IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADAIR HOMES, INC., an Oregon corporation, Respondent, v. KASEY J. BUTLER, an individual, Appellant.	No. 40525-3-II UNPUBLISHED OPINION

Armstrong, P.J. — Kasey Butler contracted with Adair Homes, Inc. to build a house. Butler secured financing for the project through a lender with connections to Adair. When Butler defaulted on his loans, the lender assigned the loans to Adair, which then initiated foreclosure proceedings. Butler counterclaimed, alleging that Adair had violated the Consumer Protection Act (CPA), chapter 19.86 RCW, by (1) failing to disclose an agreement to provide the bank with additional collateral for loans to Adair customers and (2) misrepresenting the financing options available to Adair customers. On summary judgment, the trial court dismissed Butler's CPA counterclaim and entered a judgment in favor of Adair for the amount owed on the loans. Butler appeals the dismissal of his CPA claim, arguing that the trial court erred in finding that he had failed to establish the necessary elements. Finding no error, we affirm.

FACTS

Kasey Butler, a licensed real estate broker, contracted with Adair Homes, Inc. (Adair) to develop property located in Vancouver, Washington. Adair's program requires its customers to purchase and prepare the site for construction, after which Adair builds the house from "the foundation up and the walls in." Clerk's Papers (CP) at 188. In early 2005, Butler approached

Adair, intending to build a house and sell it for a profit.

Butler initially worked with Adair employee Jeff Potts. Potts made several site visits and allegedly told Butler that his proposed construction plan "looks doable." CP at 160. But Potts also notified Butler, in writing, of particular concerns regarding the excavation of Butler's property.

Adair referred Butler to Adair Financial Services, LLC (AFS) for financing options.[1] AFS is a licensed mortgage brokerage company owned by Peter Marsh and his spouse, who also own Adair. Although AFS often assists Adair's customers in securing financing, the two entities are separate. AFS brokers loans to several lenders, including Pacific Continental Bank (Pacific).

At the time Butler was seeking a loan, Adair and AFS had an agreement with Pacific identifying certain criteria under which Pacific would make interim loans to Adair customers.[2] Although the agreement provided Adair with a competitive advantage, Pacific retained the ability to approve or reject a loan based on the individual's financial situation or creditworthiness. In conjunction with this agreement, Marsh individually agreed to provide Pacific with additional collateral—$500,000 in a dedicated account—and granted Pacific a security interest in the additional collateral, up to 20 percent of each loan. At the time, these types of agreements were not uncommon in the mortgage industry; they protected banks from acquiring collateral that was difficult to liquidate when a borrower defaulted, specifically unfinished homes.

In May 2005, AFS wrote Butler that he did not qualify for a loan and instructed him to

[1] AFS is not a party to this lawsuit.

[2] The criteria included a base line credit score and a set "loan to value" ratio, i.e. the amount a loan could total as a percentage of the property's appraised value.

improve his credit score. Undeterred, Butler entered into an agreement to purchase two contiguous lots of land on June 15, 2005. Butler again sought financing through AFS and signed a document acknowledging that he was not required to engage AFS to broker a loan for his Adair home and that he could work with other lenders.

AFS monitored Butler's credit score and determined that his score qualified him for a 30-year loan at a fixed interest rate. Following approval of the loan, Butler executed a construction contract with Adair that included a provision requiring arbitration of disputes arising under the contract. The contract also provided that all representations Adair made were contained in the contract and that any agreement not contained in the contract would not be binding. Butler signed a "sales evaluation" form in which he acknowledged that the contract was read to him as he followed along, that he had reviewed the other documents to his satisfaction, that he understood everything, and that there were no other agreements or representations made.

On August 16, 2005, Pacific granted Butler a loan—secured by a promissory note and deed of trust in favor of Pacific—enabling Butler to complete the purchase of his lots. In early 2006, after construction and financial setbacks, Butler sought further financing for the project. He was unable to secure a second loan through Pacific because the additional debt put Butler outside Pacific's "loan to value ratio" lending requirement. Adair intervened, agreeing that if Butler defaulted, Pacific could draw funds against Adair's credit line and assign the loan to Adair. Pacific issued Butler a $30,000 line of credit secured by a promissory note and deed of trust.

In late 2006, both the initial loan and the line of credit came due. When Butler refused to pay either, Adair paid the debts and Pacific assigned the notes and deeds of trust to Adair. Butler

also refused to negotiate repayment of the debt with Adair.

In September 2008, Adair sued Butler for breach of the two promissory notes and to foreclose the deeds of trust. Butler responded with four affirmative defenses (waiver, estoppel, unclean hands, and abandonment); he also counterclaimed, alleging that Adair had violated the CPA. Adair moved for summary judgment on all issues. The trial court granted Adair's motion in its entirety, denied Butler's motion for reconsideration, and awarded Adair attorney fees.

ANALYSIS

I. Standard of Review

We review a summary judgment de novo. *Hisle v. Todd Pac. Shipyard Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). In doing so, we view all facts and reasonable inferences flowing from them in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

II. Consumer Protection Claim

Butler assigns error to the trial court's dismissal of his CPA counterclaim. He argues that Adair violated the CPA by misrepresenting and concealing its financial arrangement with Pacific and misstating the terms of the construction loans. Butler does not dispute Adair's right to summary judgment, only that Adair's judgment should be offset by his CPA claim. Adair concedes that its impugned conduct occurred in the course of trade or commerce, but it maintains that Butler has failed to raise issues of material fact to support most of the elements of a CPA

claim. We agree with Adair that Butler has failed to set out sufficient facts to establish at least one of the elements of a CPA claim—that Adair engaged in unfair or deceptive acts.

To prevail on a private CPA cause of action, a party must establish: (1) an unfair or deceptive act, (2) occurring in trade or commerce, (3) impact on the public interest, (4) causation, and (5) injury to the plaintiff or his property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The failure to establish all five elements is fatal to a CPA claim. *Hangman Ridge*, 105 Wn.2d at 793.

Butler argues that Adair engaged in unfair and deceptive acts by misrepresenting or concealing that Marsh and Pacific had an agreement that Marsh would guarantee 20 percent of each loan. He also claims Adair is responsible for Potts representing that Butler would not have to make loan payments during construction, assuring him that he would be eligible for a "takeout" loan once construction was complete, and failing to advise him that he was issued the line of credit because of Adair's guarantee. Br. of Appellant at 22-23. He asserts that these allegedly unfair and deceptive acts were part of a generalized, repeated course of conduct. As evidence of this, he claims that 90 other Adair customers received similar financing between 2003 and 2006, and Pacific required Adair to commit over $2 million in order to secure back-up credit lines for 19 other customers.

To establish a deceptive act, a plaintiff is not required to show that the defendant intended to deceive, only that the alleged conduct had the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wn.2d at 785. The CPA does not define "unfair or deceptive act," but "[i]mplicit in the definition of 'deceptive' under the CPA is the understanding that the practice

misleads or misrepresents something of material importance." *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006). A knowing failure to reveal something of material importance is deceptive under the CPA. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 75, 170 P.3d 10 (2007).

As a preliminary matter, although Butler relies on his own deposition to establish Potts's alleged misrepresentations, the record does not support Butler's assertions of what Potts told him. Specifically, Butler contends that Potts told him that no payments would be required during construction. But in his deposition, Butler testified that he approached Adair because he understood that no loan payments were required during construction and that "[he and Potts] talked about that some." CP at 159. Butler also contends that Potts told him he would qualify for a "take out" loan. Br. of Appellant at 23. Contrary to this, in his supporting affidavit, Butler complains only that no one at Adair or AFS told him how to obtain a "take out" loan. CP at 148. Finally, Butler asserts that the City of La Center rejected Potts's configuration of the plot, that Potts's project budget was inadequate, and that Adair had identified Potts's failures in other projects involving steep driveway access. Butler fails to support these assertions with citations to the record. RAP 10.3(6). In short, the record does not support that Potts made any of the alleged misstatements.

And even if we accept Butler's version of the facts, he fails to show that Potts's statements have the inherent capacity to deceive a substantial portion of the public. *See Henery v. Robinson*, 67 Wn. App. 277, 290, 834 P.2d 1091 (1992). Butler relies, in part, on *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976), for the

proposition that a misrepresentation in lending requirements amounts to an unfair or deceptive practice. There, the Court found that an auto dealer's financing options were deceptive because the dealership had advertised easier credit terms than were actually available. *Ralph*, 87 Wn.2d at 306. Similarly, in *Grayson v. Nordic Construction Inc*., 92 Wn.2d 548, 599 P.2d 1271 (1979), the Court found that the defendant construction company engaged in deceptive tactics when it advertised financing options beyond its capabilities. Conversely, in *Henery*, 67 Wn. App. at 290, the court refused to find a CPA violation where there was no evidence that a mobile home dealer publicly represented to anyone other than the actual purchaser that a $500 down payment was all that was required to make the purchase. Despite his best attempts to construe Potts's alleged statements as "bait and switch tactics,"[3] Butler has failed to produce any evidence that Adair advertised its financing options or otherwise communicated them to the public. Regardless of how many Adair customers availed themselves of Pacific's financial services, without proving that Adair made misleading financing statements as a course of conduct, Butler cannot establish that the alleged misrepresentations had the capacity to deceive a substantial portion of the public.[4] *See*

[3] Bait and switch describes an offer that is made not in order to sell the advertised product at the advertised price but, rather, to draw a customer to the store to sell him another similar product that is more profitable to the advertiser. *Walker v. Wenatchee Valley Truck & Auto Outlet*, *Inc*., 155 Wn. App. 199, 215, 229 P.3d 871 (2010) (citing *Tashof v. F.T.C*., 437 F.2d 707, 709 n.3 (D.C. Cir. 1970)).

[4] Whether the defendant advertised to the general public and actively solicited a particular plaintiff, suggesting the solicitation of others, are two of several factors used to consider the public interest element of a CPA claim. *Hangman Ridge*, 105 Wn.2d at 790-91. A private dispute can be a matter of public interest if there is a likelihood that additional plaintiffs have been or will be injured in exactly the same fashion. *Hangman Ridge*, 105 Wn.2d at 790. Although a distinct element, and one that need not be addressed to determine the outcome of this appeal, we note that the evidence used to show that the allegedly unfair acts did not have the capacity to deceive a substantial portion of the public similarly demonstrates a lack of public interest. Butler has failed to show that Adair—or AFS—advertised the financing available to build an Adair

Henery, 67 Wn. App. at 291 (noting that a misrepresentation made to only one has the capacity to deceive many if, for example, it is made in a standard contract or to a sales representative that is subsequently communicated to individual buyers).

Nor has Butler shown that Adair's failure to disclose Marsh's collateral agreement with Pacific, or Adair's guarantee of Butler's line of credit, had the capacity to deceive the public. The agreement between Pacific and Marsh was not a personal guarantee of any one loan and did not affect an individual's ability to qualify under Pacific's loan requirements. The agreement merely encouraged a long-standing business relationship between Adair and Pacific. Marsh's promise of additional collateral may have given Pacific favored lender status or even induced it to make more favorable terms available to potential customers. Nonetheless, the relationship does not have the capacity to deceive a substantial portion of the public because the terms of each loan agreement were fully disclosed. Moreover, the agreement between Marsh and Pacific cannot be considered a material fact in relation to Adair's construction contracts. Adair cites *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn. App. 39, 51, 554 P.2d 349 (1976), for the proposition that a material fact is one that if communicated, would render goods or services unacceptable or, at the very least, substantially less desirable. *Testo* reflects the underlying assumption that a material fact under the CPA has the capacity to cause a plaintiff to reassess whether to purchase a good or enter into an agreement. Here, the amounts and terms of both financing agreements were clear, and Adair advised Butler in writing of his right to seek independent financing. Marsh's agreement

---

home. *Cashmere Valley Bank v. Brender*, 128 Wn. App. 497, 509-10, 116 P.3d 421 (2005) (no public interest impact where plaintiff failed to present evidence that defendant advertised the loans). Nor did Butler present evidence that Adair or AFS actively solicited him. In fact, Butler testified that he approached Adair because a client referred him there.

with Pacific does not make the loan agreement "substantially less desirable" because it changes none of the terms of the individual loan or the construction contract. Without establishing that the agreement is a material fact that has the capacity to deceive the public, Butler cannot prevail on his CPA claim.

III. Defense of Laches

Butler next argues that Adair unnecessarily delayed filing suit to foreclose the deeds of trust. He claims that the delay resulted in the decreased value of the property, thereby increasing Butler's exposure to a deficiency judgment.

The equitable principle of laches protects defendants who are injured by a plaintiff's delay in bringing an action. *Assoc. Hous. Fin. LLC v. Stredwick*, 120 Wn. App. 52, 61, 83 P.3d 1032 (2004). A party can raise the defense by pleading it in the answer to the complaint, asserting it by a motion to dismiss the complaint, or trying it with the express consent of the parties. *Rainier Nat'l Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981). But a party who fails to so raise the defense, waives it. CR 8(c); *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848 n.9, 991 P.2d 1161 (2000). Here, Butler raised four affirmative defenses in his answer to the complaint: waiver, estoppel, unclean hands, and abandonment of property; he also "reserve[d] the right to add affirmative defenses that may be determined through discovery." CP at 47. But affirmative defenses must be pleaded with certainty and particularity. *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. 380, 386, 517 P.2d 1371 (1974). Butler offers no authority for the proposition that a defendant can reserve the right to later assert any affirmative defense contrary to CR 8(d). RAP 10.3(6); *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970

(2004). Because Butler did not raise the defense of laches until his response to the defendant's motion for summary judgment, he failed to timely raise it. Accordingly, he has waived the argument.

Moreover, Butler signed the loan documents in which he agreed that the lender's delay in taking action will not result in the lender losing the right to take action. CP at 63 ("Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them."); CP at 73 ("[T]hat the Lender delays or omits to exercise any right will not mean that [the] Lender has given up that right.") We enforce contracts as plainly written by the parties. *In re Estate of Bachmeier*, 147 Wn.2d 60, 68, 52 P.3d 22 (2002). Butler also waived any laches defense by signing both the promissory notes and deeds of trust.

IV. Arbitration

Butler also argues that Adair violated the CPA when one of its agents, Potts, represented that Butler's project was "doable" and approved the excavation work. Br. of Appellant at 27. He claims that Adair is liable for Potts's actions taken within the scope of his employment. Adair counters that the claim is subject to the parties' contractual arbitration agreement. Butler responds that (1) the arbitration clause in the construction agreement is substantively unconscionable or (2) Adair waived the arbitration clause by suing to foreclose on the property.

A. Unconscionability

General contract defenses such as unconscionability may invalidate arbitration agreements. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008). A party who challenges an arbitration agreement as unconscionable, in whole or part, has the burden of proving

unconscionability. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (citing *Zuver v. Airtouch Commc'ns, Inc*., 153 Wn.2d 293, 302, 103 P.3d 753 (2004)).

Washington recognizes both substantive and procedural unconscionability. *McKee*, 164 Wn.2d at 396. Substantive unconscionability involves those cases "where a clause or term in the contract is one-sided or overly harsh." *McKee*, 164 Wn.2d at 396. For example, requiring confidentiality from consumers, circumventing state law, or requiring one party to pay all attorney fees without the ability for that party to collect any attorney fees are all substantively unconscionable. *See e.g*., *Zuver*, 153 Wn.2d at 322.

Butler argues that because the arbitration agreement does not permit him to hire an attorney, it necessarily means that Adair—a company that specializes in construction—will have the upper hand in any arbitration proceeding. Butler reasons that "Adair does not want its customers to have the benefit of the advice and assistance of a trained advocate in general and a person who might have construction expertise in particular." Br. of Appellant at 42. However, the clause applies to both parties, so neither party will have the benefit of a lawyer experienced in construction disputes. Furthermore, the clause provides that "others with specific knowledge and involvement to the factual issues relevant to the dispute may be present and provide testimony[.]" CP at 221. Both parties, then, will have access to persons with "construction expertise," and the arbitrator, who must be selected from the Construction Arbitration Service, will also presumably have such expertise. CP at 221. Finally, the no-attorney provision does not attempt to circumvent the law because it is enforceable only to the extent allowed by Washington law. Under these circumstances, we cannot find the arbitration clause substantively unconscionable.

B. Waiver

Butler asserts that Adair knew when he filed his counterclaim that he would be bringing claims for breach of the construction contract. Thus, according to Butler, Adair waived the arbitration clause by failing to then demand arbitration. Adair counters that Butler's counterclaim was too vague to put it on notice that Butler intended to litigate any contract claims.

A party waives a right to arbitrate if it elects to litigate instead of arbitrate or fails to invoke the right in a timely manner. *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 588, 201 P.3d 309 (2009); *Ives v. Ramsdem*, 142 Wn. App. 369, 382-83, 174 P.3d 1231 (2008). When a party begins litigation over an issue subject to an arbitration clause, the party must demand arbitration or the party loses the right to arbitrate. *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 619-20, 586 P.2d 519 (1978). But courts will not find a waiver "absent conduct inconsistent with any other intention but to forego a known right." *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw. Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980).

Here, the construction contract and the finance contracts are separate and distinct contracts. Nowhere in its complaint or summary judgment motion did Adair present a claim arising from the construction contract. Moreover, Butler's counterclaim was too vague to give Adair notice that Butler intended to litigate construction contract issues. Butler's counterclaim simply states that "defendant alleges that plaintiff has engaged in unfair or deceptive acts in the course of trade or business in connection with the transaction between the parties." CP at 47. Not only is "transaction" not specified, but the word is not plural, despite the parties having engaged in more than one transaction. Once it was clear that Butler was raising construction

contract claims, Adair immediately invoked the arbitration clause of the construction contract and argued that the clause barred litigation. The record falls short of establishing that Adair intended to waive arbitration. *See Lake Wash*., 28 Wn. App. at 62. Accordingly, Butler's waiver argument fails.

V. Attorney Fees

Finally, Butler assigns error to the trial court's award of attorney fees to Adair. Although he concedes that Adair is entitled to attorney fees on its mortgage foreclosure claims, he argues that he is entitled to attorney fees on his CPA claim and that the trial court should have offset these two awards. Because we have held that Butler's CPA claim fails, he is not entitled to attorney fees. *See* CR 54(d).

Adair requests attorney fees and expenses on appeal under RAP 18.1(a). Because Adair was entitled to attorney fees below, it is entitled to fees on appeal. *See Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003) (party may recover reasonable attorney fees on appeal if allowed by statute, rule, or contract and the party makes a request under RAP 18.1(a)).

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 pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Quinn-Brintnall, J.

Johanson, J.