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Court of Appeals
Division II
State of Washington
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Case No. 52000-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORTHWOOD ESTATES, LLC,

Respondent,

V.

LENNAR NORTHWEST, INC.

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Appellant in this case is Lennar Northwest, Inc. (“Lennar”). Lennar is engaged in the business of the construction and sale to the public of single- family residences. Lennar acquires its inventory of single- family lots both by engaging in the business of subdivision development and, by purchasing “finished” lots from other subdivision developers. A finished lot is a lot where all the entitlements necessary to obtain a permit to construct a residence have been obtained. This would include construction and approval of all the plat improvements such as utilities, storm and septic sewer, roads, offsite improvements such as traffic mitigation etc.

This case concerns a purchase and sale agreement (the “PSA;” *Merlino Dec. Ex. 1; CP 15-37*) and the Second Amendment to the PSA (“Second Amendment;” CP 38-40) pursuant to which Lennar contracted to purchase “finished” lots in a residential subdivision developed by Northwood Estates, LLC, the Respondent (“Northwood”).

The issue concerns a provision in ¶ 2 of the Second Amendment; CP 38-40, to the PSA which provides:

If the Plat Modification has recorded not later than the Plat Modification Deadline, the number of lots will increase by five (5) and Buyer shall pay Seller an additional seven hundred and sixty five thousand dollars (\$765,000) If the Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turnover to Buyer Seller’s Applicant status to the Plat Modification, and all other entitlements, development rights and permits related thereto.

It is undisputed that the Plat Modification was not recorded by the express deadline in ¶ 2 of the Second Amendment to the PSA. It is also undisputed that Lennar obtained a recordation of the Plat Modification after the passing of the deadline.

The Action was initiated by Northwood which asserted three causes of action. First, Northwood asserted the failure of Lennar to pay \$765,000 for the additional lots was a breach of the PSA by Lennar, despite the fact that the Plat Modification was actually accomplished by Lennar after the deadline. In the alternative, Northwood asserted two equitable claims; quantum meruit; and, unjust enrichment. *Complaint*: CP 1-5. This Motion concerns cross-motions for summary judgment followed by cross motions for reconsideration.

In the first set of motions, Lennar sought dismissal of all three causes of action. As to the breach of PSA claim, Lennar argued that the payment obligation Northwood claimed had been breached was subject to an express condition precedent containing an explicit deadline date. The PSA contained a time is of the essence provision (¶ 10.4 at CP 33) and, it is undisputed that Northwood failed to meet the deadline in the agreement between the parties. The Court found that there was no material issue of fact that the obligation of Lennar at issue was subject to an express condition precedent:

I think initially it is, in fact, a condition precedent. ***The obligation to pay the amount does not arise unless the modification is recorded by the deadline provided.***

4/10/18 RP at 29 (emphasis added).

Northwood sought summary judgment on the breach of the PSA claim. The Trial Court granted Lennar's motion as to the breach of the PSA claim and, denied all other relief sought by both parties: Order: CP 135-136.

Both parties moved for reconsideration: Lennar moved for reconsideration on the failure to dismiss the equitable claims and Northwood for reconsideration on the dismissal of the breach of PSA claim. On reconsideration, the Trial Court completely reversed itself reconstruing the operative provision of the Second Amendment as a covenant. While not stated expressly in the Order, the Court impliedly found Northwood had breached the PSA by holding that Lennar has an offset for delay damages even though Lennar had never made a claim of breach against Northwood. Order: CP 193-194. The grant of summary judgment was on the same record the Trial Court had previously concluded required dismissal of the breach of PSA claim as a matter of law. The Court held that the only issue for trial was Lennar's damages for breach, again a claim Lennar had never made.

The Court stated:

Yes, at this point, and the reason that my position on that is changed is because you convinced me that to treat it as a condition precedent without the availability of quantum meruit and unjust enrichment does result in a harsh forfeiture and I'm to construe the contract through a slightly different lens and I'm to weigh the equities, and I think if there's a alternative remedy available, it's not a harsh forfeiture and I don't view it through that lens. I think the lens through which it is viewed depends on whether there's a harsh forfeiture.

6/12/18 RP at 17:7-20.

Lennar made a Petition for Discretionary Review. The Ruling granting discretionary review by Commissioner Schnitt is App. 1. The

Ruling provides in pertinent part:

The trial court's decision on reconsideration appears based on its perceived sense of equity, or lack thereof, in the plat modification provision in the Second Amendment, *as opposed to the language of the provision itself or the objective intent of the parties*. To the extent the trial court concluded that the parties' intent was unclear, it committed probable error in impliedly granting summary judgment as to the breach of contract claim. Consequently, this court concludes that the trial court committed probable error. At the present time, the only claim in the case is Northwood's claim of breach of contract.

The highlighted portion of the Commissioner's Ruling encapsulates the issue here; do the undisputed facts in the record support the legal conclusion that the relevant language in the Second Amendment to the PSA is a condition precedent.

II. ASSIGNMENTS OF ERROR

Lennar assigns error to the decision by the Trial Court to not dismiss Northwood's breach of contract claim: CP 193-194.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

This Appeal presents two issues:

- (1) Can the remaining claim of breach of contract by Northwood be dismissed on the ground that there is no issue of material fact and that, as a matter of law, the operative provision in the agreement is a condition precedent which was not satisfied excusing the claimed payment obligation of Lennar?

(2) In light of the “time is of the essence” provision, would be excused from payment as a result of Northwood’s undisputed failure to obtain the Plat Modification by the Plat Modification deadline?

IV. STATEMENT OF THE CASE

The Complaint (CP 1-5) concerns the development and sale of a residential subdivision. As is common practice in the home building industry, Lennar placed the plat under a purchase and sale agreement before the plat improvements were constructed or approved by the permitting jurisdiction, in this case the City of Edgewood.

The seller, in this case Northwood, assumed the obligation to complete the improvements pursuant to standards set forth in the PSA (*Merlino Dec.* Ex. 1; CP 15-37). Closing would occur when the improvements are constructed and approved by the City of Edgewood.

The standards governing completion of the Plat improvements are set forth in § 2.3 to the PSA: Ex. 1 to the Merlino Dec.: CP 17-19. § 2.3 has 8 subsections. CP 17-19. Lots in the plat after completion of all the requirements of § 2.3 are called “finished lots.” To get to finished lots, Northwood first had to obtain “preliminary plat” approval from the City of Edgewood confirming the plat design conformed to the requirements of the jurisdiction. Northwood would construct the plat improvements and seek final plat approval – confirmation that the plat had been constructed in accordance with the approved plat design. At that point, the lots would be finished. Northwood would deliver finished lots to Lennar on which Lennar would construct single family homes after closing. However, Lennar had no

contractual obligation with respect to obtaining any entitlements/permits and no obligation with respect to construction of any of the plat improvements.

All of the obligations of the parties were subject to an express “time is of the essence” provision found at ¶ 10.14 of the PSA (CP 33):

Time. Time is of the essence with respect to the performance by Buyer and Seller of each and every obligation of each and every provision of this Agreement.

§ 3 of the PSA is captioned “Conditions to Closing” (CP 20-21) Under ¶ 3.4 of the PSA (CP 21), the completion of the requirements of § 2.3 is an express condition to the obligation of Lennar to close. ¶ 3.4 specifically requires recordation of the Plat and “finished lots.”

In general, it was the contemplation of the parties that Lennar’s obligations under the PSA would be conditional on Plaintiff satisfying the conditions set forth in § 2.3 to the PSA (CP 17-19). Satisfaction of those conditions were solely under Plaintiff’s control as § 2.3 places the whole burden on Plaintiff to “finish” the lots per the contractual requirements.

The “Plat Modification” involves the potential to increase the number of finished lots by 5. ¶ 2.3 of the PSA provides that: “Seller shall obtain ... the final approval ... of the Plat Modification ...” Any risk arising from non-performance is placed on Plaintiff.

¶ 1.2 to the PSA (CP 15) provides that “*if* the Plat Modification has recorded,” Lennar shall pay an additional \$765,000. Under ¶ 1.2, the obligation to pay is expressly conditioned on recordation of the Plat

Modification, which, under the PSA, is solely in Plaintiff's control. In light of ¶ 10.14 (CP 33) of the PSA, "time is of the essence," compliance with the deadlines in the contract was material to Lennar.

It is not in dispute that the closing of the sale took place on December 8, 2016, at which time Northwood was paid the entire purchase price of \$5,049,000. Because the Plat Modification had not been recorded, the parties entered into the Second Amendment to allow Northwood an opportunity to complete the Plat Modification post-closing.

The Second Addendum states: "The Plat Modification Deadline shall be changed to December 1, 2017, and Seller [Northwood] shall have no right to extend the Plat Modification Deadline." Northwood's ability to satisfy the condition to the additional payment could occur post-closing but, no later than December 1, 2017. The Second Addendum is Ex. 2 to the Merlino Declaration: CP 38-40.

¶ 2 of the Second Addendum also states:

If the Plat Modification has recorded not later than the Plat Modification Deadline, the number of lots will increase by five (5) and Buyer shall pay Seller an additional seven hundred and sixty five thousand dollars (\$765,000) ***If*** the Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turnover to Buyer Seller's Applicant status to the Plat Modification, and all other entitlements, development rights and permits related thereto.

Emphasis added.

The Managing Member of Northwood is Mr. Satwant Singh. Mr.

Singh testified:

The Agreement [PSA] called for the Plat Modification to be recorded by a specific date. The date was eventually extended to a final date of December 1, 2017 by the Second Amendment to the Purchase and Sale Agreement executed by Buyer and Seller on or about December 6, 2016.

Singh Dec. at ¶ 4:CP 57. ¶ 10.14 of the PSA, the “time is of the essence” provision, would be applicable to this deadline.

There are provisions of the PSA which expressly survive closing: § 5.2 – seller warranties; § 6.12 – removal of encroachments; § 7.3 – seller indemnity. With respect to the Plat Modification however, the only obligations of the parties after December 8, 2016 would be those under the Second Amendment. It is undisputed that Northwood did not obtain recordation of the Plat Modification by December 1, 2017.

As stated by Mr. Singh in his declaration, an application for approval of the plat modification documents were submitted on November 13, 2017: App. 9 at ¶ 7. Mr. Singh states:

The submission on November 13, 2017, was the final act within my control necessary to obtain the Plat Modification. The rest was in the hands of government officials over whom I have no control.¹

CP 57. Implicit in this testimony is the fact that the permitting jurisdiction could withhold approval and require further action by Northwood. At the time of submission of the Plat Modification there was no way of knowing with certainty whether the Modification would be approved or, whether the

¹ As discussed below, the submission of an application was not the final act required from the Applicant to obtain approval of the Plat Modification for precisely that reason.

permitting jurisdiction would impose conditions that would affect the value of the lots.

This is exactly why the 2nd Amendment requires recordation of the Plat Modification by a date certain, the Deadline Date. On its face, the 2nd Amendment requires completion of the Plat Modification by the deadline date, not commencement of the approval process.

Mr. Singh also testifies that he was aware that recordation would not occur until the Application was reviewed and approved by the City of Edgewood. CP 57-58: at ¶ 7-8. Lennar's Project Manager on the Northwood project was Garrett Gibson. As Mr. Gibson testifies: CP113 at ¶ 2, the process following submission of the application would be for the City to determine whether the application was complete. Submitting a complete application is the obligation of the developer in this case Northwood. Until the application is deemed complete, the final review process does not commence.

The Second Amendment provides: "If the Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turnover to Buyer Seller's Applicant status to the Plat Modification..." Following Northwood's failure to meet the deadline, Lennar was substituted as the Applicant and, completed the application process.

On December 13, 2017, Lennar received a Notice of Incomplete Application: Gibson Dec. Ex. 1: CP 116. Lennar submitted a revised application on January 9, 2018 which was accepted as complete; Gibson

Dec. Ex. 2: CP 118. Based on the Complete Application, City of Edgewood Staff issued a Staff Report; Gibson Dec. Ex. 3: CP 120, which clearly shows that the application process was on-going and, that further action from the Applicant could be required:

The final plat application was deemed “complete” on January 10, 2018, and staff have started their technical review to assess whether the applicant has sufficiently met all preliminary plat conditions, SEPA mitigations, as well as Edgewood Municipal Code and Washington State statutory requirements for final plat approval.

CP 120. The Plat Modification was not complete as of December 1, 2017.

The failure of the condition was solely the result of Plaintiff’s conduct because, satisfaction of the condition was solely under Seller’s control. “Seller shall obtain ... the final approval ... of the plat modification ...” § 2.3 to the PSA: Ex. 1 to the Merlino Dec. CP 15-37. Although the Second Amendment called for the Plat Modification to be recorded by December 1, 2017, according to Mr. Singh, the plat modification was not recorded until January 25, 2018. Singh Dec. App. 7 at ¶ 12: CP 59. These facts were never actually in dispute.

V. ARGUMENT

A. Standard of Review:

The Petition for Discretionary Review was taken from the Trial Court’s Order on June 8, 2018 (CP 193-194) reconsidering the Trial Court’s Order of April 13, 2018 (CP 135-136), granting summary judgment on Northwoods breach of contract claim. In the Ruling, the Commissioner

referenced both the standard of review for summary judgments and motions for reconsideration, respectively, de novo and abuse of discretion.

However, what is actually on appeal here is the Trial Court's grant of partial summary judgment contained in the order granting reconsideration. The only real issue here is whether there is any issue of material fact necessary to determine whether the Second Amendment contains a covenant or a condition precedent. The standard that should be applied here was described by the Commissioner as follows:

This court reviews summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment on the interpretation of a contract is proper where the parties' written contract, viewed in the light of the parties' other outward objective manifestations, has only one reasonable meaning. *Spradlin Rock Prods., Inc. v. Public Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 655, 266 P.3d 229 (2011). When interpreting a contract, this court's primary objective is to discern the parties' intent. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005).

App. 1 at 6-7.

B. Covenant versus Condition:

In *Tacoma Northpark, LLC v. NW, LLC*, 123 Wash. App. 73, 79, 96 P.3d 454, 457 (2004),² the Court described the differences as follows:

“Conditions precedent” are “those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty,

² As discussed below, if the provision is construed as a covenant, Northwood's failure to complete the Plat Modification by the deadline, in light of the time is of the essence provision, is a material breach which would excuse Lennar's performance.

before the usual judicial remedies are available.” *Ross v. Harding*, 64 Wash.2d 231, 236, 391 P.2d 526 (1964). In contrast, a breach of a contractual obligation subjects the promisor (NW) to liability for damages, but it does not necessarily discharge the other party's duty of performance. But the nonoccurrence of a condition precedent prevents the promisor from acquiring a right (to require O'Connor to purchase the property) or deprives it of one, but it does not subject the promisor to liability. *Ross*, 64 Wash.2d at 236, 391 P.2d 526

What are the defining characteristics of a condition? The first is the use of conditional language. The language of the Second Amendment at issue is as follows:

If the Plat Modification has recorded not later than the Plat Modification Deadline, the number of lots will increase by five (5) and Buyer shall pay Seller an additional seven hundred and sixty five thousand dollars (\$765,000)

The contract here clearly contains conditional language.

Generally, “*any words* which express the idea that performance of a promise is dependent upon some other event will establish a condition.” The essence of a condition is that uncertainty surrounds whether the event will occur.

Nelson v. Trent, 2014 WL 6900924, 184 Wash. App. 1056 (Dec. 8, 2014).³

The Restatement (Second) of Contracts § 226 (1981) includes the definition of a condition. Comment (a) states:

No particular form of language is necessary to make an event a condition, although such words as “on condition that,” “provided that” and “***if***” are often used for this purpose.

Emphasis added. The Washington Practice Manual, in summarizing case law defining a condition, states:

³ App. 2.

Words and phrases such as “on condition that,” “provided that,” “so that,” “when,” “while,” “as soon as,” and “*if*” are commonly used to form conditions.

28 Wash. Prac., Contract Law and Practice § 8.1, emphasis added.

In *Jones Assoc. Inc. v Eastside Properties Inc.* 41 Wash. App. 462, 704 P.2d 681 (1985), the Court identified another characteristic of a condition. As the Jones Court stated:

The Restatement (Second) of Contracts § 227(1) (1981) states:

In resolving doubts as to whether an event is made a condition of an obligor's duty, ... an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risks.

The Restatement § 227 comment b continues:

If the event is within [the obligee's] control, he will often assume this risk [of forfeiture]. If it is not within his control, it is sufficiently unusual for him to assume the risk that, in case of doubt, an interpretation is preferred under which the event is not a condition.

Jones Assocs., Inc., 41 Wash. App. 467.

¶ 2.3 of the PSA itself places the entire burden on Northwood to obtain the necessary approvals and construct all the plat improvements. Respondent assumed any risk relating to approval. Likewise, the Second Amendment places no responsibility on Lennar for completion of the Plat Modification by the deadline date. The timing and contents of the application for approval of the Plat Modification were entirely in Respondent's control.

The basic characteristics of a covenant are all present here. Lennar had no payment obligation until the occurrence of an event, recordation of the Plat Modification, subsequent to the time of contracting: *Tacoma Northpark, LLC*, 123 Wash. App. at 79, as Judge Blinn initially concluded:

The obligation to pay the amount does not arise unless the modification is recorded by the deadline provided.

4/10/18 RP at 29 (emphasis added). The term “if,” as used in the Second Amendment, is recognized as conditional language. The occurrence of the event was solely under Northwood’s control and Northwood bore the risk of non-performance. *Jones Assocs., Inc.*, 41 Wash. App. 467. There really is no issue as to whether the Second Amendment contained a condition precedent. It does, and the fact that the condition was never satisfied is undisputed. Because Lennar never had an obligation to pay Northwood, Lennar could not have breached the PSA.

C. Forfeiture and “Time if of the Essence:”

Whether the provision is a condition or a covenant is immaterial because the result should be exactly the same. Northwood breached a material deadline in the PSA excusing Lennar’s payment obligation:

A material breach is one that “substantially defeats” a primary function of an agreement:

[M]ateriality is a term of art in contract analysis and identifies a breach so significant it excuses the other party's performance and justifies rescission of the contract. As stated in the Washington Pattern Jury Instructions: Civil, a material breach is one “serious enough to justify the other party in abandoning the contract ... one that substantially defeats the purpose of the contract.”

Park Ave. Condo. Owners Ass'n v. Buchan Devs., LLC, 117 Wash.App. 369, 383, 71 P.3d 692, 75 P.3d 974 (2003) (footnote omitted), quoting 6A Washington Practice: Washington Pattern Jury Instructions: CIVIL 302.03, at 127 (1997).

224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wash. App. 700, 724–25, 281 P.3d 693, 707 (2012). This is the well-established doctrine of excuse or performance by prior material breach.

Where the parties agree that time is of the essence to the performance of a covenant, a failure to timely perform has been repeatedly held to be a breach justifying a forfeiture – in other words, a material breach:

When time has been made the essence of an executory contract for the sale of land, the seller may require strict performance and has the right to terminate the contract and declare a forfeiture for the late tender or nonpayment of the purchase price or any installment due.

Ryker v. Stidham, 17 Wash. App. 83, 87, 561 P.2d 1103, 1105 (1977)

(emphasis added).

The right to declare a forfeiture is derived from the express agreement of the parties. If they choose to make time the essence thereof and provide for a forfeiture in the event of a breach of such covenant, such provisions are valid and enforceable.

Moeller v. Good Hope Farms, 35 Wash. 2d 777, 782, 215 P.2d 425, 428 (1950). So, even if the provision is construed as a covenant and non-payment of a forfeiture, a forfeiture is enforceable under the circumstances here.

The issue on which Northwood has consistently pounded the table is that construing the 2nd Amendment as a condition would work a

forfeiture. But, under this contract, a forfeiture is fully legitimate under very clear and well established law.

Given that the parties made time of the essence to the performance of the obligation to complete the Plat Modification, Northwood's undisputed failure to perform would excuse any further performance by Lennar. Whether the provision is a condition or a covenant, you get to exactly the same place. Lennar has no obligation to pay Northwood for the 5 additional lots.

VI. CONCLUSION

As the Trial Court noted:

“[R]egardless of how this Court comes down on this, I'm essentially rewriting the contract. I'm adding a clause or subtracting a clause almost no matter what,

June 8, 2018 RP at 2:13-16. The Court's observation was on point in view of the Trial Court's action. The Trial Court was clearly concerned about the fact that, under the clear meaning of the PSA and Second Amendment, if Northwood did not timely perform, Northwood would not get paid. This is exactly why the Trial Court incorrectly preserved the equitable claims in the initial summary judgment order. It is also why, once it was recognized that the equitable claims were not legally sufficient, it reinterpreted the Second Amendment. However, it was not legitimate to rewrite the PSA and Second Amendment to create a right to payment clearly contrary to the intentions of the parties.

The Trial Court apparently lost sight of the fact that Northwood had already been paid \$5,049,000 and, was granted 2 extensions to complete the

Plat Modification. The end result was that Northwood did not make as much money as it would if it had fully performed. But, this is not an excuse for not holding Northwood to the deal it bargained to get. Performance is not excused merely because it became “more difficult or expensive than originally anticipated” to keep contractual obligations. *Pub. Util. Dist. No. 1 of Lewis County v. Washington Pub. Power Supply Sys.*, 104 Wash.2d at 364, 705 P.2d 1195. The Trial Court’s interpretation of the PSA and Second Amendment is clear error.

DATED this 16th day of October, 2018.

BRAIN LAW FIRM PLLC

/s/Paul e. Brain
Paul E. Brain, WSBA #13438

Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
DIVISION II
2016 SEP 11 PM 1:44
STATE OF WASHINGTON
DEPUTY

NORTHWOOD ESTATES, LLC, a
Washington Limited Liability
Company,

Respondent,

v.

LENNAR NORTHWEST, INC., a
Delaware corporation,

Petitioner.

No. 52000-1-II

RULING GRANTING REVIEW

Lennar Northwest, Inc. (Lennar) seeks discretionary review of a trial court order on reconsideration, which granted both Lennar's and Northwood Estates, LLC's (Northwood) motions for reconsideration and ruled that (1) a purchase and sale agreement and its incorporated second amendment did not contain a condition precedent excusing performance by Lennar, (2) Northwood's quantum meruit and unjust enrichment claims should be dismissed, and (3) that the remaining issue for trial is the offset of damages

caused by Northwood's delay. Concluding that discretionary review is appropriate under RAP 2.3(b)(2), this court grants Lennar's motion for discretionary review.

FACTS

Northwood owned a 33-lot plat of residential property in Edgewood, Washington. In December 2015, Northwood entered into a Purchase and Sale Agreement (PSA) with Lennar as to the property. Under the PSA, Northwood assumed the obligation to construct and improve the lots. Subsequently Northwood would deliver "finished lots" to Lennar, which would construct single family homes after closing. The PSA provided that Lennar would pay Northwood an additional \$765,000 for completion of a plat modification converting 8 of the existing lots into 13 lots. Regarding the plat modification, the PSA provided:

1.2 If the Plat Modification . . . has recorded not later than one (1) year following the Closing (the "Plat Modification Deadline"), the number of Lots will increase by five (5) and Buyer shall pay Seller an additional Seven Hundred Sixty-Five Thousand and No/100 Dollars (\$765,000.00) within fifteen (15) days of notice to Buyer of the Plat Modification to reflect the increase in the number of Lots. If the Plat Modification has not recorded by the Plat Modification Deadline, Seller shall have the right to extend the date of the Plat Modification Deadline one (1) time for up to three (3) months upon notice to Buyer not later than eleven (11) months following the Closing.

Mot. for Disc. Rev., Appendix at 3 (Purchase and Sale Agreement, Dec. 22, 2015 at 1).

On December 6, 2016, Northwood and Lennar executed a Second Amendment to the Purchase and Sale Agreement (Second Amendment) to modify the terms related to the plat modification. The Second Amendment deleted the final sentence of Section 1.2 of the PSA, and provided:

1. Plat Modification. The Plat Modification Deadline shall be changed to December 1, 2017, and Seller shall have no right to extend the

Plat Modification Deadline If the Plat Modification has recorded not later than the Plat Modification Deadline, the number of Lots will increase by five (5) and Buyer shall pay Seller an additional Seven Hundred Sixty-Five Thousand and No/100 Dollars (\$765,000.00) within fifteen (15) days of notice to Buyer of the Plat Modification to reflect the increase in the number of Lots. If Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turn over to Buyer Seller's applicant status to the Plant Modification and all other entitlements, development rights, and permits related thereto.

Mot. for Disc. Rev., Appendix at 24 (Second Amendment to Purchase and Sale Agreement, Dec. 6, 2016 at 1).

Section 10.14 of the PSA provided "[t]ime is of the essence with respect to the performance by Buyer and Seller of each and every obligation under each and every provision of this Agreement." Mot. for Disc. Rev., Appendix at 19 (Purchase and Sale Agreement, Dec. 22, 2015 at 18).

The sale closed on December 8, 2016, and Lennar paid Northwood the purchase price of \$5,049,000.¹ Northwood submitted the final plat modification documents to the City of Edgewood on November 13, 2017. The City informed Northwood that the plat modification would be heard on the City Council's January 9, 2018, agenda due to holiday schedules.

On December 4, 2017, Lennar sent Northwood a letter stating that it would not pay the additional \$765,000 because the plat modification had not been recorded by the December 1, 2017 deadline. Lennar also demanded Northwood relinquish to it the plat modification application status along with all entitlements, development rights, and

¹ This amount reflects payment of \$153,000 for each of the 33 original lots.

permits related thereto. Lennar was then substituted as the applicant and the plat modification was recorded on January 25, 2018.

On January 8, 2018, Northwood filed a complaint against Lennar for breach of the PSA, anticipatory breach of the PSA, and, in the alternative, unjust enrichment. Lennar and Northwood each filed motions for summary judgment. As to the claimed breach of the PSA, Lennar argued that the plat modification provision was a condition precedent, such that when Northwood failed to satisfy it, Lennar had no obligation to pay the additional \$765,000. After a hearing on the competing motions, the trial court entered an order granting Lennar's motion in part and denying Northwood's motion, finding "there is no material issue of fact and a breach of contract claim is not available [to] Plaintiff as a matter of law. Issues of fact exist with respect to Plaintiff's claims of unjust enrichment and quantum meruit." Mot. for Disc. Rev., Appendix at 39 (Order on Cross-Motion for Summary Judgment at 2). In its oral ruling, the trial court explained "I think initially it is, in fact, a condition precedent. The obligation to pay the amount does not arise unless the modification is recorded by the deadline provided." Mot. for Disc. Rev., Appendix at 68 (Report of Proceedings (RP) Mar. 30, 2018 at 29).

Northwood and Lennar both parties filed for reconsideration. Lennar argued that the trial court erred in not dismissing the quantum meruit and unjust enrichment claims. Northwood argued that the trial court erred in dismissing its breach of contract claim. Following a hearing on the competing motions for reconsideration, the trial court granted "[Northwood's] motion that the second amendment does not contain/constitute a condition precedent," thereby reinstating Northwood's breach of contract claim, dismissed Northwood's quantum meruit and unjust enrichment claims, and ordered "[t]he remaining

issue for trial is the offset damages caused [by] the delay.” Mot. for Disc. Rev., Appendix at 80 (Order on Motion for Reconsideration at 2). In its oral ruling on reconsideration, the trial court explained:

I see two basic difficulties. The first is that regardless of how this Court comes down on this, I’m essentially rewriting the contract. I’m adding a clause or subtracting a clause almost no matter what, and if I rule in favor of Lennar, it adds a forfeiture clause that’s not written into the contract. There’s nothing in the contract that specifies what should happen under these circumstances and so I understand Lennar’s position. . . .

The second problem I see is that Northwood’s position is that this Court’s ruling – previous ruling results in a harsh forfeiture. Where I would disagree is to state I don’t think it’s really a harsh forfeiture if you have an alternative remedy which is quantum meruit or unjust enrichment. . . .

On the other hand, if Lennar prevails then quantum merit [sic] and unjust enrichment are simply not available, then that changes the analysis, I think, because a harsh forfeiture does occur and to follow the case law, the Court should weigh the equities and construe the contract in a manner that avoids exactly that result, particularly where the contract is silent as to how to address this specific situation. . . .

[T]he more I took a look at the cases cited by [Lennar], the more I tended to agree that quantum meruit probably – I’m sorry, unjust enrichment isn’t available; quantum meruit may be, but probably not. And, I think, in light of that, I need to go back and interpret the contract through a different lens and then ask, Does this result in an overly harsh forfeiture, and if the answer is yes, then I weigh any equities of this situation.

Again, the harsh forfeiture is 765,000 when Northwood has expended several hundred thousand to do the work and Lennar gets the benefit, and I think that’s a harsh forfeiture in which case I think this Court is forced to construe the contract or attempt to construe the contract in a way where it is not a condition precedent, and I think that’s where I’m left, and so I think in light of the convincing argument that quantum meruit and unjust enrichment aren’t available, it results in a harsh forfeiture, and I’m to construe it in a manner that is not a condition precedent so as to avoid that harsh forfeiture, and I think at that point, the measure of damages is as [Northwood] indicates the 765,000 minus actual damages incurred.

Mot. for Disc. Rev., Appendix at 83-85, 96-97 (RP June 8, 2018 at 2-4, 15-16).

Lennar seeks discretionary review of the trial court’s order on reconsideration.

ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only "in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, review denied, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789, remanded, 146 Wn.2d 370 (2002), cert. denied, sub nom. *Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Lennar seeks review under RAP 2.3(b)(1) and (2).

This court reviews summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment on the interpretation of a contract is proper where the parties' written contract, viewed in the light of the parties' other outward objective manifestations, has only one reasonable meaning. *Spradlin Rock Prods., Inc. v. Public Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 655, 266 P.3d 229 (2011).

When interpreting a contract, this court's primary objective is to discern the parties' intent. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005). "[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). As a general rule, this court considers the parties' intentions as questions of fact. *Wm. Dickson Co.*, 128 Wn. App. at 493.

This court reviews a trial court's reconsideration decision for an abuse of discretion. *Rivers v. Washington State Conf. of Mason Contrs.*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Salas v. HiTech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Lennar argues that the trial court committed obvious or probable error when it reversed itself on the issue of whether the plat modification provision was a condition precedent, such that when Northwood failed to satisfy it, Lennar had no obligation to pay the additional \$765,000, and instead construed the plat modification provision as a covenant, which Northwood had breached by not obtaining recording the plat modification by the deadline. In determining that the sole remaining issue for trial was delay damages recoverable by Lennar, the trial court impliedly ruled that as a matter of law no material issue of fact existed that Northwood breached the covenant, thus entitling Lennar to damages. The trial court's decision on reconsideration appears based on its perceived sense of equity, or lack thereof, in the plat modification provision in the Second Amendment, as opposed to the language of the provision itself or the objective intent of

the parties. To the extent the trial court concluded that the parties' intent was unclear, it committed probable error in impliedly granting summary judgment as to the breach of contract claim. Further, Lennar has never brought a cross claim or affirmative defense seeking damages for any breach by Northwood. The only breach of contract claim was brought by Northwood, which Lennar moved to have dismissed on summary judgment on grounds that the plat modification provision constituted a condition precedent. In effect, the trial court granted summary judgment on an issue that was not before the court. Consequently, this court concludes that the trial court committed probable error. This court further concludes that the trial court's error substantially altered the status quo and substantially limited the parties' abilities to act by foreclosing the opportunity to engage in discovery and offer evidence related to the parties' intent and possible breaches of the PSA.

CONCLUSION

Lennar demonstrates that review under RAP 2.3(b)(2) is appropriate. Accordingly, it is hereby

ORDERED that Lennar's motion for discretionary review is granted. The Clerk will issue a perfection schedule.

DATED this 11th day of September, 2018.



Eric B. Schmidt
Court Commissioner

cc: Paul Brain
Martin Burns
Hon. Grant Blinn

Appendix 2

WESTLAW

184 Wash.App. 1056

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,

Nelson v. Trent

Court of Appeals of Washington, Division 1, December 8, 2014, Division 1, Not Reported in P.3d, 184 Wash.App. 1056, 2014 WL 6500924 (Approx. 6 pages)

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.

No. 72436-3-I.
Dec. 8, 2014.

Appeal from Pierce County Superior Court; Honorable Garold E. Johnson, J.

Attorneys and Law Firms

Paul Edward Brain, Brain Law Firm PLLC, Tacoma, WA, for Appellant(s).

Michael Alan Goldfarb, Kelley, Goldfarb, Gill, Huck Roth, PLLC, Seattle, WA, for Respondent(s).

UNPUBLISHED OPINION

VERELLEN, J.

*1 Philip Nelson appeals from the trial court's partial summary judgment order, contending that his former employer, SDC Homes (SDC), owes him stipends for the bulk sale of 256 vacant lots.¹ But, based upon the parties' objective manifestation of intent in the employment agreement's compensation provision (§ 12.1), Nelson receives a stipend only if SDC sells a home on a lot acquired through Nelson. The context rule does not apply to rewrite § 12.1's unambiguous language of "per home sold" to "per lot sold." Nelson's other arguments are unpersuasive. Accordingly, we affirm.

FACTS

SDC hired Nelson as a "Land Acquisition Manager" in February 2010. SDC's president, Robert Trent, and Nelson negotiated Nelson's employment agreement with SDC. The agreement addresses compensation in § 12.1:

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 the Land Acquisition Manager.
[2]

In March 2011, Nelson was terminated for cause. Later that month, SDC sold its assets to MDC Holdings (MDC), including 256 vacant lots purchased by SDC during Nelson's employment.² Nelson sued SDC and Trent for unpaid stipends. The trial court granted partial summary judgment for SDC and Trent, concluding that a home sale on a lot acquired through Nelson was a condition precedent to a stipend payment, and that § 12.1 did not obligate SDC or Trent to pay a stipend where SDC elected to sell the vacant lots as part of a bulk sale.

Nelson appeals.

ANALYSIS

The parties dispute the meaning of "per home sold" in § 12.1. Nelson contends that the condition to "earning" a stipend was the acquisition of land, not a home sale, and that SDC

SELECTED TOPICS

Limited Liability Companies

Conversion, Merger, and Dissolution
Limited Liability Company Operating Agreements

Secondary Sources

Construction and Application of Limited Liability Company Acts-- Issues Relating to Formation of Limited Liability Company and Addition or Disassociation of Members Thereto

43 A.L.R.6th 611 (Originally published in 2009)

...This annotation collects and discusses all of the cases which have construed and applied limited liability acts with regard to issues relating to formation of a limited liability company and the additi...

s 8:7. Fiduciary duties

Ltd. Liability Co. § 8:7 (2018 ed.)

...Most LLC statutes contain provisions concerning managers' and members' fiduciary obligations to the LLC and to each other. Generally speaking, members in member-managed LLCs and managers in manager-man...

APPENDIX II-INVESTMENT COMPANY ACT OF 1940, AS AMENDED & RULES

Money Manager's Compliance Guide
Appendix II

... (a) Definitions. When used in this subchapter, unless the context otherwise requires -- (1) "Advisory board" means a board, whether elected or appointed, which is distinct from the board of directors o...

See More Secondary Sources

Briefs

JOINT APPENDICES, VOL. I

1982 WL 939020
VERLINDEN B.V., Petitioner, v. CENTRAL BANK OF NIGERIA, Respondent.
Supreme Court of the United States
Mar. 15, 1982

...Plaintiff, complaining of the defendant by its attorneys, Bailey, Marshall, Hoeniger & Freitag, respectfully shows to this Court and alleges: 1. Federal jurisdiction is founded upon the provisions of §...

2005 WL 1995510

Supreme Court of the United States
May 17, 2005

...FN* Counsel of Record, for Respondents FN** Counsel of Record, for Petitioners To: Lincoln Property Co T/A Lincoln Prop Co ECW Inc Serve R/A Cmwh Legal Svc Corp 4701 Cox Rd Suite 301 Glen Allen, Va Yo...

Joint Appendix

2013 WL 3362783
DaimlerChrysler AG, Petitioner, v. Barbara Bauman, et al., Respondents.
Supreme Court of the United States
June 27, 2013

...Court of Appeals Docket #: 07-15386
Nature of Suit: 3360 Other Personal Injury
Bauman, et al v. DaimlerChrysler Corp, et al

was obligated to pay Nelson the stipends when SDC sold the vacant lots in bulk to MDC. He contends that the sale of a lot, with or without a home, dictated only the timing of when the stipend would be paid. He further contends that § 12.1 is ambiguous and subject to more than one reasonable interpretation. We disagree.

We review a partial summary judgment order de novo and "view the facts and the reasonable inferences from those facts in the light most favorable" to the nonmoving party.⁴ Summary judgment is appropriate where there are no genuine issues of material fact.⁵ "A material fact is one that affects the outcome of the litigation."⁶ Summary judgment is proper on a contract claim "if reasonable persons could reach but one conclusion" and "if the written contract, viewed in the light of the parties' objective manifestations, has only one reasonable meaning."⁷

The touchstone of contract interpretation is the parties' intent.⁸ We construe contracts "to reflect the intent of the parties."⁹ We follow the "objective manifestation theory" of contract interpretation, focusing on the "reasonable meaning of the contract language to determine the parties' intent."¹⁰ To ascertain the parties' intent, we focus on the objective manifestations of the agreement.¹¹ "We impute an intention corresponding to the reasonable meaning of the words used."¹²

*2 We also follow the context rule that "extrinsic evidence relating to the context in which a contract is made may be examined to determine the meaning of specific words and terms" used in the contract.¹³ Extrinsic evidence includes both the contract's subject matter and objective, the circumstances surrounding contract formation, both the parties' conduct and subsequent acts, and the reasonableness of the parties' respective interpretations.¹⁴ But extrinsic evidence may not be used to "show an intention independent of the [contract] or to 'vary, contradict[,] or modify the written word.'"¹⁵ Extrinsic evidence of a party's subjective, unilateral, or undisclosed intent regarding the meaning of a contract's terms is inadmissible.¹⁶ We "should ultimately give effect to ... the intent of the parties at the time of execution."¹⁷

Section 12.1 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 the Land Acquisition Manager.
[18]

This provision requires us to analyze the meaning of "per home sold" based upon the parties' objective manifestation of intent.

If contractual language is "clear and unambiguous," we must enforce the written contract.¹⁸ We must give "per" its "ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates otherwise."²⁰ "Per" is commonly defined as "for each" or "for every."²¹ Here, § 12.1 is plain, clear, and unambiguous. Nelson receives a \$1,000 stipend "for every" or "for each" home sold on a lot acquired through Nelson. He admitted in his deposition that the contract states that "there is no stipend on any lot until there is a home sold."²² Therefore, the parties' objective manifestation of intent is that Nelson receives a stipend if SDC sells a home on a lot acquired through Nelson.

Nelson contends that because he had no involvement in home sales and was hired principally to acquire vacant lots suitable for residential home construction, he "earned" the stipends through SDC's acquisition of the lots, and that the sale of a lot, with or without a home, dictated only the timing of a stipend payment. We disagree.

Citing the context rule, Nelson seeks to use extrinsic evidence to rewrite § 12.1, contrary to the parties' objective manifestation of intent. If the parties intended to pay Nelson a stipend for the acquisition of a lot and not a home sale, they could have manifested this intent by using "per lot" as provided in Nelson's successor's agreement rather than "per home sold."²³ Therefore, SDC's obligation to pay Nelson a stipend arises only if SDC sells a home on a lot acquired through Nelson.

Because SDC initially experienced cash-flow problems, Nelson contends that a stipend would be paid when the land generated revenue via a sale, whether or not a home had been constructed on that land. Concerns over cash flow are just as consistent with limiting stipends to occasions when revenue has been generated by the construction and sale of a home. Nelson admitted that he would "get paid ... when we [SDC] sell houses because that's the best way for cash flow. When we sell a house, we make a profit."²⁴ Structuring a

Appeal From: U.S. District Court for Northern California, San Jose Fee Status...

See More Briefs

Trial Court Documents

In re Trico Marine Services, Inc.

2011 WL 6011821

In re: TRICO MARINE SERVICES, INC., et al., Debtors.
United States Bankruptcy Court, D. Delaware.
Sep. 23, 2011

...FN1. For purposes of the Plan, the Debtors are: (1) Trico Marine Assets, Inc. ("TMA"), (2) Trico Marine Operators, Inc. ("TMO"), (3) Trico Marine International, Inc. ("TMI"), and (4) TMS. Trico Holdco...

In re Orleans Homebuilders, Inc.

2011 WL 2750754

In re: ORLEANS HOMEBUILDERS, INC., et al., Debtors.
United States Bankruptcy Court, D. Delaware.
May 03, 2011

...FN1. The Debtors in these Chapter 11 cases, along with the last four digits of each of the Debtors' tax identification numbers, are: Orleans Homebuilders, Inc. (4323), Brookshire Estates, L.P. (8725), ...

In re The Great Atlantic & Pacific Tea Co., Inc.

2012 WL 1031459

In re: THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., et al., Debtors.
United States Bankruptcy Court, S.D. New York.
Mar. 23, 2012

...Chapter 11 The Great Atlantic & Pacific Tea Company, Inc. ("A&P") and certain of its affiliates, as debtors and debtors in possession (collectively, the FN1. The Debtors in these Chapter 11 Cases, along...

See More Trial Court Documents

compensation provision to pay a stipend for each home sale is a solution to cash-flow problems. And most importantly, **Nelson's** interpretation of § 12.1 contradicts the unambiguous and plain meaning of "per home sold." The agreement does not mention "per lot," "per bulk sale," or "per bulk sale of vacant lots"; the agreement unambiguously uses the phrase "per home sold" as a condition precedent to a stipend.²⁵ We will not rewrite § 12.1 to read "per lot sold."

*3 **Nelson** contends that "per home sold" is not a condition precedent to SDC's obligation to pay a stipend. "A condition precedent is an event occurring subsequent to the making of a valid contract which must exist or occur before there is a right to immediate performance."²⁶ Generally, "any words which express the idea that performance of a promise is dependent upon some other event will establish a condition."²⁷ The essence of a condition is that uncertainty surrounds whether the event will occur.²⁸

Here, SDC had no legal or contractual obligation to construct homes on land, and there was uncertainty whether homes would be built and sold on each lot. No talismanic language is necessary to create a condition precedent in a contract.²⁹ The condition to payment of a stipend is a home sale, not the acquisition of lots suitable for residential construction. We conclude that a stipend payment is conditioned upon a home sale.

Nelson contends that SDC must pay him the stipends because SDC elected to sell the vacant lots in bulk and thus caused the nonoccurrence of a condition. **Nelson** argues that because he already "earned" the stipends through SDC's acquisition of the vacant lots, SDC cannot avoid its obligation to pay him the stipends by selling the lots in bulk. But **Nelson** does not allege or establish that SDC acted in bad faith or in violation of its duty of good faith and fair dealing. "An implied duty of good faith and fair dealing exists in every contract."³⁰ This duty requires that the parties perform in good faith the obligations, e.g., conditions precedent, imposed by their agreement so that "each may obtain the full benefit of performance."³¹ "Each party ... cannot be excused from performance of the contract by his own misconduct."³²

Nelson does not dispute that SDC could validly sell the vacant lots without homes. The record is devoid of any evidence that SDC sold the lots in bulk to MDC to avoid paying **Nelson** stipends.³³ Because good faith is the standard that governs review of SDC's failure to construct homes on lots acquired by SDC³⁴ and because the record lacks any evidence that SDC acted in bad faith in selling its assets in bulk to MDC, we reject **Nelson's** contentions.

Both parties' analogies to real estate broker commission principles are misplaced. **Nelson** functioned as a land acquisition manager, not as a real estate agent or broker. **Nelson** contends that SDC's decision not to construct homes was the equivalent of a seller electing not to sell property after a real estate agent procured a ready, willing, and able buyer to purchase property. But he cites no authority applying real estate broker "procuring-cause" principles to interpret an employment agreement's compensation provision.³⁵ Real estate broker commission principles are unhelpful, and we decline that analogy.

Lastly, **Nelson** contends that § 12.1 is illusory because it is within SDC's discretion to sell lots or build homes. This argument is unpersuasive. **Nelson's** premise is that SDC must pay him stipends whether or not a home was constructed and sold. We reject that premise. It is never illusory for contracting parties to condition payment upon the occurrence of a particular event, e.g., on a home sale.³⁶ The parties here clearly conditioned a stipend payment upon a home sale on a lot acquired through **Nelson**. Section 12.1 is not illusory simply because it is within SDC's discretion to sell lots or build homes.

*4 We affirm the trial court's partial summary judgment order.

WE CONCUR: SPEARMAN, C.J., VERELLEN, J. and SCHINDLER J.

All Citations

Not Reported in P.3d, 184 Wash.App. 1056, 2014 WL 6900924

Footnotes

- 1 The trial court certified the order it entered on partial summary judgment as final under CR 54(b). Other claims and counterclaims remain to be litigated.
- 2 Clerk's Papers (CP) at 18 (emphasis added).

- 3 **Nelson** concedes that when SDC sold the 256 lots, the lots were vacant. See Reply Br. of Appellant at 1.
- 4 *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003).
- 5 *Lowman v. Wilbur*, 178 Wn.2d 165, 168, 309 P.3d 387 (2013) (quoting *id.* at 794–95).
- 6 *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220(2005).
- 7 *Wm. Dickson Co. v. Pierce County*, 128 Wn.App. 488, 492, 494, 116 P.3d 409 (2005).
- 8 *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn.App. 86, 100, 285 P.3d 70 (2012); 25 David K. DeWolf & Keller W. Allen, *Washington Practice: Contract Law and Practice* § 5:7, at 152 (2d ed.2007).
- 9 *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982).
- 10 *Viking Bank v. Firgrove Commons 3, LLC*. — Wn.App. —, 334 P.3d 116,
- 11 *Hearst Commc'ns. Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).
- 12 *Id.*
- 13 *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*. 159 Wn.App. 389, 399–400, 245 P.3d 779 (2011).
- 14 *Id.* at 399.
- 15 *Hearst Commc'ns.* 154 Wn.2d at 503 (quoting *Hollis v. Garwall*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999)).
- 16 *Hulbert*. 159 Wn.App. at 400.
- 17 25 DeWolf & Allen, § 5:7, at 154.
- 18 CP at 18 (emphasis added).
- 19 *Lehrer v. State. Dep't of Soc. & Health Servs.*, 101 Wn.App. 509, 515, 5 P.3d 722 (2000).
- 20 *Hulbert*, 159 Wn.App. at 399.
- 21 Black's Law Dictionary 1316 (10th ed.2014); Webster's Third New Int'l Dictionary 1674 (2002) (defining "per" as "for each").
- 22 CP at 371.
- 23 **Nelson's** successor's agreement provides for a "[b]onus of \$160 *per lot* for each lot acquired by Company to be paid in the next pay cycle after lot closes." CP at 577 (emphasis added).
- 24 CP at 369.
- 25 When asked by opposing counsel whether there was "a contingency in this agreement that ... in the event the company acquired land but chose not to build on it" or "if the company was sold or there was a change in control" that **Nelson** would receive some payment, **Nelson** answered, "No." *Id.* at 373–74.
- 26 *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556–57, 730 P.2d 1340 (1987).
- 27 25 DeWolf & Allen, § 8:1, at 204 (emphasis added).
- 28 *Id.* at 205.
- 29 See *id.* at 204.
- 30 *United Fin. Cas. Co. v. Coleman*, 173 Wn.App. 463, 476, 295 P.3d 763 (2012).

- 31 *Id.* (quoting *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)).
- 32 *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn.App. 512, 515, 667 P.2d 1127 (1983).
- 33 See CP at 52 (declaration of **Trent**) ("The sale [SDC–MDC transaction] was an arm's length transaction arranged through an investment banking broker... The decision to sell was completely unrelated to the employment situation with Mr. **Nelson**, and my decision to terminate Mr. **Nelson** was in no way predicated on a potential sale."). No evidence in the record suggests that **Trent** had an ownership or other interest in MDC when SDC sold its assets to MDC.
- 34 See, e.g., *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn.App. 73, 81, 96 P.3d 454 (2004).
- 35 Although SDC also relies on real estate broker commission cases from foreign jurisdictions, SDC correctly states the applicable legal standard—good faith and fair dealing—to analyze whether SDC's decision to sell the vacant lots in bulk rather than to construct homes should obligate it to pay **Nelson** the stipends.
- 36 *Grimes v. New Century Mortg. Grp.*, 340 F.3d 1007, 1010 (9th Cir.2003) ("It is not, however, the requirement that certain conditions be satisfied that may make the contract illusory."); see *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 721, 225 P.3d 266 (2009) (holding that buyer's failure to fulfill condition precedent to furnish down payment excused vendor from completing contract); *Tacoma Northpark*, 123 Wn.App. at 76 (holding that sale of real property was subject to condition precedent that vendor obtain final plat approval which resulted in buyer's option to rescind sale).

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Superior Court Case Number: 18-2-04512-1

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