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COURT OF APPEALS
DIVISION II
CLERK OF COURT
JANICE L. HARRIS

Case No. 45743-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PHILIP A. NELSON,
Appellant,

v.

ROBERT V. TRENT and JANE DOE TRENT, husband and wife,
individually and their marital community composed thereof; and
SDC HOMES, LLC, a Washington limited liability company,
Respondents.

APPELLANT'S AMENDED OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

The dispute here involves a claim of breach of an employment agreement (the "Employment Agreement," *CP 8-23*) between Appellant Philip A. Nelson ("Nelson") and Respondent SDC Homes LLC ("SDC"). The Managing Member and principal shareholder of SDC was Respondent Robert Trent ("Trent"), who signed the Employment Agreement on behalf of SDC. Trent is a party here based on allegations that he violated RCW 49.52.050 and is liable individually for damages under RCW 49.52.070 as the manager of SDC.

On February 18, 2010, Nelson entered into the Employment Agreement with SDC under which Nelson was employed by SDC as its Land Acquisition Manager. Nelson's duties as SDC's Land Acquisition Manager are described in detail in the Employment Agreement but, in summary, Nelson was to assist SDC in the bulk acquisition of lots suitable for the construction of single-family residences. In the 12 months of Nelson's involvement, SDC acquired 450 lots.

The compensation provision in the Employment Agreement states:

SDC HOMES LLC shall pay Employee for services rendered, pursuant to this Agreement, \$5,000 monthly plus a stipend of \$1,000 per home sold if the land was purchased through Phil Nelson as Land Acquisition Manager.

(*CP 18 at § 12.1*). Compensation included both salary and performance-based compensation.

Following Nelson's termination in March 2011, SDC sold 27 houses on lots acquired during Nelson's tenure as SDC's Land Acquisition Manager. (*CP 261 at 25-26*). Trent then elected to sell all of

the assets of SDC, including the inventory of 256 additional lots acquired by SDC during Nelson's tenure as SDC's Land Acquisition Manager (CP 132), to M.D.C. Holdings Inc., which created a wholly-owned subsidiary – Richmond America Homes of Washington Inc. (collectively "MDC") – to take title to the assets. In sum, Nelson alleges that SDC breached § 12.1 of the Employment Agreement by failing to pay stipend based on post-termination sales of lots and homes acquired by SDC during Nelson's tenure as SDC's Land Acquisition Manager.

SDC and Trent moved for summary judgment on various issues (CP 36-47) which Motion was denied on the basis of issues of material fact, with the exception of the interpretation of § 12.1 of the Employment Agreement (CP 578-580). With regard to § 12.1 of the Employment Agreement, the Trial Court concluded that: (1) there was no issue of fact; (2) a home sale was a condition to the payment of stipend; and (3) SDC's election to sell the lots as part of a bulk sale of its assets excused SDC from its obligation to pay stipend. (*Id.*).

II. ASSIGNMENTS OF ERROR

Nelson assigns the following errors to the Trial Court:

Assignment of Error No. 1: The Trial Court committed error by concluding that a home sale was a condition to the payment of stipend where the evidence reasonably supported the inference that a home sale was intended only to govern *when* stipend would be paid and *not whether* stipend had been earned.

Assignment of Error No. 2: The Trial Court committed error by concluding that SDC's decision to sell lots acquired during Nelson's

tenure as SDC's Land Acquisition Manager excused the obligation to pay stipend.

Issue No. 1: Did the Trial Court commit error by granting summary judgment construing § 12.1 of the Employment Agreement as a matter of law?

Issue No. 2: Did the Trial Court commit error by concluding that SDC/Trent's decision to sell SDC's assets in bulk excused the obligation to pay stipend under § 12.1 of the Employment Agreement?

III. STATEMENT OF FACTS

SDC was incorporated in 2008. However, Trent has been involved in the home-building industry since early-2005, initially operating as Dream Builders NW Inc. Based on public records, between early-2005 and the commencement of Nelson's employment as SDC's Land Acquisition Manager in early-2010, the various entities controlled by Trent purchased 432 single-family building lots. (*CP 131-132 at ¶ 2*).

Nelson first obtained a real estate license in 1992. Nelson's professional practice has focused on bulk sales of residential building lots. Over the course of his career, Nelson has been involved in transaction for the purchase and sale of many thousands of lots. (*CP 79 at ¶ 2*). It is undisputed that Nelson had been involved in lot sales to SDC prior to accepting employment with SDC.

The Employment Agreement was mutually accepted on February 18, 2010. (*CP 8-23 at 22*). The relationship between SDC and Nelson is described in the Employment Agreement as follows:

The parties agree that at all times during the term of this Agreement defined below in Section 8.1, Employee is and shall remain an employee and not an independent contractor...

(CP 9 at § 3 (sic)).

The Employment Agreement was prepared by SDC's attorneys as stated in § 15 of the Employment Agreement (*CP 22*) and is an obvious cut-and-paste of an agreement originally prepared to retain the services of a "Vacant Land Real Estate Agent." For example, § 12.1 of the Employment Agreement describes Nelson as "Land Acquisition Manager" with a reference to "Vacant Land Real Estate Agent" being stricken out. (*CP 18-19*). However, the recitals continue to describe "Employee" as the "Vacant Land Real Estate Agent." There are two different paragraphs numbered 3 in the Employment Agreement. (*CP 9; CP 10*) The ¶ 3 of the Employment Agreement titled "Employee Status," which provides that Nelson would not be an independent contractor, precedes numbered paragraphs 2.1 through 2.8 (*CP 9*) and was apparently plugged into the Employment Agreement after the main text was prepared.

The compensation provision in the Employment Agreement states:

SDC HOMES LLC shall pay Employee for services rendered, pursuant to this Agreement, \$5,000 monthly plus a stipend of \$1,000 per home sold if the land was purchased through Phil Nelson as Land Acquisition Manager.

(CP 18 at § 12.1). So, there are two components to Nelson's compensation: (1) salary; and (2) performance-based compensation referred to as "stipend."

Nelson's undisputed testimony is that, during the course of negotiations for the Employment Agreement, Trent explained that the language regarding a home sale was intended to allow SDC not to have to pay stipend until cash flow from the properties was received.

A I believe the context of the document as it's formed here and the agreement that we did was based on you get paid for your performance of buying lots or bringing lots in the door when we sell houses because that's the best way for cash flow. When we sell a house, we make a profit. That way you're not a labor -- or not a burden on our cash flow. **Cash flow was always the issue.** Compensation was always the issue. **And saving and preserving cash flow was always an issue.**

(CP 369:9-18, *emphasis added*).

A ... And the only reason that I was purchased (*sic*) for my participation as land acquisition manager getting paid when a home was sold was purely a matter of cash flow.

Q Can you explain that? I'm not sure I understand.

A When you sell a house, you realize a profit, and you do not dip from the needed cash flow day to day to keep the lights on. You are scheduled in there. You're scheduled into when a home closes you can get your compensation.

(CP 515:19-516:2).

SDC had experienced problems with cash as of the time Nelson was hired as its Land Acquisition Manager with respect to Anderson Ridge, a plat SDC already had under contract:

Q Okay. So then what happened next with regard to the Anderson Ridge?

A Cash flow is always an issue with a start-up company, and the financing and the cash flow were not able to keep up with the demand for the property. Ultimately, the houses and the financing were not working in a business sense. It was a good location; it was a good project, but the lots and the price points were not working.

Q Okay. Then what happened?

A Then SDC defaulted.

(CP 298:9-16).

The compensation provisions of the Employment Agreement were renegotiated approximately five months after mutual execution to place a limit on the non-performance based compensation. (CP 477:19-478:3). Again, the basis for the renegotiation was cash flow:

A He [Trent] said to me [Nelson], “**We need to preserve cash flow.** This will be a good way to do it. You’re part of the management team. You’re part of – you’re a part of the executive team here. Put on your big boy pants and put up for the team.”

(CP 482:16-20, *emphasis added*).

The duties and responsibilities of SDC’s Land Acquisition Manager are enumerated at pages 4 and 5 of the Employment Agreement. (CP 11-12). Nowhere in the description of Nelson’s duties and responsibilities in the Employment Agreement is any responsibility for or involvement in home sales required and, during the course of Nelson’s employment with SDC, he had no involvement in home sales. (CP 79-80 at ¶ 3). **Nelson was hired to acquire building lots – Nelson was not hired to sell houses.** So, if you adopt Respondents’ contention that Nelson’s performance-based compensation was based on home sales rather than

land acquisition, Nelson's performance-based compensation would be based on that part of SDC's operations for which Nelson had no performance obligation, had no involvement and over which he had no control.

The same basic structure was used by SDC in the Employment Agreement with Nelson's replacement: (1) when the bonus is earned – "\$160 per lot for each lot **acquired** by [SDC];" and (2) when the bonus is to be paid – "in the next pay cycle after lot closes..." (*CP 577, emphasis added*). Nelson contends that the structure in his Employment Agreement was exactly the same: (1) when the stipend is earned – when the "**land was purchased** through Phil Nelson as Land Acquisition Manager;" (*CP 18 at § 12.1*) and (2) when stipend is paid – when cash flow is generated from the land by a house sale. The condition to Nelson earning compensation was the **acquisition** of land – not the sale of a house. The sale of a house dictated the **timing** because, at that point, the stipend could be paid from the revenues of the land.

According to Interrogatory Answers, SDC/Trent retained the services of a business broker on February 15, 2011. (*CP 178 at Supp. Answer 1(b)*). On March 4, 2011, a letter of intent was executed for the sale of SDC's assets to MDC, including lots acquired by SDC during Nelson's tenure as SDC's Land Acquisition Manager. (*CP 179 at Supp. Answer 3*). Nelson was given notice of termination on March 6, 2011. (*CP 77-78*). The SDC-MDC asset purchase closed on April 28, 2011 (*CP 179 at Supp. Rog 3*) and included 256 lots purchased by SDC during Nelson's tenure as SDC's Land Acquisition Manager. (*CP 132 at ¶ 4(b)*).

Comparing the excise tax affidavits filed when SDC acquired the various 256 lots at issue with the excise tax affidavits filed when SDC sold the same 256 lots to MDC, the cumulative sales price paid by MDC to SDC exceeded the initial purchase price paid by SDC by at least \$8 million. (*CP 132 at ¶ 4(c)*). In addition, between Nelson's termination and the closing of the SDC-MDC sale, SDC sold 27 houses on lots acquired during Nelson's tenure as SDC's Land Acquisition Manager. (*CP 132 at ¶ 4(c)*). According to Nelson then, SDC has failed to pay wages exceeding \$283,000: stipend on 27 home sales, *plus* stipend on 256 to 280 lots sales to MDC.

Respondents' Summary Judgment Motion raised a number of issues beyond the issue involved here. For example, Respondents asserted that Nelson was not entitled to stipend for the lots sold to MDC because those lots, although acquired during Nelson's tenure as SDC's Land Acquisition Manager, were not "purchased through" Nelson. Likewise, Respondents asserted that Nelson had been terminated "for cause" and, therefore, forfeited any right to additional compensation. Nelson will spend no time addressing these issues because the Trial Court concluded that there were issues of fact which precluded summary resolution of these aspects of the dispute.

The Trial Court's Order states:

Plaintiff's claims based on the bulk sales of lots is granted, this Court finding that no material issue of fact exists and Defendants are entitled to summary judgment as a matter of law.

(Dkt 579:12-14). The claim based on bulk sales of lots is the claim that SDC is obligated to pay stipend on the 256 lots acquired during Nelson's tenure as SDC's Land Acquisition Manager which were subsequently sold to MDC. Respondents asserted, and the Trial Court concluded, that the sale of a home on a lot purchased through Nelson as SDC's Land Acquisition Manager was a condition to payment and that § 12.1 of the Employment Agreement did not obligate SDC to pay stipend where SDC elected to sell lots rather than homes.

IV. AUTHORITY AND DISCUSSION

A. Standard of Review.

The review of a grant of summary judgment is *de novo* and the Appellate Court performs the same inquiry as the Trial Court. Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). A Court views the evidence and all reasonable inferences to be made from that evidence in the light most favorable to the non-moving party. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-795, 64 P.3d 22 (2003). Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); Michak, 148 Wn.2d at 794-795. "A material fact is one that affects the outcome of the litigation." Owen v. Burlington N. & Santa Fe JUL Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

B. The Interpretation of § 12.1 of the Employment Agreement Involves Issues of Fact.

The competing interpretations of the Employment Agreement can be simply stated. Respondents contend that § 12.1 of the Employment

Agreement imposes two conditions to payment: (1) the lot must be purchased through Nelson as SDC's Land Acquisition Manager; and (2) a house must be sold on one of those lots. Nelson contends there is only one condition: the lot must be purchased through Nelson. Nelson contends that the phrase "per home sold" is a contractual provision going to *when* Nelson is paid –and not a condition going to *whether* Nelson is entitled to payment. Unless there is no reasonable inference that can be drawn from the evidence supporting Nelson's contention, the Trial Court was in error in granting summary judgment.

This is an issue of construction, and the basic rule is stated in *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86 at 100, 285 P.3d 70 (Div. 1 2012):

[T]he intent of the parties controls; this intent must be inferred from the contract as a whole; the meaning afforded the provision and the whole contract must be reasonable and consistent with the purpose of the overall undertaking; and if any ambiguity exists, it must be resolved against the party who prepared the contract.

An ambiguity exists if, on the face of the contract, two reasonable and fair interpretations are possible. *State Farm Gen. Ins. Co., v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984).

It is Respondents' contention that the phrase "per home sold" is a condition to the obligation to pay stipend separate from and in addition to the portion of § 12.1 of the Employment Agreement. Whether this phrase is a condition is governed by the following standard:

Whether a contract provision is a condition precedent or a contractual obligation depends on the intent of the parties. We determine this intent from a fair and reasonable

construction of the language used, taking into account all the surrounding circumstances. *See* Where it is doubtful whether words create a promise (contractual obligation) or an express condition, we will interpret them as creating a promise. But words such as “provided that,” “on condition,” “when,” “so that,” “while,” “as soon as,” and “after” suggest a conditional intent, not a promise.

Tacoma Northpark LLC v. NW LLC, 123 Wn. App. 73 at 80, 96 P.3d 454 (2004). The term “per” is not one of the terms identified in Tacoma Northpark as creating a condition. Nelson can locate no authority holding that the term “per” has been recognized as conditional language by a Washington Court.

Words in a contract are to be given their ordinary meaning. Corbray v. Stevenson, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). The common parlance would treat the term “per” as defining a rate as opposed to specifying a condition: miles *per* hour; miles *per* gallon; a rental rate of \$ *per*-month; “you can keep two legal salmon *per* day;” this coupon is good for no more than two *per* customer; the minimum wage should be \$15 *per* hour. None of these uses involves a condition. In the common parlance, “per home sold” would define when and how much payment was made – ***not whether*** the entitlement to payment for “land was purchased through Phil Nelson as Land Acquisition Manager” has been earned.

This is how the term “per” is used in the employment agreement for Nelson’s replacement which provides for: (1) a bonus of “\$160 ***per*** lot for each lot acquired by [SDC]” (*CP 577, emphasis added*); (2) which bonus is to be paid “in the next pay cycle after lot closes...” (*CP 577*).

The right to compensation is based on the acquisition of lots. The rate at which compensation will be paid is “per” lot.

It is one fair and reasonable interpretation of § 12.1 of the Employment Agreement that the phrase “per home sold if the land was purchased through Phil Nelson as Land Acquisition Manager” was intended to mean that Nelson would earn performance-based compensation on the bulk purchase of lots, to be paid at a rate based on how quickly homes could be constructed and sold. “Per home sold” governs the *timing* of payment – *not whether* payment has been earned.

This is clearly one fair and reasonable interpretation of § 12.1 of the Employment Agreement when the “context” evidence is considered. Under *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), an ambiguity in the meaning of contract language need not exist before evidence of surrounding circumstance is admissible, but instead extrinsic evidence is admissible as to entire circumstances under which a contract was made as an aid in ascertaining parties’ intent. This is the so-called “context rule.”

The context evidence is that, when Nelson was hired as SDC’s Land Acquisition Manager, SDC was a start-up company short on cash. Paying the stipend as cash becomes available for home sales makes sense. As Nelson testified: “He [Trent] said to me [Nelson], ‘*We need to preserve cash flow.*’ ” (CP 482:16, *emphasis added*):

A I believe the context off the document as it’s formed here and the agreement that we did was based on you get paid for your performance of buying lots or bringing lots in the door when we sell houses because that’s the best way for cash flow. When we sell a

house, we make a profit. That way you're not a labor -- or not a burden on our cash flow. ***Cash flow was always the issue.*** Compensation was always the issue. ***And saving and preserving cash flow was always an issue.***

(*CP 369:9-18, emphasis added*). In light of the “context evidence,” a finder of fact could conclude that § 12.1 of the Employment Agreement provides that the purchase of the lot “through Phil Nelson as SDC’s Land Acquisition Manager” is a condition to pay stipend but that § 12.1 of the Employment Agreement also imposes a contractual obligation to pay stipend when such a lot generates revenue through a sale.

The issue would then become: does SDC/Trent’s decision to sell the lots in bulk excuse performance of the obligation to pay stipend?

C. Excuse of Performance.

In their Summary Judgment Motion, Respondents argued that the failure of a condition precedent caused by a party is actionable only if “attributable to the *malfeasance or fraudulent, arbitrary or capricious conduct*” of that party to the contract. (*CP 190:17-18, emphasis in original*). In other words, if the sale of a home is a condition to payment, Nelson can only assert a claim against Respondents for the decision not to sell houses if that decision was substantively wrongful. (*CP 190 at 8-20*). The argument is based on a real estate commission case from New Jersey; *Todiss v. Garruto*, 112 A.2d 1285 (1955).

Nelson agrees that the analogy to a real estate commission is apt even though wages are at issue here rather than real estate commissions. Under *Washington Professional Real Estate LLC v. Young*, 163 Wn. App.

800 at 810-811, 260 P.3d 991 (2011)(*citations omitted*), a commission is earned when the sale is procured:

Under the procuring cause of sale doctrine, when a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, that party is entitled to a commission regardless of who makes the sale.

It is the production of a person ready, willing and able to buy that entitles a broker to a commission – not the final closing of a deal. *Burt v. Heikkala*, 44 Wn.2d 52, 265 P.2d 280 (1954). Closing is when payment takes place. But, it is not when the commission is earned.

Nelson is in the same position as a broker who has procured a purchaser. Nelson's performance under the Employment Agreement is complete when the lots are purchased by SDC. Nelson has no obligation with respect to, nor involvement with, the subsequent home sale.

The fact that SDC/Trent elected not to sell homes after it had purchased lots "through Phil Nelson as Land Acquisition Manager" would be the equivalent of a seller electing not to sell a property after the agent procured a buyer who is ready, able and willing to purchase upon the seller's terms. So, the question is: once the commission has been earned by the procurement of a ready, willing and able buyer, can the seller avoid paying a commission by deciding not to sell? The answer in Washington is clearly "no."

It is the general rule that a broker is entitled to his commission when he produces a purchaser who is ready, able and willing to purchase upon the terms required. ***The rule applies even though the sale is not consummated by the owner*** or is consummated by him upon terms different from those stipulated in the brokerage agreement.

Bloom v. Christensen, 18 Wn.2d 137, 138 P.2d 655 (1943)(*emphasis added*). The failure of the transaction is irrelevant to the obligation to pay a commission unless the failure is the fault of the agent:

Plaintiff relies upon the well established rule stated in Dryden v. Vincent D. Miller, Inc., 56 Wn.2d 657, 660, 354 P.2d 900 (1960).

We have held that, when a real-estate broker has procured a prospective purchaser who is accepted by the seller, and the seller promises to pay the broker a certain commission for services rendered, the broker has earned the commission, and the promise to pay it may be enforced.

Such is the rule even though the ultimate sale may never be consummated so long as the failure of the sale is not due to any fault of the broker. Largent v. Ritchey, 38 Wn.2d 856, 233 P.2d 1019 (1951).

Weaver v. Fairbanks, 10 Wn. App. 688 at 690, 519 P.2d 1043 (1974). Once the fee is earned, even the fact that the transaction did not close does not affect the right of the agent to be paid. If the transaction does not close, it does not matter why. *See, also, Record Realty v. Hull*, 15 Wn. App. 826, 552 P.2d 191 (1976). The decision not to sell is not an excuse of performance for the obligation to pay a commission once the condition to payment is procured.

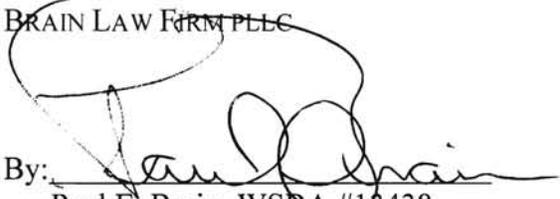
The result should be no different here. Once the stipend has been earned as a result of SDC's purchase of lots through Nelson, SDC should not be able to avoid paying the stipend by making a decision not to build houses.

V. CONCLUSION

At a minimum, issues of fact exist with respect to the interpretation of §12.1 of the Employment Agreement. Since there is no legitimate basis for concluding that SDC's obligation to pay stipend was excused by its unilateral decision to sell the lots in bulk, the Trial Court's dismissal of claims for stipend based on the bulk sales was in error.

DATED this 19th day of March, 2014.

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of March, 2014, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

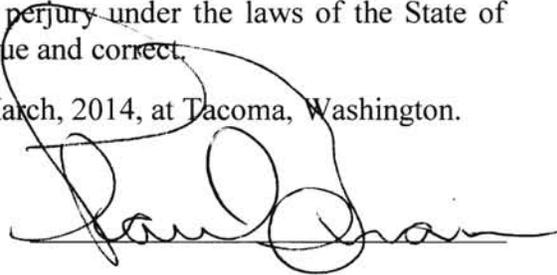
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Hand Delivery
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of March, 2014, at Tacoma, Washington.



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