IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN F. SCHROEDER,	)	**No. 29124-3-III**
Appellant,	)	
v.	)	**Division Three**
EXCELSIOR MANAGEMENT GROUP, LLC, and CRAIG G. RUSSILLO, Trustee,	)	
Respondents.	)	**UNPUBLISHED OPINION**

Sweeney, J. — The appellant landowner here agreed as part of a new negotiated promissory note and deed of trust to waive any right to judicial foreclosure. He did so to avoid judicial foreclosure. So, after he failed to make payments the lender started nonjudicial foreclosure proceedings. The landowner then sued to stop that proceeding and claimed that the land was used for agricultural purposes and that he was therefore entitled to judicial foreclosure. We conclude that the landowner validly waived any right to judicial foreclosure and we therefore affirm the trial judge's summary dismissal of his suit.

FACTS

Steven F. Schroeder owned a 200-acre parcel of property in Stevens County, Washington. In 2007, Mr. Schroeder borrowed money from Excelsior Management Group, LLC. The loan was secured by a deed of trust on the property. The deed of trust warranted that the property was not being used principally for agricultural purposes, and would not be used for such purposes in the future without Excelsior's consent.

In 2008, Mr. Schroeder defaulted on the loan. Excelsior started nonjudicial foreclosure proceedings on the property pursuant to the deed of trust. The trustee scheduled a sale in January 2009. Mr. Schroeder sued in Stevens County to stop the sale. He claimed that the property was agricultural and, therefore, only subject to judicial foreclosure. Excelsior responded by filing an action to judicially foreclose on the property.

The parties negotiated a settlement prior to foreclosure. Excelsior agreed to stop the judicial foreclosure action if Mr. Schroeder signed a new promissory note and a deed of trust. Mr. Schroeder also agreed to waive any right to request judicial foreclosure in the future by a claim that the property was being used for agricultural purposes. And he agreed not to use the property for agricultural purposes without Excelsior's agreement. Mr. Schroeder signed the new promissory note and deed of trust. The new deed of trust

again warranted that the "[p]roperty has not been used, and will not be used, for agricultural purposes." Clerk's Papers (CP) at 182.

In April 2009, the parties memorialized the agreement in a stipulated motion and order of dismissal (Order). Mr. Schroeder's attorney signed the Order. It read in part:

> 1. Schroeder has knowingly waived any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes,
> 2. Schroeder shall not be allowed to again allege that the subject property is used for agricultural purposes,
> 3. Any future deed of trust executed by Schroeder to [Excelsior], an associated company or assigns, need not be judicially foreclosed but may be foreclosed nonjudicially in accordance with RCW Chapter 61.24.

CP at 36. The court then dismissed Mr. Schroeder's suit with prejudice.

Mr. Schroeder again defaulted on the new loan and Excelsior again started nonjudicial foreclosure proceedings. And Mr. Schroeder again sued in Stevens County Superior Court to stop the trustee's sale by claiming that the property was being used for agricultural purposes and, therefore, Excelsior had to judicially foreclose. Excelsior moved for summary judgment based on Mr. Schroeder's failure to prevent the foreclosure sale of the subject property.

In February 2010, Mr. Schroeder moved to *vacate* the Order on the ground that he never authorized his attorney to execute the agreement. The motion was set for hearing on March 2, 2010. Mr. Schroeder later reset the hearing for March 23, 2010, but the motion never proceeded to hearing. Mr.

Schroeder also filed a CR 56(f) motion to continue the summary judgment hearing for further discovery. As an alternative to the continuance motion, Mr. Schroeder filed a motion to stay the effects of the Order. The motion to stay was substantially similar to the previous motion to vacate.

In April 2010, the trial court held a single hearing on both the motion to stay and the motion to vacate. Excelsior combined its response to both motions because they presented essentially the same argument—that Mr. Schroeder never authorized his attorney to execute the Order. Excelsior argued that Mr. Schroeder actually knew of the Order, discussed it with his attorney, and authorized his attorney to sign it. Excelsior urged that Mr. Schroeder should be bound by the Order regardless of whether he requested temporary relief (motion to stay) or permanent relief (motion to vacate). The court denied both of Mr. Schroeder's motions. The court also granted Excelsior's summary judgment motion in April 2010.

Mr. Schroeder moved for reconsideration of only the order denying his motion to vacate the Order. The court denied the motion. Mr. Schroeder appeals the trial court's denial of his (1) motion to vacate the 2009 stipulated order of dismissal and (2) his motion for reconsideration.

DISCUSSION

Authority of Attorney To Agree To Dismissal Terms

We review a trial court's decision to deny a motion to vacate an order of dismissal for abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Attorney Authority

Mr. Schroeder argues that the trial court erred by denying his motion to vacate the order of dismissal because his attorney surrendered a substantial right without his authorization. *See* CR 60(b)(11); *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980).

CR 60(b)(11) allows a trial court to relieve a party from a final judgment, order, or proceeding for "[a]ny other reason justifying relief from the operation of the judgment." The use of CR 60(b)(11) requires extraordinary circumstances. *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010). Extraordinary circumstances involve "reasons which are extraneous to the action of the court or go to the regularity of its proceedings." *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995).

The incompetence or neglect of a party's own attorney is generally not sufficient grounds for relief from a judgment in a civil action. *Haller v. Wallis*, 89 Wn.2d 539, 547,

573 P.2d 1302 (1978); *see also Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 126, 605 P.2d 348, *aff'd*, 94 Wn.2d 298, 616 P.2d 1223 (1980) (attorney's unauthorized surrender of substantial rights warranted vacation of judgment); *Morgan v. Burks*, 17 Wn. App. 193, 563 P.2d 1260 (1977) (upholding vacation of settlement and order of dismissal entered without client's authorization). An attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial; but, in his capacity as an attorney, he is without authority to waive any substantial right for his client unless specifically authorized to do so. *See In re Adoption of Coggins*, 13 Wn. App. 736, 739, 537 P.2d 287 (1975). There is no showing of either incompetence or neglect here. Of course, the surrender of substantial rights by an attorney contrary to a client's instructions may be grounds for vacating a judgment. But there is no showing of that on this record either.

Mr. Schroeder signed the original deed of trust. That document specifically warranted that the property was not being used principally for agricultural purposes, and would not be used for such purposes in the future without Excelsior's consent. Mr. Schroeder later sued claiming that Excelsior could not conduct a nonjudicial foreclosure because the property was agricultural. But then, he signed another deed of trust and promissory note and again warranted that the property had not been used, and would not

be used, for agricultural purposes. The order of dismissal is consistent with the warranties Mr. Schroeder made in the loan documents.

Mr. Schroeder's attorney signed the order of dismissal to prevent judicial foreclosure of Mr. Schroeder's property. Mr. Schroeder claims he had no knowledge of the order or its provisions. But he received a copy of the order prior to its entry, along with a letter from his attorney outlining several proposed changes. Mr. Schroeder admitted he discussed the order with his attorney. And Mr. Schroeder's attorney fully explained the order to Mr. Schroeder and believed he was acting with authority when he executed it. Mr. Schroeder's response was that he never really opened or read the communications from his attorney because he does not read well. Mr. Schroeder, nonetheless, personally and repeatedly authorized documents that waived any claimed right that his property was used for agricultural purposes. And simply refusing to read, or otherwise ignoring, legal documents does not generate a defense to the implications of those documents. *See Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) (Washington adheres to the general contract principle that parties have a responsibility to read the contracts they sign). All parties to this contract had duties of good faith and fair dealing. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 647, 211 P.3d 406 (2009).

Mr. Schroeder relies on *Graves* for the proposition that an attorney is without authority to waive a substantial right of a client unless special authority is given. 94 Wn.2d at 303-04. *Graves* is distinguishable. That case involved an attorney who failed to appear in a summary judgment motion, failed to present any evidence at trial, and failed to advise his clients of a $131,200 memorandum order against them. *See Graves*, 94 Wn.2d at 300-01. That is not this case. Mr. Schroeder admitted he received all written communications from his attorney and discussed those writings, including the stipulated order, by telephone. And Mr. Schroeder's attorney had Mr. Schroeder's permission to sign the order. This client is bound by his lawyer's written agreement; it was not necessary that the client appear in court or approve the deal in writing. *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 304, 971 P.2d 581 (1999).

Validity of the Agreement

Mr. Schroeder next challenges the validity of the agreement itself. He first argues that he never saw the stipulated order until after it was entered and therefore he never manifested any intent to be bound. He urges that there was no "meeting of the minds." Br. of Appellant at 24. And he argues that the stipulated order is invalid because it violates the deeds of trust act (ch. 61.24 RCW).

Whether an enforceable contract exists is a question of law that we review de

novo. *In re Estate of Krappes*, 121 Wn. App. 653, 660, 91 P.3d 96 (2004). An enforceable contract requires a "meeting of the minds" on the essential terms of the parties' agreement. *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579, 675 P.2d 1266 (1984). Acceptance follows from the offeree's communication by word, sign, or writing to be bound by the offerer's terms. *Plouse v. Bud Clary of Yakima, Inc.*, 128 Wn. App. 644, 648, 116 P.3d 1039 (2005). And there is nothing that would prohibit Mr. Schroeder from waiving whatever rights he may have by statutory or even, generally, by constitutional mandate. "'[W]aiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.'" *Peste v. Peste*, 1 Wn. App. 19, 24, 459 P.2d 70 (1969) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)).

Here, to avoid judicial foreclosure Mr. Schroeder agreed, in consideration for a new note and new deed of trust, that Excelsior could nonjudicially foreclose. To do so he had to represent, and did represent, that the property was not and would not be used for agricultural purposes without Excelsior's permission. That is the intentional and voluntary waiver of a known right. Mr. Schroeder received all written communications from his attorney, including the stipulated order and discussed those writings by telephone. And he does not argue otherwise; he simply says he did not read them. That

failure does not affect the validity of these manifest exchanges of promises for adequate consideration.

Motion for Reconsideration

Mr. Schroeder next contends that the trial court improperly ruled on his motion to vacate during the summary judgment hearing because he intended to conduct further discovery. Mr. Schroeder argues that he intentionally did not set the motion for hearing. He contends that the trial court's ruling on the unset motion amounts to a procedural irregularity under CR 59(a)(1), surprise under CR 59(a)(3), and is contrary to law under CR 59(a)(7). Mr. Schroeder concludes that the trial court abused its discretion by denying his motion for reconsideration.

We review a trial court's ruling on a CR 59 motion for reconsideration under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). The trial court properly refused to vacate the stipulated order, it then also properly denied Mr. Schroeder's motion for reconsideration of that order. His motion to vacate was almost identical to the motion for stay that was set for hearing. Mr. Schroeder offered testimony and argument when the court heard the two motions. And there is no showing on what or how any additional discovery would have changed things here. There was no abuse of discretion.

Attorney Fees

Excelsior requests fees and costs. And the promissory note and deed of trust provide for fees and costs. It is then entitled to attorney fees and costs on appeal. RAP 18.1.

We affirm the judgment of the trial court and we award Excelsior fees and costs on appeal.

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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Sweeney, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.