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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 REPLY BRIEF

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I. INTRODUCTION

The principal focus of Respondent's brief appears to be to recharacterize or obscure the issue actually presented in this appeal. So, let's go back to the Ruling (Opening Brief Appendix 1) granting discretionary review in which the Commissioner identified the error by the Trial Court:

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.¹

The "only claim in the case" is whether the Appellant, Lennar, breached an obligation to pay the Respondent, Northwood, under the terms and conditions of the Second Amendment to the PSA. The issue turns on whether it was the intent of the parties, in light of the objective evidence of contractual intent, that the Second Amendment to the PSA create a condition precedent. If so, then Lennar did not breach an obligation to pay Northwood because, as a result of the failure of Northwood to satisfy the condition, the obligation to pay never matured. This is an issue of contractual construction.

¹ App. 1 to Appellant's Opening Brief.

Respondent argues that an abuse of discretion standard should be applied here. Respondent's argument on the standard of review might make sense if the issue before this Court was whether the Trial Court abused its discretion in hearing (or not hearing) a motion for reconsideration. But what is at issue here is the grant of summary judgment characterizing the operative language of the Second Amendment as a covenant. That ruling is reviewed under a de novo standard like any other appeal from a summary judgment order.

As the Commissioner also noted, if the evidence of the parties' intent is unclear, if the Trial Court could not resolve the issue on the undisputed evidence, the Trial Court could not grant summary judgment on "the only claim in the case," whether Lennar breached the PSA. So, the alternatives available to this Court are: (1) reverse the decision of the Trial Court and remand for entry of an Order dismissing Northwood's claim of breach against Lennar or (2) remand the matter for trial on the contract issue.

With respect to the request that Northwood's equitable claims be reinstated, Northwood did not seek and was not granted discretionary review. The issue of whether the Trial Court committed error in dismissing the

equitable claims is simply not before this Court. Nor, is there any outcome possible here under which Northwood would be entitled to a fee award.

II. SUPPLEMENTAL STATEMENT OF THE CASE

Because this arises in the context of a summary judgment motion, the issue is what facts are undisputed. The PSA is dated December 22, 2015. At ¶ 2.3 (at CP 17-19), the PSA obligates Northwood to obtain “final approval” of the 33-lot plat. This configuration is called the “Approved Plat Layout.” Closing is to occur on the later of regulatory approval of this “Approved Plat Layout” or when the lots are “finished” under ¶ 1.6 (at CP 16).

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.

In ¶ 2.3, Northwood commits to seek the “Plat Modification” through “diligent, good faith efforts.” As noted at CP 16, the Plat Modification affected lots 16 to 23 – 7 lots. While the Plat Modification was pending, Lennar could not construct and sell a single-family residence on these 7 lots. The per lot purchase price paid by Lennar was \$153,000. Until the issue of whether approval of the Plat Modification was resolved, Lennar was sitting on 7 lots for which it had paid Northwood \$1,071,000

$((\$5,049,000 \div 33) \times 7 = \$1,071,000)$ which it could not use. In this industry and with respect to the Plat Modification, time was money.

¶ 1.2 (CP 15) provides that “*if* the Plat Modification has recorded within one year of closing” [resulting in an increase of 5 lots], “Buyer shall pay Seller an additional” \$765,000. The sole consequence to Northwood if it did not obtain the Plat Modification within the specified time was that Northwood would not get paid for the lots because, under the PSA, Lennar’s obligation to pay was expressly conditioned on recordation of the Plat Modification by a date certain. *If* Northwood does not deliver the lots, Northwood does not get paid. Classic conditional language.

¶ 5.4 (CP 12) is a non-merger provision which extends to representations, warranties and “covenants of the seller intended to survive closing.” ¶ 6 of the PSA (CP 12-13) is captioned “covenants of seller,” but does not include the default provisions. Of these covenants, only § 6.1.2 – removal of encroachments, is expressly identified as intended to survive closing. ¶ 7 of the PSA is captioned “default and remedies.” There is no equivalent language in the default provisions.

The condition to closing was satisfied and, 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 for the 33 lots. It is undisputed that Northwood had not even made application for the Plat

Modification as of the closing date. It is undisputed that the application would not actually be filed until November 13, 2017, 18 days before the deadline in the Second Amendment for actual recordation of the Plat Modification.

The Second Addendum is dated December 6, 2016 which is actually 2 days before the closing, before the terms and conditions in the PSA would be extinguished by merger. While the Second Amendment provides that the PSA remains in full force and effect, the obvious purpose of this language is to ensure the terms and conditions of the PSA are not modified immediately prior to 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.

The Second Amendment neither contains nor references default or remedies. Given that the drafters of the PSA were clearly aware of the issue of merger and were careful to identify what provisions of the PSA would survive closing, the lack of language preserving the right to declare a default

or seek a remedy is inconsistent with the interpretation of the Second Amendment as a covenant.

The same is true about the language precluding extension of the deadline. This language is wholly inconsistent with the existence of the grace period Northwood claims to be entitled to. It is undisputed that during the period Northwood was attempting to obtain the Plat Modification, Northwood had already been paid for that portion of the plat subject to the Plat Modification. However, as long as the Plat Modification process was unresolved, Lennar had 7 lots, for which it had paid \$1,071,000, which it could not build on or sell. Clearly, if Northwood could not get the job done within the time allotted, Lennar wanted Northwood out of the way. This is exactly why on the passing of the deadline without recordation of the Plat Modification, Lennar steps into Northwood's shoes as the applicant. These provisions are simply not consistent with the idea that Northwood could drag the process of completing the Plat Modification or compel Lennar to go through some time-consuming process to enforce a remedy.

¶ 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.

It is undisputed that the obligation to pay for the additional lots was based on actual recordation of the Plat Modification not submission of an application. How many land use approval processes is this Court familiar with where the process could be expected to be complete from application to approval in 18 days? As a sophisticated developer, Northwood could not possibly have been unaware that virtually no land use decisions will go through a complete approval in that very limited time frame.

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.²

CP 57. Implicit in this testimony is the fact that the permitting jurisdiction could withhold approval and require further action by Northwood. As Mr. Singh acknowledges, 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 permitting jurisdiction would impose conditions that would affect the value of the lots.

² 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.

While Northwood complains that it did not receive a Notice of Default or an opportunity to cure, once the Application had been filed “the rest was in the hands of government officials over whom [Northwood] had no control.” Giving a Notice of Default on December 2 would have been a pointless act and interpreting the Second Amendment to require it nonsensical. The capacity to cure was no longer possible. What exactly was Northwood going to do in the 10- day cure period given that the City of Edgewood would not act on the Application prior to January? As Northwood notes:

The City informed Northwood that due to the holidays, it was not going to seek formal [approval of the, *sic*] plat modification by the city council until January.”

Respondent’s Brief at 1.

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. And, in fact, on December 13, 2017, Lennar

received a Notice of Incomplete Application: Gibson Dec. Ex. 1: CP 116.

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

III. APPLICABLE AUTHORITY AND DISCUSSION

At the heart of this case is a garden variety issue of contractual construction.

Whether a contract is ambiguous is a question of law. A contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings. “If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties’ intent; if two or more meanings are reasonable, a question of fact is presented.” Summary judgment as to a contract interpretation is proper if the parties’ written contract, viewed in light of the parties’ other objective manifestations, has only one reasonable meaning.

GMAC v. Everett Chevrolet, Inc., 179 Wash. App. 126, 135, 317 P.3d 1074, 1078 (2014). Northwood’s principal argument regarding forfeiture is based entirely on a rule of construction: “Where it is doubtful whether words create a ‘promise’ or an ‘express condition,’ they are interpreted as creating a ‘promise.’” *Ross v. Harding*, 64 Wash. 2d 231, 236, 391 P.2d 526, 531 (1964). This rule of construction is irrelevant unless the language of the Second Amendment is “doubtful” as to the intention to create a condition.

The Second Amendment contains exactly those elements relied on by Courts to construe a contractual provision as a condition: (1) it uses classic conditional language; and (2) all the risk of non-satisfaction falls on Northwood.

What is 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).

Here, Lennar’s performance was clearly dependent on recordation of the Plat Modification by the express deadline. That the occurrence of the event was uncertain is epitomized by Mr. Singh’s statement that recordation of the Plat Modification by the deadline was “in the hands of government officials over whom [Northwood] had no control.”

The specific language used in the Second Amendment is identified in various authorities as being “conditional language.” 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:

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 (App. 2), emphasis added.

The Second Amendment places the burden of obtaining Plat Modification entirely on Northwood. Under the very authority relied on heavily by Northwood, this is a hallmark of a condition:

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. v. Eastside Properties, Inc., 41 Wash. App. 462, 469, 704 P.2d 681, 686 (1985).

In other words, if Northwood assumed the risk that the “event,” recordation of the Plat Modification by the deadline might not occur (which Northwood undeniably did), the rule of construction favoring an interpretation as a covenant is not “preferred.” When Northwood assumed that risk, it assumed the risk that it would not get paid.

Here, in order for the Plat Modification to be recorded, it required approval of the City of Edgewood:

One who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation, unless the terms or nature of the contract indicate that he does not assume this risk.

Jones Assocs., Inc. v. Eastside Properties, Inc., 41 Wash. App. 462, 471, 704 P.2d 681, 687 (1985). That the City did not approve the Plat Modification within the time frame allowed in the PSA is not an excuse for Northwood's failure to satisfy the condition. Northwood knew that at the time of contracting and assumed the risk.

To get around this conclusion, Northwood makes the following arguments:

1. The Second Amendment should be construed as a covenant because of the default provision in the PSA.

Initially, applying the default provisions to the Second Amendment makes no sense whatsoever. If Northwood had received a Notice of Default on December 2 and a 10-day opportunity to cure, there was literally nothing it could have done within that cure window. Approval and recordation of the Plat Modification was entirely in the hands of the City of Edgewood and it is undisputed that the City was not going to act on the application until January, well after the cure period would have expired. Under Washington

law, a party to a contract is not required to perform a futile act. *Music v. United Ins. Co.*, 59 Wash.2d 765, 768, 370 P.2d 603 (1962).

The transaction evidenced by the PSA closed on December 8, 2017. Under Washington law, the obligations of the PSA would be extinguished by merger on closing and recordation of the Statutory Warranty Deed required under ¶ 4.2 of the PSA. ¹ *Barber v. Peringer*, 75 Wash. App. 248, 251, 877 P.2d 223, 225 (1994) (“In general, the provisions of a real estate purchase and sales agreement merge into the deed,...”). The exception is where, as here to parties, include anti-merger provisions. See e.g. *Failes v. Lichten*, 109 Wash. App. 550, 553, 37 P.3d 301, 301 (2001) where the agreement provided: “all terms of this Agreement, which are not satisfied or waived prior to closing, shall survive closing. These terms shall include, but not be limited to, representations and warranties, attorney's fees and costs, disclaimers, repairs, rents and utilities, etc.”

The Second Amendment predates the closing and merger and is explicit that: “The parties desire to modify the terms relating to post closing Plat Modification, Closing, and to provide a holdback at closing ...” So, at to the Plat Modification, the terms of the Second Amendment are expressly intended to survive closing. At ¶ 5, the Second Amendment states: “Except as expressly amended hereby, the Agreement is confirmed and remains in

full force and effect.” In other words, the Second Amendment does not change the provisions in the PSA which are intended to survive closing.

Where the intent of the parties is unclear, extrinsic evidence is admissible to determine which provisions of a PSA were intended to survive closing. Whether the terms of a purchase and sale agreement merge depends again on the intent of the parties: “where the intent of the parties is not clearly expressed in the deed, courts may consider parol evidence. In order to determine the intent of the parties, extrinsic evidence is admissible as to the entire circumstances under which a contract is made.” *Harris v. Ski Park Farms, Inc.*, 120 Wash.2d 727, 742, 844 P.2d 1006 (1993); *Failes v. Lichten*, 109 Wash.App. 550, 554, 37 P.3d 301 (2001).

In the case of this PSA, there is no general anti-merger language. Rather, the PSA is explicit and specific as to the provisions of the PSA which were intended to survive closing: representations warranties and covenants intended to survive closing. § 6.12 – removal of encroachments, is the only covenant in the PSA expressly intended to survive closing. The default provisions are not covenants. They are remedies for breach of a covenant only one of which is intended to survive closing.

If the Second Amendment was intended as a covenant, it should have included a remedy for failure to perform. However, where the failure of Northwood to perform would simply mean the payment obligation never

arose, a remedy is unnecessary. The lack of a remedy in the Second Amendment is consistent with its interpretation as a condition.

2. The Second Amendment should be construed as a covenant because it works a forfeiture.

This is really a circular logic which elevates a rule of construction about doubtful language into essentially a blanket prohibition on conditions precedent. And it puts the cart before the horse. Go back to the well-established definition of a condition precedent in *Tacoma Northpark, LLC v. NW, LLC*, 123 Wash. App. 73, 79, 96 P.3d 454, 457 (2004)³:

“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, before the usual judicial remedies are available.” *Ross v. Harding*, 64 Wash.2d 231, 236, 391 P.2d 526 (1964).

If the Second Amendment contains a condition, there is no forfeiture of anything as, the right to payment never matured. You cannot forfeit something you never had.

Before the rule can be applied, this Court would first have to conclude that the language of the Second Amendment is susceptible to more than one reasonable interpretation. However, if the language is susceptible

³ As discussed in the Opening Brief, 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.

to more than one reasonable interpretation, in the context of a summary judgment, the result should be that the matter is remanded for trial where all the extrinsic evidence on intent can be heard. If at trial after all of the admissible extrinsic evidence is heard, the interpretation is still doubtful, the rule of construction would be applicable.

3. Even if the Second Amendment contains a condition precedent, this Court should ignore the condition because it works a forfeiture.

If the Second Amendment conditions payment on recordation of the Plat Modification by the Plat Modification deadline, it is undisputed that the condition was not satisfied. Again, the effect of failure of a condition is well known:

“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, before the usual judicial remedies are available.”

Tacoma Northpark, LLC v. NW, LLC, 123 Wash. App. 73, 79, 96 P.3d 454, 457 (2004). There is nothing to forfeit because where the condition is unsatisfied, there is no “right to immediate performance” or “breach of duty.”

On this issue, Northwood’s citation to/discussion of the authority is both incomplete and really misleading. For example, Northwood cites to *Ashburn v. Safeco Ins. Co. of Am.*, 42 Wash. App. 692, 698, 713 P.2d 742, 745–46 (1986). The basis for decision in this case was not a forfeiture

resulting from a condition. The case involved a contractual limitation of action, not a condition:

The 1-year limitation of actions provision in the contract, however, is not a condition precedent, as the Ashburns assert. Conditions precedent are those facts and events occurring subsequent to the making of the contract that must exist before there is a right to immediate performance. Here, the filing of the suit within 1 year was not a condition which must exist before SAFECO had a duty to perform. SAFECO had a duty to perform as soon as the Ashburns filed a claim for a covered loss under the policy. Failure to institute suit within 1 year bars the judicial remedy for enforcing the duty that had come into existence when the Ashburns filed their claim. The Ashburns cannot rely on the forfeiture policies underlying conditions precedent in order to invalidate the contractual period of limitation.

If anything, this case stands for the proposition that time limits in contracts are supposed to be enforced.

Port of Walla Walla v. Sun-Glo Producers, Inc., 8 Wash. App. 51, 56, 504 P.2d 324, 328 (1972) does not even mention conditions precedent in passing. The issue in that case was whether *Sun Glo* was in default. The Court, after determining that the conduct of the *Port of Walla Walla* was bad faith (at 57) denied the *Port of Walla Walla* relief on the following ground:

Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.

All Lennar did is to try and hold Northwood to the bargained for terms of a contract freely and knowingly entered into by Northwood after Northwood failed to act in conformance with that contract. Since when is that “unconscientious, unjust, or marked by the want of good faith.”

4. This Court should reinstate the equitable claims for relief.

On what basis? The issue is not even before this Court. Northwood neither sought nor was granted review of the Trial Court’s decision to dismiss these claims. Moreover, Northwood completely misrepresents the law.

The Trial Court’s conclusion was that Northwood had a contractual remedy because the Second Amendment contained a covenant. Concluding that the PSA, a contract, does not provide a contractual remedy for a failure to satisfy the condition is not the same thing as finding there was no contract. Which is what this Court would have to conclude to grant the relief Northwood is requesting as to the unjust enrichment claim.

Unjust enrichment is a form of quasi contract implied at law. Unjust enrichment is the method of recovery for the value of the benefit retained *absent any contractual relationship* because notions of fairness and justice require it. Bailie Commc'ns. Ltd. v. Trend Bus. Sys., Inc., 61 Wash.App. 151, 160, 810 P.2d 12 (1991) (emphasis added), accord: *Young v Young*, 164 Wn. 2d 477 at 484, 191 P. 3d 1258 (2008).

Quantum meruit can be applicable in the context of an express written contract. The guiding principle is stated in a case relied on heavily by Northwood:

Quantum meruit is an appropriate remedy where substantial change not within contemplation of the contracting parties occurs with a resulting benefit to one party and expense to the other.

MacDonald v. Hayner, 43 Wash. App. 81, 84–85, 715 P.2d 519, 522 (1986).

Northwood has offered no explanation as to what substantial change occurred “**not within the contemplation of the parties**” occurred. Once again the payment obligation is governed by the express terms of the Second Amendment. Because the parties clearly contemplated the contingency that the Plat Modification might not be completed by the deadline, there can be no quantum meruit claim here.

5. This Court should award fees to Northwood.

Again, on what basis. If this Court reverses the decision of the Trial Court, Lennar is the prevailing party entitled to an award of fees. If not, the only other possible resolution here is a remand for a determination as to the character of the Second Amendment. Neither party would prevail.

IV. CONCLUSION

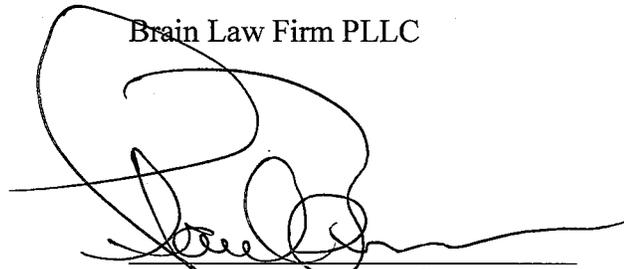
The bottom line in this lawsuit is that Northwood entered into a contract which contained an explicit deadline for Northwood’s

performance. The contract placed no burden or responsibility on Lennar with respect to meeting that deadline. Whether the deadline was met was entirely the responsibility of Northwood and all of the risk associated with not meeting that deadline fell on Northwood. Northwood failed to perform and no one but Northwood is responsible for deadline not being met. The consequence of not meeting that deadline could not possibly be clearer – Northwood only gets paid if it meets the deadline. Otherwise, Northwood gives up the ability to obtain a plat modification to Lennar.

The simple fact of the matter is that the only one to blame for Northwood not meeting the deadline was Northwood. In the final analysis, what Northwood is really complaining about is Northwood's own failure to perform.

Dated this 26th day of December, 2018

Brain Law Firm PLLC

A handwritten signature in black ink, appearing to read "Paul E. Brain", is written over a horizontal line. The signature is stylized and somewhat cursive.

Paul, E. Brain WSBA # 13438
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Transmittal Information

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