IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RICHARD PEDOWITZ, Appellant, v. ABOVE ALL ROOFING SPECIALISTS, INC., and JOHN DOE, d/b/a ABOVE ALL ROOFING SPECIALISTS, Respondent.	)	No. 63651-1-I consolidated with No. 63893-9-I UNPUBLISHED OPINION FILED: May 24, 2010

Ellington, J. — To toll a contractual limitation period for commencement of an action on the contract, a claimant must file a complaint within the applicable time period and serve it within 90 days of filing. Homeowner Richard Pedowitz filed his construction defect claim within the contractual limitation period, but indisputably did not serve it until nearly seven months later. By that time, the limitation period had long expired. Because the contract unambiguously required Pedowitz to bring suit within 18 months of substantial completion, he failed to perfect his claim within the applicable time period, and we affirm summary dismissal. We remand for recalculation of the attorney fee award.

FACTS

On December 12, 2005, Richard Pedowitz entered into a written contract with Ryan Love, owner of Above All Roofing, Inc., to reroof Pedowitz's home in Seattle for

$14,722. The second page of the two-page contract listed "Conditions of Proposal" in nine separate enumerated paragraphs. Paragraph 7 stated:

> All workmanship is guaranteed against defects for a period of (5) years from the date of substantial completion. All manufacturers' materials warranties are hereby assigned to Customer as Customer's sole remedy for any defect or failure of materials. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE. Contractor's liability is limited to repair and/or replacement of defective work. Contractor will in no event be responsible for special, incidental or consequential damages. Any claim by either Contractor or Customer arising out of or in any way relating to the work performed under this Agreement, including warranty claims involving Contractor, must be filed within eighteen (18) months of substantial completion or the final invoice, whichever is sooner.[1]

The contract specified a start date of January 16, 2006. When Above All's crew removed the old roof, they discovered deterioration and rot in the underlying structure that necessitated additional work not covered in the original contract. On January 21, 2006, the parties entered into a change order contract that added $4,500 to the project price. The change order contained the same "Conditions of Proposal" as the original contract. Above All then commenced work. According to Above All, the rot turned out to be so extensive that the parties agreed additional work was required beyond that described in the change order. Above All asserts that it completed the job by January 31, 2006. At that time, Above All demanded full payment for the additional work performed. Pedowitz refused to pay, asserting that Above All did substandard work and damaged his landscaping.

On April 18, 2006, Above All filed an action in small claims court for $4,000. Pedowitz counterclaimed for damages arising from defective workmanship. The small

[1] Clerk's Papers at 39.

claims court dismissed all claims without prejudice due to the presence of construction defect issues.

On September 12, 2007, Pedowitz filed a complaint for breach of contract against Above All in King County Superior Court. It is undisputed that the complaint was not served on Above All until April 2, 2008, almost seven months after it was filed. The parties attempted arbitration, then amended their pleadings. Above All moved for summary judgment based on the 18-month contractual limitation provision. For purposes of the motion, Above All agreed that the complaint was timely filed on September 12, 2007, but argued that dismissal was required because it was not served within 90 days after filing as required by RCW 4.16.170. The trial court agreed and dismissed Pedowitz's claims and awarded attorney fees and costs to Above All as the prevailing party.

DISCUSSION

Pedowitz argues that the trial court erred in granting summary judgment based on the 18-month contractual limitation period. "The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court."[2] We consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party.[3] Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[4]

Pedowitz argues that the 18-month contractual limitation period is invalid

[2] Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

[3] Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

[4] CR 56(c).

because the contract did not expressly supplant or modify the applicable statutes of limitation. He further argues that service within 90 days pursuant to RCW 4.16.170 was not required because the contract did not expressly require "service."[5] Because he filed and served the summons and complaint within the applicable statutes of limitation, Pedowitz asserts that summary judgment was improper.[6]

We disagree. It is well established in Washington that parties to a contract may agree to a reasonable time within which an action must be commenced to enforce claims arising from their agreement.[7] "A contract limitation period prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable."[8] Pedowitz cites no authority in support of his argument that a contract limitation period prevails only if the parties expressly waive the applicable statute of limitations.

Moreover, in Wothers v. Farmers Ins. Co. of Washington,[9] we expressly rejected the argument that RCW 4.16.170 does not apply to contractual limitation periods. In

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[5] RCW 4.16.170 provides that "[f]or the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. . . . If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations."

[6] Breach of contract has a six-year statute of limitations under RCW 4.16.040, and misrepresentation has a three-year statute of limitations under RCW 4.16.130.

[7] Southcenter View Condo. Owners Ass'n v. Condo. Builders, Inc., 47 Wn. App. 767, 771–73, 736 P.2d 1075 (1986).

[8] Yakima Asphalt Paving Co. v. Dep't of Transp., 45 Wn. App. 663, 666, 726 P.2d 1021 (1986).

[9] 101 Wn. App. 75, 79, 5 P.3d 719 (2000).

Wothers, the homeowner's insurance contract required her to "bring suit" within one year of the date of loss. She filed suit within this time period, but did not serve within 90 days as required by RCW 4.16.170. In holding that the action was not timely, the court stated,

> Washington courts have repeatedly held that the mere filing of a complaint alone does not constitute the commencement of an action for the purposes of tolling any applicable statute of limitation, whether statutory or by contract. A person must also serve the defendant within 90 days of the date of filing in order for the commencement to be complete.[10]

Pedowitz next argues that the contractual limitation provision is invalid because the term "filing" is ambiguous. He argues that "filed" might mean (1) asking the Attorney General to bring an action to restrain a prohibited act pursuant to RCW 19.86.080, (2) filing with the investigations unit of the Attorney General's office under RCW 19.86.085, (3) filing the claim with the roofer, or (4) filing with a court. He contends that the contract must be interpreted against Above All as the drafter.

"In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous."[11] "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning."[12] Interpretation of an unambiguous contract is a question of law.[13]

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[10] Id.

[11] Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

[12] Id. at 421.

[13] Dice v. City of Montesano, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006).

Pedowitz argues that the contractual limitation provision at issue in this case is vague and ambiguous in comparison with others upheld as valid. In Southcenter View v. Condominium Owners Inc., the court upheld a contractual limitation which stated that "[n]o action may be commenced or maintained" more than one year after the trigger date.[14] And in Ashburn v. Safeco Insurance Company,[15] the court upheld a one-year limitation period stating that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity . . . unless commenced within twelve months next after the inception of the loss."

The limitation provision here is not ambiguous when the contract is viewed as a whole. Paragraph 8 contains provisions for an award of attorney fees to the prevailing party and for the application of the rules of mandatory arbitration. Those provisions would be meaningless if "filed" meant something other than filing a legal action.[16] "[A] contract provision is not ambiguous merely because the parties suggest opposite meanings."[17] An unambiguous term will not be construed against the drafter.[18]

Pedowitz also argues that the trial court erred in granting summary judgment to Above All because the contractual limitation period required that the claim be filed

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[14] 47 Wn. App. at 770.

[15] 42 Wn. App. 692, 694, 713 P.2d 742 (1986).

[16] For the first time in his reply brief, Pedowitz asserts in a footnote that paragraph 7 is ambiguous because it requires that all claims be filed within 18 months of substantial completion yet provides a 5-year guaranty against defects. This language is not at issue, however, because Pedowitz discovered the alleged defects within the 18-month period. Moreover, because this argument was raised for the first time in his reply brief, we need not consider it. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[17] Martinez v. Miller Indus., Inc., 94 Wn. App. 935, 944, 974 P.2d 1261 (1999).

[18] See Petersen-Gonzales v. Garcia, 120 Wn. App. 624, 632, 86 P.3d 210 (2004).

within 18 months of "substantial completion," and there is a genuine issue of material fact regarding the date of substantial completion. We disagree. Under the relevant statute of repose, "substantial completion" means "the state of completion reached when an improvement upon real property may be used or occupied for its intended use."[19] Pedowitz asserts that Above All worked until mid-March 2006, then walked away without ever substantially completing the job. Above All asserts it completed the job no later than January 31, 2006. But this evidence does not raise an issue of material fact regarding whether the roof was substantially complete. Although Pedowitz submitted a roof condition report documenting numerous deficiencies, there is no evidence that the home could not be used or occupied for its intended purposes.

The contract required Pedowitz to file his claim within 18 months of substantial completion. The parties dispute whether the work was substantially completed by January 31, 2006, or the date of final payment on March 17, 2006, or the date the small claims action was dismissed on May 18, 2006. If we adopt the date most favorable to Pedowitz as the nonmoving party, then Pedowitz timely filed suit on September 12, 2007. But Pedowitz did not serve the summons and complaint until April 8, 2008, 203 days after filing. Because Pedowitz did not comply with the 90-day service requirement of RCW 4.16.170, the limitation period continued to run and the action must be treated as if it had never been commenced. Therefore, the trial court properly granted summary judgment dismissal.

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[19] RCW 4.16.310; see also Glacier Springs Prop. Owners Ass'n v. Glacier Springs Enter., 41 Wn. App. 829, 832, 706 P.2d 652 (1985) ("[s]ubstantial completion of construction occurs when the entire improvement, not merely a component part, may be used for its intended purposes").

Pedowitz also challenges both the award of attorney fees and costs to Above All and the amount of that award. The attorney fee award is reviewed for abuse of discretion.[20] The court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.[21] A court may award fees "only if authorized by 'contract, statute or recognized ground in equity.'"[22]

Here, paragraph 8 of the contract stated: "In the event that legal action becomes necessary to enforce any provision of this Agreement, the prevailing party in any such action shall be entitled to reasonable attorneys fee and costs."[23] The prevailing party in an action is one who receives an affirmative judgment in his or her favor.[24] "If neither party wholly prevails then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief offered the parties."[25] If both parties prevail on a major issue, neither is a prevailing party and a fee award is not appropriate.[26]

Above All had initially asserted claims against Pedowitz, which it withdrew when it asserted its limitation defense. Pedowitz contends the contractual limitation period

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[20] Frank Coluccio Const. Co., Inc. v. King County, 136 Wn. App. 751, 780, 150 P.3d 1147 (2007).

[21] Council House, Inc. v. Hawk, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

[22] Bowles v. Dep't of Ret. Sys., 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (quoting Painting & Decorating Contractors of Am., Inc. v. Ellensburg Sch. Dist., 96 Wn.2d 806, 815, 638 P.2d 1220 (1982)).

[23] Clerk's Papers at 39.

[24] RCW 4.84.330; Piepkorn v. Adams, 102 Wn. App. 673, 686, 10 P.3d 428 (2000).

[25] Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993), overruled on other grounds by Wachoria SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 490–92, 200 P.3d 683 (2009).

[26] Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24 (1997).

extinguished the claims of both parties, and therefore Above All was not the prevailing party. We disagree. By the time Above All moved for summary judgment, it had abandoned its claim against Pedowitz. Pedowitz did not abandon his claims. He cannot be said to have prevailed on a claim that was withdrawn before the court granted summary judgment to Above All.

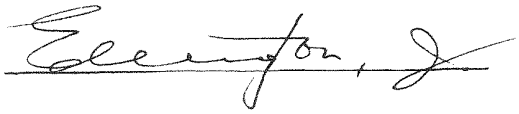
Pedowitz also contends that one must prevail on the merits of a claim to be eligible for a fee award, but there is no contractual language supporting this narrow interpretation. The court properly awarded fees to Above All as the prevailing party.

Pedowitz also challenges the amount of the fee award. He argues that the trial court awarded fees for time spent pursuing the abandoned counterclaim. Above All asserts it abandoned all collection attempts when the 18-month contractual limitation period expired on July 31, 2007. The record shows, however, that Above All asserted a counterclaim in its answer to Pedowitz's amended complaint on May 14, 2008 and asked the arbitrator to rule in its favor on the counterclaim on January 19, 2009. The trial court awarded fees and costs for all hours expended from April 3, 2008 through May 21, 2009, and there is no indication that Above All segregated its hours spent pursuing the counterclaim. It thus appears that some portion of Above All's fee award included fees for time spent pursuing the abandoned counterclaim. "If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues."[27] Accordingly, we remand for a segregation of fees and costs attributable to the counterclaim.[28]

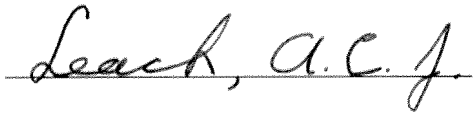
[27] Mayer v. City of Seattle, 102 Wn. App. 66, 79–80, 10 P.3d 408 (2000).

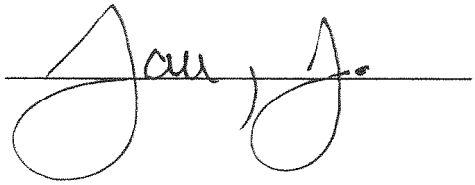
Above All requests attorney fees on appeal. RAP 18.1 allows this court to award attorney fees on appeal if applicable law authorizes them. Here, the contract provision authorizing fees for the prevailing party is authority for fees incurred on appeal.[29]

We affirm the trial court's dismissal of Pedowitz's claims and its decision to award attorney fees and costs to Above All. Pedowitz's relief is limited to the minor issue of segregating fees incurred in pursuing the abandoned counterclaim. Above All is the substantially prevailing party and is awarded its fees on appeal.[30]



WE CONCUR:





[28] Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[29] Marine Ent., Inc. v. Security Pacific Training Corp., 50 Wn. App. 768, 774, 750 P.2d 1290 (1988).

[30] See Marassi, 71 Wn. App. at 920 (awarding fees under RAP 18.1 to party that prevailed on most but not all issues on appeal).