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Gear v. Public Util. Dist. No. 2 of Grant County

Court of Appeals of Washington, Division Three

April 17, 2007, Filed

No. 25071-7-III

Reporter
2007 Wash. App. LEXIS 701 *

RON GEAR and SUSAN GEAR, husband and wife, Appellants, v. PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON, a municipal corporation, Respondent and Cross-Appellant.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Prior History: *Gear v. Pub. Util. Dist. No. 2 of Grant County, 2007 Wash. App. LEXIS 1574 (Wash. Ct. App., Apr. 17, 2007)*

Core Terms

real party in interest, services, provider, limited liability company, contracts, join

Case Summary

Procedural Posture

Appellant former company owners claimed appellee public utility district interfered with a business expectancy. The district claimed that the former owners did not have standing to sue in the name of the real party in interest, the current owner. The Superior Court of Grant County (Washington) dismissed the claims finding the former owners were not "aggrieved parties" under *Wash. Rev. Code § 54.16.330*. The former owners appealed.

Overview

The court held that the statute provided that persons aggrieved by the preferential treatment could petition the Washington Utilities and Transportation Commission for an order of noncompliance. The court concluded that there was no authority which suggested that the legislature intended to create a tortious interference claim. The appellate court concluded that the former owners were not the real party in interest. They sold the company before they sued for damages, which damages were sustained by the company. The record was silent as to whether the former owners asked the present owner to bring the instant action. The appellate court could not assume that the current owner would not bring such an action. The current owner bought the company in December 2002. It certainly had an interest in collecting damages resulting from the district's illegal contract from the date of its purchase forward to the date the preferences stopped. Therefore, the current owner was a necessary party to the instant action pursuant to *Wash. Super. Ct. Civ. R. 19(a)*. But the former owners never tried to join the company, the real party in interest. The owners should have moved to substitute the company.

Outcome
The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Communications Law > ... > Rules & Regulations > Regulated Entities > Internet Services

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Communications Law > ... > Regulated Entities > Telephone Services > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

HN1[] *Wash. Rev. Code § 54.16.330(1)(b)* prohibits

public utility districts from providing telecommunications services directly to end users. And it requires that districts ensure that rates, terms, and conditions for such services are not unduly or unreasonably discriminatory or preferential. § 54.16.330(2). The statute also defines discriminatory or ***preferential rates*** as rates, terms, and conditions are discriminatory or preferential when a district offering rates, terms, and conditions to an entity does not offer substantially similar rates, terms, and conditions to all other entities.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN2[] An appellate court will sustain the summary dismissal of a complaint only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. The appellate court, like the trial court, must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. But it will affirm on any basis supported in the record, and the moving party bears the burden of showing the absence of a material issue of fact.

Business & Corporate Law > Limited Liability Companies > General Overview

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Civil Procedure > Parties > Real Party in Interest > General Overview

HN3[] Any suit must be prosecuted by the real party in interest. Wash. Super. Ct. Civ. R. 17(a). And a party must be joined if complete relief cannot be granted to those already parties to the suit. Wash. Super. Ct. Civ. R. 19(a). But Wash. Rev. Code § 25.15.370 provides that a member may bring an action in the superior courts in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause the managers or members to bring the action is not likely to succeed.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Representatives

Civil Procedure > Parties > Real Party in Interest > General Overview

HN4[] A plaintiff may amend a complaint to substitute the real party in interest under Wash. Super. Ct. Civ. R. 17(a). And the amendment relates back if: (1) the defendant is not prejudiced; and (2) the only change brought about by the amendment is in the representative capacity in which the action is brought. Wash. Super. Ct. Civ. R. 15(c).

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN5[] Appellate courts are hard pressed to reverse a trial judge for not granting a discretionary order he was never invited to grant or deny.

Counsel: Harold J. Moberg, for appellant.

David E. Sonn (of *Jeffers Danielson Sonn & Aylward PS*), for respondent.

Judges: Written by: DENNIS J. SWEENEY. Concurred by: STEPHEN M. BROWN & TERESA C. KULIK.

Opinion by: DENNIS J. SWEENEY

Opinion

SWEENEY, C.J.--This appeal follows the summary dismissal of the plaintiffs' claim against a public utility district for interference with a business expectancy. The plaintiffs owned a retail Internet company, an L.L.C. (a limited liability company). The defendant entered into

contracts that illegally gave preference to the L.L.C.'s competitors. We conclude, however, that the named plaintiffs here are not the real party in interest. They sold the L.L.C. before they sued for damages--damages sustained by the L.L.C. And we therefore affirm the trial court's dismissal of their complaint.

FACTS

Legislative Background

In 2000, the legislature authorized public utility districts to construct telecommunications facilities "[f]or the provision of wholesale telecommunications services within [a] district. [*2] " HN1[↑] RCW 54.16.330(1)(b). But the statute prohibited public utility districts from providing telecommunications services directly to end users. *Id.* And it required that districts "ensure that rates, terms, and conditions for such services are not unduly or unreasonably discriminatory or preferential." RCW 54.16.330(2). The statute also defines discriminatory or **preferential rates**: "[r]ates, terms, and conditions are discriminatory or preferential when a . . . district offering rates, terms, and conditions to an entity . . . does not offer substantially similar rates, terms, and conditions to all other entities." *Id.*

Public Utility District No. 2 of Grant County (District) installed the necessary fiber-optic cable to provide telecommunications services. It then contracted with private Internet access providers to wholesale its excess fiber-optic services. Both Benton REA and GemNet L.L.C. bought those services. Ron and Susan Gear owned GemNet L.L.C. at the time. They bought the business in July 2000 for $25,000. They later sold it to Donobi in December 2002 for $250,000.

The Audit Reports

Both the Washington State [*3] auditor's office (in a report issued on December 26, 2003) and an independent group (the Austin report issued on July 3, 2003) concluded that the District contracts with Benton REA were illegal.

The Austin report concluded that the District's intent was to use Benton REA as an alter ego to provide services "at prices in line with the projections upon which the District's decision to develop a fiber optic system had been based." Clerk's Papers (CP) at 275. And the agreement with Benton REA accomplished that purpose. The District agreed with Benton REA to cover Benton's costs plus 10 percent.

The audit report found, among other things, that:

. "The overall intent of [Benton] REA contract . . . was to set up [Benton] as a retail Internet service provider in Grant County. The payments under this agreement were to cover the costs of [Benton], plus 10 percent. . . . The total amount paid under this agreement to date is $601,410.46."

. "The District did not have documentation to support what the District was to receive under the contracts."

. "The District exceeded its authority in state law when it used public funds to set up a non-profit business as a retail Internet service [*4] provider."

. "District management withheld information concerning the contracts from the District's elected Commissioners."

CP at 292. The audit recommended the District seek return of the money it had paid Benton under the contract. The District followed that recommendation and sued Benton REA in April 2004.

The Gears' Suit

The Gears sued the District in July 2004. They alleged that the District misrepresented that any Internet access provider could market and have equal access to the District's fiber optics. The Gears alleged that the District's conduct amounted to a tortious interference with their business expectancies and that they were damaged in the amount of $300,000. They also alleged the District violated the Consumer Protection Act, [1] breached its contract, made misrepresentations, and entered into agreements beyond its authority.

The District admitted the illegal conduct but denied that the Gears were entitled to a recovery for a number of reasons. The District claimed [*5] that the Gears failed to join a necessary party--the company, GemNet, and its current owner, Donobi. The District claimed that the Gears did not have standing to sue in the name of the real party in interest, GemNet. And it claimed that the Gears had not been damaged, in any event, because they received full price when they sold the business. The District moved for summary dismissal of the Gears' complaint.

Summary Judgment

The court dismissed the Gears' claims. It reasoned that

[1] Ch. 19.86 RCW.

the Gears' action was based on an alleged violation of the statute by the District-the District illegally favored Benton REA to the detriment of the other providers. But the statute provided that persons aggrieved by the preferential treatment could petition the Washington Utilities and Transportation Commission for an order of noncompliance. The court concluded that there was "no authority which would suggest that the legislature intended to create a tortious interference claim." CP at 357.

DISCUSSION

The Appeal

The Gears appeal only the dismissal of their claim of tortious interference. The District appeals the court's denial of a number of motions; any of which, it claims, would be dispositive [*6] of the Gears' claims. They include: (1) motions to strike Ron Gear's and his attorney's declarations filed in opposition to the District's motion for summary judgment; (2) a motion to dismiss on the basis the Gears were not a real party in interest; (3) a motion to dismiss for the Gears' failure to show damages; and, finally, (4) a motion to dismiss for failure to exhaust administrative remedies.

We *HN2*[↑] will sustain the summary dismissal of a complaint only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)*. We, like the trial court, must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321 (1998)*. But we will affirm on any basis supported in the record, and the moving party bears the burden of showing the absence of a material issue of fact. *Redding v. Va. Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994)*.

The Gears' Standing to Sue

The District argues that the real party in interest here is Donobi [*7] or GemNet since GemNet owned any "business expectancy." And Donobi bought the business for full market value. The Gears did not, then, own GemNet when they sued the District. The trial court's scheduling order of October 1, 2004, required the Gears to add additional parties by February 17, 2005. They did not do that. And GemNet is a necessary party because the failure to add GemNet subjects the District to the possibility of another lawsuit by GemNet. *CR 19(a)*.

The Gears respond that GemNet was a limited liability company, essentially a "pass-through entity." [2] And they are, therefore, the real party in interest. But even if they were not the real party in interest, the remedy, they argue, is to allow them to join GemNet as a party. *See Sprague v. Sysco Corp., 97 Wn. App. 169, 982 P.2d 1202 (1999)*.

[*8] *HN3*[↑] Any suit must be prosecuted by the real party in interest. *CR 17(a)*. And a party must be joined if complete relief cannot be granted to those already parties to the suit. *CR 19(a)*. But *RCW 25.15.370* provides that "[a] member may bring an action in the superior courts in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause the managers or members to bring the action is not likely to succeed."

The record here is silent as to whether the Gears asked Donobi, the present owner of GemNet, to bring this action. We cannot assume that Donobi would not bring such an action. Donobi bought GemNet in December 2002. It certainly has an interest in collecting damages resulting from the District's illegal contract from the date of its purchase forward to the date the preferences stopped. Donobi is, then, a necessary party to this action. *CR 19(a)*.

HN4[↑] A plaintiff may amend a complaint to substitute the real party in interest under *CR 17(a)*. And the amendment [*9] relates back if: (1) the defendant is not prejudiced, and (2) the only change brought about by the amendment is in the representative capacity in which the action is brought. *CR 15(c)*; *Beal v. City of Seattle, 134 Wn.2d 769, 773, 954 P.2d 237 (1998)*.

But the Gears never tried to join GemNet, the real party in interest. And so this is distinguishable from *Sysco Corp.* There, the plaintiff tried to join the real party in interest. But the court denied the request. And the Court of Appeals reversed for abuse of discretion. *Sysco Corp., 97 Wn. App. at 180*. We are *HN5*[↑] hard pressed to reverse a trial judge for not granting a discretionary order he was never invited to grant or

[2] "The allure of the limited liability company is its unique ability to bring together in a single business organization the best features of all other business forms--properly structured, its owners obtain both a corporate-styled liability shield and the pass-through tax benefits of a partnership." Unif. Limited Liability Company Act, 6A U.L.A. 553, 554 prefatory note (2003).

deny. *Cf.State v. Snyder, 146 Wash. 391, 400, 263 P. 180 (1928)*. GemNet is the real party in interest. The Gears should have moved to substitute GemNet.

We affirm the dismissal.

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*.

BROWN and KULIK, **[*10]** JJ., concur.

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