Souala v. Catlow Professional Movers

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Concurring: John A. Schultheis, Kenneth H. Kato

UNPUBLISHED OPINION

Aicha Souala as 'owner' contracted with Catlow Professional Movers, Inc. to move a home to her lot. Ms. Souala sued Catlow and its surety, Colonial American Casualty and Surety Company of Maryland, alleging negligence and breach of contract related to chimney and fireplace damage occurring prior to the contract. Ms. Souala appeals summary dismissal. In its cross-appeal, Catlow seeks attorney fees and costs not awarded below. Because the trial court did not err in deciding Ms. Souala lacked standing to sue on the contract and the economic loss rule barred her negligence claim, we affirm the summary judgment dismissal of Ms. Souala's complaint. We remand to the trial court for entry of findings regarding Catlow's attorney fees and costs.

FACTS

In 2001, Ms. Souala's sister, Soraya Hanson, told her of a house that could be acquired and moved to Ms. Souala's lot for the cost of filling and leveling the former foundation site. Apparently, Ms. Hanson acting as Ms. Souala's agent contacted Catlow about moving the home. Ms. Hanson told Catlow that title would transfer to Ms. Souala after the house was moved to its new location and the parties negotiated the terms of an agreement. Even though Ms. Souala argued an oral contract existed, the facts show she declined to enter into an oral or written contract until she had obtained the necessary permits to accomplish the move. Catlow decided to risk preparing the home for transfer by removing the chimney and fireplace. It assumed this risk because if Ms. Souala did not take the house, it would be demolished anyway and Catlow's employees needed the work.

After the chimney and fireplace destruction, Ms. Souala signed the parties' contract on October 22, 2001. The contract stated, 'Chimney -Contractor to Remove.' Clerk's Papers (CP) at 5. Ms. Souala paid $10,000 upon signing, and agreed to pay a remaining balance of $4,053 (including $1,053 tax) upon completion.

Catlow moved the house, but refused to lower the house until Ms. Souala paid $3,000. Ms. Souala refused to pay, partly contesting the removal of the chimney and fireplace. She sued Catlow for breach of contract, negligence, and liability, including notice to Catlow's surety. Catlow counterclaimed for the amount owing, including reimbursement for allowable expenses paid to Vera Water and Power Company for line movement charges. The trial court summarily dismissed Ms.

Souala's complaint, entered judgment in favor of Catlow for $4,934.77 plus interest and, without explaining, awarded one-half the requested attorney fees while denying Catlow's costs request.

Both parties appealed.

ANALYSIS

Summary Judgment Rulings

The issue is whether the trial court erred in summarily dismissing Ms. Souala's claim for breach of contract for lack of standing and her negligence claim under the economic loss rule.

We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court. Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 630, 71 P.3d 644 (2003). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine material fact issue exists and the moving party is entitled to a judgment as a matter of law. CR 56(c). All facts and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 198, 943 P.2d 286 (1997). The moving party has the burden of proving no material facts remain disputed. Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Generally, questions of fact are for the jury; however, when reasonable minds could reach but one conclusion, questions of fact may be determined by the court as a matter of law. Id. at 775.

Catlow denied below that any oral contract existed before the written contract of October 22, 2001. When the trial court considered the summary judgment issues, it appeared undisputed that no written contract existed until after the chimney and fireplace were removed. While Ms. Souala argues for the first time in her reply brief that the parties had an oral agreement at the time Catlow removed the chimney and fireplace, we will not review issues raised for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Since the parties did not have a contract at the time the fireplace and chimney were removed and Ms. Souala did not have an ownership interest in the house at the time of removal, the trial court did not err in deciding she lacked standing to claim injury for removal of the chimney and fireplace. Moreover, the contract refers to chimney removal and reasonable minds could solely reach the conclusion that the parties contracted with reference to the facts presented at the time of contract execution. Accordingly, the trial court did not err in dismissing Ms. Souala's contract claim. Reaching this conclusion, we need not discuss Catlow's claims under chapter 18.27 RCW that Ms. Souala was a contractor failing to satisfy registration requirements.

Next, Ms. Souala contends the trial court erred in dismissing her negligence claims under the economic loss rule. The economic loss rule bars certain tort claims when a contract exists between

parties that allocates risk and future liability. Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 211, 969 P.2d 486 (1998). The rule is described as marking 'the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others.' Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 821, 881 P.2d 986 (1994).

The economic loss rule articulated in Berschauer applies here. While Ms. Souala argues the parties were not involved in a construction contract, the parties contracted for the removal and set-up of a home, including necessary demolition work. Indeed, RCW 18.27.010(1) defines contractors in the construction industry, in part, as individuals who 'improve, move, wreck or demolish, for another, any building.'

Under the economic loss rule, Ms. Souala may not pursue damages for economic loss for removing the chimney and fireplace under a tort theory. Therefore, the trial court did not err in dismissing Ms. Souala's negligence claim. Reaching this conclusion, we need not discuss Ms. Souala's argument that the trial court erred in dismissing her negligence claim based on her inability to prove damages.

Cross-Appeal

The issue is whether the trial court erred in reducing Catlow's attorney fee award and denying Catlow's request for costs.

An appellate court will not overturn an award of attorney fees absent a manifest abuse of discretion; discretion is abused when the award is manifestly unreasonable, based on untenable grounds, or given for untenable reasons. In re Estate of Black, 116 Wn. App. 476, 489, 66 P.3d 670 (2003), aff'd, 153 Wn.2d 152, 102 P.3d 796 (2004). An attorney fee award must be supported by findings and conclusions sufficient to establish a record adequate for review. Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 715, 9 P.3d 898 (2000).

Here, the trial court made no written findings as to either the basis for the fees or the reason for denying costs. Significantly, the court's oral decision is not included in our record to help eliminate speculation concerning the legal theory upon which the trial court based its decision. See City of Lakewood v. Pierce County, 144 Wn.2d 118, 127, 30 P.3d 446 (2001) (allowing an appellate court to refer to a court's oral decision to eliminate speculation regarding legal theory used to reach decision). Catlow is left to speculate about the reasons the trial court reduced its attorney fee award and denied its cost request.

We decline to decide this issue based upon speculation. The remedy is to remand to the trial court to enter written findings. Further, Catlow, as the prevailing party, is entitled to statutory costs. The record does contain a listing of claimed costs, but we have no record for the court's denying their

recovery other than a vague reference to the contract as omitting costs. Therefore, we reverse the trial court's fee award to Catlow and remand for entry of written findings as to the fee award and denial of costs.

Attorney Fees and Costs of Appeal

Attorney fees are awarded solely pursuant to contract, statute, or a recognized ground of equity. Wilkerson v. United Inv., Inc., 62 Wn. App. 712, 716, 815 P.2d 293 (1991). By statute, attorney fees are awarded to the prevailing party in an action on a contract that specifically provides for them. RCW 4.84.330. Catlow seeks fees and costs here under RAP 18.1.

The parties' contract provides for attorney fees 'in case suit or action is commenced to collect all or any part of {the} agreement.' CP at 5. A contract that provides for the payment of attorney fees ''includes both fees necessary for trial and those incurred on appeal as well.'' Boyd v. Davis, 127 Wn.2d 256, 264, 897 P.2d 1239 (1995) (quoting Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 327, 525 P.2d 223 (1974)). As the substantially prevailing party on appeal, Catlow is entitled to its attorney fees. While the parties' contract does not provide for costs, Catlow correctly points out that Ms. Souala filed a liability of surety claim, implicating chapter 18.27 RCW. RCW 18.27.040(6) allows for the recovery of costs for actions 'filed under this section.' Accordingly, Catlow should be awarded its costs on appeal.

Summary judgment dismissal is affirmed. We remand for further proceedings consistent with this opinion for entry of findings and conclusions regarding attorney fees and costs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kato, C.J.

Schultheis, J.