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No. 73335-4

KEITH L. HOLMQUIST and KAY BURDINE HOLMQUIST, f/k/a KAY BURDINE, husband and wife; and FREDERICK A. KASEBURG, a single man,

Appellants,

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant,

and

CITY OF SEATTLE, a municipal corporation,

Respondent.

RESPONDENT CITY OF SEATTLE'S

BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent City of Seattle (“City”) respectfully requests that this Court affirm the trial court’s order denying Appellants Keith and Kay Burdine Holmquist’s and Frederick Kaseburg’s (“Plaintiffs”) motion for damages during the pendency of the City’s appeal of the underlying case.

Plaintiffs claimed that they were entitled to \$113,400 in damages for loss of exclusive use of their properties and the City’s “governmental benefit” derived from the public’s continued use of the property during the supersedeas period, but failed to establish that they suffered actual damages by the stay of enforcement of judgment and failed to establish a valid method of quantifying their purported damages. In the absence of any evidence of actual damages and a valid means of calculating those supposed damages, the trial court properly denied Plaintiffs’ motion.

II. RESTATEMENT OF THE ISSUE

Is a party entitled to damages for loss of use under RAP 8.1(b)(2) when the party was not deprived of use of the property and has not suffered actual damage?

III. COUNTERSTATEMENT OF THE CASE

Plaintiffs filed the suit to quiet title to the street end at NE 130th Street (“the Property”) against King County on June 20, 2012. Since the

Plaintiffs did not name the City as a Defendant in the action, the City was unaware of the lawsuit until the fall of 2012 when it posted a sign on the subject Property, giving notice of the City's intention to make improvements to the street end that the City and the general community had believed was City property since the City annexed the area in the 1950s. After the City learned of the lawsuit, it put the improvement project on hold, pending the outcome of the litigation. The City filed a motion to intervene based on the annexation that established its then current interest in the street end. That motion was granted by the trial court over Plaintiffs' objection.

Following the City's intervention, the Plaintiffs re-filed their motion for summary judgment. The Court granted the Motion and entered judgment in Plaintiffs favor on May 23, 2013. The judgment granted the Holmquists and Mr. Kaseburg one half of the street end each, stating that "title to the north one-half of the Real Property ... is quieted in Keith L. Holmquist and Kay Burdine Holmquist ... [and] [t]itle to the south one-half of the Real Property ... is quieted in Frederick A. Kaseburg." (CP 41-42) The Court struck two paragraphs from the Plaintiffs' Proposed Order – those paragraphs would have required King County to create two new tax parcels

from the two halves of the street end.¹ (CP 41-42) As a result, the two halves of the street end became part of Plaintiffs' larger parcels and were not established as separate tax parcels that could be independently sold, rented or developed.

The City and King County appealed the Summary Judgment, and the City filed a Notice of Supersedeas to stay enforcement of the judgment by the Plaintiffs pending the City's and County's appeal. (CP 50-51) Although Plaintiffs objected to the supersedeas and requested that this Court order the City to remove the sign that had been placed there in November 2012, Plaintiffs never claimed that they would be damaged by the supersedeas through a loss of exclusive use of the property. Rather, Plaintiffs objected to the supersedeas and requested removal of the sign to "ameliorate [the] risk" of liability that could result from "an accident or damage to the property" stemming from the public's continued use of the property. (CP 54-55) Plaintiffs also wanted to fence off the property in order to secure it. (CP 67-68) The trial court denied Plaintiffs' Objection to the Notice of Supersedeas, declining to order the City to remove its sign. (CP 96-97) In light of the Notice of Supersedeas and the trial court's order denying Plaintiffs'

¹ The trial court struck two paragraphs that would have directed King County to: "establish a real estate tax parcel number" for each half of the street end, and add that tax parcel "to the real estate tax rolls effective January 1, 2013." (CP 41-42)

objection, the City left the subject property in the same condition as it was before the City learned of and became a party to the lawsuit. Consistent with the stay, the City also did not alter the property in any way during the pendency of its appeal.²

Following the conclusion of the appeals process in this case, Plaintiffs moved the trial court for an award of damages in the amount of \$113,400 based on the loss of exclusive use of the property and the City's governmental benefit derived from inviting the public to continue to use the property. The City opposed the motion and the trial court properly denied it. The respondent City respectfully requests that this court affirm the trial court order.

IV. ARGUMENT

A. Plaintiffs Did Not Incur Any Actual, Compensable Damages Under RAP 8.1(c)(2).

RAP 8.1(c)(2) states, for decisions affecting property, the supersedeas bond amount shall be set at any monetary damages, plus interest, attorneys' fees, cost and expenses likely to accrue during the appeal, "plus the amount of the loss which the prevailing party in the trial

² Appellants improperly attached a new appendix to their opening brief that was not in the trial court record and thus not designated as part of the clerk's papers. Appellants' Brief, App. C. Moreover, Appendix C refers to events that occurred after the supersedeas period ended. That appendix is irrelevant to this appeal and was improperly submitted. Appendix C should be disregarded by this court and stricken from the record of this case.

court would incur as a result of the party's inability to enforce the judgment during review. Ordinarily, the amount of loss will be equal to the reasonable value of the use of the property during review. A party claiming that the reasonable value of the use of the property is inadequate to secure the loss which the party may suffer as a result of the party's inability to enforce the judgment shall have the burden of proving that the amount of loss would be more than the reasonable value of the use of the property during review." RAP 8.1(c)(2). For a respondent to be awarded damages under RAP 8.1 that respondent first must demonstrate that he has suffered some actual damages as contemplated under the rule.

Plaintiffs claimed that they have suffered damages as a result of their "inability to own, possess, improve, landscape, and incorporate the property into their residential use of their lots," and "additional damages" as a result of the City's "invit[ation to] the public to use and occupy Plaintiffs' property as a public beach." (CP 121) Plaintiffs did not claim that they were unable to use the street end, but rather, that they were unable to exclude the general public from using the street end during the supersedeas period. These claims do not demonstrate the damages Plaintiffs incurred through a "loss of use" that can be compensated under RAP 8.1. Notably, Plaintiffs have not claimed any damages based on their original Objection to the Notice of Supersedeas – that they have incurred liability as a result of an accident

occurring on the property, or that the property was damaged during the stay.

“The primary purpose of a supersedeas bond is ... to delay the execution of judgment against property of the debtor and to guarantee that the debtor’s ability to satisfy the judgment cannot be altered pending outcome of the appeal.” *Seventh Elect Church in Israel v. Rogers*, 34 Wn. App. 105, 120, 660 P.2d 280 (1983), citing *Murphree v. Rawlings*, 3 Wn. App. 880, 882, 479 P.2d 139 (1970); *Malo v. Anderson*, 76 Wn.2d 1, 454 P.2d 828 (1969). Under RAP 8.1(c)(2), if the City was not exempt from filing a supersedeas bond, the amount of a bond in this case to quiet title in property would have been set at “the reasonable value of the use of the property during review.” RAP 8.1(c)(2). In order to recover damages incurred during the pendency of the appeal, the Appellants must demonstrate the reasonable value of the loss incurred as a result of Appellants’ inability to use the Property.

However, to show what the “reasonable value of the loss” of use is, Plaintiffs must first demonstrate the actual damages they sustained – i.e. that they actually lost use of the property and suffered damage from that loss. They have not met their burden of proof by simply stating that they could not exclusively use the property and therefore, must have been damaged. Washington courts have consistently held in many contexts that it is the plaintiff’s burden to demonstrate, with reasonable certainty, that

he has actually been damaged. *See ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), *review granted*, 133 Wn.2d 1029 (1998), *aff'g* 135 Wn.2d 820 (1998) (in a claim for negligent misrepresentation, the court held that “[s]ufficiency of the evidence to prove damages must be established with enough certainty to provide a reasonable basis for estimating it. . . . damages must be supported by competent evidence in the record. . . . The goal of awarding monetary damages is to compensate for the losses that are actually suffered.” (internal citations omitted)); *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (In a breach of warranty suit, holding that “damages must be proved with reasonable certainty,” that the burden of proof is on the buyer claiming that the warranty was breached, and that it is an “established principle that ‘the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage.*’” (internal citations omitted)); *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 83, 248 P.3d 1067 (2011) (holding that, in a breach of contract claim, plaintiff has the burden of demonstrating that “plaintiff incurred actual economic damages as a result of the breach.”); 224 *Westlake, LLC v. Engstrom Prop., LLC*, 169 Wn. App. 700, 729, 281 P.3d 693 (2012) (holding that, in a breach of contract claim, the party seeking

damages must prove that the damages claimed were “within the contemplation of the parties at the time the contract was made, are the proximate result of defendant’s breach, and are proven with reasonable certainty.” (internal citations omitted)).

Plaintiffs did not present any evidence that proves with reasonable certainty that they incurred actual damages during the stay. Rather, all of Plaintiffs claims of damages rest on the blanket assertion that a claim of “loss of exclusive use” caused damage. Plaintiffs pled that they were damaged by the inability to “exclusively” use the property and that the public’s continued use of the property (supposedly at the City’s invitation) caused further damages. But Plaintiffs never specify at all, much less with any reasonable certainty, how this actually caused damage. Plaintiffs’ claims, without competent evidence to support and demonstrate them, fail to meet the burden of proof.

First, Plaintiffs could have continued to use the property in the same manner that they had been using it for the last 80 plus years – the stay never deprived Plaintiffs of the use of the property. Second, Plaintiffs did not present any evidence, either in their Objection to Notice of Supersedeas or their Motion to Establish Damages, that they intended to subdivide and sell, rent or develop the street end. Rather, their claims are limited to their inability to restrict others from using it and unsubstantiated

assertion that the City sign giving notice of planned improvements constituted an invitation to the public that caused an increase in public use of the street end , and that the City derived “substantial governmental benefits” from the public’s use of the street end. Rather, Plaintiffs were concerned about damages arising from any liability that might have been incurred as a result of an accident occurring on the property, “particularly drowning,” or damage to the property as a result of the inability to fence it off from the general public. (CP53-68)

None of these claims constitute evidence of actual damages stemming from loss of use and are not compensable “losses” under the law. RAP 8.1 states that a supersedeas bond amount should be sufficient to compensate the Plaintiffs for their loss of the use of the property – not an amount that reimburses Plaintiffs for others’ use of the property, particularly when the use by the general public did not cause any damage to the property owners during the stay. Plaintiffs must demonstrate some actual loss of use that Plaintiffs suffered that can be quantified and compensated. For example, in *Norco Constr., Inc. v. King Cnty.*, developer brought an action for delay damages against King County for damages incurred as a result of the County’s delay in approving the developer’s plat application. 106 Wn.2d 290, 721 P.2d 511 (1986) (en banc). Norco required approval of its plat application “to subdivide the property into 1–

acre lots and sell them as part of a subdivision.” *Id.* at 291. Norco’s claimed damages as a result of the supersedeas included “a depreciation in the value of the property, lost profits, and additional expenses including taxes, insurance, and increased development costs.” *Id.* at 293. The Court held that Norco was entitled to be compensated for these specified damages that resulted from the County’s refusal to approve the plat application. *See also Ames v. Ames*, 184 Wn. App. 826, 854-856, 340 P.3d 232, 246-247 (2014), *review denied*, 184 Wn. App. 826 (2015) (affirming the forfeiture of a supersedeas bond to compensate for the loss of ability to harvest timber resulting from delay during motion for reconsideration); *Interstate Prod. Credit Ass’n v. MacHugh*, 90 Wn. App. 650, 953 P.2d 812 (1998), *review denied*, 136 Wn.2d 1021 (1998) (denying a claim for damages resulting from supersedeas during the pendency of the appeal of a foreclosure action where respondents did not claim they intended to sell the land and could have continued to farm the land, and appellant did not pass title to land during the appeal process).

Plaintiffs did not offered any competent evidence demonstrating that they suffered loss of use damages related to their inability to use the Property during the pendency of the appeals process. The declarations of Plaintiffs show only that the public continued to use the Property in the same manner that it always has, and that Plaintiffs suffered only a loss of “exclusive” use.

Since Plaintiffs neither intended to subdivide, sell, rent, develop or otherwise do something with the Property other than keep the community from using it, nor offered evidence that they incurred liability as a result of an accident on the property or that the property was somehow damaged during the stay, they failed to demonstrate that they suffered a compensable loss of use under the RAP.

Moreover, Plaintiffs' claim that City somehow "invited" the public to continue to use the Property thereby causing additional damages is without merit. Not only is the public's continued use of the Property simply another way of saying that Plaintiffs did not have "exclusive use" of the Property, but the RAP does not provide for award of damages based on a "governmental benefit" derived from the City having "invited" the public's continued use of the property by means of leaving up a sign describing planned improvements to the Property. The City did nothing more than what it had done for the preceding 60 plus years – leave the street end open for public use. The City left the property as it had been since it learned of the lawsuit, and in compliance with the trial court's ordering denying Plaintiffs' objection to the notice of supersedeas. The RAP allows only for damages that compensate Plaintiffs' loss of use, not for the City's inaction that allowed the public, including Plaintiffs, to continue to use the street end.

Finally, since Plaintiffs' claimed damages do not relate to the liability and potential damage to property concerns set forth in their Objection to Notice of Supersedeas, the City had no prior notice that Plaintiffs would claim these "loss of exclusive use" damages. RAP 8.1(c)(2) contemplates precisely this type of notice so that an appellant is aware of the potential monetary damages it might have to pay if it is unsuccessful on appeal. Accordingly, based on Plaintiffs' failure to demonstrate that they have incurred a loss of use during the supersedeas time period that entitles them to damages under the RAP, and failure to give notice of these damages, the trial court property denied Plaintiffs' Motion and that order should be affirmed.

B. Even If Plaintiffs Had Proven Their Damages, They Did Not Establish A Valid Methodology For Calculating Damages.

After failing to establish that they incurred actual damages due to a loss of use of the property during the pendency of the appeals process, Plaintiffs arbitrarily chose the "reasonable rental value" of the street end to calculate their purported damages. Plaintiffs used a complicated calculation of the "reasonable rental value" of the street end, but the underlying reasoning for this methodology is fundamentally flawed.

First, using a "reasonable rental value" to calculate damages implies that Plaintiffs suffered loss of use damages because they were unable to rent their halves of the street end. However, Plaintiffs never stated nor

demonstrated that they intended to rent their halves of the street end or even their entire properties during the pendency of the appeals process. Rather, they asserted only that they were deprived of “exclusive use” of the Property and that the City derived a governmental benefit from the public’s use of the street end. Neither of these claims justifies an award of damages based on the reasonable rental value of the land.

Second, even if Plaintiffs had suffered actual damages and even if “reasonable rental value” was the appropriate basis for calculating damages for loss of exclusive use of the property (neither of which is true), Plaintiffs based their calculations on the incorrect assumption that the street end could be valued independent of their larger parcels. In the Summary Judgment Order, the Court specifically struck from the proposed order language directing King County to create two new tax parcels for the two halves of the street end. Instead, the Court quieted title in the two halves of the street end based on the street vacation that occurred almost 90 years ago. Thus, the result of the Summary Judgment was that the two halves of the street end were added to the existing adjacent parcels owned by the Plaintiffs. In light of the judgment, the Appellants cannot rent, develop or sell just the portion of their properties that was formerly the street end unless they first apply for and gain approval to subdivide their properties and create new parcels of land. Since Plaintiffs did not intend to subdivide and rent these portions of

their properties, as the developer in *Norco Construction* did, the reasonable rental value of the street end is not the appropriate basis for calculating damages.

Third, because Plaintiffs could not have rented the street end as its own separate parcel, in order to calculate damages based on “reasonable rental value,” not only would Plaintiffs have had to demonstrate that they intended to rent their properties during the pendency of the appeal, but Plaintiffs also would have had to first demonstrate the actual loss of rent that they incurred as a result of their inability to rent the street end portions of their properties. If they had intended to rent their entire properties (which they did not), then their loss of use damages would be limited to the difference in rent that they could have received from renting the entire properties and the amount they could have received from renting just their original parcels.

Fourth, Plaintiffs incorrectly assert that “reasonable rental value” can be used as a measure of damages when an owner has been deprived of property rights, but cannot quantify the amount of damages. This argument is unsupported by the law cited by Plaintiffs. In the cases cited by the Plaintiffs, there were tenants on the property in question, or the property was condemned by a governmental entity and used in the same manner that a tenant would use it, making rental value an appropriate measure of damages.

In this case, Plaintiffs never intended or attempted to rent the street end, and it was never used by the City in a landlord/tenant relationship, making these cases inapplicable. See *Colby v. Phillips*, 29 Wn.2d 821, 189 P.2d 982 (1948) (plaintiff sued for specific performance on a real estate sale contract and the property was occupied by a tenant); *Brown v. Pierce Cnty.*, 28 Wash. 345, 68 P. 872 (1902) (City and County condemned plaintiff's property and used it as a pesthouse for smallpox patients); *Woodworth v. Northwestern Mutual Life Ins. Co.*, 185 U.S. 354, 360, 22 S. Ct. 676, 46 L. Ed. 945 (1902) (finding that a purchaser is entitled to the legal and equitable title to the land and the "rents, issues, and profits which accrued after the confirmation of sale," but which he did not receive during the supersedeas period.)³

Finally, if Plaintiffs had suffered the types of damage that they cited as their concerns in the Objection to the Notice of Supersedeas – liability for injuries or accidents occurring on the property, or damage to the property – even then, “reasonable rental value” would be an inappropriate method of calculating damages. In either case, the amount of damages would have been properly based on any personal injury or wrongful death claim, or the

³ Plaintiffs also cite *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 10 P.3d 417 (2000), *review denied*, 142 Wn.2d 1018 (2001) to support their “reasonable rental value” argument, but in that case, the court held that an award of damages for construction defects was properly based on the cost to remedy the defects.

decrease in the fair market value of the property resulting from any property damage.

Not only did Plaintiffs fail to show that they intended to rent their properties during the supersedeas period, but the declarations submitted by Plaintiffs in their Motion Establish Damages do not provide any competent evidence to justify the use of “reasonable rental value” as a basis for calculating damages. Those declarations contain Plaintiffs’ observations, lay person opinions and hearsay statements. Accordingly, based on the lack of any actual damages resulting from the stay and the Plaintiffs’ failure to establish a valid, correct method of quantifying their purported loss of use damages, the trial court order should be affirmed.

V. CONCLUSION

To collect damages for loss of use under the RAP, Plaintiffs must demonstrate that they suffered some actual damages stemming from their inability to enforce the judgment during the supersedeas period. Plaintiffs did offer any evidence to demonstrate the fact of damage, and the trial court order denying their Motion to Establish Damages during the stay should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August 2015, I arranged for filing of the foregoing document with the Court of Appeals, Division I, and for service on counsel listed below via legal messenger.

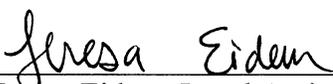
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