

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 DENYING WALKER PARKING'S
MOTION FOR SUMMARY JUDGMENT
RE: PLAINTIFFS' TORT CLAIMS**

On January 30, 2004, the Court heard argument on Walker Parking's Motion for Summary Judgment Re: Tort Claims, (Ct. Rec. 1121). Heather Yakely appeared for Defendant Walker Parking Consultants/Engineers, Inc. ("Walker") and argued the motion. John D. Lowery appeared for the Bond Fund Plaintiffs and also argued the motion. The rest of the parties were represented at the hearing as reflected in the Court's minutes, (Ct. Rec. 1411). After reviewing the motions, memoranda, submissions, applicable case law and taking oral argument, the Court was fully informed. At the hearing, the Court denied Walker's motion. This order memorializes and supplements the oral rulings of the Court.

I. FACTUAL BACKGROUND

The Spokane City Council entered into a contract with Walker to complete a feasibility analysis of the River Park Square ("RPS") garage project. It is undisputed that Walker's national reputation for excellence in parking consultant matters was the principal factor that

1 led the City of Spokane ("the City") to select the company to complete
2 an assessment. The parties dispute the accuracy of the Walker report
3 ultimately drafted and attached to the Preliminary Official Statement
4 ("POS") and Official Statement ("OS"). The Plaintiffs argue that the
5 projections were fraudulent. Specifically, they argue the RPS
6 Developers and the City provided unrealistic assumptions to Walker
7 which in turn generated unrealistic and unattainable projections.
8 Although the Financial Feasibility Analysis ("FFA") was labeled
9 independent and signed by Walker, the Plaintiffs argue that they
10 relied upon both Walker's national reputation for excellence as well
11 as the veracity of its projections in deciding to purchase the RPS
12 bonds.

13 In response, Walker argues that it simply prepared a feasibility
14 report based upon the numbers and assumptions provided. Further,
15 Walker argues it sufficiently disclaimed all findings to warn
16 investors that the projections were optimistic. Walker contends it
17 was never required to conduct an independent review of the numbers
18 provided but was instructed by the City and the RPS Developers to
19 prepare only a feasibility projection. In the instant motion, Walker
20 moves for summary judgment on the Plaintiffs' claims for negligent
21 misrepresentation and fraud.

22 **II. STANDARD FOR SUMMARY JUDGMENT**

23 Summary judgment will be granted if the "pleadings, depositions,
24 answers to interrogatories, and admissions on file, together with the
25 affidavits, if any, show that there is no genuine issue as to any
26 material fact and that the moving party is entitled to judgment as a

1 matter of law." FED. R. CIV. P. 56(c). When considering a motion for
2 summary judgment, a court may not weigh the evidence nor assess
3 credibility; instead, "the evidence of the non-movant is to be
4 believed, and all justifiable inferences are to be drawn in his
5 favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A
6 genuine issue for trial exists only if "the evidence is such that a
7 reasonable jury could return a verdict" for the party opposing summary
8 judgment. *Id.* at 248. In other words, issues of fact are not
9 material and do not preclude summary judgment unless they "might
10 affect the outcome of the suit under the governing law." *Id.* There
11 is no genuine issue for trial if the evidence favoring the non-movant
12 is "merely colorable" or "not significantly probative." *Id.* at 249.

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

1 934 (9th Cir. 1996).

2 III. DISCUSSION

3 A. Negligent Misrepresentation

4 Washington follows the Restatement definition of negligent
5 misrepresentation:

6 One who, in the course of his business, profession, or
7 employment, or in any other transaction in which he has a
8 pecuniary interest, supplies false information for the
9 guidance of others in their business transactions, is
subject to liability for pecuniary loss caused to them by
their justifiable reliance upon the information, if he fails
to exercise reasonable care or competence in obtaining or
communicating the information.

10 Restatement (Second) of Torts § 552(1). The Washington Supreme Court,
11 applying the § 552(1), announced a six-prong test for negligent
12 misrepresentation. To prevail at trial, Plaintiffs must establish:
13 (1) Walker supplied information for the guidance of others in their
14 business transactions that was false; (2) Walker knew or should have
15 known that the information was supplied to guide the Plaintiffs in a
16 business transaction; (3) Walker was negligent in obtaining or
17 supplying false information; (4) the Plaintiffs relied on the false
18 information provided by Walker; (5) the Plaintiffs' reliance was
19 justified; and (6) the false information was the proximate cause of
20 the Plaintiffs' damages. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wash. 2d
21 820, 826 (1998). The standard of proof is clear, cogent, and
22 convincing. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 97 (2000).

23 Walker argues liability for negligent misrepresentation is
24 "limited to cases where: (1) the defendant has knowledge of a specific
25 injured party's reliance; or (2) the plaintiff is a member of a group
26 that the defendants seek to influence; or (3) the defendant has

1 special reason to know that some member of a limited group will rely
2 on the information." *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127,
3 150 (1990).

4 Under the first prong, Walker argues that it had no knowledge of
5 the bondholders specific reliance. The Plaintiffs argue that
6 contention is simply not plausible because the FFA was physically
7 attached to the POS and OS with Walker's permission. The Court finds
8 that there is a triable issue of fact regarding whether or not Walker
9 had knowledge of the Bond purchasers reliance. The Court finds Walker
10 has failed in its initial burden which requires it to demonstrate an
11 absence of disputed fact as to its lack of knowledge of the
12 Plaintiffs' reliance. Specifically, Mr. John Dorsett, the manager
13 overseeing Walker's work on the RPS project, testified in the
14 following manner:

15 Q: Do you know the purpose, do you have any understanding of
16 what the purpose of an Official Statement is?

17 A: An Official Statement is a document that is sent out to
18 potential investors and is a required disclosure document
19 and potential investors review that document and use that in
20 part as the basis for making investment decisions.

21 Q: Did you understand that potential investors would be
22 looking at the Walker Report -

23 A: Yes.

24 Q: - and the Official Statement in connection with making
25 their investment decisions?

26 A: Yes.

(Ct. Rec. 1234, ¶ 4). The Court finds that Mr. Dorsett's testimony
refutes Walker's current contention that it lacked knowledge of the
Bond purchasers' reliance. In light of Walker's failure as the moving
party to meet its initial burden to demonstrate the absence of a
genuine material fact as to its lack of knowledge of the Plaintiffs'
reliance, the Court denies Walker Parking's Motion for Summary

1 judgment on Plaintiffs' negligent misrepresentation claim.¹

2 **B. Fraud**

3 In *Stiley v. Block*, 130 Wash. 2d 486 (1996), the Supreme Court
4 of Washington announced a nine-part test for fraud. The Plaintiffs
5 must prove the following to prevail at trial: (1) representation of an
6 existing fact; (2) materiality; (3) falsity; (4) Walker (as speaker or
7 writer) knew of its falsity; (5) Walker's intent that the Plaintiffs
8 act upon the representation; (6) Plaintiffs' ignorance of its falsity;
9 (7) the Plaintiffs' reliance on its truth; (8) the Plaintiffs' right
10 to rely on the representation; and (9) damages suffered by the
11 Plaintiffs. *Id* at 505.

12 Walker argues summary judgment is appropriate in this matter
13 because the Plaintiffs cannot satisfy the first element which requires
14 representation of an existing fact. Walker argues the FFA at issue
15 was a projection of future events, not a statement of existing facts.
16 Defendant Walker cites *Shook v. H.F. Scott*, 56 Wash. 2d 351(2002) for
17 the proposition that:

18 Where the fulfillment or satisfaction of the thing
19 represented depends upon a promised performance of a future
20 act, or upon the occurrence of a future event, or upon
21 particular future use, or future requirements of the
22 representee, then the representation is not of an existing
23 fact.

24 *Id.* at 353. Walker argues there can be no fraud because the
25 realization of the revenue projections relied on future events.

26 ¹Similarly, the Court finds there are triable issues as to whether
Plaintiffs were members of a group that Walker sought to influence and
whether Walker had special reason to know that the Plaintiffs would
rely on their FFA. Given the Court's finding on knowledge of
reliance, the Court will not address the second and third prongs in
detail.

1 In response, the Plaintiffs cite *Lawyers Title Insurance Corp. v.*
2 *Baik*, 147 Wash. 2d 536 (2002), which recites the policy dangers that
3 attend a rule that insulates one who offers an opinion from fraud or
4 negligent misrepresentation liability purely on the basis that the
5 writing consists of an opinion. This does not resolve the issue of
6 whether the Washington civil fraud law supports the proposition that a
7 projection of future parking revenue can be considered a
8 representation of an existing fact.

9 The Court is persuaded that the alternate formulation in *Shook*
10 applies. Specifically, while a generic future prediction may not be
11 actionable as fraud:

12 a statement is one of existing fact if a quality is asserted
13 which inheres in the article or the thing about which the
14 representation is made, the quality may be said to be to
15 exist independently of future acts or performance of the one
making the representation, independently of other particular
occurrences in the future, and independently of particular
future uses or future requirements of the buyer.

16 *Shook*, 56 Wash.2d 351, 356 (citations omitted). The Court finds there
17 is a dispute of material fact as to whether or not the Walker Report
18 constituted an element without which the RPS project could not have
19 proceeded. The Court further finds that when Walker agreed to attach
20 its professional name to the POS and OS it could have been reasonably
21 understood by investors as an endorsement of the project. That is not
22 to suggest the report provided any guaranties. Rather, there are
23 triable issues of fact about whether Walker's actions can be construed
24 as a representation of an existing fact. Accordingly, Walker, as the
25 moving party, failed to show an absence of genuine issue of material
26 fact, rendering summary judgment inappropriate.

1 **IV. Conclusion**

2 The Court finds that Walker failed to establish an absence of
3 disputed genuine material facts in regards to Plaintiffs' negligent
4 misrepresentation and fraud claims. For that reason, the Court denies
5 summary judgment. Accordingly, for the reasons stated on the record
6 and herein,

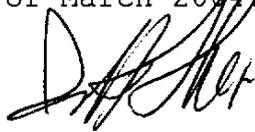
7 **IT IS HEREBY ORDERED:**

8 1. Defendant Walker Parking's Motion for Summary Judgment Re:
9 Tort Claims, (Ct. Rec. 1121), is **DENIED**.

10 **IT IS SO ORDERED.**

11 The District Court Executive is directed to enter this Order and
12 to furnish copies to counsel.

13 **DATED** this 23rd day of March 2004.

14 

15 _____
16 EDWARD F. SHEA
United States District Judge