IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SOUNDBUILT NORTHWEST, LLC, a Washington limited liability company, Respondent, v. THOMAS PRICE and PATRICIA PRICE, husband and wife, individually and their marital community composed thereof; and HYUN UM and JIN S. UM, husband and wife, individually and their marital community composed thereof, d/b/a P&U CAPITAL PARTNERS, LLC, a non-existent Washington limited liability company, Appellants.	No. 40585-7-II (Consolidated with 40925-9-II) UNPUBLISHED OPINION

Quinn-Brintnall, J. — Thomas Price and Hyun Um appeal a trial court's ruling in favor of Soundbuilt Northwest, LLC (SBNW), finding Price and Um personally and jointly liable to SBNW. Price and Um's company, P&U Capital Partners I LLC (P&U I), formed 176th Street LLC with a company owned by Gary Racca, Sunridge Homes, Inc. (Sunridge). Sunridge later sold its membership interest in 176th Street LLC to P&U Capital Partners LLC (P&U; no roman numeral "I"). At the same time, another Racca company, Sound Built Homes, Inc. (Sound Built), contracted to purchase developed property from 176th Street LLC.

In 2005, 176th Street LLC breached its real estate sale contract with Sound Built when it transferred property ownership to a lender in lieu of foreclosure. Sound Built sued 176th Street LLC for declaratory relief and specific performance. Sunridge and Sound Built eventually purchased the unfinished property from the lender for an inflated price. As part of the sale in 2006, Sound Built agreed to dismiss its claims against 176th Street LLC with prejudice. Both Sunridge and Sound Built later merged into SBNW.

This appeal concerns a second lawsuit Sound Built filed in 2008, against Price and Um, individually, for breaches of both the membership interest contract with Sunridge and the real estate contract with Sound Built. Sound Built and its successor, SBNW, claimed Price and Um caused 176th Street LLC and its member to enter into the contracts under false pretenses by pretending to be a nonexistent entity, P&U. The trial court agreed and held Price and Um jointly liable. But because SBNW's predecessor stipulated to dismissal of its breach of contract claim against 176th Street LLC in 2006, the doctrine of res judicata bars litigation of personal liability claims against two of 176th Street LLC owners that arose from the same cause of action. Sound Built could have raised these claims during its first round of litigation in 2005. Because res judicata bars Sound Built's breach of contract claims against the individual members of 176th Street LLC, individually, the trial court erred in denying Price and Um's motion to dismiss. Accordingly, we reverse the trial court's ruling in favor of SBNW, vacate the subsequent charging order, and remand for entry of a final order of dismissal.[1]

[1] Because we reverse on res judicata grounds, we do not reach the parties' other arguments on appeal with respect to successors in interest, scrivener's error, mutual mistake, collateral estoppel, LLC veil piercing, statutory personal liability, damages, or the charging order.

FACTS

In 2000, Price and Um formed P&U I, a Washington limited liability company. Racca formed Washington corporations Sound Built in 1992 and Sunridge in 2000. On October 4, 2000, Sunridge and P&U I formed 176th Street LLC to develop a residential subdivision called Frederickson Estates in Pierce County, Washington. Sound Built originally purchased the undeveloped Frederickson Estates property on May 8, 2002, for $2,586,600. 176th Street LLC's principal asset was the right to develop Frederickson Estates. Sunridge and P&U I were the only two members of 176th Street LLC, each owning a 50 percent interest.

Price and Um, acting through other entities in which they held controlling interests, were simultaneously developing two residential subdivisions adjacent to Frederickson Estates. The adjacent subdivisions shared basic infrastructure, such as a public storm water retention pond, with Frederickson Estates. Because of issues relating to cost allocation of the shared infrastructure among the development sites, Racca, Um, and Price agreed that one member should take complete ownership of 176th Street LLC. On August 27, 2003, the parties executed two contracts. First, the parties signed an "Agreement for Purchase and Sale of Membership Units" (Membership Agreement). The Membership Agreement listed Sunridge as the seller of all its membership units in 176th Street LLC to P&U, the buyer, for $650,000. Second, a "Real Estate Purchase and Sale Agreement" (REPSA) listed Sound Built as buyer of the Frederickson Estates property and 176th Street LLC as seller. The purchase price was $11,855,500. Under the REPSA, 176th Street LLC assumed the obligation to purchase the Frederickson Estates property from Sound Built, complete development of all 181 lots, and sell the finished lots back to Sound Built.

In 2005, 176th Street LLC used the Frederickson Estates property as collateral for three loans from Michael R. Mastro[2] totaling $5,050,000. Price and Um personally guaranteed those loans. The Frederickson Estates development project was delayed by more than one year and Price, Um, and Racca met once in May or June 2005 in a failed attempt to renegotiate the REPSA. The total encumbrance on the property, approximately $13,873,750, exceeded the REPSA contract price by more than two million dollars.

On August 12, 2005, Prium Companies, LLC, to which Price and Um are managing members, became the sole member of P&U I. Also in August 2005,[3] Price and Um notified Racca that 176th Street LLC would no longer pursue the Frederickson Estates project because it was "under water" or unprofitable. 3 Report of Proceedings at 299. In Pierce County Superior Court on August 29, Sound Built sued 176th Street LLC for breach of the REPSA requesting declaratory relief and specific performance. Sound Built filed a lis pendens against the Frederickson Estates title the same day.

On October 31, 176th Street LLC executed a "Deed in Lieu of Foreclosure" conveying by quit claim deed the Frederickson Estates to Mastro. On November 30, Mastro, Sound Built, and Sunridge signed real estate purchase and sale agreements (Mastro REPSAs) conveying the unfinished Frederickson Estates property from Mastro to Sound Built and Sunridge. The purchase price was $14,500,000, $2,644,500 over the original REPSA purchase price for finished

[2] It is unclear from the record exactly when Mastro became a member of 176th Street LLC but Price testified he believed Mastro became a member "sometime" in 2003. 3 Report of Proceedings at 306.

[3] It is unclear from the record the exact date Price and Um notified Racca of their anticipatory repudiation.

lots. The Mastro REPSA with Sound Built contained a clause regarding pending litigation which provided, "Upon the completed Closing of the sale of the Property to Buyer and recordation of the plat of the Property, Buyer shall dismiss the pending Pierce County Superior Court lawsuit brought by Buyer against 176th Street, LLC with prejudice." Clerk's Papers (CP) at 101.

On December 30, Um executed an assignment of rights for Frederickson Estates, assigning to Sound Built all rights, privileges, obligations, and responsibilities related to the property. Mastro conveyed the property to Sound Built and Sunridge by statutory warranty deeds on February 9, 2006. Sound Built and 176th Street LLC signed and filed with the court a stipulation and order of dismissal with prejudice of Sound Built's claims against 176th Street LLC on February 15. The order stated, "The parties hereby stipulate and agree that all claims asserted in this case have been fully compromised and settled." CP at 106.

On February 25, 2008, Sound Built sued Price and Um, individually and their marital communities, claiming breaches of the Membership Agreement and the REPSA, or alternatively, unjust enrichment. The complaint alleged, in relevant part, that because P&U was never formed as a legal entity in Washington, Price and Um were personally liable for causing 176th Street LLC's REPSA breach. Price and Um answered on April 22, admitting that 176th Street LLC was unable to pay the secured debt against the Frederickson Estates property and that it tendered its interest in the property to Mastro to satisfy its debt obligation. They moved for summary judgment on June 27, asserting that the doctrines of res judicata or collateral estoppel barred Sound Built's claims. The trial court denied the motion on August 1.

After a six-day bench trial, on March 19, 2010, the trial court made an oral ruling in favor of SBNW. On April 2, the trial court entered a written judgment finding Price and Um jointly and

severally liable for $5,897,513.80 in damages, $91,120.50 in attorney fees, and $2,281.78 in costs under the REPSA. The trial court also found, in relevant part, that (1) Price and Um had anticipatorily repudiated on the REPSA and concurrently breached the Membership Agreement in August 2005, (2) unprofitability was not a legal excuse to repudiate, and (3) neither the doctrine of res judicata nor of collateral estoppel barred SBNW's claims. The trial court entered supplemental findings of fact the same day, adding that at the time Sound Built dismissed its claims with prejudice against 176th Street LLC in 2006, it "was aware of the breach by 176th Street, LLC of the REPSA and the additional price for the 181 unfinished lots that it had agreed to pay" Mastro above the original contract price with P&U. 5 CP at 986. Last, the trial court found that Sound Built was aware that P&U I was a member of 176th Street LLC and that it believed Price and Um were members of 176th Street LLC. Price and Um appeal the trial court's judgment in SBNW's favor alleging, among other things, that the doctrine of res judicata bars the suit.

On May 21, 2010, SBNW moved ex parte for a charging order against Price's and Um's interests in Prium and another company, Queen High Full House LLC. The trial court issued the charging order, assigning Price's and Um's interests in the two companies to SBNW, terminating their management authority in the companies, ordering dissolution of both companies, and granting SBNW access to both companies' operating agreements, books, and records. Price and Um moved to amend the order, arguing that the statutes did not grant the trial court authority to dissolve the companies or SBNW the right to access the companies' books and records. The trial court denied Price and Um's motion and they appeal the order. We consolidated the two appeals on July 30.

DISCUSSION

Res Judicata

Price and Um assert that the trial court erred when it denied their motion to dismiss on the ground that res judicata bars relitigation of Sound Built's and its successor, SBNW's, breach of contract claim. SBNW argues that Sound Built's 2006 stipulated dismissal with prejudice was not a resolution of the issues on the merits and thus does not act to bar its suit against Price and Um, individually. Price and Um are correct.

Whether res judicata bars an action is a question of law which we review de novo. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005). Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000) (citing *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)), *review denied*, 143 Wn.2d 1006 (2001). "'Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.'" *Ensley v. Pitcher*, 152 Wn. App. 891, 898-99, 222 P.3d 99 (2009) (quoting *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274, *review denied*, 139 Wn.2d 1006 (1999)), *review denied*, 168 Wn.2d 1028 (2010). Res judicata bars such claim splitting if the claims are based upon the same cause of action. *Ensley*, 152 Wn. App. at 899 (citing 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.33, at 479 (1st ed. 2007) (distinguishing collateral estoppel's requirement that the issue be actually litigated from res judicata's more lenient standard where issues that could have been litigated and resolved are barred))); *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) ("a matter may not be relitigated, or even litigated for the first time, if it could have been raised, and

in the exercise of reasonable diligence should have been raised, in the prior proceeding").

Application of the doctrine of res judicata requires identity of (1) persons and parties, (2) causes of actions, (3) subject matter, and (4) the quality of persons for or against whom the claim is made in the prior judgment and subsequent action. *Pederson*, 103 Wn. App. at 69 (citing *Loveridge*, 125 Wn.2d at 763). The party asserting the defense of res judicata bears the burden of proof. *Ensley*, 152 Wn. App. at 902 (citing *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 903 P.3d 108 (2004)).

Sound Built's August 29, 2005 complaint for declaratory relief and specific performance against 176th Street, LLC contained the following allegations:

> 3.2 [176th Street] LLC is the owner of certain real property located in Pierce County and legally described as stated in Ex. 1 hereto (hereafter, the "Fredrickson [sic] Estates Plat"). On information and belief, [176th Street] LLC is a member-managed limited liability company. *The members of [176th Street] LLC, on information and belief, are Thomas Price and Hyun Um, both of whom are speaking agents of [176th Street] LLC.*
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> 3.3 On August 27, 2003, [176th Street] LLC contracted to sell the Fredrickson [sic] Estates Plat to [Sound Built] pursuant to a Purchase and Sale Agreement (the "[RE]PSA"), a true and correct copy of which is attached hereto as Ex. 2. [Sound Built] has fully performed all obligations arising under the [RE]PSA except the obligation to close, which obligation is [Sound Built]'s sole remaining obligation and which obligation has not matured.
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> 3.4 Under the [RE]PSA, [176th Street] LLC's obligations include the obligation to finish, as that term is defined in the [RE]PSA, all lots in the Fredrickson [sic] Estates Plat and to convey to [Sound Built] all such finished lots on closing schedule identified in the [RE]PSA. In order to satisfy this obligation, [176th Street] LLC is required to construct and obtain approval of all plat improvements. Finishing the lots according to the definition of "finished lots" is a condition precedent to [Sound Built]'s obligation to close, which condition has not been satisfied.
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> 3.5 Recently, Mr. Racca [(Sound Built)] met with Mr. Um and Mr. Price, acting on behalf of [176th Street] LLC. During the course of that meeting, Mr. Um and Mr. Price stated expressly that [176th Street] LLC would not close on a sale of the Fredrickson [sic] Estates Plat to [Sound Built] pursuant to the terms and conditions of the [RE]PSA. By way of explanation, *Mr. Price and Mr. Um stated that the project was "underwater," in other words, that a closing at the*

> *purchase price in the [RE]PSA would not be profitable for [176th Street] LLC. The statements of Mr. Price and Mr. Um constitute an anticipatory repudiation of the obligations of [176th Street] LLC under the [RE]PSA.*

CP at 60-61 (emphasis added).

In section 3.2 of its 2005 complaint, Sound Built clearly identified Price and Um as the individual members of 176th Street LLC, and in section 3.5, established that they anticipatorily repudiated the REPSA. Although Sound Built did not expressly sue Price and Um, individually, in 2005, it clearly possessed all relevant information and could have raised the issue of Price's and Um's alleged personal liability for 176th Street LLC's and P&U's conduct. Moreover, the trial court's unchallenged supplemental findings of fact state that at the time Sound Built dismissed its claims with prejudice against 176th Street LLC, it believed that Price and Um were members of 176th Street LLC. *See State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) (unchallenged findings are verities on appeal). Thus, Sound Built could have also asserted its third-party beneficiary claim under the Membership Agreement at that time. Sound Built, however, chose not to assert either claim in 2005.

Sound Built and Sunridge eventually acquired the unfinished Frederickson Estates Plat from Mastro for $14,500,000, $2,644,500 more than Sound Built would have had to pay for finished lots under the REPSA. Mastro required that Sound Built dismiss its lawsuit against 176th Street LLC with prejudice, which Sound Built did in 2006. In 2008, however, Sound Built sued Price and Um, individually, arguing that P&U acquired Sunridge's membership interest in 176th Street LLC under false pretenses and that Price and Um were personally liable for the increase in the price of the Frederickson Estates Plat. The trial court granted Sound Built's motion to substitute SBNW for itself on February 13, 2009, and later denied Price and Um's

request to dismiss this second lawsuit on res judicata grounds.

But Sound Built based its 2008 lawsuit on the same cause of action as its 2005 lawsuit against 176th Street LLC: the REPSA breach. Res judicata precludes claim splitting by barring not only the relitigation of claims raised in a previous lawsuit but also those claims that could have been raised. *Kelly-Hansen*, 87 Wn. App. at 329; *Ensley*, 152 Wn. App. at 898-99. Thus, here, res judicata bars claims Sound Built could have asserted in 2005, namely, its claims for Price's and Um's personal liability and as a third-party beneficiary of the Membership Agreement.[4] *Kelly-Hansen*, 87 Wn. App. at 329; *Ensley*, 152 Wn. App. at 898-99. Accordingly, we reverse the trial court, vacate the subsequently entered charging order, and remand for entry of a final order of dismissal.

SBNW argued below, as it does now on appeal, that dismissal with prejudice is not a resolution of the issues on their merits, or in other words, that dismissal with prejudice is merely a settlement between the parties and does not act to bar their suit against Price and Um, individually. Sound Built is mistaken. A stipulated voluntary dismissal with prejudice acts as a prior judgment barring a subsequent action between the same parties on the same claim. CR 41(a)(1)(B); Restatement (Second) of Judgments § 43(1)(b) (1982) ("A judgment in an action that determines interests in real or personal property . . . [h]as preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself."). And "a final order or judgment, settled and entered by agreement or consent of the parties, is no less

[4] We note that although the trial court found simultaneous breaches of both the Membership Agreement and the REPSA, it appears to have awarded SBNW damages under the REPSA only. In particular, the trial court expressly found damages resulting from Price's and Um's breaches of their obligations "to sell the finished lots" and "to timely complete the plat improvements." 5 CP at 999.

effective as a bar or estoppel than is one which is rendered upon contest and trial." *LeBire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 418, 128 P.2d 308 (1942); *see also Ensley*, 152 Wn. App. at 899 ("summary judgment can be a final judgment on the merits with the same preclusive effect as a full trial and is therefore a valid basis for application of res judicata").

Attorney Fees

Price and Um request attorney fees and expenses pursuant to RAP 18.1, as provided for by both the Membership Agreement and REPSA. The Membership Agreement attorney fees and costs provision is limited to the parties of that contract only—Sunridge and P&U—and does not apply. The REPSA attorney fees provision, however, provides that the prevailing party in "any other action arising out of this Agreement or the transactions contemplated hereby . . . shall be entitled to an award of reasonable attorneys fees and court costs incurred in such action or proceeding . . . regardless of whether such action proceeds to final judgment." CP at 27. Accordingly, we grant Price and Um reasonable attorney fees and costs on appeal pursuant to the REPSA and RAP 18.1. Except for those costs the commissioner of this court will determine pursuant to RAP 14.3 and 14.6, the trial court should determine the reasonable amount of the award on remand. RAP 18.1(i).

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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

PENOYAR, C.J.