

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

MAR 23 2004

JAMES R. LARSEN, CLERK
DEPUTY
RICHLAND, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE RIVER PARK SQUARE
PROJECT BOND LITIGATION.

NO. CS-01-0127-EFS

ORDER DENYING PRUDENTIAL
SECURITIES INCORPORATED'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE BREACH OF
WARRANTY, DENYING THE CITY OF
SPOKANE'S MOTION FOR SUMMARY
JUDGMENT DISMISSAL OF WARRANTY
AND MISREPRESENTATION CLAIMS
BASED UPON 8(C) (21)
CERTIFICATE, AND DENYING
PERKINS COIE LLP AND ROY AND
ANNE KOEGEN'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

BEFORE THE COURT, without oral argument, are Defendant Prudential Securities Incorporated ("Prudential")'s Motion For Partial Summary Judgment RE Breach of Warranty, (Ct. Rec. 1076), the City of Spokane ("the City")'s Motion for Summary Judgment Dismissal of Warranty and Misrepresentation Claims Based Upon 8(c) (21) Certificate, (Ct. Rec. 1101), and Defendant Perkins Coie LLP and Roy and Anne Koegen (taken together "Perkins Coie")'s Motion for Partial Summary Judgment, (Ct. Rec. 1161). The Court has reviewed the motions, memoranda, accompanying materials, applicable case law and is fully informed. At the heart of each motion is the question of whether the City breached

1 its warranty or made misrepresentations to Prudential concerning its
2 pledge of parking meter revenues when City officials signed documents
3 associated with the River Park Square ("RPS") garage transaction.¹ The
4 Court finds the record is replete with factual disputes on the issue
5 of warranty and misrepresentation and that this is an issue that must
6 be determined by the jury. Accordingly, Prudential, the City and
7 Perkins Coie's motions for summary judgment must be denied.

8 I. BACKGROUND

9 Prudential became involved in the RPS transaction in 1995, as a
10 potential underwriter shortly after the Developers discussed with the
11 City of Spokane a proposed purchase of the RPS garage. Foster Pepper
12 was retained in 1996 to serve as underwriters' counsel. In the course
13 of the next few years, the garage sale and purchase came to fruition.
14 As part of the transaction, Foster Pepper circulated drafts of the
15 Official Statement which was to be printed on September 15, 1998. Due
16 diligence requires parties to securities transactions to make various
17 declarations that the material to be contained in the Official
18 Statement is complete and accurate. At issue in each of the motions
19 for summary judgment is Deputy City manager Peter Fortin's signature
20 in Section 8(c)(21) of the Bond Purchase agreement ("the
21 certificate").²

22
23 ¹Foster Pepper & Shefelman PLLC ("Foster Pepper") joins
24 Prudential's opposition to the City's motion but does not join
25 Prudential's Motion for Partial Summary Judgment RE Breach of
26 Warranty.

²Prudential's Motion for Summary Judgment addresses both the
Fortin's 8(c)(21) certificate signature as well as an Opinion letter
concerning the Final Official Statement signed by James Sloane,
attorney for the City.

1 The certificate reads, in pertinent part:

2 The undersigned Deputy City Manager of the City of Spokane,
3 Washington ("the City") hereby certifies that
4 The proper officials of the City are familiar with the
5 Feasibility Study and believe that the assumptions used
6 therein are reasonable and that the projections set forth in
7 the feasibility Study and the Official Statement are
8 reasonable.

9 The City argues, first, that given the involvement of both Prudential
10 and Foster Pepper in the lengthy negotiations that preceded the
11 printing of the Official Statement that the Defendants could not have
12 justifiably relied on the content. Second, even if their reliance was
13 justified, neither Prudential nor Foster Pepper can prove Fortin made
14 a misrepresentation. Assuming that the parties justifiably relied on
15 a misrepresentation, the City argues the Certificate was never
16 intended as a warranty. Finally, if the negligent misrepresentation
17 and warranty claims cannot be defeated, the City argues Prudential and
18 Foster Pepper may not recover from the City because Mr. Fortin lacked
19 the authority to sign the certificate.³

20 In addition, the City argues an alternate liability theory.
21 Specifically, if the City is found to be liable to Prudential for
22

23 ³The parties provide the Court with opposing interpretations of
24 Deputy City Manager Fortin's authority to commit the City of Spokane
25 to contracts. The City argues Mr. Fortin did not comply with the
26 strictures of the municipal charter when he signed the certificate.
Prudential and Foster Pepper argue that Mr. Fortin had a pattern and
practice of approving bond issues in just such a manner. In addition,
Prudential and Foster Pepper argue that the Spokane City Council
delegated to Mr. Fortin the requisite authority to effectuate all
decisions necessary to bring the project to fruition in Resolution 97-
2 and City Ordinance C 31823. In light of the disputed factual issues
that attend this matter, the Court finds this an inappropriate basis
for summary judgment.

1 breach of warranty and/or misrepresentation, then it asserts a cross-
2 claim for breach of the standard of care against its counsel, Perkins
3 Coie, which represented the City throughout the RPS garage
4 transaction. The City argues Perkins Coie breached the standard of
5 care by allowing Mr. Fortin to sign the certificate and allowing Mr.
6 Sloane to sign his opinion letter.

7 **II. STANDARD FOR SUMMARY JUDGMENT**

8 Summary judgment will be granted if the "pleadings, depositions,
9 answers to interrogatories, and admissions on file, together with the
10 affidavits, if any, show that there is no genuine issue as to any
11 material fact and that the moving party is entitled to judgment as a
12 matter of law." FED. R. CIV. P. 56(c). When considering a motion for
13 summary judgment, a court may not weigh the evidence nor assess
14 credibility; instead, "the evidence of the non-movant is to be
15 believed, and all justifiable inferences are to be drawn in his
16 favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A
17 genuine issue for trial exists only if "the evidence is such that a
18 reasonable jury could return a verdict" for the party opposing summary
19 judgment. *Id.* at 248. In other words, issues of fact are not
20 material and do not preclude summary judgment unless they "might
21 affect the outcome of the suit under the governing law." *Id.* There
22 is no genuine issue for trial if the evidence favoring the non-movant
23 is "merely colorable" or "not significantly probative." *Id.* at 249.

24 If the party requesting summary judgment demonstrates the absence
25 of a genuine material fact, the party opposing summary judgment "may
26 not rest upon the mere allegations or denials of his pleading, but . .

1 . must set forth specific facts showing that there is a genuine issue
2 for trial" or judgment may be granted as a matter of law. *Anderson*,
3 477 U.S. at 248. This requires the party opposing summary judgment to
4 present or identify in the record evidence sufficient to establish the
5 existence of any challenged element that is essential to that party's
6 case and for which that party will bear the burden of proof at trial.
7 See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to
8 contradict the moving party's facts with counter affidavits or other
9 responsive materials may result in the entry of summary judgment if
10 the party requesting summary judgment is otherwise entitled to
11 judgment as a matter of law. See *Anderson v. Angelone*, 86 F.3d 932,
12 934 (9th Cir. 1996).

13 **III. LEGAL ANALYSIS**

14 **A. Misrepresentation**

15 Washington follows the Restatement definition of
16 Misrepresentation:

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

25 Restatement (Second) of Torts § 552(1). The Washington Supreme Court,
26 applying § 552(1), announced a six-prong test for negligent
misrepresentation. Based upon this, Prudential must establish: (1)
the City supplied information for the guidance of others in their
business transactions that was false; (2) the City knew or should have
known that the information was supplied to guide the Prudential in a

1 business transaction; (3) the City was negligent in obtaining or
2 supplying false information; (4) Prudential relied on the false
3 information provided by the City; (5) their reliance was justified;
4 and (6) the false information was the proximate cause of Prudential's
5 damages. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wash. 2d 820, 826
6 (1998). The standard of proof is clear, cogent, and convincing.
7 *Trimble v. Wash. State Univ.*, 140 Wash.2d 88, 97 (2000).

8 The City and Perkins Coie argue that Prudential could not have
9 relied upon Mr. Fortin's certification or Mr. Sloane's opinion letter.
10 The City and Perkins Coie reason that the underwriter and its counsel
11 knew that Mr. Fortin was not a parking revenue expert and Mr. Sloane
12 was not a securities expert so their signatures are a meaningless
13 formality. Prudential and Foster Pepper counter with extensive
14 testimony that Mr. Fortin and Mr. Sloane were well aware of the Walker
15 parking study and the effect the projections would have on the
16 transaction. Prudential and Foster Pepper argue they had every right
17 to rely on the Deputy City Manager and City Attorney's signatures on
18 the documents as key links in the due diligence process.

19 The Court finds that there is a clear factual dispute as to
20 whether Prudential could have relied on the certification and opinion
21 letter content. In addition, the Court finds, consistent with prior
22 rulings, that whether or not the Walker Report was fraudulent is a
23 question of fact. The merits of the misrepresentation claim present
24 questions of fact for the jury to determine.

25 **B. Warranty**

26 The Court finds that the issue of whether Mr. Fortin intended his

1 signature to be a warranty and whether Prudential understood it as a
2 warranty are related questions of fact. Further, the Court finds that
3 the language of the certification, drafted by the City of Spokane's
4 attorney Perkins Coie, can be reasonably read as the language of
5 warranty. The Court finds a genuine issue of fact for trial exist as
6 the evidence is such that a reasonable jury could return a verdict in
7 favor of either Prudential and Foster Pepper or the City and Perkins
8 Coie's position on warranty.

9 **IV. Conclusion**

10 The Court finds that the City, Perkins Coie, Prudential and
11 Foster Pepper have raised issues of triable fact on their respective
12 misrepresentation and warranty claims based upon the Fortin
13 certificate and the Sloane opinion letter. For that reason, the Court
14 denies summary judgment. Accordingly,

15 **IT IS HEREBY ORDERED:**

- 16 1. Prudential Securities Incorporated 's Motion For Partial
17 Summary Judgment RE Breach of Warranty, **(Ct. Rec. 1076)**, is **DENIED**.
18 2. The City of Spokane's Motion for Summary Judgment Dismissal
19 of Warranty and Misrepresentation Claims Based Upon 8(c)(21)
20 Certificate, **(Ct. Rec. 1101)**, is **DENIED**.
21 3. Perkins Coie LLP and Roy and Anne Koegen's Motion for Partial
22 Summary Judgment, **(Ct. Rec. 1161)**, is **DENIED**.

23 \\\

24 \\\

25 \\\

26 \\\

