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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KEBEDE ADMASU, et al.,

Plaintiffs,

v.

THE PORT OF SEATTLE, a Washington
municipal corporation,

Defendant.

CAUSE NO. 09-2-22569-9 KNT

MEMORANDUM OPINION

I. INTRODUCTION

This case arises out of claims of over 300 plaintiffs who live near the Seattle-Tacoma Airport (“Airport”). They have brought suit for inverse condemnation, nuisance, and trespass, based on the noise and other interference from planes flying in the vicinity of the Airport. Ninety-six of those properties, owned by 126 of the plaintiffs, are subject to avigation easements owned by the Port of Seattle (“Port”). The defendant seeks summary judgment against those plaintiffs based on the easements.

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II. BACKGROUND

The Port has dealt for many years with takings related to planes flying over residential neighborhoods near the Airport. Over time, it has undertaken a number of programs to obtain rights and compensate the homeowners who are impacted by the flights.

Most recently, the Port has been authorized to obtain aviation easements from homeowners, pursuant to the requirements of RCW 53.54, entitled "Aircraft Noise Abatement." This statute provides the Port with the authority to offer to homeowners, among other things, soundproofing, provided the owner waives damages and conveys an easement to the Port. RCW 53.54.030(3).

This section of the RCW, initially enacted in 1974, changed in 1993. Prior to 1993, it required homeowners to convey to the Port a "*full and unrestricted* easement for the operation of all aircraft, and for all noise and noise associated conditions." (emphasis added). After 1993, however, it allowed the Port to obtain an easement "for the operation of aircraft, and for noise and noise associated conditions therewith," but it no longer required the airport to obtain a full and unrestricted easement in exchange for the soundproofing it offered.

In order to implement these soundproofing programs within the "impacted areas," the Port initiated a voluntary program. D.'s Mot. for Summary Judgment, 5. Those who chose to participate in the noise abatement program initiated the process by submitting an application indicating that the program was voluntary.¹ *Id.* Once the application was accepted, program participants entered into a "homeowner Participation Agreement Initial Authorization." Under

¹ Above the signature line, the application contains the sentence: "I understand that this is a voluntary program, and that submittal of this application is not binding in any way."

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1 this agreement, the participants could decide whether or not they would accept the Port's
2 proposed scope of work for noise insulation improvements. If they chose to continue at this
3 point, the property owners signed a "homeowner Participation Agreement Final Approval,"
4 where they acknowledged the benefits of the program and the need to convey to the Port an
5 avigation easement. The final approval provides, in pertinent part:

6 1A. Avigation Easement and Subordination Agreement. In consideration for
7 participation in and receiving the benefits of the Program, Homeowner agrees
8 to convey to the Port an avigation easement which will be recorded upon
9 receipt by the Port of a fully executed Sound Insulation Contract.

10 2B. Homeowner Program Participation Payment. The Port, in consideration for
11 Homeowner's conveyance of the avigation easement, agrees to pay one
12 hundred percent (100%) of the Port-approved costs of noise insulating the
13 Premises and to allow Homeowner to participate in the Program.

14 11. Withdrawal. Homeowner may withdraw from the Program at any time
15 prior to the Sound Insulation Contract being fully executed by the Homeowner
16 and Contractor ...

17 Once this final agreement was signed, the participants executed a sound insulation
18 contract with a contractor, and then afterwards an avigation easement before a notary, wherein
19 each acknowledged it was a "free and voluntary act."

20 The easements changed in 1993 as a response to the change in RCW 53.54. Before
21 1993, the easements obtained by the Port provided:

22 4. Grantor ... in consideration of the Port's agreement to assist with certain
23 modifications and installations on the Premises for noise-impact reduction
24 purposes, and as required under R.C.W. 53.54.030(3, (sic) conveys and warrants
to the Port ... **a permanent and non-exclusive easement for the free and
unobstructed use and passage of all types of aircraft (as hereinafter defined)
through the airspace over or in the vicinity of the Premises, with such use
and passage to be unlimited as to frequency, type of aircraft, and proximity.**
Said easement shall be appurtenant to and for the benefit of the real property now
commonly known as Seattle-Tacoma International Airport ("Airport"), **including**

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1 **any additions thereto wherever located, hereafter made by the Port...** Said
2 easement and burden, together with all things which may be alleged to be incident
3 to or to result from the use and enjoyment of said easement, including, but not
4 limited to, noise, vibrations, fumes, deposits of dust or other particulate matter
5 (which are incidental to the normal operation of said aircraft), fear, interference
6 with sleep and communication and any and all other things which may be alleged
7 to be incident to or to result from flights of aircraft over or in the vicinity of the
8 Premises or in landing at or taking off from the Airport, shall constitute
9 permanent burdens on the Premises. ... Grantor furthermore waives all damages
10 and claims for damages caused or alleged to be caused by or incidental to such
11 activities. [emphasis added]

12 After 1993, the easements the Port obtained were amended to read:

13 4. Grantor ... in consideration of the Port's agreement to assist with certain
14 modifications and installations on the Premises for noise-impact reduction
15 purposes, and as required under R.C.W. 53.54.030(3), conveys and warrants to
16 the Port ... **a permanent and non-exclusive easement for the free and**
17 **unobstructed use and passage of all types of aircraft (as hereinafter defined)**
18 **through the airspace over or in the vicinity of the Premises, with such use**
19 **and passage to be unlimited as to frequency, type of aircraft, and proximity.**
20 Said easement shall be appurtenant to and for the benefit of the real property now
21 commonly known as Seattle-Tacoma International Airport ("Airport"), **including**
22 **any additions thereto wherever located, hereafter made by the Port.** ... As
23 further provided in Paragraph 5, said easement and burden, together with the
24 Easement level for average yearly noise exposure at the parcel (as defined in
25 Paragraph 5) and noise associated conditions, which may be alleged to be incident
26 to or to result from flights of aircraft over or in the vicinity of the Premises or in
27 landing at or taking off from the airport, shall constitute permanent burdens on the
28 Premises. ... Grantor furthermore waives all damages and claims for damages
29 caused or alleged to be caused by or incidental to such activities. [emphasis
30 added]

31 5. The Easement Level for average yearly noise exposure as that term is used in
32 Paragraph 4 shall be determined by reference to the Port's 1991 FAA accepted
33 noise contour map showing noise contours at intervals of one decibel day/night
34 level (DNL). The base level for this parcel is the yearly average noise exposure at
35 the more severe of the two contour lines that lie on either side of the property and
36 is [variable number, depending on property] DNL. The Easement level shall not
37 be deemed to be exceeded unless anyone so claiming establishes that the yearly
38 average noise exposure as defined herein has increased by more than 1.5 DNL
39 above the base level. Absent such a showing, the easement shall continue in full
40 force and effect as to all noise and noise associated conditions reaching or
41 affecting the parcel. ...

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1 These post-1993 easements granted to the Port unlimited use of the airspace around the
2 property up to a certain day/night noise level (DNL). The Port was permitted by the easements
3 to operate planes over the property up to that noise level, but if they were to exceed the
4 maximum by 1.5 DNL, they would be in violation of their rights to use the homeowners'
5 property.

6 In or around 1988, the Port began alerting the public about its plans to build a third
7 runway. As part of these plans, the Port continued obtaining avigation easements for properties
8 that would be impacted by the noise. The third runway opened in November, 2008.

9 In 2009, over 300 plaintiffs who own properties near the new runway brought suit
10 against the Port, claiming that air traffic using the runway has caused increased noise and
11 interference with the use of their properties. The plaintiffs claim, for example, that the aircraft
12 using the third runway cause such substantial disturbance that they “wake children,” “disturb
13 conversations,” “shake houses,” “light bulbs unscrew, and nails back out.” Pl.’s Resp. to D.’s
14 Mot. for Summary Judgment, 11. They further claim that planes flying overhead have caused
15 the buildup of particulate matter on the properties and fumes in the air. They sued for inverse
16 condemnation, nuisance, and trespass.

17 After several unsuccessful attempts at class certification, plaintiffs are proceeding in a
18 consolidated suit. The subject of the instant order is that 96 properties, owned by 126 of the
19 plaintiffs,² are subject to avigation easements owned by the Port. Pl.’s Resp. to D.’s Mot. for
20 Summary Judgment, 6. Of the properties in question, 16 are subject to unlimited noise
21 easements obtained prior to 1993, and the remaining 80 properties are subject to easements

22 ² Some of the properties have multiple owners.

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1 which allow the Port to operate aircraft over the property up to a particular noise level. Pl.'s
2 Mot. for Summary Judgment, 2.

3 The parties, by stipulation, agreed that noise level calculations at the plaintiffs'
4 properties would be performed by an aircraft noise quantification and analysis expert, Steven
5 Alverson. According to his research, the noise level at each of the properties is well within the
6 maximum noise level permitted by the post-1993 easements.³

7 The Port's motion seeks summary judgment against the 126 plaintiffs whose properties
8 are burdened by the easements.

9 III. ANALYSIS

10 1. Validity of Avigation Easements in Waiving Constitutional Rights

11 The first issue is whether the plaintiffs' voluntary conveyance of avigation easements
12 in exchange for noise abatement constitutes a waiver of their constitutional right to sue for
13 inverse condemnation. A waiver of any constitutional right must be voluntary, knowing, and
14 intelligent. *City of Bellevue v. Acrey*, 103 Wn. 2d 203, 207 (1984). The court indulges every
15 reasonable presumption against waiver of fundamental rights. *Id.* The right to be free from a
16 taking of property without just compensation is one such fundamental right. *McPherson Bros.*
17 *Co. v. Douglas County*, 150 Wn. 221, 224-225 (1928).

18 Our Supreme Court has recognized that a plaintiff may be barred from a claim for
19 inverse condemnation by a showing that the Port has obtained an avigation easement. *See*
20 *Petersen v. Port of Seattle*, 94 Wn. 2d 479, 484 (1980) ("the Port must prove all elements of a

21 ³ Alverson measured the noise using day/night level noise metric (DNL). The properties
22 subject to post-1993 easements had maximum DNL levels ranging from 65 to 76. The noise level at
23 each of the properties was between 4.3 and 13.9 DNL below the base DNL granted in the easements.

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1 [prescriptive avigation easement] to bar the [plaintiff's] claim"). Our Supreme Court has also
2 recognized that an increase in airport use and noise above and beyond the scope of the right
3 granted in a prior easement can result in a new cause of action. *Highline Sch. Dist. No. 401,*
4 *King County v. Port of Seattle*, 87 Wn.2d 6, 12 (1976). Together, these holdings indicate that
5 an avigation easement, even when prescriptively obtained, will abridge a person's ability to
6 sue for inverse condemnation so long as the holder of the interest can demonstrate the
7 existence of an easement and so long as its use of the burdened property stays within the
8 bounds granted by the easement.

9 The plaintiffs contend that their right to sue for inverse condemnation, despite having
10 granted avigation easements to the Port, can be inferred from the language of RCW 53.54.030
11 (5), which states that "an individual property may not be provided benefits under any one of
12 these programs more than once, unless the property is subjected to increased aircraft noise or
13 differing aircraft noise impacts that would have afforded different levels of mitigation, even if
14 the property owner had waived all damages and conveyed a full and unrestricted easement."
15 Plaintiffs argue that this section, when read in conjunction with Article I, Section 16 of the
16 Washington Constitution,⁴ implies that property owners impacted by increased noise levels are
17 vested with a right to sue for inverse condemnation when the noise level at their property
18 would have allowed the Port to grant additional remedies, regardless of the easements the
19 property owners already conveyed.

21 ⁴ This section reads, in part: "No private property shall be taken or damaged for public or
22 private use without just compensation having been first made ..."

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1 Plaintiffs' argument mischaracterizes the statute in question. RCW 53.54.030 is a
2 permissive grant of authority to the Port.⁵ It allows the Port to confer additional noise
3 mitigation benefits under changed circumstances without running afoul of the constitutional
4 prohibition against the gifting of public funds. It does not create any cause of action for
5 landowners who have already taken part in a noise abatement program. And even if the
6 statute's language is liberally construed, there is no language in the statute that demonstrates
7 any intent to create a cause of action against the Port.

8 The court, therefore, finds that an avigation easement may bar a plaintiff's claim for
9 inverse condemnation so long as the Port's use has not exceeded the use permitted by the
10 easement, regardless of whether the plaintiff would have been entitled to additional noise
11 mitigation remedies under the Port's noise abatement program.

12 **2. Scope of the Avigation Easements**

13 Because the Port has demonstrated that it has obtained easements burdening the
14 properties at issue, the court analyzes whether the undisputed facts indicate that the Port's use
15 of the plaintiffs' properties is within the scope of the activity permitted by the avigation
16 easements. For the purpose of this analysis, the court takes as true the allegations of the
17 plaintiffs—that the noise from the airplanes has caused their houses to shake, light bulbs to
18 unscrew, nails to back out, children to wake up, conversations to be disturbed, and that the
19 airplanes flying over have caused the buildup of particulate matter on the properties and fumes
20 in the air surrounding the properties.

21 ⁵ The permissive nature of the statute is reflected in RCW 53.54.010, which states “a port
22 district operating an airport serving more than twenty scheduled jet aircraft flights per day **may**
23 undertake any of the programs...,” and RCW 53.54.030, which states “the port commission **may** utilize
24 one of more of the following programs.” [emphasis added]

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1 Of the 96 properties at issue, 16 are subject to easements granted before 1993, and 80
2 are subject to easements granted after 1993. The pre-1993 easements and post-1993 easements
3 are considered in turn.

4 a. *Scope of the pre-1993 easements*

5 The Port's use of the 16 plaintiffs' properties is within the scope of the right granted by
6 these easements signed prior to 1993. Not only do the easements expressly consider some of
7 the alleged issues, like "vibrations, fumes, deposits ... fear, interference with sleep and
8 communication," but they grant the airport the right to use the airspace with "unlimited
9 frequency," regardless of the proximity or type of aircraft. The easements also contemplates
10 the airport's eventual third runway, where it grants the rights for the existing airport and "any
11 additions thereto, wherever located."

12 b. *Scope of the post-1993 easements*

13 The easements granted after 1993 convey to the Port a different interest from those
14 from before 1993. Here, again, the activities of the Port are within the scope of the easements
15 granted. The easements grant the right for aircraft to pass through the airspace above the
16 properties, with unlimited frequency and proximity. They burden the land with the noise and
17 "noise associated conditions ... incident to or [] result[ing] from flights of aircraft over or in
18 the vicinity of the premises or in landing at or taking off from the airport," up to the permitted
19 level for each particular property. The parties, by stipulation, agreed to be bound by
20 Alverson's noise level research, which shows that the noise level at each of the properties is
21 within the maximum noise level permitted by the post-1993 easements.

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1 The grantors of the easements further waived all damages and claims for damages
2 caused by or incidental to the Port's flight activities, again up to the permitted noise levels.
3 Though the additional burdens incidental to the flight activities, including vibrations, fumes,
4 deposits, fear, interference with sleep and communication, are not specifically enumerated in
5 the post-1993 easements, the court finds they are included in the broad rights granted as
6 "associated conditions" and ones which are "incidental" to the Port's flight-related use of the
7 land. Finally, these easements also use the same language indicating that the rights were
8 granted to the Port regardless of whether the airplanes were using the then-existing runways or
9 some future runways yet to be developed.

10 Based on the express language of the easements, the court finds that the Port's use of
11 the plaintiffs' properties is within the scope of the easements granted for both the pre-1993 and
12 post-1993 easements. Absent any valid contract formation defenses, considered below,
13 summary judgment against the 126 plaintiffs at issue is therefore appropriate.

14 **3. Contract Formation Defenses**

15 The plaintiffs, in the alternative to their constitutional arguments, assert a number of
16 contract formation defenses. These include claims that the easements were the result of duress,
17 misrepresentation, and that the agreements were substantively and procedurally
18 unconscionable. Pl.'s Resp. to D.'s Mot. for Summary Judgment, 20.

19 *a. Unconscionability*

20 *i. Procedural Unconscionability*

21 Procedural unconscionability "relates to impropriety during the process of forming a
22 contract" and refers to "blatant unfairness in the bargaining process and a lack of meaningful

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1 choice.” *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260 (1975). Whether an agreement
2 is unconscionable is a question of law for the courts. *McKee v. AT & T Corp.*, 164 Wn.2d 372,
3 396 (2008). Here, the plaintiffs voluntarily chose to participate in the noise abatement
4 program. They had the right to withdraw before signing the final agreement. They were under
5 no time constraints to sign. And they had alternatives to entering the agreements, such as
6 refusing to participate and instigating a lawsuit, as they have now done. The court, therefore,
7 finds that the process by which the Port obtained the easements was not procedurally
8 unconscionable.

9 *ii. Substantive Unconscionability*

10 Substantive unconscionability, on the other hand, involves cases where a clause or term
11 in the contract is one-sided or overly harsh. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.
12 2d 510, 519 (2009). Such unfairness must truly stand out as shocking to the conscience,
13 monstrously harsh, or exceedingly calloused. *Id.* Again, the existence of an unconscionable
14 bargain is a question of law. *Nelson v. McGoldrick*, 127 Wn. 2d 124, 131 (1995). Here, the
15 plaintiffs granted to the airport the right to use the property up to a certain limit. In return, each
16 of the plaintiffs in question received thousands of dollars’ worth of soundproofing. While the
17 negative effects of the avigation easements on plaintiffs are certainly substantial, it is difficult
18 to characterize the granting of an avigation easement as “shocking to the conscience” when
19 avigation easements are expressly authorized by statute. RCW 53.54.030. Likewise, the
20 obtaining of noise abatement in return for granting avigation easements are terms that are less
21 harsh than legally sanctioned prescriptive avigation easements that can be created without any
22 consideration. *Petersen v. Port of Seattle, supra.*

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1 *b. Misrepresentation and Duress*

2 Before directly addressing plaintiffs' misrepresentation and duress claims, the court
3 considers some of the procedural issues argued by the Port.

4 *i. 79 Plaintiffs who Ratified the Avigation Easements*

5 When a person purchases property with a recorded restriction, the purchase is a
6 ratification of that restriction. *People for Pres. & Dev. of Five Mile Prairie v. City of Spokane*,
7 51 Wn. App. 816, 824-25 (1988). Contract formation defenses of duress and
8 misrepresentation, therefore, necessarily do not apply to those plaintiffs who were not party to
9 the contract formation, but who ratified the easements when they purchased their houses.
10 Summary judgment is appropriate against these plaintiffs.

11 *ii. 20 Plaintiffs who Did Not Submit Testimony in Opposition to Motion
12 for Summary Judgment*

13 In responding to the motion for summary judgment, a number of the remaining
14 plaintiffs filed additional testimony indicating that they signed over the easements as the result
15 of misrepresentation by the Port or duress they were put under by the Port's actions. Twenty of
16 them, however, did not file any additional testimony indicating they were under duress or that
17 there was some misrepresentation. When a motion for summary judgment is made and there
18 are no issues of material fact, an adverse party may not rest upon the mere allegations or
19 denials of his pleading, but his response, by affidavits or as otherwise provided in the rules,
20 must set forth specific facts showing that there is a genuine issue for trial. *W. G. Platts, Inc. v.*
21 *Platts*, 73 Wn. 2d 434, 442 (1968). If he does not so respond, summary judgment, if
22 appropriate, should be entered against him. *Id.* Based on this rule, summary judgment is also

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1 appropriate against the 20 plaintiffs who did not provide any testimony regarding infirmities in
2 the contract formation process.

3 *iii. Merits of Misrepresentation and Duress Claims*

4 None of the plaintiffs have alleged facts supporting a claim that the Port
5 misrepresented the terms of any of the agreements or the scope of the avigation easements.
6 The terms of the avigation easements were prominently displayed in clear, detailed language,
7 including the fact that the benefits of the easement applied to “any additions” to the Airport.
8 While this language is sufficient to preclude claims by some of the plaintiffs that they were
9 ignorant of a potential third runway when they agreed to the avigation easements, the facts
10 submitted by the Port establish that the third runway was a well-publicized (and controversial)
11 issue since the late 1980s.

12 The primary focus of the plaintiffs’ misrepresentation claim is on the Port’s failure to
13 disclose that once the plaintiffs granted the Port the right to fly over their homes, they waived
14 their right to bring inverse condemnation, trespass or nuisance actions based on flights that
15 were within the scope of the easements. However, a party is not required to advise the other
16 party about the legal effect of a contract. *Prest v. Adams*, 142 Wn. 111 (1927). Consistent
17 with *Prest*, the court finds that the Port’s failure to explain the legal effects of the avigation
18 easements does not constitute misrepresentation.

19 In support of their duress claims, plaintiffs argue that they “had no choice but to sign
20 the avigation easements if they were going to be afforded any relief.” Pl.’s Resp. to D/s Mot.
21 For Summary Judgment, 21. The burden on a party claiming duress is a high one. The mere
22 fact that a contract is entered into under stress or pecuniary necessity is insufficient. *Retail*

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1 *Clerks Health and Welfare Trust Funds v. Shopland Supermarkets, Inc*, 96 Wn.2d 939, 944
2 (1982). Circumstances must demonstrate a person was deprived of his free will at the time he
3 entered into the challenged agreement in order to sustain a claim of duress. *Id.* at 939-40.
4 While the court does not minimize the difficult circumstances confronting the plaintiffs when
5 they were offered participation in the Port's noise abatement program, they could have chosen
6 not to participate and instead to pursue legal challenges against the Port, as they subsequently
7 did. Accordingly, the court finds that there is no legal basis for the duress claims.

8 Summary judgment is appropriate against the remainder of the plaintiffs raising
9 contract formation defenses.

10 **4. Nuisance and Trespass Claims**

11 Plaintiffs also sought damages based on nuisance and trespass causes of action. Having
12 conveyed away a property right, however, plaintiffs cannot sue for a use of that property right,
13 under either nuisance or trespass theories. Accordingly, those claims are dismissed for those
14 plaintiffs whose properties are subject to avigation easements.

15 **CONCLUSION**

16 The 126 plaintiffs at issue conveyed to the Port avigation easements. Such easements
17 constitute a valid abridgment of a person's right to sue for inverse condemnation as long as the
18 Port's use is within the restrictions of the interest it owns. The Port's use of the properties is,
19 according to the undisputed facts, within the scope of use permitted by those easements. The
20 plaintiffs' other arguments regarding contract issues are invalid for the reasons discussed
21 above. All other claims for nuisance and trespass are necessarily subsumed by the decision
22 regarding the validity of the easements.

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1 The Port's motion for summary judgment against the 126 plaintiffs whose properties
2 are subject to avigation easements is therefore **GRANTED**.

3 The Port shall submit an updated Order that meets the requirements of CR 56(h).

4 ENTERED this 21st day of December, 2012.

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