IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICHLAND R.V. PARK, LLC, a Washington Corporation,	)	**No. 27640-6-III**
Appellant,	)	
v.	)	**Division Three**
ACH ENGINEERING SERVICES, P.S., a Washington Professional Service Corporation,	)	
Respondent.	)	**UNPUBLISHED OPINION**

Sweeney, J. — This is a contract dispute between a developer and a civil engineering firm. Their contract provided that all legal action had to be initiated within one year of completion of the work. The developer complained about the engineering firm's work. The engineering firm acknowledged some problems and agreed to pay for the cost of fixing the mistakes. But the developer did not sue for damages within the one-year limit set out in the contract. The trial court dismissed the action on summary judgment concluding that the agreement was not ambiguous. We agree and affirm.

FACTS

Richland RV Park, LLC, hired ACH Engineering Services, PS, a civil engineering firm, to design a recreational vehicle (RV) park. ACH agreed to survey the park site. On about September 28, 2002, ACH completed its topographical survey and design work.

In December 2002, Richland RV informed ACH that it wanted the RV stalls to be wider—27.5 feet wide instead of 22 feet wide. ACH could not redesign the park as quickly as Richland RV required. So Richland RV hired another civil engineering firm, AHBL, to do the work. AHBL redesigned the park using ACH's topographical survey.

Richland RV then hired Osborne Construction to build the park according to AHBL's design. Osborne began to grade the site in April 2003. Its employees noticed the topographical survey was inaccurate. On about April 25, 2003, Osborne told ACH about the problem.

On April 28, 2003, Richland RV wrote a letter to ACH. The letter confirmed that Osborne had spoken to ACH about the errors in the survey. The letter also said that Richland RV had hired Stratton Surveying, Inc. to prepare a new survey and that the park plan would have to be redesigned and repermitted according to the new survey. The letter stated that ACH agreed to pay for the costs associated with fixing the errors caused by the inaccurate survey.

On May 21, 2003, ACH responded to Richland RV's letter in writing. It stated

that it "was willing to compensate [Richland RV Park] for the reasonable expenses [of] obtaining a new topographical survey and vertical design for the RV Park." Clerk's Papers (CP) at 67. ACH did not agree to pay "any and all incidental expenses." CP at 67.

ACH apparently never paid Richland RV for the new survey, the new design, or any other incidental expense.

On June 19, 2008, Richland RV sued ACH for breach of contract. ACH moved for summary judgment. It argued that Richland RV's lawsuit was time-barred by the contract. ACH's argument was based on this provision in the contract that limited the initiation of all legal actions to one year:

> All legal actions by either party against the other arising out of or in any way connected with the services to be performed hereunder shall be barred and under no circumstances shall any such claim be initiated by either party after one (1) year has passed from the date of completion, unless ACH's service is terminated earlier, in which case no claims shall be initiated by either party after one year has passed from the date of termination.

CP at 20.

The trial court granted ACH's motion and summarily dismissed Richland RV's suit.

DISCUSSION

Equitable Estoppel

Richland RV argues that ACH should be equitably estopped from asserting that its breach of contract action was time-barred because ACH agreed to pay some of the costs. ACH responds that Richland RV did not claim equitable estoppel in the trial court and should therefore be prohibited from arguing that theory here on appeal.

"On review of an order granting . . . a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. Richland RV argues, nonetheless, that it presented its estoppel claim to the trial court by informing the court that ACH first acknowledged liability for the cost of a new survey and design but later denied liability by asserting its contractual limitations defense. That is not the way we read this record.

In the trial court, Richland RV referred to ACH's willingness to pay for a new survey and design in the context of its argument supporting its breach of contract claim. CP at 13, 15. Richland RV never asserted, explicitly or implicitly, the doctrine of equitable estoppel. And the trial court, then, never had the opportunity to pass on that theory. *See, e.g.,* Report of Proceedings at 2-7. We, therefore, will not consider the issue for the first time on appeal. RAP 9.12.

ACH would be unlikely to prevail on a claim of equitable estoppel in any event. "Estoppel is appropriate to prohibit a defendant from raising a . . . limitations defense when a defendant has '*fraudulently* or *inequitably* invited a plaintiff to delay commencing

suit until the applicable statute of limitation has expired.'" *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992) (quoting *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986)).

Richland RV does not show or even argue that ACH fraudulently or inequitably invited it to delay filing suit until the limitations period expired. To the contrary, it argues that it timely sued ACH. ACH would not, then, be estopped from asserting that Richland RV's suit is time-barred.

Summary Judgment—Contract Interpretation

Richland RV also contends that summary judgment was not proper here because the contract is ambiguous to the extent that it bars legal actions not initiated within a defined one-year period. And it argues that it initiated legal action by its April 28 letter.

Whether a written contract is ambiguous or not is a question of law that we review de novo. *Syrovy v. Alpine Res., Inc.*, 68 Wn. App. 35, 39, 841 P.2d 1279 (1992), *aff'd*, 122 Wn.2d 544, 859 P.2d 51 (1993). A contract provision is ambiguous when, reading the contract as a whole, its terms are uncertain or capable of more than one meaning. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006); *Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 37 P.3d 1269 (2002). Summary judgment is improper if the contract is ambiguous. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003); *Kenney v. Read*, 100 Wn. App. 467, 997 P.2d 455, 4 P.3d 862

(2000). A term in a contract, however, is not ambiguous simply because the parties do not agree on the meaning. *Dice*, 131 Wn. App. at 684.

Again, the parties' contract says:

> *All legal actions* by either party against the other arising out of or in any way connected with the services to be performed hereunder *shall be barred and under no circumstances shall any such claim be initiated* by either party *after* <u>*one (1) year*</u> *has passed from the date of completion*, unless ACH's service is terminated earlier, in which case no claims shall be initiated by either party after one year has passed from the date of termination.

CP at 20 (emphasis added).

Richland RV argues that this provision does not clearly shorten the time for *filing* a legal action to one year. It acknowledges that the provision requires that a legal action be "initiated" within a determined one-year period. But it asserts that a party "initiates" or begins a legal action by merely informing the opposing party of its claim and asking the opposing party to pay. And Richland RV says it did just that.

We presume that contracting parties intend that each part of a contract have some meaning. *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wn. App. 353, 361, 127 P.3d 762 (2006). And, here, the agreement's language sheds light on the parties' intent. *Martinez v. Kitsap Pub. Servs., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999). If we accepted Richland RV's interpretation of the limitations provision, two provisions in the contract would require that Richland RV merely notify ACH of any

problems it had with ACH's work without filing a lawsuit: the limitations provision and paragraph 9, which provides:

> The Client shall promptly report to ACH any defects or suspected defects in ACH's work of which the Client is aware so that ACH can minimize the consequences of such a defect.

CP at 20. It is for us, then, unreasonable to interpret the term "initiate" in the limitations provision as requiring mere notice of a problem. Richland RV's interpretation would render the provision's actual language meaningless. We give meaning and effect to each part of a contract when possible. *Bogomolov*, 131 Wn. App. at 361. We, therefore, interpret the meaning of "initiated" as filed or served.

RCW 4.16.170 provides that a limitations period is *tolled only when* a party files a complaint or serves a summons, whichever occurs first. *Wothers v. Farmers Ins. Co. of Wash.*, 101 Wn. App. 75, 79, 5 P.3d 719 (2000). To satisfy the contractual limitations period here, then, Richland RV had to "initiate" its legal action by filing a complaint or serving a summons by September 28, 2003. It failed to do so. Its action is, therefore, time-barred. And the trial court properly granted ACH's motion for summary judgment.

Attorney Fees

ACH requests an award of attorney fees incurred at the trial court level. A trial court may award attorney fees if authorized by a contract, a statute, or by recognized equitable principles. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896

(1994). The contract here provided for fees.

ACH also requests fees on appeal. ACH is the prevailing party here on appeal. *See Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). We, therefore, grant ACH's requests for attorney fees.

We affirm the summary judgment and award appellate attorney fees to ACH Engineering Services, PS. We remand to the trial court for the award of fees in that court and on appeal. RAP 18.1(i).

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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Schultheis, C.J.

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Korsmo, J.