IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON CONSTRUCTION, INC., a Washington corporation, Appellant, v. STERLING SAVINGS BANK, a Washington bank, Respondent, DAVID ALAN, LTD., a corporation; DAVID ALAN DEVELOPMENT, LLC, a foreign Limited Liability Company; DAVID A. MILNE and VIRGINIA MILNE, husband and wife and their marital community; ACTION MORTGAGE COMPANY, a Washington corporation; BURNHAM BUILDERS, LLC, a Washington Limited Liability Company; C.E.S. NW, INC., a foreign corporation; FERGUSON ENTERPRISES, INC., a Washington corporation; CALIBER CONCRETE CONSTRUCTION, INC., a Washington corporation; TUNNEL SYSTEMS, INC., a Washington corporation; N C MACHINERY CO., a Washington corporation; and EARTH CONSULTING, INC., a foreign corporation; and THE BLACKSTONE CORPORATION, a Washington corporation, Defendants.	No. 40029-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Washington Construction, Inc. (WCI), a general contractor, entered into a construction contract with an agent for David Alan Development, LLC (DAD) to perform construction work. DAD had separately contracted with Sterling Savings Bank (Sterling) for a construction loan to develop the property. The issues on appeal concern only two parties: WCI and Sterling. WCI appeals the trial court's denial of its motions to amend its complaint to add claims of assignment, negligence, negligent misrepresentation, and aiding and abetting fraud. WCI also appeals the trial court's summary judgment dismissal of its third party beneficiary, promissory estoppel, estoppel by silence or acquiescence, estoppel in pais, equitable estoppel, unjust enrichment, equitable subrogation, and tortious interference claims.

Because WCI presents genuine issues of material fact only as to its unjust enrichment claim, we reverse summary judgment dismissal of that claim and remand for further proceedings in accord with this opinion. We affirm on all other issues.

FACTS

David Alan Milne is the controlling officer or member of three Washington companies: James Alan, LLC (JAL), DAD, and David Alan, Ltd. (DAL). On May 9, 2007, JAL entered into a construction loan agreement ("Cook Agreement") with Sterling wherein Sterling agreed to lend JAL $7,535,000 to finance the acquisition and development of the "Cook Addition," a residential property in Kitsap County. The Cook Agreement contained an acceleration clause giving Sterling the option to make any outstanding loan debt "immediately due and payable" if the property should come under any lien or encumbrance not cured within 30 days. Clerk's Papers (CP) at 278.

Six months later on November 5, 2007, Sterling entered into a construction loan agreement ("Rita Estates Agreement") with DAD, another Milne company, for the acquisition and development of Rita Estates, a residential property in Pierce County. The Rita Estates Agreement provided for a $3,050,000 loan from Sterling to DAD and stated,

> CONDITIONS PRECEDENT TO EACH ADVANCE. Lender's obligation to make the initial Advance and each subsequent Advance under this Agreement shall be subject to the fulfillment to Lender's satisfaction of all of the conditions set forth in this Agreement and in the Related Documents.
>
> Approval of Contractors, Subcontractors, and Materialmen. Lender shall have approved a list of all contractors employed in connection with the construction of the improvements. . . . Lender shall have the right to communicate with any person to verify the facts disclosed by the list or by any application for any Advance, or for any other purpose.

CP at 792. The Rita Estates loan was secured by a construction deed of trust recorded on November 13, 2007, and by a promissory note guaranteed by DAD and David and Virginia Milne, individually. As additional security, DAD and Sterling entered into an "Assignment of Plans, Contracts and Entitlements" (APCE) agreement. Under the APCE, DAD assigned to Sterling "all of its rights, powers, privileges, claims and causes of action, and all of its right, title and interest in and to and proceeds from . . . all contracts of every kind relating to the acquisition, development, construction . . . of all or any part of the Property, including, without limitation, construction contracts and subcontracts." CP at 710. The APCE grants DAD a license, immediately revoked upon DAD's default under either the APCE or Rita Estates Agreement, under which to operate and move forward with the Rita Estates project.

Sterling initially advanced $1,502,153 to DAD to acquire the Rita Estates property in November 2007. Sterling had also advanced $7,161,710 to JAL for the acquisition and development of the Cook Addition. On April 23, 2008, however, the general contractor for the

Cook Addition filed an $833,344.48 lien on the property and claimed to hold rights superior to Sterling's. Sterling, in accordance with the Cook Agreement, requested JAL cure the lien defect by paying its contractor within 30 days. JAL did not cure the defect.

Meanwhile, Milne appears to have suggested to Sterling a number of potential contractors to begin work on the Rita Estates development. Then, on August 19, 2008, without notice to or approval by Sterling, DAL, representing itself as DAD's agent,[1] entered into a "Construction Contract for Sitework Services Between Owner and Contractor" with WCI for work on the Rita Estates project. As verification of adequate financing, Milne showed WCI an unsigned copy of the DAD-Sterling Rita Estates Agreement and an email from Sterling urging DAD to start the project quickly due to the impending rainy fall season and concerns over falling land values. The lump sum contract price was $995,554 and required WCI to begin work on August 18, 2008, the day before the parties signed the contract. The construction contract also required WCI to submit an invoice for each 30-day period of work and DAL to remit payment no later than 30 days after receiving the invoice.

Milne orally informed Sterling the following day, on August 20, about its newly-formed agreement with WCI. Sterling also received and reviewed a copy of the WCI-DAL construction contract. Sterling told Milne to cease work on the Rita Estates project because WCI had not been approved as the general contractor as required under the Rita Estates Agreement and

[1] Throughout proceedings below and on appeal, Sterling argues that DAL is not DAD's agent. Sterling argues the facts that WCI contracted with DAL and Sterling contracted with DAD are "critically important and material" to the outcome of WCI's claims. 3 Report of Proceedings (RP) at 62. But WCI's second and third amended complaints both allege that "[DAL] acted as agent for [DAD]." CP at 22, 805. And DAL, DAD, and David and Virginia Milne's answer admits the allegation as true.

Sterling would not fund any development costs. Milne refused to stop the work, citing environmental concerns stemming from the two days of clearing work WCI had already performed.[2]

On August 21, nearly four months after Sterling requested JAL cure the lien defect with the Cook Addition contractor, Sterling sent a default notice to JAL, DAD, and the Milnes. Because of JAL's failure to cure the Cook Addition lien defect and to complete construction as required under the Cook Agreement, Sterling demanded immediate repayment of its $7,122,390.09 loan plus another $1,300,000 required to complete the project. Sterling then issued a notice of cessation of advances on the Rita Estates project on the basis that DAD and the Milnes, the borrower and guarantors, were in default on the Cook Agreement, which materially changed their financial condition.

Nobody notified WCI that Sterling had issued the notice of cessation of advances on August 21, 2008—two days after WCI entered into the Rita Estates construction contract and three days after it began work. Throughout the following month, WCI received repeated assurances from Milne that payment would be forthcoming. In apparent reliance on these assurances, WCI agreed to transfer a Department of Ecology permit to itself and deposited a cash bond with the City of Gig Harbor, Washington.

Unbeknownst to WCI, Sterling had repeatedly notified Milne that he must stop performance on the Rita Estates project. For example, Sterling wrote in an email to Milne dated September 8, 2008, "As I told you in our meeting, [WCI] was not approved by [Sterling] to move

[2] It appears Milne argued that because WCI had already "cleared" the Rita Estates development site in preparation for other work, to abandon the site at this stage would have resulted not only in erosion to the land but also in potential fines.

forward on the site. This was a condition of the approval. I told you at our meeting that you needed to stop the work until all issues were resolved." CP at 362. To which Milne responded, "The work was already started, the site had been cleared. Once this happens, you need to move forward. Also, you seem to be playing ostrich on the fact the plat entitlements are expiring March 16th 2009. The [Rita Estates] loan has absolutely nothing to do with Cook dispute." CP at 361.

On September 19, 2008, WCI submitted its first Rita Estates project invoice for $634,939.22 (after deducting retainage) for work performed through that date. On September 18, in seeming anticipation of WCI's invoice, Milne[3] appears to have attempted to resolve the Rita Estates project issues by sending the following email to Sterling:

> I believe the background on Rita [Estates] is important to make a correct decision on the withdrawal of the cessation letter. As [Sterling] knows, I was reluctant to start another subdivision in this housing market. I already have three in the Kitsap Peninsula and have not sold a lot since March. However, the plat entitlement [is] going to expire in March of 2009 and with all the new regulations, who knows? We started the clearing on August 18th. By the time we received the cessation letter the site had been cleared, no storm water facilities were, or are, installed, no outlet pipe for the site, simply no way to protect the environmental concerns were in place.
> However, I can't in good faith, have contractors working without a source of payment. Therefore I will stop work tomorrow on two conditions;
> 1) somebody from Sterling Saving will assume the responsibility on the [National Pollutant Discharge Elimination System] permit.
> 2) the contractor [WCI] is paid for all work to date, September 19th 2009.
> The plat will still expire in March and I will expect Sterling to pay me for the damages and provide a full release on the loan, but that is not a condition (see above). I have requested the cessation letter be removed and a two party check system be installed. Please consider the request again.

CP at 364. Sterling rejected Milne's proposed course of action.

Despite the ongoing dispute between Sterling and Milne/JAL, Sterling approved WCI as a

[3] It is unclear at this point which of his three companies Milne was representing.

contractor to perform limited work to prepare the Cook development site for winter. On at least two occasions during the last weeks of September 2008, Sterling and WCI communicated directly through email regarding the Cook Addition; neither party mentioned the Rita Estates project. Sterling eventually paid WCI directly for its Cook project-related work.

WCI submitted its second invoice to DAL on October 16, 2008, for work performed through that date. Payment for the first invoice was due on October 19. After some attempted delay by Milne, WCI finally discovered Sterling would not release the funds. Sterling denied payment even after a project engineer certified $623,015.46 of WCI's September invoice. By the time work ceased in October 2008, WCI had nearly completed the work, valued at approximately $1,029,856.37 under the construction contract.

WCI filed a mechanics lien against Rita Estates in October 2008. WCI then filed a complaint in Pierce County Superior Court on November 19, first amended on December 1, alleging, in relevant part, that Sterling knew of WCI's contract with DAL and allowed continued work on the Rita Estates project and failed to notify or confirm that WCI had been notified of the cessation of advances. WCI asserted the failure to notify amounted to an implicit approval of WCI as contractor for the Rita Estates project motivated by Sterling's own "deteriorating financial condition" and self-interest. CP at 8. Thus, WCI argued that as a third-party beneficiary to the Rita Estates Agreement, it was entitled to payment and Sterling should either be estopped from withholding payment or, alternatively, that Sterling had been unjustly enriched by WCI's performance.

On April 3, 2009, WCI filed a second amended complaint to add other lien claimants for the purpose of lien foreclosure. On August 4, WCI moved for leave to amend its complaint for

the third time because (1) Sterling's appointed trustee of its deed of trust securing the Rita Estates property had issued a notice of trustee's sale for October 30 (approximately six weeks prior to the start of trial, then scheduled for December 14); (2) WCI's owner wished to be added as an individual plaintiff; and (3) Sterling had "reneged" on an agreement to pay for WCI's efforts to obtain an extension of the plat recording deadline on the Rita Estates property to preserve property value. The proposed third amended complaint also added the following tort claims against Sterling: (1) Sterling "negligently administered the [Rita Estates] Agreement relied upon by WCI"; (2) Sterling's "omissions and conduct constituted negligent misrepresentation of the status of the [Rita Estates Agreement] to WCI's and [its owner's] damage and detriment"; (3) Sterling's "omissions and conduct constituted a tortious interference with WCI contract relations"; and (4) Sterling "aided, abetted and enabled Milne's wrongdoing." CP at 63.

On August 14, the trial court made an oral ruling partially granting WCI's motion. Specifically, the trial court granted WCI leave to amend to add Sterling's trustee as a defendant and WCI's tortious interference claim against Sterling. The trial court denied the other proposed amendments and later denied WCI's motion for partial reconsideration on the basis that the tort claims would prejudice Sterling and potentially confuse the jury. WCI filed its third amended complaint on September 29.

On September 11, Sterling moved for summary judgment with respect to WCI's third party beneficiary, equitable estoppel, equitable subrogation, unjust enrichment, and tortious interference claims. Sterling argued summary judgment was appropriate because (1) WCI was not a third party beneficiary to the Rita Estates Agreement, (2) WCI could not assert an equitable estoppel cause of action, (3) the doctrine of equitable subrogation did not extend to debtor-

creditor relationships, (4) WCI's unjust enrichment claim failed because Sterling was not a party to the construction contract between WCI and DAL, (5) Sterling had no duty to notify WCI about DAD's default or ensure loan funds were disbursed to WCI, and (6) Sterling has priority over all lien claims because its deed of trust was perfected before any entity commenced labor or supplied material for the project. WCI opposed, asserting that Sterling had a duty to disclose the cessation of advance to WCI either because WCI was a third party beneficiary to the Rita Estates Agreement or by direct operation of the assignment of WCI's construction contract with DAL (acting as DAD's agent) to Sterling under the APCE.

On October 23, the trial court entered an amended order granting Sterling summary judgment, dismissing with prejudice WCI's (1) breach of contract as a third party beneficiary, (2) equitable estoppel, (3) equitable subrogation, (4) unjust enrichment, and (5) tortious interference with business expectancy claims.[4] WCI promptly filed a motion to amend the summary judgment order for clarification of the trial court's intent with respect to WCI's remaining estoppel and assignment claims and, if necessary, for leave to amend its complaint for the fourth time. With respect to the assignment claim, WCI averred that because DAD defaulted under the Rita Estates

[4] Action Mortgage Company is Sterling's loan servicer and agent. Action Mortgage moved for summary judgment dismissal on the basis that it was unjust to require it to defend against claims that arose out of a contract to which it was not a party or, alternatively, requested to join Sterling's motion for summary judgment pursuant to CR 25 in the event Sterling prevailed. The trial court granted Action Mortgage's motion on October 9, 2009, dismissing it from the case. The same day, the trial court granted Sterling's motion for summary judgment regarding Consumer Protection Act, ch. 19.86 RCW, claims filed by DAL and David and Virginia Milne. On November 5, the trial court granted Sterling's motion for summary judgment on any and all claims filed by DAL and David and Virginia Milne. On December 4, the trial court denied WCI's motion to dismiss trustee's sale and granted Sterling summary judgment dismissing any and all of DAD's claims. It appears that Sterling purchased the Rita Estates property at a trustee's sale on January 8, 2010.

Agreement, its license to operate under the agreement was automatically revoked under the APCE and Sterling, as assignee, had sole authority, rights, and obligations under the construction contract. On November 5, the trial court amended its October 23 order to include additional documents considered in connection with Sterling's motion for summary judgment and entered final judgment pursuant to CR 54(b), denying WCI's motion to amend its complaint to add an assignment claim and dismissing all of WCI's remaining claims against Sterling.

WCI timely appeals.[5]

DISCUSSION

Assignment Claim

WCI challenges the trial court's denial of its motion for leave to amend its complaint for the fourth time to add an assignment claim. WCI asserts that Sterling had an obligation under the APCE to notify WCI either that DAD had defaulted on the Rita Estates Agreement, triggering a transfer of rights, or that Sterling would not advance funds for WCI's work. Sterling denies it had any obligation or owed any duty to WCI because it was not a party to a contract or business transaction with WCI related to the Rita Estates development. To overcome the lack of privity between WCI and Sterling, WCI argues (1) that DAL acted as DAD's agent and (2) upon DAD's default on the Rita Estates Agreement, all rights DAD had under its construction contract with WCI were immediately transferred to Sterling. Thus, according to WCI, Sterling inherited any and all obligations or duties DAL/DAD/Milne owed to WCI and WCI may bring various causes

[5] Only one party other than Sterling responded to WCI's appeal. Caliber Concrete Construction, Inc., one of WCI's subcontractors on the Rita Estates project, submitted a brief explaining that the issues on appeal impact WCI and Sterling, and only tangentially affect the rights of the other parties.

of action directly against Sterling.

We review a trial court's denial of a motion for leave to amend a complaint for abuse of discretion. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 728-29, 189 P.3d 168 (2008) (citing *Tagliani v. Colwell*, 10 Wn. App. 227, 233, 517 P.2d 207 (1973)). A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons. *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889, 155 P.3d 952 (2007), *aff'd*, 166 Wn.2d 489, 210 P.3d 308 (2009). A trial court's failure to explain its reason for denying leave to amend may amount to an abuse of discretion unless the reasons for denying the motion are apparent in light of circumstances shown in the record. *Rodriguez*, 144 Wn. App. at 729-30 (citing *Tagliani*, 10 Wn. App. at 233); *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 199, 49 P.3d 912 (2002).

"'[W]hen a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.'" *Ensley v. Mollmann*, 155 Wn. App. 744, 759, 230 P.3d 599 (quoting *Doyle v. Planned Parenthood of Seattle-King Cnty., Inc.*, 31 Wn. App. 126, 130-31, 639 P.2d 240 (1982)), *review denied*, 170 Wn.2d 1002 (2010). "The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.'" *Haselwood*, 137 Wn. App. at 889 (quoting *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983)). In determining prejudice, a court may consider undue delay, unfair surprise, futility of amendment, and jury confusion. *Haselwood*, 137 Wn. App. at 889 (citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987)); *Wilson v. Horsley*,

137 Wn.2d 500, 505-06, 974 P.2d 316 (1999).

Despite the fact that the trial court did not state its reasons for denying WCI's fourth motion to amend, they are apparent in light of circumstances shown in the record and we hold that the trial court did not abuse its discretion. First, the trial court could have reasonably found the proposed assignment claim to be unfairly prejudicial to Sterling. The trial court granted Sterling summary judgment dismissing WCI's third party beneficiary, equitable estoppel, equitable subrogation, unjust enrichment, and tortious interference claims on October 23, 2009. WCI filed its fourth motion for leave to amend its complaint to add an assignment claim five days later on October 28.

On November 5, the trial court denied WCI's motion for leave to amend, finding that "given the dismissal of the claims in its October 23, 2009, Order . . . there is no just reason for delay in entering final judgment against WCI on its claims against Sterling." CP at 974. Because WCI filed its fourth motion for leave to amend five days after an adverse summary judgment order and based the assignment claim on the same facts alleged under the dismissed claims, the trial court could have reasonably determined that the proposed amendment unfairly prejudiced Sterling because of undue delay. *Haselwood*, 137 Wn. App. at 889-90 (trial court did not abuse its discretion when it denied a motion to amend filed after an adverse granting of summary judgment because the motion could have reasonably been found to be untimely and to allow the party to pursue entirely new theories of liability would prejudice the other parties' interest in promptly resolving claims).

Second, even if WCI had filed a motion for reconsideration under CR 59 or for relief under CR 60 of the October 23 summary judgment order (rather than moving to amend

complaint), the assignment claim is meritless. Generally, the "assignment of a contract does not cast upon the assignee the liabilities imposed by the contract on the assignor." *Dahlhjelm Garages v. Mercantile Ins. Co. of Am.*, 149 Wash. 184, 189, 270 P. 434 (1928). It is a well-established rule that a party to a contract cannot relieve himself of his obligations by assigning the contract. *McGill v. Baker*, 147 Wash. 394, 399-400, 266 P. 138 (1928). But if the assignee attempts to enforce the contract against the other party, it can only do so by performing, or showing a performance of, the obligations which the contract imposes and the assignee takes on the burdens of the assignor. *Dahlhjelm*, 149 Wash. at 189; *McGill*, 147 Wash. at 400.

Here, Sterling did not attempt to enforce the construction contract against WCI and the question of whether Sterling performed the obligations under the construction contract does not arise. *Dahlhjelm*, 149 Wash. at 189. Moreover, the APCE and the resulting assignment of DAD's rights in the Rita Estates project to Sterling were intended by the parties as only an "additional security for the [Rita Estates l]oan." CP at 710. Because the assignment did not bind Sterling to carry out DAL/DAD's obligations under the construction contract and Sterling took the APCE only as a means of securing repayment of their advances to DAD, it incurred no liability or obligation to WCI. *See McGill*, 147 Wash. at 400 (assignee assumed no contract liability when it took an assignment merely as a means of securing repayment); *cf. Dahlhjelm*, 149 Wash. at 189-90 (assignee assumed liabilities under a contract by collecting a large number of installment payments from the other party to the contract and used the proceeds for its own use).

Accordingly, the trial court did not abuse its discretion when it denied WCI's fourth motion for leave to amend its complaint to add an unsupported assignment claim.

Third Party Beneficiary Claim

WCI asserts that it is a third party beneficiary of the Rita Estates Agreement and the trial court erred when it dismissed WCI's third party beneficiary claim in its November 5 order. The trial court made no findings of fact or conclusions of law. Because WCI is not a third party beneficiary of the Rita Estates Agreement and could not bring a contract claim against Sterling even if it were a third party beneficiary, we hold that the trial court did not err when it dismissed this claim.

We review summary judgment dismissals of claims de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005)). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). And we consider all facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Atherton*, 115 Wn.2d at 516.

"'The question whether a contract is made for the benefit of a third person is one of construction.'" *Kim v. Moffett*, 156 Wn. App. 689, 699, 234 P.3d 279 (2010) (internal quotation marks omitted) (quoting *McDonald Constr. Co. v. Murray*, 5 Wn. App. 68, 70, 485 P.2d 626, *review denied*, 79 Wn.2d 1009 (1971)). Construction of a contract determines the legal consequences that follow from the terms of the contract. *Kim*, 156 Wn. App. at 697 n.6 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990)). To the extent this court is

required to interpret contract provisions, we apply the de novo review standard. *Kim*, 156 Wn. App. at 697. While interpretation of a contractual provision is often an issue of fact, construction is always a question of law and, thus, amenable to summary judgment. *Kim*, 156 Wn. App. at 697 (citing *In re Marriage of Burke*, 96 Wn. App. 474, 476, 980 P.2d 265 (1999)).

A third party beneficiary contract exists when the contracting parties intend to create one. *Murphy*, 112 Wn. App. at 196 (citing *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986)). The test of intent is not whether the parties desired to confer a benefit upon the third person or advance his interests but is an objective one: whether performance under the contract would necessarily and directly benefit the third party. *Kim*, 156 Wn. App. at 699 (citing *McDonald*, 5 Wn. App. at 70-71); *Murphy*, 112 Wn. App. at 196 (citing *Postlewait*, 106 Wn.2d at 99). But a third party beneficiary can enforce a contract provision only to the extent that the parties to the contract can enforce it. *Shaffer v. McFadden*, 125 Wn. App. 364, 369, 104 P.3d 742 (citing *Kinne v. Lampson*, 58 Wn.2d 563, 567, 364 P.2d 510 (1961)), *review denied*, 155 Wn.2d 1010 (2005).

Here, even if we assume that Sterling and DAD entered into the Rita Estates Agreement intending to benefit a general contractor, the agreement provides that the benefited contractor must have had Sterling's approval. WCI never received such approval and it therefore cannot be an intended beneficiary of the Rita Estates Agreement. Moreover, even if WCI is a third party beneficiary to the Rita Estates Agreement, it has no surviving claim against Sterling. On December 4, 2009, the trial court granted Sterling summary judgment dismissal of any and all of DAD's claims against Sterling. It does not appear from the record that DAD has appealed the December 4 summary judgment order. Accordingly, the trial court did not err when it dismissed

this claim in its November 5 order.

Negligence/Negligent Misrepresentation Claims

In its proposed third amended complaint, WCI asserted that Sterling, through its agent, Action Mortgage, negligently administered the Rita Estates Agreement relied upon by WCI to WCI's damage and detriment, and Sterling's omissions and conduct constituted negligent misrepresentation of the status of the loan agreement to WCI's damage and detriment. The basis of the allegation was that Sterling "breached a duty to WCI by failing to disclose to WCI that Sterling Savings would not advance funds under" the Rita Estates Agreement. CP at 78. Sterling denies it owed any duty to notify WCI that it would not disburse advances. The trial court denied WCI's motion to amend to add the negligence claims and also denied WCI's subsequent motion for reconsideration.

We review a denial of a CR 59 motion for reconsideration for an abuse of discretion. *Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995) (citing *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203-04, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991)). "'The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.'" *Haselwood*, 137 Wn. App. at 889 (quoting *Caruso*, 100 Wn.2d at 350). And in determining prejudice, a court may consider undue delay, unfair surprise, futility of amendment, and jury confusion. *Haselwood*, 137 Wn. App. at 889 (citing *Herron*, 108 Wn.2d at 165); *Wilson*, 137 Wn.2d at 505-06.

On August 14, 2009, the trial court held a hearing on WCI's third motion to amend. The discovery deadline was set 10 weeks later on October 26. Trial was set to begin on December 14. Sterling argued unfair surprise, prejudice because of undue delay in adding new claims, and

hardship because it would have to defend against claims barred by the economic loss rule.[6] WCI argued that the economic loss rule did not bar its tort claims, and that additional discovery, if needed, would be minimal because the negligence claims were based on facts already alleged by WCI. The court denied WCI's motion to amend and stated,

> I don't want to continue this trial date. It is set in December. If it has to be continued, it means it going out well beyond six months, based upon my civil trial calendar, and I think that there is, on the tort claim[s], prejudice and hardship to add, and confusing to the jury to bring in personal injury tort claims in what appears to be, for lack of a better word, a construction development case. And I think that those should not be part of this lawsuit. It doesn't mean that they may not be viable claims for another day, but not part of this lawsuit.[7]

1 Report of Proceedings (RP) at 19. Here, the record supports a finding that permitting an amendment to add WCI's tort claims would have prejudiced Sterling because trial would have been delayed an additional six months and granting the motion would have the effect of broadening the issues necessitating additional discovery at additional cost to the parties. *See Haselwood*, 137 Wn. App. at 889.

Moreover, WCI's assertion that Sterling owed a duty to disclose either DAD's default under the Rita Estates Agreement or Sterling's notice of cessation is without merit. Because WCI and Sterling were not contracting parties who entered into a common transaction, Sterling did not

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[6] Our Supreme Court recently issued an opinion "clarifying" the economic loss rule and explaining that "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent tort duty of care, and '[t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.'" *Eastwood v. Horse Harbor Found.. Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010) (internal quotation marks omitted) (quoting *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

[7] The court also found that adding WCI's owner as a plaintiff, individually, to assert personal injury claims would confuse the jury and denied that amendment as well.

owe WCI any general duty to contract in good faith. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004) (a duty of good faith and fair dealing is implied in all existing contracts "'in relation to performance of a specific contract term'" (quoting *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991))), *cert. denied*, 544 U.S. 905 (2005). And Sterling, as the lender financing a real estate development project, was not a fiduciary upon whom WCI, an experienced general contractor, relied to have its interests "cared for." *Liebergesell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980) (a fiduciary relationship arises as a matter of law but can also arise in fact if one party "'occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for'" (quoting Restatement (First) of Contracts § 472(1)(c) (1932))). WCI does not allege sufficient facts to establish that Sterling was in a position of disproportionately higher bargaining power, had assumed an advisory position, had a long-lasting history of business with WCI akin to a friendship, or any other type of relationship recognized in Washington to rise to the level of a fiduciary relationship potentially triggering a duty to disclose. *See, e.g.*, *Liebergesell*, 93 Wn.2d at 890-92 (discussing the facts upon which courts have found fiduciary relationships in fact if not in law).

Accordingly, the trial court did not abuse its discretion when it denied WCI's third motion to amend to add the negligence claims.

Aiding and Abetting Fraud Claim

WCI does not allege that Sterling committed fraud. Rather, WCI asserts that Sterling aided and abetted Milne's alleged fraudulent acts. Sterling argues that there is no civil cause of action for aiding and abetting fraudulent activities recognized in Washington. In the same ruling

and order denying leave to amend to add WCI's negligence claims, the trial court also denied the addition of WCI's aiding and abetting fraud claim because it found the claim prejudicial. As discussed in the previous section, because the trial court reasonably found that the addition of WCI's tort claims would prejudice Sterling, we likewise hold that it did not abuse its discretion when it denied WCI's motion to amend the complaint to add the aiding and abetting fraud claim.[8]

Principles of Estoppel

WCI asserts that the trial court erred when it dismissed WCI's estoppel claim in its November 5 order. In its third amended complaint, WCI claimed that Sterling should be estopped from refusing to release funds to pay for WCI's construction work on Rita Estates under the loan agreement. Sterling moved for summary judgment on WCI's "equitable estoppel" claim only. CP at 245. Again, the trial court made no findings of fact or conclusions of law but dismissed the equitable estoppel claim in its October 23 order because it found there were no genuine issues of material fact, and subsequently dismissed "any and all claims based on estoppel" in its November 5 order. CP at 974.

We review a summary judgment dismissal of an estoppel claim (and the following claims of unjust enrichment, equitable subrogation, and tortious interference) de novo, and we consider

[8] But because the parties are confused as to whether the cause of action exists, we note that under some circumstances Washington recognizes a civil cause of action for aiding and abetting fraud. *See, e.g.*, Restatement (Second) of Torts § 876 (1977); *Martin v. Abbott Labs.*, 102 Wn.2d 581, 597-99, 689 P.2d 368 (1984) (plaintiffs unable to bring a claim based on a theory of concerted action because they failed to show tacit agreement among defendants and the activity did not rise to the level of concerted action); *see also Cain v. Dougherty*, 54 Wn.2d 466, 471-72, 341 P.2d 879 (1959) (substantial assistance under *Restatement (Second) of Torts*, § 876(b) or (c) requires more than merely offering an opinion); *Halverson v. Skagit County*, 139 Wn.2d 1, 12-13, 983 P.2d 643 (1999) (rejecting the "acting in concert" tort theory in inverse condemnation cases because the "substantial assistance or encouragement" standard falls short of active, proprietary participation).

all facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party, here, WCI. *Torgerson*, 166 Wn.2d at 517; *Atherton*, 115 Wn.2d at 516. Equitable relief is available only if there is no adequate remedy at law. *Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wn. App. 493, 498, 717 P.2d 1384 (1986) (citing *Orwick v. City of Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984)). There are four principles of estoppel claims

WCI asserts it is entitled to make: promissory estoppel, estoppel by silence or acquiescence, estoppel in pais, and equitable estoppel.[9]

A promissory estoppel claim is based on the existence of a promise and may be used to enforce that promise even if there is no mutual assent or consideration. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 397-98, 879 P.2d 276 (1994); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 258-59, 616 P.2d 644 (1980). The promise needed to invoke the doctrine of promissory estoppel must be "'a clear and definite promise.'" *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 173, 876 P.2d 435 (1994) (quoting 1 Paul H. Tobias, *Litigating Wrongful Discharge Claims* § 4.52, at 4-89 (1993)). The essential elements of promissory estoppel are "'(1) a promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.'" *Hilton v. Alexander & Baldwin, Inc.*, 66 Wn.2d 30, 31, 400 P.2d 772 (1965) (quoting *Weitman v. Grange Ins. Ass'n*, 59 Wn.2d 748, 751, 370 P.2d 587 (1962)).

Sterling's promise to DAD to pay an approved general contractor is a "clear and definite promise" conditioned on DAD's full compliance with all terms of the Rita Estates Agreement. *Havens*, 124 Wn.2d at 173; *Hilton*, 66 Wn.2d at 31 (a promise must be communicated by the promisor to the promisee before the promisee can justifiably rely upon it); *see also* Restatement

[9] Sterling argues that WCI may not assert its promissory estoppel, estoppel by silence or acquiescence, and estoppel in pais claims because it only pleaded "estoppel" and Sterling thereafter characterized WCI's claim as "equitable estoppel." But Sterling fails to cite any authority supporting the proposition that a plaintiff pleading a claim of estoppel, which a defendant later labels "equitable estoppel," and argues it did not intend to limit itself to only "equitable estoppel," is precluded from asserting any other theories of estoppel. We do not address Sterling's issue preservation argument further. RAP 10.3(a)(6).

(Second) of Contracts § 76 cmt. a (1979) (a promise is "conditional" if an event must occur before a duty of immediate performance of the promise arises, and the "condition" is the event which must occur). Here, the record shows that DAD breached when it failed to obtain Sterling's approval for WCI as the general contractor and that it defaulted when Sterling determined that JAL's default on the Cook project materially changed DAD/Milne's financial capacity. Once DAD defaulted on the Rita Estates Agreement, the contract with Sterling terminated as a matter of law terminating its promise to pay; such is the nature of conditional promises. Put simply, no promise remains for WCI to attempt to enforce. Accordingly, the trial court did not err when it dismissed WCI's promissory estoppel claim.

Estoppel by silence or acquiescence requires that "[w]here a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice." *Huff v. N. Pac. Ry. Co.*, 38 Wn.2d 103, 114, 228 P.2d 121 (1951). Estoppel by silence or acquiescence does not arise without full knowledge of the facts and a duty to speak or act on the part of the person against whom the estoppel is claimed. *Consol. Freight Lines v. Groenen*, 10 Wn.2d 672, 677, 117 P.2d 966 (1941).

> "Mere silence, without positive acts, to effect an estoppel must have operated as a fraud, must have been intended to mislead, and itself must have actually misled. The party keeping silent must have known, or had reasonable grounds for believing that the other party would rely and act upon his silence. *The burden of showing these things rests upon the party invoking the estoppel*."

Consol. Freight, 10 Wn.2d at 677-78 (quoting *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 34, 159 P. 1077 (1916)); *contra Harms v. O'Connell Lumber Co.*, 181 Wash. 696, 701, 44 P.2d 785

(1935) (a fraudulent intention to deceive or mislead is not essential to establishing a claim of estoppel by silence). Here, the record indicates Sterling knew WCI was continuing work under its construction agreement even though Sterling did not intend to pay any advances. But even assuming Sterling's silence or inaction was motivated by Sterling's self-interest in protecting its deteriorating financial condition as WCI asserts, as discussed above, Sterling did not owe WCI any duty to speak. Accordingly, WCI cannot meet the requirements to bring a claim of estoppel by silence or acquiescence and the trial court did not err in dismissing it.

Last, both estoppel in pais and equitable estoppel require the claimant to prove, by clear and cogent evidence (1) an admission, statement, or act inconsistent with the claim asserted afterward; (2) action by the other party in reasonable reliance on that admission, statement, or act; and (3) injury to that party when the first party is allowed to contradict or repudiate its admission, statement, or act. *McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987); *Proctor v. Huntington*, 146 Wn. App. 836, 845, 192 P.3d 958 (2008) (citing *Thomas v. Harlan*, 27 Wn.2d 512, 518, 178 P.2d 965 (1947)), *aff'd*, 169 Wn.2d 491, 238 P.3d 1117 (2010), *cert. denied*, 131 S. Ct. 1700 (2011). Considering all facts submitted and the reasonable inferences therefrom in the light most favorable to WCI, the record does not support a finding that Sterling made an admission, statement, or inconsistent act with a later asserted claim. Here, Sterling communicated with and paid WCI directly for its work related to the Cook Addition without discussing the status of the Rita Estates project. These acts alone are not "inconsistent" with Sterling's later assertion that it did not owe a duty to disclose.[10]

[10] The parties debate whether a privacy notice included in the Rita Estates Agreement prevented Sterling from disclosing to WCI the fact that DAD had defaulted on the agreement and payment would not be forthcoming. Because we hold that Sterling had no duty to either disclose or notify WCI of the cessation of advances, we do not address these arguments.

Moreover, the question of whether WCI may assert an estoppel claim depends on WCI's right to rely on Sterling's representations, either explicit or implied through its failure to speak, regarding payment for WCI's work. *Liebergesell*, 93 Wn.2d at 889. WCI's right to rely on Sterling's representation only arises if (1) a fiduciary relationship existed between the two parties and (2) Sterling had a general duty to contract in good faith. *Liebergesell*, 93 Wn.2d at 889. Neither condition is satisfied here. Accordingly, we hold that WCI cannot prove the evidence required to assert estoppel in pais and equitable estoppel claims and the trial court did not err when it dismissed them.

Unjust Enrichment

Generally, "'a person who has conferred a benefit upon another, by the performance of a contract with a third person, is not entitled to restitution from the other merely because of the failure of performance by the third person.'" *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 732, 741 P.2d 58 (quoting 66 Am. Jur. 2d *Restitution and Implied Contracts*, § 16, at 960), *review denied*, 109 Wn.2d 1009 (1987). But this rule is not absolute. To establish a contract implied in law (1) one party must confer a benefit on another, (2) the recipient must appreciate or know of the benefit, and (3) the recipient "must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value." *Pierce County v. State*, 144 Wn. App. 783, 830, 185 P.3d 594 (2008); *Alvarado v. Microsoft Corp.*, 2010 WL 715455, *4 (W.D. Wash. 2010) (citing *Bailie Commc'n, Ltd. v. Trend Bus. Sys. Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12, 814 P.2d 699, *review denied*, 117 Wn.2d 1029 (1991)).

"A person confers a 'benefit' upon another if he performs services beneficial to or at the request of the other, or in any way adds to his security or advantage." *Family Med. Bldg., Inc. v. Dep't of Social & Health Servs.*, 37 Wn. App. 662, 670, 684 P.2d 77 (1984), *aff'd*, 104 Wn.2d 105, 702 P.2d 459 (1985). Recovery for the value of the recipient's unjust gain is measured by the cost of the benefit provided or by the increase in value to the property or interests of the recipient. *Young v. Young*, 164 Wn.2d 477, 487, 191 P.3d 1258 (2008); *Ducolon Mech. Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 712, 893 P.2d 1127 (1995) (contract price, while evidence of reasonable value, is not determinative of the value of performance (citing *U.S. for Use of Bldg. Rentals Corp. v. W. Cas. & Sur. Co.*, 498 F.2d 335, 338 (9th Cir. 1974))). The burden is on the conferring party to prove the value of the benefit conferred. *See Noel v. Cole*, 98 Wn.2d 375, 383, 655 P.2d 245 (1982); *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 277, 135 P.3d 955 (2006), *review denied*, 159 Wn.2d 1013 (2007). The conclusion that retention without restitution would be unjust is a conclusion of law, not a finding of fact. *Town Concrete*, 43 Wn. App. at 502 (citing *Lloyd v. Ridgefield Lumber Ass'n*, 38 Wn.2d 723, 735, 231 P.2d 613 (1951); *Park v. Ross Edwards, Inc.*, 41 Wn. App. 833, 837, 706 P.2d 1097, *review denied*, 104 Wn.2d 1027 (1985)).

We hold that WCI raises a genuine issue of material fact as to whether it conferred a benefit onto Sterling. Sterling, as the financer of the Rita Estates project, had an interest in seeing the land developed, sold, and its loan repaid. The bank was aware of DAL's contract with WCI and knew it would not pay WCI for any work performed. Yet Sterling allowed WCI to work for two months on its property without intervention.

Under these facts, if WCI's work performed on the project after Sterling was made aware

of WCI's involvement increased the value of the Rita Estates property, then Sterling benefited from WCI's performance and it would be unjust to permit it to receive but not pay for the work. *Farwest*, 48 Wn. App. at 732; *Alvarado*, 2010 WL 715455, at *4 (the plaintiff must "allege that 'the party receiving the benefit must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value'" (quoting *Cox v. O'Brien*, 150 Wn. App. 24, 37, 206 P.3d 682 (2009))). Accordingly, we reverse the summary dismissal of WCI's unjust enrichment claim and remand for a determination of the reasonable value of the benefit to Sterling, if any, of WCI's work on the Rita Estates project WCI conducted after August 20, 2008, the date Sterling learned the DAL-WCI construction contract would not be terminated.

Equitable Subrogation

Equitable subrogation is a remedy designed to prevent unjust enrichment by maintaining a proper order of priorities. *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 166, 776 P.2d 681 (1989) (citing D. Dobbs, *Remedies* § 4.3 at 250 (1973)); *Bank of Am., N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007). Washington courts have expanded and applied the doctrine of equitable subrogation to many types of relationships. *See Bank of Am.*, 160 Wn.2d at 564-72 (applying the doctrine as between mortgage refinancing lenders competing for priority under the recording acts); *Newcomer v. Masini*, 45 Wn. App. 284, 290, 724 P.2d 1122 (1986) (tortfeasor who was fully responsible for an accident but never a named party in the subsequent action was unjustly enriched by the resulting settlement and therefore liable for equitable subrogation to the defendant in the action); *but see Lynch*, 113 Wn.2d at 166-67 (declining to extend the doctrine to debtor-creditor relationships (citing *United Pac. Ins. Co. v. Boyd*, 34 Wn.

App. 372, 377, 661 P.2d 987 (1983))).

Subrogation has at least two elements: first, the person seeking it must have answered for the debt of another, usually by paying the other's creditor and, second, the person must have acted under some duty or compulsion, legal or moral, and not as a volunteer or intermeddler. *BNC Mortg., Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 253, 46 P.3d 812 (2002). Here, WCI does not argue that it answered for DAD's debt to Sterling such that it became qualified to bring an equitable subrogation claim. Accordingly, we hold that the trial court did not err when it dismissed this claim.

Tortious Interference

To prove tortious interference with a business expectancy, a plaintiff must show (1) the existence of a valid contractual relationship or business expectancy, (2) that the defendant had knowledge of that expectancy, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that the defendant interfered for an improper purpose or used improper means, and (5) resulting damage. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 114 Wn. App. 151, 157-58, 52 P.3d 30 (2002) (citing *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997); *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 998, 974 P.2d 342 (1999)).

A valid "business expectancy" includes any prospective contractual or business relationship that would be of pecuniary value. *Newton*, 114 Wn. App. at 158 (citing Restatement (Second) of Torts § 766B, cmt. c (1979)). Interference with a business expectancy is intentional "'if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action.'" *Newton*, 114

Wn. App. at 158 (quoting Restatement (Second) of Torts § 766B, cmt. d (1979)). Interference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession. *Newton*, 114 Wn. App. at 158 (citing *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989)).

Interference is justified as a matter of law only when the interferor engages in the exercise of an absolute right, equal or superior to the right which is invaded. *Topline Equip., Inc. v. Stan Witty Land, Inc.*, 31 Wn. App. 86, 93, 639 P.2d 825) (citing *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980)), *review denied*, 97 Wn.2d 1015 (1982). An absolute right exists only where a person has a definite legal right to act, without any qualification. *Topline*, 31 Wn. App. at 94.

Sterling argues that its exercise of its right to issue a notice of cessation of advances was a recognized privilege negating any improper interference. *Calbom v. Knudtzon*, 65 Wn.2d 157, 163, 396 P.2d 148 (1964) (citing Restatement (First) of Torts § 769 (1939)); *Leingang*, 131 Wn.2d at 157. We agree. Once DAD defaulted under the Rita Estates Agreement, Sterling had an unqualified right to issue a notice of cessation on the Rita Estates project. WCI does not contend that Sterling did not possess this right; rather, it focuses its argument on Sterling's alleged improper motives. But because the interference was legally justified, Sterling's motivations are irrelevant for purposes of this issue and we hold that the trial court did not err when it dismissed the claim.

Accordingly, because WCI presents a genuine issue of material fact only as to its unjust enrichment claim, we reverse summary judgment dismissal of that claim and remand for further proceedings in accord with this opinion. We affirm on all other issues.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.