IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

William Oseran, Appellant, v. Aardvark Engineering Services, Inc. d/b/a A.E.S. Inc., Respondent.	)	No. 65409-8-I UNPUBLISHED OPINION FILED: May 23, 2011

Schindler, J. — William Oseran appeals the order to enforce a settlement agreement between Oseran and Aardvark Engineering Services, Inc. Because there is a genuine issue of material fact as to the material terms in the settlement agreement, the trial court erred in enforcing the agreement without holding an evidentiary hearing. We reverse the order to enforce the settlement agreement, vacate the attorney fee award, and remand.

FACTS

William Oseran owns a building in Seattle. In August 2006, Oseran hired Aardvark to provide mechanical engineering design services for the renovation of the building.

In fall 2008, the City of Seattle notified Oseran that the design for the elevator

shaft and stairwell pressurization system did not comply with the city code. On September 10, in an e-mail to Oseran, Aardvark acknowledged the error and agreed to assume financial responsibility for additional costs.

> The problem with trying to calculate the fan size is that the engineer has no way of knowing how tight the shaft is constructed nor what the elevator door gap dimension will be. Never-the-less, it appears I have miss sized [sic] both the shaft AND stairway pressurization fans.
>
> . . . I have re-selected the fans based on 1000 CFM per door. The new fans will require larger openings. We will have to remove and replace the existing pressurization fans with these new fans.
>
> . . . .
>
> Sorry to have caused this mix-up. I will take financial responsibility for the additional costs associated with my error.

Aardvark redesigned the plans for the elevator shaft and stairwell pressurization system to comply with the city code. The new design required Oseran to incur additional construction costs to replace the fans in the pressurization system, which included cutting and framing openings in the shaft.

Oseran and Aardvark disagreed on the amount of the additional costs incurred. Oseran estimated the additional costs totaled $11,390. Aardvark initially offered to pay Oseran $3,300 to cover the costs related to the stairwell and elevator shaft pressurization system design error. But Aardvark later took the position that the actual costs were $2,221.

Oseran sued. The complaint alleged that Aardvark admitted performing negligent work but refused to reimburse Oseran for the costs incurred as a result of the negligent work.

> Defendant negligently and beneath professional standards performed its work on the contract project for the . . . building and as a result, plaintiff has suffered damages. . . . Defendant has admitted negligence and performance below professional standards in connection with the work,

> but defendant, notwithstanding repeated demands, has refused and neglected to compensate plaintiff for the results of such admitted negligence and below-standard performance.

Aardvark's attorney sent an e-mail to Oseran's attorney to "reach a quick settlement/resolution in this matter." The e-mail states that Aardvark "admitted there was a minor design error" and "it appears the parties are arguing over a relatively small sum," but the amount Oseran spent exceeded the cost to correct Aardvark's error and "litigation of this matter will quickly eat up [Oseran's] net recovery." The e-mail notes that the attorney has "no authority at this point" but suggests a $7,300 settlement for the "work performed" if Oseran was "willing to split the difference to quickly settle this matter."

Oseran's attorney made a counteroffer. The February 9 letter states the attorney has "settlement authority consistent with the terms" in the letter but Oseran disagreed with "the sufficiency of $3,300 as an accurate assessment for a fix." According to the letter, Oseran "incurred direct, out-of-pocket expenses over and above the $11,390" and was "uncomfortable simply 'splitting the difference,'" but was "agreeable to accepting $9,000 as settlement."

In a February 12 e-mail, Aardvark's attorney replied to the counteroffer—"If you can tell me your client will accept $8,000.00, please leave me a voicemail to that effect."[1] The e-mail also states that "[t]o sweeten the deal, my firm will take the laboring oar in preparing the settlement agreement and dismissal document."

In a February 16 e-mail, Aardvark's attorney confirms the parties had reached an agreement and insisted on drafting the settlement documents.

> Pursuant to our exchange of e-mails and your voicemail this

[1] (Emphasis omitted.)

> morning, I write to confirm that we have reached a settlement in this matter for the sum of $8,000.00 (Eight Thousand Dollars) to be paid to your client, Oseran, on behalf of Aardvark in exchange for a complete release and dismissal of all claims relating to Aardvark's work (and its employees, agents, insurers . . . etc., per standard settlement agreement language) on the project that is the subject of Oseran's complaint in this matter (i.e. a complete pay money and close file forever deal). Please respond to this e-mail with an "agreed" and, per my offer, we will handle preparation of the settlement documents and dismissal pleading. Please also send me payee information and your and Oseran's tax ID number. Thanks!

On the afternoon of February 17, Oseran's attorney responded with "Agreed." A few hours later, Aardvark's attorney replied, "We will get the settlement and dismissal documents over to you shortly. Thanks!"

The following day, Oseran's attorney e-mailed Aardvark's attorney to clarify that the release applied only to the design errors for the stair and elevator pressurization system.

> Clarification: Please draft the release specific only to the stair and elevator shaft pressurization issues. (Aardvark did other work for systems in the building to which the release should not apply.)

In response, the attorney states that Aardvark "will not be so limiting the release." The attorney claimed that the February 16 e-mail states that the "$8,000.00 was in exchange for finality, and not to leave open the door for a later suit against Aardvark."

Oseran's attorney disagreed.

> [A]ll of our correspondence involved only the single claim brought by our client against Aardvark in the underlying complaint. . . . [W]e are skeptical whether you reasonably expected that our client would settle not only the claim in this matter but also any and all "claims" that may arise from the work now or in the future.

The attorney confirmed that Oseran would only "agree to provide a complete release

and dismissal of the claim alleged in the underlying suit (elevator shaft and stairwell pressurization system design error)" and affirmed that if the "scope is not agreeable, we will proceed to trial."

On March 10, Aardvark filed a motion to enforce the settlement agreement and award attorney fees and costs on equitable grounds. In support, Aardvark submitted some of the e-mails and a two-page, unsigned "Release Of All Claims And Settlement Agreement" drafted by Aardvark. The release states that Oseran agreed to "forever release" Aardvark "from any and all claims, demand, damages, losses, liabilities, suits, litigation . . . arising from and/or relating to" Aardvark's work on the renovation project. The release also states that Oseran agreed "to satisfy all debts or liens" and that the parties agreed to pay their own attorney fees and costs.

Oseran argued the parties never discussed "unknown claims being resolved in settlement negotiations." Oseran argued that the settlement agreement was limited to the "specific discreet claim" involving the stairwell and pressurization system design error. Oseran asserted that before and after filing the lawsuit, the parties only discussed the "dollar damages from the defective design" of the pressurization system. Oseran also argued that the settlement agreement was unenforceable under contract law. Oseran submitted correspondence disputing the value of the additional costs as a result of the redesign of the elevator shaft and stairwell pressurization system and the e-mails and letters related to settlement.

Without a hearing, the trial court granted Aardvark's motion to enforce the settlement agreement and entered the following findings:

> This Court finding that the terms of the settlement agreement, and

in particular that it released "all claims" and was a "close file forever deal," were clear and unambiguous;

This Court finding that the objective intentions of the parties can be determined from the words used in the February 17, 2010 settlement agreement;

This Court also finds that . . . Aardvark incurred attorney fees and

> costs to enforce the clear and unambiguous February 17, 2010, settlement agreement;
>
> This Court finding that the Release of All Claims and Settlement Agreement contains the terms agreed to by the parties in their February 17, 2010, settlement agreement.

The court ordered Oseran to sign the Release Of All Claims And Settlement Agreement and awarded Aardvark attorney fees and costs.

In a motion for reconsideration, Oseran challenged enforcement of "a specific set of terms and conditions . . . based on the loose language in the February 16, 2010 e-mail." Oseran pointed out that "the existence of any form of settlement and release language is completely missing" from the February 16 e-mail." Oseran also argued that neither CR 2A nor the Release Of All Claims And Settlement Agreement provided for an award of attorney fees.

The trial court denied Oseran's motion for reconsideration and entered the following findings:

> This Court finding that [Oseran] did not raise his objection to an award of attorney fees and costs in his Response of Plaintiff Oseran to Defendant's CR 2(A) Motion and thus has waived this objection;
>
> This Court finding that [Aardvark's] request for attorney fees and costs in its Motion to Enforce Settlement Agreement was based on a recognized ground in equity, and in particular fees and costs incurred to enforce a valid settlement agreement;
>
> This Court finding that upon its own initiative it may award attorney fees and costs, under CR 11, because the Response of Plaintiff Oseran to Defendant's CR 2(A) Motion was not well grounded in fact, was not warranted by existing law, and needlessly increased the costs of litigation;
>
> This Court finding that [Oseran] did not raise an objection to the Release and Settlement Agreement, attached to the Declaration of Gregory P. Thatcher and [Aardvark's] proposed Order Granting Motion to Enforce Settlement Agreement, in his Response of Oseran to Defendant's CR 2(A) Motion and thus has waived this objection.

The court ordered Oseran to comply with the order enforcing the settlement agreement

and awarded Aardvark attorney fees and costs under CR 11. Oseran appeals.

ANALYSIS

Oseran contends that the trial court erred in (1) granting Aardvark's motion to enforce the settlement agreement, (2) ordering him to sign the Release Of All Claims And Settlement Agreement, (3) awarding Aardvark attorney fees and costs, and (4) denying the motion for reconsideration.

A trial court's authority to compel enforcement of a settlement agreement is governed by CR 2A. Morris v. Maks, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). CR 2A provides:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

We review a decision to enforce a settlement agreement de novo. Lavigne v. Green, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). The party moving to enforce a settlement agreement has the burden of proving there is no genuine dispute as to the material terms of the agreement. Brinkerhoff v. Campbell, 99 Wn. App. 692, 696-97, 994 P.2d 911 (2000). "When a motion is made to enforce a settlement agreement on grounds that its existence and material terms are not genuinely disputed, the issue is also whether a genuine dispute of fact exists." In re the Marriage of Ferree, 71 Wn. App. 35, 43, 856 P.2d 706 (1993). If the moving party meets its burden, "the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact." Patterson v. Taylor, 93 Wn. App. 579, 584,

969 P.2d 1106 (1999) (citing Ferree, 71 Wn. App. at 44).

In a motion to enforce a settlement agreement, the court must view the evidence in the light most favorable to the nonmoving party and "determine whether reasonable minds could reach but one conclusion." Ferree, 71 Wn. App. at 44. "[I]f the nonmoving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues of fact." Brinkerhoff, 99 Wn. App. at 697.

Oseran contends that because there was a genuine dispute over the material terms of the settlement, the trial court erred in enforcing the settlement agreement without holding an evidentiary hearing. Specifically, Oseran asserts that there is a genuine issue of material fact as to whether the release should be limited to the elevator shaft and stairwell pressurization system design error. We agree.

Viewing the evidence in the light most favorable to Oseran, in September 2008, Aardvark admitted that it did not design the stairwell and elevator shaft pressurization system to comply with the city code, and agreed to assume financial responsibility for that error.

> [I]t appears I have miss sized [sic] both the shaft AND stairway pressurization fans.
>
> . . . .
>
> Sorry to have caused this mix-up. I will take financial responsibility for the additional costs associated with my error.

Thereafter, the parties disagreed about the amount of the additional costs related to Aardvark's redesign of the elevator shaft and stairwell pressurization system. For example, in an August 11, 2009 letter, Aardvark states that because "the most

straightforward approach would have been to remove the old fans and replace them with larger fans," the sum of $2,221 was sufficient to cover the error. In a November 11, 2009 letter, Oseran takes the position that the "cost of the redesign and reinstallation of the correct pressurization system" was $11,390. In a later e-mail, Aardvark's attorney specifically refers to the $11,390 that Oseran states he incurred for the design error for the pressurization system. The e-mail states that "I am willing to assume my client's $3,300 offer was an accurate assessment for a fix . . . and that the $11,390 for the work performed is an accurate and reasonable billing."

Because Oseran has raised a genuine issue of material fact as to the scope of the settlement agreement, we reverse the order granting Aardvark's motion to enforce the settlement agreement and remand for an evidentiary hearing. Accordingly, we also vacate the award of attorney fees.

Schindler, J.

WE CONCUR:

Leach, A.C.J.

Becker, J.