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No. 361136

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RONALD THORNHILL and MADELINE THORNHILL,
Husband and Wife, Respondent

v.

KRISTOPHER ROBINSON, JENNIFER KRAFT, and all other
Occupants of 422 Barth Ave., Richland, WA 99352, Appellant

REPLY BRIEF OF APPELLANT

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I. RESTATEMENT OF CASE

Unlawful detainer proceedings are summary in nature and do not provide a forum for litigating title. *Puget Sound Inv. Grp, Inv. V. Bridges*, 92 Wn. App. 523, 526, 963 P.2d 944 (1998); 35A Am. Jur. 2d Forcible Entry and Detainer § 11 (West 2018) (“[W]hen a question as to the plaintiff’s title is directly and inextricably involved in an action for unlawful detainer and related damages, the action will not lie and cannot be maintained.”). This case presents a bona fide question of title which cannot be resolved in an unlawful detainer proceeding and must be resolved by a full civil proceeding to quiet that title question.

Madeline and Ron Thornhill purchased the home in this case for the purpose of selling it to the Robinsons. VRP1 53:17-53:22 (Ron Thornhill stating they “would be willing to come in and find a place, build some equity in it for them”); VRP 54:24-55:6 (Ron Thornhill describing the intention that Kris would refinance or payoff the loan after five years); VRP1 55:8-55:11 (Ron Thornhill saying they reached agreement on the “dollar amount”

and what Kris's "payment toward the equity was, based on the amortization chart."); VRP1 54:22-54:24 (Ron Thornhill stating the amortization table was used to show Kris how much equity they would have when they hit the 5-year point). The parties reached a friendly agreement and, without the assistance of an attorney or real estate professional, made their own agreement titled a "Rent to Own Agreement" (the "Contract"). CP 4 (emphasis added); CP 60:21-25 (lease was pulled from the internet).

The home was not habitable in the state in which it was purchased by Thornhills, VRP1 18:2-18:7, *see* VRP1 56:2-56:6 ("there was a lot of improvements"), and Kris, via the Contract, obligated himself to make the improvements to the home including those initially necessary to make the home habitable. CP 4 (contract states "Tenant shall have the obligation to conduct any construction or remodeling that may be required to use or improve the Premises . . ."). Kris made those improvements. VRP1 18:2-18:7; VRP1 56:2-56:17.

The improvements were paid for by both the Thornhills and Kris. Kris paid approximately \$8,000 out of pocket and Thornhills financed approximately \$20,000 and added that to the agreed upon purchase price of \$170,000. CP 89:13-89:19; VRP1 56:2-56:6. The \$170,000 was amortized out over 20 years at 4.5% interest to establish Kris's payments which included the financed improvements. VRP1 34:15-34:21; VRP1 54:21-

56:9. Through these payments, Kris was paying Thornhills back for the improvements they financed because it was amortized into the payments, with interest.

Thornhills utilized the amortization table “because [they] wanted to give [Kris] a dollar number that they would have as equity when they hit the five-year point.” VRP1 54:21-54:25. By the time Thornhills commenced the unlawful detainer proceeding, Thornhills had been paid \$44,933 under the Contract, CP 17, and to date have been paid \$63,133 by Kris. The Contract required Kris to pay the remaining purchase price of \$141,136.23 in September 2019 at the end of the five-year Contract term. CP 4. That remaining balance correlates precisely to the principal amount remaining on the amortization table as of September 2019. CP 17. At that time Kris would have accumulated \$28,863.77 in equity in the home. CP 17 (difference in principle between initial and remaining balance); *See* VRP1 54 (Ron Thornhill stating the amortization table was to show Kris how much equity he would have in the home).

II. COUNTER-ARGUMENTS

II.1. Respondent argues form over substance by focusing on legal terms of art imprecisely used by the non-lawyer drafted Contract.

The Contract has numerous defects and does not comply with the legally required formalities for a lease, RCW § 65.08.060 (lease over 2

years is “conveyance”), a real estate contract, RCW § 64.04.010 (“conveyance” to be by deed), or a residential rental agreement. RCW § 59.18 *et seq.* (Contract exempted Thornhills from landlord’s duty to maintain premises, RCW § 59.18.060, without the required waiver, RCW § 59.18.230, which requires approval of state or Tenant’s attorney to actually be waived and in compliance with the Act. RCW § 59.18.360).¹ The Contract also leaves out the material terms that would be required to specifically enforce a contract that wasn’t otherwise saved by part performance. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). The Contract here in our case, the trial court determined, was saved by partial performance, CP 81.

Considering the multitude of technical deficiencies in the Contract and the admitted lack of legal sophistication of the parties, CP 59:25-60:2 (Thornhills’ additional briefing following evidentiary hearing), it is doubtful the parties used the terms “lease,” “landlord,” and “tenant” with the full import of their precise definitions as legal terms of art in mind when they prepared the Contract. It would be inappropriate to place form over substance by relying on the terms selected by non-attorneys to draft a

¹ Argued orally in court below. VRP3 7:16-8:25.

friendly agreement to determine the true reality of a parties' partially and substantially performed agreement especially where the actual reality is inconsistent with those terms. It would be a rare residential tenant that would be willing to invest such time, money, and effort into a mere rental and a rare landlord to establish rent based off an amortization table with partial payments allocated to the tenant's equity in the rental. VRP 54:22-54:24.

II.2. The conclusion that Thornhills agreed to sell the home to Robinsons is supported by the record.

On direct examination Ron Thornhill testified in an evidentiary hearing that “. . . one of the things Chris [sic] and Katie had talked about was that they *were renting* and they really *wanted to have* a home.” VRP 53:18-53:20 (emphasis added). He then immediately testified:

So we talked about being able to help them do that. I've done it for my son, Ben, done it for my daughter. I've done it for my cousin.

So we talked about we would be willing to come in and find a place, build some equity in it for them. Fund the fixing, putting everything together, and then it up so that they could use it to build their credit and to build up, you know, some, you know -- to start moving forward -- a little more forward in life, and so we did. We set it up. We found the house. They found a house. We were all looking together. We then decided it was going to work. It was all a mutual thing.

VRP 53:20-54:6. Thornhills wanted to help Kris go from *renting* a home to *having* a home and then set up a transaction to do just that

with him by finding a house, *id.*, determining that \$170,000 was the appropriate amount, VRP 56:6, and laying out an amortization schedule at 4.5% interest to show Kris just how much *equity* he would have in five years when he was to “then [pay] off the loan, or basically [refinance] at that point . . .” VRP 54:22-55:3; *See also* VRP1 34:15-34:1 (Plaintiff’s opening statement referring to the arrangement as a “loan”). Kris agreed to pay taxes, insurance, utilities, and maintenance, CP 59:15-59:21, just as a vendee under a real estate contract or a purchaser under a note and deed of trust would traditionally do, because “[t]he intent was that the Robinsons would purchase the home after a set time, if all the obligations were met [and it] would be illogical to expect the Thornhills to pay the obligations” because they were standing in the place of a vendor or seller, *not* a landlord. CP 62:24-62:26.

The Contract itself, aside from the parties orally agreed terms, is consistent with a purchase as opposed to a rental in that it calls for “monthly *installments* of \$1,075.50” as opposed to rent. CP 4 (emphasis added). The monthly installment payment did not include taxes and insurance because they did not want Kris to pay interest on those items, CP 62:10-62:13, they agreed to all those amounts separately and in addition to the monthly installments.

CP 59:15-59:17.

That testimony and this record provides more than adequate support for the conclusion that Thornhills agreed to buy and then sell the home to the Robinsons to help the Robinsons go from *renting* a home to *having* a home and have the Robinsons stand in the place of a purchaser. VRP 53:20-54:6.

II.3. The option language in the contract does not constitute an option to purchase.

Respondent again argues form over substance by pointing to the Contract's inclusion of a provision entitled "Option to Purchase" as conclusively establishing the Contract cannot be a real estate contract. Brief of Respondents 8-9 (*citing* RCW § 6161.30.010(1)). The "option to purchase" provision does not operate as an option contract and the form should not be elevated over the substance.

The statute does not define an "option to purchase." The Restatement found it important to point out the imprecise use by law trained professionals of the term "option" and the associated risk of confusing what is merely "any continuing offer, even though revocable" or "any power to make a choice" with an "option contract." Restatement (Second) of

Contracts § 25 (1981) cmt a.²

One definition provides that “a purchase option is regarded as an offer by the optionor to sell to the optionee, which offer is irrevocable for the period of its duration.” 17 Wash. Prac., Real Estate § 6.61 (2d ed.). The Restatement provides “[a]n option contract is a promise which meets the requirements for the formation of a contract and limits the promisor’s power to revoke an offer.” Restatement (Second) of Contracts § 25 (1981). An option contract for real estate must also specify all terms essential to form the future contract it contemplates before a court can specifically enforce it. *Kruse*, 121 Wn.2d at 722.

In the present case, the Contract provides:

OPTION TO PURCHASE. Tenant, upon satisfactory performance of this Lease, shall have the option to purchase the real property described herein for a purchase price of \$141,136.23. Each parties [sic] shall promptly execute any and all further instructions or other documents, including Sales Agreement which may be reasonable required for purchase of the real property.

This provision does not define a timeframe in which the “option” could be

² Comment a. in full states:

a. “Option.” A promise which constitutes an option contract may be contained in the offer itself, or it may be made separately in a collateral offer to keep the main offer open. Such promises are commonly called “options.” But the word “option” is also often used for any continuing offer, even though revocable, and indeed is sometimes used to refer to any power to make a choice. To avoid ambiguity the phrase “option contract” is used in this Restatement.

exercised and conditions it only upon satisfactory performance of the lease. Without the timeframe limitation and read in isolation, the optionee could exercise the option so long as he is satisfactorily performing the lease by tendering the purchase price to the Thornhills. Considering Thornhills amortized the home based on \$170,000 purchase price, VRP 56:6, it is doubtful their intention was to allow Kris to purchase the home at the beginning of the term at such a steep \$30,000 discount.

When the Contract is read as a whole and in context with the parties' extra-contractual agreements, their course of performance, and this record, the more logical conclusion is that the Contract's "option" language was, in substance, a required balloon payment to pay off the "loan" and not an option contract. VRP 55:2 (Thornhill on Direct).

The Contract required Kris to pay Thornhills \$64,530.00 in "installment payments" over five years. CP 4. The installment payments did not include Kris' agreement to also pay the utilities, insurance, taxes, and maintenance of the home because the parties didn't want him paying interest on those things in addition to the \$170,000 principle amount. CP 59:15-59:21. It required *him* to make the home habitable and make any further improvements, CP 4, and, although not expressly stated in the contract, the parties agreed Kris would bear the ultimate expense of those improvements because they were paid directly out of his pocket or amortized into the

installment payments. VRP1 18:2-18:7; VRP1 56:2-56:17. Once those prior obligations were satisfactorily performed, he had the month of September 2019 to pay off or refinance the loan of \$141,136.23, CP 4, VRP1 55:1-55:4, after deducting the *equity* he accrued over the previous five years, VRP1 54:22-55:3, an amount that coincides perfectly with the amortization table 60th period principle balance. CP 17. The “option to purchase” provision in the Contract was not an option contract, it was a balloon payment demanding the loan be paid in full by the end of September 2019. Consequently, it not expressly excluded from application of the real estate contract forfeiture act as an option contract.

II.4. Assuming arguendo the option language did constitute an option, the Court should have exercised its power in equity to save the harsh and unjust result of forfeiture.

Assuming arguendo that it was an option contract gives rise to a wholly different problem for Respondent’s position based on the courts’ abhorrent view of forfeitures. “An option contract must meet the requirements for the formation of a contract and limits the promisor's power to revoke an offer.” 25 Wash. Prac. Contract Law § 2:16 (2d ed.). If Kris did have an option, it would have had to be forfeited in order to terminate his interest in the property and the courts search to find waivers to save the harsh and unjust results of forfeiture. *Kaufman Bros. Const., Inv. v. Olney’s Estate*, 29 Wn. App. 296, 300, 628 P.2d 838 (Div. 3 1981) (*quoting*

Stevenson v. Parker, 25 Wn. App. 639, 647, 608 P.2d 1263 (1980)).

“[F]orfeitures are not favored in the law, and [courts] should promptly seize upon any circumstance arising out of the contract or relations of the parties that would indicate an election or an agreement to waive the harsh and at time unjust remedy of forfeiture.” *Id.* “It is equally well established, however, that forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial.” *Id.* (quoting *Dill v. Zielke*, 26 Wn.2d 246, 252, 173 P.2d 977 (1946)).

In *Kaufman*, lessee entered a lease for farm property requiring \$1,000 biannual payments to be made to lessor and provided the lessee an option to purchase the farm for \$30,000. *Id.* at 298. The option could be exercised any time during the five-year term and the lease payments would be credited against the purchase price. *Id.* The lessee’s failed to make all but one payment on time and the lessor accepted them without taking any further action. *Id.* The property had appreciated over the term and the lessee invested \$10-\$15k in improvements. *Id.*

The lessee attempted to exercise the option three days prior to expiration and the lessee’s last payment was five months past due. *Id.* at 297-98. The lessor summarily declared the option forfeited and rejected their request to exercise it. *Id.* at 298. The lessor then encumbered the farm as security for a note which was defaulted and the farm was foreclosed and

sold at auction. *Id.*

The *Kaufman* court reversed the trial court and reinstated the lessee's superior right to performance of the option. *See id.* at 302. After discussing in depth the policy against forfeiture, *id.* 299-00, that court stated nonpayment of rent does not automatically terminate a lease option, the lessor waived the right of forfeiture for past breaches by accepting payments, and a lease option is not terminated without "an objective manifestation of his intent to declare a forfeiture." *Id.* at 300.

Forfeiting Kris's option contract on October 2017 after 36 months into Kris's performance of the Contract after investing money and effort into improvements of the property would operate as an inequitable and unjust forfeiture of a valuable right represented by his improvements, his accrued equity from prior payments, and the appreciation of the home's value. Such a forfeiture would be inequitable and unjust under the facts here and should be avoided. The basis of the forfeiture at that time was premised on the difference between the \$44,933.00 that Kris *had paid* and the \$47,493.11 he should have paid according to Thornhills's calculations claiming past due rents from October 2014 and April 2015 as the primary

basis for the forfeiture. Thornhills had, apparently,³ never previously taken any prior action to collect those payments which operates as a waiver of the right to forfeiture based on said payments. *Id.* at 299.

The Contract does not spell out what, if any, limitations on revocation are imposed on Thornhills nor does it state with any specificity what defaults would automatically and strictly cause such a forfeiture. CP 4-5. The Contract does not clearly demand forfeiture for the missed payments and before making such a declaration a court must consider “every agreement, every declaration, and every relation of the parties arising out of the contract, and if there be anything that warrants a finding that the parties have resolved anew, it will so decree.” *Id.* at 300 (*quoting Stevenson*, 25 Wash. App. at 647).

In the present case, Kris is, at this time, current on all amounts due to Thornhills and Thornhills would not be denied the benefit of their bargain to receive the \$64,530 in payments and the principle balance of \$141,136.23. The defaults had previously gone unenforced and the amount claimed in arrears was relatively small in relation to the amount that should

³ The record shows no indication of notice and reasonable opportunity to cure having been given prior to the unlawful detainer proceeding’s commencement. The Contract’s provides no notice and cure mechanism in its express terms.

have been paid at the time the action was instituted, \$2,560.11 claimed versus \$44,933. CP 2:4-2:13 (Complaint). Forfeiture would operate to unjustly deny Kris the benefit of his improvements, his accrued equity, and the appreciation in value of the home and would enrich the Thornhills with Kris's effort and expense into the improvements, the appreciation over that time, the interest that was paid, and the reversion of his equity back to the Thornhills. This is the type of case where the Court should have exercised equity to save the option, if one existed, from the harsh and unjust remedy of forfeiture.

II.5. The Contract and the parties' performance of the Contract establish that Kris had a purchase interest encumbering title not subject to a summary unlawful detainer proceeding.

There is no dispute the Contract was not executed with all essential and material terms spelled out in black and white. The Contract does not strictly comply with the rules for leases of more than two years, for real estate contracts, or even for residential rental agreements. *See* § 1.1 *supra* (citing to various statutes for which the Contract fails to comply). The Contract combined with the parties' actual performance supplies the context, and the rest of the parties' agreement, which takes the parties' relationship arising out of the Contract outside the confines of purely a possessory interest and into that of a purchase interest where the occupant stands in the place of a purchaser encumbering title where whom holds

superior title must *first* be determined and is a subject that cannot be addressed in unlawful detainer's summary proceedings. *See eg.* 35A Am. Jur. 2d Forcible Entry and Detainer § 11 (West 2018) (“[W]hen a question as to the plaintiff's title is directly and inextricably involved in an action for unlawful detainer and related damages, the action will not lie and cannot be maintained.”); RCW § 59.18.040 (expressly excepting application of the Residential Landlord Tenant Act from application to occupancies where the occupant stands in the place of a purchaser).

Of the various forms of traditional real estate purchases; either a real estate contract (“REK”), a note and deed of trust, cash sale, or lease with option contract to purchase; the Contract at issue here and the parties’ relationship arising from it most closely analogizes with that of a REK. There are numerous formal and technical shortfalls to the Contract, but there “were clearly numerous terms that were not put in writing, but were agreed to amongst the parties.” CP 59:23-59:25 (Thornhills’ additional briefing to the trial court arguing Kris agreed to pay for taxes and insurance even though the Contract did not state it).

Thornhills established the “monthly installments” of \$1,075.50, CP 4, upon a purchase price of \$170,000, VRP 56:6, amortized over 20 years at 4.5% interest. VRP 55:5. This amortization was intended to show Kris how much equity he had in the home when it was time for him to payoff the

loan. *See* VRP 54:22-55:3. He had to make a final payment of \$141,136.23 in September 2019 to pay-off the principle balance remaining on the “loan” at that time. CP 4. The parties’ agreement also required Kris to make all required and desired improvements to the home which were to be paid by him either directly out of pocket or through the total amount financed by Thornhills. CP 4; VRP 56:2-56:6 (Ron Thornhill explaining the addition of improvements they purchased running the principle amount up to \$170,000).

The Contract is not acknowledged and because of that does not comply with the formal requirements as either a lease of more than 2 years or a conveyance in the form of a recorded real estate contract. There are two equitable doctrines that can save an REK from noncompliance with formalities; purchaser ratification and doctrine of part performance both of which are applicable here. 18 Wash. Prac., Real Estate § 21.5 (2d ed.). The trial court found the Contract saved by partial performance despite the shortfalls. CP 81.

By taking possession of the property and making payments Kris performed “to some extent” under the Contract thereby ratifying it. 18 Wash. Prac., Real Estate § 21.5 (2d ed.). Partial performance can save even a completely oral REK and by taking possession, making \$44,933 of the Contract’s required \$64,530 total installment payments, and by making

approximately \$28,000 of improvements to the real property financed into the installment payments the Contract was partially, if not substantially, performed and saved from its formal deficiencies. *Id.* (citing *Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993)). The failure to provide a legal description is also of no consequence once the purchaser takes possession of the property not properly described in the writing. *See eg. Zinn v. Knopes*, 111 Wn. 606, 608-09, 191 P. 822 (1920). Not surprisingly, the trial court below found the Contract to be specifically enforceable under the partial performance doctrine. CP 81.

The fact the Contract does not spell out the mechanism for forfeiture, is not recorded, and remains unacknowledged does not prevent Thornhills from exercising the statutory remedy of forfeiture. RCW § 61.30 *et seq.*; 18 Wash. Prac., Real Estate § 21.5 (2d ed.). The act does not void an unacknowledged REK and a vendor needs only record a memorandum of the REK acknowledged by the vendor to access the forfeiture remedy exclusive to REKs. *Id.*; RCW § 61.30.030(1).

Treating the parties' relationship arising from the Contract as a REK and applying the forfeiture remedies to it would be the most equitable outcome to this case. It would have provided both parties' adequate protections for their respective interests in the Contract; the Thornhills could regain ownership, keep the prior payments, and the benefit of their

bargain and Kris would have had reasonable notice and opportunity to cure any deficiency to prevent summary forfeiture of all he has invested. The reasonableness was the measure by which courts reviewed forfeitures prior to the foreclosure act and would attempt to find waiver where justified because the courts “abhor forfeitures. 18 Wash. Prac., Real Estate § 21.30 (2d ed.). Kris should be entitled to the protections of the act as an individual standing in the place of a purchaser.

II.6. Bar K Land Co. v. Webb is on point for the proposition unlawful detainer is inapplicable to situations where the occupant stands in the place of a purchaser.

The occupant in *Bar K Land Co. v. Webb* still stood in the place of a purchaser after her right to purchase had expired because the parties had treated her as and regarded her as a purchaser. 72 Wn. App. 380, 385, 864 P.2d 435 (Div. 3 1993). By the time the unlawful detainer proceeding was commenced, the earnest money agreement had long since expired having gone nearly nine months beyond closing. *Id.* at 381-82. Because the relationship was entered by the parties with the understanding that she was to be the purchaser and she relied upon that status, the relationship could not be treated as a landlord-tenant relationship upon default and any remedy had to be pursued via an ejectment action not an unlawful detainer proceeding. *See id.* at 385.

In the present case, Kris intended to purchase the home and

Thornhills setup the transaction with the intention of Kris eventually purchasing the home. II.2 *supra*. Whatever the parties' relationship arising from the Contract is, it is not purely a landlord-tenant relationship and cannot be resolved in an unlawful detainer proceeding where the question as to superior title cannot be resolved.

III. CONCLUSION

The parties' relationship arising from the legally unsophisticated and unartfully drafted Contract is not a landlord-tenant relationship where the only question is the right to possession. The record fully supports the conclusion that a purchase interest was conveyed to Kris and his interest was more than a mere possessory interest. Respondent's heavy reliance upon form over substance by relying upon the imprecise use of legal terms of art in the parties' Contract disregards the reality of the parties' relationship. Respondents argued just the opposite to convince the trial court to disregard the form with respect to determining Kris' payment amount because the parties had agreed to numerous terms that were not put into the Contract, CP 59:15-61:12, CP 62:3-63:3, and simultaneously argue the substance to be avoided to disregard Kris's standing as a purchaser.

Because this relationship is not a landlord-tenant relationship and Kris does stand in the place of a purchaser under the parties' Contract and extra-contractual agreements, the summary unlawful detainer proceeding

should not apply as it does not allow the full breadth of the parties' respective interests to title to be protected or litigated. The question as to superior title cannot be resolved in such a proceeding, has yet to be resolved, and this unlawful detainer proceeding should be dismissed and the parties directed to rely upon the REK forfeiture remedial mechanism or other relief in a full civil proceeding which could be consolidated with or added to the other concurrent civil action simultaneously commenced by Thornhills against Kris in the trial court below.

Respectfully submitted this 13th day of December, 2018.



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