IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WOODINVILLE BUSINESS CENTER NO. 1, a Washington limited partnership, Respondent, v. ALBERT L. DYKES, an individual and former general managing partner of Woodinville Business Center No. 1; MARGARET RYAN-DYKES, an individual, and the marital community comprised thereof, Appellant.	)	No. 65734-8-I UNPUBLISHED OPINION FILED: February 21, 2012

Ellington, J. — This case involves the award of attorney fees as damages. Woodinville Business Center No. 1 (WBC) was required to defend an action and pay a money judgment because of the conduct of its former managing partner, Albert Dykes, who breached the partnership agreement for his own purposes. In this lawsuit, WBC sought reimbursement of the fees in both the underlying action and this one. The trial court awarded the requested fees.

We affirm. We also award attorney fees on appeal on the same grounds, and remand for the trial court to fix the amount.

BACKGROUND

In 1980, Ned Lumpkin, Al Dykes, and John Kloster formed WBC as a limited partnership. Its purpose was "to invest in, finance the acquisition of, purchase, own, improve, develop, operate, manage and maintain . . . a warehouse/office complex" in Woodinville.[1]

The partners had a clear agreement as to what their respective roles would be. Dykes and Kloster would gather investors to fund the development; and Lumpkin, through his construction company, Lumpkin, Inc., would construct the project. Lumpkin, Inc. would receive 10 percent of direct construction costs as its fee for serving as general contractor and as a partial return on his initial investment. Dykes would manage the project.

The general partners made Dykes the managing partner, authorizing him to make and execute contracts on behalf of the partnership so long as his actions were consistent with the laws and the partnership agreement.

Lumpkin, Inc. constructed two buildings of the four-building project as planned. Further development stalled due to permitting issues and unfavorable market conditions.

Around 2001, the partners had a falling out about other business dealings unrelated to the Woodinville project.

By 2003, WBC was ready to begin constructing the third and fourth buildings. Although the partnership agreement expressly prescribed that Lumpkin, Inc. was to

[1] Clerk's Papers at 18.

perform the construction work, Dykes solicited bids from other contractors. The bidding process suffered several irregularities. Dykes ultimately signed a contract with MRJ to construct the buildings. MRJ fulfilled that contract.

Ned Lumpkin and Lumpkin, Inc. sued WBC for breach of contract, and Dykes personally for breach of contract and breach of fiduciary duty. Dykes managed the defense. His personal business attorney defended both Dykes personally and the partnership.

After a bench trial, the court found Lumpkin had a contractual right to perform the construction work on the buildings and to collect the 10 percent general contractor's fee. It found that Dykes' hiring of MRJ was a retaliatory action stemming from discord between Dykes and Lumpkin about a different project. It also found that the unauthorized bidding process was weighted against Lumpkin because of Dykes' failure to disclose material information and because Dykes conspired to ensure MRJ would be awarded the contract. The court concluded Dykes breached his fiduciary duty to Lumpkin by concealing material information and failing to accord him full candor and good faith dealing.

The court awarded damages and entered judgment against both WBC and Dykes. We affirmed.[2] Thereafter, WBC paid Lumpkin, Inc. $310,094.79 in full satisfaction of the judgment.

[2] Lumpkin, Inc. v. Woodinville Business Center No. 1, noted at 145 Wn. App. 1049, 2008 WL 2792019, at *1. Dykes petitioned the Washington Supreme Court for review, but was denied. Lumpkin, Inc. v Woodinville Business Center No. 1, 165 Wn.2d 1028, 203 P.3d 378 (2009).

WBC brought this action for indemnity, seeking reimbursement of the judgment paid to Lumpkin, Inc., reimbursement of partnership money expended in defending the underlying case, and attorney fees for the indemnification action. The trial court granted summary judgment against Dykes for the amount paid on the judgment and for attorney fees incurred in the underlying matter and in this indemnification action.

Dykes appeals only the awards of attorney fees. Both parties request fees on appeal.

DISCUSSION

We review orders on summary judgment de novo, engaging in the same inquiry as the trial court, considering only the evidence and issues raised below.[3] Whether there is a legal basis to award attorney fees and costs is a question of law and is also reviewed de novo.[4]

Washington follows the American rule that attorney fees are not recoverable unless there are grounds in contract, statute, or equity.[5] Here, only equitable grounds are at issue.

Generally, "indemnity" refers to reimbursement, and a separate action in equity may lie "when one party discharges a liability which another should rightfully have

[3] RAP 9.12; Wash. Fed'n of State Emps. v. Office of Fin. Mgmt., 121 Wn.2d 152, 156-57, 849 P.2d 1201 (1993).

[4] McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App. 283, 289, 951 P.2d 798 (1998).

[5] City of Seattle v. McCready, 131 Wn.2d 266, 273-74, 931 P.2d 156 (1997); Manning v. Loidhamer, 13 Wn. App. 766, 769, 538 P.2d 136 (1975).

assumed."[6] The Washington Supreme Court has recognized four exceptions to the American rule under equitable indemnity: (1) where an action by a third person subjects a party to litigation (exposure to litigation); (2) where the fees are incurred to protect a common fund; (3) in cases of bad faith or misconduct; and (4) where fees are incurred to dissolve wrongfully issued temporary injunctions or restraining orders.[7] Washington courts have also permitted equitable recovery of attorney fees in cases involving breach of fiduciary duty.[8]

The parties' arguments here concern the exceptions for exposure to litigation and for breach of fiduciary duty.[9] Fees are awardable on either basis.

Equitable Indemnification For Attorney Fees As Damages[10]

Where a person has subjected another party to litigation, three elements are necessary to create liability: (1) a wrongful act or omission by A toward B; which

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[6] Central Wash. Refrigeration, Inc. v. Barbee, 133 Wn.2d 509, 513, 946 P.2d 760 (1997).

[7] McCready, 131 Wn.2d at 274. The common fund theory was extended to award attorney fees to petitioners who successfully defended constitutional principles for the benefit of a general class of taxpayers in Weiss v. Bruno, 83 Wn.2d 911, 914, 523 P.2d 915 (1974).

[8] See Hsu Ying Li v. Tang, 87 Wn.2d 796, 799-800, 557 P.2d 342 (1976); Green v. McAllister, 103 Wn. App. 452, 468-69, 14 P.3d 795 (2000).

[9] WBC argues its award is justified by other equitable grounds, including bad faith and common fund, but it did not argue these below. We do not address these arguments. RAP 2.5(a) (appellate court may refuse to review any claim not addressed below).

[10] While the traditional American rule relates to attorney fees as costs, an award of attorney fees in a wrongful action by a third person that subjected a party to litigation is considered an award of damages. McCready, 131 Wn.2d at 275 (citing Wells v. Aetna, 60 Wn.2d 880, 882, 376 P.2d 644 (1962)).

(2) exposes or involves B in litigation with C; and where (3) C was not connected with the wrongful act or omission of A toward B.[11] This is commonly described as the "ABC rule."[12]

Dykes contends WBC did not and cannot show all three elements of the ABC rule in the underlying case.[13] We disagree.

RCW 25.05.165(3) provides that a partner owes to his partnership a fiduciary duty of care, including refraining from engaging in intentional misconduct. According to the findings in the underlying case, Dykes deliberately breached the partnership agreement to satisfy his own vendetta against Lumpkin, and made no mention of the discussions with MRJ in the status report he distributed to the other WBC investors and partners. It is clear Dykes committed intentional misconduct and thus breached his fiduciary duty toward the partnership.

Second, Dykes' breach of the partnership agreement deprived a third party, Lumpkin, Inc., of its right to perform the construction services and be compensated by WBC for that work. This exposed WBC to a lawsuit by Lumpkin, Inc.

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[11] Woodley v. Benson & McLaughlin, P.S., 79 Wn. App. 242, 246, 901 P.2d 1070 (1995) (quoting Manning, 13 Wn. App. at 769); see also Stevens v. Sec. Pacific Mortg. Corp., 53 Wn. App. 507, 524, 768 P.2d 1007 (1989).

[12] See, e.g., Jain v. J.P. Morgan Securities, Inc., 142 Wn. App. 574, 587, 177 P.3d 117 (2008); Blueberry Place Homeowners Ass'n v. Northward Homes, Inc., 126 Wn. App. 352, 358, 110 P.3d 1145 (2005); George v. Farmers Ins. Co. of Washington, 106 Wn. App. 430, 445-46, 23 P.3d 552 (2001).

[13] WBC asserts Dykes failed to make this argument below. This is wrong. In his response to WBC's motion for summary judgment, Dykes clearly laid out the elements of the ABC rule for the court's consideration. See Clerk's Papers at 234.

Finally, neither Lumpkin nor Lumpkin, Inc. were party to Dykes' wrongful act or omission toward WBC. To the contrary, the findings in the underlying case show that Dykes deliberately prevented Lumpkin from involvement in the extra-contractual negotiations with MRJ.

This scenario fulfills the ABC rule and allowed the court to award attorney fees to WBC as damages.

Dykes next argues that the court's failure to enter findings of fact and conclusions of law in support of its decision to award attorney fees as damages precludes review of its award of attorney fees.

Generally, findings of fact and conclusions of law are not appropriate for decisions made on summary judgment.[14] Dykes relies on Estrada v. McNulty for the proposition that "[t]he trial court must provide an adequate record upon which to review a fee award."[15] But the issue in Estrada and in other cases cited by Dykes was the reasonableness of a court's fees award.[16] Dykes does not challenge the reasonableness of the fees awarded here. Rather, the only question is whether there was a legal basis for reimbursement of fees, which there was.

Reimbursement Of Fees Incurred In Bringing Indemnification Case

Under Hsu Ying Li v. Tang, a court may award attorney fees under the "fiduciary

[14] CR 52(a)(5)(B).

[15] 98 Wn. App. 717, 723, 988 P.2d 492 (1999).

[16] Id. (whether award of attorney fees is reasonable is reviewed for abuse of discretion).

duty" exception to the American rule.[17] In Tang, a 1976 partnership case, the Washington Supreme Court refused to apply the "common fund" theory to justify an award of fees.[18] But the court affirmed the award on the premise that the power to award fees "'springs from our inherent equitable powers, [and] we are at liberty to set the boundaries of the exercise of that power.'"[19] The court reasoned that the defendant's breach of his fiduciary duty to the plaintiff, his partner, amounted to constructive fraud, and that these circumstances justified an award of attorney fees.[20] Division Three of this court applied the Tang reasoning in Green v. McAllister in 2000, holding that the defendant partners had committed fiduciary breach, thus allowing the court discretion to award attorney fees to the plaintiff.[21]

WBC contends Dykes breached his fiduciary duty toward WBC, making the award of attorney fees incurred in the indemnification action appropriate under Tang and Green.

Dykes argues WBC's reliance on Tang and Green is misplaced. First, Dykes

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[17] 87 Wn.2d 796, 799-800, 557 P.2d 342 (1976); Green, 103 Wn. App. at 468-69.

[18] Tang, 87 Wn.2d at 798-99; Seattle School Dist. No. 1 of King County v. State, 90 Wn.2d 476, 542, 585 P.2d 71 (1978) (common fund theory is where litigation benefits others as well as the litigant, and protects, preserves, or creates a common fund) (citing id.).

[19] Tang, 87 Wn.2d at 799 (alteration in original) (quoting Weiss, 83 Wn.2d at 914).

[20] Id. at 800-01.

[21] 103 Wn. App. 452, 468-69, 14 P.3d 795 (2000). Green also said, without citing relevant authority, "the innocent partner is *entitled* to his fees if the conduct constituting breach violates the partnership agreement, or is 'tantamount to constructive fraud.'" Id. at 468 (emphasis added).

points out that the courts in both Tang and Green held that the breaches of fiduciary duty rose to the level of constructive fraud, and the trial court here made no such finding or conclusion.[22]

"Constructive fraud" is "[c]onduct that is not actually fraudulent but has all the actual consequences of fraud" and "[a b]reach of a legal or equitable duty, irrespective of moral guilt, [having a] 'tendency to deceive others or violate confidence'"[23] or "failure to perform an obligation, not by an honest mistake, but by some 'interested or sinister motive.'"[24]

Despite the absence of an explicit constructive fraud determination, the findings in the underlying case support the conclusion that Dykes' breach of fiduciary duty toward WBC constituted constructive fraud. Dykes deliberately deceived others and breached his obligation to WBC, all to serve his own retaliatory purpose.

Dykes points out that three years after Tang, the Supreme Court in ASARCO Inc. v. Air Quality Coalition clarified that the award of attorney fees in Tang was "only superficially based on proof of constructive fraud. The actual award stemmed from the prevailing party having preserved partnership assets, *i.e.*, [a common fund]."[25] Several

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[22] Dykes again points out that the court entered no findings or conclusions regarding the award of attorney fees. But, as discussed above, the record on appeal is sufficient to analyze the question of law presented to this court.

[23] Green, 103 Wn. App. at 467 (emphasis omitted) (quoting Black's Law Dictionary 314 (6th ed. 1990)).

[24] Id. at 468 (quoting In re Estate of Marks, 91 Wn. App. 325, 336, 957 P.2d 235 (1998)).

[25] 92 Wn.2d 685, 716, 601 P.2d 501 (1979); see also Seattle School Dist., 90 Wn.2d at 542-44.

appellate court cases have recognized this as a limitation on the Tang fiduciary duty

exception, requiring additional justification for attorney fees under the common fund theory.[26] Dykes points to a 1990 Division Three case, Brock v. Tarrant, which explicitly states "[attorney] fees are not recoverable in separate indemnity actions by the innocent defendant against the wrongdoer."[27] Dykes claims this rule is dispositive here, despite Tang.

Tang has been distinguished on several occasions, but it has not been overruled.[28] And here, the partnership paid both the judgment and all the fees in the underlying action. These moneys amounted to a common fund, belonging as they did to the partners, not to Dykes personally. Logic and fairness dictate that where a party successfully recovers attorney fees as damages under an equitable indemnity theory, the award should not be compromised by the cost of bringing the indemnity action.

Attorney Fees on Appeal

Both parties request attorney fees and costs on appeal.

WBC requests costs under RAP 14.2. WBC relies upon the same grounds in

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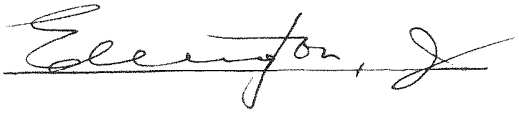
[26] See, e.g., Perez v. Pappas, 98 Wn.2d 835, 845, 813 P.2d 475 (1983) (rejecting appellate reliance on Tang for fees in breach of fiduciary duty matter because Tang was really about the presence of an identifiable fund) (quoting ASARCO, 92 Wn.2d at 716); Shoemake v. Ferrer, 143 Wn. App. 819, 831, 182 P.3d 992 (2008) ("But the Shoemakes misread [Tang]. In fact, the court in [Tang] applied a well-established equitable basis for the award of attorney fees: the prosecution of a successful action to preserve a common fund.") (citing ASARCO, 92 Wn.2d at 716; Tang, 87 Wn.2d at 799), aff'd, 168 Wn.2d 193, 225 P.3d 990 (2010).

[27] 57 Wn. App. 562, 572, 789 P.2d 112 (1990).

[28] See Green, 103 Wn. App. at 468 ("when breach of fiduciary duty is established, the court has discretion to award attorney fees") (citing Tang, 87 Wn.2d at 799).

equity argued above for its request for attorney fees and points out that Green authorizes fees on appeal to the prevailing party in a partnership breach of fiduciary duty case.[29] On these principles, we award fees and costs to WBC as the prevailing party. As the trial court is familiar with the parties and the facts, we remand to the trial court for a determination of fees on appeal. RAP 18.1(i).

Affirmed.



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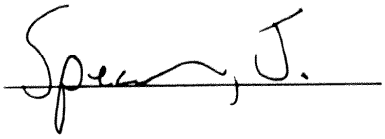

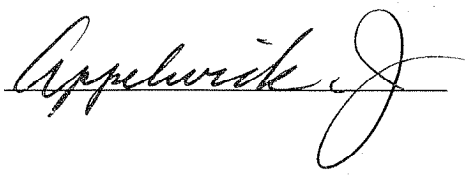

[29] Id. at 472.