

No. 64269-3-1

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

SERGEY SAVCHUK,

Appellant,

v.

STEVEN JERDE and DARLYCE J. JERDE,
husband and wife,

Respondents.

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COURT OF APPEALS
DIVISION ONE
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BRIEF OF RESPONDENTS

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 ORIGINAL

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INTRODUCTION

Parties to a contract shall be bound by its terms. In his opening brief, Appellant Sergey Savchuk criticizes the “harshness” of the real estate installment contract he entered into with the Respondents Steven and Darlyce Jerde. He characterizes the \$500,000 he lost because of his default as an inequitable and unfair “windfall” for the Jerdes. However, Savchuk agreed to this contract with full knowledge of the consequences of default. No one forced him to agree.

Furthermore, Savchuk had numerous opportunities to cure his breach. The original closing date of August 31, 2007 passed without full performance by Savchuk. The Jerdes agreed to extend the closing until May 30, 2008, and gave Savchuk the benefit of a revised payment schedule. When Savchuk again failed to pay as agreed, the transaction did not close. After the Jerdes won summary judgment in the trial court, they again offered Savchuk an opportunity to close the transaction as agreed. Only when Savchuk failed to perform after summary judgment did the Jerdes move to enforce their contractual right to keep the \$500,000 in payments already made, and retain the subject property.

Savchuk's appeal is not based on any error of law, but rather upon his hope that the Court will re-write the installment contract to grant him an outcome more to his liking. There is no legal basis for the remedy he is seeking.

Respondents Steven and Darlyce Jerde respectfully request this Court to affirm the trial court's summary judgment, and dismiss this appeal.

I. RESTATEMENT OF ISSUES PRESENTED

1. When Savchuk was in material breach of the PSA, and the installment payments he made to the Jerdes were forfeited pursuant to the terms of the contract, did the trial court properly grant summary judgment to the Jerdes?
2. Did Savchuk failed to establish any grounds for reconsideration under CR59(a), and should the trial court's Order Denying Motion for Reconsideration should therefore be affirmed?

II. STATEMENT OF THE CASE

A. Facts

On October 2, 2006, the Jerdes signed a Residential Real Estate Purchase and Sale Agreement (PSA) with Savchuk, a

Whatcom County real estate developer. CP at 98. The parties agreed that the Jerdes would sell and Savchuk would buy the real property located at 2439 Douglas Rd. in Ferndale, Washington. CP at 102. The Purchase and Sale Agreement contained an adequate legal description of the property. CP at 103.

Savchuk and the Jerdes agreed on a purchase price of \$725,000. CP at 98. Savchuk initially paid \$20,000 in earnest money, which he agreed was a non-refundable deposit to be disbursed to the Jerdes upon execution of the contract. CP at 102, 107. The PSA contained an addendum/amendment that set forth the following payment schedule:

\$30,000 due 1/15/2007
\$50,000 due 2/1/2007
\$50,000 due 4/1/2007
\$50,000 due 6/1/2007
\$50,000 due 8/1/2007
Due in full 8/31/2007.

CP at 104.

The PSA was a real estate installment contract of the type commonly seen in the first half of the twentieth century, before the advent of the modern mortgage industry.

Although the PSA specified a closing date of August 31, 2007, Savchuk did not pay as agreed. CP at 107. As of August 31,

2007, he had paid only \$200,000 towards the full purchase price of the property. CP at 105. Rather than seek forfeiture and immediate enforcement of their contractual rights, the Jerdes agreed to extend closing until May 20, 2008, and executed an undated written agreement to that effect. CP at 105. The Extension of Closing Date Addendum set forth the following revised payment schedule:

\$250,000 due 8/31/2007
\$25,000 due 9/7/2007
\$25,000 due 10/10/2007
\$25,000 due 12/1/2007
\$25,000 due 2/1/2008
\$25,000 due 4/1/2008
Remaining balance due 5/30/2008

CP at 105.

The Extension of Closing Date Addendum also set forth various penalties, late fees, additional consideration of \$10,000 to support the extension of the closing date, and a clause which clearly and unequivocally stated that “[a]ll payments are non-refundable in the event of failure to close.” CP at 105. Despite this extension, Savchuk failed to make the final payments, and never closed on the property. CP at 108. The Jerdes retained the partial payments as specified by the PSA. CP at 65.

B. Procedural Posture

After paying a total of \$500,000 towards the purchase price, Savchuk defaulted. On February 9, 2009, Savchuk filed his Complaint for Breach of Contract and Refund of Payments Made, seeking a refund of \$480,000.

The Jerdes moved for summary judgment, and on July 31, 2009, Superior Court Judge Ira Uhrig ruled for the Jerdes. The summary judgment order gave Savchuk the opportunity to obtain financing and close the transaction within 30 days. Judge Uhrig ordered this provision at the suggestion of the Jerdes, who hoped that after three years, Savchuk might finally pay the balance of the installments due under the contract and close the sale. Unfortunately, this was not to be.

Savchuk instead filed a Motion for Reconsideration, which Judge Uhrig denied on September 4, 2009. On September 15, 2009, the trial court entered an Amended Order Granting Summary Judgment, dismissing Savchuk's complaint, finding that he was in material breach of contract, forfeiting all payments made to the Jerdes, stating that title to the real property shall remain with the

Jerdes, and awarding attorney's fees. Savchuk filed his Notice of Appeal on October 8, 2009.

III. LEGAL ARGUMENT

A. Standard of Review

On appeal, summary judgment is reviewed de novo. *Verdon v. AIG Life Insurance Co.*, 118 Wn. App. 449, 76 P.3d 283 (2003). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). A fact is a material fact if it is one upon which the outcome of the litigation depends, in whole or in part. *Atherton Condominium Apartment Owners Assoc. Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

In the contract interpretation context, summary judgment is proper "if the parties' written contract, viewed in the light of the parties' other objective manifestations, has only one reasonable

meaning.” *Hall v. Custom Craft Fixtures Inc.*, 87 Wn. App 1, 9, 937 P.2d 1143 (1997).

“The touchstone of contract interpretation is the parties’ intent.” *Tanner Electric Coop. v. Puget Sound Power & Light Co.* 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). In construing a contract, the Court applies certain principles: 1) the intent of the parties controls; 2) the court must ascertain the intent from reading the contract as a whole; and 3) the court will not read an ambiguity into a contract that is otherwise unambiguous. *BP Land & Cattle LLC v. Balcom & Moe Inc.*, 121 Wn. App. 251, 254, 86 P.3d 788 (2004); *Mayer v. Pierce County Medical Bureau Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995); *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965). An ambiguity will not be read into a contract where it can be reasonably avoided by reading the contract as a whole. *Carlstrom v. Hanline*, 98 Wn. App. 780, 784, 990 P.2d 986 (2000). “Summary judgment is appropriate if a contract is unambiguous, even if the parties dispute the legal effect of a provision.” *BP Land & Cattle*, 121 Wn. App. at 254; *Mayer*, 80 Wn. App. at 420.

B. The Purchase and Sale Agreement is valid and enforceable under the statute of frauds.

The statute of frauds applies to every conveyance of real estate, or any interests therein, and every contract creating or evidencing any encumbrance upon real estate. *RCW 64.040.010*. Part performance is a recognized exception of the requirement of the statute of frauds. One of the requirements of the doctrine of part performance is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they may be accounted for by some other hypothesis they are not sufficient. *Wagers v. Associated Mortgage Investors*, 19 Wn. App. 758, 765, 577 P.2d 622 (1978); *Granquist v. McKean*, 29 Wn.2d 440, 187 P.2d 623 (1947).

Perhaps one of the lessons to be learned from this case is that contracts should be drafted by lawyers, not real estate agents. The Jerdes concede that there are references in the PSA to a Deed of Trust and Promissory Note that were never actually utilized or enforced. Savchuk's attempt to create an issue of fact regarding a Deed of Trust and Promissory Note is illusory. Savchuk's own part performance by paying \$480,000 towards the full purchase price

eliminates any doubt that he knew that he had entered into an installment contract. The contract was fully compliant with the statute of frauds.

C. The \$500,000 forfeiture is not an impermissible penalty, nor is it liquidated damages.

Savchuk incorrectly argues that the forfeiture of the \$500,000 as a result of his own breach is an impermissible penalty in violation of RCW 64.04.005.

RCW 64.04.005(2)(a) defines earnest money as “any deposit, deposits, payment or payments in part of the purchase price for the property, made in the form of cash, check, promissory note, or other things of value for the purpose of binding the purchaser to the agreement and identified in the agreement as an earnest money deposit, and does not include other deposits or payments made by the purchaser.” Earnest money may not exceed five percent of the purchase price. *Id.*

RCW 64.04.005(2)(b) defines liquidated damages as “an amount agreed by the parties as the amount of damages to be recovered for a breach of the agreement by the other and identified

in the agreement as liquidated damages, and does not include other deposits or payments made by the purchaser.”

Savchuk’s contention that the statute requires a refund of all but the original \$20,000 earnest money deposit in the event of his own breach is without merit. Savchuk properly concedes that the installment payments are not identified anywhere in the PSA as either earnest money or liquidated damages. The earnest money that is identified in the PSA does not exceed five percent of the purchase price, and was properly awarded to the Jerdes as a result of Savchuk’s breach.

In his brief, Savchuk repeatedly refers to the installment payments as “deposits”. A deposit implies that the money was only entrusted to the Jerdes for safekeeping, and that Savchuk had the right to demand its return during the pendency of the transaction. In fact, the money was not being held for safekeeping, but became the Jerdes’ property immediately upon receipt. Savchuk’s payments were the manifestation of his obligation under the contract. Had Savchuk performed fully, the Jerdes then would have been obligated to transfer title to the property. Furthermore, given the uncontested fact that Savchuk stopped making payments, it is

difficult to imagine how he can argue that the Jerdes failed to establish evidence of Savchuk's breach of contract.

The plain language of both the statute and the PSA supports the Jerdes' argument that they are entitled to the \$480,000 in addition to the earnest money. Not only were the installment payments not identified as earnest money, they clearly were not made for the purpose of binding the purchaser to the agreement. No interpretation of the contract is necessary. Before the advent of the modern mortgage market, it was quite common for sellers to retain title to real property while the buyer made a series of payments. When the final payment was tendered, the seller would convey title through a deed. That outcome did not occur here only because of Savchuk's failure to complete the payments.

Savchuk states in his brief that the Jerdes "could not plausibly support the retention [of the \$480,000] as liquidated damages in this transaction." Quite correct. The payments are not and never have been liquidated damages, and RCW 64.04.005(3) cannot be construed to make them so.

Savchuk's reliance on *Watson v. Ingram*, 124 Wn.2d 845, 881 P.2d 247 (1994) to support his contention that the \$480,000 forfeiture should be disallowed is misplaced. The issue in *Watson*

was whether a \$15,000 non-refundable earnest money deposit was enforceable as liquidated damages. The Supreme Court analyzed the case through the prism of a two factor test. Liquidated damages are upheld if the amount fixed is a reasonable forecast of just compensation of the harm caused by the breach, and the harm must be very difficult to ascertain. *Id.* at 850; *Walter Implement Inc. v. Focht*, 107 Wn.2d 553, 559, 730 P.2d 1340 (1987).

The test is inapplicable here. The \$480,000 is not liquidated damages, but represents a series of installment payments. As such, the Jerdes have no burden to prove that the amount represents damages. Savchuk's conduct is inconsistent with his claim that the refund he is seeking represents some form on liquidated damages. Until his breach, Savchuk behaved in a manner consistent with a purchaser making installment payments. Savchuk's argument ultimately fails because he agreed that these sums were non-refundable installments. These payments were not conditioned upon the default of the purchaser.

Parties are free to negotiate a contract that allows for payments of non-refundable sums. Traditionally courts have been "loathe to interfere with the rights of parties to contract as they please between themselves." *Management Inc. v. Schassberger*,

39 Wn.2d 321, 326, 235 P.2d 293 (1951). “It is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining.” *Watson*, 124 Wn.2d at 852. While “[t]he bargain may be an unfortunate one for the delinquent party...it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence.” *Reichenbach v. Sage*, 13 Wash. 364, 368, 43 P. 354 (1896).

D. There is nothing unconscionable about the Purchase and Sale Agreement which states that installments are non-refundable in the event of default.

At one time, contracts for the sale of land which called for a down payment and a series on monthly installments were quite common. The seller would retain title until the last installment was made, at which time ownership would be conveyed by way of a deed. From time to time, purchasers would default under such contracts, and appellate courts were called upon to settle the law surrounding such defaults.

Jennings v. Dexter Horton & Co., 43 Wash. 301, 86 P. 576 (1906) involves a contract whereby Dexter Horton & Co. agreed to

sell a certain parcel of real property for \$3740, \$2000 of which was tendered as a down payment, with the balance to be paid in successive monthly installments. The contract also stated that all payments would be retained by Dexter Horton as “liquidated damages.”¹ The purchaser breached the contract and defaulted on the payments. The purchaser’s successor in interest brought suit, claiming that it was entitled to a refund of the installments made.

The Supreme Court affirmed the trial court decision denying the request for a refund. “The termination of the contract concluded all of appellant’s rights thereunder, including any right to the return of money which appellant had agreed should be retained by respondent as liquidated damages in the event of default of payments. By this action, appellant seeks to rescind the contract...A party so in default will not be allowed to rescind a contract.” *Jennings*, 43 Wash. at 306.

An agreement that installments were to be non-refundable was binding on parties to a contract one hundred and four years ago. It is no less binding today. A seller may declare a contract forfeited if the purchaser defaults on the contract, and if the contract

¹ RCW 64.04.005 was not enacted until 1991. The statutory definition of liquidated damages discussed in the previous section is inapplicable to a 1906 case.

so provides, may retain all payments previously made. *Kruger v. Horton*, 106 Wn.2d 738, 725 P.2d 417 (1986).

State ex rel. Foley v. Superior Court of King County, 57 Wn.2d 571, 358 P.2d 550 (1961) concerned an installment contract to sell real property in Seattle for \$28,000. The purchaser made sporadic payments, then defaulted entirely. When the seller brought suit to recover possession of the property, the purchaser asserted in his answer that forfeiture of the \$10,000 he had paid would be unconscionable. The facts of this case differ substantially from the case at bar. Where Savchuk has no good reason for his breach of contract, the trial court in *Foley* found that the purchaser's default was "not due to willful neglect, carelessness, or intentional delay, but were due to the fact that he was ill, unable to work, and had no income." *Id.* at 574. The trial court found in favor of the seller, and authorized a forfeiture. On the day the findings of fact, conclusions of law, and judgment were to be signed, the purchaser tendered a check for the balance of the contract, plus additional terms. The seller rejected the offer of payment.

The Supreme Court held that there was no reason why the purchaser's tender of an amount sufficient to pay the balance of the contract, plus interest and expenses incurred by the seller, should

not have been sufficient to relieve him of the forfeiture. *Id.* at 575. In contrast, Savchuk has made no payment since his default in 2008. When given the opportunity to close the sale after the summary judgment hearing on July 31, 2009, Savchuk was either unwilling or unable to do so. Under these facts, there is nothing unconscionable about enforcing the terms of the contract into which Savchuk freely entered.

Forfeitures are not favored and are never enforced unless the right to the forfeiture is absolutely clear. *Dill v. Zielke*, 26 Wn.2d 246, 173 P.2d 977 (1946); *John R. Hansen Inc., v. Pacific International Corp.*, 76 Wn.2d 220, 455 P.2d 946 (1969). When time is made the essence of a real estate contract, however, the seller is entitled to exact compliance with the time requirements of the contract. Courts will enforce a forfeiture if an installment payment is not made on time. *Jones v. Brandt*, 2 Wn. App. 936, 939, 471 P.2d 696 (1970); *Sisson v. Durrant*, 152 Wash. 382, 278 P. 174 (1929).

In the case at bar, the Jerdes' right to the \$480,000 is absolutely clear. The PSA unambiguously states that all payments are non-refundable in the event of failure to close. The function of the court is to enforce contracts as drafted by the parties and not to

change the obligations of the contract the parties saw fit to make. *In re: Estate of Bachmeier*, 147 Wn.2d 60, 52 P.3d 22 (2002). Savchuk was in default when he failed to pay as agreed and close the transaction on August 30, 2007. He knowingly and voluntarily executed the Extension of Closing Date Addendum which extended the closing date by nine months, and also contained the all important non-refundable payments clause. Savchuk is an experienced and sophisticated real estate developer. In order to obtain more time to close the deal, Savchuk bargained away his right to claim any refunds of the installment payments in the event of his own default. The Jerdes have been extraordinarily patient with Savchuk, offering him two opportunities to finalize the transaction after his default. Further forbearance on the part of the Jerdes is not required.

E. The PSA is not substantively unconscionable.

Substantive unconscionability involves cases where a clause or term in a contract is one sided or overly harsh. *Torgerson v. One Lincoln Tower LLC*, 166 Wn.2d 510, 519, 210 P.3d 318 (2009); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004). “Shocking to the conscience”, “monstrously harsh” and

“exceedingly calloused” are the terms sometimes used to define unconscionability. *Adler*, 153 Wn.2d at 344-45 (quoting *Nelson v. Goldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)).

In *One Lincoln Tower*, it was the seller who breached a contract for the sale of condominium units, and the buyer who brought suit seeking specific performance and money damages. The buyers unsuccessfully argued that the limitation on remedies was unconscionable and unenforceable. The buyers were trained, licensed real estate agents “who had a reasonable opportunity to understand the terms of the agreement, which under these circumstances cannot be classified as a contract of adhesion.” *One Lincoln Tower*, 166 Wn.2d at 521. The “perhaps misguided judgment” on the part of one party does not make a contractual clause unconscionable. *Id.* The key is whether both parties “in an arms-length transaction, negotiated and entered into a contract with no indicia of unfair surprise.” *Id.* (quoting *American Nursery Products v. Indian Wells Orchards*, 115 Wn.2d 217, 225, 797 P.2d 477 (1990)).

In the present case, Savchuk is a real estate developer who entered into an arms-length transaction. The non-refundable payment clause of the PSA was not hidden in a maze of fine print,

but printed clearly in legible type on the Extension of Closing Date Addendum. When Savchuk breached the contract, the forfeiture of his payments should have been no surprise.

Savchuk's next argument - that he is the injured party and that the Jerde's are not entitled to a "windfall" because the transaction did not close - is without merit. In the summer of 2006, Savchuk was either unwilling or unable to secure conventional financing and purchase the subject property for cash, subject to a mortgage. The installment contract with the Jerdes gave him the opportunity to purchase the property, while the financing would remain invisible to his other creditors. The non-refundable payments clause was reasonable protection for the Jerdes after Savchuk's first breach. They could have taken steps to terminate the transaction at that juncture. The non-refundable payments clause was part of the consideration that supported the continuation of the installment contract. The red hot real estate market of 2006 is now ice cold in 2010. If this Court were to simply rescind the contract as Savchuk suggests, the parties cannot be returned to the financial positions they occupied when they began. Savchuk's breach has resulted in a significant opportunity cost to the Jerdes; it is unlikely that the property could be sold for \$725,000 in 2010. If

the property were worth three times what it was in 2006, would Savchuk be so eager to rescind the contract? Savchuk is not asking for specific performance. He does not want the property because its value has dropped since 2006. Savchuk wants this Court to erase the non-refundable payments clause, for his own benefit and the significant detriment of the Jerdes.

Savchuk had three years to perform under the terms of the contract, but failed to do so. He agreed that the forfeiture of his payments would be the Jerdes' remedy if he defaulted, and he should be held to that agreement.

"It is black letter law of contracts that the parties to a contract shall be bound by its terms." *Adler*, 153 Wn.2d at 344. As Judge Learned Hand said, "[I]t does not in the end promote justice to seek strained interpretations in the aid of those who do not protect themselves." *American Nursery*, 115 Wn.2d at 226 (quoting *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933)).

F. Attorney's Fees and Costs.

The Purchase and Sale Agreement provides that the prevailing party in litigation is entitled to reasonable attorney's fees

and costs. The trial court properly awarded the Jerdes their attorney's fees and costs on summary judgment.

The Jerdes respectfully request an award of attorney's fees and costs incurred in this appeal, pursuant to the terms of the PSA and RAP 18.1.

IV. CONCLUSION

Appellant Sergey Savchuk asks this Court to reverse summary judgment, and order the Jerdes to return the \$480,000 in installment payments made under the PSA, plus interest and attorney's fees. The trial court's decision on summary judgment was proper, and should not be disturbed on appeal.

The trial court appropriately refused to re-write the contract to benefit Savchuk. If this Court reverses, it would undermine more than a century of precedent regarding real estate installment contracts, and would invite parties dissatisfied with the results of business transactions to seek judicial rescission of contracts.

The large sum of money involved does not make the non-refundable payments provision of the contract unenforceable. Parties to a contract shall be bound by its terms.

Respondents Steven and Darlyce Jerde respectfully request this Court to affirm the trial court, award reasonable attorney's fees and costs on appeal, and dismiss this case.

Respectfully submitted this 19th day of February, 2010.

THE LUSTICK LAW FIRM

A handwritten signature in black ink, appearing to read 'Mark Kaiman', written over a horizontal line.

Mark Kaiman WSBA No. 31049
Attorney for Respondents