

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MAR 23 2004

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IN RE RIVER PARK SQUARE  
PROJECT BOND LITIGATION.

NO. CS-01-0127-EFS

ORDER GRANTING RPS DEFENDANTS'  
MOTIONS FOR SUMMARY JUDGMENT  
ON THE CITY OF SPOKANE'S NINTH  
AND TENTH CROSS CLAIMS

On February 27, 2004, the Court conducted a motion hearing in the above-captioned matter. The Court considered RPS Defendants' Motion for Summary Judgment on City of Spokane's Ninth Cross Claim, (Ct. Rec. 1130), and Motion for Summary Judgment on City of Spokane's Tenth Cross Claim, (Ct. Rec. 1133). Eric Stahl appeared for the RPS Defendants and Laurel Siddoway appeared for the City of Spokane. Other Counsel were present as reflected in the Court's Minutes, (Ct. Rec. 1568). After reviewing the motions, memoranda, accompanying submissions, and applicable case law, the Court was fully informed. At the hearing the Court **granted** the RPS Defendants' Motions for Summary Judgment on the City of Spokane's Ninth and Tenth Cross Claims. This order memorializes and supplement's the Court's oral rulings.

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ORDER ~ 1

1 I. CITY OF SPOKANE'S NINTH CROSS-CLAIM

2 A. PROCEDURAL HISTORY

3 On April 15, 2002, the Court issued a written order dismissing  
4 the City of Spokane's (the "City") Seventh Claim for Relief which  
5 alleged the RPS Defendants had a fiduciary or quasi-fiduciary duty to  
6 disclose several material facts regarding the risks associated with  
7 the RPS transaction, (Ct. Rec. 289). The Court held, in pertinent  
8 part:

9 The existence of a fiduciary duty is a question of law.  
10 Miller v. U.S. Bank of Washington, 72 Wash. App. 416, 426  
11 (1994). A fiduciary relationship exists where there is a  
12 relationship of confidence and trust that justifies one  
13 party to expect that his interests will be protected by the  
14 other party. Liebergessell v. Evans, 93 Wash. 2d 881, 889-91  
15 (1980). In the absence of such a duty, no heightened  
16 disclosure obligations exists. Tokarz v. Frontier Fed. Sav.  
17 & Loan Assoc., 33 Wash. App. 456, 463 -64 (1982).

18 Here, the City has alleged no facts supporting the  
19 existence of such a relationship. The City has alleged that  
20 heightened disclosure obligations existed because public  
21 monies were involved. (Ct. Rec. 6 at ¶ 2.53.) The Court  
22 has been unable to find support for this assertion in law.  
23 Unless some special relationship existed between the City  
24 and the Developers, no heightened duty to disclose existed.  
25 Tokarz, 33 Wash. App. at 463 -64. The theory of an  
26 integrated transaction, which is grounded in contract,  
imposes no heightened disclosure requirements. Developer's  
motion to dismiss the City's Seventh Cross-Claim, for  
"Breach of Duties of 'Public/Private Partner'" is **granted**.

(Ct. Rec. 289 at 5-6).

21 On August 20, 2002, the Court considered the City of Spokane's  
22 Motion to Amend, (Ct. Rec. 370). The City attempted to plead  
23 additional facts that would allow its Answer to be amended to include  
24 a claim for Breach of Fiduciary or Quasi-Fiduciary duty. The RPS  
25 Defendants' argued such an amendment would be futile based upon the  
26 Court's April 15, 2002, order. The Court disagreed and permitted the

1 City to amend its Answer to include a claim for Breach of Fiduciary or  
2 Quasi-Fiduciary duty against the RPS Defendants. The  
3 August 20, 2002, order reads, in pertinent part:

4 The City alleges that the repeated characterizations of this  
5 transaction by the Developers as a "public/private  
6 partnership" impose greater duties of disclosure upon it.  
7 Neither the parties nor the Court have identified any  
8 authority supporting this position. Typically, "public-  
9 private partnership" is a slogan used to generate support  
10 for a project which involves expenditure of public monies in  
11 conjunction with private investment, such as the  
12 revitalization of an older commercial center for a city.  
13 While a public entity and a private entity may enter a  
14 legally enforceable relationship in a written agreement,  
15 which could impose fiduciary obligations on the parties, the  
16 City of Spokane and the Developers did not create such a  
17 relationship here.

18 However, it is possible for parties who label their  
19 dealings as a "public/private partnership" to conduct  
20 themselves in such a way as to create a quasi-fiduciary  
21 relationship with a duty to disclose all material facts. A  
22 quasi-fiduciary relationship creates a duty to disclose  
23 where (1) a special relationship of trust and confidence has  
24 been developed between the parties, (2) one party is relying  
25 upon the superior specialized knowledge and experience of  
26 the other, (3) a seller has knowledge of a material fact not  
easily discoverable by the buyer, or (4) a statutory duty to  
disclose exists. Colonial Imports, Inc. v. Carlton N.W.,  
121 Wash. 2d 726, 732 (1993). This Court previously  
dismissed the City's claim that a relationship of trust and  
confidence existed. The new factual allegations do not  
change that conclusion. See Micro Enhancement Int'l, Inc.  
v. Coopers & Lybrand, LLP, 110 Wash. App. 412, 435 (2002)  
(holding that the fact that one party trusted and had  
confidence in the other party was insufficient). In  
addition, the City has not pled a statutory duty to  
disclose.

27 The proposed claim alleges that "the Developers were  
28 experienced in the ownership and operation of an urban  
29 retail mall with adjacent paid parking and, . . . had  
30 exclusive dealings with the prospective retail tenants,  
31 including Nordstrom and AMC, about the terms on which retail  
32 patrons would use the parking garage." (Ct. Rec. 370 Att. ¶  
33 2.100.) Further, the City alleges "[the Developers  
34 represented] that they had done market research that  
35 established that the RPS mall would be 'hot' and 'exciting'  
36 and 'knock your socks off,' and that such market research  
suggested that Walker's projections of parking revenue would  
be met." (*Id.* at ¶ 2.103.) Finally, the City alleges that  
it "was relying upon the Developers' superior knowledge in

1 the area of retail development and their exclusive knowledge  
2 of the understandings and expectations of Nordstrom, AMC and  
3 other retailers about the terms on which their retail  
4 patrons would use the Parking Garage." (*Id.* at ¶ 2.111.)

5 The only Washington case interpreting superior  
6 knowledge, Hutson v. Wenatchee Federal Savings and Loan  
7 Association, 22 Wash. App. 91, 105 (1978), imposed a duty to  
8 disclose upon a lender when dealing with "unknowledgeable  
9 and uncounseled customers, members of the general lay public  
10 who rely on the lender's advice." *Id.* While this rationale  
11 may be distinguishable here, as the City of Spokane is a  
12 sophisticated party represented by several attorneys  
13 throughout the Parking Garage transaction and not a member  
14 of the lay public, the Court cannot find that the  
15 allegations, if proven, would be legally insufficient. The  
16 City has identified specialized knowledge the Developers  
17 possessed and alleged that it relied on that knowledge. The  
18 Developer's principal argument, that the City could not have  
19 reasonably relied upon their statements due to its size,  
20 resources and in-house legal department, is a factual  
21 defense, appropriate for resolution at the summary judgment  
22 or trial stage rather than on the pleadings. Therefore, the  
23 Court finds that the City has adequately alleged the  
24 existence of a quasi-fiduciary duty to disclose, and leave  
25 to include the breach of quasi-fiduciary duty claim should  
26 be granted.

Alternatively, a duty to disclose can arise "where the  
facts are peculiarly within the knowledge of one person and  
could not be readily obtained by the other . . . . However,  
a party cannot be permitted to say that he was taken  
advantage of, if he had means of acquiring the information .  
." Oates v. Taylor, 31 Wash. 2d 898, 904 (1948). The  
City has alleged the necessary facts to support such a duty  
- "[the Developers had] exclusive dealings with the  
prospective retail tenants, including Nordstrom and AMC,  
about the terms on which retail patrons would use the  
parking garage." (Ct. Rec. 370 Att. ¶ 2.100.) Further, the  
City identifies three items the Developers failed to  
disclose that fit within those exclusive dealings: "AMC's  
expectations and/or perceived need for free or low-cost  
parking for its theater patrons, (5) . . . information  
concerning the unlikelihood of retailer or third party  
subsidization of a validation program, particularly at the  
parking volumes projected by Walker, and (6) . . . the  
nature of the dispute arising with AMC or the terms of its  
resolution." (*Id.* at ¶ 2.115.) Opposing this claim, the  
Developers argue that the City could easily have ascertained  
all these facts. Their assertion is a factual defense,  
appropriate for resolution at the summary judgment or trial  
stage rather than on the pleadings.

The Developers also oppose the City of Spokane's motion  
to add a misrepresentation claim because justifiable  
reliance is a necessary element. Again, the Developers

1 argue that "[e]very fact alleged by the City as being  
2 justifiably relied upon could easily have been ascertained  
3 by it." (Ct. Rec. 386 at 10 ll. 10-11.) As before, this is  
4 a factual defense, not appropriately raised at this  
5 juncture. The Court finds that the City has adequately pled  
6 a claim for misrepresentation, and leave to amend is  
7 therefore **granted**.

8 (Ct. Rec. 442, at 5-9). Thus, the Court held the City of Spokane had  
9 satisfied the pleading requirements in alleging it relied upon the  
10 superior specialized knowledge and experience of the RPS Defendants  
11 and that the Developers had knowledge of a material fact not easily  
12 discoverable by the City of Spokane. *Colonial Imports, Inc. v.*  
13 *Carlton N.W.*, 121 Wash. 2d 726, 732 (1993). The Court further  
14 reaffirmed its earlier holding that no special relationship of trust  
15 and confidence existed between the parties and that no statutory duty  
16 to disclose existed. *Id.*

17 On November 21, 2003, the RPS Defendants' filed a Motion for  
18 Summary Judgment on City of Spokane's Ninth-Cross Claim, (Ct. Rec.  
19 1130). In their motion, the RPS Defendants' argue *inter alia* the City  
20 has failed to substantiate their allegations with sufficient proof  
21 that the RPS Defendants possessed superior specialized knowledge and  
22 experience or were aware of material facts not easily discoverable.

23 On December 22, 2003, the City of Spokane filed a Motion for  
24 Sanctions Against the RPS Developer for Failure to Comply with  
25 Discovery Order, (Ct. Rec. 1249). In their motion, the City alleged  
26 that the RPS Defendants failed to comply with the Court's August 25,  
2003, discovery order. Specifically, the City was not provided with  
requested documents necessary for the completion of their opposition  
to the RPS Defendants' Motion for Summary Judgment on the City of  
Spokane's Ninth Cross Claim, (Ct. Rec. 1130), and Tenth Cross Claim,

1 (Ct. Rec. 1133). The City argued it had not received requested  
2 documents related to the negotiations between the RPS Defendants and  
3 potential tenants that ultimately decided not to rent space within the  
4 RPS facility. The City claimed that the details of the negotiations  
5 could shed light on the alleged superior specialized knowledge and  
6 experience of the RPS Defendants and that the Developers had knowledge  
7 of a material fact not easily discoverable by the City

8 On January 6, 2004, the RPS Defendants filed a Response and  
9 Opposition to City of Spokane's Motion for Sanctions Against the RPS  
10 Developer for Failure to Comply with Discovery Order, (Ct. Rec. 1306).  
11 The RPS Defendants admitted an inadvertent copying error caused the  
12 delay and stated the requested materials were delivered on December  
13 30, 2003. On January 21, 2004, the Court issued an order, (Ct. Rec.  
14 1389, which granted in part and denied in part the City's Motion for  
15 Sanctions. Specifically, the Court declined to strike the Motions for  
16 Summary Judgment or to impose sanctions. Rather, the Court required a  
17 certification of the records provided and implemented a revised  
18 briefing schedule to accommodate resetting oral argument from January  
19 28, 2004, to February 27, 2004.

20 **B. STANDARD FOR SUMMARY JUDGMENT**

21 Summary judgment will be granted if the "pleadings, depositions,  
22 answers to interrogatories, and admissions on file, together with the  
23 affidavits, if any, show that there is no genuine issue as to any  
24 material fact and that the moving party is entitled to judgment as a  
25 matter of law." FED. R. CIV. P. 56(c). When considering a motion for  
26 summary judgment, a court may not weigh the evidence nor assess  
credibility; instead, "the evidence of the non-movant is to be

1 believed, and all justifiable inferences are to be drawn in his  
2 favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A  
3 genuine issue for trial exists only if "the evidence is such that a  
4 reasonable jury could return a verdict" for the party opposing summary  
5 judgment. *Id.* at 248. In other words, issues of fact are not  
6 material and do not preclude summary judgment unless they "might  
7 affect the outcome of the suit under the governing law." *Id.* There  
8 is no genuine issue for trial if the evidence favoring the non-movant  
9 is "merely colorable" or "not significantly probative." *Id.* at 249.

10 If the party requesting summary judgment demonstrates the absence  
11 of a genuine material fact, the party opposing summary judgment "may  
12 not rest upon the mere allegations or denials of his pleading, but . .  
13 . must set forth specific facts showing that there is a genuine issue  
14 for trial" or judgment may be granted as a matter of law. *Anderson*,  
15 477 U.S. at 248. This requires the party opposing summary judgment to  
16 present or identify in the record evidence sufficient to establish the  
17 existence of any challenged element that is essential to that party's  
18 case and for which that party will bear the burden of proof at trial.  
19 See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to  
20 contradict the moving party's facts with counter affidavits or other  
21 responsive materials may result in the entry of summary judgment if  
22 the party requesting summary judgment is otherwise entitled to  
23 judgment as a matter of law. See *Anderson v. Angelone*, 86 F.3d 932,  
24 934 (9th Cir. 1996).

25 **C. DISCUSSION**

26 The issue before the Court is whether the City of Spokane has  
provided enough evidence on its claim for breach of fiduciary or

1 quasi-fiduciary duty to stave off the RPS Defendants' Motion for  
2 Summary Judgment. The Court previously held:

3 A quasi-fiduciary relationship creates a duty to disclose  
4 where (1) a special relationship of trust and confidence has  
5 been developed between the parties, (2) one party is relying  
6 upon the superior specialized knowledge and experience of  
7 the other, (3) a seller has knowledge of a material fact not  
8 easily discoverable by the buyer, or (4) a statutory duty to  
9 disclose exists. Colonial Imports, Inc. v. Carlton N.W.,  
10 121 Wash. 2d 726, 732 (1993).

11 (Ct. Rec. 442, at 6). In addition, the Court previously held that no  
12 special relationship of trust and confidence existed between the  
13 parties and that no statutory duty to disclose existed. Accordingly,  
14 the City must establish material issues of disputed fact exist as to  
15 whether it relied upon the superior specialized knowledge and  
16 experience of the RPS Defendants or that the Developers had knowledge  
17 of a material fact not easily discoverable by the City of Spokane.

18 The Court finds the City has failed to produce sufficient  
19 evidence to demonstrate the existence of a genuine issue for trial.  
20 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The City  
21 has not provided credible evidence that raises a triable issue as to  
22 whether it relied upon the superior specialized knowledge and  
23 experience of the RPS Defendants or that the Developers had knowledge  
24 of a material fact not easily discoverable by the City of Spokane.  
25 See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Indeed,  
26 the Spokane City Council members in office at the time of the RPS  
transaction unanimously testified in their depositions that they did  
not rely upon the RPS Defendants. Similarly, the Court is equally  
persuaded that there has been an insufficient showing that the RPS  
Defendants possessed knowledge of material facts not easily

1 discoverable by the City. Accordingly, summary judgment on the City  
2 of Spokane's Ninth Cross Claim is appropriate.

3 **II. CITY OF SPOKANE'S TENTH CROSS-CLAIM**

4 The City argues in its tenth cross claim that the RPS Defendants  
5 fraudulently induced the Spokane City Council to adopt legislation  
6 approving the City's participation in the RPS project.<sup>1</sup> In *Stiley v.*  
7 *Block*, 130 Wash. 2d 486 (1996), the Supreme Court of Washington  
8 announced a nine-part test for fraud. The Plaintiffs must prove the  
9 following to prevail at trial: (1) representation of an existing fact;  
10 (2) materiality; (3) falsity; (4) RPS Defendants (as speakers) knew of  
11 its falsity; (5) RPS Defendants' intent that the Plaintiffs act upon  
12 the representation; (6) Plaintiffs' ignorance of its falsity; (7) the  
13 Plaintiffs' reliance on its truth; (8) the Plaintiffs' right to rely  
14 on the representation; and (9) damages suffered by the Plaintiffs. *Id*  
15 at 505.

16 Previously, the Court found that the City had failed to meet its  
17 *Celotex* burden on the issue of reliance in regards to the ninth cross  
18 claim for breach of fiduciary or quasi-fiduciary duty. The Court  
19 finds that reliance is an element of the tenth cross claim for fraud  
20 and that the City must satisfy its burden to allow the cross claim to  
21 proceed to trial. For the same reasons summary judgment on the City's  
22 Ninth Cross Claim is appropriate, the RPS Defendants Motion for  
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<sup>1</sup>The Court identified the applicable summary judgment rules above and will apply the same standard to the City's tenth cross claim.  
ORDER ~ 9

1 Summary Judgment on the City's Tenth Cross Claim is granted.<sup>2</sup>  
2 Accordingly, for the reasons stated on the record and herein,

3 **IT IS HEREBY ORDERED:**

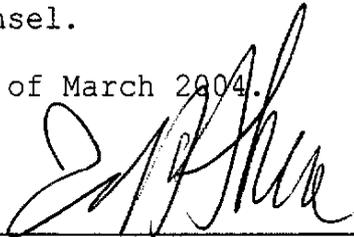
4 1. RPS Defendants' Motion for Summary Judgment on City of  
5 Spokane's Ninth Cross Claim, (Ct. Rec. 1130), is **GRANTED**.

6 2. RPS Defendants' Motion for Summary Judgment on City of  
7 Spokane's Tenth Cross Claim, (Ct. Rec. 1133), is **GRANTED**.

8 **IT IS SO ORDERED.**

9 The District Court Executive is directed to enter this Order and  
10 to furnish copies to counsel.

11 **DATED** this 23<sup>rd</sup> day of March 2004.



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14 **EDWARD F. SHEA**  
United States District Judge

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25 <sup>2</sup>The Court is also persuaded the statements made by the RPS  
26 Defendants in urging the Spokane City Council to accept the RPS  
project are constitutionally protected. Since elaboration on this  
alternative holding is not required given the Court's ruling on the  
reliance issue, the Court will not address the *Noerr-Pennington*  
defense in detail.