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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37755-1-II

Jefferson County Cause No. 06 2 00332 1

**IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON**

KELLY J. CARROLL, a/k/a, KELLY OLDFORD

Appellant

v.

JAMES SCOTT JOHNSON

Respondent

Respondent's Brief

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I. INTRODUCTION AND STATUS OF PROCEEDING

The Respondent, James Scott Johnson ("Johnson"), filed this lawsuit in the Jefferson County Superior Court in October of 2006, against the defendants Gary Oldford ("Gary") and Kelly J. Carroll (a/k/a Kelly Oldford") (hereinafter "Kelly"). Only Kelly is the Appellant in this case.

Johnson sought an order of specific performance, compelling Gary and Kelly to convey a vacant lot to Johnson, which they had agreed to convey to Johnson as a part of a transaction in which Mr. Johnson had purchased a house on the adjacent lot. Johnson's Complaint also sought a judgment against Gary and Kelly for damages arising from serious concealed defects in the house. The trial Court granted Johnson's specific performance claim, ordering both Gary and Kelly to convey their respective interests in the vacant lot to Johnson. The Court denied Johnson's damage claim, which is not at issue in this appeal.

Gary disappeared after the trial, and did not comply with the Court's Order to specifically perform the conveyance. Therefore, the Court ordered that a Commissioner's Deed be executed by the Court Commissioner on August 29, 2008. Accordingly, Gary's 50% interest in the property has already been conveyed to Johnson. Gary did not appeal the Trial Court's ruling and is not a party to this appeal.

Kelly filed this appeal. She filed a Motion to Stay the Enforcement of the Specific Performance Decree pending her appeal, but the Court ordered that a supercedeas bond be posted as a condition of granting a stay. She decided not to post a bond and, instead, executed a deed to Johnson for her 50% interest in the property to comply with the Court's Judgment. Accordingly, the specific performance decree has been fully complied with and Mr. Johnson is now vested with fee title to the subject property.

II. STATEMENT OF FACTS

Gary and Kelly Oldford were married in 1985 and were divorced as of December 3, 2003 (Ex 4). Their divorce decree specified that, as of the date of the decree, they each owned an "undivided 50% interest as tenant in common" in the subject property, known as 91 Cressey Lane, Port Ludlow. (Ex. 4). Accordingly, the property was no longer community property after that date, and Gary and Kelly Oldford were each able to convey their 50% tenant in common interest separately.

Gary and Kelly had lived at the Cressey Lane property since 1991. The property consisted of two adjacent platted lots, which were identified as Lots 1 and 2, Area 4, Port Ludlow No. 1 Plat. (Ex. 2). The house was located on Lot 2. Lot 1 was vacant and unimproved and had been

purchased by the defendants for future use as a septic drainfield for the house on Lot 2, because the septic system on Lot 2 was inadequate and had experienced failure. (See last page of Ex. 3).

Prior to their divorce the Oldfords had experienced financial difficulties and had filed a Chapter 7 bankruptcy petition in February of 2003. (Ex. 3). The property (both lots) was listed on the "Schedule A - Real Property" section of the petition (See last page of Ex. 3) as the Oldfords' homestead, with a value of \$110,000. The schedule included the following Note:

"Note: @ 91 Cressey Ln, Port Ludlow, WA, 98365K DOP 1991 for \$70,500; homestead includes lot owned free and clear used for septic purposes adjoining house, fmv includes \$8,000 for lot."

That statement was made by the Oldfords under oath and is important because it establishes that:

- (a) The Oldfords then believed the total property (including both lots) to be worth only \$110,000;
- (b) Lot 1 by itself was declared to be worth only \$8,000; and
- (c) Lot 1 was intended to be used as the septic system for the house on Lot 2.

Although the Oldfords sought to give testimony at trial that varied from the foregoing sworn statements in their bankruptcy petition, the trial court, *sua sponte*, pointed out two recent cases of the Washington Court of Appeals dealing with the issue of judicial estoppel: *Skinner v. Holgate*, Wash. Court of Appeals Cause No.35506-0-II; and *McFarling v. Evaneski*, 141 Wn.App. 400 (2007). Both of the foregoing cases discuss the doctrine of judicial estoppel, which can be summarized as follows:

"Judicial estoppel is an equitable doctrine precluding a party from asserting one position in a court proceeding and later seeking advantage by taking an inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535..... The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222,225 ... (2005)....

(See *Skinner*, pages 6, 7). The Court was therefore fully justified in assuming that the statements made in the Oldfords' bankruptcy petition were binding upon them in the instant case.

In April of 2004, in compliance with the divorce decree (Ex. 4) they listed both lots for sale as one package. The property was then in foreclosure due to their default on a bank deed of trust, and a foreclosure sale was scheduled for June 25, 2004. (Ex. 5) Plaintiff became aware of

the property and wanted to buy both lots at the same time. It was clear to him that it would be essential to have both lots, because Lot 1 was needed as a septic drainfield for Lot 2. If only one lot had been offered for sale he would not have been interested in buying either property. (RP I-33)

However, Johnson's bank was not willing to loan enough money for the purchase of both lots. Accordingly, Johnson and the Oldfords began discussing this dilemma. The Oldfords were facing the foreclosure deadline and encouraged Johnson to just go ahead and buy Lot 2 (with the house) and then buy Lot 1 later when he had the funds. A Real Estate Purchase and Sale Agreement for Lot 2 (Ex. 7) was signed by Johnson on April 30, by Gary on May 4, and by Kelly on May 11, 2004. (Gary and Kelly were no longer living together by that time.)

In that agreement, the parties agreed upon the sale and purchase of Lot 2 (the lot with the house) for a price of \$120,000. However, as a part of the same transaction, Kelly wrote a letter to Mr. Johnson (Ex. 9) dated May 11, 2004, (the same date she signed Ex. 7), agreeing that the Oldfords would sell Lot 1 to Johnson for \$12,000, to be paid by Johnson giving \$6,000 in cash to Kelly and by Johnson giving a car to Gary. The letter read as follows:

".....Scott and Melissa, I know that you want to purchase the lot and I don't blame you. I would like to be paid in full. I cannot finance the

property. You can give Gary the car and me \$6,000.00. I cannot sign anything over right now. When you guys purchase the home and sell your property in Paradise Bay you can buy the lot. I have been thru a lot and have lost everything. I want you guys to buy the lot and I want you to know that I will sit on it till you guys have the money. (Promise)....." [emphasis added]

In reliance upon this "Promise" by Kelly, Johnson went ahead and closed his purchase of Lot 2 (which included the house) in August. (Ex. 11; RP I-35,36). Johnson convincingly testified that he would never have closed the purchase of the house and Lot 2 if he had not also been assured that he would be able to buy Lot 1. (RP I-33). In fact, all of the negotiations between Johnson and the Oldfords had been about buying both lots. There were never any discussions contemplating the purchase of just one lot. (RP I-97, 98, 99, 100)

Johnson had previously been an employee of the construction company owned by the Oldfords and had always trusted both of them. (RP I-7,8; I-101). He had absolutely no reason to believe that the promise contained in Kelly's letter would not be honored.

There was ample evidence that the \$12,000 price to be paid for Lot 1 was a fair price. In their negotiations regarding the deal, Gary showed Johnson an appraisal that the Oldfords had obtained for the two lots

together, dated July 25, 2003 (Ex. 10) which showed that Lot 1 had a "contribution value" of \$10,000 to the total property. (RP I-18).

In early September, only about two weeks after closing the purchase of the house and Lot 2, Johnson contacted Gary and told him he was ready to close on the purchase of Lot 1 in accordance with their prior agreement. Johnson prepared a "Purchase Agreement" dated September 10, 2004, (Ex. 13), which read in part as follows:

Purchase Agreement

The Grantor, Gary L. Oldford and Kelly J. Carroll, who acquired title as Kelly J. Oldford, as tenants in common are selling to James S. Johnson the vacant lot described below,
Lot 1, [remainder of legal description]
James S. Johnson will be transferring to Gary L. Oldford a 2001 Suzuki Esteem,....., for his interest in said property. Kelly J. Carroll will receive \$6,000 for her interest in said property at which time the deed will be signed over to James S. Johnson.

This Purchase Agreement was completely consistent with the agreement expressed by Kelly in her May 11 letter (Ex. 9). The Purchase Agreement was signed by Johnson and Gary on September 10. The Purchase Agreement was signed by Gary and Johnson, but not notarized, and it was recorded with the Jefferson County Auditor on November 23, 2004, under Auditor's File No. 492007.

In reliance upon the May 11 letter and this new Purchase Agreement, Johnson completed all of the performance required of him under both of those agreements, by giving Gary the Suzuki automobile on September 10 and later signing over the title to the car to Gary on November 23, 2004. (Ex. 14) Gary took the car, drove it to California and never returned it. Johnson demanded that Gary give a deed to the property, consistent with the Purchase Agreement, but Gary refused to do so.

On September 10, 2004, less than three weeks after closing his purchase of Lot 2 ¹, Johnson also wrote to Kelly (Ex.12), advising her that he now had the \$6,000 and was ready to pay her and close on the purchase of Lot 1. Although she admits having received the letter, Kelly did not respond to it, and Johnson found that her phone had been disconnected. (RP I-42) Kelly had moved to Nevada in early 2004 and had moved to a new address in Nevada later in that year but had not advised Johnson of her new address. (RP I-51). Although the letter clearly advised her that Johnson was exercising his right to buy the lot, Kelly never responded to contest or refute that right, nor did she comply with Johnson's demand that she perform the May 11 agreement.

¹ The deed for Lot 2 is dated in June (Ex. 11), but the purchase of Lot 2 did not close until late August due to the Oldfords' bankruptcy and the pending foreclosure on Lot 2. (RP I-35,36)

Despite continuing attempts to reach her, Johnson did not hear anything from Kelly until she returned to the Port Ludlow area in 2006 and left a note on Johnson's door dated May 4, 2006 (Ex. 20) and said she wanted to talk about the lot. She then said that she would not sell the lot for the \$6,000 price she originally agreed upon. She did not deny that an agreement existed. She just said she wanted more money. (RP I-59, 60; II-10) Johnson had been ready, willing and able to pay the \$6,000 to Kelly ever since September of 2004, and had tendered that sum to her at that time, but she refused to accept that sum and refused to honor her agreement to convey Lot 1 to Johnson.

In the meantime, Johnson discovered that the Olfords had not paid any of the real estate taxes on Lot 1 since 2003 and that the County was about to foreclose on it. Accordingly, he paid the 2004 tax bill on the lot to keep the property out of foreclosure. (Ex. 16). He also discovered that the Oldfords had not paid any of the assessments owing to the Port Ludlow Maintenance Commission from 2001 to 2006, and that those assessments were delinquent, in the total amount of \$2,612.79. He paid \$779.92 of that amount to the Commission in January 2007 in order to postpone a foreclosure of the Commission's lien. (Exs. 18 and 19).

In the summer of 2006, Mr. Johnson discovered that Ms. Oldford was trying to sell the Lot 1 property. Accordingly, he finally realized that

Kelly was not going to honor the May 11, 2004, agreement. He immediately commenced this action and filed a Lis Pendens in September of 2006.

Lot 1 is absolutely essential to the use and enjoyment of the Lot 2 property. The drainfield on Lot 2 has failed and Lot 1 is the only feasible site for a drainfield to service Lot 2. For that reason, Mr. Johnson would never have purchased Lot 2 without having the Oldford's commitment to sell Lot 1 to him as well. (FF 11, CP 4)

III. ARGUMENT

A. The Trial Correctly Ruled that Ms. Oldford's May 11 2004 Counteroffer Letter Formed the Basis for an Enforceable Unilateral Contract

The Trial Court ruled that Kelly was bound to comply with her May 11 letter agreement (Ex. 9). The Court's Conclusions of Law 5 and 6 (CP 11) succinctly state the reasons for that decision:

5. Ms. Oldford's letter of May 11, 2004 (Exh. 9), rejected the offer made by Mr. Johnson in the Real Estate Sale Contract (Exh. 8) to purchase Lot 1 in installments, but the May 11 letter also made a counteroffer of a unilateral contract. An offer of a unilateral contract is an offer to enter into a contract upon the doing of a bargained-for act by the offeree. Performance by the offeree constitutes an acceptance of the offer and the contract becomes executed. In her May 11 letter, Ms. Oldford promised to sell her interest in Lot 1 to Mr. Johnson for \$6,000, provided he performed certain conditions. In reliance upon the offer and promises made by Ms. Oldford, Mr. Johnson performed those

conditions and he tendered the \$6,000 payment to her, but she refused to accept it.

6. As of September 11, 2004, Mr. Johnson had performed all acts required of him by the unilateral contract offer made by Ms. Oldford and his acceptance of the offer was complete and the contract was enforceable. Ms. Oldford was thereupon bound to convey her interest in Lot 1 to Mr. Johnson, upon payment to her of \$6,000.

First, the May 11 letter can be considered an Earnest Money Agreement, i.e., a unilateral executory contract which she was bound to perform. Secondly, the letter could be viewed as an option agreement which was validly exercised by Mr. Johnson. Third, the letter, coupled with Mr. Johnson's extensive and justifiable reliance upon the agreement and his performance of the agreement, formed the basis for holding that Kelly was equitably estopped from denying the agreement expressed in the letter.

It is important to emphasize that Kelly's May 11, 2004, letter (Ex. 9), in which she promised to sell Lot 1, was signed on the very same day that she signed the Real Estate Purchase and Sale Agreement for Lot 2. Accordingly, the two documents are actually a part of the same transaction. The two parcels were inextricably bound together because one was intended to be a septic drainfield for the other (Ex. 3). The two properties were offered for sale together, as ordered by the Oldfords' divorce decree, and they would have been sold together except for the fact

that Johnson was not able to get a loan for enough money to buy both at the same time. However, the Oldfords were about to lose both properties due to the impending foreclosure and their bankruptcy, and they therefore pleaded with Johnson to buy Lot 2 and the house, inducing him to do so by promising that the other lot, Lot 1, would be held for him to buy as soon as he had the funds. By persuading Johnson to buy Lot 2, the Oldfords were able to receive enough money to pay off the mortgage, terminate the foreclosure and avoid losing both lots in the pending foreclosure and bankruptcy.

Kelly's May 11 letter is unequivocal in her commitment to sell Lot 1 to Johnson:

"I know that you want to purchase the lot and I don't blame you. I would like to be paid in full. I cannot finance the property. You can give Gary the car and me \$6,000.00. I cannot sign anything over right now. When you guys purchase the home and sell your property in Paradise Bay you can buy the lot. I have been thru a lot and have lost everything. I want you guys to buy the lot and I want you to know that I will sit on it till you guys have the money. (Promise)....." [emphasis added]

In other words, the only condition placed upon her commitment to sell was that "When you guys purchase the home..." Johnson was thus assured that if he bought the home on Lot 2 (which he did in August) that he would also be able to buy Lot 1, which was critically required as a

septic drainfield for Lot 2 and the house. Johnson obviously relied upon the assurances in Kelly's May 11 letter when he purchased the house -- and he did so again when he transferred his car to Gary. Kelly's "Promise" to sit on the property and sell it to Johnson should therefore be specifically enforced.

1. The Agreement Was Not Ambiguous

In her first assignment of error, commencing at page 17 of her Brief, Kelly argues that the trial court erred in finding that the May 11 letter constituted an enforceable contract. Essentially, her argument boils down to the assertion that the contract was ambiguous because it did not contain a complete legal description of the Lot 1 property.

Respondent's argument attempts to create ambiguity where none existed. In the context of the other documents, there is absolutely no question that Kelly's May 11 letter was referring to Lot 1, the vacant lot. Her letter was written in response to the letter (Ex. 6) written by Melissa Douke, Johnson's domestic partner, in which Johnson submitted the Real Estate Contract for the house on Lot 2 (Ex. 7) and a second contract for Lot 1. Melissa's letter says: "Here are all the papers. We also included an offer for the second lot...." Kelly accepted the offer to buy Lot 2 and signed that document on May 11 (Ex. 7). On the same day, she wrote the

letter (Ex. 9) and communicated a counteroffer regarding the vacant Lot 1. Since the Oldfords owned only two lots (Ex. 3 and RP II-94), and Lot 2 was covered by the signed contract (Ex. 7), the letter could only have been referring to Lot 1. Her letter rejected Johnson's offer to buy Lot 1 on installment payments but said that she would sell for \$6,000 in cash and a transfer of the car to Gary, provided that Johnson first closed on his purchase of the house on Lot 2. There is absolutely no ambiguity in her final statement of the deal: "I want you guys to buy the lot and I want you to know that I will sit on it till you guys have the money. (Promise)." It is hard to imagine a more clear-cut written promise to sell a piece of property!

It should also be observed that the Lot 1 parcel was not an ill-defined parcel of land or a parcel that required a detailed metes and bounds legal description. It was Lot 1 in Area 4 of the Port Ludlow No. 1 plat, the boundaries of which were shown on the plat. (See Ex. 2)

The trial court thus found Kelly's "ambiguity" argument completely unpersuasive. The two parcels (the adjacent Lots 1 and 2) were the only real estate that the Oldfords owned. (See Ex. 3, RP II-94, RP II-99, RP III-101-103). "The house" was on Lot 2 and "the lot" was the vacant Lot 1. The trial court specifically found at Finding of Fact ("FF") No. 7 (CP 3) as follows:

7. At all times material hereto, Lots 1 and 2 were the only parcels of real property owned by the defendants. Accordingly, when the word "lot" was used in the exhibits presented to the Court, there was no ambiguity or question about which "lot" was being referred to.

While Kelly's letter does not meet the formal requisites of a deed, it did not need to be a "deed" in order to create a binding executory contract. Earnest Money Agreements and Real Estate Purchase and Sale Agreements are signed everyday without notary acknowledgements, because they are not intended to be deeds, i.e. they are not final conveyances. They are executory contracts which bind parties to execute deeds at a later date, after the conditions in the executory contract have been met.

In Coherent Holdings, LLC v. Montalvo, 131 Wash.App.1057 (2006) (Unreported), the Court considered an agreement between a purchaser and seller for the sale of land and the grant of an easement for a well. The Court held that the agreement was simply a promise to execute other conveyance documents at a later closing date, and therefore the statute of frauds did not apply to such an agreement, which did not convey real property, pledge earnest money or grant an immediate interest in or encumber real property.

2. There Was a Meeting of the Minds Regarding the Agreement. A Unilateral Contract Does Not Have to be Signed by the Offeree. The Offeree's Acceptance is Accomplished by Performing the Acts Requested by the Offeror.

Commencing at page 22 of her Brief, Kelly argues that the Court erred when it ordered Kelly to specifically perform without making a finding that there was a meeting of the minds between Johnson and Kelly.

Kelly seems to be implying that there is no record of a meeting of the minds because the May 11 letter was not countersigned by Johnson. A unilateral contract is one in which the offeror promises certain performance provided the offeree performs certain acts. By performing those acts, the offeree accepts the offer and the contract thus becomes binding upon the offeror. There is no requirement that the offeree must sign a document or otherwise affirm in advance that he will be performing the acts requested by the offeror. His acceptance is not accomplished by signing a written contract, it is accepted by performing the requested acts.

A unilateral contract exists when one party offers to do a certain thing in exchange for the other's performance, and performance by the other party constitutes acceptance. *Knight v. Seattle-First Nat'l Bank*, 22 Wn.App. 493, 496, 589 P.2d 1279 (1979).

Cascade Auto Glass v. Progressive Ins. Co., 135 Wn.App.760, 769; 145 P.3d 1253 (2006).

Johnson clearly accepted the unilateral contract offer by (1) purchasing the house, (2) transferring his car to Gary and (3) tendering the \$6,000 to Kelly. Kelly was then obliged to perform by conveying her interest in the Lot to Johnson.

3. Kelly Did Not "Change Her Mind" Until After Johnson Had Performed the Unilateral Contract.

Kelly admitted at trial and in her brief that she signed the May 11 letter and that it applied to the Lot 1 property, but she testified at trial that she later changed her mind and told Johnson in a telephone conversation in late May that she no longer wanted to sell the Lot 1 property to Johnson. That testimony was refuted by Johnson, who testified that no such telephone conversation ever occurred. Assuming, *arguendo*, that such a call occurred, the trial court found that, if the call occurred, it did not occur in late May, but sometime after the Fall of 2004, after Mr. Johnson had performed all the acts required of him in the May 11 letter. (See FF 15, CP 6-7).

The Court's findings in this regard are fully supported by the evidence. Kelly's testimony about a phone call to Johnson was supported by her current husband and by her daughter, both of whom testified that they were present when Kelly was talking on the phone and that they overheard Kelly tell Johnson to "get the car back from Gary." Since the

car was not transferred to Gary until September 10 (See Ex. 13 and 14), the telephone conversation, if it occurred, must have occurred some time thereafter. By that time, Johnson had already performed all of the acts required of him under the May 11 letter: (1) he had closed on the purchase of the house on Lot 2 in August, (2) he had transferred the car to Gary and (3) he had tendered the \$6,000 to Kelly.

The trial court fully considered Kelly's claim that she withdrew her offer in May, but found that her testimony was not credible. See Finding of Fact No. 15 (CP 6-7):

.....Since the car was not transferred to Mr. Oldford until September 10, the Court finds that, if the phone call occurred, it occurred sometime after September 10, after Mr. Johnson had already performed the unilateral contract, by closing the purchase of Lot 2 and transferring the car to Mr. Oldford.

The offeror of a unilateral contract cannot revoke the offer after the offeree has already performed the acts required in the original offer. The offer can only be withdrawn prior to performance by the offeree. *Knight v. Seattle-First National Bank*, 22 Wn.App. 493, 589 P.2d 1279 (1979); *Vehicle/Vessel LLC v. Whitman County*, 122 Wn.App. 770, 95 P.3d 394 (2004).

Kelly's testimony that she "changed her mind" about the lot and told Mr. Johnson in late May is not credible for another reason: if she had

done so in May, why would Johnson have (1) closed on the purchase of Lot 2 in August, (2) transferred the car to Gary in September and tendered the \$6,000 to Kelly in September? Furthermore, if she had withdrawn her offer to sell the lot at any time in 2004, then why did she write the note she left on Johnson's door on May 4, 2006 (Ex. 20) in which she said "It's imperative you call me. I need to talk to you tonight. Regards to lot! Important! "

The Court thus had abundant grounds to conclude that Kelly's alleged telephonic withdrawal of the May 11 offer never occurred, or, if it did, it occurred too late and was a breach of the agreement. The Court was fully justified in ordering the specific performance of Kelly's promise to convey her interest in Lot 1 to Johnson.

4. Kelly's Argument About the Paradise Bay Property is Erroneous.

Kelly's brief argues that the May 11 letter was not enforceable because Johnson did not sell his Paradise Bay property. The letter contained the following phrase:

"When you guys purchase the home and sell your property in Paradise Bay you can buy the lot..."

In essence, Kelly is arguing that sale of Johnson's Paradise Bay property was condition precedent to her obligations under the contract. Her

argument on this point is completely specious. The provision that Johnson had to buy the home (on Lot 2) was obviously a condition precedent to his right to buy the Lot 1 property. Quite understandably, the Oldfords did not want to sell Lot 1 to anyone but the owner of Lot 2, because the house on Lot 2 needed to have Lot 1 available as a septic field. However, the provision about Johnson selling his Paradise Bay property was not a condition precedent to Kelly's performance. It was obviously a contingency for Johnson's benefit, not for Kelly's benefit. Johnson thought that he might need the money from the Paradise Bay property before he could afford to buy Lot 1. As it turned out he was able to get a loan to buy the house and Lot 2, and he did not need to sell the Paradise Bay property to fund the purchase of either Lot 2 or Lot 1. Since the contingency was there for his benefit, Johnson had the right to waive it. See *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wash.2d 375, 78 P.3d 161 (2003). Sale of the Paradise Bay property was not an act that he was obliged to perform as an acceptance of the unilateral contract, because the act of selling his Paradise Bay property was not an act that would have constituted any benefit for or consideration to Kelly. Kelly had no conceivable interest in whether the Paradise Bay property was sold or not sold, as long as she got her \$6,000.

B. The May 11 Letter Also Qualified as an Option Agreement.

The May 11 letter can also be viewed as an option agreement. It granted Johnson the right to purchase the second lot within a reasonable period of time and promised not to sell the lot to anyone else in the meantime. Kelly specifically covenanted that she would "sit on" the lot until Johnson had the money. That is precisely what an option agreement is all about: a covenant to hold a property available for purchase by the optionee.

The case of *Wetherbee v. Gary*, 62 Wash.2d 123 (1963) presents a similar situation, where two parcels of land were involved in a single transaction and the court treated the second as an option. In *Wetherbee*, a seller entered into an earnest money agreement to sell a 65-acre parcel and gave an option to the buyer to buy a second 70-acre parcel. The option for the 70-acre parcel contained the phrase "Void if other sale falls through." In other words, the option was contingent upon closing the first transaction. The Seller later refused to honor the option agreement and the trial court agreed with his contention that there was no consideration for the granting of the option. The Supreme Court overruled that decision as follows:

Was there consideration for the option? We believe there was. Giving to plaintiff's evidence the favorable interpretation to which it was

entitled, we conclude there was a single transaction involving two facets -- the agreement to purchase the 65-acre tract and the option to purchase the 70-acre tract. It was defendant's own suggestion that the two agreements be tied together by insertion in the option agreement the clause: "Void if other sale falls through."

It is true that the \$200 payment made at the time defendant signed the instruments was identified as earnest money on the purchase of the 65-acre tract, and was eventually applied to the purchase price thereof; but this payment, together with the completion of the purchase of the 65-acre tract, is sufficient consideration for the option.

Restatement, Contracts §83 provides:

"Consideration is sufficient for as many promises as are bargained for and given in exchange for it if it would be sufficient.

(a) for each one of them if that alone were bargained for"

"An option to buy or sell is frequently given as a part of a larger contract with other purposes; and a consideration sufficient to make the option binding and irrevocable may be found in the consideration that the optionee gives in that larger contract...." 1 Corbin, Contracts §266.

Kelly signed her May 11 letter on the same day she signed the earnest money agreement for Lot 2, thus tying the two transactions together. As in *Wetherbee*, she granted Johnson the right to purchase the second property (Lot 1), provided he completed the purchase of the first (Lot 2). Johnson's earnest money for the Lot 2 transaction -- and his good faith

completion of the purchase of Lot 2 -- constituted not only his acceptance of the unilateral contract, but are also adequate consideration for the granting of the option to purchase Lot 1. He closed the purchase of Lot 2 on August 20, and exercised his option (Ex. 12) to purchase Lot 1 only about three weeks later, on September 11, 2004 -- a short span of time that was well within anyone's definition of a reasonable time. His letter clearly advised Kelly he was ready to close on the purchase of Lot 1:

"We are getting the \$6,000.00 together for your half of the 2nd lot.....So give me a call and we'll 'get 'er done.' "

C. The Part Performance Doctrine

The Court made the following Conclusions of Law No. 7 and 8:

7. Ms. Oldford contends that the Statute of Frauds was not complied with. However, the court concludes that the Statute of Frauds does not bar enforcement of the contract for Lot 1 because Mr. Johnson is entitled to specific performance under the "part performance" doctrine. He took delivery and possession of the Lot 1 property, he paid the consideration for the property to Mr. Oldford and tendered consideration to Ms. Oldford, he paid some of the overdue taxes and the Port Ludlow Maintenance Commission fees owing on Lot 1, and he also maintained the lot. The defendants did nothing with respect to Lot 1 after the summer of 2004, except to show it to real estate sales persons and pay a portion of the real property taxes that were owing on Lot 1.

Commencing at page 24 of her Brief, Kelly argues that the Court erred in applying the partial performance and equitable estoppel doctrines.

It should first be pointed out that the "partial performance" doctrine only comes into play if the Court concludes that the contract has not yet been fully performed. As argued hereinabove and at trial, Johnson had fully -- not partially -- performed the unilateral contract set forth in the May 11 letter. He had purchased the house on Lot 2, he had transferred the car to Gary and he had tendered the \$6,000 to Kelly. All those actions were performed prior to any communication from Kelly that she was not going to honor the contract. Accordingly, there was full performance, not partial performance.

The partial performance doctrine was advanced by Johnson at trial only in the event that the court was troubled by failure to comply with the statute of frauds. As indicated above, because the May 11 letter was a unilateral executory contract, not a final deed, there was no requirement that it be notarized or that it be signed by Johnson. However, even if the trial Court had disagreed with that argument and felt that the agreement should have been notarized or should have included a more detailed legal description, the evidence showed that the terms of the parties' agreement were sufficiently clear that the Court was fully justified in holding that Ms. Oldford was equitably estopped from denying the enforceability of the agreement set forth in her May 11 letter.

Appellate courts have made it clear that where an agreement is proven by clear and unequivocal evidence, and acts relied upon to establish part performance point to the existence of the claimed agreement, the statute of frauds will not be rigidly applied. In Ben Holt Industries v. Milne, 36 Wn.App. 468 (1984), the Court considered the question of whether a lease would be enforced notwithstanding the fact that it did not comply with the statute of frauds. Citing Stevenson v. Parker, 25 Wn.App. 639 (1980) and Miller v. McCamish, 78 Wn.2d 821 (1971), the Court in Milne (at 36 Wn.App. 475) made it clear that it is not appropriate to just blindly apply the statute of frauds to every situation where formal requisites are not followed:

Miller relied upon by the Stevenson court, rejected the old arguments advanced to support rigid application of the statute of frauds. The court stated that statutory interpretation is the appropriate basis for resolving statute of frauds issues, and looked to the legislative intent behind the enactment of RCW 19.36.010 and RCW 64.04.010. The court stated that

The clear purpose and intent behind these statutes of frauds is the prevention of fraud. To apply these statutes in such a manner as to promote and encourage fraud would be to *defeat the clear and unambiguous intent of the legislature in their enactment.*

Miller, at 828. The Miller court went on to say that "the court's overriding concern is precisely directed toward and concerned with the quantum of proof

certain enough to remove doubts as to the parties' oral agreement....".....

The necessary proof requires, first, that the agreement be proven by clear and unequivocal evidence.....The second requirement is that the acts relied upon to establish part performance must "point to the existence" of the claimed agreement.

The two Milne/Miller tests are certainly met in the instant case. As to the first test, Kelly's May 11 letter was more than just an "oral agreement", it was a "clear and unequivocal" writing which clearly expressed her desire and her agreement that Johnson could buy Lot 1, provided (a) he first purchased Lot 2, (b) paid her \$6,000 and (c) gave the Suzuki automobile to Gary.

As to the second test, Johnson's performance clearly "points to the existence" of and is consistent with that agreement: he purchased Lot 2 and the house, he signed an agreement with Gary (Ex. 13) that was consistent with Kelly's May 11 letter, he performed the agreement with Gary by transferring the car to him, and he tendered his performance to Kelly (payment of \$6,000), which she refused to accept. Johnson's performance was therefore entirely consistent with the agreement.

Except for their failure to execute deeds, the Oldfords' behavior since 2004 was also consistent with the agreement: neither paid the real estate taxes or the Port Ludlow maintenance commission assessments for

Lot 1. Johnson was forced to pay a portion of those obligations to prevent the Lot from being foreclosed upon. The Oldfords moved to California and Nevada, did nothing with respect to Lot 1 for more than a year and a half (from September of 2004 to May of 2006) and did not exercise any rights of ownership. Johnson gave notice to Kelly in September 2004 that he was ready to buy Lot 1, and tendered the price. Not until May of 2006 did Kelly ever refute Mr. Johnson's claim that he had a right to purchase the property for \$6,000. She never exercised any rights of ownership of Lot 1 during that period.

D. Promissory Estoppel

The Court also concluded (at FF 8 and 9, CP12-13), that Johnson was entitled to specific performance under the doctrine of promissory estoppel:

8. Mr. Johnson is also entitled to specific performance under the doctrine of promissory estoppel. That doctrine requires: (1) a promise; (2) where the promisor reasonably expected to cause the promisee to change his position; (3) which in fact did cause the promisee to change his position; (4) by justifiably relying on the promise in such a manner; and (5) that injustice can be avoided only by enforcement of the promise. *Jones v. Best*, 134 Wn.2d 232, 239, 950 P.2d 1 (1998).

9. The Court concludes that the five elements of promissory estoppel are satisfied in this case. Kelly Oldford promised to sell Lot 1 to Mr. Johnson for \$6,000, agreeing to wait until the sale on Lot 2 closed. Kelly Oldford reasonably expected Mr. Johnson to complete the

purchase of Lot 2 and give the car to Gary, thus changing his position. Mr. Johnson did complete the purchase of Lot 2 and he transferred the car to Gary, in reliance upon Kelly's promise to "sit on" Lot 1 and sell her interest in the lot to him for \$6,000. Under those circumstances, Mr. Johnson had every reason to believe, and was justified in believing, that Kelly Oldford would complete the transfer of her interest in Lot 1 to him when he gave the \$6,000 to her. Finally, injustice can only be avoided by requiring Kelly Oldford to complete the transfer of Lot 1 to Mr. Johnson.

There is substantial evidence to support all of the Court's conclusions regarding promissory estoppel. Accordingly, the Oldfords were both equitably estopped from disavowing their agreements. The trial court was fully justified in ordering them to sign deeds to convey Lot 1 to Mr. Johnson.

E. Appellant's Claims for Slander of Title and Wrongful Filing of a Lis Pendens Were Properly Dismissed.

Having ruled that Johnson was entitled to specifically enforce the agreements with the Oldfords, there was no basis upon which the trial court could have ruled that Johnson's filing of a lis pendens was wrongful. As indicated in his testimony, he discovered in 2006 that Kelly had listed Lot 1 for sale with a broker and was trying to sell it. He also discovered that this was being done surreptitiously, and that Kelly was trying to prevent Johnson from knowing that the property was on the market. (RP,

I-10,11) Kelly had instructed the broker not to put a "for sale" sign on the property, and had not told the broker about the agreement she had with Johnson or about Johnson's demand that she convey the property to him. In fact it was Kelly's own real estate broker who gave Mr. Johnson the idea of filing a lis pendens. (RP, II-11)

Given his well-founded belief that he had an interest in Lot 1 and his discovery that Kelly was trying to sell the property, Johnson was completely justified in filing a lis pendens, in order to prevent Kelly, who was still the record owner of the property, from selling the property to another person.

RCW 4.28.328(3) provides that a person filing a lis pendens can only be liable for damages if he fails to establish a substantial justification for filing the lis pendens. Obviously, the trial court sustained Mr. Johnson's specific enforcement claim, and there can be no doubt that he had substantial justification to file the lis pendens. However, even if Johnson had not prevailed on his specific enforcement claim, the evidence is still quite clear that he was acting in good faith and with substantial justification. Where a claimant has a reasonable, good faith basis in fact or law for believing they have an interest in the property, a lis pendens is justified, even though the claimant does not eventually prevail.

South Kitsap Family Worship Center v. Weir, 135 Wash.App. 900, 146 P.3d 935 (2006).

CONCLUSION

The trial court's Findings of Fact and Conclusions of Law were based upon substantial evidence and are consistent with the law. There is no basis for overturning any of the trial court's rulings on appeal.

Respectfully submitted this 17th day of December, 2008.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 37755-1-II

Jefferson County Cause No. 06 2 00332 1

**IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON**

KELLY J. CARROLL, a/k/a, KELLY OLDFORD

Appellant

v.

JAMES SCOTT JOHNSON

Respondent

Declaration of Mailing

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Julie L. Larm-Bazzill, states:

1. I am a resident of the State of Washington. I live and reside in King County, Washington.

2. I am over the age of 18 years. I am not a party to this action. I am competent to be a witness.

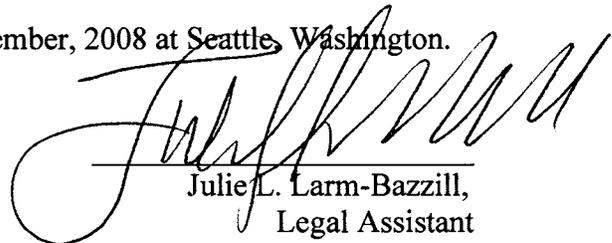
3. On December 17, 2008, I sent via U.S. Mail copies of Respondent's Brief and this Declaration of Mailing to:

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Washington State Court of
Appeals Division II
950 Broadway
Ste 300, MS TB-06
Tacoma, WA 98402-4454

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

DATED this 17th day of December, 2008 at Seattle, Washington.


Julie L. Larm-Bazzill,
Legal Assistant