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No. 63422-4

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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FF REALTY LLC,

Appellant,

v.

KIMSCHOTT FACTORIA MALL, LLC,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

In its Respondent's Brief, Kimschott seeks to turn the traditional summary judgment standards upside down by arguing that FF Realty failed to prove its case in its opposition papers. To the contrary, Kimschott had the burden of proving there are no genuine issues of material fact. It offered virtually no evidence — and conspicuously no testimony from a single percipient witness. As a matter of law, Kimschott failed in its burden and summary judgment must be reversed.

Among other things, Kimschott attacks FF Realty for not offering any evidence establishing that Kimschott failed to use commercially reasonable efforts to secure the REA Amendment. But, as shown in the opening brief, that argument is factually incorrect and the record shows substantial evidence of Kimschott's failure to use reasonable efforts to secure the amendment. This evidence alone is enough to establish a material issue of fact.

What is more, Kimschott brushes past its own failure to offer any evidence whatsoever proving that it did use commercially reasonable efforts to secure the Amendment to the REA. Kimschott filed the motion for summary judgment, so it had the burden of showing there are no triable issues of fact. Yet, Kimschott put forth no deposition testimony or affidavits establishing that it used commercially reasonable efforts, and,

tellingly, its Respondent's Brief does not point to anything in the record showing there are no issues of material fact. These omissions are fatal to Kimschott's motion, and lay bare the trial court's fundamental error (and further explain why the trial court was unable to offer any explanation for its ruling). In addition, because the use of commercially reasonable efforts is virtually always a factual issue for the trier of fact, Kimschott does not even come close to meeting its burden in moving for summary judgment.

But, Kimschott does not stop there and butchers the summary judgment standard even further. For example, Kimschott argues, for the first time on appeal, that, in opposing a summary judgment motion, that *even if* Kimschott did not use commercially reasonable efforts, FF Realty must nevertheless prove that the Amendment would have been executed had Kimschott used such reasonable efforts. There is absolutely no legal authority for imposing such a burden on FF Realty. And, even if such a burden existed, Kimschott failed to point to any evidence in the record showing there are no disputed issues of fact on this point. In fact, all evidence points in a different direction, as Target expressed a willingness to help resolve the one outstanding condition to recording the Amendment to the REA. Unfortunately, Kimschott never responded to Target's offer and we know why — Kimschott wanted to blow the deal up because it

was re-evaluating the economics; thus, it withdrew its signature from escrow, the antithesis of commercially reasonable efforts.

Kimschott also erroneously argues, again, for the first time on appeal, that FF Realty, in opposition to the motion, must prove that all of the parties to the Amendment to the REA are still willing to sign the Amendment. Again, there is no legal authority supporting this position, and notably, Kimschott never put forth any evidence in its summary judgment motion showing that any party is no longer willing to sign the Amendment to the REA.

Furthermore, Kimschott virtually ignores all of the contract interpretation issues FF Realty raised on appeal. Thus, in an about-face, despite premising its entire motion on the ground that the purchase agreement terminated on October 31, 2008, on appeal, Kimschott now argues that the contract termination date is irrelevant. Quite simply, the Superior Court could not have granted summary judgment without deciding that the agreement unequivocally terminated on October 31, 2008. But, there are substantial disputed issues concerning the interpretation of the key provisions of the agreement.

Kimschott further argues that the points FF Realty raised in opposition to summary judgment are outside of the pleadings. This is yet another argument that Kimschott is raising for the first time on appeal, and

for that reason alone, should be rejected. Kimschott's argument is also factually and legally incorrect. All of FF Realty's arguments fall within the scope of the pleadings, and the case law Kimschott cites in support of its argument is easily distinguishable.

Kimschott also mischaracterizes FF Realty's forfeiture argument. Kimschott contends, in misdirection, that FF Realty is somehow trying to add new claims for forfeiture or money damages. FF Realty has not and is not asserting new claims. It is seeking, and has always sought, specific performance which is expressly authorized under the parties' agreement.

Lastly, the Superior Court erred in failing to allow FF Realty a minimal continuance in order to take some discovery.

Granting summary judgment in this case was therefore entirely inappropriate, and this Court should reverse and remand the case for trial.

## II. ARGUMENT

### A. **Kimschott Failed To Carry Its Burden To Prove That It Used Commercially Reasonable Efforts To Have The Amendment To The REA Executed**

#### 1. **Kimschott Offers No Evidence Establishing, Beyond Dispute, That It Used Commercially Reasonable Efforts To Secure The Amendment To The REA**

To state the obvious, in a summary judgment proceeding, the moving party bears the initial burden of showing the absence of material facts. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182

(1989). “If the moving party fails to sustain this burden, it is unnecessary for the non moving parties to submit affidavits or other materials.” *Hash v. Children’s Orthopedic Hospital*, 49 Wn. App. 130, 132, 741 P.2d 584 (1987) (emphasis added).

Kimschott failed to meet this basic and fundamental burden. It submitted no direct witness testimony, nor any expert testimony, to demonstrate that it had used commercially reasonable efforts to gain final approval of the REA Amendment. Despite this lack of evidence, Kimschott argues that the trial court had “ample” evidence to show that it used commercially reasonable efforts to secure the amendment. Brief of Respondent at 22-25) This is simply not true. The only “evidence” Kimschott puts forth is the fact that it was able to get most of the parties to sign off on the REA Amendment. (*Id.* at 22) But, even if incomplete performance could create an inference that Kimschott used commercially reasonable efforts — and Kimschott cites no legal authority suggesting it would — it certainly cannot be enough to show there are no genuine issues of material fact, particularly because all inferences must be made in favor of the non-moving party.

Additional evidence in the record further contradicts Kimschott’s argument that it used commercially reasonable efforts to secure the REA

Amendment. For example, Mark Faulkner of FF Realty communicated the following to Kimschott on September 30, 2008:

“I just got off the phone with Greg and walked him through our deal and shared with him our commitment extension (*sic.*) with Pac Life. He said he is finalizing his decision this week and will get back to me as soon as he has approval by his group. ***He made it clear that Target is not opposed to the Fairfield closing and wants to know what he needs to do to assist us to get our deal closed. . .***”

(CP 250; emphasis added.) Kimschott took no action whatsoever to act on Target’s offer to help close the FF Realty deal, *a fact that to this day is undisputed in the record.*

Kimschott argues that it never subsequently approached Target in an attempt to secure the REA Amendment because, in early October, Target informed all parties that it would not revisit the issue for six months. (Brief of Respondent at 23.) But, there is no such statement from Target in the record. It should therefore be discarded. *Ferencak v. Department of Labor & Industries*, 142 Wn. App. 713, 175 P.3d 1109 (2008) (Court declined to consider facts and argument unsupported by citation to the record; citing RAP 10.3).

Kimschott also tries to explain away its failure to use commercially reasonable efforts to secure the REA Amendment because it would have had to deal with “big companies” (Brief of Respondent at 23.) Neither law, nor logic, recognize a “big company” exemption from the duty to use commercially reasonable efforts. Nor does the agreement create any such exemption. In fact, one would assume that “big companies,” more so than small companies, have more resources to get things done.

Add to this analysis the well-settled rule that whether a person used commercially reasonable efforts is a question of fact to be determined by the trier of fact, unless reasonable minds could not differ on the issue. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *see also Security State Bank v. Burk*, 100 Wn. App. 94, 101, 995 P.2d 1272, 1277 (2000) (holding that issue of commercial reasonableness can only be determined as a matter of law in the “clearest of cases.”). On the facts above, there is simply no way the Superior Court could have rightly found that this issue was beyond dispute, particularly in light of another basic tenet of summary judgment motions that all reasonable inferences must be found in favor of the non-moving party – FF Realty. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 565 P.2d 1224 (1977). The clarity and weight of this rule of law stand in stark contrast

to Kimschott's failure to offer any evidence and the trial court's unwillingness to explain its ruling.

**2. FF Realty Does Not Have To Prove What Would Have Happened Had Kimschott Used Commercially Reasonable Efforts To Secure The Amendment To The REA**

In an apparent attempt to justify its lack of evidence, Kimschott further argues that a determination as to whether it used commercially reasonable efforts is unnecessary until there is evidence in the record to support a finding that obtaining the REA Amendment was possible through commercially reasonable efforts. (Brief of Respondent at 20.) As an initial matter, this argument completely ignores Target's statement that it had no opposition to the FF Realty transaction and wanted to know what it could do to help that transaction close. That fact alone destroys Kimschott's entire argument.

Furthermore, Kimschott never raised this issue in its motion, and therefore, it cannot be a basis for summary judgment. *See Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613, 615 (1993) ("A party moving for summary judgment must raise, in its opening memorandum, all the issues on which it believes it is entitled to summary judgment."). Kimschott is likewise barred from asserting an entirely new claim for the first time on appeal. *See Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App.

290, 299, 38 P.3d 1024, 1029 (2002) (refusing to consider argument in support of motion for summary judgment that was not raised before the trial court).

Nor does Kimschott point to any evidence in the record showing that it would have been impossible to secure the REA Amendment through commercially reasonable efforts. Again, there is no testimony from Target or Safeway to this effect, nor are there any documents supporting this position. Without evidence, Kimschott is not entitled to summary judgment. In fact, the only pertinent “evidence” is that Kimschott had a motive for wanting the deal not to close, a motive which inspired it to not use commercially reasonable efforts.

The only reasonable inference as to why Kimschott ignored Target’s offer to accommodate the FF Realty closing can be found in Kimschott’s own e-mail of September 24, 2008. (CP 246, and a copy of the same document, CP 452, is attached as Exhibit C to Brief of Appellant.) “With respect to the *overall Investment Return for Kimschott, the economics require* concurrent documentation, recordation and execution of *all stakeholder programs*.” In other words, it was not in Kimschott’s economic interest to do anything to help close the FF Realty deal.

After acknowledging its overriding interest in its own “Investment Return,” Kimschott then compounds the matter by engaging in dishonesty and bad faith, rather than commercially reasonable efforts. Kimschott asks everyone – during this period of delay that Kimschott itself supports – to maintain their documents in escrow. “In the meantime, *my request (hope) is that all stakeholders maintain their documents in escrow as currently submitted* in an effort to close the concurrent transactions by mid October.” (CP 246; emphasis added.) Yet, six days before, Kimschott itself had instructed the escrow agent to withhold Kimschott’s own signature and to conceal this information from the other parties, including FF Realty. “[O]ur client has asked us to hold his signature pages until we are ready to do so. *We hereby request that you regard this request as confidential and that you do not disclose this request/action to the other parties.*” (CP 411, Exhibit B to Brief of Appellant; emphasis added.)

In addition, none of the cases Kimschott cites remotely support its contention that, in opposition to a summary judgment motion where the issue was never raised, FF Realty must prove that the REA Amendment would have been executed had Kimschott used commercially reasonable efforts. For example, Kimschott cites *Egbert v. Way*, 15 Wn. App. 76, 546 P.2d 1246 (1976). But there, the court reversed a summary judgment

denying specific performance where the seller breached the agreement by failing to use good faith efforts to clear title to her property. In so holding, the court expressly prohibited what Kimschott is trying to do here, that is, use the effect of its own breach as a means to deny specific performance.

Kimschott also cites *Langston v. Huffacker*, 36 Wn. App. 779, 678 P.2d 1265 (1984), which is another case where the appellate court reversed a denial of specific performance. That case, however, was decided after a court trial, and says nothing about a plaintiff's obligation in opposing summary judgment. Moreover, *Langston* confirms the rule set forth in *Egbert* that a seller cannot defeat a claim of specific performance by relying on its own failure to perform under the contract.

The other two cases cited by Kimschott: *B.A. Van de Grift, Inc. v. Skagit County*, 59 Wn. App. 545, 800 P.2d 375 (1990) and *Pacific Northwest Shooting Park Assn. v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006) are way off point. *Van de Grift* involved a claim against Skagit County to force it to accept the plaintiff as the successor contractor to road work. Van de Grift was an unlicensed contractor and thus ineligible for the work. No set of facts could overcome the basic fact that he was unlicensed and therefore summary judgment was granted. The facts in *Van de Grift* are nothing like those presented here.

Likewise, in *Shooting Park*, the court affirmed a summary judgment in favor of the city on a tortious interference claim. Again, the facts there are completely inapposite. Moreover, the *Shooting Park* court confirmed one of the basic rules of summary judgment law — where a party seeks summary judgment by alleging that the nonmoving party failed to present sufficient evidence to support its claim, as Kimschott is doing here — the moving party “must identify those portions of the record, together with affidavits, if any, which demonstrate the absence of a genuine issue of material fact.” *Id.* at 351, 144 P.3d at 280 (citations omitted) As such, rather than helping Kimschott, this case only serves to emphasize the fundamental flaw in its summary judgment motion.

**3. Kimschott Cannot Obtain Summary Judgment Based On Speculation That The Amendment Is No Longer Possible**

As a corollary to the prior argument, Kimschott also argues that it is entitled to summary judgment because FF Realty has not produced evidence proving that an Amendment to the REA will still be possible after a trial on the merits. (Brief of Respondent at 22). As before, however, this argument was never raised in the Superior Court and Kimschott cannot, therefore, raise it for the first time on appeal. *See Sorrel, supra*, 110 Wn. App. at 299, 38 P.3d at 1029.

Also like the previous argument, Kimschott is necessarily turning the summary judgment standards on their head. Kimschott moved for summary judgment; and therefore, it had the initial burden of identifying those portions of the record that prove that the Amendment to the REA is now impossible. Kimschott does not cite any evidence, and instead, relies entirely on speculation and conjecture. For example, it cites J.P. Morgan Chase's acquisition of Washington Mutual, then queries whether Chase will sign the Amendment to the REA. There is no evidence cited, nor does Kimschott cite any reason why Chase would not sign the Amendment to the REA. At best, this is something that should be decided by the trier of fact after hearing all of the evidence.

Finally, also like the previous argument, there is absolutely no legal authority cited that remotely supports Kimschott's position. For all of these reasons, Kimschott's new arguments should be rejected.

**B. The Superior Court Erred In Finding The Agreement Automatically Terminated On October 31, 2008**

Section 4(b) of the First Amendment to the Purchase and Sale Agreement allows FF Realty to elect a liquidated damages remedy of \$200,000 or automatically extend the closing for 15 days after the REA Amendment becomes final. (CP 42, Exhibit A to Brief of Appellant.) Kimschott produced no evidence at the trial court to contradict the

testimony of Mark Faulkner, who negotiated that amendment on behalf of FF Realty, that an automatic extension is what the First Amendment meant. (CP 447, ¶11; emphasis added.) Because this was a summary judgment motion, it was incumbent on the trial court to accept Mark Faulkner's declaration as to the parties' contractual intent. See *Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1033 (1999) ("Because this is a summary judgment appeal, we do not weigh the parties' credibility but resolve all reasonable inferences in favor of the non-moving party."). This is especially true here because Kimschott offered no testimony contradicting Faulkner.

In addition, Kimschott ignores FF Realty's other arguments that support its interpretation of the agreement. For example, Kimschott fails to provide any explanation as to how Section 5 of the agreement, which contains the outside closing date, should be read in conjunction with Section 4(b) which extends the closing until after the execution of the REA Amendment. Perhaps this is why Kimschott now takes the curious position that what the contract says about termination is irrelevant. Of course, this directly contradicts the arguments made in its motion for summary judgment where it argued repeatedly that the contract automatically terminated at the outside closing date. (CP 255, lines 14-16

and n.1; CP 256, lines 11-12 and 21; CP 258, lines 24-25; CP 259 lines 23-24; CP 265, lines 12-13; CP 266, lines 9-11.) And, Kimschott took this same position prior to litigation, telling FF Realty it was Kimschott's position that if the Amendment to the REA is not executed by October 31, 2008, the purchase agreement "will" terminate. (CP 97-98, Exhibit E to Brief of Appellant.) It cannot completely reverse field now.

In addition, Kimschott also puts too great an emphasis on the fact that FF Realty filed its complaint only a few days after the October 31, 2008 "outside closing date." (Brief of Responded at 24.) But, this fact cannot create an inference, let alone establish there are no genuine issues of material fact because on October 31, 2008, Kimschott's counsel sent FF Realty's counsel a letter setting forth Kimschott's unequivocal refusal to continue performing under the agreement. (CP 103-104, Exhibit G to Brief of Appellant.) At that time, there was nothing left for FF Realty to wait for and its only remaining option was an action for specific performance.

At bottom, there is simply no way the Superior Court could have granted summary judgment without determining that the agreement unequivocally terminated on October 31, 2008, regardless of whether the Amendment to the REA was executed. And, the law and the evidence presented do not support that finding.

**C. The Complaint Put Kimschott On Adequate Notice That FF Realty Sought Specific Performance To Require Kimschott To Perform All Acts Necessary To Complete The Transfer**

Kimschott argues that the complaint is based solely on the premise that all the signatures approving the REA Amendment were in a form ready to be recorded. But, the complaint is far broader. Paragraph 9, for example, alleges that “The Defendant failed to tender performance as required by the PSA at the close of business on October 31, 2008.” (CP 8, ¶9, lines 8-9.) The same paragraph also alleges that Kimschott was wrong in concluding that it had no further responsibility to close when the REA Amendment did not come together by September 31, 2008. (CP 8; ¶9, lines 9-12.) The complaint also alleges that Kimschott failed to complete the purchase and sale and therefore breached the agreement. (CP 9, ¶13.) Further, the complaint seeks specific performance under the contract to require Kimschott “to perform all acts necessary to complete the transfer of the Property and related Easements to Plaintiff.” (CP 9, ¶14; emphasis added.) “All acts” does not leave anything out. Obviously, among those acts is Kimschott’s duty to use commercially reasonable efforts to obtain the required signatures.

Within the last two weeks the Washington Supreme Court has decisively confirmed and reinforced the validity of the notice rule of pleading. *Putman v. Wenatchee Valley Medical Center*, \_\_\_ Wn.2d \_\_\_,

\_\_\_ P.3d \_\_\_, 2009 WL 2960977, (September 17, 2009). In this case, the Supreme Court emphatically underscored the fundamental importance of notice pleading as being one of the primary components of our justice system:

“RCW 7.70.150 conflicts with CR 8 and our system of notice pleading, which requires only ‘a short and plain statement of the claim’ and a demand for relief in order to file a lawsuit. CR 8(a). Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims.”

*Putman v. Wenatchee Valley Medical Center*, 2009 WL 296077 at 3; *see also Champagne v. Thurston County*, 163 Wn.2d 69, 86-87, 178 P.3d 936, 946 (2008) (holding courts must look at the totality of the pleadings to determine whether the allegations gave the defendant fair notice of the nature of the action).

Ignoring this fundamental principle of notice pleading, Kimschott mistakenly relies on *Molloy v. City of Bellevue*, 71 Wn. App. 382, 859 P.2d 613 (1993). In *Molloy*, the plaintiff asserted a cause of action for failure to accommodate. Later, in opposition to a summary judgment motion, plaintiff asserted that he also had a completely separate cause of action for wrongful termination. The court affirmed summary judgment

holding that “the complaint could not be fairly construed to contain a separate cause of action for wrongful termination.” *Id.* at 386, 859 P.2d at 616. And, as alleged there, the wrongful termination was completely incompatible with the facts alleged in support of the failure to accommodate claim. 71 Wn. App. at 386-7.

Here, however, FF Realty did not assert a new cause of action in opposition to summary judgment, nor is it asserting any new facts that are inconsistent with the general breach of contract allegations in the complaint. As such, *Molloy* is clearly distinguishable and inapplicable.

**D. Kimschott’s Forfeiture Argument Is Grossly Misplaced**

Kimschott erroneously claims that FF Realty is attempting to assert a money claim for damages based on forfeiture. That is not correct. FF Realty is seeking, and has always sought, specific performance as expressly authorized under the agreement. As such, Kimschott’s discussion of FF Realty’s forfeiture argument completely misses the point.

Relief from forfeiture is an equitable doctrine; it is not a claim for relief. *See Aubrey v. Angel Enterprises*, 43 Wn. App. 429, 431, 717 P.2d 313, 314 (1986) (“[I]t is well settled in Washington that forfeitures are not favored in the law and are never enforced in equity unless the right thereto is so clear as to permit of no denial.”) (internal citations omitted). As argued in the opening brief, the interpretation of the agreement that

Kimschott offered in its motion for summary judgment (and apparently now is abandoning) would result in a substantial forfeiture, which the law abhors. Kimschott does not dispute that FF Realty would forfeit more than \$4 million that it invested in this project. But instead, Kimschott attempts to confuse the issues rather than addressing the substance.

**E. Additional Discovery Under CR 56(f) Was Improperly Denied**

The trial court improperly denied FF Realty's request to conduct additional discovery to further demonstrate that material facts were at issue. A trial court has a duty to accord the parties reasonable opportunity to make their record complete before ruling on a motion. *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990). This is especially true in this case when Kimschott filed its motion for summary judgment *a mere four months after the complaint was filed and long before the discovery cutoff*.

Kimschott claims that FF Realty did not adequately set out what it intended to find in additional discovery. But in fact it did. (CP 439-440.) The bullet point listing in FF Realty's brief exceeds what is necessary to meet the criteria for what evidence would be established through the additional discovery. *Briggs v. Nova Services*, 135 Wn.2d 955, 961-62, 147 P.3d 616 (2006); cited in Brief of Respondent at 32. Examples of the discovery sought by FF Realty include:

- First party written discovery and depositions of Kimschott personnel regarding any and all actions they took . . . to obtain agreement from the necessary parties to the lender's partial release . . .
- Development of expert testimony . . . regarding the commercial reasonableness of Kimschott's actions with respect to obtaining the REA signatures, and its conduct in unilaterally directing the return of the signed REA Amendment from escrow.
- Third party written discovery and depositions of all signers to the REA Amendment as to their grant of authority to record the signed REA Amendment, and any requests by Kimschott to alter or withdraw that authority.
- Third party written discovery and depositions of Target Corporation regarding the negotiations related to Target's relocation and redevelopment of its store. . . “

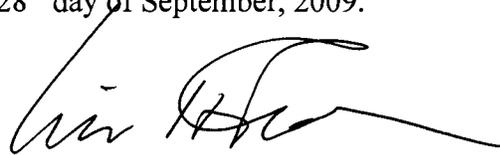
Moreover, this list directly follows from the complaint for specific performance seeking to require that Kimschott engage in *all* activities necessary to affect the closing of the purchase and sale agreement. Kimschott's argument in the trial court (CP 463; lines 11-12) that FF Realty did not describe what it intended to show is simply wrong.

Further, as noted in the motion, the discovery cut-off was months away, and little time (November – February) had passed after the complaint had been filed before Kimschott rushed in with a summary judgment motion. In addition, the trial date, May 3, 2010, was more than a year away. Therefore, there was no reasonable basis for the Superior Court to deny a short continuance.

### III. CONCLUSION

Accordingly, this Court should reverse the trial court's improper summary judgment order and remand this case for trial.

Respectfully submitted this 28<sup>th</sup> day of September, 2009.



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