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STATE OF WASHINGTON
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No. 87395-0

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SUPREME COURT OF THE STATE OF WASHINGTON

PATRICK H. KOFMEHL, an individual,

Plaintiff/Petitioner,

v.

BASELINE LAKE, LLC, a Washington limited liability company,

Defendant/Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER KOFMEHL

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I. SUPPLEMENTAL ARGUMENT

“Void or illegal real estate contracts create a common law right in rescission.”¹

“[R]escission seems to me like a slam dunk in this case. Because the parties didn’t agree on anything. At least not in terms of the writing required by law. There is no contract. Isn’t that -- isn’t that it?”

(Baseline’s counsel) MR. AHREND: Well, the contract’s void....”²

Baseline Lake, LLC’s (“Baseline”) posturing and argument regarding who has the burden of proving the contents of the underlying contract is nothing more than a red herring. Answer to Petition for Review, p. 8, ¶ 1. The dispute in this matter is not over who has the burden of proof regarding “*whether the vendor is ready, willing and able to perform as agreed.*” *Id.* Instead, the dispute here was whether or not a contract had been formed and, if so, who bore what obligations.

Because the Trial Court voided the contract as a result of its holding that “*the parties didn’t agree on anything,*” there was no contract left to be interpreted, and no obligations, legal or equitable,

¹ Hornback v. Wentworth, 132 Wn. App. 504, 513 (2006), citing Gilmore v. Hershaw, 83 Wn.2d 701, 704 (1974).

² RP 10/12/2010, p. 19, l. 17 – p. 20, l. 23 (emphasis added).

to be performed. As a result, Baseline's primary argument that "*restitution and rescission are unavailable if the vendor is ready, willing, and able to perform as agreed,*" does not assist them. Answer to Petition for Review, p. 10, ¶ 2.

Here, the Trial Court determined the parties had not agreed, "*on anything,*" and as a result rendered the purported contract void. When a contract is void, there is no contract; and therefore, no foundation exists comprising a legal or equitable obligation of either party. Accordingly, Baseline has found itself in the possession of money which it has no legal or equitable right to retain, thus mandating restitution.

A party who successfully rescinds a contract is entitled to be restored to the "*position they would have occupied if no contract had ever been made.*" Hornback, 132 Wn. App. at 513 (citations omitted); Hackney v. Sunset Beach Investments, 31 Wn. App. 596, 601-02, (1982); Thompson v. Hunstad, 53 Wn.2d 87, 91 (1958) (citing Cone v. Ariss, 13 Wn.2d 650 (1942); Home Realty Lynnwood, Inc., 146 Wn. App. 231, 240 (2008)). After all, the major

underlying objective of restitution is to prevent unjust enrichment to either party. Restatement, Sec. 376 at 222.

Baseline's argument that Kofmehl bears the burden of proving Baseline was not ready, willing and able to perform as agreed is simply an argument seeking impermissible reformation of a voided contract. However, Washington law does not support reformation of a voided contract allowing one party to retain benefits to which it has no legal or equitable right.

Washington State only allows reformation "*on the ground of mutual mistake where such mistake is indicated by clear and convincing evidence... [showing] that the intention of the parties was identical at the time of the transaction and that the written agreement did not express that intention.*" Lofberg v. Viles, 39 Wn.2d 493, 498 (1951); Tenco, Inc. v. Manning, 59 Wn.2d 479, 483 (1962).

It is undisputable that a void or illegal real estate contract creates a common law right of rescission. Hornback, 132 Wn. App. 504, 513 (2006). Parties successfully rescinding a contract are entitled to be restored to the "*positions they would have occupied if*

no contract had ever been made.” Id.; see also Hackney, 31 Wn. App. 596, 601-02, (1982); Thompson v. Hunstad, 53 Wn.2d 87, 91 (1958). Although Washington courts appear to have created an exception to the general rule that a rescinded contract leads to restitution, that exceptional bar to restitution applies only where the would-be purchaser, or vendee, is “*in default*” or in “*in breach.*” Home Realty of Lynnwood v. Walsh, 146 Wn. App. 231, 240 (2008); Gillmore v. Green, 39 Wn.2d 431, 437 (1951). In other words, for the exception to apply, the purported terms must be capable of identification so that a court could determine whether one party is “*in default*” or “*in breach.*” Id.

Essentially, the rule avoids the inequity that would occur if a buyer breaches a contract but escapes liability for that breach by exercising the statute of frauds. Id. Unlike the case at bar, in both Home Realty and Gillmore, the parties did not dispute what property was subject to the alleged real estate contract. Id. Thus, the Court was in a position to determine whether one party was “*in default*” or “*in breach.*” Id.

Accordingly, here, allowing Division III's decision to stand will result in diverging opinions and distorted case law. Courts will thereafter be placed in the position of assigning terms to contracts that have been determined nonexistent due to the parties' inability to agree. Such a decision is contrary to established law. Washington courts neither impose their own terms nor "reform" real estate contracts when the subject "*agreement fails to satisfy the requirements for formation of a contract for the sale of land.*" Halbert v. Forney, 88 Wn. App. 669, 676-77 (1997). Rather, "[N]egotiation, not litigation, is the proper method to agree upon those vital terms." Id. Here, Baseline's continued request that this Court burden Kofmehl with disproving Baseline's subjective interpretation of the PSA simply ignores established Washington law.

II. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Based on RAP 18.1, Patrick H. Kofmehl respectfully requests an award of reasonable attorney fees and costs incurred on appeal. A party may be awarded attorney fees based on a contractual fee provision at the trial and appellate level. See e.g., Renfro v. Kaur,

156 Wn. App. 655, 666-67 (2010). Here, the Agreement provided that the prevailing party is entitled to recover his/her attorney fees. CP 75-77.

III. CONCLUSION

This Court should affirm the Final Judgment and related Orders of the Trial Court.

DATED this 5 day of October, 2012.

DUNN & BLACK, P.S.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2012, I caused to be served a true and correct copy of the foregoing document to the following:

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SUSAN C. NELSON

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Dear Sir/Madam:

Attached for filing please find the **Supplemental Brief of Petitioner Kofmehl**.

This is in the matter of Kofmehl v. Baseline Lake, LLC, Case No. 87395-0, and being filed by:

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Thank you. Please do not hesitate to contact us if you have questions.
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