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DIVISION II OF THE COURT OF APPEALS FOR

THE STATE OF WASHINGTON

SANDRA J. KEATLEY,

PLAINTIFF/RESPONDENT

V.

DUANE BRUNER,

DEFENDANT/APPELLANT.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Respondent, Sandra Jo Keatley, initiated this action against appellant, Duane Bruner, for dissolution of a "meretricious relationship"[1] and an equitable division of the property owned by each. Later, Ms. Keatley amended her Complaint to assert a claim for breach of contract referencing an "Earnest Money Receipt and Agreement", which she prepared for Duane's signature on March 22, 2005. The Trial Court ultimately dismissed that meretricious relationship claim as barred by the stature of limitations; however the breach of contract claim proceeded to trial that resulted in a decree ordering Bruner to specifically preform the purported contract ten years later by selling his two platted lots improved with his home and barn to Keatley for $295,000. Bruner appeals that judgment.

Although the trial resembled a soap box opera more than a sober legal inquiry into the validity of the contract, the issues for this appeal are fundamental: Is a written contract for the sale of land valid and enforceable when it (1) has no proper legal description, (2) is not supported by consideration; (3) lacks material terms; (4) allows the potential purchaser an unlimited time to close the purchase for a set price with no obligation to ever do so; and (5) restrains the land owner from selling or alienating his property to anyone except that potential purchaser in perpetuity?

Bruner submits on its face the purported contract is void and no court is at liberty to alter or manufacture contractual terms not agreed to by the contracting parties, especially where the contract is governed by the statute of frauds.

[1] Also known as Committed Intimate Relationship (CIR).

As will be seen from a more detailed statement of facts, although the purported contract called for $1,000 to be paid for "earnest money," Ms. Keatley never actually paid any money whatsoever.

Although an earnest money agreement typically imposes on the would-be purchaser a duty to actually purchase the property by a date certain or forfeit the earnest money, this purported contract imposed no duty on the would be purchaser whatsoever. The purported contract contained no provision for forfeiture of the (nonexistent) earnest money, nor any obligation for Ms. Keatley to purchase the property, ever. But the contract certainly created an obligation on the property owner to hold the property forever free from encumbrance in the event the would-be purchaser, Ms. Keatley, decided to exercise what the trial court found to be Ms. Keatley's "open-ended purchase option contract." Finding Q, CP 399.

Aside from lack of consideration, an improper legal description by tax parcel number and omission of other material terms, the contract on its face is void as an unlawful restraint on alienation of real property and runs afoul of the rule against perpetuities. There can be no specific performance of a void contract. There can be no damages for breach of a void contract. There can be no estoppel to allow enforcement of a void contract. The remedy is reversal of the trial court and dismissal of Keatley's cause of action.

II. ASSIGNMENTS OF ERROR

A. Trial court Finding F. in so far as it states "Shortly thereafter, Keatley paid Bruner the $1,000.00 in earnest money called for by the contract", CP 397, is not supported by substantial evidence.

Issue:

Does the record contain substantial evidence that Bruner actually received $1,000 from Keatley?

B. Trial court Finding M in so far as it states "Given the lack of a closing date, the Court will infer a 'reasonable amount of time' for closing and, under the circumstances of this case, Keatley's demand for closing is October 2010 was within a reasonable amount of time" CP 398 was entered in error.

Issue:

In a written contract governed by the statute of frauds which contains "all other essential terms" Finding G, CP 397, is it error for a court to "infer a 'reasonable amount of time for closing' when the contract imposes no such time limit on its face?

C. Trial court Finding G, "the contract contains a legal description by reference and all other essential terms", is not supported by substantial evidence and is legal error.

Issues:

1. Does a legal description of platted lots by only tax parcel numbers satisfy the statute of frauds?

2. Is a closing date an essential term?

3. Is a forfeiture or liquidated damage clause pertaining to disposition of earnest money upon default an essential term?

4. Do other missing terms as enumerated in *Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994) render the contract too indefinite to allow for judicial enforcement?

D. Trial court Conclusion A that "Bruner and Keatley entered into an enforceable written agreement under which Keatley would purchase and Bruner would sell the Chapman Road property for $295,000.00", CP 399, is legal error.

Issues:

1. Is the agreement void for lack of consideration?
2. Is the agreement void for lack of a legal description?
3. Is the agreement void as an unreasonable restraint of the alienation of real property?
4. Is the agreement void in violation of the rule against perpetuities?

E. Conclusion B that "Bruner breached this contract in October of 2010", CP 399, is an error.

Issue:

Can a party to a void contract breach it?

F. Trial court Conclusion F. "Keatley's breach of contract damages are $205, 000.00 plus prejudgment interest at the statutory rate", CP 400, is error.

Issue:

Can there be damages for breach of a void contract?

G. Trial court Conclusion G "Bruner shall convey the Chapman Road Property, free and clear of all encumbrances, to Keatley, in exchange for $295,000 not later than one hundred twenty days from the date when final judgment is entered" CP 400, is error.

Issues:

Can a court lawfully order specific performance of an "open-ended purchase option contract" to convey real property which is void?

H. Trial court's Conclusion G that "Keatley is the prevailing party in this action and is entitled to statutory attorney fees and costs", CP 400, is in error if reversed on appeal.

Issue:

If the trial court's judgment is reversed on appeal is Keatley the prevailing party?

I. The Amended Judgment of April 24, 2015, CP 409, is error.

Issue:

As above.

III. STATEMENT OF THE CASE

Although this is an action for purported breach of contract, Ex. 20, the trial had precious little to do with the contract. Rather, over repeated objections and a motion in limine, CP 335, from Duane Bruner's attorney, William Kogut, VR1-3[2] the trial devolved into a "she said, he said", rendition of a twenty year romantic relationship between the parties from 1982 through 2002. This has little or nothing to do with the parties' rights under the purported 2005 "contract".

The trial Court entertained testimony that the parties were high school sweethearts, VR1-41, and thereafter Ms. Keatley testified the parties spent much time together. VR1-46 He said she never spent the night. VR2-93, 99 She said she intended to build a life with Duane but didn't want to get married. VR1-46, 121 He said they were just boyfriend/girlfriend and there were no special commitments. She said he "cheated" on her. He said he saw other women and had every right to do so.

She said, they broke up in 2002. On this point the parties agreed. VR1-72

As to the "Chapman Road" property at issue here the parties agreed it was purchased by Mr. Bruner in 1995 with his own funds and then improved with a house, also with his own funds, and Ms. Keatley had no title interest in the property whatsoever from the inception. VR1-118, 121 VR2-91. The property consisted of two platted lots. CP 411-12; Ex. 66, 67; VR1-151

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[2] VR1 is the trial transcript for December 2, 2014; VR2 is the transcript for the remainder of the trial plus the oral opinion of the court.

The record does show Keatley spent substantial time with Duane prior to 2002, and they did normal things a couple would do together. The trial court admitted all sorts of testimony over Bruner's objections seemingly having nothing to do with the contract issues such as Christmas cards, ex. 5, 6, 7, 8, 9, 10, 11, VR1-84, pictures of the Christmas tree Sandra said she cut herself and, of course, the faithful dog—whose primary allegiance between the two was never clearly established. Ex. 17, VR1-92

But in 2002 they broke up over allegations of another woman. Although the romantic relationship ended at that point they remained friends, he put her on his logging company payroll for some bookkeeping work she was doing, and allowed her to still quarter some animals in his barn.

Sandra desired to purchase the property and barn and acreage so in March of 2005 she typed up a one page "Earnest Money Receipt and Agreement" on her computer, printed it out and left it laying on Mr. Bruner's desk for him to sign after he filled in a blank for a purchase price. VR1-105-6 Without discussion and outside her presence he filled in $295,000 and signed exactly as she had drafted it. This agreement is attached as Appendix 1 and is all this case is about.

Although the document references earnest money, there was no provision for the forfeiture of the earnest money and no requirement that she purchase the property by any date. She said she didn't put in a closing date because she didn't have the money VR1-107 and it was "something we'd work out." VR1-107 The only "legal description" was a tax parcel number and reference to 1176 Chapman Road in Castle Rock. And that's it.

The document on its face therefore allowed Ms. Keatley to wait as long as she wanted to close the deal, if ever, and required Mr. Bruner to keep the property available for sale to her, and not sell it to anybody else, until, if ever, she acted to close the deal. Unlike a right of first refusal, the sale price was fixed at $295,000 allowing Ms. Keatley to obtain the property for that sum no matter how much the property appreciated, without recourse by Bruner--which is exactly what happened as the trial court found the value of the property had appreciated to $500,000 by the time of trial. Finding O. CP. 398

She was in no hurry to close the deal but when the other woman moved her horses into the barn in 2010 Keatley demanded to close. VR1-110, VR2-90. Bruner refused, and Ms. Keatley sued.

The trial court Findings of Fact and Conclusions of Law are attached as Appendix 2. For the most part the factual findings (except as to the payment of $1,000 in earnest money) are in reality legal conclusions and should be reviewed as such.

Amongst other findings, the trial court expressly found the parties intentionally didn't provide a closing date, Finding H, and that had Bruner demanded closing sooner Keatley would have purchased the property. Finding N. CP. 398 The trial court expressly found: "Although they entitled the contract as an 'Earnest Money Receipt and Agreement,' the lack of a closing date, the uncontroverted testimony that the date was left open intentionally to allow Plaintiff time to finance the purchase of the property, and the parties' actions post-execution, establish that they intended to create an open-ended purchase option contract." Finding Q, CP 398-99

IV. STANDARD OF REVIEW

This was a bench trial which ultimately resulted in entry of Findings of Fact and Conclusions of Law by the trial court. True Factual Findings are reviewed to determine if they are supported by substantial evidence. *Govett v. First Pac. Inv. Co.*, 68 Wn.2d 973, 973, 413 P.2d 972 (1966). Substantial evidence is such evidence that would persuade a fair minded person the facts were actually proven. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Conclusions of Law are reviewed de novo. *Morello v. Vonda*, 167 Wn.App. 843, 848, 277 P.3d 693 (Div. 2, 2012). Legal conclusions couched as factual findings are reviewed de novo. *In re Welfare of L.N.B.-L.*, 157 Wash. App. 215, 243, 237 P.3d 944 (Div. 2, 2010); *citing In re Disciplinary Proceeding Against VanDerbeek*, 153 Wash.2d 64, 73 n. 5, 101 P.3d 88 (2004).

The burden of proof is on the party asserting the claim. To establish a claim against Mr. Bruner, Ms. Keatley has the burden of proving the existence of the contract, that the contract imposes a duty, that a party failed to perform that duty, and the amount of damages necessary to place the non-breaching party in the same position it would have been if the breach had not occurred. *Jacob's Meadow Homeowners Assoc. v. Plateau 44 II, LLC*, 139 Wn.App. 743, 162 P.3d 1153 (Div. 1, 2007). Washington follows the objective manifestation test for contracts; the terms assented to must be sufficiently definite and supported by consideration. In the absence of objective manifestations of mutual assent to terms supported by consideration, there can be no contract. *Keystone Land v& Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004).

> A court must inquire as to whether there is any basis for refusing to enforce the contract made by the parties or whether a party has asserted valid affirmative defenses to the formation of the contract. This inquiry leads the court into a consideration, among others, of whether there is before it (1) a statute of frauds problem, (2) a lack of contractual capacity, (3) an illegal contract, (4) a contract induced by fraud, mutual mistake of material fact, duress, or (5) a contract of adhesion.

Foster v. Knutson, 84 Wash. 2d 538, 544-45, 527 P.2d 1108, 1112 (1974); *citing Williston on Contracts,* §§ 450, 677A, 1487A, 1578A, 1602, 1617 (3d ed. W. Jaeger 1960). Then, and only then, does the Court examine the alleged contract itself "to determine what events and conduct of the parties the contracting parties intended, by their contract, to define their mutual obligations." *Foster*, 84 Wn.2d at 545..

V. ARGUMENT

A. Contract Lacks Consideration.

Assignment of error A challenges trial court Finding F in so far as it finds "Keatley paid Bruner the $1,000.00 in earnest money called for by the contact" for lack of substantial evidence.

From the outset of the trial Bruner took the position that if there was a check there would be no evidence it was ever cashed. VR1-36. And there wasn't.

Ms. Keatley testified she left a check for $1,000 with the written agreement on the desk, VR1-106; however, Ms. Keatly never testified the check actually cleared the bank. Ms. Keatley virtually admitted Bruner didn't have and/or cash the check because they were "friends". VR1-115 ("Q. Do you have any proof that Duane ever received or cashed that earnest money check? A. I don't know what he did with the check. I just assumed that we didn't need it because we were still friends.") Bruner testified he never received a check from Keatley. VR2-89

Moreover the trial court *found* Keatley actually needed "$295,000 in cash" to close the deal, Finding R, CP 399, not $295,000 less $1,000 in paid earnest money to close. And the court concluded a decree of specific performance should issue directing Bruner to convey the property to Keatley "in exchange for $295,000." Conclusion F, CP 400 And that's what the Amended Judgment said as well. CP 410 There was no credit for the earnest money because none was paid.

A contract not supported by consideration is void. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004); *Huberdeau v. Desmarais*, 79 Wn.2d 432, 439, 486 P.2d 1074, 1078 (1971); *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wn. App. 444, 449, 90 P.3d 703 (Div. 1 2004) Here there was none. The finding is not supported by substantial evidence and must be set aside. Since Keatley bears the burden to establish a valid contract, the finding is implied in the negative. *Bogle & Gate, P.L.L.C. v. Holly Mountain Res.*, 108 Wn. App. 557, 560, 32 P.3d 1002 (Div. 1, 2001); quoting *Cahn v. Foster & Marshall, Inc.* , 33 Wn. App. 838, 840, 658 P. 2d 42 (Div. 3, 1983).

B. The court's finding of a "reasonable closing date" is error, but superfluous.

Finding M is the court's determination that a closing date in 2010 was "reasonable" for the contract executed in 2005. CP 298 However at most this is beside the point if the contract is void and pointless if it is not since the contract on its face allows Keatley to exercise her option anytime she wanted without regard to whether her choice was "reasonable" or not by some unknown standard. The court found the parties intentionally agreed by the written terms of the contract her election to exercise her option was not subject to any time limitation. Finding Q, CP 399

("...the lack of a closing date, the uncontroverted testimony that the date was left open intentionally to allow Plaintiff time to finance the purchase of the property, and the parties' actions post-execution, establish that they intended to create an open-ended purchase option contract.")

A court is not at liberty to write a contract for the parties they did not write themselves. *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 833, 991 P.2d 1126 (1999) amended, 1 P.3d 578 Rather:

> Under the rules of construction applicable to contracts generally, a provision in a lease giving an option to purchase will be so construed as to effectuate the intention of the parties where it is ascertainable from the language employed by them, and where the parties express without ambiguity their intention, no room for judicial construction is left and no court can alter their agreement, although the bargain is hard or unwise.

Union Oil Co. v. Hale, 163 Wash. 503, 505, 2 P.2d 87 (1931)

This is the applicable rule here. The court found these parties intentionally agreed to set no time limit for their own reasons and enforced the agreement as written. Also finding the option was exercised within a "reasonable time" is superfluous.

C. Other missing terms render the contract unenforceable and void

The trial court found (Finding G) "the contract contains a legal description by reference and all other essentials terms" to which appellant has assigned error C.

As to the legal description the agreement states: "Parcel # WK2713005 located at 1176 Chapman Road and adjacent Parcel# WK2713007. Total land being approximately 10 acres." The written agreement doesn't "reference" anything other than the two tax parcel numbers. Ex. 20 For the reasons set forth under Section D. 1. below, this does not meet the requirements of the statute of frauds.

Other missing terms include (1) time and manner for transferring title; (2) procedure for declaring forfeiture of earnest money; (3) allocation of risk with respect to damage or destruction; (4) insurance provisions; (5) responsibility for repairs, water and utilities, (6) restrictions if any on capital improvements, liens, removal or replacement of personal property and types of use and (7) a closing date (although the court found the parties agreed not to have one.) *Hubbell v. Ward*, 40 Wn.2d 779, 785, 246 P.2d 468 (1952).

These requirements are not specific to real estate contracts. They are necessary to form a binding contract to transfer title to real property:

> It seems necessary to reiterate once again that negotiation, not litigation, is the proper method for agreeing upon these vital terms. Agreements to buy and sell real estate "must be definite enough on material terms to allow enforcement without the court supplying those terms." *Setterlund*, 104 Wn.2d at 25 The facts of this case demonstrate the very ambiguity which renders an alleged agreement unenforceable. There was no meeting of the minds here as to any of the material terms except for the price. This is not enough to form an enforceable contract for the purchase and sale of real property.

Sea-Van Investments v. Hamilton, 125 Wn.2d 120, 129, 882 P.2d 173 (1994) This agreement doesn't come close to supplying the necessary terms to constitute an enforceable agreement to transfer title to real estate. A court is not at liberty to reform a contract with missing terms entered into with the knowledge that the terms were missing although neither party is aware of the legal consequence of the omission. 1 *Restatement of the Law of Contracts (Second)*, (1981), Sec. 156, Illustration 4, p.415.

D. Trial Court Conclusion A that this was an enforceable written agreement is error.

This is a conclusion of law which must be reviewed de novo.

This writing is not an enforceable written agreement because it lacks consideration (see A above), lacks a proper legal description, is an unreasonable restraint on the alienation of real property and violates the rule against perpetuities. The burden to demonstrate the contract is valid and enforceable is on the party which claims its breach. *Holly Mountain Res.*, 108 Wn. App. at 560

1. The contract is void because it violates the statute of frauds by failing to incorporate a proper legal description for these two platted lots.

This contract, whether characterized as an earnest money agreement or an option, is subject to the statute of frauds. RCW 64.04.010[3]. That statute has been construed to require "every contract or agreement involving a sale or conveyance of *platted* real property must contain, in addition to other requirements of the statute of frauds, the description of such property by the correct lot numbers(s), block number, addition, city, county, and state." (italics added). *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 882, 983 P.2d 653 (1999), quoting *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949). But here, the legal description in the agreement for these two platted lots was only by tax parcel number and street address. Ms. Keatley tried to avoid the rule by claiming a tax parcel number satisfies the statute generally, citing *Bingham v. Sherfey*, 38 Wn.2d 886, 889, 234 P.2d 489 (1951). However *Bingham* only pertains to tax parcels for unplatted property, "...is not inconsistent with the rule

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[3] Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

announced in Martin…" Id. at 889, and is inapplicable here. See also *Losh Family, LLC v. Kertsman*, 155 Wn.App. 458, 465, 228 P.3d 793 (2010).

Washington's rule regarding the adequacy of a legal description to satisfy the statute of frauds has been described as "the strictest in the nation." 18 William B. Stoebuck & John W. Weaver, *Washington Practice, Real Estate: Transactions* Sec. 16.3, at 225 (2d. Ed.) Although an extremely strict rule, our Supreme Court follows it and refused to abandon it. *Key Design* 138 Wn.2d at 883 In *Key Design* the court refused to recognize any exceptions or permit reformation. Ibid. at 888 Failure to include a proper legal description makes the agreement unenforceable. Ibid. at 889 An inadequate legal description simply renders the contract void. *Maier v. Giske*, 154 Wa.App. 6, 15, 223 P.3d 1265 (2010) If nothing else, this simple, undeniable, fact is dispositive of this appeal and mandates reversal as a matter of law.

2. The "open-ended purchase option contract", as the court characterized it, Finding Q, CP 399, also constitutes an unreasonable restraint on alienation of property as well as a violation the rule against perpetuities, and is thus void for those reasons as well.

Robroy Land Company, Inc. v. Prather, 95 Wn.2d 66, 622 P.2d 367 (1980) states the rule. That case involved a challenge to a first right of refusal option to purchase land under the rule against perpetuities and the rule against unreasonable restraint of alienation. There the first right of refusal was available to the optionee without time limitation. Although the case at bar does not involve a first right of refusal, the analysis is set forth. Our case involves an option, rather than a first right of refusal. Commenting upon *Robroy*, this Court noted: "*Robroy* acknowledged that the holder of an ordinary option has a greater interest in land than the holder of a right

of first refusal." *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn.App. 900, 910, 146 P.3d 935 (Div. 2, 2006).

The *Robroy* court opined "Both the rule against perpetuities and the rules against restraints upon alienation stem from the general policy against withdrawal of property from commerce and both are judge-made law." *Robroy,* 95 Wn.2d at 69; *quoting Betchard v. Iverson*, 35 Wn.2d 344, 348, 212 P.2d 783 (1949) the court summarized: "The rule against perpetuities prohibits the creation of future estates which, by possibility, may not become vested within a life or lives in being at the time of the testator's death and twenty one years thereafter. *Any limitation of a future interest which violates this rule is void. The purpose of this rule is to prevent the fettering of the marketability of property over long periods of time by indirect restraints upon its alienation.* " (Italics added by *Robroy*)

Of importance here the court made a careful distinction between a right of first refusal which it characterized as a "preemption" and an ordinary option such as the court found here:

> A option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership.

Robroy, 95 Wn.2d at 70, quoting 6 *American Law of Property* Sec. 26.64, at 507 (A. Casner ed. 1952) For the reasons discussed in the opinion our court was unwilling to apply the rule against perpetuities to this preemption, unlike an option. The court also opined the rule against perpetuities might be limited to a reasonable time in a commercial lease where the time for performance was omitted by inadvertence; however here this is *not* a commercial transaction and the court found the parties

intended there be no time limit. And there was no such language regarding an unreasonable restraint on alienation which is discussed below.

> Thus the question before us is whether a fixed price right so fetters alienability that it must be invalidated as an unreasonable restraint on alienability.
>
> A fixed price preemptive right may have a substantial effect on the alienability of land because:
>
> A fixed price is usually set sufficiently low, in the light of possible developments, to enable the designated person to reap the benefits of any increase in value...the owner of the estate will be deterred from attempting to sell his property because of the improbability that he will realize the full market value.

Lawson v. Redmoor Corp. 37 Wn.App. 351, 353-54, 679 P.2d 972 (Div. 1, 1984), quoting *Restatement of Property* Sec. 413, comment *f* at 2444 (1944).

Girard v. Myers, 39 Wn. App. 577, 585, 694 P.2d 678 (1985) concluded even a fixed price preemptive right is an invalid unreasonable restraint on alienation when "it sets no time limit within which the holder must act, it contains no procedural requirements that the holder must follow to exercise the right and it interferes with alienation by requiring an onerous commission or reduction in price." The court opined this restraint should be analyzed under *Restatement of Property* Sec. 413(2)(b) which requires consideration of Sec. 406(c) criteria whether the restraint is "reasonable under the circumstances." *Comment i* details that the restraint is unreasonable if the person imposing the restraint has no interest in the land, the restraint is unlimited in duration or if the number of persons to whom alienation is prohibited is large.

Of course the restraint here is even more unreasonable since it continues without regard to whether there is a purchase offer, i.e. it is a fixed priced option, not

a preemption, it is of unlimited duration, the one imposing the restraint, Keatley, has no interest in the land, and the number of persons to whom alienation is prohibited is everyone in the world besides Keatley.

Also according to *Lawson* a restraint is generally unreasonable when it is unlimited in duration, or prohibits alienation to a large number of persons. *Lawson* at 354, *Restatement of Property* at 2402. Here the "open-ended purchase option contract" was without termination date by design and with a fixed price. It in effect prohibited alienation to anybody but Keatley. See also *Stoebuck*, Ibid, Sec. 1.26 at 51 ("When the restraint is against alienation of a future estate in fee simple and the restraint is capable of lasting until the estate will or may become possessory, it will probably be held void.").

Although the court found Keatley exercised her option within a reasonable time, the validity of the option must be judged on the date of execution of the contract and whether she exercised the option at all, much less when, tells us nothing about whether this contract created an unreasonable restraint on the alienation of land and is thus void by its terms. By its language and as found by the court, the contract was perpetual. See also IV *Restatement of Property* Sec. 406 (1944) , 2407 (restraint on sale of land unreasonable when one imposing restraint has no interest in land, it is unlimited in duration and the number of persons to whom alienation is prohibited is large.).

E. Remaining assignments of error relate to trial court legal conclusions based on assumption of valid contract.

Assuming the contract is void it cannot be breached (Assignment E); nor are damages due for that alleged breach (Assignment F); nor is a party entitled to specific

performance (Assignment G); nor is Keatley the prevailing party (Assignment H); and the resulting judgment is error (Assignment I).

VI. CONCLUSION

The parties failed to enter into a binding enforceable contract. There was no consideration, it lacked material terms, it violated the statute of frauds for want of proper legal description, it is an unreasonable restraint on alienation and violates the rule against perpetuities. The judgment of the trial court should be reversed and the case dismissed.

DATED this 16th day of November, 2015.

GOODSTEIN LAW GROUP PLLC

Richard B. Sanders, WSBA #2813
Attorney for Duane Bruner
Goodstein Law Group PLLC
501 S. G Street
Tacoma, WA 98405
Telephone: 253-779-4000
Email: rsanders@goodsteinlaw.com

EARNEST MONEY RECEIPT AND AGREEMENT

Castle Rock, Washington
March 22, 2005

SANDRA JO KEATLEY (hereinafter called "Purchaser") hereby agrees to purchase, and the undersigned Seller hereby agrees to sell the following described real estate located in Castle Rock, County of Cowlitz, State of Washington, described as:

Parcel# WK2713005 located at 1176 Chapman Road and adjacent Parcel# WK2713007. Total land being approximately 10 acres.

TOTAL PURCHASE PRICE IS: $ 295,000.00 Dollars.

1. Title of Seller is to be free of encumbrances or defects.

2. Earnest Money: Purchaser hereby deposits, and receipt is hereby acknowledged of, ONE THOUSAND ($1,000.00) DOLLARS, evidenced by personal check paid or delivered as earnest money in part payment of the purchase price for the aforedescribed real estate.

On this date, I hereby approve and accept the sale set forth in the above Agreement and acknowledge receipt of a true copy of this Agreement signed by both parties.

[signature] 3-23-05

Duane Bruner Date
Seller

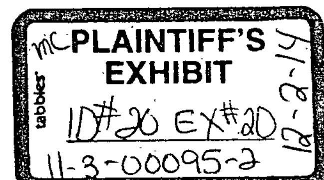
Seller's Address: 1176 Chapman Road, Castle Rock, WA 98611
Seller's Phone: (360) 274-7103

[signature] 3-23-05

Sandra Jo Keatley Date
Purchaser

Purchaser's Address: 6806 West Side Highway, Castle Rock, WA 98611
Purchaser's Phone: (360) 274-5363
Purchaser hereby warrants she is of legal age.

APPENDIX 1



FILED
SUPERIOR COURT

2015 MAR 20 A 9 26

COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK

BY ________

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

SANDRA J. KEATLEY, Plaintiff, v. DUANE BRUNER, Defendant.	No. 11 3 00095 2 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for trial without jury on December 2, 2014. Plaintiff, Sandra Keatley, originally filed this action as the Plaintiff seeking the following relief:

a. Dissolution of Committed Intimate Relationship (CIR);

b. Breach of Contract;

c. Equitable Estoppel; and

d. Quiet Title.

Defendant, Duane Bruner, by way of his answer filed a counterclaim for adverse possession. Bruner also asserted the three-year and six-year statutes of limitation as affirmative defenses.

Keatley's CIR claim was dismissed on summary judgment prior to trial. All other matters were tried before this Court.

APPENDIX 2

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

94

000396 ORIGINAL

Scanned

I. FINDINGS OF FACT

A. From the year 1982 through 2002, Keatley and Bruner were involved in an intimate, familial relationship. During this time, Keatley and Bruner developed the property commonly known as 1176 Chapman Road, Castle Rock, Washington, and more fully described at Exhibits A and B hereto (hereinafter, "the Chapman Road Property"). The Chapman Road Property had been in Keatley's family for many years before Bruner purchased it.

B. Keatley owns the property directly to the north of the Chapman Road Property.

C. When Bruner built the shop on the Chapman Road Property, he did so within one foot of the boundary with the Keatley property. Bruner built the home on the Chapman Road Property close to the boundary as well, extending the fenced backyard across the boundary and onto Keatley's property. He did so with Keatley's permission. Keatley played a large role in the design and placement of the home on the Chapman Road Property.

D. Bruner built a barn on the Chapman Road Property that Keatley used, in conjunction with her property to the north, to run a cattle operation.

E. After the house was built on the Chapman Road Property, Keatley made daily use of the house and barns on the property.

F. On March 23, 2005, Keatley and Bruner co-authored and executed a contract wherein Bruner agreed to sell the Chapman Road Property to Keatley for $295,000.00. Shortly thereafter, Keatley paid Bruner the $1,000.00 in earnest money called for by the contract. Keatley continued to make daily use of the property until October of 2010.

G. The contract contains a legal description by reference and all other essential contract terms.

H. The contract does not contain a date for closing the transaction. Keatley and Bruner left the closing date open for the purpose of allowing Keatley to find financing to purchase the property.

///

///

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Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

1 I. Between March of 2005 and October of 2010, Keatley and Bruner made joint use of the
2 Chapman Road Property. During this time, Keatley inquired at least every three months
3 with Bruner regarding his desire and/or need to close on the March 2005 contract. Bruner
4 repeatedly assured Keatley that he was in no hurry and that there was no need to close the
5 sale.
6 J. Keatley relied on these assurances and continued to use the property under the assumption
7 that Bruner would sell it to her pursuant to the contract.
8 K. In October of 2010, Keatley demanded closing and Bruner refused, claiming for the first
9 time that the contract had expired.
10 L. Keatley commenced this action in February of 2011.
11 M. This was a long term relationship of twenty years, and things were done in a loose manner
12 without involving attorneys. These were both business people that had both purchased
13 property. Given the lack of a closing date, the Court will infer a "reasonable amount of
14 time" for closing and, under the circumstances of this case, Keatley's demand for closing in
15 October of 2010 was within a reasonable amount of time.
16 N. Bruner has taken the position that Keatley's right to close had expired due to the passage of
17 time despite his prior assurances that Keatley could wait to close the transaction. Had
18 Bruner demanded closing sooner, Keatley would have purchased the property. Allowing
19 Bruner to change position would harm Keatley in that it would undermine her right to
20 purchase the Chapman Road Property under the terms of the contract.
21 O. The Chapman Road Property has a fair market value of $500,000.00
22 P. The Chapman Road Property is unique to Keatley given its proximity to her property, her
23 familial connection to the property, her long-term use of the property, and the role she
24 played in designing the buildings constructed on the property.
25 Q. The contract was drafted by Plaintiff and Defendant without the help of attorneys. Although
26 they entitled the contract as an "Earnest Money Receipt and Agreement," the lack of a

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closing date, the uncontroverted testimony that the date was left open intentionally to allow Plaintiff time to finance the purchase of the property, and the parties' actions post-execution, establish that they intended to create an open-ended purchase option contract.

R. The Plaintiff is a business woman with substantial assets, business acumen, and financial support. But for Defendant's repeated assurances, Plaintiff would have and could have marshaled her assets to purchase the property for $295,000.00, a price that was $205,000.00 below its fair market value as admitted by Defendant. It would have been futile, costly, ~~and~~ and to apply for a commercial or private loan and inappropriate ~~with regard to applying for a commercial or private loan, dishonest,~~ to take the necessary measures to actually secure $295,000.00 in cash in October of 2010 given Defendant's unequivocal refusal to sell the property from the very moment Plaintiff demanded closing through the following four and a half years of litigation.

II. CONCLUSIONS OF LAW

A. Bruner and Keatley entered into an enforceable written agreement under which Keatley would purchase and Bruner would sell the Chapman Road Property for $295,000.00.

B. Bruner breached this contract in October of 2010.

C. The six-year statute of limitations under RCW 4.16.040 applies to Keatley's breach of contract claim. This action was commenced with four months of the date of breach and, therefore, Keatley's claims are timely.

D. Keatley demanded closing within a reasonable amount of time under the circumstances and, even so, Bruner is equitably estopped from claiming that Keatley waited too long to demand closing.

E. Under *McFerran v. Heroux,* 44 Wn.2d 631, 269 P.2d 815 (1954), Defendant bore the burden of proving that Plaintiff had the inability to close on the purchase of the Chapman Road property. Defendant failed to meet his burden. To the contrary, Plaintiff proved by a preponderance of the evidence that she had the ability to close on the purchase of the property and would have done so but for Defendant's repudiation of the contract. As such,

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were the court to apply *Carlson v. Leonardo Truck Lines, Inc.*, 13 Wn.App. 795, 538 P.2d 130 (1975), and place the burden of proof on the Plaintiff, she would meet her burden under the evidence in the record.

F. Keatley's breach of contract damages are $205,000.00 plus prejudgment interest at the statutory rate. These damages are inadequate given this property's uniqueness to Keatley.

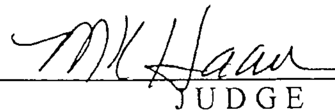
G. Bruner shall convey the Chapman Road Property, free and clear of all encumbrances, to Keatley, in exchange for $295,000.00 not later than one hundred twenty days from the date final judgment is entered.

H. Bruner shall maintain the property in its current condition pending sale to Keatley.

I. Bruner has proven none of the elements of adverse possession and title to all property lying north of the legally described northern boundary of the Chapman Road Property is quieted in Keatley and Bruner is ejected from the same.

J. Keatley is the prevailing party in this action and is entitled to statutory attorney fees and costs.

Dated: March 20th, 2015.



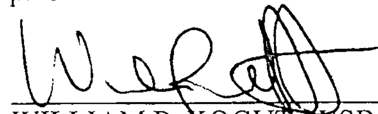
JUDGE

Presented by:

MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Plaintiff

Dated: March 20, 2015

Approved as to form and notice of presentation waived:



WILLIAM P. KOGUT, WSBA #14992
Of Attorneys for Defendant

Dated: March 20, 2015

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

Cowlitz Co... Assessor's Parcel Search

Parcel: WK2713005 Site Address: 1176 CHAPMAN RD , CASTLE ROCK 98611

1/5/2015 11:45 AM

Account: R016063

Owner: BRUNER DUANE R
Mailing Address: 1176 CHAPMAN RD
CASTLE ROCK, WA 98611

Jurisdiction: COWLITZ COUNTY

Abbr Property Ref: SECT,TWN,RNG:27-10N-2W DESC: T-13D EXC RD R/W FEE 771223 EXC ESMT TO COUNT Y FEE 840402038 EXC T-8A-6,13D-1 OWN SEG 1071 PARCEL: WK2713005

Neighborhood: 66 - WK NORTH OF RIVER

Tax District: 650 Castle Rock (Rural/Outlying Area)

Levy Code: 650 = R-401-LV-#6-C1

Current Assessed Value

Assess Year	Tax Year	Type	Actual Value	Assess Value	Acres
2014	2015	IMPROVEMENTS	229,200	229,200	0
2014	2015	LAND	38,850	38,850	5

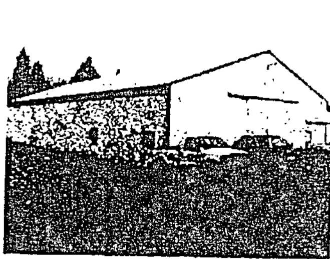
Conveyance History:

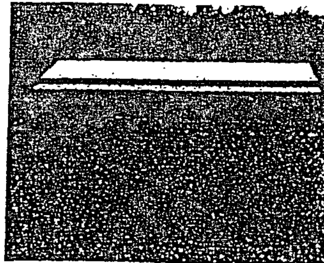
Reception	Book	Page	Grantor
860402016	1000	351	DUDONSKY RICHARD H GUARDIAN D
930105033	1136	702	BRUNER DUANE R
1071			BRUNER DUANE

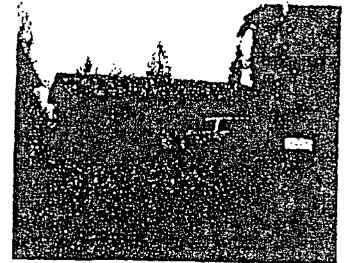
Property Details: Short Plat/Large Lot #:

Model	Floor	Sq Ft
Model: DET_GAR_WD	FIRST	960
Model: SFR	FIRST	2026

Photographs:







Disclaimer: Neither Cowlitz County nor the Assessor/Treasurer warrants the accuracy, reliability or timeliness of any information in this system, and shall not be held liable for losses caused by using this information. Portions of this information may not be current or accurate. Any person or entity who relies on any information obtained from this system, does so at their own risk. All critical information should be independently verified.

Ex. A

Cowlitz Co[illegible] Assessor's Parcel Search

Parcel: WK2713007 Site Address:

1/5/2015 11:46 AM

Account: R050033

Owner: BRUNER DUANE R

Mailing Address: 1176 CHAPMAN RD
CASTLE ROCK, WA 98611

Jurisdiction: COWLITZ COUNTY

Abbr Property Ref: SECT,TWN,RNG:27-10N-2W DESC: T-8A-6,13D-1 PARCEL: WK2713007

Neighborhood: 66 - WK NORTH OF RIVER

Tax District: 650 Castle Rock (Rural/Outlying Area)

Levy Code: 650 = R-401-LV-#6-C1

Current Assessed Value

Assess Year	Tax Year	Type	Actual Value	Assess Value	Acres
2014	2015	LAND	40,430	40,430	5.17

Conveyance History:

Reception	Book	Page	Grantor
930405033	1136	702	

Property Details: Short Plat/Large Lot #:

Photographs:

Disclaimer: Neither Cowlitz County nor the Assessor/Treasurer warrants the accuracy, reliability or timeliness of any information in this system, and shall not be held liable for losses caused by using this information. Portions of this information may not be current or accurate. Any person or entity who relies on any information obtained from this system, does so at their own risk. All critical information should be independently verified.

 Ex. B

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDRA J. KEATLEY, Plaintiff, vs. DUANE BRUNER, Defendant.	No. 47646-1-II DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. APPELLANT'S OPENING BRIEF

was served on November 16, 2015 on the following parties and in the manner indicated below:

Matthew J. Andersen
Walstead Mertsching PS
PO Box 1549
Longview, WA 98632-7634
Email: mjandersen@walstead.com

[X] by United States First Class Mail
[X] by Electronic Mail
[ ] by ABC Delivery

FILED
COURT OF APPEALS
DIVISION II
2015 NOV 16 PM 3:42
STATE OF WASHINGTON
BY ______
DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of November 2015 at Tacoma, Washington.

Deena Pinckney, Legal Assistant

ORIGINAL