

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

METCO HOMES, LLC, a Washington ) limited liability company, MARYLAND ) CASUALTY COMPANY, a domestic ) Insurance company, ) Appellants, ) v. ) N.P.R. CONSTRUCTION, INC., a ) Washington corporation; NATHAN A. ) ANDREWS AND JENNIFER ) ANDREWS d/b/a N.P.R., N.P.R. ) FENCE, N.P.R. FENCING, N.P.R. ) FENCE, INC., N.P.R. FENCING, INC., ) a Washington corporation, ) Respondents. )	No. 64535-8-I DIVISION ONE UNPUBLISHED OPINION FILED: <u>November 1, 2010</u>
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spearman, j. — The trial court dismissed Metco Homes LLC’s lawsuit against N.P.R. Construction on grounds that Metco had been administratively canceled by the secretary of state. The court also awarded attorney fees to N.P.R. based on the prevailing party attorney fee clause in the contract between N.P.R. Construction and Metco. Under Chadwick Farms Owners Ass’n v. FHC, LLC, 166 Wn.2d 178, 207 P.3d 1251 (2009), a limited liability company (LLC) may not sue or be sued after its

certificate of formation has been administratively canceled, and as such, the trial court properly dismissed the lawsuit. The award of fees, however, was error, and we reverse that order. Affirmed in part, reversed in part, and remanded.

## FACTS

Metco developed and built the Garden Grove II condominiums in Everett, subcontracting with N.P.R. Construction (hereinafter NPR) to install vinyl siding and fencing for the project. Metco completed its work in 1998. The siding leaked, and Metco sued NPR in 2004. The secretary of state administratively dissolved Metco on June 1, 2006. Metco noted the case for trial in July 2007, and the case was set for trial on May 5, 2008. Counsel for NPR, Eileen McKillop, was also representing NPR as plaintiff in a separate case which was scheduled for a one-week trial on April 28, 2008 in King County Superior Court.

On January 18, 2008, the defendants in NPR's King County case asked McKillop for a continuance of "at least 90 days." McKillop responded that same day, "I would be willing to continue the trial date to the end of June or first part of July 2008." She told Metco, however, a different story. Specifically, in a letter dated February 6, 2008, McKillop told Metco the April 28 trial date in the King County case was a conflict that could not be moved:

As you know, trial of this matter is set for May 5, 2008. Unfortunately, Judge McCarthy just rescheduled a two week jury trial in another King County Superior Court case in which I represent Defendant and Counterclaimant on April 28, 2008. This is the fourth trial continuance in this case and Judge McCarthy made it very clear that no further continuances would be allowed.

This has caused a conflict with the trial date in this case. . . .  
(Footnotes omitted).<sup>1</sup>

On February 8, 2008, two days after McKillop sent her letter, the court in her King County case entered an order continuing the trial date until August 4, 2008.

McKillop never told Metco about the new trial date in her King County case. In fact, in a letter dated February 15, 2008, McKillop continued to push Metco for a trial continuance:

Enclosed please find a Stipulation and Order Continuing the Trial Date in the above entitled matter. Please sign the Stipulation and Order and return it to me for filing with the court. The Clerk of the Court advises us that we should send the Stipulation and Order with a cover letter indicating our trial date preferences or conflicts. She indicated that jury trials are now being set for October/November 2008. Please let me know what your preference is for a trial date in October/November, and any conflicts you may have, and I will advise the court in a cover letter.

On February 19, McKillop sent Metco a revised Stipulation and Order for a continuance. Metco agreed to McKillop's request, and the court moved the trial date from May 2008 to December 2008.

On February 21, McKillop wrote a draft motion for summary judgment on grounds that Metco's certificate of formation had been canceled, and it had no standing to sue or be sued. McKillop did not file the motion until after Metco's certificate of formation was canceled on June 1, 2008.

On July 31, 2008, the trial court granted the motion and awarded attorney fees to NPR based on the prevailing party clause in the contract between Metco and NPR.

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<sup>1</sup> This letter was inaccurate because Judge McCarthy had actually rescheduled the trial date to April 28, 2008 in December of 2007. Additionally, Ms. McKillop knew Judge McCarthy had not been the assigned judge at least since January 18, 2008 when she filed an affidavit of prejudice against the newly assigned judge.

Metco sought and received direct Supreme Court review. Metco argued it should be able to maintain the lawsuit because (1) it filed the suit before its certificate of formation was administratively canceled, and (2) opposing counsel lied to obtain a trial continuance, resulting in the trial date being moved to a date after administrative cancellation. The Supreme Court deferred consideration of the appeal pending its decision in Chadwick Farms.

Shortly after seeking direct review, Metco filed with the trial court a motion to vacate the summary judgment order on grounds that McKillop used deception to move the trial date beyond the date Metco's certificate of formation was to be administratively canceled. NPR opposed the motion. NPR also filed a motion with the Supreme Court to strike any references to the motion to vacate. The trial court denied the motion to vacate, but *sua sponte* ordered sanctions against NPR under CR 11, reserving the amount for a future ruling after the parties had submitted briefing on the issue. Metco did not follow up with briefing, and NPR moved to reconsider. The trial court granted the motion to reconsider and no award of CR 11 sanctions was ever assessed against NPR or Ms. McKillop. Metco filed a second amended notice of appeal appealing the order denying the motion to vacate.<sup>2</sup> The Supreme Court transferred the appeal to this Court after issuing its decision in Chadwick Farms.

## DISCUSSION

### Effect of Cancellation of Certificate of Formation

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<sup>2</sup> NPR acknowledged in its supplemental briefing that its motion to strike is now moot.

Metco argues the trial court erred in granting summary judgment because under the LLC statutes, a canceled LLC may maintain a lawsuit if the suit was filed before cancellation. We disagree. The Supreme Court's decision in the Chadwick Farms case is dispositive on this issue.

Chadwick Farms involved actions brought against and on behalf of LLCs that had been canceled. Chadwick Farms, 166 Wn.2d at 182-185. The Court distinguished between the LLC dissolution and cancellation processes, noting that RCW 25.15.070(2)(c) provided that the existence of the LLC continued only until the issuance of the certificate of cancellation. Id. at 187-188. Giving effect to both processes, the court concluded that a canceled LLC could neither be sued nor maintain a lawsuit. Id. at 189-192, 199. Only a dissolved, but not yet canceled, LLC could sue, be sued, and maintain a suit. Id. at 194, 199. Here, Metco's certificate of formation was canceled on June 1, 2008. As such, Metco ceased to exist as an entity, could no longer maintain a lawsuit, and under Chadwick Farms, the trial court properly granted summary judgment.

Metco nevertheless argues in its supplemental briefing that the motion to vacate should have been granted. According to Metco, Ms. McKillop's alleged deception caused the cancellation, and justice requires the summary judgment order be vacated. A trial court's decision on a motion to vacate is reviewed for abuse of discretion. Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v.

Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court acts on untenable grounds when its findings are not supported by the record, and acts for untenable reasons if it uses an incorrect standard of law or the facts do not meet the requirements of the standard of law. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

We conclude the trial court acted on tenable grounds when denying the motion to vacate its order of dismissal. Although the allegations regarding counsel are disturbing if true, it is simply inaccurate to say the alleged deception “caused” the cancelation. Regardless of the alleged actions of NPR’s counsel, Metco could have renewed the LLC at any time in the two years after it was administratively dissolved. Under these circumstances, the trial court’s decision was neither untenable nor was it based on an incorrect standard of law. The trial court did not abuse its discretion in denying the motion to vacate.

#### *Attorney Fees*

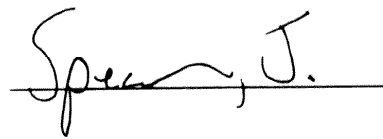
Metco next argues that the trial court erred in awarding attorney fees based on the prevailing party provision in the contract between Metco and NPR. We agree, and reverse the award of fees and costs. A LLC is created by and exists only after the filing of a certificate of formation. RCW 25.15.070. A LLC for which the certificate of formation has been canceled has ceased to exist. Chadwick Farms, 166 Wn.2d at 194. It can no longer sue or be sued, nor may a lawsuit be maintained by or against it. Chadwick Farms, 166 Wn.2d at 191-92. Accordingly, a lawsuit to enforce contractual duties owed by a LLC, including a duty to pay attorney fees and costs, cannot be

maintained after the LLC has been canceled. Id.

Nevertheless, NPR cites Maple Court Seattle Condo. Ass'n v. Roosevelt, LLC, 139 Wn. App. 257, 263, 160 P.3d 1068 (2007) for the proposition that attorney fees and costs may be awarded against a canceled LLC. We reject this argument. Nowhere in the case is there a reference to an award of attorney fees or costs. NPR also claims, without citation to any authority, that the fee award was proper because Metco's insurance carrier, Maryland Casualty, was also a plaintiff in the case. Maryland Casualty, however, was not a party to the contract between Metco and NPR, and the prevailing party attorney fee clause in that contract does not apply to the company.

We affirm the orders granting summary judgment and denying the motion to vacate, reverse the order awarding attorney fees and costs, and remand for proceedings consistent with this opinion.<sup>3</sup>

WE CONCUR:

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<sup>3</sup> Although we affirm dismissal, Metco was successful on part of its appeal. Under these circumstances, neither party has substantially prevailed for purposes of costs on appeal under RAP 14.2