IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA, Appellant, v. ROBERT WAGNER, as an individual and as TRUSTEE of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (aka "THE ROBERT H. WAGNER PENSION PLAN"), and DOES 3 through 50, inclusive; Respondent.	No. 40367-6-II UNPUBLISHED OPINION

Penoyar, C.J. — Robert Wagner loaned Mark Olla over $2 million from his and his wife's personal pension fund. Because Olla could not make the loan payments when they came due, Olla and Wagner executed a settlement agreement that included a release clause prohibiting Olla from suing Wagner for known and unknown claims. Despite the release clause, Olla later sued Wagner, asserting numerous claims. The trial court dismissed all of Olla's claims, concluding, in relevant part, that Olla was estopped from asserting the claims because he intended to sue Wagner when he signed the settlement agreement. We affirm.

FACTS

In 2007, Olla decided to move from Malibu, California to Washington State. He placed his Malibu house, which was subject to a deed of trust, on the market. He sought financing to enable him to purchase a house in Washington while waiting for the Malibu house to sell.

On September 25, 2007, the Robert H. Wagner Pension Plan[1] loaned $1.7 million to Olla

[1] Wagner served as the pension plan's trustee.

to finance Olla's purchase of a Washington home for $1.35 million. The mortgage disclosure statement, which Olla signed, stated that the loan was a "bridge loan" that Olla would repay with the sale proceeds of his Malibu house. Because the loan amount exceeded the house's purchase price, the pension plan secured Olla's debt by obtaining a second deed of trust on the Malibu property and a first deed of trust on the Washington property. The promissory note required Olla to make monthly interest-only payments until September 27, 2008, at which time the entire unpaid principal and any accrued interest became due and payable in full. Olla used some of the excess loan proceeds to pay a six-month interest reserve on the loan.

On November 7, the pension plan loaned Olla an additional $150,000 for improvements to the Washington property. The pension plan kept a five-month interest reserve and secured the loan with a third deed of trust on the Malibu property. The promissory note required Olla to make monthly interest-only payments until September 10, 2008, at which time the entire unpaid principal and any accrued interest became due and payable in full.

On March 14, 2008, the pension plan loaned Olla an additional $160,000, keeping a six-month interest reserve. The pension plan secured the loan with a fourth deed of trust on the Malibu property. The promissory note required Olla to make monthly interest-only payments until September 19, 2008, at which time the entire unpaid principal and any accrued interest became due and payable in full. Additionally, the parties also negotiated a four-month postponement of Olla's obligations to make interest payments on the first two loans in exchange for Olla's agreement to add $37,500 to his principal balance.

Each of the three promissory notes that Olla issued to the pension plan included a choice-of-law clause that read, "This Note shall be construed in accordance with the laws of the State of

California." Plaintiff's Ex. 7 at 2; Plaintiff's Ex. 18 at 2; Plaintiff's Ex. 179 at 2.

By September 2008, Olla had not sold the Malibu house or made any interest payments on the loans. He was experiencing financial problems. Olla and Wagner had a series of communications about the situation in September 2008. They discussed renting out the Malibu house to generate income. Olla insisted that he could rent the house for twice its actual rental value. Wagner did not think that renting the Malibu home was a good idea because it would interfere with Olla's effort to sell the Malibu property and repay the bridge loans. Wagner also told Olla that he would attach any rents, which he was permitted to do under the terms of the deeds of trust. Wagner also believed that Olla was not willing to sell the California property for its fair market value. On September 20, Olla e-mailed his friend, Virginia Vassallo, expressing his frustration with Wagner: "He has revealed himself to be adverse to my interests. I will sue him and bring in the Real Estate Board and the ABA." Defendant's Ex. 183, tab 36.

On September 22, Olla and Wagner had an "acrimonious" discussion. Clerk's Papers (CP) at 543. Later that day, Joseph Privitera, Olla's friend and business associate, told Wagner that Olla would be willing to settle his debt by conveying deeds in lieu of foreclosure[2] on both properties to the pension plan in exchange for a payment of $350,000. Wagner counteroffered, stating that he would accept the deeds and pay Olla $50,000. That evening, Olla e-mailed Wagner, expressing disappointment with Wagner's counteroffer, and offering to convey the deeds in exchange for $500,000.

Negotiations continued through the end of September. Because of the earlier,

[2] A "deed in lieu of foreclosure" is "[a] deed by which a borrower conveys fee-simple title to a lender in satisfaction of a mortgage debt and as a substitute for foreclosure." Black's Law Dictionary 476 (9th ed. 2009).

acrimonious discussion, Wagner primarily negotiated with Robert Freedman, Olla's brother-in-law. At the end of September, the parties reached an understanding that Olla would convey the deeds for a payment of $165,000.

On October 2, Wagner e-mailed an initial draft of the proposed settlement to Freedman, who forwarded it to Olla. The next day, Olla e-mailed Wagner, confirming that he had received the proposed settlement. In the e-mail, Olla thanked Wagner for providing the proposed settlement on schedule and informed him that an attorney was reviewing the proposal.

On October 10, Olla e-mailed Wagner, stating that he had some concerns and questions "[g]iven the fact that we are on the eve of signing our agreement to transfer the . . . house of mine in Malibu and the [Washington] house back to you for the prespecified agreed price of $165,000-net to me as negotiated with you on my behalf by my brother-in-law Robert Freedman." Defendant's Ex. 183, tab 39. In particular, Olla asked Wagner about the settlement's tax implications and arrangements for insuring the Malibu property after settlement. Olla also stated in the e-mail: "Finally, I assume the agreement effectively terminates all obligations that you and I have to each other directly with finality save your obligation to pay the WAMU loan payments[3] until you sell or make other future transfer of the Malibu house to a third party. Could you please confirm this." Defendant's Ex. 183, tab 39.

On October 13, Olla briefly consulted an attorney about the settlement agreement. An e-mail from Olla to the attorney indicated Olla's awareness that he was at risk of a deficiency judgment if he could not repay the loans in full through the foreclosure process: "I have

[3] As part of the proposed settlement, Wagner had apparently agreed to pay the mortgage on the Malibu home to Washington Mutual, the mortgagee and holder of the first deed of trust.

trepidation going forward at this time b/c I think I have no legal way out of my situation especially since there exists a contractual cause of action for any remainder unpaid . . . on the note, as pointed out by you." Defendant's Ex. 183, tab 33. Apparently, Olla did not retain this attorney to assist him.

On October 14, Wagner responded to Olla's October 10 e-mail. He attached a revised draft of the settlement agreement, which incorporated minor changes that Olla had requested. On October 17, Olla e-mailed Wagner, asking him to "tighten" some language on page 2 of the agreement in order to close an "objectionable loophole." Defendant's Ex. 183, tab 42. Olla stated in the e-mail that he had just read the proposed agreement for the first time because he had been "relying on lawyers that were to be provided by my brother-in-law but who are not apparently as sharp as I [sic]." Defendant's Ex. 183, tab 42. After Wagner responded to Olla's concerns the following day, Olla was satisfied and he faxed the signed agreement to Wagner, completing the transaction.

The final settlement agreement included the following recital:

> Settlement. Seller[4] has not been able to sell or refinance its Properties[5] and the value of such Properties . . . is less than the sum of the outstanding principal and accrued interest on such Loans. Seller desires to resolve the defaults by executing and delivering to Buyer, among other things, deeds to the Properties in lieu of foreclosure. In consideration thereof, *Buyer is willing to agree not to sue Seller for any liability arising under the Loan Documents, all on the terms and subject to the conditions set forth more particularly in this Agreement.*

Defendant's Ex. 183, tab 44, at 1 (emphasis added). Paragraph 7.1 of the agreement included

[4] "Seller" refers to Olla; "Buyer" refers to the pension plan. Defendant's Ex. 183, tab 44, at 1.

[5] "Properties" refers to the both the California and Washington properties. Defendant's Ex. 183, tab 44, at 1.

Olla's acknowledgment that the consideration for the transfer of the properties was "fair, just and equitable" and "not less than the fair market value of Seller's interest in the Properties." Defendant's Ex. 183, tab 44, at 3. Paragraph 7.3 included Olla's acknowledgment that that he entered into the agreement and executed the deeds in lieu of foreclosure voluntarily, in good faith, and without duress or undue influence. That paragraph also stated that Olla had had an opportunity to consult with attorneys and accountants about the meaning, interpretation, and effect of the settlement agreement.

Paragraph 9 of the settlement agreement included a release clause, which remained unaltered throughout the negotiations:

> Release of Buyer. As additional consideration for the provisions of this agreement, Seller hereby releases and forever discharges Buyer, Buyer's agents, attorneys, successors and assigns from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever which Seller might now have or claim to have against Buyer, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way concerning, arising out of or founded on the Loan Documents or the Loans, including without implied limitation, all such loss or damage of any kind heretofore sustained or that might arise as a consequence of the dealings between the parties. This release will not extend to any claim arising after the date of this Agreement to the extent such claim is based on acts or omissions of Buyer occurring after the date of this Agreement except that such release is specifically intended by the parties to include the transactions contemplated by this Agreement.

Defendant's Ex. 183, tab 44, at 4. In paragraph 10, the pension plan likewise promised not to sue Olla provided that Olla did not institute any action against it.

The parties performed the agreement: the pension plan paid Olla $165,000, and Olla transferred title on both properties to the plan through deeds in lieu of foreclosure. Olla signed estoppels affidavits stating that he acted freely and voluntarily in executing the deeds, was not acting under coercion or duress, and was not acting under any misapprehension as to the effect of

executing the deeds.

Litigation

On December 30, 2008, Olla sued Wagner and the pension plan in Los Angeles County Superior Court. Based on this lawsuit, Olla filed two separate lis pendens on the Malibu property and a lis pendens on the Washington property. Wagner expunged all three lis pendens.

On June 25, 2009, Olla filed a pro se complaint in Kitsap County Superior Court, alleging numerous causes of action relating to the settlement agreement and the negotiations leading up to the agreement. Olla's complaint described his causes of action as follows: (1) violations of the federal Truth in Lending Act, (2) violations of RCW 18.85.230, (3) fraudulent and intentional deceit, (4) quiet title, (5) fraud, (6) breach of oral and written contract, (7) breach of implied covenant of good faith and fair dealing, (8) undue influence, (9) unjust enrichment, (10) intentional infliction of emotional distress, (11) intentional interference with prospective economic advantage, and (12) declaratory and injunctive relief. Wagner answered, asserting numerous counterclaims[6] and affirmative defenses, including a defense that the settlement agreement released all of Olla's claims.

Wagner moved for an expedited fact finding hearing, which the trial court granted. In its order, the trial court stated, "[T]he Court shall issue findings of fact and conclusions of law on the issue of the enforceability of the parties' settlement agreement." CP at 227.

At a three-day bench trial in November 2009, Olla proceeded pro se. Both parties called multiple witnesses. On cross-examination, Olla's friend Vassallo testified that Olla had planned to use the settlement proceeds to sue Wagner despite the agreement's mutual release clauses:

Q: Now, is it true that . . . Mr. Olla told you that he intended to sue Mr.

[6] According to Wagner, at the time that he filed his response brief in this case, these counterclaims were pending trial in Kitsap County Superior Court.

> Wagner as soon as he received the settlement money?
>
> A: Oh, yes. He was going to use that money to get himself a legal representation and sue, yes. Because he didn't feel it was right, but he felt that he couldn't stop it with no money.
>
> Q: Did Mr. Olla tell you that that settlement agreement he signed contained language that would prevent him from suing?
>
> A: Well, you know, we discussed that, you know, the agreement was no good so it didn't really matter if it was telling you that you can't go against it, because that was the whole thing, we didn't feel the agreement was good.

Report of Proceedings (RP) (Nov. 17, 2009) at 79-80.

On December 11, the trial court entered an oral ruling dismissing all of Olla's claims. The trial court subsequently entered extensive findings of fact and conclusions of law. The trial court concluded that Olla had failed to meet his burden of proving any of his claims and causes of action based on fraud, misrepresentation, intentional deceit, undue influence, procedural or substantive unconscionability, duress or coercion, and "all . . . remaining claims and causes of action seeking the rescission of the settlement agreement." CP at 552. The trial court concluded that because the settlement agreement was fully enforceable, Olla knowingly and voluntarily released all of the remaining claims that he included in his complaint. The trial court also concluded that Olla was estopped from advancing all his claims against Wagner because Olla had a plan to initiate litigation against Wagner when he entered into the settlement agreement despite his knowledge that the settlement agreement contained full mutual releases. Finally, the trial court concluded that all of Olla's claims against Wagner were frivolous in violation of RCW 4.84.185 and had been brought for an improper purpose and contained allegations not well grounded in fact in violation of Civil Rule 11.

Olla appeals.

ANALYSIS

In this appeal, Olla states that the trial court committed "numerous errors of fact," and he describes the trial court's findings as "largely erroneous." Appellant's Br. at 7, 65. Moreover, throughout his 75-page brief, Olla repeatedly challenges the trial court's characterization of the facts, arguing that the evidence is clear that Wagner misled him in various ways into signing the settlement agreement.

But contrary to RAP 10.3(g), Olla does not assign errors to any allegedly improper findings of fact, and he does not challenge any finding by number. Nor does he comply with RAP 10.4(c), which requires a party to include the material portions of any challenged finding in its brief, or to attach such portions to its brief. These rules have a useful purpose; they "add order to and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as findings claimed to have been made in error." *In re Marriage of Stern*, 57 Wn. App. 707, 710, 789 P.2d 807 (1990).

Because Olla has ignored these basic rules, it is exceedingly difficult to understand his arguments on appeal. In most instances, it is simply unclear whether Olla argues, albeit implicitly, that substantial evidence does not support certain findings or, alternatively, that the trial court erroneously failed to recognize that his evidence on a certain factual issue was more persuasive than his opponent's. Although we review arguments of the former variety, we defer to the trial court on issues of witness credibility and persuasiveness of the evidence. *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008).

Because Olla does not properly assign error to any trial court findings, we accept the trial court's findings as verities on appeal and do not reweigh the evidence supporting them. *See*

Robel v. Roundup Corp., 148 Wn.2d 35, 47, 59 P.3d 611 (2002). Accordingly, we limit our review to determining whether the unchallenged findings justify the trial court's conclusions of law. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007); *Fuller v. Emp't Sec. Dep't*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988).

I. Estoppel

The trial court concluded that estoppel precluded Olla from advancing "any and all . . . claims" against Wagner because Olla intended to sue Wagner at the time that Olla signed the settlement agreement even though he knew that the agreement contained full mutual releases. CP at 552. We agree.

Estoppel is not favored and a party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994). Equitable estoppel requires: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the relying party if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Berschauer/Phillips Constr. Co.*, 124 Wn.2d at 831.

Before Olla received the settlement proceeds, he told Vassallo that he intended to use the proceeds to sue Wagner even though he knew that the agreement released all claims. This is consistent with Olla's September 20 e-mail to Vassallo, in which he said that he would sue Wagner. These representations amount to clear, cogent, and convincing evidence that Olla never intended to honor the settlement agreement when he signed it; thus, his act of signing the agreement and releasing all claims against Wagner was inconsistent with his private intent to sue

Wagner. Olla did, in fact, sue Wagner using the settlement proceeds. It is unchallenged that Wagner would not have entered the settlement agreement had he known of Olla's intent to sue him. Because of Olla's deception, Wagner has been forced to defend this lawsuit and appeal and to quash three separate lis pendens. Accordingly, the trial court properly concluded that estoppel warrants dismissal of all of Olla's claims.

II. Choice of Law and Subject Matter Jurisdiction

Olla also argues, for the first time on appeal, that the trial court did not have subject matter jurisdiction to determine the enforceability of the settlement agreement because each of the promissory notes that he issued to Wagner included choice-of-law clauses reading, "This Note shall be construed in accordance with the laws of the State of California." Plaintiff's Ex. 7 at 2; Plaintiff's Ex. 18 at 2; Plaintiff's Ex. 179 at 2. In Olla's view, the promissory notes' choice-of-law clauses gave the Los Angeles Superior Court "exclusive jurisdiction" to determine whether the settlement agreement was enforceable. Appellant's Br. at 4. In a related argument, he asserts that the trial court erred when it applied Washington law, rather than California law, to determine the settlement agreement's enforceability.

We decline to review all of Olla's arguments involving the choice-of-law clauses because he did not raise these arguments in the trial court.[7] *See* RAP 2.5(a). Olla argues that he can raise these choice-of-law arguments under RAP 2.5(a)(1), which permits a party to assert lack of subject matter jurisdiction for the first time on appeal. But a choice-of-law clause in a written agreement does not govern whether a trial court has subject matter jurisdiction; rather, it

[7] We also note that Olla also failed to specially plead foreign law in his complaint, as CR 9(k) requires. CR 9(k); CR 44.1(a). In the absence of proper pleading, Washington law applies unless such application would result in a manifest injustice. CR 9(k)(4).

determines which state's law applies to any dispute that may arise between the parties concerning the agreement. *See* Black's Law Dictionary 275 (9th ed. 2009); *see also Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (whether a court has subject matter jurisdiction depends on the "type of controversy" it is asked to adjudicate). Accordingly, because Olla's choice-of-law-based challenges are not jurisdictional challenges, we decline to review them under RAP 2.5(a)(1).

We affirm the trial court's dismissal of Olla's lawsuit. We award Wagner attorney fees and costs on appeal in accordance with paragraph 11 of the settlement agreement.[8]

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.

Penoyar, C.J.

We concur:

Van Deren, J.

Johanson, J.

[8] Paragraph 11 states, "If legal action is required to enforce the provisions of this agreement, the prevailing party shall be entitled to recover its attorneys' fees and costs from the nonprevailing party." Defendant's Ex. 183, tab 44, at 5.