IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT L. PRATT and SHARON PRATT, husband and wife,	)	**No. 28717-3-III**
Respondents,	)	**Division Three**
v.	)	
JAMES DAVEY and DANA DAVEY, husband and wife,	)	**UNPUBLISHED OPINION**
Appellants.	)	

Siddoway, J. — Robert and Sharon Pratt appeal "loss of use" damages and attorney fees awarded against them in a real property dispute. We find no error in the trial court's award of damages. We decline to consider the Pratts' challenge that fees awarded below were more properly the province of this court, because the Pratts did not object to the award in the trial court. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The Pratts were awarded specific performance of a contract to purchase James and Dana Davey's Rosamond Avenue home in a 2007 trial. The Daveys appealed and lost.

In addition to affirming the Pratts' right to enforce the contract, this court held that the Pratts were entitled to an award of their fees and costs on appeal as the prevailing party, pursuant to the parties' earnest money agreement. The Pratts filed an affidavit in support of fees 11 days after entry of this court's decision.

Following remand, the trial court addressed an issue that it had reserved at the time of the first trial: the damages, if any, incurred by the Pratts as a result of a posttrial delay in their ability to move into the Rosamond Avenue home. In December 2009, the trial court heard the Pratts' request for these reserved damages, treating their request and supporting declarations as a motion for summary judgment. The Daveys opposed the motion with a declaration of James Davey, contesting the evidence presented by the Pratts. Concluding that Mr. Davey's declaration did not raise any genuine issue of material fact, the court awarded the Pratts $20,490.06 in damages. Of this, $7,200 was for loss of use of the Rosamond Avenue home, based on the opinion of the Pratts' expert that there was a $300 per month difference in the rental value between that home and the home on Perry Street where the Pratts continued to reside after the Daveys disavowed an obligation to sell.

The trial court also heard the Pratts' request for attorney fees at the December 2009 hearing. Fees requested by the Pratts included not only the fees they had incurred in the trial court but also the fees incurred in the first appeal, as to which they had already

submitted a request—still pending—in this court. The Daveys did not contest the fee request in the trial court. The court awarded fees of $9,356.20, $4,926.20 of which comprised fees incurred in the first appeal.

After the trial court entered judgment and the Daveys filed this appeal, a commissioner of this court entered a ruling on the Pratts' December 2008 request for fees incurred in the first appeal. It denied the request as untimely under RAP 18.1(d), which provides that affidavits must be filed within 10 days. In light of the Pratts' unsegregated fee request in the trial court, however, the fees had already been awarded.

In this second appeal, the Daveys assign error to the trial court's (1) determination that no genuine issue of material fact exists concerning the amount of the Pratts' damages, (2) award of loss of use damages on the basis of lost rental value evidence presented by the Pratts, and (3) award of attorney fees incurred in proceedings in this court in light of the later-determined untimeliness of the Pratts' affidavit.[1]

ANALYSIS

I

[1] The Daveys' opening brief also assigned error to the trial court's alleged failure to consider James Davey's declaration in ruling on summary judgment, but the Pratts thereafter supplemented the record with an amended order, entered on October 25, 2010, indicating that the Davey declaration had been considered. Following the clarification, the Daveys' withdrew that assignment of error. Clerk's Papers at 109-10; Reply Br. of Appellants at 1.

The Daveys contend that through the declaration of James Davey they demonstrated disputes of fact as to the extent of the Pratts' damages, thereby making summary judgment improper. They argue specifically that Mr. Davey's declaration demonstrated genuine issues of material fact as to (1) adjustments for expenses associated with the Rosamond Avenue home that would exceed the rental value differential and (2) a failure by the Pratts to reduce their claimed automobile expense attributable to longer trips and commutes by reductions for shorter trips. Br. of Appellants at 6-7.

We review an order on summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp*., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). To avoid summary dismissal, the nonmoving party must offer specific detailed evidence that raises a genuine issue of material fact. *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004). Argumentative assertions and unsupported conclusory allegations will not defeat summary judgment. *Id.*

Mr. Davey's declaration did not dispute the rental values arrived at by John Westover, the Pratts' expert. Rather, it offered legal argument that difference in rental values would be a proper measure of damages only if the Pratts intended to rent out the

Rosamond Avenue home, and that the only other proper measure of damages would be if the Pratts incurred out-of-pocket expenses living in the Perry Street home that exceeded those they would have incurred in the Rosamond Avenue home. On the basis of this legal premise, Mr. Davey expressed his opinion, without supporting detail, that under either scenario the Pratts could not have lost money. Like the trial court, we regard the rental value differential identified by Mr. Westover as a legitimate measure of damages, as discussed in section II below. The evidence offered by Mr. Davey bearing on hypothetical damage claims, different from the claim asserted by the Pratts, did not raise a genuine issue of material fact.

As to the second issue that the Daveys contend required trial—the mileage component of the Pratts' damages—the controverting evidence submitted by the Daveys consisted of this testimony from Mr. Davey:

> The Pratts claim the increased mileage required to drive from their present home on S. Perry to both Mr. Pratt's work and to Lewis and Clark High School. The Pratts, however, do not provide an offset for the miles saved as a result of their present home being closer to dozens of other places. A proper mileage figure could only be accurately determined by an audit of all the places to which the Pratts drive. Claiming mileage without this offset is neither accurate nor fair.

Clerk's Papers at 89, ¶ 9. This is not the demonstration of any facts. Conjecture and argument of this sort is insufficient to avoid summary judgment.

II

The Daveys next argue that the trial court erred in accepting the Pratts' evidence on loss of use damages. The loss or damage whose determination was reserved by the trial court in 2007 was the foreseeable inability of the Pratts to live in the Davey home pending resolution of the appeal. At the December 2009 hearing, the Pratts presented the declaration of Mr. Westover, a real estate broker, who had prepared a comparative market analysis based on neighboring properties in order to arrive at the difference in rental value between the house on Rosamond Avenue in which they desired to live, and the Perry Street home in which they continued to live pending the first appeal. Mr. Westover concluded that the rental value of the Rosamond Avenue home was $300 per month higher than the rental value of the Perry Street home. He also concluded that the value of the Rosamond home was in the $260,000 range while the value of the Perry home was in the $185,000 range. The Daveys did not produce any evidence contradicting Mr. Westover's data or conclusions, and the trial court accepted the rental value differential as a basis for damages for loss of use of the Rosamond Avenue home.

Both sides point to RAP 8.1(c)(2), dealing with supersedeas procedure on appeal, as authority for the measure of loss when a party who prevails at trial is deprived of the use of property during the appeal process; the rule provides in relevant part that "[o]rdinarily, the amount of loss will be equal to the reasonable value of the use of the property during review." From this, the Daveys argue that because there was no evidence

that the Rosamond Avenue home was ever used or intended to be used as a rental property, rental value was an irrelevant and insufficient basis for measuring damages. They identify no alternative method by which loss of use should be measured.

The Daveys cite no legal authority for their argument, other than RAP 8.1(c)(2). Since they do not dispute that the Rosamond Avenue home was materially more valuable than the Pratts' Perry Street home, their implicit position appears to be that, as a matter of law, fair market rental value is not an appropriate measure of damages for loss of use of a nonrental home. While damages questions are usually discretionary and therefore for the trier of fact, the appropriate measure of damages for a given cause of action is a question of law reviewed de novo. *Womack v. Von Rardon*, 133 Wn. App. 254, 262-63, 135 P.3d 542 (2006).

The purpose of damages in a breach of contract action is "'not the mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled.'" *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949) (emphasis omitted) (quoting Charles T. McCormick, Handbook on the Law of Damages § 137, at 561 (1935)). The first element that must be estimated in attempting to fix a sum that will fairly represent the expectation interest is the loss in value to the injured party of the other party's performance. Restatement (Second) of Contracts, §

347(a), cmt. b (1981).

Where the injured party's expectation interest is to reside in a promised home, a reasonable measure of damages, relied upon and accepted in Washington cases, is the difference in value between the promised home and the home for which the injured party has to settle in light of the breach. Rental value has been relied upon as an offset against the purchase price for a defendant's delay in conveying title. *Colby v. Phillips*, 29 Wn.2d 821, 824, 189 P.2d 982 (1948). It is a reasonable alternative measure of recovery for a contractor's unfinished or defective construction of a home. *E.g., Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 758, 637 P.2d 998, 645 P.2d 737 (1981), *review denied*, 97 Wn.2d 1013 (1982); *see also Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 427-28, 10 P.3d 417 (2000), *review denied*, 142 Wn.2d 1018 (2001). The difference in rental value of property as promised is generally the measure of a tenant's damages for breach of a landlord's covenant to repair property or regarding the use of property. *Pappas v. Zerwoodis*, 21 Wn.2d 725, 734, 153 P.2d 170 (1944); *accord* Restatement, § 348(1) (if a breach delays the use of property and the loss of value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property).

The Daveys' argument is based on the flawed premise that the only conceivable relevance of the market differential in the rental values of the Rosamond Avenue home

and the Perry Street home would be to a "lost rents" claim. But the rental value differential has relevance beyond the lost rent context. The market rent differential is an available measure of the value of living in a more desirable home and, being a periodic measure, it is easily applied in cases involving delayed performance. We see no error in the trial court's accepting it as the measure of damages for loss of use.

III

The Daveys finally argue that of the $9,356.20 in attorney fees awarded to the Pratts by the trial court, $4,926.20 was incurred in connection with the first appeal. In light of this court's denial of the Pratts' fee request as untimely, they ask us to reduce the fees awarded by $4,926.20.

Events relevant to this argument occurred as follows:

November 21, 2008	A commissioner of this court granted a motion on the merits in the first appeal, affirming the trial court and holding that, as prevailing parties, the Pratts were entitled to an award of their fees on appeal upon compliance with RAP 18.1(d).
December 2, 2008	The Pratts file an affidavit in support of their requested fees for the appeal with this court.
February 6, 2009	A panel of this court denies the Daveys' motion to modify the commissioner's ruling.
September 8, 2009	The Supreme Court denies the Daveys' petition for discretionary review.

December 4, 2009	The trial court hears the reserved damages and fee issues; it awards $9,356.20 in attorney fees, including the fees that were incurred in the first appeal.
December 31, 2009	The Daveys file a notice of appeal from the December 4 orders and judgment.
February 3, 2010	A commissioner of this court, acting in our file on the first appeal, denies the Pratts' December 2008 request for fees incurred in the first appeal as untimely.

The Daveys had the opportunity to argue to the trial court at the time of the December 4, 2009 hearing that this court, not the trial court, was the appropriate body to award fees and costs for the first appeal. They did not. RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The Daveys' failure to raise and preserve this issue prevents them from relying on our commissioner's later ruling.

The Pratts request attorney fees under the earnest money agreement. Having prevailed in this appeal, they are entitled to recover them.

We affirm the trial court and award the Pratts their reasonable attorney fees on appeal contingent upon their compliance with RAP 18.1(d).

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW

2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.