

FILED
Court of Appeals
Division II
State of Washington
9/30/2019 3:56 PM
No. 52896-7-II

COURT OF APPEALS, DIVISION 2
OF THE STATE OF WASHINGTON

134th STREET LOFTS, LLC

Appellant,

v.

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

Respondents,

and

134th STREET LOFTS II, LLC

Nominal Third-Party Respondent.

BRIEF OF RESPONDENTS

FOX ROTHSCHILD LLP
Wendy E. Lyon, WSBA #34461
David P. Papiez, WSBA #54186
Attorneys for Respondents
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
Phone: (206) 624-3600
Fax: (206) 389-1708

TABLE OF CONTENTS

I. Introduction 1

II. Statement of Issues 2

III. Statement of the Case..... 2

 A. Statement of Facts..... 2

 Project Entity Formation..... 2

 January Settlement Agreement..... 3

 Lawsuit and Lis Pendens..... 5

 B. Procedural History 7

IV. Argument..... 9

 I. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS’ FEES AFTER CANCELING A LIS PENDENS WHERE ACTION DID NOT AFFECT TITLE TO REAL PROPERTY 9

 II. THE TRIAL COURT DID NOT ERR WHEN IT GRANTED ICAP SUMMARY JUDGMENT BECAUSE ICAP DID NOT BREACH THE JANUARY SETTLEMENT AGREEMENT 12

 A. There is no ‘free-floating’ duty of good faith and fair dealing that is unattached to an existing contract 14

 B. Covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract..... 15

V. Attorneys’ Fees..... 17

VI. Conclusion..... 17

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

Badgett v. Security State Bank, 116 Wn.2d 563, 47 P.2d 356 (1991) 14

Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn. App. 630, 700 P.2d 338 (1985) 15

Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980)..... 13

Betchard-Clayton, Inc. v. King, 41 Wn. App. 887, 707 P.2d 1361, *review denied*, 104 Wn.2d 1027 (1985) 15

Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 194 P.3d 280, 291 (2008) 14

Castro v. Stanwood School District No. 401, 151 Wn.2d 221, 86 P.3d 1166 (2004) 13

CHG Int'l, Inc. v. Robin Lee Inc., 35 Wn. App. 512, 667 P.2d 1127, *review denied*, 100 Wn.2d 1029 (1983) 14

City of Lakewood v. Pierce County, 144 Wn.2d 118, 30 P.3d 446 (2001) 13

Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 739, 935 P.2d 628 (1997) 15

Guest v. Lange, 195 Wn. App. 330, 381 P.3d 130 (2016) 10

Hwang v. McMahill, 103 Wn. App. 945, 15 P.3d 170 (2000) 17

Lonsdale v. Chesterfield, 99 Wn.2d 353, 662 P.2d 385 (1983)..... 14

Matson v. Emory, 36 Wn. App. 681, 676 P.2d 1029 (1984)..... 14

Miller v. Othello Packers, Inc., 67 Wn.2d 842, 410 P.2d 33 (1966) 14

SAK & Assocs., Inc. v. Ferguson Const., Inc., 189 Wn. App. 405, 357 P.3d 671, 676 (2015)..... 15

Spokane School Dist. No. 81 v. Spokane Educ. Assn'n, 182 Wn. App. 291, 331 P.3d 60, 70 (2014)..... 15

<i>Syrett v. Reisner McEwin & Associates</i> , 107 Wn. App. 524, 24 P.3d 1070 (2001)	17
<i>Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.</i> , 169 Wn. App. 111, 279 P.3d 487 (2012)	14
<i>Teter v. Deck</i> , 174 Wn.2d 207, 274, P.3d 336 (2012).....	10

Statutes

RCW 4.28.320	10
RCW 4.28.328	1, 2, 7, 8, 9, 10, 11, 17
RCW 4.84.330	17

Rules

CR 56(c)	12
CR 56(e)	13
RAP 18.1(a).....	17

I. INTRODUCTION

This case involves the struggle for control over a real estate project, namely the construction of an apartment building in Vancouver, Washington. While Appellant was originally charged with developing the project, and Respondents provided most of the funding, Appellant failed to perform. After numerous second chances, Respondents exercised contractual rights to assume control of the entity that owns the real property and project. Appellant protested by filing a breach of contract action and wrongfully recording a lis pendens against title to the real property. This delayed the project's progress.

Respondents successfully sought and obtained orders cancelling the lis pendens, awarding damages, fees and costs, dismissing all of Appellant's claims, and confirming that Appellant had breached its contractual obligations. Appellant focuses its appeal on two issues: (1) the trial court's decision to award Respondents the fees incurred in bringing the motion to cancel the lis pendens pursuant to RCW 4.28.328(2); and (2) the trial court's dismissal of Appellant's claim for breach of the duty of good faith and fair dealing on summary judgment. Respondents request that the Court affirm the trial court's orders.

II. STATEMENT OF ISSUES

1. Should the Court affirm the trial court's December 7, 2018 Order? Specifically, did the trial court properly award attorneys' fees under RCW 4.28.328(2) when it cancelled a lis pendens in an action that does not affect title to real property? (YES)

2. Should the Court affirm the trial court's November 2, 2018 Order? Specifically, did the trial court properly grant summary judgment in favor of Respondents, dismissing Appellant's breach of the duty of good faith and fair dealing claim, when Respondents fulfilled all contractual obligations and had a specific contractual right to record a deed of trust? (YES)

III. STATEMENT OF THE CASE

A. Statement of Facts

Project Entity Formation

On November 3, 2015, 134th Street Lofts II, LLC ("Project Entity") was formed for the purpose of holding, owning, developing and selling real property located in Clark County, Washington ("134th Property"). CP 348. The Project Entity intends to develop the 134th Property into an apartment building ("134th Project"). CP 348-349. Pursuant to the Amended and Restated Limited Liability Company Agreement of 134th Street Lofts II LLC dated November 16, 2015, as amended February 19, 2016 ("134th LLC

Agreement”), Appellant, 134th Street Lofts, LLC, is the Class B member of the Project Entity and Respondent iCap Northwest Opportunity Fund, LLC (“iCap Fund”) is its Class A member. CP 349. Appellant and Respondent iCap Pacific NW Management, LLC (“iCap Management”) were the Managers of the Project Entity. CP 349-350. Pursuant to a Management Services Agreement, dated November 16, 2015 (“134th MSA”), between the Project Entity and Appellant, Appellant agreed to perform services in furtherance of the development of the 134th Property and 134th Project as the Developer. CP 349. However, Appellant failed to fulfill its obligations under the 134th LLC Agreement as Manager and under the 134th MSA as Developer. CP 349.

January Settlement Agreement

As a result of Appellant’s failure to fulfill its obligations under the 134th LLC Agreement and 134th MSA, Respondents filed a First Amended Complaint against Appellant on June 27, 2017, under King County Superior Court case number 17-2-10920-7 SEA. CP 349. Appellant and Respondents entered into a Settlement Agreement on January 16, 2017, whereby the 134th LLC Agreement and 134th MSA were amended, and Appellant became the sole operating Manager of the Project Entity and remained as Developer (“January Settlement Agreement”). CP 349. In the January Settlement Agreement, Appellant agreed to cause the Project Entity

to pay Respondent iCap Fund \$6,170,506.32 by June 1, 2018. CP 437.

Additionally, Appellant agreed to cause the Project Entity to pay \$1,850,000 to Respondent iCap Fund on or before October 1, 2018. CP 437. This amount was evidenced by a promissory note and secured by a deed of trust that Appellant agreed would be recorded against the Project Property. CP 437-438. Paragraph 8 of the January Settlement Agreement provides that the \$1.85 million note will be “secured by a deed of trust in the form attached hereto as Exhibit C, which counsel for [iCap Respondents] will record with the Clark County Auditor against the 134th Property” (“iCap Deed of Trust). CP 437-438.

In March 2018, shortly after the iCap Deed of Trust was recorded in accordance with the terms of the January Settlement Agreement, the construction lender, Parkview Financial, which had a first position deed of trust on the 134th Property, indicated it would not release additional loan funds for construction draws until the iCap Deed of Trust, which was in second position, was released. CP 350. Despite the contractual right to maintain the iCap Deed of Trust as a lien on the 134th Property, Respondent iCap Fund recorded a release within just three weeks of learning of Parkview Financial’s objection in order to ensure the 134th Project continued to be funded. CP 350.

Thereafter, Appellant breached the January Settlement Agreement in numerous ways including, but not limited to, failing to adhere to the budget and schedule, and failing to cause the Project Entity to pay the required sums to Respondent iCap Fund. CP 350. After weeks of negotiations regarding amending the January Settlement Agreement, and once the parties had agreed to all material terms of an amendment, Appellant abruptly backed out, refusing to sign the amendment. CP 350. On July 13, 2018, Respondents sent a default and termination notice to Appellant. CP 509-510. In accordance with paragraph 5 of the January Settlement Agreement, Respondent iCap Management assumed full control of the Project Entity and the 134th Project, and Appellant was terminated as Developer under the 134th MSA. CP 350.

Lawsuit and Lis Pendens

Instead of cooperating in the transition of management as required under paragraph 3.3(e) of the 134th MSA, and as affirmed in paragraph 5 of the January Settlement Agreement, Appellant filed this lawsuit. CP 350. Appellant claimed that Respondent iCap Fund breached the duty of good faith and fair dealing by filing and maintaining a deed of trust on the Property—even though the January Settlement Agreement required iCap Fund to do so. CP 4. Appellant tried to excuse its own failures by claiming that the iCap Deed of Trust held up construction funding, rendering it

impossible for Appellant to perform. CP 4. Appellant could not have performed even if the iCap Deed of Trust had not been recorded or released three weeks earlier because the 134th Project was already substantially delayed. CP 350. Appellant is responsible for entering agreements with inconsistent obligations that resulted in the delay of funding. CP 445.

Upon receipt of the lawsuit, Respondents' counsel contacted Appellant's counsel (who had changed since the King County litigation and resulting January Settlement Agreement), she explained the situation in detail, and then she sent him the January Settlement Agreement which expressly provides that Respondent iCap Fund has the right to maintain a deed of trust to secure the \$1.85 million note. CP 563. Respondents' counsel also sent relevant correspondence of the parties' negotiations relating to the amendment of that agreement. CP 563-564. With this information (demonstrating that the basis for the lawsuit—recording of the iCap Deed of Trust on the Project Property—was not actionable because Respondent iCap Fund has a clear contractual right to maintain a deed of trust on the 134th Property), Respondents' counsel requested that Appellant's counsel dismiss the lawsuit or she would consider seeking Rule 11 sanctions. CP 564. Appellant's response was to record a lis pendens against the 134th Property, causing significant damage to Respondents and the 134th Project. CP 350.

As a result of the wrongful lis pendens, the Project Entity was unable to consummate a multi-million dollar refinancing loan from Pyatt Broadmark Management, LLC, placing the Project Entity in jeopardy of foreclosure by Parkview Financial, whose loan to the Project Entity matured in August 2018. CP 350. To avoid a default, Respondents paid Parkview Financial interest in the amount of \$84,252.42, an Extension Fee of \$48,750.00, and a Document Fee of \$6,975.00 in exchange for a one-month extension of the Parkview Financial loan to allow Respondents to bring a motion before the trial court to cancel the improper lis pendens. CP 351. In other words, iCap Fund had to pay nearly \$140,000 to keep the Parkview Financial loan from going into default for one month, which was necessitated exclusively by Appellant's wrongful lis pendens. CP 351.

B. Procedural History

On July 17, 2018, Appellant filed this action against Respondents alleging breach of the duty of good faith and fair dealing (relating to the iCap Deed of Trust) and seeking declaratory relief (requesting an extension of time for Appellant to perform under the January Settlement Agreement) and injunctive relief (requesting that Respondents not be allowed to assume control of the 134th Project). CP 4-6. On September 14, 2018, the trial court cancelled the lis pendens and gave Respondents the right to seek damages and fees under RCW 4.28.328. CP 68-72. On November 2, 2018, the trial

court granted Respondents' Motion for Partial Summary Judgment, which dismissed all of Appellant's claims with prejudice, and gave Respondents the right to move for fees and costs as the prevailing party under paragraph 23 of the January Settlement Agreement. CP 322-323. On December 7, 2018, the trial court entered an Order and Judgment Granting Summary Judgment Motion for Damages and Fees re Lis Pendens, Granting Motion for Summary Judgment re Liability and Judgment. CP 340-343. The December 7, 2018 Order: (a) established Appellant's liability for breach of the January Settlement Agreement; (b) awarded damages of \$139,977.42 to Respondents for the wrongful filing of the lis pendens; (c) awarded \$13,847 to Respondents under RCW 4.28.328 for attorneys' fees incurred in connection with cancelling the lis pendens; (d) awarded Respondents \$27,777.43 for attorneys' fees and costs as the prevailing party under paragraph 23 of the January Settlement Agreement; and (e) dismissed Respondents' remaining counterclaims without prejudice and directed the clerk to close the case. CP 340-343.

On January 7, 2019, Appellant filed a notice of appeal, identifying the November 2, 2018 and December 7, 2018 Orders only. In its opening brief, Appellant takes issue with only two of the trial court's rulings: (1) awarding Respondents approximately \$14,000 in the December 7, 2018 Order for attorneys' fees incurred canceling the lis pendens; and (2) granting

of summary judgment in Respondents' favor in the November 2, 2018 Order, finding that Respondents did not breach the duty of good faith and fair dealing. Appellant does not contest the trial court's cancellation of the lis pendens, the award of approximately \$140,000 in damages, the dismissal of Appellant's causes of action for declaratory and injunctive relief, the award of approximately \$28,000 in fees and costs to Respondents as the prevailing party, or the finding that Appellant is liable for breach of its obligations under the January Settlement Agreement. Respondents request that the Court affirm the trial court's Orders in their entirety.

IV. ARGUMENT

I. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS' FEES AFTER CANCELING A LIS PENDENS BECAUSE THE ACTION DID NOT AFFECT TITLE TO REAL PROPERTY

Appellant does not challenge the trial court's finding that the lis pendens was wrongful, nor the amount of damages awarded. Appellant, instead, argues that the trial court improperly awarded attorneys' fees to Respondents as a matter of law under RCW 4.28.328(2), rather than as a matter of discretion under RCW 4.28.328(3). This argument fails.

A party who files a wrongful lis pendens is liable for attorneys' fees under RCW 4.28.328(2). RCW 4.28.328(2) provides for a mandatory award of reasonable attorney fees incurred in cancelling the lis pendens.

RCW 4.28.328(2) (“A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.”) (emphasis added). The Court reviews the trial court’s decision under RCW 4.28.320 and RCW 4.28.328 for an abuse of discretion. *See Guest v. Lange*, 195 Wn. App. 330, 335, 381 P.3d 130 (2016). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Teter v. Deck*, 174 Wn. 2d 207, 215, 274, P.3d 336 (2012).

Pursuant to RCW 4.28.328(2), Appellant is responsible for Respondents’ reasonable attorneys’ fees incurred to cancel the lis pendens. Appellant argues that it had “substantial justification” for filing the lis pendens and therefore, can avoid the imposition of actual damage and attorneys’ fees. But this supposition arises from a conflation of RCW 4.28.328(2) and RCW 4.28.328(3). RCW 4.28.328(2) imposes liability for fees automatically on a claimant when a wrongful lis pendens is canceled because the action does not affect title to real property, whereas RCW 4.28.328(3) imposes liability for actual damages and attorneys’ fees and costs, subject to the court’s discretion, when the aggrieved party “prevails in defense of the action in which the lis pendens was filed.” In other words,

RCW 4.28.328(2) and RCW 4.28.328(3) describe two different scenarios, and only RCW 4.28.328(2) applies where, as here, the court finds the action does not affect title to real property, and therefore, cancels the lis pendens and awards damages and fees. RCW 4.28.328(3) applies, where a lis pendens is allowed to cloud title during the pendency of an action because the action affects title, but the aggrieved party ultimately prevails, entitling the court to award fees in its discretion depending on whether it believes there was “substantial justification” for filing the lis pendens in the first place.

Here, Appellant wrongfully filed a lis pendens, Respondents moved the trial court to cancel the wrongful lis pendens, and the trial court granted that motion. Actual damages and reasonable attorneys’ fees were awarded to Respondents pursuant to RCW 4.28.328(2) as a matter of law, and the trial court therefore had no discretion to abuse regarding the imposition of those damages and attorneys’ fees.

The trial court properly cancelled the lis pendens and awarded fees as a matter of law under RCW 4.28.328(2), rather than as a matter of discretion under RCW 4.28.328(3), because the title to real property was not at issue in the lawsuit. Appellant argues that control over a business entity that owns real property is tantamount to an action affecting title to real property. However, as Appellant recognizes in its opening brief, no

Washington court has ever held that control over a business entity—such as the Project Entity—“affects” title to real property, and this is for good reason. Title to the 134th Property is not, and has never been, in question. The 134th Property is owned by the Project Entity, and it is control over the Project Entity—rather than title to the 134th Property—at the heart of this dispute. This is a critical distinction. Although Appellant was removed as manager of the Project Entity and developer under the MSA, it remains the Class B member of the Project Entity, entitled to all the rights and privileged granted to it within the 134th LLC Agreement. While, for good reason, the Appellant may no longer control the Project Entity, it stands to share in the proceeds of the development of the 134th Property as prescribed within the 134th LLC Agreement.

Accordingly, the Court should affirm the trial court’s awarding of actual damages and attorneys’ fees to Respondents after canceling Appellant’s wrongful *lis pendens* that did not affect title to real property.

II. THE TRIAL COURT DID NOT ERR WHEN IT GRANTED ICAP SUMMARY JUDGMENT BECAUSE ICAP DID NOT BREACH THE JANUARY SETTLEMENT AGREEMENT

Summary judgment is appropriate when the pleadings and the evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). A "material fact" is a fact upon which the litigation depends, in whole or in

part. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 643, 618 P.2d 96 (1980). Once the moving party has made and supported his motion, the nonmoving party must come forward with specific facts showing that a genuine issue of fact exists for trial. CR 56(e). In conducting this inquiry, the trial court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001).

This Court's review of the trial court's decision to grant summary judgment is de novo. *Castro v. Stanwood School District No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004).

The trial court properly granted summary judgment for Respondents because iCap did not breach the January Settlement Agreement. More specifically, iCap Fund did not breach the implied duty of good faith and fair dealing by not releasing the iCap Deed of Trust immediately upon learning that the senior lender, Parkview Financial, objected to it because: (1) there is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract; and (2) covenants of good faith and fair dealing cannot trump express terms or unambiguous rights in a contract.

A. There is no ‘free-floating’ duty of good faith and fair dealing that is unattached to an existing contract.

The Washington Supreme Court has “consistently held that there is no ‘free-floating’ duty of good faith and fair dealing unattached to an existing contract.” *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 215–16, 194 P.3d 280, 291 (2008). In *Badgett v. Security State Bank*, the Court stated:

There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it “inject substantive terms into the party’s contract”. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Thus, the duty arises only in connection with terms agreed to by the parties.

116 Wn.2d 563, 47 P.2d 356 (1991). The duty exists only in relation to performance of a specific contract term. *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 279 P.3d 487 (2012). Thus, the duty arises only in connection with terms agreed to by the parties. *Matson v. Emory*, 36 Wn. App. 681, 676 P.2d 1029 (1984); *Lonsdale v. Chesterfield*, 99 Wn. 2d 353, 662 P.2d 385 (1983); *CHG Int’l, Inc. v. Robin Lee Inc.*, 35 Wn. App. 512, 667 P.2d 1127, *review denied*, 100 Wn.2d 1029 (1983); *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 843-44, 410 P.2d 33 (1966).

There is no term of the January Settlement Agreement that

Appellant alleges was not performed in good faith.

B. Covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract.

Covenants of good faith and fair dealing do not trump express terms or unambiguous rights in a contract. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 739-40, 935 P.2d 628 (1997). Numerous courts have confirmed that the covenant of good faith and fair dealing cannot apply to contradict a contract, require a material change of terms, or “inject substantive terms into the parties' contract”. *See e.g., Betchard-Clayton, Inc. v. King*, 41 Wn. App. 887, 890, 707 P.2d 1361, *review denied*, 104 Wn.2d 1027 (1985); *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 635, 700 P.2d 338 (1985). In particular, “there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *SAK & Assocs., Inc. v. Ferguson Const., Inc.*, 189 Wn. App. 405, 414–15, 357 P.3d 671, 676 (2015). Similarly, if the contract imposes no duty, there is no duty of good faith. *Spokane School Dist. No. 81 v. Spokane Educ. Assn’n*, 182 Wn. App. 291, 310–11, 331 P.3d 60, 70 (2014) (The district had no duty to arbitrate matters that it had not agreed to arbitrate under the CBA. Because it had no duty to arbitrate, it could not have breached its duty of good faith by standing by its contractual rights).

Here, Respondent iCap Fund had no implied duty to not do exactly what the contract says it is required to do. Paragraph 8 of the January Settlement Agreement provides that Respondent iCap Fund's \$1.85 million note will be "secured by a deed of trust in the form attached hereto as Exhibit C, which counsel for [iCap Respondents] will record with the Clark County Auditor against the 134th Property." The parties agreed only that the iCap Deed of Trust would be released upon satisfaction of the promissory note that it secured. At the time that the Project Entity became a borrower of Parkview Financial and apparently agreed not to further encumber the 134th Property, Appellant was the Project Entities' sole Manager. At the time that the Project Entity agreed to execute a promissory note and deed of trust to secure that note, which it agreed in the January Settlement Agreement would be recorded against the 134th Property, Appellant was also the sole Manager. There is no dispute that Appellant had the authority to enter into both the loan agreement with Parkview Financial, and the January Settlement Agreement with Respondents. Appellant, as Manager, thus apparently agreed to inconsistent obligations. Appellant's negligence does not allow it to demand that Respondent iCap Fund forfeit its express contractual rights.

As a matter of law, iCap Fund had a contractual right to record and maintain the iCap Deed of Trust on the 134th Property until the promissory

note was satisfied. That note, which matured on October 1, 2018, has not been satisfied. iCap Fund could not have breached the January Settlement Agreement by doing exactly what the January Settlement Agreement required it to do.

Accordingly, the Court should affirm the trial court's granting of summary judgment for Respondents because iCap did not breach the January Settlement Agreement.

V. ATTORNEYS' FEES

Attorneys' fees on appeal are awarded to the respondent as the prevailing party when a contract, statute, or recognized ground of equity permits recovery, and the respondent is the prevailing party. *RAP 18.1(a); Syrett v. Reisner McEwin & Associates*, 107 Wn. App. 524, 532, 24 P.3d 1070 (2001); *Hwang v. McMahill*, 103 Wn. App. 945, 954, 15 P.3d 170 (2000), *review denied*, 144 Wn.2d 1011 (2001). Accordingly, if the Court affirms the trial court, Respondents respectfully request that the Court award its attorneys' fees pursuant to RCW 4.28.328, and RCW 4.84.330 and paragraph 23 of the January Settlement Agreement.

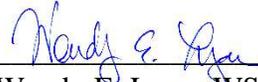
V. CONCLUSION

For the reasons set out above, Respondents respectfully request that the Court affirm the trial court's decision because: (1) the trial court properly awarded attorneys' fees under RCW 4.28.328 to Respondents after

Appellant wrongfully filed a lis pendens in an action that does not affect title to real property; and (2) the trial court properly granted summary judgment in favor of Respondents because iCap did not breach the January Settlement Agreement.

DATED this 30th day of September, 2019.

Respectfully Submitted,



Wendy E. Lyon, WSBA #34461
David P. Papiez, WSBA #54186
FOX ROTHSCHILD LLP
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Courtney Tracy, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for Respondents iCAP NORTHWEST OPPORTUNITY FUND, LLC, iCAP PACIFIC NW MANAGEMENT, LLC in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On September 30, 2019, I served a true and correct copy of the foregoing document on the following party, attorney for Appellant, via email and mail, and addressed as follows:

James L. Sellers
Sellers Law Office
405 West 13th Street
Vancouver, WA 98660
jsellers@SellersLawOffice.com

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

SIGNED at Seattle, Washington, this 30th day of September, 2019.



Courtney Tracy

FOX ROTHSCHILD LLP

September 30, 2019 - 3:56 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52896-7
Appellate Court Case Title: 134th Street Lofts, LLC, App v. iCap NW Opportunity Fund, LLC, et al, Resps
Superior Court Case Number: 18-2-05422-6

The following documents have been uploaded:

- 528967_Briefs_20190930155508D2363520_5251.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Appellate Respondents Brief.pdf

A copy of the uploaded files will be sent to:

- jsellers@sellerslawoffice.com
- robert@sellerslawoffice.com
- robert@sounddefenders.com

Comments:

Sender Name: Rebecca Bennett - Email: rbennett@foxrothschild.com

Filing on Behalf of: Wendy E Lyon - Email: wlyon@foxrothschild.com (Alternate Email: ctracy@foxrothschild.com)

Address:
1001 Fourth Avenue
Suite 4500
Seattle, WA, 98154
Phone: (206) 624-3600

Note: The Filing Id is 20190930155508D2363520