IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NEW HORSESHOE SALOON ASSOCIATES, LLC, a Washington Limited Liability Company,	)	No. 65635-0-I
Appellant/Cross-Respondent	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
COMMERCE BUILDING LIMITED PARTNERSHIP,	)	
Respondent/Cross-Appellant.	)	FILED: November 21, 2011

GROSSE, J. – Where, as here, the trial court dismisses an action after considering matters outside the pleadings, we review the decision as a summary judgment under CR 56 rather than as a failure to state a claim under CR 12(b)(6). Because New Horseshoe Saloon Associates, LLC (NHSA) does not allege that the trial court's decision failed to comply with the requirements of CR 56 and fails to demonstrate any abuse of discretion in the trial court's denial of its motion for reconsideration, we affirm the trial court's dismissal of NHSA's claims against Commerce Building Limited Partnership (Commerce). We reject Commerce's cross appeal, but agree that Commerce is entitled to an award of attorney fees for responding to NHSA's frivolous appeal.

FACTS

The parties own adjoining buildings on Hewitt Avenue in Everett. NHSA and its predecessors in interest have operated a restaurant or bar in the building at 1805 Hewitt for at least 15 years.

In 1996, Commerce and prior owners of 1805 Hewitt signed a letter of

understanding providing for the construction and use of an emergency exit from the second floor of the Horseshoe Saloon through the Commerce Building to comply with city, county, and state requirements. The parties contemplated initial compensation to Commerce of $600 a year, rising eventually to $1,800 per year. The letter of understanding recited that the parties would "execute a recordable easement or similar evidence of right of access and use," but no document was ever recorded.

Commerce and the prior owners of 1805 Hewitt operated under the agreement until about 1998. Commerce has never entered into any agreement about the egress with NHSA, which has owned 1805 Hewitt since 2002, but licensed use of the exit to one of NHSA's tenants from about 2006 to 2008.

In January 2010, Commerce attempted to negotiate an egress agreement with NHSA. When that attempt proved unsuccessful, Commerce notified NHSA that it would be closing the exit on February 28, 2010.

On February 26, 2010, NHSA filed an action claiming breach of contract and a prescriptive easement for use of the egress. On the same date, NHSA also obtained a preliminary injunction precluding interference with the exit.

On March 23, 2010, Commerce moved to dismiss NHSA's action on summary judgment and under CR 12(b)(6). Commerce also requested an award of attorney fees under CR 65(c) and RCW 7.40.080 for responding to the temporary restraining order.

After a hearing, the trial court granted Commerce's motion, dismissed NHSA's claims with prejudice, and dissolved the temporary restraining order. The court declined Commerce's request for attorney fees under CR 65(c) and RCW 7.40.080.

The court also denied NHSA's motion for reconsideration.

ANALYSIS

On appeal, NHSA first contends that the trial court erred in dismissing its action under CR 12(b)(6) because there are "hypothetical facts," asserted for the first time on appeal, that are sufficient to support its breach of contract claim.[1] But as Commerce correctly observes, the trial court dismissed NHSA's claims on summary judgment, not for failure to state a claim under CR 12(b)(6). NHSA's repeated assertions that the trial court dismissed the case under CR 12(b)(6) are therefore frivolous. In NHSA's motion for reconsideration, counsel for NHSA expressly acknowledged that the trial court had granted Commerce's "motion for summary judgment."

Where, as here, the trial court considers matters outside the pleadings, including the declarations of counsel and attached documents, we review the motion as one for summary judgment under CR 56.[2] On appeal, NHSA has failed to assign error to the trial court's summary judgment decision, failed to identify any material disputed facts, and relies solely on the existence of "hypothetical facts." NHSA's allegations merit no further appellate review.[3]

NHSA next contends that the trial court erred in denying its motion for

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[1] "'[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.'" Bravo v. Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)).

[2] CR 12(b); see also Clallam Cnty. Citizens for Safe Drinking Water v. City of Port Angeles, 137 Wn. App. 214, 227, 151 P.3d 1079 (2007).

[3] See RAP 12.1(a); Camer v. Seattle Post-Intelligencer, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986).

reconsideration based on "newly discovered evidence." CR 59(a)(4) authorizes the trial court to grant reconsideration on the basis of "[n]ewly discovered evidence" that a party "could not with reasonable diligence have discovered and produced at the trial." We review the trial court's decision for an abuse of discretion.[4]

In support of the motion for reconsideration, NHSA submitted several documents created between 1995 and 1998 during the negotiations between Commerce and prior owners of 1805 Hewitt. All of these documents, however, were public records that NHSA obtained from the city of Everett. NHSA complains that there was no time for discovery after Commerce filed its motion to dismiss. But NHSA failed to request a continuance to undertake discovery in response to Commerce's summary judgment motion as expressly authorized by CR 56. Because NHSA makes no showing that it could not have obtained the evidence earlier, the documents do not qualify as newly discovered.[5]

Nor is the alleged newly discovered evidence even material to NHSA's breach of contract claim. At best, the documents establish the existence of negotiations over the egress and an agreement between Commerce and prior owners. Although those parties indicated an intent to record an easement or some other document memorializing their agreement about the egress, they never did so. NHSA does not point to any evidence in the documents suggesting the existence of an agreement or contract between Commerce and NHSA. Indeed, NHSA repeatedly acknowledges that

[4] Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).
[5] See Morinaga v. Vue, 85 Wn. App. 822, 831, 935 P.2d 637 (1997); see generally Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 88, 60 P.3d 1245 (2003).

it is relying on the existence of a hypothetical agreement between Commerce and the current owner of NHSA "because, hypothetically, [the current owner] could have had an agreement with Commerce."

NHSA makes no showing that the documents were newly discovered or material to a breach of contract claim. Accordingly, the trial court did not abuse its discretion in denying NHSA's motion for reconsideration.

In its cross appeal, Commerce contends that the trial court should have awarded attorney fees and costs as damages for dissolving the temporary injunction. But "[t]he applicable equitable rule is that attorney fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order."[6] Such an award is therefore discretionary.[7] Generally, a temporary restraining order is wrongful if it is dissolved after a full hearing.[8]

The record indicates that Commerce requested and is seeking an award of all attorney fees incurred in the trial court for responding to NHSA's action. But "where injunctive relief is not the sole purpose of the suit and only incidental or ancillary thereto, counsel fees as damages are recoverable only for services reasonably performed in attempting to quash the temporary injunction and not for professional services rendered in the trial on the merits."[9]

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[6] Cornell Pump v. City of Bellingham, 123 Wn. App. 226, 231, 98 P.3d 84 (2004) (quoting Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 758, 958 P.2d 260 (1998)); see also CR 65(c).
[7] Cornell Pump, 123 Wn. App. at 231.
[8] Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 143, 937 P.2d 154 (1997).
[9] Cecil v. Dominy, 69 Wn.2d 289, 293-94, 418 P.2d 233 (1966).

Commerce has not identified the arguments made to the trial court or the basis for the trial court's refusal to grant its request for attorney fees under CR 65(c) and RCW 7.40.080. Given the nature of the temporary injunction in this case, the trial court could reasonably have determined that the temporary injunction was merely incidental to the action on the merits and that any cost and fees incurred in responding specifically to the injunction were negligible. Based on the record before us, we cannot say that the trial court abused its discretion in denying attorney fees for dissolving the temporary injunction.

We agree with Commerce, however, that it is entitled to an award of attorney fees for a frivolous appeal under RAP 18.9(a). An appeal is frivolous "if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal."[10] That standard is satisfied here.

On appeal, NHSA has failed to address the legal basis for the trial court's dismissal of its action on summary judgment. NHSA's motion for reconsideration rested on documents that do not, in any event, support the existence of a cognizable cause of action against Commerce. NHSA's appeal therefore presents no debatable issues, and Commerce is entitled to attorney fees incurred in responding to NHSA's frivolous appeal.

The trial court's decision is affirmed. Commerce's request for attorney fees on appeal is granted, subject to compliance with RAP 18.1(d).

[10] In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997).

Grosse, J.

WE CONCUR:

Becker, J.

Schweller, J.