

FILED

NO. 306208

MAY 14 2012

WHITMAN COUNTY CAUSE NO. 10-2-00293-4

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

GARRETT RANCHES, LLC
a Washington Limited Liability Company
Respondents

v.

LARRY HONN FAMILY, LLC
a Washington Limited Liability Company
Appellants

APPELLANT HONN'S BRIEF

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I. APPELLANT'S ASSIGNMENTS OF ERROR

- A. Assignment of Error No.1: The trial court made an Error of Law in failing to find that the Notice of Forfeiture of the Farm Lease terminated the parties' contractual relationship until reinstated pursuant to the terms of the Farm Lease;
- B. Assignment of Error No.2: The trial court made an Error of Law in holding that the parties must arbitrate issues related to an Option to Purchase including terms of a Real Estate Sale Agreement;
- C. Assignment of Error No.3: The arbitrators made an Error of Law by holding, if the parties could not agree on the terms of a Real Estate Sale Agreement the arbitrators would decide the terms.

II. STATEMENT OF THE CASE

The first issue raised by this appeal arises from a February 3, 2012 Order compelling arbitration at which time the appellant's argued there was no contract to compel arbitration. The primary issue before the court was whether or not a contract existed between the parties on which to compel arbitration which was discussed in the court's oral decision. (CP 213)

The trial court clearly stated the issue in the oral decision:

THE COURT: All right. This is how I see it here today. You have this Lease and an Option to Purchase. It contains an arbitration clause. There was a notice of a breach, a notice of termination, that was served upon the tenants. There's a cure period and a cure process that allows for reinstatement. The lease terminology of paragraph 12 provides that on service of a notice of termination, that it's automatic, the lease is terminated, and the termination of the lease would also, **I believe as argued here, terminate the arbitration clause and the requirement to arbitrate.**

(Emphasis Added)

(CP 213)

Additionally, the January 28, 2011 and February 10, 2012 trial court's confirmation of arbitration awards compelled the parties to create the terms of a a Real Estate Sale agreement for the appellant's family farm by arbitration. (CP 4), (CP 241-242)

The parties entered into a Cash Rent Farm Lease with Option to Purchase (hereafter "Farm Lease") on September 14, 2010. (CP 14-20) Soon thereafter a dispute arose between the parties regarding the Farm Lease which resulted in arbitration and the initial arbitration award dated December 28, 2010. (CP 3-5)

The arbitration award dated December 28, 2010 was filed on January 3, 2011 and specifically held at paragraphs 2 – 2.1 as follows:

2. Option. The option to purchase within the Cash Lease Farm Lease with Option to purchase is valid subject to the following:

2.1 The parties shall mutually agree upon the terms, covenants and conditions of a contract of sale consistent with the Cash Rent Farm Lease by January 1, 2012. **If the parties are unable to reach an agreement by that date as to the terms, the arbitrators reserve jurisdiction to issue a further arbitration award pertaining to the terms of the proposed contract of sale.** *Emphasis Added* (CP 213)

The trial court confirmed the January 3, 2011 arbitration award on January 28, 2011.(CP 6-7)

The parties could not agree to the terms of a real estate sale agreement for the Honn family farm which resulted in the respondent setting a second arbitration hearing on November 23, 2011. (CP 23-24)

Due to a number of defaults in the Farm Lease, on November 29, 2011 the appellant served, pursuant to the

terms of the Farm Lease, a Notice of Termination of the Farm Lease. (CP 26-27) (CP 29)

A second Notice of Termination of the Farm Lease was reissued and served by certified mail on December 19, 2011. (CP 31-33) (CP 35)

The effect of the Notice of Termination is clearly stated in paragraph 12 of the Farm Lease which stated:

“. . . Lessor may, in addition to any other remedy, declare this Lease forfeited and immediately enter the Property and all rights and privileges herein granted shall thereon terminate as fully as though this Lease had expired by the limitations herein expressed”. (CP 17)

The appellants notified the respondent of the effect of the Notice of Termination however the respondent rejected the appellant's position.(CP 41-43) (CP 45) (CP 52)

The arbitration was scheduled by the respondent. (CP 40-52)

In light of the effect of the Notice of Termination and the failure of the parties to reach an agreement as to the effect of the notice of termination the appellant filed for a

motion to stay arbitration due to a lack of contract. (CP 56 - 63)

The respondent filed a motion to compel arbitration. (CP 141-146)

The trial court on January 13, 2012 held a hearing on the competing motions and the trial court entered an Order compelling arbitration and denying the appellant's motion to stay arbitration. (CP 188-189)

Under protest by the appellant, arbitration was held on December 22, 2011. (CP 190-204) The arbitrators entered a second arbitration award on January 19, 2012 which specifically created the terms for a Real Estate Sale Agreement for the appellant's family farm. (CP 190-204)

The arbitrators in their arbitration award dated January 19, 2012 created terms for a Real Estate Sale Agreement for the appellant's family farm which included significant personal property which the parties had not agreed to buy/sell. (CP 191-192)

On February 10, 2012 the trial court confirmed the second arbitration award and in so doing indicated the Order was a final Order as to the issue of the parties' Real Estate Sale Agreement (CP 241-242)

III. STANDARD OF REVIEW

The existence of a contract is a legal question that is subject to *de novo* review. Yeats v. Estate of Yeats, 90 Wash.2d 201, 204, 580 P.2d 617 (1978); Keystone Masonry, Inc. v. Garco Constr., Inc., 135 Wash.App. 927, 932, 147 P.3d 610 (2006); Colby v. Yakima County, 133 Wash.App. 386, 391, 136 P.3d 131 (2006).

This court has held that it will review an arbitration award if the arbitration award states an error of law on the face of the award, Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). (citing Boyd v. Davis, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995)).

IV. LEGAL ARGUMENT

A. Assignment of Error No.1, The trial court made an Error of Law in failing to find that the Notice of Forfeiture of the Farm Lease terminated the parties contractual relationship until reinstated pursuant to the terms of the Farm Lease.

On November 29, 2011 the respondents received a Notice of Termination of the Farm Lease from the appellants (CP 26-27) and on December 19, 2011 received an Amended Notice of Termination of the Farm Lease. (CP 31-33)

The Notice of Termination was properly served upon the Respondent pursuant to the terms of the Farm Lease. (CP 18-19) The Appellant served the Notice of Termination by United States Postal Service certified mail pursuant to the requirements of the Farm Lease. (CP 29; 25)

The trial court chose not to enter any findings of fact or conclusions of law when it entered its Order on February 3, 2012. However, the transcript of the court's oral ruling indicates that it recognized the effect of the

appellant's Notice of Termination of the Farm Lease. By stating:

.....The lease terminology of paragraph 12 provides that on service of a notice of termination, that it's automatic, the lease is terminated, and the termination of the lease would also, I believe as argued here, terminate the arbitration clause and the requirement to arbitrate.

(CP 213)

It is well established law that a trial court, when interpreting contract terms, shall attempt to determine the parties' intent by focusing on their objective manifestations as expressed in the agreement. McGuire v. Bates, 169 Wn.2d 189,234 P.3d 205 (2010)

The appellant argued that the effect of the Notice of Termination of the Farm Lease was the automatic termination of the Farm Lease by the clear language of the Lease itself. The Farm Lease which was before the trial court specifically addressed the effect of the Notice of Termination in paragraph 12, by indicating:

“Lessor may, in addition to any other remedy, declare this Lease forfeited and immediately enter the Property and all rights and privileges herein granted shall thereon terminate as fully

as though this Lease had expired by the limitations herein expressed”.
(CP 17)

The language used and the plain meaning of paragraph 12 of the Farm Lease results in the Farm Lease’s automatic termination. The language of paragraph 12:

“and all rights and privileges herein granted shall thereon terminate as fully as though this Lease had expired by the limitations herein expressed”
(CP 17)

has only one meaning and intent.

Further, paragraph 12 indicates that the:

“Lessee shall have thirty (30) days from the date of receipt of such notice within which to perform such agreement and thereby reinstate this Lease”
(CP 17-18)

The Farm Lease specifically states that the Farm Lessee may “reinstate” the Lease.

Black’s Law Dictionary (2nd Ed) defines “reinstate” as:

To place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed. See Collins v. U. S., 15 Ct Cl. 22.

The use of the parties' specific wording "reinstate" further indicates that the intent of the Farm Lease was its termination by the delivery of the Notice of Termination. No other intent can be reasonably gleaned from paragraph 12 of the Farm Lease.

Pursuant to well established Washington contract law, contract terms must be given their ordinary meaning and their full effect. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493,502-503, 115 P.3d 262 (2005).

"The touchstone of contract interpretation is the parties' intent. Contract interpretation must be based on the intent of the parties **as reflected in their agreement.**" Litowitz v. Litowitz, 146 Wn.2d 514, 528,48 P.3d 261 (2002) (quoting Tanner Elec. Coop. v. Puget Sound Power & Light, 128 Wn.2d 656,674,911 P.2d 1301 (1996)).(emphasis added)

A trial court should ascertain the parties' intent by focusing on the objective manifestations of the agreement, rather than on any unexpressed subjective

intent. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wash.2d 493, 503, 115 P.3d 262 (2005). The trial court disregarded paragraph 12 of the Farm Lease. This is contrary to long standing Washington case law which holds that a trial court's interpretation of contract provisions should give lawful effect to all the provisions in a contract which is favored over those that render some of the language meaningless or ineffective. Newsom v. Miller, 42 Wash.2d 727, 731, 258 P.2d 812 (1953).

Further, a trial court is required to interpret contract provisions to render them enforceable whenever possible. Patterson v. Bixby, 58 Wash.2d 454, 459, 364 P.2d 10 (1961). Paragraph 12 of the Farm Lease has no other reasonable interpretation or meaning. Our courts have consistently held that words used in a contract are given their ordinary, usual, and popular meaning unless the agreement clearly demonstrates a contrary intent. Hearst Communications v. Seattle Times Co. 154 Wn.2d 493,504, 115 P.3d 262 (2005). Simply put, a clear and unambiguous contract is enforced as written. McDonald v.

State Farm Fire & Cas. Co., 119 Wash.2d 724, 733-34, 837 P.2d 1000 (1992).

The trial court made an error of law by disregarding the plain meaning of Paragraph 12 of the Farm Lease and ordered arbitration of the terms of a Real Estate Sale Agreement for the appellant's family farm.

1. **ABSENT SAVING CLAUSE**

Paragraph 12 of the Farm Lease states in significant part;

Breach of Lease: Time is of the essence of this agreement, and in the event the Lessee shall fail to carry out any of the covenants or agreements herein contained, then and in such event, the **Lessor may, in addition to any other remedy, declare this Lease forfeited and immediately enter the Property and all rights and privileges herein granted shall thereon terminate as fully as though this Lease had expired by the limitations herein expressed;** provided, however, the Lessor shall deliver written notice specifying such violation to the Lessee and the **Lessee shall have thirty (30) days from the date of receipt of such notice within which to perform such agreement and thereby reinstate this Lease.** No waiver by the Lessor of strict performance of any one covenant shall constitute a waiver of any subsequent enforcement of such covenant.
(CP 17-18)

The trial court reviewed the Notice of Termination and indicated it was a judicial question but chose not to make a judicial determination. The trial court stated in its oral ruling of January 13, 2012:

13 But the situation we have here is that there is a
14 claim of a breach. **There was a notice of termination.**
15 The issue, however, of whether there was a breach, which
16 affects of, would it give a termination is not agreed.
17 It is in dispute. And by reason of that, **I feel that**
18 **that's a question that's not an arbitrator, but I**
19 **believe only a court can decide.** I could be wrong on
20 that, but that's my initial thinking. But I believe
21 that since you've got a dispute, then you've got a
22 contest here, and since the law does not favor
23 forfeitures or terminations of property rights, that at
24 this point, it's going to take a judicial determination,
25 I feel, to resolve that particular issue.

(CP 182)

...
19 So I'm going to deny the motion to stay, grant
20 the motion to compel, **and I'm doing it because you've**
21 **got a disputed issue as to whether there was a breach**
22 **and there's not been a determination made as to the**
23 **validity of the notice to terminate and that is**
24 **dependent, I feel, on whether there was a breach.**

(CP 184)

The appellant specifically brought its motion based upon the effect of the Notice of Termination and lack of a contract to arbitrate. The court failed to give effect to the Notice and the language used in paragraph 12 of the Farm Lease. It is clear as to the effect of the Notice of Termination. (CP 26-27; 31-33) The effect is a contract

remaining between the parties including paragraph 15 of the Farm Lease.

Paragraph 15 of the Farm Lease states:

Arbitration: In the event any dispute shall arise between the parties, or with respect to this Lease, then and in that event the parties shall submit such issues to binding arbitration in accordance with R.C.W. 7.04A. Each party shall appoint one arbitrator, the two arbitrators shall appoint a third arbitrator, and the three arbitrators shall meet and decide any issues submitted to them within thirty (30) days of their appointment, which decision shall be final and binding on both parties. The arbitrators shall have all powers and duties as are set forth in R.C.W. Chapter 7.04A. Venue shall be in Whitman County Washington.

(CP 19)

The arbitration clause (paragraph 15) contained no saving language in the event of the issuance of the Notice of Termination. (CP 19) The arbitration clause would therefore terminate as well, pursuant to paragraph 12.

The Webster's New World Law Dictionary © 2010

defines a saving clause as:

A provision in a statute or contract that if any clause is determined to be unenforceable, the remainder of the statute or contract will remain intact and enforceable.

In this case there is nothing to preserve a duty of the parties to arbitrate any issue upon the service of the Notice of Termination. As previously indicated the court recognized this but failed to enforce the provision with the court pointing out in its oral decision:

.....The lease terminology of paragraph 12 provides that on service of a notice of termination, that it's automatic, the lease is terminated, and the termination of the lease would also, **I believe as argued here, terminate the arbitration clause and the requirement to arbitrate.** *(Emphasis Added)*
(CP 182)

There was no duty to arbitrate and the trial court made an error of law by ordering arbitration and failing to enforce the Farm Lease provisions.

B. Assignment of Error No.2, The trial court made an Error of Law in holding that the parties must arbitrate issues related to an Option to Purchase including terms of a Real Estate Sale Agreement.

The Trial Court required the parties to arbitrate the terms of a Real Estate Sales Agreement. (CP 4) First, the appellant argued that there was no contract between

the parties as the Notice of Termination terminated the Farm Lease and all its provisions therein. (CP 213)

Although, public policy strongly favors arbitration as a remedy for settling disputes, arbitration should not be invoked to resolve disputes that the parties have not agreed to arbitrate. ACF Prop. Mgmt. Inc. v Chausse, 69 Wn.App. 913, 919, 850 P.2d 1387 (1993) (quoting King County v. Boeing Co., 18 Wn.App. 595, 603, 570 P.2d 713 (1977)). In fact our Supreme Court stated in Weiss v. Lonquist, 153 Wash.App. 502, 510, 224 P.3d 787 (2009) that parties cannot be compelled to arbitrate unless they have agreed to do so.

Once the Farm Lease was terminated there was no longer a contractual obligation to arbitrate any issue. The duty to arbitrate arises from a contractual relationship. Satomi Owners Ass'n v. Satomi LLC, 167 Wn.2d 781, 225 P.3d 213 (2009).

In this case the only contractual relationship between the parties was the Farm Lease with Option to Purchase. According to the terms of the lease itself, it was

extinguished upon issuance of the Notice of Forfeiture.
(CP 17-18)

The trial court in effect determined that there was a duty to arbitrate and that the Notice of Forfeiture did not cut off that duty. (CP 214)

Further, the trial court knew that the main issue the respondent was seeking to arbitrate was the establishment of terms for a Real Estate Sales Agreement as this issue was carried over in the first arbitration award. (CP 213)

This was done in the face of long standing law in Washington that a court cannot create terms for a contract. In Pettaway v. Commercial Automotive Service, Inc., 49 Wn.2d 650, 306 P.2d 219 (1957) at page 653 the court clearly stated that proposition by holding:

The terms of a contract must be definite and ascertainable. **Neither the court nor the jury can create a contract or create terms of a contract where the parties to the contract have failed so to do.** If any element essential to the contract has been omitted or is incapable of ascertainment, the contract is invalid and unenforceable. (*Emphasis Added*)

In this case, the trial court should have recognized

the arbitrators clearly lacked authority to create any terms for the Real Estate Sale Agreement. Further, the arbitrators included personal property (irrigation and other equipment) in with the Real Estate Sale Agreement. There was no agreement by the parties that any of these issues be arbitrated. Washington courts have held that the question of which claims parties agree to arbitrate will depend upon the nature of the claims and the scope of the clause that provides for arbitration. Townsend v. Quadrant Corp., 153 Wn.App. 870, 224 P.3d 818 (2009), review granted, 169 Wn.2d 1021 (2010). In this case the determination of terms for a Real Estate Sales Agreement was not authorized.

In argument, even if the Notice of Termination of the Farm Lease was not served, there is no duty to arbitrate the terms of Real Estate Sales Agreement. The only duty imposed upon the parties under the arbitration clause was to arbitrate disputes. The establishment of terms for a Real Estate Sale Agreement is not the arbitration of a dispute but rather the creation of terms for a contract.

The establishment of terms to a contract by arbitration was not agreed to by the appellant.

C. Assignment of Error No.3, The arbitrators made an Error of Law by holding, if the parties could not agree on the terms of a Real Estate Sale Agreement, the arbitrators would decide the terms.

On February 10, 2012 the trial court confirmed the arbitration award dated January 19, 2012. (CP 248-249) The confirmation Order indicated that it was a final order regarding the issue of the Option to purchase and Real Estate Sale Agreement. (CP 249) The first arbitration award regarding the Option to Purchase and Sale Agreement was entered on January 3, 2011. (CP 1-5) In the first arbitration award the arbitrators held at paragraph 2 and 2.1 as follows:

2. Option. The option to purchase within the Cash Lease Farm Lease with Option to purchase is valid subject to the following:

2.1 The parties shall mutually agree upon the terms, covenants and conditions of a contract of sale consistent with the Cash Rent Farm Lease by January 1, 2012. **If the parties are unable to reach an agreement by that date as to the**

terms, the arbitrators reserve jurisdiction to issue a further arbitration award pertaining to the terms of the proposed contract of sale.
(*Emphasis Added*) (CP 4)

The arbitrators committed an error of law on the face of the first arbitration award in retaining jurisdiction to create terms of the Real Estate Sale Agreement if the parties failed to agree on contract terms. The fundamental principle to establishing a contract is the “meeting of the minds”. It is black letter law that an enforceable contract requires a “meeting of the minds” on the essential terms of the parties' agreement.” McEachern v. Sherwood & Roberts, Inc., 36 Wash.App. 576, 579, 675 P.2d 1266 (1984) (citing Peoples Mortgage Co. v. Vista View Builders, 6 Wash.App. 744, 496 P.2d 354 (1972)), *review denied*, 101 Wash.2d 1010, 1984 WL 287410 (1984).

Here, the basis for the arbitrators retaining jurisdiction and creating contract terms was the parties' failure to reach “a meeting of the minds”.

The arbitrators had no authority to establish terms to a contract. It is well established law in Washington that

a court cannot create terms for a contract. In Pettaway v. Commercial Automotive Service, Inc., 49 Wn.2d 650, 653, 306 P.2d 219 (1957) our Supreme Court clearly stated that proposition by holding:

The terms of a contract must be definite and ascertainable. **Neither the court nor the jury can create a contract or create terms of a contract where the parties to the contract have failed so to do.** If any element essential to the contract has been omitted or is incapable of ascertainment, the contract is invalid and unenforceable. (*Emphasis Added*)

The arbitrators clearly ingnored Washington case law in creating terms of the Real Estate Sale Agreement. Further, the arbitrators included personal property (irrigation and other equipment) in with the Real Estate Sale Agreement. (CP 252) The arbitrators further awarded farmland water rights under the Real Estate Sales Agreement which were never discussed. (CP 253)

The arbitrators further exceeded their authority by requiring the appellant to produce a bill of sale and or depreciation schedules of the appellant's personal property. (CP 252) This abuse of authority by the arbitrators continued by their holding that if tax schedules

were not provided by the appellant, the irrigation wheel line (personal property) of the appellant's son, would also be included in the Real Estate Sale Agreement. (CP 253)

The arbitrators continued their abuse of authority by holding that any personal property belonging to the appellant not removed from the appellant's rental property by March 19, 2012 would be included in the real estate sale agreement. (CP 253)

The arbitrators exceeded their authority by adding terms to the Farm Lease holding that the appellant must clean up a farm dump site which has been used for years to be cleaned up by March 10, 2012 or costs for its clean up will be assessed against the appellant. (CP 254)

The arbitrators exceeded their authority by adding terms to the Farm Lease holding that the appellant must immediately assign over to the respondent all utilities and metering related to the farm lease property. (CP 254)

The arbitrators rounded out their abuse of authority by holding that all other equipment owned by the appellant not removed by March 19, 2012 would become

property of the respondent. (CP 253)

None of the above terms were agreed to by the appellant nor discussed with the respondent. The arbitrators exceeded their authority expressed on the face of the arbitration awards and committed an Error at Law in so doing.

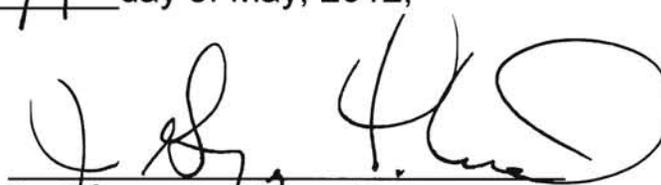
V. CONCLUSION

This court after its review of the facts in this case and the plain meaning of the Farm Lease, should find that the trial court committed error in not holding the parties contract and the duty to arbitrate was terminated by the Notice of Termination of the Farm Lease.

Further, this court of review should find that the trial court committed an error at law by ordering the arbitration of the terms of a Real Estate Sale Agreement.

Finally, this court should hold that the arbitrators exceeded their authority in retaining jurisdiction to create the terms of a Real Estate Sale Agreement if the parties could not agree on the terms.

Dated this 11th day of May, 2012,



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CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on May 14, 2012, I caused to be served a copy of the foregoing APPELLANT HONN'S

BRIEF to the following listed party(s) via the means indicated:

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DATED May 14, 2012.


LORRIE HODGSON