IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

INDEMNITY COMPANY OF CALIFORNIA, a foreign corporation,	)	NO. 67200-2-I
Respondent,	)	DIVISION ONE
v.	)	
constantin hapaianu, an individual,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: October 15, 2012

Lau, J. — Constantin Hapaianu challenges the trial court's April 22, 2011 order granting Indemnity Company of California's (ICC) summary judgment motion on its claim for breach of an indemnity agreement. Because Hapaianu fails to demonstrate a genuine issue of material fact, we affirm and award ICC attorney fees and costs under RAP 18.1.

FACTS

The material facts are undisputed. In the late 1990s, Hapaianu took steps to build his "dream home," a single-family residence on his property near Ames Lake in

King County. Because Hapaianu wanted to build near a wetland, the King County Department of Development and Environmental Services (DDES) required him to enter into a "Sensitive Area Restoration Agreement" (SARA). The SARA obligated Hapaianu to "install all sensitive area and/or buffer mitigation measures" in accordance with a county-approved mitigation plan. The SARA required Hapaianu to "perform monitoring and maintenance" for at least three years after the county approved installation of the mitigation measures. Finally, the SARA provided that "[a]ny failure" on Hapaianu's part to "proceed with due diligence and in good faith in the construction, maintenance, and/or monitoring" of the required mitigation work would result in default. Hapaianu signed the SARA on July 27, 2000.

King County also required Hapaianu to obtain a surety bond guaranteeing his compliance with the SARA. Hapaianu contacted ICC, and ICC agreed to provide the surety bond. As a condition to approval of the surety bond, Hapaianu signed an indemnity agreement. According to the indemnity agreement, ICC retained the "exclusive right" to deny, pay, compromise, defend, or appeal any claim on the surety bond made by King County. If ICC incurred any loss by reason of its suretyship, including attorney fees and expenses, Hapaianu agreed to indemnify ICC.

On July 31, 2000, ICC furnished a surety bond in the penal amount of $10,020. The surety bond named Hapaianu as principal, ICC as surety, and King County as obligee. The surety bond stated that its purpose was to "secure [Hapaianu's] performance of work and payment of fees in accordance with the [SARA]." If Hapaianu failed to perform any of the terms of the SARA, ICC could elect either to perform the

work itself or to tender whatever amount King County estimated was necessary to effect compliance with the SARA (up to the penal amount).

On September 9, 2008, DDES employee Lisa Brandt mailed Hapaianu a letter advising him that King County had no record that his mitigation plan had been "implemented." Brandt warned Hapaianu that his surety bond was in jeopardy and asked him to contact her to discuss the situation. The record shows that Hapaianu contacted Brandt a few weeks later, but the record is silent on the substance of their conversation.

On November 18, 2008, Brandt mailed Hapaianu a second letter again asserting that "no mitigation has been implemented." Brandt also claimed that an aerial photograph revealed further unauthorized impacts and asked Hapaianu to submit a revised mitigation plan reflecting current conditions. Brandt requested the revised plan by February 1, 2009, and warned Hapaianu that DDES would file a claim on the surety bond if he did not comply.

In a July 7, 2009 letter, DDES finance director Elaine Gregory informed ICC that Hapaianu had failed to comply with the SARA. Gregory stated that ICC could either remedy the default through its own efforts or tender the full amount of the surety bond to King County. On July 17, 2009, ICC claims examiner Mitchell Petras mailed Hapaianu a letter informing him of King County's claim and asking Hapaianu to "list the specific reasons for disputing any of the [county's] contentions . . . ." Hapaianu claims that he was out of state at that time. On August 10, 2009, Petras mailed Hapaianu a second letter advising that he had "one final opportunity to clear this problem up" and

reminding him of ICC's right to indemnification for any loss incurred in relation to the surety bond.

During this time, Petras was also in contact with DDES. On August 10, 2009, Petras mailed DDES a letter asking for more information regarding the scope of the work needed to bring Hapaianu's property into compliance with the SARA. DDES ecologist Betsy MacWhinney responded by forwarding a copy of the mitigation plan. MacWhinney's cover letter asserted that the mitigation plan had "not been implemented as required." MacWhinney claims that she reaffirmed Hapaianu's noncompliance in a subsequent phone conversation with Petras.[1]

ICC elected to forfeit Hapaianu's surety bond. On August 31, 2009, ICC issued a $10,020 check to King County in settlement of its claim. According to its transmittal letter, ICC issued the check "for the failure of [Hapaianu's] compliance with county requirements for monitoring wetlands despite several extension[s] granted." (Capitalization omitted.)

On November 5, 2009, ICC sued Hapaianu for indemnification on its $10,020 loss. Hapaianu answered,[2] asserting various affirmative defenses challenging the

[1] Petras's handwritten memorandum memorializing his conversation with MacWhinney includes the following note: "Project was finalled [sic] (plants installed) in January 2008." But MacWhinney later stated, "I did not tell Mr. Petras that plantings were completed as of 2008. . . . It is now, and has always been my understanding that Hapaianu has not done any of the planting required under the permit conditions." Petras also states, "Based on my conversation [with] Betsy Mac Whinney, it was my understanding that Constantin Hapaianu had failed to complete the wetland mitigation work." Hapaianu concedes that "the statement that the plants had been installed was not true." Appellant's Br. at 10.

[2] Hapaianu initially answered the complaint pro se. ICC filed a statement of

validity of the surety bond and the propriety of King County's attempt to enforce it. Hapaianu also counterclaimed for money damages, alleging that ICC violated the Consumer Protection Act (CPA) and breached its implied duty of good faith and fair dealing. Finally, Hapaianu asserted third party tort claims against King County employees Pesha Klein and Betsy MacWhinney.[3]

In November 2010, all parties filed summary judgment motions. First, Klein and MacWhinney moved for summary judgment dismissal of Hapaianu's third party claims. Shortly after, ICC moved for summary judgment dismissal of Hapaianu's CPA and breach of good faith counterclaims. Hapaianu filed a consolidated response to both motions in which he argued, among other things, that the SARA, the surety bond, and/or the indemnity agreement were unenforceable on any one of nine separate grounds.[4] Finally, Hapaianu moved for partial summary judgment, contending that King

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arbitrability indicating that the case was subject to mandatory arbitration. Hapaianu lost the arbitration. Through counsel, he subsequently requested a trial de novo and amended his answer.

[3] Hapaianu did not name King County as a third party defendant; rather, he named Klein and MacWhinney individually. Neither Klein nor MacWhinney is a party to this appeal. See infra note 6.

[4] Specifically, Hapaianu argued that (1) the indemnity agreement or surety bond violates the statute of frauds, (2) the indemnity agreement is procedurally and/or (3) substantively unconscionable, (4) the attempt to enforce the indemnity agreement after issuance of Hapaianu's certificate of occupancy violates LUPA, (5) the "attempts to utilize the invalid surety agreement to coerce Hapaianu to enter into a new mitigation plan or pay for the County's use of the bond money somewhere else in King County" violates the law related to vested rights, and that enforcement of the indemnity agreement violates (6) Const. art. XI, § 11, (7) procedural due process rights, (8) substantive due process rights, and/or (9) Const. art. I, § 11. (Boldface omitted.) Hapaianu sought to incorporate each of these arguments into his opening brief. See Appellant's Br. at 26-28. Because this court "do[es] not permit litigants to use

County's claim on the surety bond violated the Land Use Petition Act (LUPA).[5]

On December 17, 2010, the court dismissed Hapaianu's third party tort claims against Klein and MacWhinney and, in a separate order, dismissed Hapaianu's CPA and good faith counterclaims against ICC and denied Hapaianu's motion for summary judgment on his LUPA contention. Hapaianu unsuccessfully moved for reconsideration of both orders.

Following the dismissal of Hapaianu's third party claims, counterclaims, and "collateral attacks" on the surety bond, only ICC's original indemnity claim remained. ICC moved for summary judgment. On April 22, 2011, the court found that ICC was entitled to indemnification as a matter of law and granted ICC's motion. The court entered a judgment in the amount of $10,020 and awarded ICC its attorney fees and costs. Hapaianu appeals.[6]

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incorporation by reference as a means to argue on appeal . . .," Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 890-91, 251 P.3d 293 (2011), we decline to address the merits.

[5] Hapaianu asked the trial court to "enter a partial summary judgment that the final certificate of occupancy granted [on January 16, 2008] was a final land use decision pursuant to the terms of the Land Use Petition Act . . . . ; that once King County issued [the occupancy certificate], which was not timely appealed or revoked, the mitigation provisions which were a condition of his permit were deemed to have been complied with as a matter of law[;] . . . [and] that King County cannot require Hapaianu to develop a new mitigation plan under the guise of monitoring vegetation that has been deemed by the County to sufficient [sic] comply with mitigation provisions of Hapaianu's building permit." We decline to review these contentions for the reasons stated infra note 6.

[6] Hapaianu's notice of appeal designated for review only the April 22, 2011 order granting ICC's summary judgment motion on its indemnity claim. Under RAP 5.3(a)(3), a notice of appeal "must . . . designate the decision or part of decision which the party wants reviewed." Nevertheless, Hapaianu's opening brief raises issues relating to the trial court's December 17, 2010 orders dismissing his third party claims, dismissing his

ANALYSIS

Hapaianu argues that the trial court erred in granting ICC's motion for summary judgment because genuine issues of material fact exist as to whether he performed the terms of the SARA and whether ICC forfeited the surety bond in good faith.[7] ICC contends that Hapaianu failed to raise a genuine issue of fact as to either claim and

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CPA and breach of good faith counterclaims, and rejecting his LUPA contention. In a February 13, 2012 order, a panel of this court dismissed Klein and MacWhinney from the appeal and limited the scope of review to the April 22, 2011 summary judgment order granting ICC's indemnity claim. Hapaianu unsuccessfully sought discretionary review of the panel's order. Although RAP 2.4(b) requires us to review an undesignated order if resolution of the designated order "must stand or fall" on the issues resolved by the earlier, undesignated order, Franz v. Lance, 119 Wn.2d 780, 782, 836 P.2d 832 (1992), Hapaianu has offered no argument as to why RAP 2.4(b) requires review of the undesignated December 17, 2010 orders. For these reasons, we decline to review any issues resolved by the trial court's December 17, 2010 summary judgment orders.

[7] On appeal, Hapaianu also argues that the court "erred in holding RCW 19.17.170 renders all defenses to a surety agreement invalid." Appellant's Br. at 1. We decline to reach the merits because Hapaianu fails to explain why the court erred. See Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument). Hapaianu also contends that the court erred "in deciding that MacWhinney's Requests for Admission (RFA) were proper and in not deciding Hapaianu's objections to such requests when ruling on the motions for summary judgment." Appellant's Br. at 2 (capitalization omitted). Because MacWhinney is not a party to this appeal, see supra note 6, we decline to reach this argument. Finally, Hapaianu argues that the court erred "in refusing to consider evidence submitted by him in support of his motion for partial summary judgment and in defense of ICC's and MacWhinney's motions for summary judgment" and "in failing to grant reconsideration to consider deposition testimony which was presented late as a result of a snow storm but before the Superior Court had signed any written orders." Appellant's Br. at 2. We decline to reach these arguments because they relate to the trial court's December 17, 2010 summary judgment orders and its denial of Hapaianu's reconsideration motion, none of which is properly before this court. See supra note 6.

that the undisputed evidence clearly establishes Hapaianu's liability.

When reviewing a summary judgment order, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Jones, 146 Wn.2d at 300-01.

Hapaianu contends that a genuine issue of material fact exists as to whether he performed the terms of the SARA. Appellant's Br. at 19-23. However, the record shows he never presented any evidence that he installed the required plantings. Instead, he argues that King County waived its right to challenge performance (and, thereafter, to file a claim on the surety bond) when it failed to appeal the issuance of his certificate of occupancy pursuant to LUPA.[8] The trial court rejected this argument in one of its December 17, 2010 summary judgment orders. Because that order is not properly before us, see supra note 6, we decline to address Hapaianu's LUPA contention. And because Hapaianu fails to point to any evidence that he satisfied the terms of the SARA, we conclude that no issue of fact exists as to his failure to comply.

Hapaianu next argues that a genuine issue of material fact exists as to whether ICC forfeited the surety bond in good faith. Appellant's Br. at 36-39. The implied duty

[8] Under LUPA, "[a] land use decision becomes unreviewable by the courts if not appealed to the superior court within LUPA's specified 21-day timeline." Mercer Island Citizens for Fair Process v. Tent City 4, 156 Wn. App. 393, 399, 232 P.3d 1163 (citing RCW 36.70C.040(3)).

of good faith and fair dealing "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). Washington courts typically imply this duty into "every" contract. See, e.g., Badgett, 116 Wn.2d at 569. No Washington court has specifically addressed whether an implied duty of good faith applies to an indemnity agreement associated with a surety bond. Even if we assume without deciding that ICC owed Hapaianu an implied duty of good faith, Hapaianu's claim fails.

The record demonstrates that ICC paid King County based on its good faith belief that Hapaianu failed to perform the terms of the SARA. ICC claims examiner Mitchell Petras mailed Hapaianu two letters, the first informing Hapaianu of King County's claim and the second advising that he had "one final opportunity to clear this problem up." Petras also mailed DDES a letter requesting more information regarding the scope of the work needed to bring Hapaianu's property into compliance. DDES employee MacWhinney provided Petras a copy of the approved mitigation plan and asserted that the plan had "not been implemented as required."

Hapaianu speculates that ICC would have been more willing to defend or deny King County's claim if, instead of mailing its notices to Hapaianu, ICC had phoned him using the number it had on file. He also urges that ICC should have used certified mail. However, the implied duty of good faith and fair dealing "arises only in connection with terms agreed to by the parties." Badgett, 116 Wn.2d at 569. Nothing in the indemnity agreement required ICC to contact Hapaianu by phone or to use certified mail. The indemnity agreement expressly waived Hapaianu's right to notice of "any claim or

demand" made against the bond. We conclude that no genuine issue of fact exists as to ICC's good faith forfeiture of the bond.

Hapaianu materially breached the indemnity agreement when he failed to indemnify ICC for its loss. Hapaianu does not dispute that he signed the indemnity agreement. Nor does he dispute that, upon his failure to perform the terms of the SARA, the surety bond obligated ICC to perform the terms itself or to tender to King County whatever amount the county estimated was necessary to effect compliance with the SARA (up to the penal amount). In addition, Hapaianu does not dispute that the indemnity agreement granted ICC the "exclusive right" to deny, pay, compromise, defend, or appeal any claim on the surety bond. Finally, he does not dispute that ICC incurred a $10,020 loss when it elected to forfeit the surety bond. Because Hapaianu fails to raise a genuine issue of material fact as to his performance of the SARA or ICC's good faith, the court properly granted summary judgment in favor of ICC on its breach of indemnity claim.

SUBJECT MATTER JURISDICTION

Hapaianu claims that the trial court lacked "original jurisdiction" to hear a matter involving a certificate of occupancy that was not appealed within 21 days pursuant to LUPA. He argues that issuance of a certificate of occupancy constitutes a "land use decision" within the meaning of LUPA.[9] Hapaianu cites no authority for this proposition

[9] See RCW 36.70C.020(2) (defining "land use decision" as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on [one of three enumerated categories].").

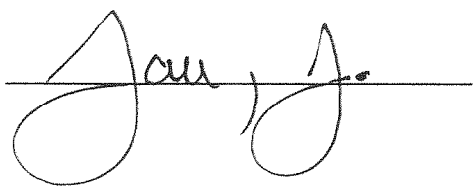
and conceded below that he was unable to locate any. We assume that none exists. See State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) ("'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'") (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). This claim fails.

ATORNEY FEES AND COSTS

Both parties request attorney fees and costs. Hapaianu's briefs provide no argument or analysis challenging either the amount or the award of attorney fees and costs by the trial court to ICC under the indemnity agreement. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignments of error unsupported by reference to the record or argument will not be considered on appeal (citing RAP 10.3(a)(5))); accord RAP 10.3(a)(6). This issue is waived. We award attorney fees and costs on appeal under RAP 18.1(a) to ICC conditioned on its compliance with RAP 18.1(d). Finally, we decline to award attorney fees and costs to Hapaianu because no basis in law supports his request.

CONCLUSION

For the reasons discussed above, we affirm the April 22, 2011 summary judgment order in ICC's favor, including the attorney fees and costs award. We deny Hapaianu's fees and costs requests and award reasonable fees and costs to ICC under RAP 18.1(a) conditioned on its compliance with RAP 18.1(d).



WE CONCUR: