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Case No. 66190-6-I

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

SILVERHAWK, LLC,
Appellant,

v.

KEYBANK NATIONAL ASSOCIATION,
Respondent.

**APPELLANT SILVERHAWK, LLC'S
REPLY BRIEF**

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I. INTRODUCTION

In this action, Appellant Silverhawk LLC (“Silverhawk”) simply seeks the correct calculation of a prepayment penalty paid to KeyBank National Association (“KeyBank”) (collectively referred to as the “Parties”). Silverhawk does not dispute that a penalty is due, but demands the amount be calculated pursuant agreed upon formula in the Parties’ contract (the “Contract,” or the “Master Agreement”¹).

The transaction's purpose in this case is *paramount*: the variable rate loan (the “Loan”) and the interest rate swap (“Swap”) (referred to together as the “Loan Package”) were entered into simultaneously and with the *sole* purpose of creating a fixed rate loan with a prepayment penalty. KeyBank’s argument that only KeyBank had the right to terminate the Swap, which has the practical effect of requiring Silverhawk to continue making Loan payments even though the Loan was repaid in full, is absolutely contrary to the purpose of the transaction and the intent of the Parties.

The Court should find in Silverhawk’s favor because the Master Agreement applied to the factual scenario presented and the existence of an oral agreement between the Parties to terminate the Master Agreement is a disputed material fact. Silverhawk and KeyBank have submitted

¹ The Master Agreement contains a choice of law provision specifying New York law as controlling, which will be discussed in more detail in subsequent sections.

conflicting evidence on this point and, therefore, the trial court's grant of summary judgment on this basis was inappropriate.

II. ARGUMENT

A. Standard of Review On Appeal Is *De Novo* And The Court Must Make An Independent Decision.

“A motion to dismiss pursuant to CR 12(b)(6) that is supported by materials outside of the complaint is treated as a motion for summary judgment.” Hope v. Larry's Markets, 108 Wn. App 185, 191, 29 P.3d 1268 (2001). The Parties agree the court conducts *de novo* review and engages in the same inquiry as the trial court. Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). *De novo* review means that the court is not bound by the lower courts conclusions, and must independently evaluate the evidence on the record to determine the proper outcome. See In re Disciplinary Proceeding Against Turco, 137 Wn.2d 227, 246, 970 P.2d 731 (1999).

Here, KeyBank incorrectly suggests that this Court should affirm the trial court's decision because there is “ample basis to support the trial court's dismissal of the action.” (*KeyBank Brief at p. 7*). But, finding *support* for the trial court's dismissal is *not* the standard. Undoubtedly, the appellate court can come to the same conclusion as the trial court if supported by the evidence and the law, but that does not relieve the appellate court of its duty to engage in *de novo* review as KeyBank suggests.

It should also be emphasized that the burden is on KeyBank to prove by *uncontroverted facts* that it is entitled to judgment as a matter of law. Hope, 108 Wn. App at 192. “If the moving party does not sustain that burden, summary judgment should not be entered.” Id. The trial court's dismissal of this case was inappropriate given the limited and *controverted* facts in this matter as discussed more fully below.

On a final note, KeyBank also claims that the trial court's decision should be affirmed because Silverhawk has failed to state a claim upon which relief can be granted, referencing the standard in CR 12(b)(6). (*KeyBank Brief at p. 17*). But, once again this is not the standard. Once evidence outside the pleadings have been introduced, "the motion to dismiss must be treated as one for summary judgment and dismissal for failure to state a claim would be in error." Hope, 108 Wn. App. at 192.

B. The Master Agreement Was Applicable.

KeyBank correctly observes that New York law governs the Master Agreement. (*CP at p. 62*)(§11(a)). New York courts have refused to read the Master Agreement's choice of law provision broadly. Finance One Public Company Ltd. v. Leman Brothers Special Financing, Inc., 414 F.3d 325, 334-35 (2nd Cir. 2005)². Therefore, the Master Agreement and all claims or defenses arising thereunder are interpreted under New York law, but Washington law applies to all other claims between the parties. Id. at 335.

² Second Circuit interpreted an ISDA Master Agreement choice of law provision under New York law.

1. The Master Agreement Is Ambiguous And Its Meaning Is A Question Of Fact.

Since the Master Agreement's termination provisions are subject to more than one interpretation—a version offered by KeyBank and conflicting version offered by Silverhawk—the Master Agreement is ambiguous and its meaning is a question of fact inappropriate for summary judgment.

Under New York law, the purpose of contract interpretation is to ascertain the parties' intent. Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 573 (2nd Cir. 1993) (citations omitted) (applying New York law). "If a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence." LaSalle Bank Nat. Ass'n v. Nomura Asset Capitla Corp., 424 F.3d 195, 206 (2nd Cir. 2005) (citation and internal quotations marks omitted) (applying New York law). Ambiguity exists when the written language in the contract is susceptible to more than one reasonable interpretation. Consarc Corp., 996 F.2d at 573. When ambiguity exists, the intention of the parties must be ascertained in light of the surrounding facts and circumstances and extrinsic evidence is admissible for that purpose. Tobin v. Union News Co., 239 N.Y.S.2d 22, 25, 18 A.D.2d 243 (1963). Furthermore, when ambiguity exists the meaning of the contract and the intent of the parties becomes a question of fact that cannot be resolved on a motion for summary judgment." LaSalle Bank Nat. Ass'n, 424 F.3d at 205.

Contrary to KeyBank's assertions, the Master Agreement and its applicability to an early termination were not clearly defined. After hearing KeyBank's interpretation of the Master Agreement, several ambiguities in the Master Agreement become apparent. Reasonable minds could differ as to whether *only* KeyBank had the right to terminate the transaction, and further whether notice is actually required for an Early Termination Date. KeyBank's suggestion that its interpretation of the Master Agreement is the only viable interpretation is not supported by an examination of the language of the Master Agreement. Nor is the practical effect of Silverhawk's interpretation illogical in light of the purpose of the transaction. There is sufficient lack of clarity within the four corners of the instrument to create a material issue of fact as to the Master Agreement's meaning which is inappropriate for consideration on summary judgment. LaSalle Bank Nat. Ass'n, 424 F.3d at 205.

2. KeyBank Did Not Have A Unilateral Right To Terminate.

Under KeyBank's interpretation there is absolutely no purpose for the Additional Termination Event provision because if only KeyBank can terminate the Swap upon repayment of the Loan, the Additional Termination Event provision has no meaningful effect. KeyBank has absolutely no reason to ever voluntarily terminate upon repayment of the Loan. An interpretation that renders any of the contract provisions superfluous or meaningless is not preferred and should be avoided if possible. LaSalle Bank Nat. Ass'n, 424 F.3d at 206).

Furthermore, it makes no sense that Silverhawk could repay the Loan, but then KeyBank could force Silverhawk to keep making the monthly payments. Instead, the obvious reason for the Additional Termination Event provision was to give Silverhawk the flexibility to get out of the transaction for precisely the reason presented in this case – repayment of the Loan– while ensuring that KeyBank would not lose the economic benefit of its investment upon early termination. "In construing a contract, due consideration must be given to the purpose of the parties in making the contract ... and wherever possible it must be given a fair and reasonable interpretation." Tobin, 239 N.Y.S.2d at 25. The purpose of the transaction is critical here; the Swap and Loan were obtained with the *singular* purpose of creating a fixed rate loan with a prepayment penalty. KeyBank's interpretation completely disregards the purpose and intent of the transaction, and reads the Master Agreement in a way that is unreasonable and not in accord with the Parties' intent.

It should also be emphasized that KeyBank's claimed "*right* to terminate the transaction by giving notice of an Early Termination Date," is *not* the language used in the Master Agreement. (*KeyBank's Brief p. 10 (emphasis added)(CP at p. 26)*). The only reference to a "right" is in the provision's heading which says "Right to Terminate Following Termination Event" or "Right to Terminate Following Event of Default." (*CP at p. 26 (§§6(a) and (b))*). But, the Master Agreement specifically says the headings are not to be used in the interpretation of the Master Agreement. (*CP at p. 29(§8(g))*). So, removing KeyBank's reference to a

"Right to Terminate" muddies the water as to what exactly these provisions mean. Instead, the provision actually says that KeyBank "may" give notice of an Early Termination Date. (*CP at p. 26 (§§6(a) and (b))*). Words and phrases should be given their plain meaning. LaSalle Bank Nat. Ass'n, 424 F.3d at 206. This does not clearly preclude another manner of termination. It seems if notice were actually a necessary prerequisite for termination, the Master Agreement would have clearly provided so. Finally, it should be emphasized that if there are ambiguities in an agreement that cannot be resolved by reference to other canons of contract interpretation, these ambiguities are to be interpreted against the drafter, which in this case is KeyBank. See Yudell v. Ann Israel & Associates, Inc., 669 N.Y.S.2d 580, 581, 248 A.D.2d 189 (1998).

3. If Notice Was Required Under The Master Agreement, KeyBank's Communications Constitute Such Notice.

If KeyBank in fact had the unilateral right to terminate the Master Agreement then Silverhawk contends that such a right was in fact exercised³. After Silverhawk informed KeyBank that the Auburn Property would be sold later that month and the Loan repaid, KeyBank emailed Silverhawk the following: "Please note the loan payoff is separate from the swap termination," and "**the swap termination was quoted on 12/2,**

³ The exercise of such a right is *not* undisputed as KeyBank claims. (*KeyBank's Brief p. 11*). In its Opening Brief, Silverhawk simply stated that "KeyBank *claims* it gave no notice designating a date." (*Silverhawk's Brief p. 10*) (*emphasis added*). This is quite different than an admission, and rather an acknowledgement of KeyBank's position.

but will need to be updated on the payoff date." (*CP at p. 98*). The initial prepayment penalty of \$106,283 was then listed directly below this statement. (*CP at p. 98*). Silverhawk contends that this email sent by KeyBank, in combination with the loan payoff statement stating that the Swap must be terminated, constitute notice of an Early Termination Date and designate the Loan payoff date as the Early Termination Date for calculation of the prepayment penalty. (*CP at pp. 98, 101*).

Interestingly, the Master Agreement allows for notices to be given in pretty much every manner possible, from personal delivery to email, except when it comes to notice of an Early Termination Date. Under the Master Agreement, notice of an Early Termination Date can only be given in person, by courier, telex, certified or registered mail. (*CP at p. 30 and App. 1 hereto (§10)*). Silverhawk admits that notice was not given in that manner, but Silverhawk contends that the emailed notice is still effective because both Silverhawk and KeyBank waived strict compliance with the Master Agreement's notice provisions.

Under New York law, "a party to a contract may be precluded from insisting on strict compliance by conduct amounting to waiver or estoppel." Wilff & Munier, Inc. v. Whitig-Turner Contracting Co., 946 F.2d 1003, 1009 (2nd Cir. 1991)(applying New York law). "Waiver is an intentional abandonment or relinquishment of a known right or advantage." Id. Like any contractual provision, a notice provision in a contract "may be waived by implication or express intention of the party for whose benefit the provision inures." Id. In this case, the notice

provision was intended to benefit Silverhawk because the purpose of the provision was to ensure that Silverhawk would have sufficient time to acquire funds to pay the prepayment penalty. The Parties waived strict compliance with the notice requirements when KeyBank designated the Early Termination Date as the Loan payoff date in the December 4, 2008 email to Silverhawk, and Silverhawk subsequently accepted that notice by performance.

On a final note, if the amount quoted by KeyBank was in fact just an offer to terminate the Master Agreement as KeyBank claims, KeyBank's December 4, 2008 email makes no sense. Arguably, Silverhawk should have been able to pay to terminate at any time. Instead, KeyBank represented that the transaction could only be terminated on the payoff date, which caused Silverhawk to wait until the closing to obtain the final penalty amount and left Silverhawk no option but to pay the amount quoted by KeyBank or stop the sale that was already in progress.

4. Loan Repayment Was An Additional Termination Event.

KeyBank disputes Silverhawk's interpretation that an Early Termination Date automatically happens upon repayment of the Loan unless KeyBank provides notice otherwise. To support its argument, KeyBank differentiates an "Additional Termination Event" from an "Automatic Early Termination" under various Events of Default, the latter

clearly requiring no notice and occurs immediately upon the occurrence of the various listed scenarios.

But, Silverhawk contends that Automatic Early Termination under certain Events of Default does not preclude a partially or semi-automatic termination under other provisions of the Master Agreement. Unlike Automatic Early Termination, KeyBank has the option to postpone the termination date by notice under an Additional Termination Event. However, in the event notice designating a date is not provided the transaction will terminate similar to the Automatic Early Termination provision. Since termination under an Additional Termination Event and Automatic Early Termination are in fact different, it makes sense that they are differentiated in the Master Agreement.

It must be emphasized that once the Loan is repaid there was no longer a purpose for the Swap. It makes sense that the transaction would terminate, one way or another, upon repayment of the Loan. The Swap was not a speculative investment for Silverhawk. Rather, the transaction was structured as a loan with a prepayment penalty that Silverhawk was supposed to be able to repay and terminate at any time, and KeyBank's construction of the Master Agreement completely ignores this fact.

On another note, KeyBank focuses on the fact that Silverhawk called for the prepayment penalty *before* the Loan was repaid, in an attempt to claim that an Additional Termination Event had not yet occurred so KeyBank was under no obligation to properly calculate the penalty. But, the fact that the Loan had not yet been repaid at the moment

Silverhawk called for the termination penalty is irrelevant. Not only from a practical standpoint, but also based on the words in the Master Agreement which should be given their plain meaning. LaSalle Bank Nat. Ass'n, 424 F.3d at 206. The Early Termination Date is just that – *a date* – not a moment, hour or minute in that day. Giving the term its plain meaning, the Early Termination Date was the entire day of December 30, 2008, regardless of the timing of the Loan repayment on that day.

Key Bank's argument also defies common sense. KeyBank is saying that because Silverhawk obtained the quote for the prepayment penalty just hours before Silverhawk repaid the Loan, the Master Agreement does not apply. But, if Silverhawk had instead repaid the Loan and then called KeyBank for the prepayment penalty, the Master Agreement would have applied. This is ridiculous and clearly was not what the Parties intended when they entered into the Master Agreement. The date the Loan was repaid is the date the prepayment penalty is supposed to be calculated according to the Master Agreement regardless of the timing of repayment on that day.

5. Alternatively, Silverhawk's Repudiation Of The Transaction Was An Event Of Default.

Silverhawk also contends that its actions constituted repudiation of the Master Agreement and an Event of Default, which would have also triggered an Early Termination Date. According to the Master Agreement, it is an Event of Default if a party "disaffirms, disclaims, repudiates or rejects, in whole or in part" the transaction. (*CP at p. 56 (§5(a)(v)(3))*).

Under New York law, repudiation is the announcement of an intention not to perform that is positive and unequivocal. DiFolco v. MSNBC Cable L.L.C., 662 F.3d 104, 111-12 (2nd Cir. 2010) (applying New York law).

If Silverhawk's announcement to KeyBank on or about December 4, 2008 that Silverhawk would be repaying the Loan and terminating the Swap was not considered repudiation of the Master Agreement, then the call to KeyBank on the morning of the closing surely was an announcement of Silverhawk's intention to terminate the transaction and cease performance. Whereas, Silverhawk asked for the prepayment penalty before the Loan was technically repaid (which KeyBank argues prevented an Additional Termination Event from occurring), repudiation occurred either on December 4, 2008 when KeyBank was notified of the sale and Loan repayment, or at the latest on December 30, 2008 during the telephone call with KeyBank on the closing date. Silverhawk contends that repudiation of the Master Agreement triggered KeyBank's obligation to calculate the prepayment penalty according to the Master Agreement. But ultimately, since the substance of the conversation between Silverhawk and KeyBank on December 30, 2008 is in dispute, repudiation of the Master Agreement on that date, which hinges on the disputed representations made during that call, would be a question of fact that must be submitted to a jury. See DiFolco, 662 F.3d at 111-12.

scenario was not required to trigger this section, which is also supported by Section 8(g) that says, "the headings used in this Agreement are for convenience of reference only and are not to affect the construction of or be taken into consideration when interpreting this Agreement." (*CP at p. 29*(§8(g)). Under this scenario, the Early Termination Date occurred on either December 4, 2008 or December 30, 2008 due to Silverhawk's consent liquidate, or it's actual liquidation weeks later. And, as pointed out by KeyBank, notice of an Early Termination Date is not required under this provision to terminate the transaction and trigger calculation of the prepayment penalty.

7. If KeyBank Had Unilateral Right To Terminate, Then The Master Agreement Was Unconscionable.

If the Master Agreement provides KeyBank with a unilateral right to terminate the Swap, the Master Agreement is unconscionable and overreaching. "An unconscionable contract has been defined as one which 'is so grossly unreasonable or unconscionable in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.'" Gillman v. Chase Manhattan Bank, N.A., 573 N.Y.S.2d 787, 791, 73 N.Y.2d 1 (1988). Generally, the proponent must show absence of meaningful choice (procedural unconscionability) and contract terms that are unreasonably favorable to one party (substantive unconscionability). State v. Wolowitz, 468 N.Y.S.2d 131,

145, 96 A.D.2d 47 (1983)(citations omitted). Examples of procedural unconscionability include, but are not limited to the following:

high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties. Examples of unreasonably favorable contractual provisions are limitless but include inflated prices, *unfair termination clauses*, unfair limitations on consequential damages and improper disclaimers of warranty.

Id. (Emphasis added). However, under certain circumstances a "contractual term is so outrageous and oppressive as to warrant a finding of unconscionability irrespective of the formation process." Id.

If in fact the Master Agreement only allows KeyBank to terminate the Swap, Silverhawk contends that such a termination provision is so outrageous and oppressive that it is unconscionable. The transaction was supposed to mimic a loan with a prepayment penalty upon early termination. But, now KeyBank reveals that Silverhawk actually never could have terminated the transaction and that KeyBank could have forced Silverhawk to keep making payments even though the Loan was repaid. The Master Agreement was artfully contrived to convey the impression that Silverhawk could terminate the transaction for a prepayment penalty. Unlike Silverhawk, KeyBank is a sophisticated banking institution that deals in these transactions regularly. In this case, inequality of bargaining power, imbalance in the understanding and acumen of the Parties, and deceptive practices and language in the Master Agreement are present. In addition, given the purpose of the transaction, such a one-way termination

provision is an outrageously unfair termination clause and should not be enforced.

"If the record before the court indicates that unconscionability may exist, and the issue is not free from doubt, then the court must hold a hearing where the parties may present evidence with regard to the circumstances of the signing of the contract, and the disputed terms setting, purpose and effect." Id. In other words, a finding as to unconscionability is not appropriate on summary judgment and the case should be remanded for further discovery, and submitted to a trier of fact.

C. The Existence Of An Oral Agreement To Terminate Is A Question Of Fact.

KeyBank's primary argument for dismissing Silverhawk's Complaint relies on the existence of an oral agreement to terminate the Master Agreement. Since the alleged oral agreement to terminate would be considered a contract separate and apart from the Master Agreement, Washington law would apply. KeyBank argues Silverhawk and KeyBank entered into an oral agreement to terminate the Master Agreement before the Loan was repaid, so none of the Master Agreement provisions could have been triggered in the first place. However, KeyBank disregards the fact that the existence of an oral agreement between Silverhawk and KeyBank to terminate the Master Agreement, and all of KeyBank's obligations thereunder, is in fact *disputed*. Silverhawk and KeyBank submitted conflicting affidavits to the trial court on this point.

Silverhawk whole-heartedly agrees that the Parties were free to contract with one another in a manner that did not violate any other existing contractual obligations, but that is *not* what occurred in this case. KeyBank offers no evidence to support the creation of an oral agreement other than: (1) testimony of KeyBank representatives that is in direct conflict with testimony submitted by Silverhawk; and (2) a so-called "Termination Agreement" that was not signed by Silverhawk's managing member, or by anyone that was a party to the alleged oral agreement, and that was sent to Silverhawk *after* the transaction was consummated and the prepayment penalty was wire transferred to KeyBank. (*CP at pp. 16* (§§14-20); *CP at pp. 88-89* (§§2-3); *CP at pp. 94-95* (§§6-9); *CP at p. 107*; *CP at pp. 111-12* (§2)).

All the cases cited by KeyBank on this issue provide great sound bites, but are irrelevant because KeyBank has failed to establish by uncontroverted evidence that such an oral agreement even exists in this case. As even KeyBank points out, such an oral agreement must be "fairly and understandingly" entered into, and there must be evidence the Parties' "clear intention" to enter such an agreement. (*KeyBank Brief p. 7*). Silverhawk has filed affidavits supporting the fact that there was not a clear intention, and therefore KeyBank cannot show by uncontroverted evidence that these elements have been met.

It is well established that disputes over the existence of an oral agreement are not appropriate for summary judgment. Crown Plaza Corp. v. Synapse Software Systems, Inc., 87 Wn. App. 495, 500, 962 P.2d 824

(1997). They depend a great deal on the credibility of the witnesses, and only a fact finder can determine which of these statements is more credible. *Id.* at 501. Deciding this issue involves weighing the testimony, a function that is reserved exclusively for the trier of fact. Since Silverhawk provided evidentiary material on summary judgment to controvert KeyBank's version of the conversation that gave rise to the "verbal agreement to terminate," those facts are in dispute and summary judgment on this issue was not proper.

D. Silverhawk Did Not Assume The Risk Of Mistake Because The Master Agreement Allocated That Risk To KeyBank As Calculation Agent.

1. A Damage Estimate After The Fact Does Not Mean Silverhawk Was Able To Verify KeyBank's Calculation On The Early Termination Date.

KeyBank's claims that Silverhawk, "could have done its own calculations before agreeing to Key's offer, could have asked Key how it arrived at the number it did, could have negotiated further with Key to attempt to get a more favorable payment, and could have simply held off on any agreement until Key sent notice of an Early Termination Date," are *not* supported by the record. (*KeyBank Brief at p. 22*). Discovery has not been conducted and Silverhawk's ability to take such action has *not* been established.

KeyBank's suggestions are great *in hindsight*. Of course, if it had been made clear to Silverhawk that the amount was only an "offer" by KeyBank to terminate the Master Agreement and not the prepayment

penalty, Silverhawk may have done several of the things suggested by KeyBank. But, at the time KeyBank did not make its intentions clear, and can point to nothing but disputed testimony to establish such an intention. Instead, KeyBank engaged in actions that lead Silverhawk to believe that the amount was a prepayment penalty, arguable so that Silverhawk would not engage in any of the above referenced behaviors that would reduce the payment KeyBank received.

As for Silverhawk conducting its own calculation, such action was not required by the Master Agreement nor has Silverhawk's ability to do so been established on the record. Silverhawk is not a sophisticated banking institution, it is not a financial expert, nor does it have a derivative department like KeyBank, and furthermore had no idea how to calculate the prepayment penalty for an interest rate swap, which is precisely why KeyBank was designated as the "Calculation Agent" in the Master Agreement. It should also be noted that Silverhawk's damage estimate in this case was calculated using the formulas provided by KeyBank in the weeks *after* the closing, and has no bearing on Silverhawk's ability to make such a calculation on the closing date. (*CP at pp. 95-96*)(¶14). Since the Parties did not have equal bargaining positions or access to information, the burden was on KeyBank to provide an accurate amount according to a predetermined formula in the Master Agreement that would ultimately be relied upon by Silverhawk. If KeyBank failed to do so, as it did in this case, Silverhawk would have a legal remedy.

Finally, KeyBank's suggestion that Silverhawk could have simply held off on payment until KeyBank sent notice of an Early Termination Date *after* repayment of the Loan does not work from a practical standpoint either. KeyBank made clear in communications to Silverhawk that, in addition to the Loan, the Auburn Property "also [secured] an interest rate swap that **must be terminated and any amount paid prior to collateral release.**" (*CP at p. 101*). In other words, KeyBank would not release its lien on the Auburn Property until the Swap was terminated and the prepayment penalty was paid to KeyBank. But, the Auburn Property could not be sold unless it was free of KeyBank's lien. Therefore, the Swap had to be terminated and the prepayment penalty had to be paid to KeyBank on the closing date, and not later, otherwise the Auburn property could not have been sold on that date, which would frustrate the entire purpose of repaying the Loan in the first place.

When considered in light of the actual factual scenario in this case, the various hindsight actions identified by KeyBank simply do not show that Silverhawk elected to make payment with limited knowledge, and therefore assumed the risk of mistake. Instead, Silverhawk followed KeyBank's directions for acquiring the penalty amount that made sense given the factual scenario presented, and further relied on the contractual protections in the Master Agreement that the prepayment penalty would be properly calculated.

2. **Silverhawk Had No Knowledge Of Uncertainty Therefore Silverhawk Did Not Assume the Risk of Mistake.**

Since New York law applies to KeyBank's contract defenses, the case law cited by KeyBank on this point is not binding. However, even assuming Washington law did apply, KeyBank's arguments are still unpersuasive because KeyBank continues to completely disregard the factual differences that make the cases cited in KeyBank's Brief distinguishable from the case at hand.

KeyBank relies heavily on the dissent in Morgan v. Morgan, 10 P. 99, 122, 38 P. 1054 (1984), for the proposition that Silverhawk's "error in failing to understand what [the Master Agreement] actually required ... does not provide any basis for relief." (*KeyBank's Brief p. 17*). But, as discussed at length above, the Master Agreement is ambiguous and therefore what the Master Agreement actually did or did not require is a question of fact.

KeyBank also continues to rely heavily on CPL (Deleware) LLC v. Conley, 110 Wn. App 786, 791, 40 P.3d 679 (2002), in its risk of mistake analysis, which was addressed at length in Silverhawk's Opening Brief. The common thread in all the cases cited by KeyBank on this point, including CPL Delaware, Tiegs v. Boise Cascade Corp., 83 Wn. App 411, 426, 922 P.2d 115 (1996), and Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 739 P.2d 648 (1987), is that there were facts in the record that established the party's actual *knowledge* or *awareness* of uncertainty and a

decision to proceed, which is vastly different than the facts that have been established in this case.

KeyBank has cited nothing in the record that shows Silverhawk had actual knowledge or awareness that the prepayment penalty was not correct or was not a prepayment penalty at all, and decided to proceed with the transaction anyway. In fact, there was absolutely no reason for Silverhawk to question the calculation because it understood it to be the prepayment penalty required under the Master Agreement, calculated pursuant to an agreed upon formula, and KeyBank as "Calculating Agent" was contractually required to calculate the amount in good faith. KeyBank has not established facts or case law sufficient to support this defense.

E. Attorney Fees.

1. Silverhawk's Appeal Is Not Frivolous Because Its Arguments Are Supported By the Law and The Facts.

KeyBank's frivolous appeal claim did not arise from the Master Agreement, but rather under the forum state's law, and therefore Washington law applies to this claim. Finance One Public Company Ltd., 414 F.3d at 334-35. In this case, Silverhawk's appeal is based on the trial court's error in granting KeyBank's motion to dismiss on summary judgment based on a *disputed oral agreement*. Silverhawk's appeal is solidly based in the law and the facts on record, and therefore is not frivolous. In addition, the trial court never considered interpretation of the

Master Agreement and its applicability to the factual scenario presented in this case, so its consideration upon review could hardly be considered frivolous either. “A lawsuit is frivolous if it cannot be supported by a rational argument on the law or facts.” Forester v. Pierce County, 99 Wn. App. 168, 183, 991 P.2d 687 (2000). Furthermore, if *any* of the claims asserted on appeal are not frivolous, then the action is not frivolous. Id. at 183-84. Here, Silverhawk’s contract interpretation is based on legitimate legal theories and the contract language. There are significant merits to Silverhawk’s claim and the arguments it presents, at a minimum, are debatable issue of law. KeyBank’s suggestion that this appeal is frivolous is entirely baseless and should be disregarded.

2. Under New York Law, There Is No Mutuality of Remedy For Indemnification Provisions.

If this Court finds in KeyBank’s favor on appeal, KeyBank is not entitled to attorney fees under Washington law mutuality of remedy doctrine because New York law applies to interpretation of the Master Agreement. (*CP at p. 36 (Part 3(e))*). Unlike KeyBank's frivolous appeal claim, KeyBank's claim for attorney fees would arise directly from a provision in the Master Agreement. Under New York law, the general rule is that each party is responsible for its own attorney fees unless authorized by agreement between the parties, statute or other court rule. Hooper Associates, Ltd. v. AGS Computers, Inc., 549 N.Y.S.2d 365, 366, 74 N.Y.2d 487 (1989). “It is not uncommon, however, for parties to contract to include a promise by one party to hold the other harmless for a

particular loss or damage and counsel fees are but another form of damage which may be indemnified in this way.” Id. The court in that case went on to clarify, that such indemnification provisions are to be strictly construed. Id. at 367. Unless the intention to indemnify is unmistakably clear from the language of the agreement, the Court will not read into an agreement a legal duty the parties did not clearly intend. Id.

The indemnification provision in question states the, “Defaulting Party, will, on demand, indemnify and hold harmless the other party for an against all reasonable-out-of pocket expenses, including legal fees, incurred by such other party by reason of enforcement and protection of its rights under this Agreement.” (*CP at pp. 29-30 and App. 1 hereto (§9)*). According to the unambiguous words used in this provision, the indemnification provision only allows attorney fees for the non-defaulting party. If Silverhawk prevails on its breach of contract claim then KeyBank is a Defaulting Party under the Master Agreement. But, the reverse does not hold true. In the event KeyBank prevails, Silverhawk is not a Defaulting Party under the Master Agreement, nor has KeyBank alleged at any point that Silverhawk is in default under the Master Agreement. Construing this indemnity strictly as required by New York law, there are no circumstances under which Silverhawk is required to indemnify KeyBank for attorney fees.

III. CONCLUSION

The trial court erred in granting KeyBank's motion to dismiss on summary judgment because the trial court based its dismissal on a *disputed* oral agreement between Silverhawk and KeyBank to terminate the Master Agreement and all of KeyBank's obligations thereunder. The standard of review in this case is *de novo* and the trial court *must* be reversed if there are material issues of fact. Since Silverhawk has shown the applicability of the Master Agreement and disputed material facts in this case, the trial court's order must be vacated and the case should be remanded for discovery and further proceedings on its merits.

DATED this 23rd day of March, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of March, 2011, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

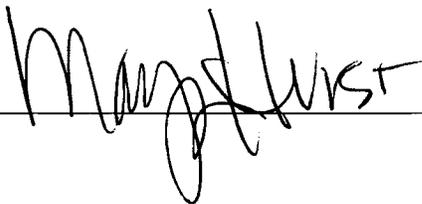
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Hand Delivery
 U.S. Mail (first-class, postage prepaid)
 Facsimile
 Email

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

DATED this 23rd day of March, 2011, at Federal Way, Washington.



APPENDIX 1

A Defaulting Party will, on demand, indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement or any Credit Support Document to which the Defaulting Party is a party or by reason of the early termination of any Transaction, including, but not limited to, costs of collection.

10. Notices

(a) **Effectiveness.** Any notice or other communication in respect of this Agreement may be given in any manner set forth below (except that a notice or other communication under Section 5 or 6 may not be given by facsimile transmission or electronic messaging system) to the address or number or in accordance with the electronic messaging system details provided (see the Schedule) and will be deemed effective as indicated:—

- (i) If in writing and delivered in person or by courier, on the date it is delivered;
- (ii) If sent by telex, on the date the recipient's answerback is received;
- (iii) If sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);
- (iv) If sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; or
- (v) If sent by electronic messaging system, on the date that electronic message is received,

unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Local Business Day.

(b) **Change of Addresses.** Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.

11. Governing Law and Jurisdiction

(a) **Governing Law.** This Agreement will be governed by and construed in accordance with the law specified in the Schedule.

(b) **Jurisdiction.** With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably:—

- (i) submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York; and
- (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party.

Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction (outside, if this Agreement is expressed to be governed by English law, the Contracting States, as defined in Section 1(3) of the Civil Jurisdiction and Judgments Act 1982 or any modification, extension or re-enactment thereof for the time being