FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHD, INC.,	)	**No. 29395-5-III**
Respondent,	)	
v.	)	**Division Three**
MELVIN C. TAGGART, d/b/a TAGGART ENGINEERING & SURVEYING,	)	
Appellant.	)	**UNPUBLISHED OPINION**

Sweeney, J. — This is the second time this matter has come before the court. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 220 P.3d 229 (2009). Earlier we reversed and remanded for further proceedings after concluding that the equitable doctrine of judicial estoppel did not apply. *Id.* at 106. The court, on remand, has now concluded that the escrow holder had authority to provide a payoff figure, accept payment of that sum, and cancel the debt owed based on the payoff figure provided, even if the escrow holder provided the wrong payoff figure. We affirm the summary judgment of the court.

FACTS

Melvin C. Taggart does business as Taggart Engineering & Surveying. He performed survey work for CHD Inc. CHD lagged behind on payments. CHD then executed a $16,000 promissory note and deed of trust to a piece of real estate on October 1, 1997. The note named Mr. Taggart as the payee and beneficiary of the deed of trust. The note was escrowed at the law office of Waldo & Schweda (now Waldo, Schweda & Montgomery):

> This note and the Deed of Trust securing same, together with a Request for Full Reconveyance, *shall be placed in escrow at the Law Office of Waldo and Schweda, P.S.*, North 2206 Pines Road, Spokane, Washington 99206, without fee to said agent. Upon completion of payments hereunder, the original Note, Deed of Trust and signed Request for Full Reconveyance shall be delivered to the Maker for reconveyance of the security interest.

Clerk's Papers (CP) at 407 (emphasis added). The deed of trust securing the promissory note stated:

> This deed is for the purpose of securing performance of each agreement of Grantor herein contained, and payment of the sum of Seventeen Thousand and 00/100ths Dollars ($17,000.00) with interest, in accordance with the terms of a promissory note of even date herewith, payable to Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

CP at 409. The deed of trust language provided for "such further sums as may be advanced or loaned by Beneficiary to Grantor." CP at 409.

CHD later refinanced the encumbered property and this required that Mr. Taggart be paid off. Richard Perednia acted as closing agent. He ordered a title report. The report reflected CHD's deed of trust in favor of Taggart. Mr. Perednia contacted Waldo, Schweda & Montgomery to obtain a payoff figure on the note including interest. Rose Hulvey works for the law firm. She reviewed the file and attempted to contact Mr. Taggart, unsuccessfully, to verify that no payments had been made. She reported a total payoff amount of $28,847.79 to Mr. Perednia. Mr. Perednia sent the funds and the law firm provided a copy of the note marked "PAID IN FULL" on August 9, 2006. CP at 61-62, 388-91.

Mr. Taggart said later that the payoff amount provided was wrong. The law firm told Mr. Perednia that the payoff sum was wrong and attempted to invalidate the payoff statement.

CHD sued to quiet title in the property used to secure its debt. The court ultimately concluded that CHD should be judicially estopped from claiming that the debt owed was different than the $41,0000 CHD listed in a bankruptcy filing. CHD appealed the ruling and we vacated the judgment and remanded for further proceedings. *CHD, Inc.*, 153 Wn. App. at 106.

The matter proceeded to summary judgment on remand. Mr. Taggart again argued

that admissions by CHD in its bankruptcy filings removed any question as to the amount of the debt and that CHD should be bound by those statements. CHD argued that it had the right to rely on the authority of Taggert's agent to set and accept the payoff figure. The court agreed with CHD:

> The Court finds that there is no genuine issue of material fact regarding the apparent authority granted to Waldo, Schweda [&] Montgomery. . . . In this matter Mr. Perednia could reasonably rely on the deed of trust and the promissory note and information provided by Rose Hulvey of Waldo, Schweda [&] Montgomery to determine a pay-off figure.

CP at 589. The court also granted CHD's request for fees and costs but later reduced the fees by $6,382 after finding certain fees were incurred during the first appeal.

DISCUSSION

We review a summary judgment grant de novo. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Here there are no disputed material facts and so the question is one of law. *Walcker v. Benson & McLaughlin, P.S.*, 79 Wn. App. 739, 741, 904 P.2d 1176 (1995).

Mr. Taggart contends that disputed facts remain that preclude summary resolution of this dispute, specifically, the authority of Waldo, Schweda & Montgomery to calculate

the payoff amount. CHD responds that the escrow documents clearly say otherwise.

An agent can bind its principal to a contract with either actual or apparent authority. *King v. Rivelund*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). An agent has apparent authority to act for a principal only when the principal makes objective manifestations of the agent's authority to a third person. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008). A principal's objective manifestations create apparent authority when they cause the third person to subjectively believe that the agent has authority to act for a principal and that belief is objectively reasonable. *Id.*

Here, Mr. Taggart (the principal) by all objective manifestations conferred authority on Waldo, Schweda & Montgomery (the agent) by the promissory note. Mr. Taggart participated in the formation of that note. The language of the note states that the note and deed, along with a request for reconveyance, will be placed in "escrow." CP at 407. It appoints the "Law Office of Waldo and Schweda" as the "agent" who will act "without a fee." CP at 407. The note instructs the law firm to release the request for reconveyance "[u]pon completion of payments" on the note. CP at 407. Mr. Perednia (the third party) requested the figure from the law firm and the firm provided the figure. Mr. Perednia paid that sum to the firm and the firm responded with a copy of the note

marked "PAID IN FULL." CP at 62, 388-91. Mr. Perednia's belief in the law firm's authority was based on the explicit language in the note and was objectively reasonable. The term "escrow" and the associated instructions would most certainly lead a reasonable person to conclude that the law firm was the agent. *Ranger Ins.*, 164 Wn.2d at 555.

We conclude then that the court properly entered summary judgment in CHD's favor.

Attorney Fees

CHD also appeals the trial court's denial of attorney fees associated with the first appeal. CHD did not request fees during the first appeal, but argues, nonetheless, that failure is irrelevant because there was no final judgment and it was not a prevailing party within the meaning of RCW 4.84.330. We review de novo a trial court's decision awarding fees under RCW 4.84.330. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009); *Quality Food Ctrs. v. Mary Jewell T, LLC*, 134 Wn. App. 814, 817, 142 P.3d 206 (2006).

A prevailing party in an action on a contract may request an award of attorney fees. RCW 4.84.330. A "prevailing party" means that party in whose favor final judgment is rendered. *Id.* But that party must devote a section of its opening brief to the request for fees or expenses. RAP 18.1(b). This requirement is mandatory. *Phillips*

Bldg. Co. v. An, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996).

Here, the court first ruled in favor of CHD. Mr. Taggart moved for reconsideration. He asserted that the law firm was not his agent and the note did not create an escrow, and that CHD should be judicially estopped from disputing any disclosures or representations it made in the bankruptcy, in any event. The court granted his motion and entered an order dismissing CHD's claim for relief and for judgment in favor of Mr. Taggart in the amount of $41,000 plus interest and attorney fees. CHD appealed that final judgment and had it prevailed it would have been entitled to attorney fees under RCW 4.84.330. *CHD*, 153 Wn. App. at 106. However, it first had to request fees in its opening brief. It did not. The fact that this court remanded the case for further proceedings does not help. There effectively was no prevailing party in the first appeal. *See Sardam v. Morford*, 51 Wn. App. 908, 911-12, 756 P.2d 174 (1988) (no prevailing party attorney fees where each party successfully defended against a major claim by the other).

The court then correctly reduced CHD's fee award by $6,382—the amount of attorney fees from the first appeal that was never requested.

CHD requests attorney fees as the prevailing party on appeal pursuant to RCW 4.84.330 and RAP 18.1. And CHD should be awarded fees as the prevailing party.

DeAtley v. Barnett, 127 Wn. App. 478, 486, 112 P.3d 540 (2005).

We then affirm the summary judgment of the trial court and the related award of fees, and grant fees to CHD as the prevailing party 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:

_____
Siddoway, A.C.J.

_____
Kulik, J.