

FILED
SUPREME COURT
STATE OF WASHINGTON
7/12/2022 12:10 PM
BY ERIN L. LENNON
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No. 100932-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WOODBURN INDUSTRIAL CAPITAL GROUP, LLC,
an Oregon limited liability company,

Appellant,

v.

ROBERT J. PLUMMER, SR., an individual, and
ROBERT PLUMMER, JR., an individual,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The issue raised in the petition for review was decided by this Court 71 years ago. The Court of Appeals applied this Court's well-established precedent stating that a tax assessor's parcel number contained in a real property transfer writing is sufficient to satisfy the statute of frauds. That same precedent also held that when a tax parcel number is accompanied by an ambiguous legal description, the tax parcel number is sufficient and the ambiguous language is "surplusage." Review should be denied.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. When a real property transfer agreement contains a tax parcel number, is the statute of frauds satisfied?

2. If, in a real property transfer agreement, the tax parcel number is accompanied by ambiguous language about the legal description, is the statute of frauds still satisfied because the property can be accurately identified and the ambiguous language is mere surplusage?

III. STATEMENT OF THE CASE

Woodburn Industrial Capital Group (Woodburn) offered to buy Plummer Sr.'s (Plummer) property by sending him a purchase and sales agreement (PSA). Petition Appx. A. at 1. The PSA was a standard form of contract. CP 46-65. It contained numerous preprinted provisions that had blanks to be filled in and checkboxes to mark. *Id.* It also contained the tax parcel number of the property, and language incorporating by reference the legal description “provided in the Preliminary Report (described in Section 5)...”. CP 47.

The PSA also included an offer deadline, and Plummer failed to sign the PSA by the deadline. *Id.* After the deadline had passed, Woodburn and Plummer continued to communicate regarding the offer, and Woodburn extended the deadline during a phone conversation. *Id.* Plummer signed and returned the PSA without modifying any terms. *Id.*

A few weeks later, Plummer attempted to escape the contract by sending Woodburn a letter indicating that by affixing his signature to the PSA Woodburn had already signed, Plummer was intending the PSA to be a counteroffer, not an acceptance. *Id.* He then said that he was revoking the “counteroffer.” *Id.*

Woodburn sued for specific performance; both parties moved for summary judgment. *Id.* Woodburn argued that the undisputed facts reflected mutual assent to the PSA. CP 31-38. Plummer argued that the PSA both parties signed was merely a revoked counteroffer, and that the PSA did not comply with the statute of frauds. CP 106.

In response to Plummer’s allegation that the legal description could not be ascertained without resort to oral testimony, Woodburn pointed to (1) the PSA’s inclusion of the tax parcel number, (2) the PSA’s reference by incorporation of the legal description contained in the title report, and (3) the

undisputed fact that the tax parcel number and title report both contained the accurate legal description. CP 145-146.

The superior court granted summary judgment to Plummer. Petition Appx. A. at 1.

Woodburn appealed, arguing that when Plummer signed the PSA a valid contract was formed. *Id.* Woodburn also argued that the PSA listed both a tax parcel number and referred to the related title report, both of which provided a legal description that satisfied the statute of frauds. *Id.*

Regarding the statute of frauds issue, Plummer responded by conceding that including a tax parcel number in a PSA satisfies the statute of frauds. *Id.* at *3. However, he argued that in this case, the tax parcel number was somehow “negated” by the inclusion of the phrase “Legal Description to be determined in Escrow.” *Id.*

In an unpublished opinion, the Court of Appeals reversed. *Id.* at *1. The panel rejected Woodburn’s renewed request for

summary judgment on the issue of mutual assent. *Id.* Instead, the panel determined there was a genuine disputed issue of material fact on mutual assent.¹ *Id.* at *3.

On the statute of frauds issue, the Court of Appeals concluded that the tax parcel number satisfied the statute's requirements and rejected Plummer's argument that a placeholder phrase could "negate" the tax parcel number. *Id.*

Although he moved for reconsideration, Woodburn did not move to publish the opinion. He then filed his petition for review, arguing that the unpublished opinion conflicts with this Court's precedent regarding legal descriptions and the statute of frauds.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Plummer's petition for review advances the statute of frauds argument that he made to the Court of Appeals: that the

¹ Woodburn disagrees with the Court of Appeals that there is any dispute of *material* fact regarding mutual assent. However, that issue is not raised in Plummer's petition for review, and Woodburn does not see a proper basis under RAP 13.4(b) to petition this Court for review on that issue.

undisputedly accurate legal description referenced in the tax parcel number was “negated” by the subsequent phrase “Legal Description to be determined in Escrow.” Petition 11-12. He avers that the phrase renders the undisputedly accurate legal description attached to the tax parcel number ambiguous. *Id.* He argues that the law demands oral testimony to determine *why* the phrase “Legal Description to be determined in Escrow” was included. 10-11. He argues that the Court of Appeals’ decision conflicts with this Court’s decision in *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1951).

A. As explained in this Court’s long-standing precedent, the statute of frauds simply requires that a land transfer writing provide the means to ascertain the legal description without resort to oral testimony. A tax parcel number satisfies that requirement and reference to a related document containing the legal description both satisfy that requirement.

The statute of frauds states that: “Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by

deed...” RCW 64.04.010. In Washington, a writing with no legal description complies with the statute of frauds if the writing “contain[s] a description sufficient to locate the land without recourse to oral testimony or contain[s] a reference to another instrument that does contain a sufficient description.” *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960).

A tax assessor’s parcel number has long been held as a sufficient description to locate land and in compliance with the statute of frauds. *Bingham v. Sherfey*, 38 Wn.2d 886, 889, 234 P.2d 489 (1951) (reference to tax parcel number furnished the legal description with sufficient definiteness and certainty to meet the requirements of the statute of frauds); see also, *Turpen v. Johnson*, 26 Wn.2d 716, 719, 175 P.2d 495 (1946) (Carried as Assessor’s Tax Lot No. 22 of Niels Hendrichsen D.L.C. deemed sufficient legal description for purposes of tax foreclosure); *City of Centralia v. Miller*, 31 Wn.2d 417, 427, 197 P.2d 244 (1948)

(Property sufficiently described when tax lot numbers and general locality of realty was given).

In *Bingham*, this Court reversed the trial court's dismissal for lack of a sufficient legal description in the plaintiff's action for specific performance of a written option for purchase of real property. *Bingham*, 38 Wn.2d at 889. In overturning the trial court's dismissal, the Court found that a description by tax lot number is sanctioned by statute requiring assessors to assign designated tax numbers that refer to the legal description of record in the auditor's office. *Id.* at 888. The relevant statute provided:

that the assessor shall give to each tract of land where described by metes and bounds a number, to be designated as Tax No. ____, which said number shall be placed on the tax-rolls to indicate, that certain piece of real property bearing such number, and described by metes and bounds in the plat and description book herein mentioned...

Id.; Rem.Rev.Stat. § 11137.

Finding it to be consistent with the rule announced in *Martin v Seigel*, 35 Wash.2d 223, 229, 212 P.2d 107 (1949), the *Bingham* court held:

Oral testimony is not necessary to determine the exact legal description of the land upon which the minds of the parties met...a reference to this public record furnishes the legal description of the real property involved with sufficient definiteness and certainty to meet the requirements of the statute of frauds.

Id. at 889.

Here, the PSA contained both an accurate tax parcel number and a reference to the preliminary title report. The Court of Appeals ruled that the statute of frauds was satisfied. Petition Appx. 5. The ruling correctly applies this Court's precedent.

B. This Court's *Bingham* decision held that the statute of frauds is satisfied even when a tax parcel number is followed by an ambiguous legal description. The ambiguous subsequent language is simply "surplusage".

In *Bingham*, the real property option contract contained a reference to the tax parcel number, followed by an ambiguous

recitation of the legal description. *Bingham*, 38 Wn.2d at 887. The legal description recited in the agreement was ambiguous for two reasons. First, it included no meridian. *Id.* The Court was required to ascertain the meridian by deductive reasoning and resort to judicial notice. Second, it excluded from the description “tracts of land heretofore sold” to third parties, without identifying those tracts specifically. *Id.*

Despite the erroneous legal description contained in the agreement itself, this Court in *Bingham* did not hold that an ambiguous legal description “negated” the legal description associated with the tax parcel number. Nor did the *Bingham* court rule that the erroneous legal description rendered the issue of the correct legal description “ambiguous.”

Instead, this Court held that reference to the tax parcel number was sufficient to ascertain the correct legal description, and ignored the erroneous and ambiguous legal description in the agreement as “surplusage.” *Id.* at 888

In fact, the *Bingham* decision specifically rejected the argument that Plummer advances in favor of review. The trial court in *Bingham* ruled that the uncertainty created by the “indefinite and uncertain” legal description in the agreement violated the statute of frauds, despite the inclusion of the tax parcel number. *Id.* at 887. This Court reversed, holding: “In view of our holding on the sufficiency of the first part of the description [i.e., the tax parcel number], it is not necessary for us to pass upon the sufficiency of the second.” *Id.* at 888.

Bingham recognized that reference to the tax parcel number “in effect” incorporates “the system of recorded instruments of a county auditor.” 18 WILLIAM B. STOEBUCK AND JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 13.3, at 83 (2004). Reference to the tax parcel number “is truly an exception to the strict rule that the description must be found within the four corners of the instrument, for one has to search at least the assessor's records,

and perhaps also the auditor's, to obtain the legal description.”

Id.

Plummer’s petition mischaracterizes *Bingham*. Petition 9. Plummer claims that in *Bingham*, this Court “held that reference to a tax parcel *by itself* may satisfy the statute of frauds where the addition of subsequent descriptive language ‘neither takes from, nor adds to, the tax title reference.’ ” *Id.* (emphasis in original) (quoting *Bingham*, 38 Wn.2d at 888). Plummer suggests that the tax parcel number here cannot provide the legal description because it was accompanied by a phrase suggesting Woodburn thought the legal description was somehow in dispute and needed to be “determined.”²

Again, *Bingham* does not so hold. In fact, *Bingham* cited prior precedent of this Court holding that even an *erroneous and*

² It is possible that the phrase was simply a placeholder that should have been deleted. However, it is undisputed that the tax parcel number here provides an accurate legal description of the subject property.

contradictory legal description in a PSA does not “negate” the effectiveness of a legal description attached to a tax parcel number. *Bingham*, 38 Wn.2d at 888, citing *Turpen v. Johnson*, 26 Wn.2d 716, 720, 175 P.2d 495 (1946). In *Turpen*, the tax parcel number was included in the sale agreement but was followed by an inaccurate metes and bounds description. *Turpen*, 26 Wn.2d at 720. This Court, rather than holding that this created an improper “ambiguity,” simply dismissed the inaccurate legal description in the document as “clerical inadvertence” and held that inclusion of the tax parcel number meant “the actual land in controversy is definitely traceable and accurately described...”. *Id.* at 719-720.

The Court of Appeals’ decision is precisely in line with *Bingham*, holding that the tax parcel number satisfies the statute of frauds regardless of any ambiguous subsequent language. The phrase “Legal description to be determined in escrow” is

mere “surplusage” and in no way “negates” the legal description associated with the tax parcel number.

C. There is no need to resort to oral testimony to ascertain the legal description. It is contained in the tax records and title report, both of which are incorporated by reference in the PSA as required by Washington law.

Plummer argues that this Court should take review because the legal description of the subject property cannot be ascertained without calling Woodburn’s representative to inquire as to what the phrase “Legal Description to be determined in Escrow” means. Petition at 11.

Plummer’s argument is a straw man. There is no dispute that the tax parcel number and title report contain the correct legal description. Asking the meaning of a phrase that, under *Bingham*, is mere “surplusage,” is not necessary to determine the subject property’s legal description.

It is “well established” in this Court’s precedent that the statute of frauds is satisfied if “a person of ordinary intelligence

and understanding can successfully use the description in an attempt to locate and identify the particular property sought to be conveyed”. *Ontario Land Co. v. Yordy*, 44 Wash. 239, 243, 87 P. 257 (1906).

In addition to listing tax parcel numbers this Court permits incorporation of other documents by reference into a contract. *Wash. State Major League Baseball Stadium Pub. Facilities v. Huber*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013) (“In general, ‘[i]f the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.”)) (quoting *Satomi Owners Ass’n v. Satomi LLC*, 167 Wn.2d 781, 801, 225 P.3d 213 (2009); *W. Wash. Corp. of Seventh Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (“Incorporation by reference allows the parties to ‘incorporate contractual terms by reference to a separate... agreement to which they are not parties, and including a separate document which is unsigned.”))

(quoting 11 Williston on Contracts § 30:25, at 233-34 (4th ed. 1999)).

Indeed, this Court and lower courts have noted that the doctrine of incorporation by reference does not require that the document referred to actually be attached to the contract. *Grant v. Auvil*, 39 Wash.2d 722, 724–25, 238 P.2d 393 (1951); *Knight v. Am. Nat'l Bank*, 52 Wn. App. 1, 4-6, 756 P.2d 757 (1988) (finding that the lease complied with statute of frauds even though the two exhibits to which it referred, and which contained the legal description, were not physically attached to the lease itself).

Here, not only did inclusion of the tax parcel number satisfy this rule, but the PSA incorporated by reference the subsequent title report, which also lists the correct property description. CP 46-65. There is no need for a court to hear oral testimony to identify the subject property.

D. Should Woodburn prevail on remand, the trial court should include its award of reasonable attorney fees and costs incurred on appeal, including for preparing this Answer.

Attorney fees and expenses may be awarded to a party or preparation and filing of its answer to an unsuccessful petition for review. RAP 18.1(j). If the Court of Appeals awarded fees, then this Court (1) decides whether fees should be awarded under this provision, (2) includes that decision in its ruling denying review, and (3) determines the amount of those fees and expenses. *Id.*

However, both the Court of Appeals and this Court are empowered direct that the trial court determine the amount of fees and expenses on remand. RAP 18.1(i); *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 70, 109 P.3d 405 (2005).

Here, the PSA at issue contains a prevailing party attorney fee provision. CP 12. The Court of Appeals did not award attorney fees to Woodburn, because Woodburn must first prevail on remand to be a “prevailing party.”

Woodburn respectfully requests that, in its ruling denying review, this Court should indicate that Woodburn is entitled to attorney fees and expenses incurred in answering Plummer's petition, if Woodburn prevails on remand. RAP 18.1(j). This Court should direct the trial court to determine the amount of those fees and expenses after remand. RAP 18.1(i).

V. CONCLUSION

The petition offers no basis for this Court to take review. The Court of Appeals' decision was exactly in line with this Court's long-standing precedent on the statute of frauds. Review should be denied, and in the event Woodburn prevails on remand, the superior court should award attorney fees for responding to Plummer's petition.

This document contains 2814 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 12th day of July, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 12th day of July, 2022.

/s/ Patti Saiden

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

July 12, 2022 - 12:10 PM

Transmittal Information

Filed with Court: Supreme Court
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Superior Court Case Number: 19-2-10262-0

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