

70466-4

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No. 70466-4

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

KRK Holdings, LLC, a Nevada limited liability company,

Appellant,

vs.

EAST WEST BANCORP, INC., a Delaware corporation, d/b/a EAST
WEST BANK,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
THE HONORABLE JANICE E. ELLIS

BRIEF OF APPELLANT

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DIVISION I
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I. INTRODUCTION AND STATEMENT OF ISSUES

Respondent East West Bancorp Inc. promised to have “paid or discharged” “[m]onetary encumbrances or liens” and to obtain title insurance prior to closing of its sale of real property to appellant KRK Holdings LLC for \$1.75 million. Even though the encumbrance could have been removed at closing from sale proceeds, East West refused to pay the funds required to discharge an easement restricting access to the property, causing title insurers to refuse to insure the property. After the scheduled closing date passed, East West sued KRK seeking a declaration that the parties’ purchase and sale agreement was unenforceable and that KRK’s only remedy was return of its \$90,000 earnest money. The trial court’s summary judgment in East West’s favor raises the following issues:

1. Did the trial court’s summary judgment render illusory a seller’s promises to have “paid or discharged” “[m]onetary encumbrances or liens” and to obtain title insurance prior to closing?

2. Did the trial court’s summary judgment wrongly allow a seller to benefit from its breach of its promise to obtain title insurance?

3. Did the trial court err by striking parts of a declaration of the buyer's real estate consultant on the grounds it was not based on the consultant's personal knowledge even though the consultant declared that he had "personal knowledge of the matter attested to herein"?

4. Did the trial court err by ignoring the defendant's request for a CR 56(f) continuance to present a full record regarding the parties' intent on who would bear responsibility for resolving the access easement issue and on whether the plaintiff purposefully undermined a title insurance commitment?

5. Did the trial court err by granting the seller its attorney's fees after declaring the parties' agreement unenforceable?

II. ASSIGNMENT OF ERRORS

1. The trial court erred in entering its Order Granting Plaintiff's Motion To Strike And Granting Plaintiff's Motion For Summary Judgment. (CP 1-2)

2. The trial court erred in declining to rule on KRK's request for a continuance under CR 56(f). (CP 47)

3. The trial court erred in entering its Order Awarding Attorney's Fees And Costs And Order Of Disbursement Of Funds Held In Interpleader Matter No. 13-2-02081-3. (CP 165-66)

III. STATEMENT OF FACTS

A. KRK and East West's PSA required East West to discharge monetary encumbrances and obtain title insurance prior to closing.

In March 2011, KRK entered into a Vacant Land Purchase and Sale Agreement (PSA) with East West to purchase real property in Snohomish County. (CP 122-141) KRK as buyer made a \$90,000 earnest money deposit and agreed to pay East West as seller \$1,750,000 for the property. (CP 122, 161) The PSA contained an integration clause; the parties agreed that the PSA "constitutes the entire understanding between the parties" and that the agreement could only be modified by a writing signed by both parties. (CP 125) The PSA also provided that "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." (CP 125)

In the PSA, East West agreed that "title to the Property shall be marketable at Closing" and that "[m]onetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before Closing." (CP 123) East West further agreed to obtain and pay for title insurance. (CP 123, 149, 161) In the event that "title cannot be made so insurable prior to the Closing Date," the PSA stated that KRK's remedy was a refund of its earnest money,

and provided that the agreement “shall thereupon be terminated” and that KRK “shall have no right to specific performance or damages as a consequence of [East West’s] inability to provide insurable title.” (CP 123)

The PSA provided that KRK would conduct a feasibility assessment and “verify . . . whether or not the Property can be platted, developed and/or built on.” (CP 126) The parties agreed to a closing date “15 days after [the] feasibility release.” (CP 122, 161) On June 24, 2011, KRK completed its feasibility assessment and informed East West that it would “proceed to closing pursuant to the terms of the [PSA]. . . . [T]he currently scheduled closing date is July 11.” (CP 117) KRK confirmed that East West “is required to provide title insurance and deliver title by statutory warranty deed in compliance with the” PSA, specifically those provisions requiring that title be “marketable” and that East West have discharged monetary encumbrances and liens. (CP 117)

B. East West refused to pay from closing proceeds the funds required to release an easement restricting access to the property, preventing title insurers from insuring the property.

Prior to East West's acquisition of the property, a former developer of the property, East Everett Investments LLC (EEI), had recorded an easement restricting access to a portion of the property after EEI's co-developer failed to pay its share of development costs and EEI advanced funds to cover those costs. (CP 11, 15-20) The easement provided that the access restriction could be released by payment to EEI of the co-developer's share of development costs, which the easement estimated at \$500,000. (CP 16)

On July 8, 2011, three days before the scheduled closing, East West informed KRK that "despite its best efforts," including asking six title insurance companies "to review the access issue," it had not been able to obtain title insurance. (CP 143) The access easement was the only issue preventing East West from obtaining title insurance. (CP 49, 143) East West informed KRK that it "must decide whether it wishes to waive the access/marketability issue and proceed to closing or have its earnest money returned." (CP 144)

The sale did not close on July 11, 2011. (CP 49, 162)

C. The trial court granted East West summary judgment and declared the PSA “a nullity.”

On October 30, 2012, East West sued KRK seeking a declaratory judgment that the PSA was unenforceable because the parties failed to close on July 11, 2011, and that KRK’s only remedy was a return of its \$90,000 earnest money deposit. (CP 158-64) On March 27, 2013, East West moved for summary judgment, repeating its assertion that “[t]he PSA became a nullity when sale of the property did not close on July 11, 2011.” (CP 145-54)

In response, KRK asserted that the sale would have closed had East West fulfilled its obligation to obtain title insurance, and that East West could have obtained insurance by paying the development costs identified in the access easement with funds from closing. (CP 44-47) KRK also asserted that East West’s breach of its obligation to obtain title insurance relieved KRK of its obligation to close on the scheduled date. (CP 46) Because discovery had not been completed, KRK also requested a continuance under CR 56(f) in order to conduct additional discovery regarding the parties’ intent and East West’s purported inability to obtain title insurance. (CP 47) In reply, East West

argued that KRK, not itself, bore responsibility for discharging the access easement. (CP 38-42)

On May 9, 2013, Snohomish County Superior Court Judge Janice Ellis granted East West's summary judgment motion. (CP 1-2) The trial court also granted East West's motion to strike portions of the declaration of Ben Durham, KRK's real estate consultant on the transaction with East West, who testified that the encumbrance could have been satisfied, and title insurance obtained, at closing. (CP 2, 48-49) The trial court did not rule on KRK's request for a continuance. The trial court granted East West \$29,379.47 in attorney's fees and costs based on the "prevailing party" fee provision in the PSA. (CP 2, 165-66) KRK timely appealed.

IV. ARGUMENT

A. The trial court's summary judgment order rendered East West's contractual obligations illusory and wrongly allowed East West to benefit from its breach of the PSA.

The trial court ignored the plain language of the PSA, in which East West promised to have "paid or discharged" "[m]onetary encumbrances or liens" and to obtain title insurance prior to closing. Instead of holding East West to its agreement, the trial court accepted East West's interpretation of the PSA, which

rendered its promises illusory. Moreover, the trial court allowed East West to benefit from its breach of its promise to obtain title insurance. This court should reverse and remand for further proceedings consistent with the enforceability of the PSA.

1. This court reviews the trial court’s grant of summary judgment de novo, construing all facts in the light most favorable to KRK.

This court reviews the trial court’s summary judgment order de novo. *Lokan & Associates, Inc. v. Am. Beef Processing, LLC*, ___ Wn. App. ___, ¶ 10, 311 P.3d 1285, 2013 WL 5883787 (2013). On summary judgment, “[t]he moving party has the burden to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him.” *Lokan*, ___ Wn. App. at ¶ 10 (internal quotation omitted). A trial court should grant summary judgment only when “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Lokan*, ___ Wn. App. at ¶¶ 10, 23 (citing CR 56(c)).

“Determining what the parties to a contract intended is generally a question of fact,” ill-suited for resolution on summary judgment. *Columbia Asset Recovery Grp., LLC v. Kelly*, ___ Wn. App. ___, ¶¶ 17-18, 312 P.3d 687, 2013 WL 5883781 (2013)

(reversing summary judgment because whether parties intended contract to be a purchase or discharge of debt was a disputed question of fact). A contract's interpretation must be resolved by a trier of fact where it "depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." *Lokan*, ___ Wn. App. at ¶¶ 11, 13 (reversing summary judgment "because the trier of fact must choose between the reasonable inferences presented"). Because KRK was the non-moving party, in determining the parties' intent this court must view the facts and all reasonable inferences in the light most favorable to it.

2. The trial court erred by allowing East West to treat as illusory its promise to discharge encumbrances and obtain title insurance.

In breach of its contractual obligation to have "paid or discharged" "[m]onetary encumbrances or liens," East West chose not to pay funds required to release the access easement and instead asserted that it could not obtain title insurance "despite its best efforts" *because* of this encumbrance that could have been discharged at closing. This court should reverse the trial court's summary judgment order because it rendered East West's promises

illusory and allowed East West to back out of its agreement with KRK without consequence.

In construing a contract, “(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). “Washington follows the objective manifestation theory of contracts, which has us determine the intent of the parties based on the objective manifestations of the agreement, rather than any unexpressed subjective intent of the parties.” *Condon v. Condon*, 177 Wn.2d 150, 162, ¶ 20, 298 P.3d 86 (2013). “When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we adopt the latter interpretation.” *Berg v. Hudesman*, 115 Wn.2d 657, 672, 801 P.2d 222 (1990) (citing *Dickson v. United States. Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970)).

Washington courts “interpret contract provisions to render them enforceable whenever possible.” *Schnall v. AT & T Wireless Servs., Inc.*, 171 Wn.2d 260, 266, ¶ 6, 259 P.3d 129 (2011). Towards

this end, Washington courts reject “interpretations that would render contract obligations illusory.” *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997), *rev. denied*, 132 Wn.2d 1009; *State v. Wilson*, 102 Wn. App. 161, 168, 6 P.3d 637 (2000) (“The court will not give effect to interpretations that would render contract obligations illusory.”); *Delson Lumber Co., Inc., v. Washington Escrow Co., Inc.*, 16 Wn. App. 546, 552, 558 P.2d 832 (1976). “A contract is illusory when its provisions make performance optional or discretionary.” *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 770, ¶ 25, 145 P.3d 1253 (2006), *rev. denied*, 161 Wn.2d 1012 (2007).

Given these principles, the trial court’s grant of summary judgment was in error because it rendered East West’s promise to “pa[y] or discharge[]” “[m]onetary encumbrances or liens” and to obtain title insurance meaningless and illusory. (CP 123) The “access easement” was a “monetary encumbrance” that could have been discharged by payment from closing to the property’s former developer. (CP 16 (access easement would persist until co-developer’s share of costs was paid to former developer), 49, 123 (encumbrances could be discharged “on or before Closing”)) East West asserted, and the trial court agreed, that East West could

ignore its obligation to pay off this monetary encumbrance, cause title insurers to be unwilling to insure the property, and escape from its agreement to sell the property to KRK. In essence, East West asserted that it could walk away from the PSA at any time without consequence. This court should reject East West's interpretation rendering its obligations "optional or discretionary." *Cascade*, 135 Wn. App. at 770, ¶ 25.

East West's argument was premised on extrinsic evidence – declarations from its attorney and real estate broker, and an unexecuted contract between KRK and the easement holder – purporting to establish that KRK bore responsibility for clearing the access easement. (CP 3-37) This evidence could not override the unambiguous language in the PSA imposing that obligation on East West. *Graoch Associates No. 5 Ltd. P'ship v. Titan Const. Corp.*, 126 Wn. App. 856, 866 n. 15, ¶ 15, 109 P.3d 830 (2005) ("Extrinsic evidence, such as the declaration of a party to a contract, may not be used (1) to establish a party's unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word.") (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695–96, 974 P.2d 836 (1999)).

East West's reliance on extrinsic evidence is especially misplaced in light of the contract's integration clause. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 851, ¶ 23, 158 P.3d 1265 (2007) (reversing summary judgment and rejecting respondent's reliance "on inadmissible extrinsic evidence to add to the contract and to contradict the contract's integration clause"), *rev. denied*, 163 Wn.2d 1020 (2008). Even ignoring that extrinsic evidence cannot vary the terms of the PSA, East West's extrinsic evidence establishes, at most, a genuine issue of material fact regarding who the parties intended to bear responsibility for clearing the access easement. *Kelly*, ___ Wn. App. at ¶¶ 17-18; *Lokan*, ___ Wn. App. at ¶ 11.

For example, a subsequent agreement signed by KRK (but not the access easement holder, EEI) purporting to discharge the access easement could not establish *as a matter of law* that KRK and East West intended that KRK would discharge the access easement when they signed the PSA a month earlier. (CP 11-14) *Equilon Enterprises LLC v. Great Am. Alliance Ins. Co.*, 132 Wn. App. 430, 440, ¶ 19, 132 P.3d 758 (2006) (language of contract between named insured and additional insured was "irrelevant when the language at issue—that of the additional insured

endorsement, is unambiguous”). At best, this evidence would create only a factual issue whether the obligation was “assumed by Buyer” KRK. (CP 123)

Nor could the unilateral statements of East West’s attorney and real estate broker, after the PSA was signed, establish that the parties intended KRK to be responsible for resolving the access easement. (CP 4 (attorney: “The express purpose of the Agreement [between KRK and EEI] is to resolve the Declaration of Access Easement issue”), 37 (real estate broker: “The obligation to reach a settlement of costs would fall on [KRK] as a cost of acquisition of this parcel.”)); *Graoch Associates*, 126 Wn. App. at 866 n. 15, ¶ 15. These statements from East West’s agents directly conflict with the statement of KRK’s manager, who less than a month before the scheduled closing date affirmed KRK’s position that “East West Bank is required to provide title insurance and deliver title . . . in compliance with . . . Sections c and d” of the PSA that required East West to discharge or pay monetary encumbrances and liens. (CP 117, 123) East West’s own evidence also indicates that it “asked [six] title companies to review the access issue,” and East West provided no explanation why it went through this effort if it in fact believed that KRK bore the responsibility for clearing title. (CP 143)

This court should reject East West's position that it could simply walk away from the PSA, and should reverse the trial court's summary judgment order. In light of the PSA's unambiguous language requiring East West to pay or discharge all encumbrances or liens, there is at the very least a genuine issue of material fact regarding the parties' intent. This court should remand for further proceedings consistent with the enforceability of the PSA.

3. East West cannot benefit from its breach of its promise to obtain title insurance.

The trial court also erred in granting summary judgment because East West's obligation to close cannot be excused by its own frustration of a condition precedent to its obligation to close, i.e., that it obtain title insurance for the property prior to closing. This court should reverse the trial court's summary judgment order for this separate and independent reason.

"A condition precedent is a fact or event included in a contract that must take place before a right to immediate performance arises." *Lokan*, ___ Wn. App. at ¶ 18; *see also* Black's Law Dictionary (9th ed. 2009) (defining "condition precedent" as "An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises.").

“It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.” *Highlands Plaza, Inc. v. Viking Inv. Corp.*, 72 Wn.2d 865, 876, 435 P.2d 669 (1967) (quoting 5 S. Williston, *Contracts* § 677 (3rd ed.), *appeal after remand*, 2 Wn. App. 192, 467 P.2d 378 (1970)). Thus, “[w]hen through the fault of the promisor the occurrence or fulfillment of the condition precedent . . . is prevented, and the condition would have been fulfilled except for the prevention on part of the promisor, then the performance of the condition is excused and the liability of the promisor . . . on the contract becomes absolute regardless of the failure to fulfill the condition.” *Refrigeration Eng’g Co. v. Mckay*, 4 Wn. App. 963, 970, 486 P.2d 304 (1971); *see also* Restatement (Second) of Contracts § 245, comment a (1981) (prevention of condition precedent by party excuses condition precedent “so that performance of the duty that was originally subject to its occurrence can become due in spite of its non-occurrence”).

This duty to refrain from frustrating the performance of a contract is part of the duty of good faith implied in every contract.

Frank Coluccio Const. Co., Inc. v. King County, 136 Wn. App. 751, 764, ¶ 22, 150 P.3d 1147 (2007) (“There is an implied duty of good faith and fair dealing in every contract. This duty obligates the parties to cooperate with one another so that each may obtain the full benefit of performance.”) (citation omitted); *Cavell v. Hughes*, 29 Wn. App. 536, 539, 629 P.2d 927 (1981); *Egbert v. Way*, 15 Wn. App. 76, 79, 546 P.2d 1246 (1976) (“Each party has the affirmative good faith obligation to perform conditions precedent under a contract and cannot be excused from performance by his own misconduct;” reversing denial of specific performance on real estate sale contract because “[t]he only barrier to the release of these tax obligations as a condition precedent to sale is [seller]’s own reluctance to perform”). The trial court erred in granting summary judgment because a fact-finder could have found that East West violated its contractual duty in this case by frustrating the procurement of title insurance, a condition precedent to closing.

In *Cavell*, for instance, the Court of Appeals did not allow a party to profit from his own bad faith actions that prevented the occurrence of a condition precedent. The defendant in *Cavell* contracted to sell his house to the plaintiff, conditioned on the local country club approving plaintiff’s membership application. After

deciding he wanted out of the deal, the defendant, a director on the club's board, prevented the club from approving the plaintiff's application. This court reversed the trial court's dismissal of plaintiff's specific performance action because defendant's actions were not in good faith, but rather for "the specific purpose of frustrating the sale . . . because he felt he had made a bad bargain." *Cavell*, 29 Wn. App. at 539. The appellate court excused performance of the membership condition and held defendant was obligated to complete the sale. *Cavell*, 29 Wn. App. at 540.

Here, as in *Cavell*, this court should refuse to allow East West to benefit from its own frustration of the condition precedent to its obligation to close, *i.e.*, that it obtain title insurance. (CP 123, 149, 161) East West could have eliminated the only obstacle to title insurance – discharge of the access easement – from the proceeds at closing, but without explanation it refused to do so. (CP 16, 49, 123, 143-44) Instead, East West demanded that KRK choose between "waiv[ing] the access/marketability issue and proceed[ing] to closing or hav[ing] its earnest money returned." (CP 144)

East West's letter asserting that KRK must assume the monetary obligation necessary to remove the access easement (CP 143-44) was an anticipatory breach that excused KRK from any

further obligations, including its obligation to close by July 11, 2011. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994) (“[A]n anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance”). *CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991) (“Repudiation of a contract by one party may be treated by the other as a breach which will excuse the other’s performance.”), *rev. denied*, 120 Wn.2d 1010 (1992). Accordingly, East West cannot assert that the failure to close excused its liability when it had already informed KRK that it would not take the steps necessary to obtain title insurance and close.

East West could have obtained title insurance by discharging the access easement with a portion of the proceeds received from KRK at closing. This court should reverse the trial court’s summary judgment order that allowed East West to benefit from its unexplained rejection of a clear avenue for obtaining title insurance and fulfilling its contractual obligations under the PSA.

B. The trial court erred by striking a declaration based on personal knowledge and containing statements that were neither “speculative” nor “conclusory.”

The trial court erred by striking portions of the declaration submitted by KRK’s real estate consultant based on East West’s perfunctory assertions that the declaration lacked foundation and personal knowledge and was conclusory and speculative. (CP 40) This court should reverse the trial court’s order striking the declaration as well as the related summary judgment order.

This court “review[s] de novo evidentiary rulings made in conjunction with a summary judgment motion.” *Bloome v. Haverly*, 154 Wn. App. 129, 138, ¶ 12, 225 P.3d 330 (2010) (reversing trial court’s refusal to strike declarations that contained party’s “subjective intent as to the meaning of” restrictive content). “Supporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence” CR 56(e). A summary judgment order that improperly excludes evidence creating a genuine issue of material fact must be reversed. *Sun Mountain Prods., Inc. v. Pierre*, 84 Wn. App. 608, 619-20, 929 P.2d 494 (reversing summary judgment order based on improper exclusion of declarations), *rev. denied*, 132 Wn.2d 1003 (1997).

The trial court struck portions of the declaration of Ben Durham, the real estate consultant who advised KRK on the transaction with East West. The trial court accepted East West's assertion, without any supporting analysis, that Durham's declaration "is replete with speculation, conclusory statements, opinions couched as facts, and hearsay." (CP 40) But Durham expressly testified that "I worked directly on the transaction that is the subject of [this] litigation, and that I have personal knowledge of the matter attested to herein." (CP 48)

East West's other objections to Durham's declaration were also misplaced. East West asserted that Durham's statements that it "could have obtained an insurable title commitment upon payment of the fee referenced in the [access] easement" and "the Easement could have been resolved through the payment of funds at closing" were "speculation" and "conclusory," but the plain language of the easement supports Durham's statements. (CP 16 (access would be restricted "until that obligation is paid and/or acceptable arrangements are made for the payment of the balance owing"))

Likewise, East West objected to Durham's statement that East West "chose not to resolve the Easement access issue, and

informed KRK . . . that the transaction could not be closed” even though East West had admitted those facts in both its complaint and motion for summary judgment. (*Compare* CP 7 with CP 149, 162; *see also* CP 143-44) Finally, East West’s concession that six title insurers refused to insure the property because of the “access issue” (CP 143) belies its objection to Durham’s testimony that East West “could have obtained an insurable title commitment, but for a price.” (CP 7)

East West’s objections to Durham’s declaration are particularly misplaced and disingenuous given its submission of a declaration from its own real estate broker, Joseph Coakley. (CP 33-37) Coakley’s statements went far beyond Durham’s description of East West’s refusal to obtain title insurance despite its ability to do so, and instead purported to interpret the contract itself. (CP 34 (stating that KRK bore “[t]he obligation to reach a settlement” regarding the access easement)) As explained above, these statements were inadmissible to contradict the plain language of the PRA. *Graoch Associates No. 5*, 126 Wn. App. at 866 n. 15, ¶ 15; *Nishikawa*, 138 Wn. App. at 851, ¶ 23; *see also Bloome*, 154 Wn. App. at 138, ¶ 12. The trial court erred by striking portions of the

Durham declaration and by entering summary judgment after excluding Durham's statements.

C. The trial court erred by ignoring KRK's request for a continuance under CR 56(f) when additional discovery would not have prejudiced East West in the slightest.

East West moved for summary judgment less than five months after commencing this action against KRK, a foreign defendant, and before any significant discovery. KRK requested a continuance under CR 56(f) because it needed further discovery regarding "1) [East West's] ability to obtain an insurable title commitment; 2) [East West's] decision to forego payment of the amount needed to resolve the access/marketability issue; and 3) the parties' intent as to how the access/marketability issue would be resolved." (CP 47) The trial court abused its discretion by ignoring KRK's request and instead granting summary judgment based on extrinsic evidence that KRK did not have the opportunity to rebut.

Under CR 56(f), a trial court can grant a continuance on a summary judgment motion "to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." A party seeking a continuance should "state what evidence would be established through the additional

discovery.” *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). A trial court abuses its discretion if it denies a continuance under the rule “on untenable grounds or for untenable reasons.” *Coggle*, 56 Wn. App. at 507.

In *Coggle*, for example, the trial court abused its discretion by denying a continuance when “[l]ittle discovery had been pursued” and the opposing party would not suffer any prejudice from the grant of a continuance. 56 Wn. App. at 508. This court noted that “[t]he primary consideration in the trial court’s decision on the motion for a continuance should have been justice” and that “the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case.” *Coggle*, 56 Wn. App. at 507-08.

Here, the trial court abused its discretion by ignoring KRK’s request for a continuance. As in *Coggle*, little discovery had taken place. (CP 47) KRK explained that it would use a continuance to seek additional evidence regarding: 1) East West’s assertion that it was unable to obtain title insurance, 2) why East West failed to clear title to the property, and 3) the parties’ intent regarding who bore responsibility for discharging the access easement. (CP 47) The trial court failed to rule on KRK’s request, let alone provide any

reasoning how East West would be prejudiced by a continuance or why KRK should not be allowed to pursue discovery. Under East West's theory of the case, there was at a minimum a genuine issue of material fact regarding the parties' intent concerning the access easement. The trial court erred by not granting KRK a continuance to obtain evidence on this critical issue and why East West refused to discharge the access easement.

D. The trial court erred by awarding East West its attorney's fees.

The trial court awarded East West \$29,379.47 in attorney's fees and costs based on the fee clause in the PSA, which provides that "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses." (CP 125, 165-66) As explained above, the trial court erred by granting East West's motion for summary judgment and, accordingly, it also erred in granting East West its attorney's fees below.

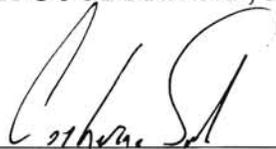
"A contract that provides for attorney fees at trial also supports such an award on appeal." *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 241. ¶ 15, 287 P.3d 606 (2012). KRK is entitled to its fees incurred on appeal should it prevail on remand.

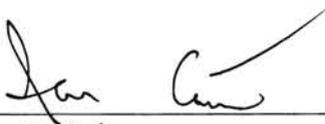
V. CONCLUSION

This court should reverse the trial court's Order Granting Plaintiff's Motion To Strike And Granting Plaintiff's Motion For Summary Judgment, reverse the award of attorney's fees to East West, and remand for further proceedings consistent with the enforceability of the PSA.

Dated this 12th day of December, 2013.

SMITH GOODFRIEND, P.S.

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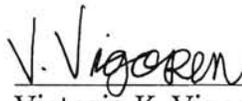
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 12, 2013, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Steven D. Robinson Jacque Elizabeth St. Romain Karr Tuttle Campbell 701 Fifth Avenue, Suite 3300 Seattle WA 98104	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 12th day of December, 2013.



Victoria K. Vigoren