IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CENTRAL PARK WEST LLC, Appellant, v. UNIGARD INSURANCE COMPANY, Respondent.	No. 42542-4-II UNPUBLISHED OPINION

Bridgewater, J.P.T.[1] — Central Park West LLC (Central) appeals from the trial court's grant of summary judgment in favor of Unigard Insurance Company. We hold that the trial court did not weigh the credibility of evidence in granting summary judgment. This appeal is frivolous. We affirm the trial court's summary judgment and award of attorney fees and costs to Unigard on appeal.

FACTS

Kenneth Mroczek is the principal of Central. He profits from purchasing salvageable assets from estate sales. The items that were the subject of this lawsuit were chandeliers allegedly purchased from an estate. Central stored its salvageable assets at and insured the Aberdeen storage building through a policy with Unigard. The policy contained a provision rendering the policy void "in any case of fraud by [the insured]" or when the insured "intentionally conceal[ed] or misrepresent[ed] a material fact concerning" covered property or a claim under the policy. Clerk's Papers (CP) at 54.

[1] Judge C. C. Bridgewater is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

Mroczek alleged a theft of chandeliers from the Aberdeen building on June 10, 2005. A Unigard representative informed Mroczek that Unigard needed a list of the stolen items and supporting documentation, such as photographs, and return of a sworn proof of loss form. On February 14, 2006, Mroczek executed a sworn proof of loss form listing "114 cartons containing two fixtures each of vintage/antique brass chandeliers valued at $1,000.00 each that were fixtures for the building." CP at 75. Unigard informed Central that it could pay only the $51,000 policy limit. On September 5, 2006, Unigard closed the claim without issuing any payments.

On April 18, 2008, Mroczek met with a Unigard representative and stated that the chandeliers were valued between $1,000,000 and $2,000,000. The representative informed Mroczek that the policy limited coverage for business personal property to $51,000. Mroczek replied that he had intended to install the chandeliers in the Aberdeen building. The representative informed Mroczek that he should at least sign a proof of loss form for the undisputed $51,000 policy payment and that Unigard would continue investigating the chandeliers.

Unigard interviewed the estate's executor who informed Unigard that the estate did not have either antiques or antique chandeliers. Unigard also interviewed a workman who had moved estate items into the storage building; he stated that he did not move any boxes or chandeliers matching Mroczek's claims. Finally, Unigard consulted with an appraiser who described the claims as implausible.

Despite previously stating he had examined "maybe 60 [percent]" of the chandeliers, on March 6, 2009, Mroczek executed a new, sworn proof of loss form listing 228 vintage chandeliers, including 80 Quezal chandeliers, 50 "[e]tched" chandeliers, 10 "[e]tched/Deco"

chandeliers, and 88 "[a]cid [f]rosted Deco" chandeliers, for a total value of $580,860. CP at 115-16, 156-57. Eventually, Mroczek filed suit against Unigard seeking payment for the chandeliers.

Unigard moved for summary judgment, arguing that (1) Central failed to prove the existence of the chandeliers; (2) there was no issue of material fact about Central's misrepresentation of the chandeliers' existence or amounts, thus voiding the insurance policy; and (3) even if the chandeliers existed, they fell under the $51,000 coverage limit. In opposition to summary judgment, Central submitted Mroczek's affidavit describing in greater detail the barn, the boxes, and his discovery of the chandeliers. But Mroczek submitted no independent documentation supporting this statement or any of his statements about the chandeliers' existence.

The trial court granted summary judgment in favor of Unigard, ruling that Central made "an intentional misrepresentation of material fact that [the chandeliers] ever existed" and noting the absence of "anything" supporting Central's assertions; Mroczek's inconsistency in asserting that he only examined 60 percent of the chandeliers but later submitting a highly detailed, itemized proof of loss form describing every chandelier; and the overall "incredible" nature of Central's claims. Report of Proceedings at 18-19.

ANALYSIS

Summary Judgment

Central argues that the trial court erred in granting summary judgment in favor of Unigard. We disagree.

We review an order granting summary judgment de novo. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is appropriate when "there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When reviewing a summary judgment order, we review the evidence in the light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). The burden is on the moving party to show an absence of evidence supporting the nonmoving party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). After the moving party meets this burden, the nonmoving party must set forth specific facts rebutting the moving party's contentions and demonstrating that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party "may not rely on . . . having its affidavits considered at face value." *Seven Gables*, 106 Wn.2d at 13. Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). When reasonable minds could reach only one conclusion from the evidence, questions of fact may be determined as a matter of law. *Rutt v. King County*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995).

Here, Unigard met its burden by demonstrating the absence of any evidence supporting the chandeliers' existence. In response, Central submitted Mroczek's self-serving affidavit describing his discovery and ownership of the chandeliers. But Central could not rely on having its affidavits considered at face value. *Seven Gables*, 106 Wn.2d at 13. Central also submitted an affidavit in which the affiant stated that Mroczek had mentioned the chandeliers when they discussed a loan for renovating the Aberdeen building. But these were yet more of Mroczek's unverified statements that the chandeliers existed. Accordingly, the trial court did not err in ruling that

Central failed to meet its burden on summary judgment to prove the chandeliers existed.

Further, because no evidence supported the chandeliers' existence and, by his own testimony, Mroczek not only claimed they existed but listed them in itemized detail despite having examined only 60 percent of them, reasonable minds could reach only one conclusion: Central, through Mroczek, intentionally misrepresented the chandeliers' existence. *See Rutt*, 125 Wn.2d at 703-04. Accordingly, the trial court properly granted summary judgment in favor of Unigard, and Central's claims fail.

Attorney Fees

Unigard, citing RCW 4.84.185 and CR 11, argues that Central's claims are frivolous and requests attorney fees and costs incurred at trial and on appeal.

But Unigard did not request its attorney fees and costs incurred below from the trial court. Accordingly, it may not request those fees and costs for the first time on appeal. *Scott v. Goldman*, 82 Wn. App. 1, 10, 917 P.2d 131 (1996). Moreover, "CR 11, a superior court rule, does not explicitly authorize us to award sanctions." *Schorno v. Kannada*, 167 Wn. App. 895, 904, 276 P.3d 319, *reconsideration denied* (2012) (citing *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (2009)).

RAP 18.9(a) authorizes this court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999). An appeal is frivolous if there are "'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741

(2003) (internal quotation marks omitted) (quoting *Millers Cas. Ins. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)). Central's appeal is frivolous. The standard that a nonmoving party may not rely on having its affidavits taken at face value on summary judgment is well-known and oft-cited. *See, e.g.*, *Seven Gables*, 106 Wn.2d at 13. But Central chose to pursue its appeal based solely on having Mroczek's affidavit taken at face value. Central presented no debatable point of law and the chance for reversal was nonexistent. We award Unigard its reasonable attorney fees and costs on appeal, to be determined by our Commissioner upon Unigard's compliance with RAP 14.4.

Affirmed.

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.

Bridgewater, J.P.T.

We concur:

Hunt, J.

Van Deren, J.