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

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134<sup>th</sup> STREET LOFTS, LLC,

Plaintiff,

v.

iCAP NORTHWEST OPPORTUNITY FUND, LLC, and iCAP PACIFIC NW  
MANAGEMENT, LLC,

Defendants,

and

134<sup>th</sup> STREET LOFTS II, LLC,

Nominal Third-Party Defendant.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This case arises out of a contractual dispute between 134th Street Lofts, LLC (LOFTS I) as Plaintiff and iCAP Northwest Opportunity Fund LLC and iCAP Pacific NW Management, LLC, collectively iCAP, as Defendants. The dispute is over which party should control 134th Street Lofts II, LLC (LOFTS II), a purpose-built corporate entity for the development of a housing project (the Project) on 134th Street (134th Street Property) near Vancouver, Washington. Pursuant to A Management Service Agreement (“134 MSA) between LOFT II and LOFTS I, LOFTS I had a right an obligation to develop the Project and 134<sup>th</sup> Street Property.

A dispute arose and the parties entered into a Settlement Agreement that entitled LOFTS I to continue with the development of the Project. The Settlement Agreement entitled iCap to place a lien on the Project and 134<sup>th</sup> Street Property which was subordinate to the prior construction lien of a lender who provided financing for the Project. When the lender found out about the iCap lien it refused to disburse further funds for development. iCap initially refused to remove the lien. When it finally did to unfreeze the development loan proceeds, the resulting delay prevented LOFTS I from timely proceeding with development of the Project. iCap responded by exercising its power to

remove LOFTS I as the project developer under the Settlement Agreement.

Thereafter, LOFTS I and iCAP entered into a contract (the Settlement Agreement) to govern each party's rights and responsibilities regarding control of LOFTS II, and through LOFTS II, the Project and the 134th Street Property. In the Settlement Agreement iCAP was granted the right to place a lien on the 134th Street Property. The lien was to be secondary to existing and ongoing financing of the Project secured before the Settlement Agreement was negotiated. When iCAP filed their lien the financier froze any funding, precipitating a crisis that imperiled the Project.

LOFTS I sued, alleging breach by iCAP of the covenant of good faith and fair dealing and filed a lis pendens on the 134th Street Property. The trial court lifted the lis pendens and ordered damages, attorneys fees and costs against LOFTS I pursuant to RCW 4.28.328.

## **II. ASSIGNMENTS OF ERROR**

No. 1. The Trial Court erred in granting attorneys fees by right under RCW 4.28.328 to iCAP. **(citation needed)**. Because granting attorneys fees by right is only appropriate when the action is "not affecting the title to real property."

No. 2. The Trial Court erred entering summary judgement on for iCAP as to breach of the Settlement Agreement through failure to abide by the implied covenant of good faith and fair dealing. **(citation needed)**.

### **III. STATEMENT OF THE CASE**

#### **Formation of the Project Entity**

On November 3, 2015, Defendant 134<sup>th</sup> Street Lofts II, LLC (“Project Entity”) was formed for the purpose of holding, owning, developing and selling real property located in Clark County, Washington (“134<sup>th</sup> Property), on which the Project Entity intended to build an apartment building (“134<sup>th</sup> LLC Project”). CP 73#1-74. Pursuant to an Amended and Restated Limited Liability Company Agreement of 134<sup>th</sup> Street Lofts II LLC dated November 16, 2015, as amended February 19, 2016 (“134<sup>th</sup> LLC Agreement”), plaintiff, Lofts I, is the Class B Member of the Project Entity and iCap Northwest Opportunity Fund, LLC (“iCap Fund”) is the Class A member . CP 74#1; CP 87 & 125.. The 134<sup>th</sup> Agreement is Exhibit A to the Declaration of Jim Christensen, attached to the Motion for Partial Summary Judgment, CP 79-135.

Thereafter, LOFTS I and iCAP entered into a contract (the MSA) to govern each party’s rights and responsibilities regarding control of LOFTS II, and through LOFTS II, the Project and the 134th Street

Property. CP 137-154, This agreement made LOFT I the project manager and developer. CP 148-152. A dispute arose and the parties entered into a Settlement Agreement. CP 74 #4. In the Settlement Agreement iCAP was granted the right to place a lien on the 134th Street Property. CP 74 #4. The lien was to be secondary to existing and ongoing financing of the Project secured before the Settlement Agreement was negotiated. CP 62 #3, CP 63 #6, CP 64 #7. When iCAP filed their lien the financier froze any funding, precipitating a crisis that imperiled the Project. *Id*; CP 30 #3.

LOFTS I and iCAP initiated negotiations to lift iCAP's lien on the 134th Street Property, with iCAP initially refusing to withdraw the lien. CP 63 #6; CP 75 # 8; CP 63 #6-CP 64. However the delay diminished LOFT I's ability to timely develop the Project. CP CP 63 #6, CP 64 #7. iCAP eventually declared LOFTS I in breach of the Settlement Agreement and took control of LOFTS II and thus the Project and the 134th Street Property. CP 4 #6. LOFTS I sued in this action, alleging breach by iCAP of the covenant of good faith and fair dealing in order to recover control of LOFTS II and the 134th Street Property. CP 1-6 In coordination with their suit and to provide notice to potential other parties of the disputed control of the 134ths Street Property through LOFTS II, LOFTS I filed a *lis pendens* on the 134th Street Property. CP 53-60; CP 75 #10 CP 65, 66, and 67.

The Trial Court, the Hon. Daniel L. Stahnke granted iCAP's motion to lift the lis pendens on September 14, 2018 (CP 68-73) and the Hon. Daniel L. Stahnke granted partial summary judgement for iCAP on all substantive issues on CP 322, 323. (CP) Judge Stahnke also ordered damages and attorneys fees for the lis pendens under RCW 4.28.328(2), which grants attorney's fees as a matter of right when the action giving rise to the lis pendens is "not affecting the title to real property."

#### IV. ARGUMENT

##### A. Standard of Review

From *Trimble v. Washington State University*, 140 Wn.2d 88, 9-93(1), (2) (2000):

[1,2] The standard of review on summary judgement is well settled. Review is de novo; the appellate court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999).

**1. The trial court erred in granting attorney's fees by right and, in effect, ruling that the present action "does not affect the title to real property."**

The trial court erred in granting attorney's fees by right, because when the underlying dispute between parties is over control and agency of real property, which party has the right to control, develop, encumber,

transfer, or defend the property from legal action, then the action should be found to “affect the title to real property.”

Under Washington law “[a]t any time after an action affecting title to real property has been commenced...” a party may file a notice with the auditor of each county in which the property exists to provide prior notice that the property is subject to the court action. RCW 4.28.320. A claimant is liable to an aggrieved party who prevails on a motion to cancel a lis pendens for actual damages and, in the court’s discretion, attorneys’ fees, unless the claimant establishes a substantial justification for filing the lis pendens. RCW 4.28.328 (3). However, if the Court rules that the party which filed the lis pendens is “[a] claimant in an action not affecting the title to real property against which the lis pendens was filed...” actual damages and reasonable attorneys’ fees are appropriate. RCW 4.28.328 (2).

The lis pendens is substantially justified where the claimant has a reasonable good faith basis in fact or law of an interest in the property. *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 912 (2006). While under RCW 4.28.328 (2), the term “affect the title to real property” has not been defined. *McCarthy v DeFord*, No. 47004-7-II, 8 (2016)(unpublished).

The courts have identified that in suits for monetary damages the action does not affect the title to real property. *Bramall v. Wales*, 29 Wn. App. 390, 395 (1981); *Bangasser v. Midtown Limited Partnership*, NO 75226-0-I, (2017) (unpublished). The courts have also shown that when actual title to property, such as the validity of a conveyance, is in dispute a lis pendens is appropriate. *Udall v. T.D. Escrow Services, Inc.*, 132 Wn. App. 290, 295 (2006). The court has not ruled if a lis pendens is appropriate when agency and control over a property are in dispute. One of the facts recounted in the unpublished *Bangasser* opinion was that agency and control over the entity in which property titled resided was not in dispute. NO 75226-0-I, (unpublished).

Here the sole dispute between LOFTS I and iCAP is who has legal right to control the project entity LOFTS II. The reason LOFTS I and iCAP dispute control over LOFTS II is because LOFTS II controls the ability to develop, encumber, transfer, subdivide, and defend in court the property rights and title of the 134<sup>th</sup> Street Property. The only way for LOFTS I to assure that control of LOFTS II would have any real-world meaning is to notify potential counter parties that decisions to transfer, encumber, or litigate title are legally disputed.

Despite the existence of these type of project entities, the current case law does not address this situation. The Court should adopt the rule

that when litigants have a good faith dispute over the legal right to transfer, encumber, or enact any other title action for a property, that dispute and resultant legal action “affect(s) the title to real property” for the purposes of RCW 4.28.328. Especially when, as here, the dispute takes the form of a fight over control of a project entity which is effectively a legal proxy for the disputed property. The legal dispute over control of LOFTS II is simply a legal dispute as to who has the right to control, transfer and encumber the 134<sup>th</sup> Street Property and thus affects the title to the 134<sup>th</sup> Street Property.

**2. The trial court erred in granting summary judgement for iCAP because iCAP had a contractual obligation to LOFTS I which was breached.**

The trial court should not have granted summary judgement for iCAP because iCAP’s actions prevented LOFTS I from working with iCAP to ensure that both parties enjoyed the benefit of their bargained for exchange.

Summary judgement is appropriate when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson Court L.P. v Tony Maroni’s, Inc.*, 134 Wn.2d 692, 698 (1998). “A material fact is one that affects the outcome of litigation.” *Owen v Burlington N. Santa Fe R. R.*, 153 Wn.2d 780, 789 (2005).

Additionally, the facts should be viewed in the light most favorable to the non-moving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590 (2005).

Every contract is a bargained for exchange of rights and responsibilities in the form of consideration. *King v. Riveland*, 125 Wn.2d 500, 505 (1994). A court interprets a contract to ascertain the parties' intent. *Graoch Associates No. 5 LTD. Partnership v Titan Const. Corp.*, 126 Wash. App. 856, 109 P.3d 830, 832 (Wash. App., 2005).

In addition to the explicit consideration of the contract, in Washington law every contract includes an implied duty of good faith and fair dealing. *Rekhter v. State, Dept. of Social and Health Services*, 180 Wash.2d 102, 323 P.3d 1036, 1041 (Wash 2014). The duty of good faith and fair dealing obligates the parties to a contract to cooperate with each other so all may receive the contract's full benefit. *Id.* The duty of good faith and fair dealing cannot add or contradict express contract terms. *Id.* A trial court has the authority to excuse a condition which has been prevented or hindered through a breach of covenant of good faith and fair dealing. *Kilcullen v. Calborn*, 177 Wash. App. 195, 312 P.3d 60, 65 (Wash. App., 2013).

Here, iCAP and LOFTS I agreed that funds would be paid from LOFTS II to iCAP and secured by an encumbrance on the Project, in return LOFTS I would control and develop the 134<sup>th</sup> Street Property.

iCAP's interest was to be secured by the Deed of Trust which Parkview objected to on March 7th 2018. iCAP argues that it had no obligation to remove the Deed of Trust, but the entirety of the settlement agreement was the exchange of control of the LOFTS II project entity in exchange for the secured funds.

To forward that agreement iCAP agreed to timelines that recognized the need for almost immediate action on funding concerns as described in §6(b) of the Settlement Agreement where iCAP agreed to consider requests for a draw within two days of agreeing to the agreement. Furthermore in §16 of the Settlement Agreement, iCAP agreed to execute any further documents necessary to complete the purpose of the Settlement Agreement, LOFTS I control of the Project through LOFTS II in exchange for secured funds for iCAP.

When iCAP executed their Deed of Trust financing and financing for the Project was frozen both parties gained responsibilities under the implied covenant of Good Faith and Fair Dealing. It was LOFTS I responsibility to come up with a financing arraignment that would allow for the Deed of Trust, and it was iCAP's responsibility to allow LOFTS I a reasonable amount of time to secure alternative financing.

LOFTS I's responsibility under the covenant of Good Faith and Fair Dealing did not allow for an infinite delay in providing iCAP with

their negotiated for security. LOFTS I had a responsibility to as quickly as possible either find alternative financing which would allow for the Deed of Trust to attach to the 134<sup>th</sup> Street Property or provide alternative acceptable security. However, LOFTS I's interest in unfreezing the funding for the Project was much more immediate and it was only reasonable that iCAP would act with the necessary alacrity to allow LOFTS I to operate the Project while both parties cooperated to bring about the desired ends of the Settlement Agreement.

The difference in responsibilities under the Duty of Good Faith and Fair Dealing was based upon the necessary timelines for each party to receive their benefit from the contract. The payment secured by the Deed of Trust was months away but for the Project to continue financing was immediately necessary to purchase supplies and pay sub-contractors.

The Deed of Trust should have been removed while the parties negotiated sufficient security or LOFTS I made other financing arrangements to secure iCAP's interest protected by the Deed of Trust. While the Deed of Trust was intended to secure iCAP's right to payments in June and October of 2018, the disputed time period occurred between March 7th and March 27th of 2018. By failing to execute such instruments necessary to continue with and complete the Project as iCAP had agreed to in §16 of the Settlement Agreement, iCAP was in breach of

explicit contract terms and the responsibility of mutual good faith and fair dealing. Because iCAP did in fact breach the Settlement Agreement, it was reversible error for the trial court to grant summary judgement.

## V. CONCLUSION

134th Street Lofts, LLC asks that the Court declare as a matter of law that any action for control of the LOFTS II entity is an action affecting the title of the 134th Street Property, and that this matter be remanded for proceedings consistent with that ruling.

134th Street Lofts, LLC asks that the Court declare as a matter of law that iCAP violated the implied covenant of good faith and fair dealing and that this matter be remanded for trial on remedies and damages.

Alternatively, 134th Street Lofts, LLC asks the Court to conclude 134th Street Lofts, LLC adduced sufficient evidence to create an issue of material fact regarding whether iCAP's conduct violated the implied covenant of good faith and fair dealing, and that this matter be remanded for trial on that issue.

*August 30, 2019*

Respectfully submitted,



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**SELLERS LAW OFFICE**

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**Transmittal Information**

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