

72907-1

72907-1

No. 72907-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
2015 AUG -6 AM 11:50

---

LUCKY STAR ENTERPRISES, LLC, a Washington limited liability  
company,

*Respondent and Plaintiff,*

v.

KENT HILL PLAZA LLC, aka KENT EAST HILL PLAZA LLC, a  
Washington limited liability company,

*Appellant and Defendant.*

---

**REPLY BRIEF OF APPELLANT**

---

DOUGLAS S. TINGVALL, WSBA #12863  
Attorney for Appellants  
8310 154<sup>th</sup> Ave SE  
Newcastle WA 98059-9222  
RE-LAW@comcast.net  
425-255-9500/Fax 425-255-9964

## TABLE OF CONTENTS

Table of Authorities .....	3
Argument	
1. Introduction.....	5
2. The standard of review for whether a contract was formed is de novo .....	5
3. The standard of review for whether Lucky Star breached its duty of good faith and fair dealing is also de novo.....	8
Conclusion .....	10

TABLE OF AUTHORITIES

Washington Cases:

*Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994).....7

*Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 167 P.3d 1112 (2007).....8

*Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 935 P.2d 628 (1997).....9

*Knipschild v. C-J Recreation, Inc.*, 74 Wn.App. 212, 872 P.2d 1102 (1994).....6

*Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993).....6

*Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971).....7

*Ottgen v. Clover Park Technical College*, 84 Wn.App. 214, 928 P.2d 1119 (1996).....7

*Peoples Mortgage Co. v. Vista View Builders*, 6 Wn.App. 744, 496 P.2d 354 (1972).....7

*Peterson v. Kitsap Community Federal Credit Union*, 287 P.3d 27 (Wn.App. Div. 2 2012).....9

*Powers v. Hastings*, 93 Wn.2d 709, 612 P.2d 371 (1980).....6

*State v. Nason*, 96 Wn.App. 686, 981 P.2d 866 (1999).....6, 7

*Swanson v. Holmquist*, 13 Wn.App. 939, 539 P.2d 104 (1975).....7

Other Jurisdictions:

*Amoco Oil Co. v. Ervin*, 908 P.2d 493 (Colo.1995) .....9

*Flower City Painting Contractors, Inc. v. Gumina Constr. Co.*, 591 F.2d 162 (2d Cir.1979).....7

Miscellaneous:

RESTATEMENT (SECOND) OF CONTRACTS, section 20(1)  
(1979).....7

## ARGUMENT

### 1. Introduction.

This is a classic case of the proverbial “ships passing in the night.” Without a meeting of the minds on all material terms of the Lease, no contract was created at all. As the trial court found, “[t]he installation of the new HVAC system was a central part of this bargain between the two parties.” FF 12. Yet, the parties had difficult expectations about this “central part” of the bargain. Kent Hill thought it could simply replace the HVAC units in their existing locations, while Lucky Star knew all along that it wanted the HVAC units relocated. Lucky Star’s architect visited the premises *before* the Lease was signed and knew that his design of the HVAC system would require relocating the HVAC rooftop units. Kent Hill was not aware of Lucky Star’s secret intention. Cutting new holes in this 40-year-old building and installing the new HVAC units in different locations would not only jeopardize the integrity of the roof membrane, but also require structural retrofitting. For such a “central part” of the bargain, the parties should have attached to the Lease the drawings or at least the schematic (Ex 13), as the parties had done with the site plan (Exhibit A of Ex. 11).

### 2. The standard of review for whether a contract was formed is *de novo*.

Lucky Star asserts that the trial court's decision should be reviewed under the "abuse of discretion standard." While Lucky Star is correct that the abuse of discretion standard of review applies to the *remedy* of specific performance, the analysis consists of two parts. First, the court must first determine whether a contract was created, which is a question of law and reviewed de novo. *Knipschild v. C-J Recreation, Inc.*, 74 Wn.App. 212, 215, 872 P.2d 1102 (1994); *State v. Nason*, 96 Wn.App. 686, 691, 981 P.2d 866 (1999). Second, if and only if this court concludes under de novo review that a contract was formed, then this court determines whether the trial court abused its discretion in granting the remedy of specific performance.

When a court is asked to grant the remedy of specific performance, the trial court is required to make findings that the contract clearly and unequivocally leaves no doubt as to the terms, character, and existence of the contract. *Powers v. Hastings*, 93 Wn.2d 709, 612 P.2d 371 (1980); *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). The trial court here made no such findings.

"[T]he contract be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract. . . . A mere preponderance of the evidence is not sufficient. If the evidence leaves it at all doubtful as to whether or not a contract was entered into, the court will not decree specific performance."

*Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971).

“When each party has a different understanding of a material term, a basis exists for a court to find no contract was formed. *See Swanson v. Holmquist*, 13 Wn.App. 939, 943, 539 P.2d 104 (1975). In accordance with this principle, the RESTATEMENT (SECOND) OF CONTRACTS, section 20(1) (1979), provides: ‘There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other.’

“When there is uncertainty of meaning in the terms of the promise that the court cannot resolve, the promise is fatally ambiguous and void. *Peoples Mortgage Co. v. Vista View Builders*, 6 Wn.App. 744, 748, 496 P.2d 354 (1972); *see Flower City Painting Contractors, Inc. v. Gumina Constr. Co.*, 591 F.2d 162, 164-65 (2d Cir.1979). A court may look to parol evidence to explain the ambiguity and, if the meaning remains unclear, no contract is formed. *Peoples Mortgage*, 6 Wn.App. at 748, 496 P.2d 354. Questions of whether an ambiguity in a contract exists and the legal effect of a contract are issues of law reviewed de novo.”

*State v. Nason*, 96 Wn.App. 686, 691, 981 P.2d 866 (1999).

“[T]he law of contracts . . . is designed to enforce expectations created by agreement.” *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 821, 881 P.2d 986 (1994). Here, Kent Hill and Lucky Star had different expectations and understandings of a material term of the Lease, *i.e.*, the locations of the HVAC units. It is fundamental that “[a] contract is not formed unless there is mutual assent between the contracting parties.” *Ottgen v. Clover Park Technical College*, 84 Wn.App. 214, 219, 928 P.2d 1119 (1996). In this case, the

parties did not even discuss relocating the HVAC units until months after the Lease was executed when Lucky Star's drawings were delivered to Kent Hill. Kent Hill could not foresee and not expect or contemplate that Lucky Star's drawings would require cutting new holes in the roof. Lucky Star knew after its architect's first visit to the premises *before* the Lease was signed that the architect's drawings would require relocating the HVAC units, yet Lucky Star said nothing about it. Lucky Star's architect had to have known that cutting holes in the roof of a 40-year-old building would impose significant risks and require substantial retrofitting. Lucky Star had knowledge that Kent Hill did not have, yet Lucky Star did not share that knowledge. Instead, like a seller who remains silent about known latent defects, Lucky Star said nothing until *after* the Lease was signed and then sprung the surprise on Kent Hill.

**3. The standard of review for whether Lucky Star breached its duty of good faith and fair dealing is also de novo.**

“The process of determining the applicable law and applying it to these facts is a question of law that we review de novo.” *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007). “When the issue is whether the parties committed a particular act, we review any contested facts under the substantial evidence test. . . . But where there is no dispute about what the parties did, ‘whether the conduct constitutes an

unfair or deceptive act can be decided by this court as a question of law,' which we review de novo." *Peterson v. Kitsap Community Federal Credit Union*, 287 P.3d 27, 37 (Wash.App. Div. 2 2012).

"The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time.... The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 739, 935 P.2d 628 (1997) (quoting *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo.1995)).

Here, the facts with respect to preparation of the architect's drawings are uncontested. Lucky Star's architect visited the premises before the Lease was signed. The architect knew that his drawings would call for the new HVAC units to be placed in different locations from the existing ones. Lucky Star did not disclose this knowledge to Kent Hill. There was no discussion about the locations of the HVAC units before the Lease was signed. The preliminary schematic (Ex. 13) prepared by Lucky Star's architect could have been disclosed to Kent Hill and made an exhibit to the Lease. Kent Hill did not contemplate relocating the HVAC units as part of its obligations under the Lease.

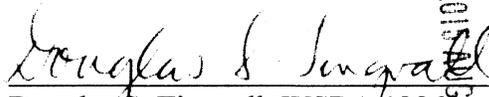
Based on these undisputed facts, whether Lucky Star breached its

duty of good faith and fair dealing by failing to disclose its secret intention to require relocation of the HVAC units is reviewed by this court de novo.

**CONCLUSION**

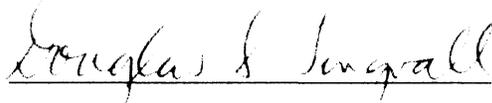
The trial court should have concluded that the parties never had a meeting of the minds, such that no contract was formed. If a contract was formed, Lucky Star breached its duty of good faith and fair dealing by (a) failing to disclose to Kent Hill that its plans for the new HVAC system would require relocating the HVAC rooftop units, and (b) refusing to consider a reasonable alternative utilizing the existing holes in the roof and requiring no structural retrofitting or sacrifice in the roof's integrity. The decision of the trial court should be reversed and the case dismissed. Attorney's fees should be awarded to Kent Hill at trial and on appeal.

Respectfully submitted on August 5, 2015.

  
Douglas S. Tingvall, WSBA 12863  
Attorney for Appellant

**DECLARATION OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that I successfully emailed a copy of this document to respondent's attorney of record on August 5, 2015, at Newcastle, Washington.



2015 AUG 6 AM 11:58  
COURT OF APPEALS  
STATE OF WASHINGTON