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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

NO. 34589-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LLOYD and MONICA NISHIKAWA,
husband and wife,

Appellants,

v.

U.S. EAGLE HIGH,
a Washington limited liability company,

Respondent.

RESPONDENT'S BRIEF

Timothy L. Ashcraft, WSBA #26196
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent

1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

ORIGINAL

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ISSUES

1. Is a real estate purchase and sale agreement valid when there is no valid legal description?
2. Can an agent whose authority has been expressly revoked attach a legal description such to make an invalid agreement valid?
3. Can there be a valid agreement when there is no meeting of the minds?

COUNTER STATEMENT OF THE CASE

A. Introduction

This is a real estate dispute arising out of a purchase and sale agreement for the sale of commercial property. The plaintiffs, Lloyd and Monica Nishikawa, sued for specific performance and monetary damages based on their allegation that defendant U.S. Eagle High LLC (U.S. Eagle) failed to close on a valid agreement. But there was never a valid purchase and sale agreement, as there was no legal description until after Mr. Choo Kim, the principal for U.S. Eagle High, explicitly instructed the dual agent in this case, Sung Lee and Wanda Coats from Windermere Real Estate, not to attach the legal description. Thus, the agent was without authority and the agent's actions cannot bind the principal. Moreover, an addendum to the agreement provided that only the Seller could provide the legal description and Mr. Choo Kim never added such a description.

Additionally, this was not a valid agreement because there was no meeting of the minds. Mr. Choo Kim, who does not speak English very well, always intended for the Nishikawas to take the property “as is” meaning that any issues regarding the property, including environmental issues, belonged to the buyers and that they would indemnify him for any liability arising out of the property. Mr. Kim would have never signed the purchase and sale agreement except that the dual agent, Sung Lee, assured him that the Nishikawas were taking the property “as is” and would indemnify him for any liability.

B. RELEVANT FACTS

On or about August 9, 2002, Mr. Choo Kim obtained titled to a piece of property in Pierce County, Washington, legal described as follows:

Lots 2 and 3, Pierce County Short Plat,
Recorded February 7, 1995, under recording
number 9502070438, Records of Pierce
County Washington.

The common address for this property is 13415, 13415 ½, 13417 and 13417 ½ Pacific Avenue South, Tacoma, Washington. (CP 9).

On or about August, 30, 2002, Mr. Kim transferred the ownership of the property to U.S. Eagle High, LLC. Mr. Kim is the sole member of that LLC. (CP10).

In 2005, Mr. Kim entered into negotiations to sell the property to the plaintiffs, Lloyd and Monica Nishikawa. (CP 10). Mr. Kim does not

speak English very well. (CP 10). Mr. Kim, the plaintiffs, and real estate agent Sung Lee all attended the same church. Mr. Lee offered to be the agent for the transaction, operating as a dual agent. (CP 10). Mr. Kim relied on Mr. Lee to convey his terms to the Nishikawas. (CP 10).

From the beginning of the negotiations, Mr. Kim was adamant that the Nishikawas buy the property “as is” meaning that the Nishikawas accepted the property, and any problems on the property including environmental problems. (CP 10). This also meant that the Nishikawas would indemnify Mr. Kim for any environmental liability related to the property. (CP 10).

On or about August 2, 2005, Mr. Choo Kim signed the Purchase and Sale Agreement. (CP 14-20). He did this only with the assurance from Sung Lee that the Nishikawas would sign an indemnity agreement. (CP 10). Mr. Kim would not have signed the agreement otherwise. (CP10).

The Agreement did not contain a legal description of the property being sold. On page one of the Agreement, it provides that “(Buyer and Seller authorize the Listing Agent or Selling Licensee to insert and/or correct, over their signatures, the legal description of the Property.)” (CP 14). However, an addendum to the Agreement provided that “1. Seller shall provide the legal description.” (CP 20).

The Nishikawas did not sign the proposed indemnity agreement. (CP 10). Thus, an essential element of the transaction was missing, and Mr. Kim did not want to sell the property without that indemnity agreement. (CP 10). The then-attorney for U.S. Eagle High, Martin Burns, reviewed the Purchase and Sale Agreement and discovered that no legal description had been attached. (CP 21). Mr. Burns wrote a letter to Wanda Coats and Sung Lee at Windermere, explicitly instructing them not to attach the legal description. (CP 22, 25-26). He sent this letter via fax at 10:14 on September 19, 2005. (CP 22, 28-29). On September 20, 2005 at approximately 11:05 a.m., Mr. Burns received a letter from Wanda Coats at Windermere, informing him that she had attached the legal description. (CP 22, CP 30-31).

ARGUMENT

A. There was never a valid Purchase and Sale Agreement because a valid legal description was never legally added to the Agreement.

1. The contract did not contain a valid legal description.

Under Washington law, a contract for the sale of property must contain a valid legal description.

We have held consistently that, in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference

to another instrument which does contain a sufficient description.

Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). *See also*, *Bonded Adjustment Co. v. Edmunds*, 28 Wn.2d 110, 111-12, 182 P.2d 17 (1947). In *Martin v. Siegel*, 35 Wn.2d 223, 229, 21 P.2d 107 (1949), the court held that a real estate purchase and sale agreement must describe the property “by the correct lot number(s), block number, addition, city, county, and state.”

Until the legal description was added by Wanda Coats on September 20, there was no valid legal description. The Purchase and Sale Agreement itself does not contain the legal description. Martin Burns testified that he reviewed the pertinent documents and found no legal description attached. (CP 21). Moreover, Wanda Coats’ letter of September 20, 2005 indicates there was no legal description, which she attempted to add on September 20, 2005. (CP 30). “An agreement containing an inadequate legal description of the property to be conveyed is void, and is not subject to reformation, or specific performance.”

Ecolite Mfg. Co. v. R.A. Hanson Co., Inc., 43 Wn. App. 267, 270, 716 P.2d 937 (1986)(internal citations omitted).¹ As such it was not binding and did not afford any party any rights.

¹ Because it was not a valid agreement, none of the terms of the Agreement could bind either party. As such, this “agreement” was really just an agreement to agree, which is

Any potential dispute regarding the legal description was resolved in *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 983 P.2d 653 (1999). In *Moser*, the parties entered into a purchase and sale agreement, but while they listed the street address for the property, no legal description was inserted. *Id.* at 878. The contract provided that the “full and complete legal description must be inserted prior to execution by the parties.” *Id.* The legal description was never added and the seller sold the property to another buyer. *Id.* at 879-880. The original buyer sued the seller for damages and specific performance, seeking to set aside the sale to the second buyer. *Id.* at 880. The trial court found for the seller on summary judgment, holding that no valid agreement existed due to the lack of a valid legal description. *Id.*

On appeal, the appellant asked the court to overrule *Martin v. Siegel*, and hold that a street address is a valid legal description. *Id.* at 880-81. In the alternative, the appellant asked for the court to adopt a judicial admission exception to *Martin*, and hold that when the seller admits in court documents that the property described in the purchase and sale agreement by a street address is the actual property being sold, then the street address is sufficient to satisfy the statute of frauds. *Id.* at 881.

not enforceable. *See, e.g., Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 175-76, 94 P.3d 945 (2004).

The court rejected all of these arguments and affirmed the trial court. The court concluded that the lack of a proper legal description rendered the agreement unenforceable. *Id.* at 889. The court, having reaffirmed *Martin*, found no reason to adopt a judicial admissions exception. *Id.* Finally, the affirmed the general rule that an agreement with an inadequate legal description is not subject to reformation. *Id.* at 888-89. According to *Moser*, any implication by the appellant² that the agreement was valid with only a street address (which, in any event, was incomplete)³ is incorrect.

2. Plaintiffs incorrectly rely on *Edwards v. Meader* and its progeny.

Plaintiffs reliance on *Edwards v. Meader*, 34 Wn.2d 921, 925, 210 P.2d 1019 (1949) is misplaced and does not aid the analysis of this case. *Edwards* stands only for the proposition that when an agent, acting within his or her authority, actually attaches a legal description to a purchase and sale agreement, then the agreement becomes valid at that point. In *Edwards*, it was the seller who sued the buyer for the failure to perform on the purchase and sale agreement. The Agreement provided that the

² See appellant's brief at 8-9, citing *First National Bank of Kennewick v. Conway*, 87 Wash. 506, 151 P. 1129 (1915) and *Fallers v. Pring*, 144 Wash. 224, 257 P. 627 (1927).

³ *Cf.* CP 14, identifying the property as 13415 Pacific Avenue and CP 9 in which Choo Kim testifies that the property at issue has a street address of 13415, 13415 ½, 13417 and 13417 ½ Pacific Avenue.

seller's agent would insert the legal description, which was done a day or two later. *Id.* at 923-24. Thus, in *Edwards* there was no issue about whether the agent was authorized by his principal to insert the legal description or whether that authority had been revoked.

Here, any authority of the agent was expressly revoked. (See Section A.4., below). The principal is not liable for the unauthorized acts of the agent. *See Routh v. Wagner*, 53 Wn.2d 347, 350, 333 P.2d 674 (1959).

The other cases cited for this proposition are all real estate commission cases, and did not involve the issue of whether the legal description was adequate to satisfy the statute of frauds for the sale of real estate. *See Noah v. Montford*, 77 Wn.2d 459, 463 P.2d 129 (1969); *McCarthy v. Rogstad*, 6 Wn. App. 699, 495 P.2d 667 (1972); *McKoin v. Kunes*, 5 Wn. App. 731, 490 P.2d 735 (1971). Additionally, as with *Edwards*, the issue of whether the Agent had authority to insert the legal description was not at issue in any of those cases.

3. Only the Seller, Choo Kim of U.S. Eagle High, had the authority to add the legal description and Choo Kim never added such a description.

Given that the Agreement did not have a valid legal description, the next issue is whether anyone had any authority to add the legal description. Within the Agreement, there are two references to supplying

the legal description. On page one of the Agreement, it provides that “(Buyer and Seller authorize the Listing Agent or Selling Licensee to insert and/or correct, over their signatures, the legal description of the Property.)” (CP 14). However, an addendum to the Agreement provided that “[s]eller shall provide the legal description.” (CP 20). When there is a specific addendum to a boilerplate contract, the specific provision controls over the general provision. *Wright v. Safeco Ins. Co. of America*, 124 Wn. App. 263, 277, 109 P.3d 1 (2004).

Thus, the addendum, which provides that only the seller can provide the legal description, is the operative provision. Mr. Choo Kim never added the legal description and there is no evidence to suggest that he did. Rather, Wanda Coats added the legal description on September 20, 2005. As discussed below, the act of Wanda Coats attaching the legal description is invalid.

4. Even if an agent was originally authorized to add the legal description, such authority was expressly revoked prior to the adding of the legal description.

As noted above, only Choo Kim could have attached the legal description, which he never did. But even if the agent could have attached the legal description, Wanda Coats and Sung Lee did not have authority to do so. Thus, any actions by them in attaching the legal description are of no effect.

The authority of an agent can be revoked at any time. *Arcweld Mfg. Co. v. Burney*, 12 Wn.2d 212, 221-22, 121 P.2d 350 (1942); *Debenedictis v. Hagen*, 77 Wn. App. 284, 290, 890 P.2d 529 (1995). Once revocation has occurred, “in no event may the agent continue to act on behalf of the principal.” *Hagen*, 77 Wn. App. at 290. The principal is not liable for the unauthorized acts of the agent. *See Routh v. Wagner*, 53 Wn.2d 347, 350, 333 P.2d 674 (1959).

In this case, Martin Burns, then attorney for Choo Kim and U.S. Eagle High, sent a letter on September 19, 2005 to Wanda Coats and Sung Lee, expressly revoking any authority to attach the legal description. (CP 22, 25-26). Once this was done, Wanda Coats and Sung Lee lost the ability to bind Choo Kim and U.S. Eagle High. Thus, Wanda Coats’ attachment of the legal description on September 20, 2005 is of no legal effect.

Plaintiffs argue that revoking the agent’s authority was an attempt to modify a contract, which requires mutual assent. Plaintiffs are incorrect. As cited above, a contract without a valid legal description is void and unenforceable. *Ecolite Mfg. Co. v. R.A. Hanson Co., Inc.*, 43 Wn. App. 267, 270, 716 P.2d 937 (1986); *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 889, 983 P.2d 653 (1999). Thus, there was no contract to modify. Moreover, as an agent’s authority can be revoked at any time,

Choo Kim was free to revoke that authority independent of any approval by the Nishikawas.

The Nishikawas then argue that Sung Lee (and his broker, Wanda Coats) was a dual agent, and if the authority was revoked, it was only revoked as to U.S. Eagle. Certainly, Choo Kim can only revoke the authority of his own agent. But here, the Agreement provides that only the Seller (according to the Addendum) or the Seller's agent (according to the first page of the Agreement) can provide the legal description. At best, then, the dual agent was only acting on behalf of the Nishikawas when the legal description was attached. But the buyer (or buyer's agent) was not permitted to attach the legal description.

It is also important to remember the duties of a dual agent. Under Washington law, a dual agent is "[t]o take no action that is adverse or detrimental to either party's interest in a transaction." RCW 18.86.060(2)(a). Furthermore, an agent is to "[t]o timely disclose to both parties any conflicts of interest." RCW 18.86.020(2)(b). In this case, the dual agent violated both of these tenets of Washington law. At a minimum, the dual agent was required to advise both clients of this potential conflict of interest and withdraw from the transaction. Martin Burns warned Sung Lee and Wanda Coats of this issue in his September

19 letter. (CP 25-26). The dual agent's unauthorized and unlawful actions cannot bind the principal, U.S. Eagle High.

The confusion in this case arises from the dual agency status of Sung Lee/Wanda Coats. Consider these same facts, except that each party has a separate agent. When the seller's agent is instructed not to attach the legal description, he or she does not do so, as he or she received explicit instructions from the principal. In that scenario, the legal description is never attached. Of course, as discussed above, the result is an invalid contract, as there is no valid legal description. If the buyer sues the buyer would not prevail, based on all of the cited case law regarding inadequate legal descriptions. The outcome cannot be different because a dual agent was involved.

The final, and quite frankly desperate, argument of plaintiffs is to argue that the authority granted to the dual agent here was "authority coupled with an interest" which makes the authority irrevocable. The case cited for this proposition, *State Ex. Rel. Everett Trust & Savings Bank v. Pacific Waxed Paper Co.*, 22 Wn.2d 844, 157 P.2d 707 (1945) is not a real estate case. Respondent is unaware of any case standing for the proposition that a real estate agent's authority is "authority coupled with an interest." Moreover, as part of this analysis, "it is necessary that the 'interest' be in the subject matter of the power, and not merely in that

which is produced by the exercise of the power, for, if the agent's interest exists only in the proceeds of the execution of the power, the interest comes into being only after the power is exercised and extinguished, and hence the two are never united." *Arcweld Mfg. Co. v. Burney*, 12 Wn.2d 212, 223, 121 P.2d 350 (1942). Here, the agent's only interest is in that which is produced by the agency, i.e. a commission. The agent does not gain any interest in the property itself, and therefore it cannot be an authority coupled with an interest.

B. There was never a valid Purchase and Sale Agreement because there was no meeting of the minds.

Because this is not a valid contract, this Court should affirm the trial court. But even if the court disagrees on the "agent authority" issues discussed above, the lack of a meeting of the minds precludes a ruling for the plaintiffs.

To have a "meeting of the minds" necessary to have a valid contract, the contract must "embody all essential and material parts of the contemplated [contract] with sufficient clarity and certainty to indicate the parties' meeting of the minds on all material terms with no material matter left for future agreement or negotiation." *Knight v. American Nat. Bank*, 52 Wn. App. 1, 4, 756 P.2d 757 (1988)(internal citations omitted).

Here, Mr. Choo Kim always intended that the plaintiffs take the property “as is” including an indemnity agreement. (CP 10). His lack of English skills made him rely on the dual agent, Sung Lee, to accomplish this goal. Because the Nishikawas did not want to sign the indemnity agreement, there was no meeting of the minds on the essential terms of the Agreement, and thus no valid contract exists.

C. Even if this Court finds this to be a valid contract, injunctive relief is not available and plaintiffs’ damages should be limited to the earnest money.

Again, this Court should affirm the trial court. But even if the Court provides any relief to plaintiffs, the Court should deny the request for specific performance. At best, only monetary damages are available, which should be limited to the earnest money amount.

While it is true that Washington law does allow for specific performance under certain circumstances, “it will be denied where there is an adequate remedy at law, where performance is impossible, and where, under the facts and circumstances, it would be inequitable to compel the defendant to perform.” *Streater v. White*, 26 Wn. App. 430, 433, 613 P.2d 187 (1980)(internal citations omitted). Moreover, when specific performance is sought, a higher burden of proof is required. The party seeking specific performance must show clear and unequivocal evidence that “leaves no doubt as to the terms, character, and existence of the

contract.”” *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) quoting *Powers v. Hastings*, 93 Wn.2d 709, 717, 612 P.2d 371 (1980).

Additionally, in this case the purchase and sale agreement limited the seller’s remedy to the retention of the earnest money. (CP 18). The buyer’s remedy, under equitable principles, should be the same. Indeed, allowing one party to seek all available remedies, including specific performance, while limiting the other to only the earnest money, is unconscionable. *See, e.g., Ruver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 317-318, 103 P.3d 753 (holding that a contract allowing one party to seek punitive damages but not the other was substantively unconscionable).

In this case, specific performance should not be available. First, plaintiffs have an adequate remedy at law, as set forth in their responses to Interrogatories, in which they identify the various categories of monetary damages. (CP 70). Secondly, plaintiffs cannot meet their burden of clear and convincing evidence. Finally, pursuant to the terms of the contract and equity, any damage should be limited to the earnest money amount.

D. U.S. Eagle requests attorneys’ fees and costs for this appeal.

Following the summary judgment motion, the trial court awarded attorneys’ fees and costs to U.S. Eagle. Pursuant to the contract and

Washington law, U.S. Eagle requests attorneys' fees and costs since that have been incurred since that judgment was entered.

The Agreement provides for attorneys' fees and costs. (CP 18). Even though U.S. Eagle maintains that the Agreement is void, "[a]ttorneys fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee provision is invalidated. See *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wash.2d 98, 121-122, 63 P.3d 779 (2003); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wash.App. 188, 196-97, 692 P.2d 867 (1984); *Yuan v. Chow*, 96 Wash.App. 909, 915-18, 982 P.2d 647 (1999); and *Stryken v. Panell*, 66 Wash.App. 566, 572-73, 832 P.2d 890 (1992)." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). In *Labriola*, the court awarded attorneys' fees based on a non-compete agreement, even though the court invalidated the agreement for lack of consideration. *Id.* at 839. In *Panell*, the court awarded fees based on a real estate contract, even though the court rescinded the contract based on mutual mistake. *Panell*, 66 Wn. App. at 569, 572.

CONCLUSION

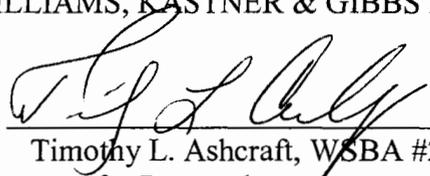
The issues in this case are straight forward. Under Washington law, a purchase and sale agreement without a valid legal description is void. Additionally, Washington law is clear that an agent's authority is

revocable at any time, and a principal is not bound by the unauthorized acts of the agent. Here, the legal description was not attached until after the agent's authority had been expressly revoked. Prior to the agent attaching the legal description, there was no valid agreement. An unauthorized act cannot change that status. The trial court should be affirmed, and U.S. Eagle should be awarded its costs and attorneys' fees.

DATED: 8/31/06

WILLIAMS, KASTNER & GIBBS PLLC

By



Timothy L. Ashcraft, WSBA #26196
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 31st day of August, 2006, I caused a true and correct copy of the foregoing document, "RESPONDENT'S BRIEF," to be delivered by ABC legal messenger to the following counsel of record:

Counsel for Appellant(s):

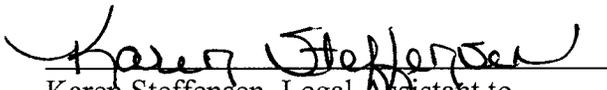
Mailing Address:

Thomas H. Oldfield
SLOAN BOBRICK OLDFIELD & HELSDON PS
P.O. Box 65590
University Place, WA 98564

Physical Address:

7610 40th Street West
Tacoma, WA 98466

DATED this 31st day of August, 2006, at Tacoma, Washington.


Karen Steffensen, Legal Assistant to
TIMOTHY L. ASHCRAFT

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