

FILED  
COURT OF APPEALS  
DIVISION II

No. 38832-4-II

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STATE OF WASHINGTON  
BY 

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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RANDY GOULD and "JANE DOE" GOULD, husband and wife; BRET DRAGER  
and "JANE DOE" DRAGER, husband and wife; and GREG JOHNSON and  
"JANE DOE" JOHNSON, husband and wife,

Appellants,

v.

LEDAURA LLC, a Washington limited liability company,

Respondent,

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**APPELLANTS' REPLY BRIEF**

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**ORIGINAL**

**TABLE OF CONTENTS**

UNDISPUTED FACTS ..... 1

SUMMARY OF ANALYSIS.....2

    1.    Are the Lease and the Option separate  
          Agreements or do they contain severable  
          Covenants? Yes.....2

    2.    Does the Option / Purchase and Sale  
          Agreement include or incorporate a legal  
          Description of the property, thereby  
          Satisfying the statute of frauds  
          (RCW 6.04.010)? Yes.....3

ARGUMENT ..... 3

    1.    The Lease and the Option are separate  
          agreements or, if one agreement, then the  
          Covenants of the Lease and of the Option  
          are divisible and thus independent..... 3

    2.    The Option / Purchase and Sale Agreement  
          Satisfy the Statute of Frauds, RCW 6.04.010. .... 5

CONCLUSION ..... 6

APPENDIX A – DECISION FLOW CHART

## TABLE OF AUTHORITIES

### **CASES**

<i>Atlantic LB, Inc. v. Vrbicek</i> , 905 A.2d 552, 560 (Pa.Sup. 2006) .....	4
<i>Geonerco, Inc. v. Grand Ridge Properties IV LLC</i> , 146 Wn.App. 459, 468, 191 P.3d 76 (2008) .....	6
<i>Harting v. Barton</i> , 101 Wn.App. 954, 965 (2000).....	2,4
<i>Kaufman Bros. Const., Inc. v. Olney's Estate</i> , 29 Wn.App. 296, 628 P.2d 838 (1981) .....	5
<i>McFerran v. Heroux</i> , 44 Wn.2d 631, 638, 269 P.2d 815 (1954).....	5
<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn.App. 841, 848-9, 158 P.3d 1265 (2007) .....	6
<i>Santos v. Dean</i> , 96 Wn.App. 849, 854, 982 P.2d 632 (1999) .....	5

### **STATUTES**

RCW 6.04.010.....	3,5
-------------------	-----

### **OTHER AUTHORITY**

1 Corbin on Contracts 907, § 272.....	5
49 Am. Jur. 2d Landlord and Tenant § 296 .....	2

The Appellants Randy Gould, Bret Drager and Greg Johnson (collectively referred to herein as "Gould") provide this brief in reply to the Respondent's Ledaura LLC (hereinafter referred to as "Ledaura") Brief.

Since the parties had extensively briefed the issues on summary judgment, Gould's Opening Brief included responses to all of the arguments Ledaura advances on appeal. Rather than restate all of the arguments, Gould provides an outline of those arguments in this Reply Brief.

### **UNDISPUTED FACTS**

There is no dispute that on January 24 and 25, 2006, Gould and Ledaura executed what became the final agreements relating to a commercial building located at 601 St. Helens in Tacoma, Washington. Those agreements were as follows:

- 1) A Lease Agreement dated January 24, 2006 (the "Lease") (CP 160-174)<sup>1</sup>;
- 2) An Option to Buy Real Estate dated January 25, 2006 (the "Option") (CP 186-188)<sup>2</sup> with an attached, fully executed Commercial & Investment Real Estate Purchase & Sale Agreement dated January 25, 2006 (the "Purchase and Sale Agreement") (CP 176-184)<sup>3</sup>; and

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<sup>1</sup> The identical but somewhat illegible signed document is at CP 10-23.

<sup>2</sup> The identical but somewhat illegible signed document is at CP 28-29.

<sup>3</sup> The identical but somewhat illegible signed document is at CP 30-38.

- 3) An Addendum dated January 25, 2006 (the "Addendum") (CP 190-191)<sup>4</sup>.

The question presented to this Court is: If the Lease for the property terminates, does the Option also terminate?

### SUMMARY OF ANALYSIS

The process for answering that question is as follows:

1. **Are the Lease and the Option separate agreements or do they contain severable covenants? Yes.**
  - A. If the Lease and Option are separate agreements, termination of the Lease cannot terminate the Option. *See generally* 10 ALR 2d 884 (Appendix C to Appellants' Opening Brief). This Court must then determine if the Statute of Frauds is satisfied as discussed in Section 2 below.
  - B. If the Lease and Option together constitute one agreement, the Court must determine if:
    - (i) the Lease and Option covenants are divisible and if independent and separate consideration is paid. If so, termination of the lease does not terminate the Option. *See eg. Harting v. Barton*, 101 Wn.App. 954, 965 (2000). 49 Am. Jur. 2d Landlord and Tenant § 296. If the Lease and the Option constitute one agreement with divisible covenants, the parties agree that the Statute of Frauds has been satisfied. The Option is therefore enforceable and this Court must reverse the Trial Court.
    - (ii) the Lease and Option covenants are entire and indivisible, and so interdependent that the lease is essential to enforcement of the Option and no

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<sup>4</sup> The identical but somewhat illegible signed document is at CP 26-27.

consideration was paid. Under those circumstances, the Option would terminate.

**2. Does the Option / Purchase and Sale Agreement include or incorporate a legal description of the property, thereby satisfying the statute of frauds (RCW 6.04.010)?  
Yes.**

A. If the Lease and the Option constitute one agreement with divisible covenants, the parties agree that the Statute of Frauds has been satisfied. The Option is therefore enforceable and this Court must reverse the Trial Court.

B. If the Lease and the Option constitute separate agreements, and if the Option includes or incorporates a legal description, then the Option is enforceable and this Court must reverse the Trial Court.

This analysis, in the form of a flow chart, is attached as Appendix A.

### **ARGUMENT**

**1. The Lease and the Option are separate agreements or, if one agreement, then the covenants of the Lease and of the Option are divisible and thus independent.**

- The Lease and the Option are physically two separate agreements. CP 160-174, 186-188.
- The Lease and the Option were executed on different days. CP 160, 188.
- Gould paid separate consideration for the Option in the

amount of \$35,000.00. CP 186. See *Harting v. Barton*, 101 Wn.App. 954, 965 (2000).

- The Option only listed the Purchase and Sale Agreement and the Addendum. CP 187. Consequently, the Lease is not incorporated in the Option.
- The subject matter of the Lease and of the Option are directed at two different purposes: lease of the property and purchase of the property. CP 160-174, 186-188.
- The material terms in each agreement are different from, and incompatible with, those of the other. Those differences are illustrated in the following table:

<u>Separate Docs</u>	<u>Term</u>	<u>Consideration</u>	<u>Assignability</u>
<b>Lease Agreement</b>	2006 to 2009	Rent	NO
<b>Option Agreement</b>	2006 to 2014	\$35,000	YES

- Nothing in any of the Agreements states or suggests that a breach of the Lease terminates the Option. See *Atlantic LB, Inc. v. Vrbicek*, 905 A.2d 552, 560 (Pa.Sup. 2006).
- More than a year after the Agreements were signed, Ledaura - recognizing that the Agreements did not provide that a breach of the Lease terminated the Option - proposed an

addendum that was rejected by Gould, but which would have provided that a default under the Lease constitutes a default under the Option. CP 77-81, 86-90. See Santos v. Dean, 96 Wn.App. 849, 854, 982 P.2d 632 (1999).

- In reliance upon the Option, Gould made significant and expensive improvements to the building and important changes in their position with the expectation that they could purchase the building. CP 74, 83, 304-5. 1 Corbin on Contracts 907, § 272; See also McFerran v. Heroux, 44 Wn.2d 631, 638, 269 P.2d 815 (1954).
- All of the equities favor Gould: Gould made significant and expensive improvements to the building, all of which would be lost if the Option were terminated (CP 83); Gould timely exercised the Option, doing so well in advance of its actual expiration date (CP 48); and enforcing the Option now will cause no harm to Ledaura, who will be paid for the property at the price it specifically negotiated. *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn.App. 296, 300, 628 P.2d 838 (1981).

**2. The Option / Purchase and Sale Agreement satisfy the Statute of Frauds, RCW 6.04.010.**

- Exhibit A to the Agreements (CP 174, 340) undisputedly existed and did specify the correct legal description.
- The Option and the Purchase and Sale Agreement both independently reference Exhibit A as providing the legal description for the property. CP 177, 186.
- Gould believed that Exhibit A was attached to both the Option and the Purchase and Sale Agreement. CP 302.
- Even if Exhibit A did not exist, the Purchase and Sale Agreement, which is incorporated into the Option, states on the first page “Buyer and Seller authorize Listing Agent or Selling Licensee to insert and/or correct, over their signatures the legal description of the Property”. (CP 176) *Geonenco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn.App. 459, 468, 191 P.3d 76 (2008); *See also Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.App. 841, 848-9, 158 P.3d 1265 (2007).

### **CONCLUSION**

The Option at issue in this case is the same as options property owners routinely execute in favor of third parties. Options are typically transferrable and of lengthy durations. Ledaura now seeks to add uncertainty in the real estate market by arguing that all

agreements between two parties must necessarily be construed to interrelate such that a breach of one is presumed to be a breach of all the other agreements unless there is specific language to the contrary. This proposition is neither supported by the law nor by common sense. If parties intend to make their agreements dependent upon the other, they must so state. In the absence of such clear and unambiguous language, a breach under one agreement cannot be deemed a breach under another.

For the reasons stated in the Appellants' Opening Brief and as summarized in this Reply Brief, this Court should reverse the decision of the Trial Court and declare the Option to be enforceable and order that Ledaura comply with its terms.

Respectfully submitted this 30th day of September, 2009.

DAVIS ROBERTS & JOHNS, PLLC

A handwritten signature in black ink, appearing to read 'Mark R. Roberts', written over a horizontal line.

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Attorneys for Appellants Drager, Gould,  
and Johnson

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**CERTIFICATE OF SERVICE**

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STATE OF WASHINGTON  
BY \_\_\_\_\_

I hereby certify that on the 30th day of September, 2009, I caused DEFO to be served the foregoing APPELLANTS' REPLY BRIEF on the following individual in the manner indicated:

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(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 30<sup>th</sup> day of September, 2009, at Gig Harbor, Washington.

  
KRISTINE R. PYLE

**APPENDIX A**

**DECISION FLOW CHART**

