute a revival of claims or causes of action already time barred prior to the filing of the litigation affected by this agreement, or those causes of action that may have become time barred between March 14, 2007 and the signing of this Agreement.

* * * *

5. Reservation of Rights. **The parties hereto specifically reserve any and all rights, together with any and all defenses, that either party may have against the other with respect to claims, demands, causes of action, expenses or the like arising out of or in connection with the claims between the parties in the litigation affected by the Agreement.** Notwithstanding this reservation, Zeco Development Group Inc, is bound by the Court Order regarding the admissibility of expert witness testimony and is further limited to introducing in evidence at trial the evidence which was disclosed in response to discovery as of April 11, 2008. Should the case be refiled by Zeco, Zeco would be prohibited from conducting discovery, but the Coldwell Banker defendants would be entitled to depose Chris Benson prior to trial.

CP 59-60. Both parties agree that this tolling agreement is in effect between them.

Zeco's claims against Loeb went to trial before visiting Judge Kenneth Cowsert (the "Summersun Trial"). As is so often the case, trial had many surprises. Loeb prevailed on his claim that the agreement was unenforceable because "there was never a meeting of the minds on the sale of the Retail Parcel." CP 75 at ¶ 61. However, visiting Judge Kenneth Cowsert declined to make a finding whether the legal description was

attached to the offer that Heyntsen delivered to Halterman. Instead, he rather cryptically found that:

The Court does not find that the Exhibits were with the Purchase Offer at the time Loeb reviewed and executed the same.

CP 72 at ¶ 46.

The evidence at trial, and particularly Halterman's own testimony, left Zeco with little doubt about what actually had happened: Heyntsen did deliver the legal descriptions as she testified, and Loeb never saw them as he testified. The failure was Halterman's. He simply did not present the legal descriptions to Loeb because he thought they were unimportant. As a result, Loeb executed an offer that did not have the legal descriptions attached. But Halterman did include the legal descriptions when he delivered Loeb's counteroffer to Heyntsen, causing Zeco to believe that Loeb had agreed to sell all of the property, including the Retail Parcel.

Zeco therefore filed this action against Coldwell Banker alleging that it negligently failed to present the legal description to Loeb. In its action pending at the time the tolling agreement was executed, Zeco alleged:

2.17 Mr. Loeb and Mr. Halterman claim that the attachments, including a plat map showing five parcels and five legal descriptions initialed by Mr. Zembruski and submitted to Mr. Halterman by Ms. Heyntsen as part of the

purchase offer, were never attached to the purchase offer and were never approved by Mr. Loeb.

* * * *

2.23 Ms. Donaldson and Ms. Heyntsen were negligent in failing to adequately prepare and complete legal documents affecting the rights of Zeco Development and in giving advice on legal matters.

2.24 Ms. Donaldson was negligent in not adequately supervising the transaction taking place in her office by (1) allowing the development of a conflict of interest (2) in the failure to ensure the integrity of the delivery and receipt of documents from one agent to the other and (3) the advice and direction given to Zeco.

2.25 As the broker for the Coldwell Banker office, Ms. Donaldson is responsible for the conduct of the agents over whom she retains rights of direction and control for their preparation of documents and providing advice and direction concerning the prepared documents.

* * * *

2.28 As the direct and proximate cause of the Defendants' negligence, Zeco Development was prevented from realizing a business opportunity through the purchase of the Summersun property suffering damages in such amount as shall be established at trial.

CP 39-41.

The complaint in this action alleges that Colwell banker was negligent in failing to present the legal descriptions to Loeb.

57. Halterman's failure to read correspondence and determine the identity of the property that Loeb intended to sell was negligent.

58. Halterman's failure to present the legal descriptions with Zeco's Offer to Loeb was negligent.

59. CBAT is vicariously liable for Halterman's negligence.

60. Zeco was damaged by Halterman's negligence in an amount to be proven at trial.

CP 11.

After this action was commenced, Coldwell Banker filed for summary judgment on the grounds that the tolling agreement limited any action to the specific factual allegations in the former Complaint even if the same legal theory was asserted under different facts. The trial court agreed and granted summary judgment.

V. LEGAL ANALYSIS

A. Standard of Review.

The standard of review on an order granting summary judgment is, of course, *de novo*. *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). Zeco is entitled to the benefit of the evidence and all reasonable inferences that can be drawn from it. CR 56.

B. The Tolling Agreement Does Not Bar This Action.

In its original Complaint, Zeco alleged that Coldwell Banker's agent Heyntsen negligently failed to present the legal description of the property to Loeb, preventing formation of a binding contract. In its

current Complaint, Zeco alleges that Coldwell Banker's agent Halterman negligently failed to present the legal description of the property to Loeb, preventing formation of a binding contract. The only difference in the claims is the identity of the responsible Coldwell Banker agent. Both complaints assert the same duty concerning the same transaction and contract and seek the same damages.

The parties agree that the tolling agreement is a place marker, preserving Zeco's rights to recommence its pending lawsuit against Coldwell Banker, but limiting Zeco to the action that was actually pending at the time. Coldwell Banker asserts, however, that the tolling agreement prevents any deviation from the specific factual allegations in the original complaint. Coldwell Banker actually based its motion on a paragraph by paragraph comparison of the factual allegations in both complaints. CP 17-18.

Contrary to Coldwell Banker's argument, courts decide cases based on the evidence presented at trial, not on the factual allegations contained in the Complaint. Long gone are the days of code pleading and demurrers. Under modern rules of notice pleading, a party may introduce evidence different from or additional to that set forth in the Complaint under legal theories in the Complaint.

The complaint properly raised a claim under the common law action for tortious interference with a dead body. Our state rules of civil procedure merely require that a complaint provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” CR 8(a). The complaint simply must give sufficient notice to the defendant of **the nature of the claim being brought.** *Lightner v. Balow*, 59 Wash.2d 856, 858, 370 P.2d 982 (1962) (“[P]leadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted.”). We liberally construe pleading requirements in order “to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process.” *State v. Adams*, 107 Wash.2d 611, 620, 732 P.2d 149 (1987).

Adams v. King County, 164 Wn.2d 640, 656-57, 192 P.3d 891, 899-900 (2008) (emphasis added).

The purpose of notice pleading is to give fair notice to the court and the parties of the general nature of the claims asserted. *Chen v. State*, 86 Wn.App. 183, 193, 937 P.2d 612, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997). The notice pleading rule does not require parties to state all of the facts supporting their claims in the initial complaint. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 222, 829 P.2d 1099 (1992). Instead, the complaint must at least identify the legal theories upon which the plaintiff is seeking recovery, or must contain allegations that raise a fair inference that evidence on certain legal theories will be presented at trial. *Berge v. Gorton*, 88 Wash.2d 756, 763, 567 P.2d 187 (1977).

The circumstances here are no different than if a plaintiff named the wrong employee of a trucking company in a negligence action arising out of an automobile accident. If the evidence at trial demonstrated that the accident was caused by a different employee than the one alleged in the complaint, the case still would go to the jury. The fact that this information was particularly within the defendant's ability to ascertain would not escape attention. Any attempt by the company to dismiss the action because the specific facts of the accident were not as pled in the Complaint would be rejected out of hand, and properly so.

The Court should reject Coldwell Banker's attempt to turn a tolling agreement into a straightjacket. Zeco's claim for Coldwell Banker's negligence in presenting the legal description of the property has not substantively changed, and therefore is within the tolling agreement.

C. RCW Chapter 18.86 Provides a Remedy.

Coldwell Banker next makes the somewhat astonishing argument that Halterman owed Zeco no duty whatsoever.

Halterman was agent for Summersun. Therefore Mr. Halterman only owed a duty to Summersun under RCW18.86.

CP 20. This belief may explain Halterman's conduct, but it is wrong nonetheless.

RCW 18.86.030 is entitled “Duties of Licensee” and states that “Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived.” RCW 18.86.010(11) defines “Real estate brokerage services” as “the rendering of services for which a real estate license is required under chapter 18.85 RCW.” RCW 18.85.010(1) requires a license for anyone who

- (a) Sells or offers for sale, lists or offers to list, buys or offers to buy real estate or business opportunities, or any interest therein, for others;
- (b) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate or business opportunities, or any interest therein, for others;
- (c) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, lease, or exchange of a manufactured or mobile home in conjunction with the purchase, sale, exchange, rental, or lease of the land upon which the manufactured or mobile home is, or will be, located;
- (d) Advertises or holds himself or herself out to the public by any oral or printed solicitation or representation that he or she is so engaged; or
- (e) Engages, directs, or assists in procuring prospects or in negotiating or closing any transaction which results or is calculated to result in any of these acts.

Halterman offered the property for sale to Zeco, and he negotiated the agreement with Zeco. His interactions with Zeco required a license under RCW Chapter 18.85, and the duties of RCW 18.86.030 therefore apply to his conduct.

But Coldwell Banker also ignores the fact that whether or not Halterman represented Zeco, Coldwell Banker did. RCW Chapter 18.86 specifically addresses the roles of the parties when, as here, two different agents in a single brokerage represent both buyer and seller in the same transaction.

In a transaction in which different licensees affiliated with the same broker represent different parties, **the broker is a dual agent**, and must obtain the written consent of both parties as required under RCW 18.86.060. In such a case, each licensee shall solely represent the party with whom the licensee has an agency relationship, unless all parties agree in writing that both licensees are dual agents.

RCW 18.86.020(2) (emphasis added). Coldwell Banker was a dual agent in this transaction. Even under its own analysis, Coldwell Banker therefore owed Zeco every duty under the statute. RCW 18.86.060.

Moreover, as this Court recently held, RCW Chapter 18.86 does not eliminate the longstanding common law duties owed by real estate brokers. *Boguch v. Landover Corp.*, 153 Wn.App. 595, 610, 224 P.3d 795, 802 (2009) (“In addition, pursuant to RCW 18.86.010, a real estate agent ‘retains common law duties’ owed to clients. *Jackowski v. Borchelt*, 151 Wash.App. 1, 14, 209 P.3d 514 (2009).”). Those duties long have included duties from a seller’s agent to the buyer. *E.g.*, *Svendson v. Stock*, 143 Wn.2d 546, 555-56, 23 P.3d 455, 460 (2001); *McRae v. Bolstad*, 101 Wn.2d 161, 167, 676 P.2d 496, 500 (1984).

D. Coldwell Banker's Collateral Estoppel Analysis Is Flawed.

Coldwell Banker devoted much of its summary judgment motion to its argument that Zeco was collaterally estopped by the trial court's Findings of Fact and Conclusions of Law from the Summersun trial. CP 22-27. Coldwell Banker was not a party at the trial because of the tolling agreement. The claims against Coldwell banker were not tried, and the trial court made no findings regarding them. The whole purpose of the tolling agreement was to preserve Zeco's claim, not extinguish it.

In its motion, Coldwell Banker did not even purport to analyze its collateral estoppel claim. The full extent of the authority and analysis that Coldwell Banker offered consisted of: "Collateral estoppel differs from res judicata in that the actions need not be identical, and the party invoking the defense need not have been a party to the underlying action. *Lucas v. Velikanje*, 2 Wn.App. 888, 471 P.2d 103 (1970)." CP 22.

Coldwell Banker could not be more wrong. *Lucas* itself states that the issues must be identical.

Before the doctrine of collateral estoppel can be applied, affirmative answers must be given to the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? *Bernhard*

v. Bank of America Nat'l Trust & Sav. Ass'n, Supra;
Henderson v. Bardahl Int'l Corp., Supra.

Lucas, 2 Wn.App. at 894. The Washington Supreme Court likewise requires that the issues be “identical.” *Nielson By and Through Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wash.2d 255, 263, 956 P.2d 312, 316 (1998).

The issues in the two cases are not identical. If anything, they are opposite sides of a coin. This case is based on the Judge Cowser’s core finding in the Summersun trial.

The Court does not find that the Exhibits were with the Purchase Offer at the time Loeb reviewed and executed the same.

CP 72 at ¶ 46.

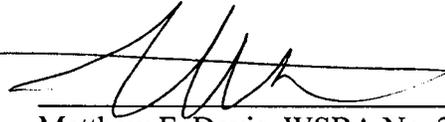
Coldwell Banker wants to rewrite this finding to mean that: “Therefore, it has been determined as a matter of law that Mr. Halterman did not get the legal descriptions with the REPSA and did fail to present the legal descriptions to Mr. Loeb.” CP 28. Judge Coswert made no such finding, either explicitly or implicitly. If anything, Judge Cowser’s findings strongly support the inference that Halterman did receive the legal descriptions, but that they were not “with the Purchase Offer” when Halterman presented it to Loeb. The only explanation for that sequence of events is Halterman’s failure to present the legal descriptions to Loeb.

VI. CONCLUSION

The trial court interpreted the tolling agreement too narrowly. Consistent with the tolling agreement, Zeco has pled the same “causes of action that it was maintaining at the signing” the Tolling Agreement, and this Court therefore should reverse summary judgment and remand for trial.

DATED this 19th day of April, 2010.

DEMCO LAW FIRM, P.S.



Matthew F. Davis, WSBA No. 20939
Attorneys for Zeco Development, Inc.

DECLARATION OF MAILING

I, Leslie Rothbaum, am over the age of 18 years, and based on my personal knowledge, state as follows:

On April 19, 2010, I caused true and correct copies of the documents listed below to be served on the persons listed below by ABC Messenger Service.

LIST OF DOCUMENTS:

BRIEF OF APPELLANTS

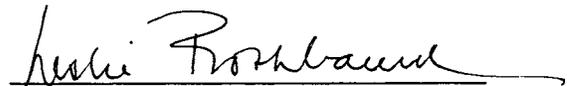
LIST OF PERSONS TO WHOM DOCUMENTS SENT:

Jeffrey Downer
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LEE SMART P.S. INC.
1800 One Convention Place
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Seattle, WA 98101-3929

I certify, under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 19th day of April 2010, at Seattle, Washington.

DEMCO LAW FIRM, P.S.


Leslie Rothbaum