

ORIGINAL

Appeal No: 47576-6-II
Clallam County Superior Court No: 13-2-00893-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

NATHAN B. SCHLEICHER and MARY L. SCHLEICHER,
husband and wife,

Appellants.

v.

BASIL D. BENA,

Respondent

APPELLANTS' REPLY BRIEF

FILED
COURT OF APPEALS
DIVISION II
2019 MAY 23 3 11 PM '19
STATE OF WASHINGTON
BRYAN DEPUTY

APPEAL FROM THE CLLAM COUNTY SUPERIOR COURT
The Honorable Christopher Melly

Craig L. Miller
Craig L. Miller & Associates, P.S.
711 East Front Street, Suite A
Port Angeles, WA 98362
(360) 457-3349
cmiller@craiglmiller.com
Attorney for Appellants

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I. INTRODUCTION

In analyzing this case, it is necessary to outline what the trial court actually did, in order to demonstrate the fallacies of law of the trial court's reasoning. It is also necessary to keep separate the three different agreements which were before the court for analysis; a purchase and sale agreement, a written release of a promissory note and mortgage subsequent to the purchase and sale agreement, and an alleged agreement to reinstate that note and mortgage after they were released. Analysis of each of these agreements, when done in the context of the applicable rules for the interpretation of written contracts versus oral contradictory testimony, leads to the conclusion that the decision of the trial court should be reversed.

II. ARGUMENT OF COUNSEL

1. **Parol evidence was used to contradict the plain terms of written documents.**

First, the trial court found, despite the language of a release dated February 3, 2012 (Ex. 6), referencing them as "...satisfied, released and discharged..." that a note and mortgage dated August 30, 2011 (Ex. 2, 3), nonetheless remained valid between the parties.

Second, the trial court found that this note and mortgage, although not mentioned in any documents related to the closing of a real estate

transaction and the execution and recording of a deed (Ex. 13) and real estate excise tax affidavit (Ex. 12) on March 20, 2012, were neither controlled by an integration clause in the purchase and sale agreement nor merged into the deed.

The basis of the trial court's decision enforcing the August documents is that it found the Respondent Bena more credible than the Appellants Schleicher. The court thus found the purchase price of the property to be \$450,000 rather than the \$350,000 stated in the purchase and sale agreement and related documents, and enforced respondent's statements to that effect. See, e.g.: 1) the court's conclusion of law that the parties did not intend the note and mortgage to be released, so they weren't (CP 16); 2) the court's determination that it did not believe there was a merger (CP 10); and 3) the respondents' argument that "all legal impediments" fall before the facts (Respondent's Brief, p. 23). Both the court's analysis, and the respondent's brief are free of any analysis beyond conclusory statements as to why this determination of facts conquers all legal objections.

These two decisions resolved against the defendants' their defenses, based as they were upon the proposition that the various written documents between the parties barred enforcement of a contradictory subjective intent. These two decisions could not be more wrong, and

should be reversed. These findings make a mockery of the idea that writings between the parties have meaning, and turn all contracts into issues solely of the subjective intent of one of the parties; he who can convince a trial court that the other party is lying, i.e. "It doesn't matter what we wrote down, what we agreed to is what I say it is."

A. The August documents were fully released.

The trial court made no specific analysis of appellant's arguments that the written release and the note controlled over the subjective intent of the parties, apparently deciding that it should enforce what it found to be the intent of the parties, however expressed. The trial court did not address whether the intent that it found was contradictory to the written documents, and was thus precluded by the substantive parol evidence rule. The trial court did not address whether the intent that it found created terms inconsistent with the written agreements between the parties, in contradiction of the doctrine of integration. The trial court did not address whether the agreements which it determined continued to be valid "between the parties" were contrary to or inconsistent with the deed executed by the respondents, and thus merged into the deed.

1. The substantive parol evidence rule prevents parol testimony to contradict a writing.

As discussed in Appellant's Opening Brief, pp. 14-17, the admission of parol evidence does not mean that such evidence can then be used to contradict the written agreement of the parties. Additional

authority beyond that previously cited for this proposition is found in Hearst Communications, Inc. v. Seattle Times, 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005):

In Hollis, we sought to clarify the meaning of Berg: Initially Berg was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule announced in Berg has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis v. Garwall, Inc., 137 Wash.2d 683, 693, 974 P.2d 836 (1999) (citations omitted). Since Berg, we have explained that surrounding circumstances and other extrinsic evidence are to be used “to determine the meaning of *specific words and terms used*” and not to “show an intention independent of the instrument” or to “vary, contradict or modify the written word.” *Id.* at 695–96, 974 P.2d 836 (emphasis added). See also U.S. Life Credit Life Ins. Co. v. Williams, 129 Wash.2d 565, 571, 919 P.2d 594 (1996) (court’s intention in adopting the “context rule” was not “to allow such evidence to be employed to emasculate the written expression of” the meaning of the contract’s terms); In re Marriage of Schweitzer, 132 Wash.2d 318, 327, 937 P.2d 1062 (1997) (“context rule” cannot be used to show intention independent of the instrument); Go2Net, Inc. v. C I Host, Inc., 115 Wash.App. 73, 60 P.3d 1245 (2003) (admissible extrinsic evidence does *not* include evidence of a party’s unilateral or subjective intent as to contract’s meaning).

See, also, Paradiso v. Drake, 135 Wash.App. 329, 336, 143 P.3d 859, 862 (2006), rev. den. 160 Wn.2d 1024 (2007):

We follow the objective manifestation theory of contracts, looking for the parties’ intent by its objective manifestations rather than the parties’ unexpressed

subjective intent. Hearst Communications, Inc. v. Seattle Times Co., 154 Wash.2d 493, 503, 115 P.3d 262 (2005) (citing Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle, 62 Wash.App. 593, 602, 815 P.2d 284 (1991)). Thus, we consider only what the parties wrote, giving words in a contract their ordinary, usual, and popular meaning unless the agreement, as a whole, clearly demonstrates a contrary intent. Hearst Communications, Inc., 154 Wash.2d at 504, 115 P.3d 262 (citing Universal/Land Constr. Co. v. City of Spokane, 49 Wash.App. 634, 637, 745 P.2d 53 (1987); J.W. Seavey Hop Corp. of Portland v. Pollock, 20 Wash.2d 337, 348–49, 147 P.2d 310 (1944)).

The critical analytical question then becomes whether, despite the objective wording of the contracts at issue, the court may, upon a determination of a contrary intent, interpret them differently than they actually read. The February 3, 2012, release (Ex. 6) states:

The undersigned, Basil D. Bena, of Port Angeles, Washington, hereby certifies that the mortgage, dated 30 August 2011, executed by Nathan Bruce Schleicher and Mary Louise Schleicher, as mortgagees, to Basil D. Bena, as mortgagor, and has not been recorded, together with debt secured by said mortgage, has been fully paid, satisfied, released and discharged, and that the property secured thereby commonly referred to as 1010 East Half Mile Road has been released from the lien of such mortgage.

While it may sound rhetorical, one wonders what about this language is not directly contradicted by a conclusion that this language is only effective as to a third party lender. “Contradict” is defined as “to assert the contrary of” Merriam-Webster’s Collegiate Dictionary, (11th ed. 2003). The document says it was “...satisfied and discharged...” The

court said it was not, based solely upon parol evidence. This conclusion can only be reached by imposing upon the parties an oral and contradictory version of their writing, advanced by but one of the parties.

In support of this position, respondent cites only Dave Johnson, Ins., Inc. vs. Wright, 167 Wn.App. 758, 275 P.32d 339, rev. den. 175 Wn.2d 1008 (2012). In this case, a buy/sell agreement and an employment agreement were wholly silent upon what would happen to certain insurance policies transferred to an employee/buyer, in the event that he was terminated from the business. Noting that the contracts contained no integration clause, and noting the rules set forth in Hearst, supra, the court upheld the trial court's determination that the question of whether the policies should be returned to the seller was not governed by the written contracts, but by a separate oral contract, and then enforced the seller's version of that oral contract. It is respectfully submitted that Dave Johnson Ins., Inc., supra, does not stand for the position that one can contradict a written agreement simply by claiming that contradictory language is a "separate oral agreement". Either the objective writings between the parties should be followed, or the exception for a "separate oral agreement" swallows the objective theory of contracts, and all contracts become susceptible to attacks by but one party who wants to add

to the written agreement. The separate agreement must be complementary, not contradictory.

2. Portions of the court's conclusion of law on intent are more akin to a finding of fact, and are not based on any evidence.

In conclusion of law 3(a), the trial court stated respondents would obtain financing only if their lender, "...had a first position security interest in the property...", and, the parties "intended that {the financing company} rely upon the release so that financing could be obtained..." CP 28-29. Respondent's assigned error to these statements as not supported by any evidence. Assignments of Error, Nos. 1(a) and (c) and 2(a). These two statements seem to form a significant portion of the trial court's rationale for determining the parties intended the release to be valid only in relating to the financing of the purchase, and not to affect the validity of the release between them. These statements are, at best, assumptions without factual support by the trial court.

A. There is nothing in Bruce Schleicher's testimony that discusses priority issues. Respondent's testimony only suggests that he thought about this subject (RP 31, 44).

B. There is nothing in the exhibits showing the release was ever submitted to the lender. Only the note accompanying the release was

submitted to the lender, and that did not mention the existence of the note and mortgage (RP 63, 275).

C. There is nothing in Bruce Schleicher's testimony showing the release was ever mentioned to the lender, and certainly nothing in the record showing the lender was ever advised of the existence of the August documents.

D. The only discussion in Bruce Schleicher's testimony of the purpose of the release related to making the undisclosed debt disclosure, accurate by its terms at the time of its execution and also at the time of closing (RP 264).

E. Similarly, the only discussion of the purpose of the release in respondent's testimony was to avoid having the Schleichers commit loan fraud (RP 182).

It is respectfully submitted that the trial court's determination of the intent of the parties is based upon factual assumptions by the court, which are not supported by the record. There is no factual foundation for the court's conclusion that the release was intended to apply to the appellants' lender, rather than between the parties themselves.

3. The Real Estate Purchase and Sale Agreement is integrated, and provides for a purchase price of \$350,000.

Additional rules, not strictly based upon the substantive parol evidence rule, but significantly similar to that rule in purpose, apply to the integration clause of the real estate purchase and sale agreement. While such a clause is designed to assure a limitation of the agreement to the parties to their writings, the trial court did not address at all the existence of this clause. The real estate purchase and sale agreement between the parties (Ex. 1, p. 4 of 5), states:

Integration. This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller.

Such clauses "...strongly support the conclusion that the contract was integrated..." M.A. Mortenson v. Timberlake Software Corp., 140 Wn.2d 568, 579, 998 P.3d 305 (2000), citing to Olsen Media v. Energy Services, Inc., 32 Wn.App 579, 584, 648 P.2d 493 (1982).

However, the courts will enforce additional agreements between the parties, so long as those agreements are not contradictory to the terms of the written agreement. In Lopez v. Reynoso, 129 Wn.App. 165, 118 Wn.3d 398 (2005), rev. den. 1557 Wn.2d 1003 (2006), cited by both parties in their briefs, the court stated the relevant inquiry as follows, 129 Wn.App. 172:

Assuming that the written sale agreement was only partially integrated and that the parties had orally agreed to additional terms, we address the remaining question: whether the purported oral agreement contradicts any valid terms of the written contract. [Emphasis added.]

The Lopez court then found that a difference in purchase price between the contractual statement of price and the oral statement of price was contradictory, but also found that both parties to the case agreed to the amount owing despite this contradiction. 129 Wn.App. at 172.

Respondents' argument that the difference in the written versus oral price is not contradictory is pure sophistry. It is argued that the "purchase price" stated on page 1 of the purchase and sale agreement only refers to cash at closing, and any additional consideration is not "purchase price." Thus, the \$100,000 note is not "cash at closing" and thus not "purchase price," so the \$350,000 statement of purchase price is not contradicted by an oral agreement that the purchase price was really \$450,000.

The actual language of the purchase and sale agreement, not quoted in full by respondents (Ex. 1, p. 2) is:

Buyer shall pay to Seller the purchase price, including the Earnest Money, in cash at Closing, unless otherwise specified in this agreement.

The additional consideration for the purchase would have had to be "otherwise specified" in writing to satisfy the "purchase price" definition

of the purchase and sale agreement. This argument also fails because of the real estate excise tax definitions of purchase price, which affect the transaction at the time of closing, as discussed in part, infra. The written purchase price is quite clear. Including additional amounts in that price based upon parol testimony contradicts the writing, and violates the integration clause.

4. The doctrine of merger prohibits enforcement of any agreements for additional consideration which are antecedent to the deed.

The real estate purchase and sale agreement was signed in May of 2001, while the promissory note and mortgage for an additional \$100,000 were signed in August of that same year. The August documents could thus be viewed as an amendment to that agreement, and the parties could have proceeded to close on the sale of respondent's property on the combined terms of the May and August documents. Regardless of the issues surrounding the February release of the August documents, and the simultaneous February allegations of a promise to reinstate that note and mortgage, the parties closed on March 19, 2012, on a sale for \$350,000 (Ex. 10). The deed for this transaction was recorded on March 20, 2012, with an excise tax stamp from the Clallam County Treasurer for \$350,000

(Ex. 13), based upon a Real Estate Excise Tax Affidavit filed that same day for that amount (Ex. 12).

Both parties agree about the law of merger, each citing Snyder v. Roberts, 45 Wn.2d 865, 278 P.2d 348 (1955) and Black v. Evergreen Land Developers, Inc., 754 Wn.2d 241, 450 P.2d 470 (1969) respondent at 30, petitioners at 20-22. Summarizing those cases, the parties rights are “fixed by the deed” Snyder 45 Wn.2d at 871, but “stipulations not contained in or performed by the deed, and not inconsistent with the deed...are held to be collateral...” Snyder at 872, Black at 249.

The trial court’s analysis of the merger doctrine consisted of a statement that the court “...did not believe...” that the August note and mortgage merged into the deed. CP 30 Because the trial court enforced the August documents, it made no ruling on whether the alleged February promise to reinstate that note and mortgage merged into the deed.

As with the discussion of the substantive parol evidence rule and the integration rule, supra, petitioners do not perceive that it is possible to determine that a purchase price of \$450,000 is not “inconsistent” with a written purchase price of \$350,000 upon which a real estate transaction closed. Respondent provided no logic for his defense of this ruling of the trial court, merely repeating the trial court’s mantra of its acceptance of Bena’s version of the transaction, and enforcing that version over, yet

again, another requirement that writings be honored. While it may be getting tiresome to repeat, the recordation of a deed should mean something, and should not be subject to being overridden by a trial court's acceptance of one party's assertion that more money was owed than the recorded documents demonstrate.

2. The alleged oral promise to reinstate the note and mortgage is not enforceable because of the statutes of fraud.

The trial court did not reach the issue of the validity of the alleged February oral promise to reinstate the note and mortgage, as it found the August documents still valid and enforceable, and that those documents satisfied the statutes of frauds. At trial, defendants asserted both the contract and the real estate statutes of frauds as defenses to the enforcement of the oral promise. Petitioners argue that the court may enforce this alleged oral agreement, as an alternative method of sustaining the trial court, on four bases.

- A. The contract statute of frauds is applicable to this alleged promise.

Oral contracts may be subject to two different statutes of frauds; the contract statute, RCW 19.36.010, and the real estate statute, RCW 64.04.010. These statutes generally require certain contracts to be in writing, with the goal of "...preventing fraud...". Unfortunately, whether

applying the contract strictly to require a writing discourages fraud, as petitioners would suggest in this case (preventing the oral creation of a promise to convey an interest in real property), or encourages fraud, as respondent suggests (allowing persons to avoid oral promises to pay money), Respondents' Brief, pp. 32-33, is wholly a matter of perspective. What one side of a dispute perceives as fraud, the other side perceives as only requiring what is right.

Petitioners first submit that the alleged promise to execute a promissory note not due for five years (see Ex. 3) secured by a mortgage similarly not due for five years (Ex. 2) is subject to the contract statute of frauds, RCW 19.36.010:

In the following cases, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say (1) every agreement that by its terms is not to be performed in one year from the making thereof.

It is the period of performance which determines the applicability of the contract statute, and an agreement to execute an agreement which cannot be performed for more than one year is subject to the statute.

Klinke v. Famous Recipe Fried Chicken Inc., 24 Wn.App. 202, 600 P.2d 1034 (1979), judgment affirmed and remanded 94 Wn.2d 255, 616 P.2d 644 (1980).

B. The real estate statute of frauds is also applicable to this alleged promise.

The real estate statute of frauds is RCW 64.04.010:

Every conveyance of real estate or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed....

Respondent does not contest the applicability of this statute to the oral promise, instead arguing that it is taken out of the operation of the statute by part performance (Respondent's Brief at 34), or by promissory estoppel (Respondent's Brief, p. 36), or by equitable estoppel (Respondent's Brief p. 37).

1. There has been no part performance to take the oral agreement out of the statute of frauds.

The standards applicable to the proof of a sufficient part performance, as opposed to the mere recitations of the rule stated in the respondent's brief by citing briefly to Miller v. McCamish, 78 Wn.2d 821, 479, P. 2d 919 (1971) are found in Berg v. Ting, 125 Wash.2d 544, 556-57, 886 P.2d 564, 571 (1995):

This court has identified three factors, or elements, which are examined to determine if there has been part performance of the agreement so as to take it out of the statute of frauds:

- (1) Delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent,

substantial and valuable improvements,
referable to the contract.

Kruse v. Hemp, 121 Wash.2d 715, 724-25, 853 P.2d 1373 (1993);
Powers v. Hastings, 93 Wash.2d 709, 717, 612 P.2d 371 (1980).

In addition, where specific performance of the agreement is sought, the contract must “be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.” Miller, 78 Wash.2d at 829, 479 P.2d 919 (quoting Granquist v. McKean, 29 Wash.2d 440, 445, 187 P.2d 623 (1947)); see Williams v. Fulton, 30 Wash.App. 173, 178, 632 P.2d 920, rev. den., 96 Wash.2d 1017 (1981).

The only one of these elements that may have been established in support of an alleged agreement to reinstate the note and mortgage is consideration; execution of the February release. That execution, alone, however, may have been for a multitude of reasons besides the existence of a promise to reinstate. Release of that note and mortgage could have been for gratuitous reasons, i.e. acceptance by respondent that he had to accept only \$350,000 for the property, or other similarly plausible explanations. This ambiguous evidence may provide some evidence of the existence of some kind of contract, but it reveals nothing about the specific terms.

2. Equitable estoppel does not take the oral agreement out of the statute of frauds.

Equitable estoppel, based upon representations which are not honored, is simply not available as an offensive weapon for plaintiffs to create a contract. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d

255, 258, 616 P.2d 644 (2004); Greaves v. Medical Imaging Systems, Inc., 124 Wn.2d 389, 397-398, 879 P.2d 276 (1994).

3. Promissory estoppel does not take the oral agreement out of the statute of frauds.

Promissory estoppel, based upon a promise which is not honored, may make an agreement otherwise within the operation of the statute of fraud, enforceable, but only in the narrowest of circumstances. The alleged oral promise must be made implicitly or explicitly for the purpose of satisfying the statute of frauds. In re The Estate of Nelson, 85 Wn.2d 602, 610-611, 537 P.2d 765 (2004), Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 259-260, 616 P.2d 644 (2004). There is nothing about the alleged promise here which would indicate that it was made for the purpose of avoiding the statute of frauds; rather, it related to the creation of interest in real estate by an oral contract, which is the very position that the statute of frauds is designed to avoid.

C. Any agreement for additional consideration beyond that subject to the real estate excise tax is illegal, and should not be enforced.

The purchase and sale transaction between the parties closed on March 19, 2012, on the basis of a purchase price of \$350,000. Respondent's version of the case, adopted by the trial court, is that the purchase price was actually \$450,000. Of that price, \$100,000 was

deferred, to be paid 5 years in the future. Washington's real estate excise tax, pursuant to RCW 82.45.030(1) is applied to the selling price of the property, which is, "... the total consideration paid or contracted to be paid to the transferor...". The Department of Revenue's regulations for the tax, define "selling price," WAC 458-61A-102 (19), as, "...equal to the total consideration paid or contracted to be paid to the seller...", thus mirroring the statutory definition. This regulation also defines "consideration," WAC 458-61A-102(2), as, "... anything of value, either tangible or intangible; paid or delivered...in return for the transfer of real property..." This section then gives a particularly applicable example: "For example, Lee purchases a home for \$250,000. He puts down \$50,000, and finances the balance of \$200,000. The full consideration paid for the house is \$250,000."

It is indisputable that excise tax was only paid on a purchase price of \$350,000 (Ex.12 and 13). Respondent argues this was permissible, because there was an appraisal for the lower amount, and a lower amount is permitted under WAC 458-61A-102 (19). It is submitted that the parties could have used that provision, if they had accurately indicated the consideration being paid on the tax affidavit and then attempted to reduce the tax by showing that the price being paid was too high. There is no evidence of an attempt to do this. Respondents also offer the self-serving

testimony of Mr. Bena that he would have paid the additional tax when he received the \$100,000, but the tax is due on the sale of the property, not at some speculative future date. RCW 82.45.100(1).

The refusal of the courts to enforce illegal contracts is based upon the idea that the parties should be left where they are after such a contract, and are not to benefit by the illegality. Certainly, here, the parties should be left where they were at the closing of the \$350,000 sale, on which the real estate tax was accurately paid. Mr. Bena, particularly, should not be permitted to benefit by receiving an additional \$100,000 in consideration for the sale of his property without having to pay the real estate excise tax on that purchase price. Additionally the courts should not create a method for avoiding payment of the excise tax on all of the consideration to be paid for the purchase of real property, by permitting parties to fail to disclose “seller-financing” obligations at the time of the filing of the excise tax affidavit, and then pay no tax on that portion of the purchase price.

- D. The court’s decisions requires respondents to make a false statement to a lender, and the loan transaction financing the purchase of respondent’s property is, therefore, illegal.

The trial court acknowledged that the respondents wanted the note and mortgage to “go away” so that they would not commit mortgage fraud

upon their lender. CP 28. He accomplished this by having the release be effective as to the lender, but not as to the parties. This action accomplished nothing, since the court apparently, did not read the document that respondent Schleicher testified he was concerned about, the undisclosed debt acknowledgment, Ex. 5. That document states, in pertinent part:

We have no additional debt obligations together than those disclosed on the 1-003/loan application of the same date hereof, that are expected to exist at/or around the time of this transaction closing. We, Nathan B. Schleicher/Mary L. Schleicher acknowledge and certify that we have no other debt obligations that are expected to exist at or around the time of their transaction closing beyond what we provided on our loan application and what is provided above on this document. We further acknowledge and certify that we understand that knowingly withholding debt obligation information is mortgage fraud, which is punishable by incarceration in federal prison.

This language makes the existence of the additional \$100,000 debt, at the time of closing, if not disclosed, mortgage fraud. It is noteworthy that this statement is effective at closing, allowing the debtor to, as respondents did here, resolve undisclosed obligation before that date. The trial court overrode that resolution, and made the appellants' statement on this acknowledgment false, when the closing of the financing occurred in May of 2012.

Respondent's glib response is that the \$100,000 was not really an obligation, since the mortgage (not the note) uses the phrase that the amount is due "on demand." Ex. 2. See Respondent's brief, p. 38. The actual debt instrument, however, states simply, Ex. 3:

After five (5) years after date, with grace, we promise to pay to the order of Basil D, Bena the sum of One Hundred Thousand Dollars for value received...

This is certainly not a contingent statement of debt. If valid at the time of closing, as the trial court ruled, this was a debt of appellants and its disclosure was mandated. In the light of the purchase and sale agreement, respondent's demand that the purchase price of his property exceeded the various writings, if enforced, would result in the parties together participating in an illegal financing transaction. Washington's statute on loan misstatements makes it a crime for "any person" to "directly or indirectly" make a misstatement to a lender. RCW 19.144.080.

Respondent seems to acknowledge this, when he notes that he could be an "accessory" to fraud, if appellants' position on this issue is correct (RP 182). This court should not enforce any obligation of the appellants to pay the respondent an additional sum of money, over and above that accurately reported to the lender.

E. Attorney's Fees should not be awarded.

In the consideration of respondent's request for attorney's fees, the distinction between respondent's two theories of recovery needs to be followed. Respondent commenced the action against the petitioners seeking to enforce an oral promise to reinstate a note and mortgage, CP 91. With such an oral promise, there would be no attorney's fees clause in a contract to support a claim for those fees. Should the trial court be affirmed on respondent's alternative theory for affirmance of the oral contract, no attorney's fees should be awarded.

The trial court determined, however, that the released note and mortgage were viable. There were attorney's fees clauses in those agreements, but only relating, from the note, to "...actions 'to collect' the note" Ex. 3, or from the mortgage, only in the event of "default in payment on the mortgage", Ex. 2.

Respondent's action sought neither, and neither result was obtained from the trial court's decision. Payment of any sum under the terms of the note and mortgage are years in the future, and there is, even as of the current date, no default on either instrument. This case is similar to Hindquarter Corp. v. Property Development Corp., 95 Wn.2d 809, 815, 631 P.2d 923 (1981), where attorney's fees were denied in an action seeking to determine renewal under a lease, when the lease's attorneys' fees clause applied only to the curing of defaults. This situation is

distinguishable from Atlas Supply, Inc. v. Realm, Inc., 170 Wn.App. 234, 287 P.3d 4606 (2013), where the attorneys' fees clause applied to the "costs of collection" and the court ruled that applied to counterclaims raised in a suit for collection, which could have defeated collection of the alleged debt..

This suit is not for "collection" as the attorney's fees clause is limited, and the trial court's ruling denying attorney's fees should be upheld. A similar rationale applies to respondent's request for attorney's fees on appeal.

III. CONCLUSION

Appellants respectfully request that the court reverse the decision of the trial court, and remand for further proceedings in accordance with the court's decision.

DATED: May 12, 2016

CRAIG L. MILLER & ASSOCIATES, P.S.

By



CRAIG L. MILLEER, WSBA #5281
Attorney for Appellants

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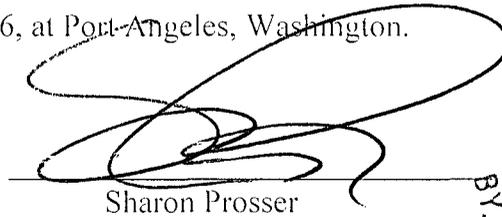
CERTIFICATE OF SERVICE

I, Sharon Prosser, certify that on May 12, 2016, I caused a true and correct copy of this RESPONDENTS' REPLY BRIEF to be served on the following in the manner indicated below:

Valerie A. Villacin, WSBA 34515	<input type="checkbox"/> facsimile @
Smith Goodfriend, P.S.	<input checked="" type="checkbox"/> First Class Mail
1619 8 th Avenue North	<input type="checkbox"/> Email @
Seattle, WA 98109	<input type="checkbox"/> hand delivery

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

DATED May 12, 2016, at Port-Angeles, Washington.



Sharon Prosser

BY
DEPUTY

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DIVISION II
2016 MAY 13 PM 12:42
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