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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON
BY *JW*

NO. 36391-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOUTHRIDGE SILVER CREEK, LLC
and JOHN DOES and JANE DOES 1 through 10,
Appellants

v.

EVERGREEN STATE BUILDERS LLC,
and CONIFER HOMES, LLC
Respondents

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Evergreen State Builders' ("Evergreen") Response to Southridge Silver Creek's ("Southridge") Appellate Brief ("Respondent's Brief"), is unsupported by the record and misses the point. Evergreen was eager to find a way out of the transaction because at the time of performance it had committed itself to another, more lucrative project. It then used the County's administrative delay as a tool to accomplish this goal. Evergreen's inaccurate claim that the lots were not finished was merely a pretext to terminate the purchase. Evergreen anticipatorily breached the Real Estate Purchase and Sale Agreement ("Contract"), days before the March 31, 2006 closing date ("Closing Date").

Because Evergreen unilaterally terminated the Contract, it denied Southridge the opportunity to perform and never confirmed whether or not Southridge could actually perform. As a result, Southridge was released from further contractual obligation to Evergreen. In fact, Evergreen's Phase 18 Lots ("Lots") were finished by the scheduled Closing Date. Evergreen's anticipatory breach rendered that fact irrelevant. Evergreen's claim is barred by its own action. Southridge has always maintained: (1) the Lots were finished; (2) any delay was administrative; (3) such delay was due to third parties and unrelated to Southridge's contractual responsibilities; and (4) Evergreen's breach was legally inexcusable. Each

of these points introduces material issues of fact which should have precluded summary judgment. The trial court erred when it failed to account for this and entered an Order for Summary Judgment in favor of Evergreen (“Summary Judgment Order”). The remedy for the trial court’s Summary Judgment Order is for this Court to reverse and remand.

II. REPLY TO RESPONDENT’S ARGUMENT RE FACTS

As an initial matter, Evergreen claims it is not the correct party to this litigation; Conifer Homes, LLC is the true buyer under the Contract. However, the Contract clearly states that Evergreen “*or*” Conifer is the purchaser and that Conifer is a “related entity”. CP 185 (*emphasis added*).

It is just as disingenuous to claim facts are “undisputed”. Respondent’s Brief is peppered with this claim. For instance, Evergreen claims it is undisputed that the parties did not discuss the terms of the Contract. CP 30. The numerous handwritten and signed revisions to the Contract speak for themselves. While the parties used a standard contract form, as they had done in their previous transaction, Evergreen had ample opportunity and ability to negotiate the binding terms, and did so. *See* CP 185-186, 192.

Evergreen’s recitation of the facts illustrates Evergreen’s attempts to shed responsibility for its breach and obscure the remaining material issues of fact. In addition to the clarifications above, Southridge

incorporates its earlier factual statement herein for the purposes of this reply.

III. REPLY TO RESPONDENT'S ARGUMENT

A. **Evergreen's Claim that Southridge did Not Perform per the Contract is Irrelevant Because it Anticipatorily Breached the Contract Prior to the Time for Southridge's Performance.**

Southridge is not arguing the Contract "relieved [it] of the obligation to provide finished lots at closing", that it would "force [Evergreen] to close", or that it needed or could extend the Closing Date. Respondent's Brief, pp. 22, 31-2. These are non-issues because Evergreen anticipatorily breached the Contract. Mr. Kelly's communications with Mr. Baldwin prior to March 31, 2007 were "clear and positive" as was the March 28, 2007 letter from Evergreen's attorney terminating the Contract. CP 182.¹ See *Wallace Real Estate Investment, Inc. v. Groves*, 72 Wn. App. 759, 868 P.2d 149 (1994), (hereinafter *Wallace I*), *affirmed*, 124 Wn.2d 881(1994) (hereinafter *Wallace II*).

Evergreen claims it could terminate the agreement early because the Lots were not finished when Southridge recorded the Phase 18 Plat

¹ Anticipatory repudiation of a contract is a question of fact that may only be decided on summary judgment if reasonable minds can only reach one conclusion when taking all evidence in a light most favorable to the non-moving party. *Alaska Pacific Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn. App. 354, 365, 993 P.2d 417 (1997).

(the “Plat”), and tentatively scheduled closing.² Respondent’s Brief, p. 28. This misstates the Contract’s terms. Southridge’s obligations under Sections 7, 8, and 17 were not due until the Closing Date. CP 192. Evergreen’s argument that Section 8 allowed it to terminate prior to closing, allegedly due to unfinished lots, is not supported by the Contract’s terms. Evergreen denied Southridge the chance to deliver the Lots in accordance with the Contract. This is anticipatory breach. *See Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994); *Turner v. Gunderson*, 60 Wn. App. 696, 807 P.2d 370 (1991). This fact should have barred summary judgment.

The only matter holding up issuance of building permits was the signature of the Pierce County Hearing Examiner (“Hearing Examiner”) on the decision. The Hearing Examiner had already approved the Phase 18 final plat (“Final Plat”) and signed his approval on the Final Plat the day of the public hearing, March 16, 2006. His later signature on the decision was purely a ministerial act confirming what he had already done. If necessary Southridge could have sheperded it through the administrative process before closing. Instead, Evergreen elected to immediately

² Evergreen’s RAP 2.5 argument regarding this theory is inapplicable. Denying a party the chance to perform and releasing it from further obligations is the core of anticipatory breach. *See* CP 147-48.

terminate the transaction, even before the time for performance had arrived.

Furthermore, Evergreen's argument that it could have lost \$63,291.00 in interest a month is insincere. *See* Respondent's Brief, p. 15. Evergreen was the party who breached the Contract and caused Southridge damages in the form of extensive development and holding costs. Breach aside, Dan Kelly admits in his declaration that he and his business partner funded this purchase with their own cash and a private loan, from a friend, with a reduced interest rate. CP 332, 338. Moreover, even if Evergreen started building homes immediately, it would not have built and sold 77 homes at once. Evergreen's cost of purchase (and subsequent profits) would be paid over the course of building and selling their houses. Consequently, there is no evidence in the record that Evergreen faced any financial penalty had they completed the transaction according to its terms.

B. The Two Clauses of Section 17.2 Support Southridge's Position that It Met, or Could have Met, the Obligation to Provide Finished Lots on the Closing Date.

A question of fact exists as to whether the lots were "finished." As Evergreen points out, two provisions work together to define "finished lots". However, Evergreen attempts to ignore the second clause while accusing Southridge of ignoring the first. *See* Respondent's Brief, p. 12.

The first clause in Section 17.2 requires the Lots to be in a “complete” condition for purposes of submitting a building permit. CP 197. To begin, it is undisputed that Evergreen never submitted an application for a permit because it prematurely terminated the Agreement. Second, Southridge was never required by the County to perform any further work on the Evergreen Lots because they were, in fact, finished. CP 164-65. Indeed, the remaining non-Evergreen Lots on Plat 18 (which were physically indistinguishable from Evergreen’s) were “finished” and permits were issued before the Hearing Examiner’s decision was signed and entered into the computer system in May, 2006. CP 166, 183, 230-31. Based on its experience with the previous five phases in this development, Southridge understood the work was complete when the Final Plat was approved and signed by the Hearing Examiner. This belief is reasonable considering the issuance of permits on all of the non-Evergreen lots on Plat 18.

The first clause however must be interpreted in light of the second clause. Accordingly, finished lots must also be free of “restrictions preventing the issuance of building permits that are *related to Southridge’s obligations* in the Final Plat”. CP 197 (*emphasis added*). When read together, the Contract mandates that finished lots must be physically complete, which the Evergreen Lots were, *and* there can be no restrictions

on permitting related to Southridge, which there was not. *See* CP 166, 183, 230-31. All work was complete and approved as shown by the Hearing Examiner's March 16, 2006 signature on the Final Plat. All that was left was the ministerial act of entering the decision in the computer systems. That issue was unrelated to any activity associated with Southridge.

Evergreen's arguments are further untenable because Evergreen admits Southridge acted in accordance with prior accepted practices when it recorded the Plat following the hearing and Hearing Examiner's approval. Respondent's Brief, pp. 4-5. It is unknown why a delay occurred between the March 16, 2006 approval and sign-off, and entry of the decision in the County computer system. However, that delay was certainly unrelated to any act required to be performed by Southridge.

A material issue of facts exists as to why permits were available for a portion of Phase 18 when all the lots were in identical condition and no additional work was performed by Southridge. There is no evidence of some special arrangements being made or that Southridge requested the County to make building permits available. The record only indicates that some "unique" review was done by the Pierce County Development Engineering supervisor to release permits before the computer records showed a complete signoff by all departments. *See* CP 230-31, 223, 235.

One reasonable interpretation would be that the lots in Phase 18 were finished but an administrative problem precluded release of all permits. Another reasonable interpretation was that the builders for the other 86 lots had closed their purchase whereas Evergreen had not. In any event, there is no evidence in the record that Southridge had some unfulfilled obligations yet to be performed to make the Lots finished or had any involvement or control over the issuance of permits. As such, Southridge had completed its obligations to provided “finished lots” as defined in the Agreement.

C. **An Issue of Fact Exists as to the Date Final Plat was Obtained and Recorded and Therefore the Closing Date.**

Evergreen argues closing should have occurred fifteen days following the date on which the Final Plat was recorded at the Pierce County Auditor’s Office (“Final Plat Recording”). Respondent’s Brief, p.2, *quoting* Section 7.2. Evergreen claims that Final Plat and Final Plat Recording did not occur until after May 10, 2006, the date the Hearing Examiner’s decision was signed and he entered his approval, in the computer systems. Respondents’ Brief p.6; CP 26. If Evergreen is correct, under the Agreement closing was to occur fifteen days later, May 25, 2006. Evergreen knew that the decision of the Hearing Examiner had not been issued and entered into the system prior to the scheduled March

Closing Date. Respondents' Brief, p. 2. Despite that knowledge, Evergreen unilaterally terminated the Agreement on March 28, 2006, fully aware that both Southridge's performance and its own performance were not yet due.

It is Southridge's position that Final Plat occurred in March, 2006 following the hearing at which the Hearing Examiner affixed his signature on the Final Plat. Southridge relied on the representation that the signed document was in fact "final" and its reliance was reasonable as this procedure was consistent with the other plats Southridge completed at Silver Creek. CP 163-164. However, if Evergreen is correct, Final Plat occurred on May 10, 2006, two months after Evergreen terminated the Contract. Since an issue of fact exists as to *when* Final Plat actually occurred granting summary judgment was improper.

D. The Water System was Operational per that Term's Intended Meaning Under the Contract and does Not Support Evergreen's Decision to Breach the Contract.

Evergreen asserts the Lots were not finished because a water availability certificate was not issued until May 30, 2006. Therefore, it claims, the water system was not "operational". Southridge disputes this. If Evergreen's position is correct, the trial court necessarily had to find: (1) a water certificate was necessary for the water system to work, Southridge failed its obligation to acquire the water certificate; (2) water

was not available on April 1, 2006, despite the water certificate's statement that it was; (3) Southridge could not have obtained the water certificate before the Closing Date; and (4) this caused the Lots to be unfinished. The record does not support such findings.

Nothing in the Agreement requires a water certificate to be executed for the water to be classified as operational. All work was completed on the water system by March 10, 2006 and the County signed off on it on that date. CP 166. None of the other builders that closed on Phase 18 lots had any issue with the water being operational. CP 166.

Under these circumstances the trial court should have afforded Southridge all reasonable inferences supported by the evidence. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). “[W]hen a provision is subject to two possible constructions, one of which would make the contract unreasonable ...and the other of which would make it reasonable and just” courts adopt the reasonable interpretation. *Berg v. Hudesman*, 115 Wn.2d 657, 673, 801 P.2d 222 (1990), citing *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). The reasonableness of each party's position regarding “operational” should be filtered through “what each [party] knew or had reason to know” and the subsequent conduct of each party. *Berg v. Hudesman*, 115 Wn.2d at 667-68, citing *Restatement (Second) of*

Contracts, §§ 212, 214(c), cmt b (1981); *See also Hearst Communications Inc. v. Seattle Times Co.*, 120 Wn. App. 784, 86 P.3d 1194 (2004). Evergreen is incorrect when it claims the “only evidence the court can look to interpret the contract is the contract itself.” Respondent’s Brief, p. 24.

Some of the circumstances supporting Southridge’s contention the system was operational include: (1) the fire department and County approved the system in early March; (2) the water certificate states the Plat had water by April 1, 2006; (3) Evergreen has offered no evidence to refute this; (4) The water company has not refuted water availability or specifically claimed the system was non-operational; (5) two other builders who received permits for Phase 18 lots on or about April 3, 2006 made no complaint about the condition of the Plat; (6) per Section 17.2 restrictions unrelated to Southridge’s performance do not affect the Lot’s “finished” status; (7) Evergreen did not inform Southridge it believed the water system was not operational until summary judgment proceedings; and (8) Evergreen never allowed Southridge the opportunity to prove the system was operational.³ CP 153-54; 166; 169; 183; 230; 248.

³ Evergreen’s argument that Southridge bonded around “utilities such as water” is confused. Respondent’s Brief, p. 24. Southridge bonded the work it took to complete the water system, not the system itself. CP 179. The bond was released because the system was approved of by the Fire Marshall and County. CP 228.

It is true the Contract does not expressly carve out exceptions to closing for administrative delays by third parties. However, the second clause of the Section 7.2 states the equivalent. CP 197. It is unreasonable to assert the Lots were unfinished per Section 17 when Southridge completed the construction and the restrictions were caused by third parties over which Southridge had no control. Southridge's interpretation of the term "operational" is the reasonable one in light of the circumstances and the parties' contractual intent.

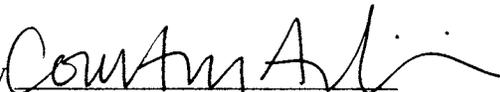
IV. CONCLUSION

For the above-stated reasons, the trial court erred when granting summary judgment to Evergreen. Evergreen breached the Contract before the Closing Date. That fact alone should have barred summary judgment. The Contract terms such as Section 7, 8, and 17 do not support Evergreen's breach or its subsequent arguments attempting to sustain its breach. Southridge performed per the Contract and yet was denied the opportunity to provide finished lots by the prescribed date. Southridge presented numerous issues of material fact regarding the parties' performances, contractual obligations, and reasonable contract interpretation which should have defeated Evergreen's Motion for Summary Judgment. Southridge therefore respectfully requests this Court

reverse the trial court's Summary Judgment Order. Southridge further requests that this Court award Southridge its reasonable attorneys' fees.

Respectfully submitted this 27th day of October, 2007.

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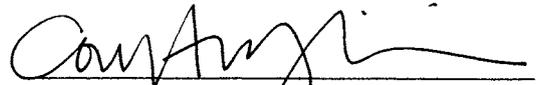
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