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STATE OF WASHINGTON
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No. 38981-9-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Steven and Deborah Mattingly, husband and wife,
Appellant,

v.

Palmer Ridge Homes, LLC, a Washington limited liability company,
And Contractors Bonding and Insurance Company, Bond Account
SG0213, a Washington corporation
Respondent.

REPLY BRIEF OF APPELLANT MATTINGLY

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10/29/09 N.C.

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ARGUMENT

Summary judgment in this matter must be reversed because the facts presented establish genuine issues of material fact whether the Construction Contract's Limitation of Suit or the 2-10 Exclusive Remedy bar the filing of Mattingly's October 16, 2008 lawsuit.

Palmer Ridge repeatedly argues that Mattingly was told three times that any claims against Palmer Ridge related to the Project must be brought within one year. Respondent's Brief, 12, 13, 14, and 15. This statement is factually inaccurate. While it is true there are three documents that reference a one year time period, all three periods begin and end at different times and only two of the three purport to limit the filing of a lawsuit after the specified time.

The trial court failed to appreciate the legal distinctions between these three documents, justifying the decision to grant summary judgment by stating: Mattingly "signed three times that he knew when the warranty[1] was expiring. Those are the documents he signed." RP 02/06/09, 21:25-22:1. The Certificate of Substantial Completion does not discuss a

[1] It cannot be concluded from the report of proceedings whether the court based its decision to grant summary judgment on the grounds that the warranties expired prior to filing the lawsuit, which was not properly before the court, or whether the court accepted the argument made by Palmer Ridge that one of the two one-year limitation of suit provisions barred the lawsuit. Regardless of the trial court's reasoning, appellate courts review a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29,34, 1 P.3d 1124 (2000).

limitation on the filing of a lawsuit, but instead, limits implied warranties to "one (1) year from the date of final payment or date of occupancy, which ever comes first." CP 183-84. When determining whether the Mattingly's lawsuit is time-barred, the provisions of the Certificate of Substantial Completion should not be considered.

In addition to wrongly considering the Certificate of Substantial Completion, the trial court committed errors of law and entered summary judgment without considering the facts in the light most favorable to Mattingly. First, the trial court erred in failing to determine which of the two conflicting limitation of suit provisions controlled; this is error. The suit limitation provisions in the Construction Contract and 2-10 HBW conflict, with each provision beginning and ending at different times. It should first be determined whether the Construction Contract's Limitation of Suit or the 2-10 Exclusionary Clause was the provision which triggered the one-year limitation of suit period to begin.

Second, the trial court failed to consider the and all reasonable inferences from them, in the light most favorable to Mattingly, the nonmoving party. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The facts relating to enforcement of the Construction Contract's Limitation of Suit and 2-10 Exclusionary Clause establish genuine issues of material fact which prevent summary judgment. A

motion for summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997). Read alone, the Construction Contract's Limitation of the Suit and 2-10 Exclusionary Clause conflict. Reading the two provisions together creates an irreconcilable ambiguity prohibiting summary judgment. Consequently, summary judgment is inappropriate.

Even if the contracts are unambiguous, reasonable minds could reach conflicting conclusions whether (1) the project was completed more than one year before Mattingly filed their law suit; (2) construction work ceased more than one year before Mattingly filed their law suit; (3) the Limitation of Suit in the Construction Contract does not bar this lawsuit; and (4) the 2-10 HBW failed to effectively modified the Construction Contract. The trial court's grant of summary judgment should be reversed.

I. The Provisions of the Construction Contract's Limitation of Suit and the 2-10 Exclusionary Clause Are Inconsistent.

The Limitation of Suit and the 2-10 Exclusionary Clause conflict. A court's function in interpreting contracts is to determine the parties' mutual intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Interpretation of a contract provision is a question of law

appropriate for summary judgment only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 143 Wn. App. 819, 826-27, 142 P.3d 209 (2006).

The outcome resulting from enforcement of the Limitation of Suit and 2-10 Exclusion Clause is ambiguous. The Limitation of Suit in the Construction Contract limits the period either party may initiate a lawsuit against the other, providing as follows:

> No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after one year beyond the <u>completion of the project</u> or <u>cessation of work</u>.

CP 134 (emphasis added). Taken in the light most favorable to Mattingly, the evidence offered in opposition to Palmer Ridge's motion for summary judgment demonstrates that the project was never completed and that Palmer Ridge's construction work had not ceased on October 18, 2007, one year before Mattingly filed this lawsuit.

On the other hand, the 2-10 Exclusionary Clause allows Mattingly to file a lawsuit against Palmer Ridge within one year from a different date than that stated in the Construction Contract's Limitation of Suit. The 2-10 HBW provides as follows:

> Effective one year from the Effective Date of Warranty, You have waived the right to seek damages or other legal or equitable remedies from your Builder.

("2-10 Exclusionary Clause"). The Effective Date of Warranty is defined in the 2-10 warranty booklet and was unilaterally determined by 2-10 HBW to be June 5, 2006[2]. CP 106; 148. Mattingly's right to file a lawsuit against Palmer Ridge was prohibited by the 2-10 Exclusionary Clause after June 5, 2007. Mattingly moved into the home in mid-May 2007.

It cannot be disputed that the date required for Mattingly to file suit in the Limitation of Suit is different from the date in the 2-10 HBW. Several competing interpretations of the Limitation of Suit and 2-10 Exclusionary Clause may be reached. These competing interpretations prohibit the trial court from interpreting the contracts on summary judgment. Entry of summary judgment was made in error.

II. The Construction Contract Reflects the Parties' Intent and the Limitation of Suit Should Control.

The court must first determine which suit limitation provision was enforceable. The Construction Contract and the Limitation of Suit therein reflect the parties' agreement. The touchstone of contract interpretation is

[2] After this lawsuit was filed, the 2-10 HBW changed the Effective Date of Warranty to April 17, 2007. CP 378. As of August 15, 2008, when 2-10 HBW sent Mattingly's counsel a letter referencing the Effective Date of Warranty, this change had not been made. CP 106. It is believed this change occurred on November 18, 2008, as this is the "RePrint Date" shown in the top left corner of the amended Certificate of Warranty Coverage provided Mattingly in December 2008. CP 378; 353.

the parties' intent. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005). The court looks at the parties' intent in the contract's language, subject, and purpose; the circumstances surrounding formation; the parties' subsequent conduct; and the reasonableness of the parties' interpretations. *Tanner*, 128 Wn.2d at 674. The meaning of a contract provision is a mixed question of law and fact, with the intent of the parties controlling. *Mut. Of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008).

It is uncontested that the parties specifically negotiated the terms of the Construction Contract. Palmer Ridge concedes that the Construction Contract was "extensively negotiated." CP 15. Mattingly bargained for the provisions of the Construction Contract. Consequently, it is illogical to believe that Mattingly then intentionally relinquished the warranties and other protections in the contract with no additional consideration.

The contract that both parties "extensively negotiated" reflects the intent of the parties much better than the boilerplate contained in the 2-10 HBW in which neither party had any ability to modify. The Construction Contract's Limitation of Suit should control whether Mattingly's complaint is time-barred.

III. There was No Meeting of the Minds Regarding the 2-10 HBW.

The parties failed to reach a meeting of the minds as to the terms of the 2-10 HBW. An enforceable contract requires a meeting of the minds on the essential terms of the parties' agreement. *Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn. App. 459, 465, 191 P.3d 76 (2008). When a purported agreement does not reflect a meeting of the minds, the courts should resolve such disputes in the way most likely to enforce the parties' expectations. *In re Partnership of Rhone and Butcher*, 140 Wn. App. 600, 607-8, 166, P.3d 1230 (2007).

A. Mattingly Was Unaware of the Contract Terms of the 2-10 HBW.

There can be no meeting of the minds because Mattingly could not know the terms of the 2-10 HBW when they were enrolled in the program. Mattingly had not been provided the 2-10 HBW warranty booklet to review prior to enrollment, nor did they receive a "sample" warranty booklet until they moved into the home. CP 351-52. Mattingly cannot have intended to be bound by provisions in the 2-10 HBW when they did not know what those terms were. The 2-10 HBW terms were added by Palmer Ridge after the Construction Contract was agreed upon and executed and the purchase of the property closed. There was no meeting of the minds.

B. The 2-10 HBW Is Not Part of the Construction Contract.

The 2-10 HBW contradicts the terms of the Construction Contract and cannot be considered part of the Construction Contract. First, the two documents have many conflicting terms. Second, the 2-10 HBW is not listed within the definition of Contract Documents in Article 1 of the Construction Contract, which gives the following definition:

> The contract documents consist of this agreement, general conditions, construction documents, specifications, allowances, finish schedules, construction draw schedule, information disclosure statement, all addenda issued prior to execution of this agreement and all change orders or modifications issues and agreed to by both parties. These contract documents represent the entire agreement of both parties and supersede any prior oral or written agreement.

CP 131. Next, no third party warranty agreement is included in the Contract Documents. Finally, the Contract Documents represent the entire agreement of the parties, meaning that the terms of the 2-10 HBW are not part of the agreement between Mattingly and Palmer Ridge.

C. Mattingly's Signature on the 2-10 HBW Enrollment Form Does Not Bind Them to the Acknowledgment When It Is Not True.

Mattingly did not execute a document containing the warranty terms, but rather, signed an enrollment form. CP 291. Palmer Ridge makes much of the fact that Mattingly signed the 2-10 HBW Enrollment form containing an acknowledgement that they had read a sample copy of the warranty booklet. A person who signs an agreement without reading it

is not bound by its terms if there was not ample opportunity to examine the contract. *Stokes v. Bally's Pacwest, Inc.*, 113 Wn. App. 442, 446, 54 P.3d 161 (2002). In addition, boilerplate language in a contract does not bind the parties if the clause is not factually correct because "parties to a contract are not bound by incorrect statements of fact." *Denny's Rests. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 203, 859 P.2d 619 (1993). Whether Mattingly actually read the 2-10 HBW booklet before signing the enrollment form is a question of fact.

Mattingly was not provided ample opportunity to review the 2-10 HBW prior to being enrolled in the program. He was not given the warranty booklet before enrollment. Palmer Ridge and Mattingly had already negotiated the specific terms, including the Limitation of Suit, and Mattingly had no reason to believe this document would or could change of provisions of the Construction Contract. Palmer Ridge informed Mattingly the documentation was required for the home warranty and mentioned nothing of the suit limitation:

> The only reason I signed the documentation for the 2-10 HBW was because Rick Palmer told me that the documentation was required for the warranty our home would receive. Before being enrolled in the 2-10 HBW program by Palmer Ridge Homes, I was not provided the opportunity to review the Sample 2-10 Home Buyers Warranty Booklet.

CP 121.

The 2-10 HBW enrollment form lacks contractual provisions and simply references the booklet. The 2-10 HBW cannot be enforced against Mattingly because, contrary to the acknowledgement on the form, the record demonstrates Mattingly was not provided an opportunity to review the 2-10 HBW. The representation on the form was false and is not binding on Mattingly. This evidence must be taken in the light most favorable to Mattingly and summary judgment should have been denied.

IV. 2-10 HBW Did Not Effectively Modify the Construction Contract.

The 2-10 HBW provisions are different than those contained within the Construction Contract and are only effective if they modify the Construction Contract. In order for the differing terms of the 2-10 Exclusionary Clause to modify the Limitation of Suit, Palmer Ridge must prove a mutual modification. The parties agree that for an effective modification, there must be consideration or a mutual change in obligations and rights separate from that of the original contract and a meeting of the minds. Respondent's Brief, 22. Whether a basic contract was intended to be modified by a separate document is a question of fact. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-23, 826 P.2d 664 (1992).

Palmer Ridge failed to raise the issue of contract modification before the trial court. On summary judgment, Palmer Ridge failed to allege the legal requirements for modification or provide any facts to support a modification by the 2-10 HBW. For the reasons set forth in Section III above, there was no meeting of the minds. Additionally, there must be consideration or a mutual change in obligations and rights separate from that of the original contract. Palmer Ridge's motion for summary judgment should have been denied for lack of an enforceable modification.

A. No Exchange of Consideration or Mutual Change of Obligations.

The parties failed to exchange the necessary consideration to modify the Limitation of Suit. The promise to perform an existing legal obligation is not valid consideration. *Harris v. Morgensen*, 31 Wn.2d 228, 240, 196 P.2d 317 (1948). Past benefit is insufficient consideration for a promise. *Snow v. Nellist*, 5 Wn. App. 140, 143, 486 P.2d 117 (1971).

Under the construction contract, Mattingly paid Palmer Ridge $563,750.00 for Palmer Ridge to build Mattingly a home. Either party was allowed to file a lawsuit one year from completion of construction or cessation of work. Palmer Ridge had a legal duty to construct the home for the agreed upon price and could be sued one year from completion of

the project or cessation of work if there were problems with the home. CP 32-39.

After Mattingly was enrolled in the 2-10 HBW, Palmer Ridge was still required to build the home for the same contract price, but Mattingly was no longer permitted to sue Palmer Ridge one year from completion of the construction. If Palmer Ridge's argument is accepted, Mattingly could only sue Palmer Ridge one year from the Effective Date of warranty, which was calculated to be three weeks after Mattingly moved into the home. There can be no question that the 2-10 Exclusionary Clause changes the one year Limitation of Suit and shortens the period Mattingly may file suit. The parties agree no consideration was exchanged other than the original Construction Contract price.

Palmer Ridge argues that consideration for this change in position was contained in the Construction Contract price. Palmer Ridge was obligated to provide a warranty under the Construction Contract, and it is reasonable that part of the contract price would pay for provisions of a warranty, but itemization of Palmer Ridge's cost of the 2-10 HBW in the construction budget does not incorporate terms of the 2-10 HBW into the contract. Nor does it constitute sufficient consideration for a relieved duty in the future which is not contemplated at the time the original consideration is paid.

Extrinsic terms cannot be incorporated into a contract simply because money is allocated for the 2-10 HBW in the construction budget. Under Palmer Ridge's approach, if a different warranty company was chosen, different contract terms would be incorporated into the Construction Contract. There would be no finality to construction contracts because regardless of what the parties agreed to in the contract, as long as they allocated funds in the contract price to a third party warranty company, additional terms could be added to the agreement. It is illogical to find consideration for a contract which Mattingly did not know existed was exchanged at the time of forming the Construction Contract and before Palmer Ridge's obligations were performed.

B. No Mutual Change in Obligations.

There was no mutual change in obligations sufficient to constitute a mutual modification of the Construction Contract. The case of *Rosellini v. Banchero*, 83 Wn.2d 268, 517 P.2d 955 (1974), is factually analogous to this case and prevents modification of the Limitation of Suit in the Construction Contract by the 2-10 Exclusionary Clause. Palmer Ridge attempts to distinguish *Rosellini* on the grounds that in our case, there was consideration paid for the change in obligations, and in *Rosellini* there was not. For the reasons discussed in the previous section, like *Rosellini*, there was no exchange of consideration between Mattingly and Palmer Ridge

for the reduced limitation period. *Rosellini* is instructive in this case and should act to invalidate the 2-10 HBW for lack of consideration.

After Mattingly was enrolled in the 2-10 HBW, Mattingly had the same duty to pay the same amount of money as stated in the Construction Contract. Palmer Ridge had a reduced duty in the form of a much shorter period in which Mattingly could file suit against Palmer Ridge and the reduced obligation to provide warranty work. The change in obligations was not mutual.

V. Mattingly Filed Suit within the One Year Limitation of Suit Period in the Construction Contract.

The Mattinglys' filed their lawsuit within the one-year period required by the Construction Contract's Limitation of Suit. The Limitation of Suit provision prohibits either party from initiating legal action "one year beyond the completion of the project or cessation of work." CP 134. The evidence presented to the trial court, which must be construed in the light most favorable to Mattingly, at a minimum establishes genuine issues of material fact as to whether the project was completed by Palmer Ridge and whether Mattingly filed this lawsuit before Palmer Ridge ceased work.

The only dates relevant to determining when the Limitation of Suit began to run are the dates the project was complete or construction work

ceased. Argument by Palmer Ridge that other dates[3] affect when the Limitation of Suit bars the Mattinglys lawsuit is incorrect.

A. Cessation of Work.

Palmer Ridge offers no response to Mattingly's argument that Palmer Ridge had not ceased work more than one year before Mattingly filed their lawsuit. Palmer Ridge offered no evidence on this subject to the trial court. Taken in the light most favorable to Mattingly, the emails between the parties demonstrate Palmer Ridge had not completed the project on October 29, 2007 and Palmer Ridge planned to return to the project to complete the remaining work. CP 125-26; 206-26. .

The emails between Mattingly and Palmer Ridge prevent entry of summary judgment under the "cessation of work" element of the Limitation of Suit. These emails demonstrate work on the project had not ceased prior to one year before Mattingly filed their complaint on October 16, 2008. If the Limitation of Suit controls, Mattingly's lawsuit is not barred by the "cessation of work" language.

B. Completion of the Project.

Whether the home was complete more than one year before Mattingly filed their complaint is a genuine issue of material fact which

[3] Palmer Ridge erroneously argues that the dates of "substantial completion, final payment for construction, final certificate of occupancy, and the Mattinglys occupying the house" affect the determination of when the construction was complete. Respondent's Brief, 16.

precludes entry of summary judgment. The parties agree Washington case law distinguishes between completion of a construction contract and substantial completion of a construction contract.[4] Substantial completion is not at issue here; completion is the bar which must be met for summary judgment to be proper. Genuine issues of material fact were raised which prevent a determination that the project was complete.

i. Expert Testimony of Mark Lawless.

Taken in the light most favorable to Mattingly, the expert testimony of Mark Lawless required the trial court to deny Palmer Ridge's motion for summary judgment because the project has not been completed. Mark Lawless testified, in pertinent part, as follows:

> Based upon my site visit, review of the residence, construction plans and specifications, and punch list provided by Steve Mattingly to Palmer Ridge Homes, LLC, I have determined that Palmer Ridge Homes and/or its subcontractors failed to return to the Mattingly residence to complete the punch list work.
>
> ...
>
> The punch list is typically performed when the construction is substantially complete. The construction is not complete until all punch list items have been corrected or completed by the contractor. In my opinion, because the punch list items were not performed, Palmer Ridge Homes, LLC failed to complete construction of the Mattingly's residence.

[4] Compare Appellant's Brief, 35 to Respondent's Brief, 15-16.

CP 227-38. No evidence on the subject of completion of the home was offered by Palmer Ridge.

ii. Application of Honeywell, Inc. v. Babcock.

Palmer Ridge concedes that under *Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 412 P.2d 511 (1966), a project is not complete until all work necessary to perform the contract is complete. Respondent's Brief, 16. The significance of the work to be performed is irrelevant, so long as it was required under the Construction Contract. In *Honeywell*, the installation of three thermometers was finished on October 15, 1963. *Id.* at 244. The work in *Honeywell* which rendered the contract incomplete was that portion of the subcontractor's work for which the general contractor paid $845.84 to have completed. *Id.*

Palmer Ridge appears to argue that the incomplete punch list items referenced by Mattingly were only "minor tasks" and "fastidious requests," and despite these requests, the home was complete.[5] Palmer Ridge does not allege that the incomplete punch list items were not included within the Construction Contract. If they were included, the fact

[5] Palmer Ridge argues: "The Mattinglys cite Honeywell, Inc. v. Babcock, 68 Wn.2d 239, 412 P.2d 511 (1996) [sic], for the proposition that incomplete punch list items mean that a project is not 'complete.' However, said more precisely, Honeywell stands for the rule that a project is not complete until all work necessary to perform the contract is complete. That a party to a project defines a list of what they want done as a 'punch list' is immaterial. The work that is to be completed is the proper focus."

that the remaining tasks may have been relatively minor is irrelevant. The project was not complete.

Whether the work identified on the Mattingly's punch list falls within the scope of the Construction Contract is a question of fact. The testimony of Mark Lawless concludes that the work was within the Construction Contract, stating: "because the punch list items were not performed, Palmer Ridge Homes, LLC failed to complete construction of the Mattingly's residence." CP 230. There is no evidence in the record to indicate that a reasonable person may not agree with the opinion of Mr. Lawless that the work necessary to perform the contract was not complete or was outside the scope of the Construction Contract. Palmer Ridge's failure to complete the required construction work means the home is not complete. The trial court erred when it entered summary judgment.

Completion of the Construction Contract is required to trigger the running of the Limitation of Suit provision. For purposes of this summary judgment, Mr. Lawless's opinion that the project is not complete creates genuine issues of material fact which precluded entry of summary judgment.

iii. Mattingly Declined to Accept the Project as Complete.

The project was never accepted by Mattingly as completed. The Final Inspection Section of the Inspection Punch List provides a space to

acknowledge the project is "accepted as completed." CP 370. Mattingly failed to execute this document. Taking the facts in the light most favorable to Mattingly, failure to execute the Final Inspection document and the continued emails to Palmer Ridge regarding their return to the property to complete construction, it is clear Mattingly never believed the project was complete.

C. Mattingly Is Not Estopped From Arguing the Home Was Not Completed.

The theory of estoppel does not bar Mattingly from arguing the home was not completed in May 2007. The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result by the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Kramarevcky v. Dep't of Soc. & Helath Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

Palmer Ridge fails to set forth the elements of estoppel or explain how the second or third elements of equitable estoppel have been met. Palmer Ridge fails to indicate with any specificity which statements this theory of estoppel applies to. Even if Mattingly were to guess at the

specific sections of the complaint[6] and Declaration of Steve Mattingly[7] which Palmer Ridge takes issue with, Palmer Ridge fails to explain how they relied upon these statements. Furthermore, even if such reliance had been shown, Palmer Ridge fails to explain how this reliance has resulted in an injury. The estoppel theory should be disregarded by the court.

VI. If legally binding, the 2-10 HBW should not be enforced against Mattingly.

If the 2-10 HBW is enforceable against Mattingly, the 2-10 Exclusionary Clause should not be enforced because it is unreasonable and against public policy. A contract limitation period will not be enforced if prohibited by statute or public policy, or if the provision is unreasonable. *Wothers v. Farmers Ins. Co. of Wash.*, 101 Wn. App. 75, 79, 5 P.3d 719 (2000). In deciding whether the provision is unreasonable, "consideration must be given to all the circumstances surrounding the transaction, including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms and whether the important terms were hidden in a maze of fine print." *Southcenter*

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[6] Once counsel for Mattingly realized the use of incorrect language in the complaint, Mattingly immediately filed an amended complaint to correct the error in language. The error arose simply from the legal difference between completion and substantial completion.

[7] Steve Mattingly explained his incorrect reference to "completion of construction in his original declaration as follows: "I intended to state that the construction was suficinetly complete to the extent that Pierce County allowed us to move into our home on May 14, 2007, when the Certificate of Occupancy was issued. However, numerous punch list items and other construction defects still existed and Palmer Ridge had not yet finished these items. I have never believed the construction of my home was complete."

View Condominium Owners' Ass'n., 47 Wn. App. at 771 (citing *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 544 P.2d 20 (1975)).

Palmer Ridge failed to argue that enforcement of the 2-10 HBW is reasonable. As previously argued, enforcement of the 2-10 Exclusionary Clause is unreasonable because Mattingly was not given an opportunity to review or understand the terms of the 2-10 HBW or the fact that the 2-10 HBW contradicts the terms of the Construction Contract. Even if Mattingly had been given such an opportunity, it is unlikely they would have noticed the provision as it is hidden on page 5 of a 31 page document. CP 150-81. The circumstances surrounding the contract as described make it unreasonable to enforce.

Mattingly was provided three weeks from moving into the home to file a lawsuit. The result of the 2-10 Exclusionary Clause is inherently unreasonable. Instead of addressing the issue of reasonableness, Palmer Ridge simply attacks Mattingly's argument the one year warranty period expired three weeks after occupying the home as disingenuous and that the company corrected its mistake.

Mattingly did not learn the Effective Date of Warranty was changed until sometime in December 2008. CP 353. Shortly after moving into the home, Mattingly was notified that the 2-10 HBW expired June 5, 2007. CP 124. Palmer Ridge and the 2-10 HBW company allege to have

corrected this error and notified Mattingly of the correction, but there is no evidence in the record indicating that the 2-10 HBW company corrected its mistake. Neither is their evidence in the record that Mattingly was informed of this correction. Even had the correction been made by the 2-10 HBW company, it does not benefit the homeowner if they are not informed – it simply benefits the 2-10 HBW company.

The 2-10 HBW company had not made the correction before sending Mattingly's counsel a letter dated August 15, 2008 when Mattingly was informed that the one year period expired June 5, 2007. CP 346-47. Contrary to the assertions by Palmer Ridge and 2-10 HBW, the correction was not made until November 18, 2008[8] when a different Certificate of Warranty Coverage was mailed to Mattingly. CP 378.

VII. Disclaimer of Express and Implied Warranties By the 2-10 HBW is Relevant on Appeal.

Disclaimer of the express and implied warranties by is relevant to interpreting the contract because it is further evidence that the parties did not intend the 2-10 HBW to replace the Construction Contract. The objective in interpreting a contract is to give it a practical and reasonable meaning that fulfills its purpose, rather than a strained or forced meaning

[8] Compare the "print date" of June 28, 2006 in the upper left corner of the original Certificate of Warranty Coverage defining expiration as June 6, 2006, CP 372, to the "RePrint Date" of November 18, 2008 on the amended Certificate of Warranty Coverage defining expiration as April 17, 2007. CP 378.

that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective. *Forest Mktg. Enters., Inc. v. Dep't. of Natural Res.*, 125 Wn. App. 126, 104 P.3d 40 (2005). The parties cannot have intended that the 2-10 HBW would apply, as argued by Palmer Ridge, because its terms render much of the Construction Contract nonsensical and ineffective.

The blanket disclaimers in the 2-10 HBW clearly conflict with the specific warranties admittedly bargained for in the Construction Contract. The 2-10 HBW renders the specifically negotiated Construction Contract warranties meaningless. Mattingly would not agree to relinquish the Construction Contract warranties without consideration. Clearly, Mattingly was not given an opportunity to review the terms of the 2-10 HBW, and did not intend that the 2-10 HBW modify his rights under the Construction Contract.

VIII. Palmer Ridge Did Not Meet Its Summary Judgment Burden

Summary judgment should not have been granted because Palmer Ridge did not show that it was entitled to judgment as a matter of law. Accepting Palmer Ridge's argument that attaching the contract containing the operative provision to a supporting declaration allows the moving party to concoct new argument in their responsive documents.

The only reference in the briefing to the one year limitation of suit in the Construction Contract is as follows:

> [t]he plaintiffs agreed to the terms of a construction contract that contains a one year time limit for lawsuits against Palmer Ridge.

CP 20. The language of the Construction Contract's Limitation of Suit was not included in its motion. *Id.* No mention was made of when the time limit began to run, that the triggering events were satisfied, or that Mattingly failed to file suit within one year form completion or cessation of work was made. Palmer Ridge, did however, spend significant time raising the issues of the various warranties and waiver of those specific warranties. Mattingly should not be forced to guess at the subject matter Palmer Ridge moved for summary judgment upon. Palmer Ridge failed to meet its burden in its moving papers.

CONCLUSION

The trial court should have denied Palmer Ridge's motion for summary judgment. There were three provisions relating to a limitation on the time to file a suit. First, the court should not have considered the Certificate of Substantial Completion because simply limits implied warranties and does not discuss limitations of a lawsuit.

Second, the 2-10 Exclusionary Clause cannot be enforced because it is inconsistent with the Construction Contract and there was no consideration to support a modification of the Construction Contract.

Furthermore, there was no meeting of the minds. The provisions of the Construction Contract control this dispute.

Finally, the Limitation of Suit in the Construction Contract does not act to bar this lawsuit because the limitations period did not expire prior to filing of the suit. There is no evidence in the record in which a reasonable person could conclude Palmer Ridge ceased work more than one year prior to Mattingly filing their lawsuit. Furthermore, the testimony of Mark Lawless creates genuine issues of material fact exist of whether the construction was completed by Palmer Ridge more than one year before Mattingly filed suit.

For the foregoing reasons, Mattingly respectfully requests that this Court reverse the trial court's Order Granting Defendant' Motion For Summary Judgment dated January 16, 2009 dismissing the case, and the trial court's entry of the February 13, 2009 Judgment awarding Palmer Ridge attorneys' fees and the matter remanded for further proceedings. Mattingly also requests attorney's fees incurred during this appeal.

Respectfully submitted this 29th day of October, 2009.

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Certificate of Service

I hereby certify under penalty of perjury of the laws of the State of Washington that I caused one copy of the foregoing Reply Brief of Appellant to be served upon the following in the manner indicated below:

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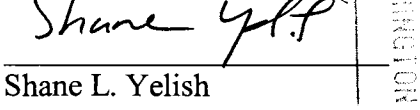
DATED this 29th day of October, 2009 at Tacoma, Washington.



Shane L. Yelish

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