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No. 97690-2

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

BORTON & SONS, INC.,
a Washington state corporation

Plaintiff / Appellant

v.

BURBANK PROPERTIES, LLC,
a Washington state limited liability company

Defendant / Respondent

**BRIEF OF APPELLANT
BORTON & SONS, INC.**

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I. INTRODUCTION

Two commercial parties entered into an agricultural lease with an option to purchase the property. The lease period spanned three crop years but the option to purchase the property had to be executed not later than two years into the lease. It is undisputed on this record that the optionee failed to timely exercise its option to purchase the property under the terms of the contract.

The long-accepted rule with respect to options to purchase real property states that deadlines in such contracts involving real estate are strictly construed and enforced. If this Court were to apply the prevailing rule in this case, it is undisputed that the option to purchase the property was not timely exercised and the option thus terminated.

In response to the declaratory judgment action filed in this case, the respondent sought to argue an exception to this rule that a court could impose an “equitable grace period” to change the contract terms so that the late exercise of the option would now be deemed timely. While this is a recognized theory, it only applies in “special circumstances” and then only in “very limited” situations. Respondent’s arguments below sought to enlarge the scope of this

exception to simply allow the Court to re-write the contract entered into by the parties. It was error to do so.

There should be no such expansion of the exception to the standard rule in this case. When the exception to the rule swallows the rule, maybe it's time to better define the rule or, at the very least, re-examine how the rule is applied. Boiled down to its essence, this is a simple contract case, where the parties' agreed, unambiguous deadlines should have been enforced. The Respondent failed to comply with the terms of the option to purchase and should not now be allowed a second bite at the apple. The option terminated by its terms. The contract should be enforced as written and agreed to.

The case involves the sale of about 135 acres of irrigated farmland located in the Columbia Basin in Walla Walla County, just Southeast of Pasco¹ in February 2016. The sale was from Respondent (hereinafter "Burbank Properties") to Appellant (hereinafter "Borton") for a sales price of \$1,550,000 in cash paid by Borton to Burbank Properties. The transaction allowed Burbank Properties to lease the land for only three crop years after the sale and granted

¹ The property is a total of 163.78 acres. Of that, 153 acres appear to be irrigable, but only 135 acres is actually irrigated for crop production. (CP 119).

Burbank Properties the option to re-purchase the property, but that option had to be exercised no later than December 31, 2017.

Burbank Properties had the right to exercise its purchase option anytime after the lease started. Burbank Properties had 674 days in which to exercise its option to purchase the property under the terms of the written lease. There was nothing ambiguous about the deadline its own attorney drafted. Burbank Properties could have exercised its option on day 1, or day 674, or any day in between. It did not. Because it failed to timely exercise the option, Burbank Properties asked the trial court for an equitable “do-over” or extension.

The rule in this case is undisputed. Options to purchase real estate need to be timely exercised in strict accordance with their terms. The parties entered into a written contract which unambiguously set forth the terms for Defendant to lease and possibly buy back the property at issue in this case. However, that option had to be exercised no later than December 31, 2017. Defendant did not do so.

Defendant asks this Court to re-write the parties’ contract under the guise of equity. As a matter of law, Defendant is not entitled to any such equitable relief. There is no basis to do so on the

undisputed record. There is no inequitable forfeiture at issue in this case. Defendant cannot meet the legal threshold adopted in a line of Washington cases to be entitled to such relief. Even if it could, this Court should exercise its discretion to hold Burbank Properties to the clear contract it signed.

Additionally, Burbank Properties admitted on the record that it was not ready, willing and able to exercise the option (at the time it sent the late notice of exercise or even when the trial court was considering the parties' cross motions for summary judgment) and therefore Burbank Properties' motion should have been denied and Borton's motion should have been granted.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in its granting of Burbank Properties' Motion for Summary Judgment and entering the Judgment in this case.

Issues Related to Assignment of Error No. 1:

1. Did Burbank Properties timely exercise the option to purchase the property at issue in this case per the terms of that option?

2. If the Court is inclined to address whether Burbank Properties is entitled to an “equitable grace period” in which to exercise the option outside the express terms of the contract, has Burbank Properties met the threshold requirements for the Court to even consider such equitable relief? In particular, is this the type of agreement amenable to such relief and did Burbank Properties install any permanent substantial improvements to the property that would constitute an inequitable forfeiture if it were to not be allowed to exercise the option?
3. Even if the Court were to determine that an equitable relief analysis is applicable do the undisputed facts of this case warrant the granting of such relief?
4. Can the Court decide this issue as a matter of law or do issues of fact exist which would mandate that this case be reversed and remanded back to the trial court for decision at trial on any of these issues?
5. Was it error to grant Burbank Properties’ summary judgment for specific performance of the option agreement where the

record shows Burbank Properties was not “ready, willing and able” to purchase the property and where its attempted late exercise was not unconditional?

6. Is the defendant Burbank Properties entitled to an award of attorney’s fees when it has only prevailed on an equitable basis and not on the contract?
7. Is Borton entitled to an award of attorney’s fees and costs based upon the contract language?

Assignment of Error No. 2: The trial court erred in failing to grant Borton’s motion for summary judgment on these cross motions for summary judgment since Borton was entitled to judgment as a matter of law on these facts presented to the trial court.

Issues Related to Assignment of Error No. 2:

1. See Issues 1-7 listed above which are incorporated by this reference.

Assignment of Error No. 3: The trial court erred in failing to grant Borton’s Motion for Reconsideration.

Issues Related to Assignment of Error No. 3: The issues presented are the same as listed above and, in addition, the issue

presented is whether the trial court abused its discretion in denying the motion based upon the additional evidence that was submitted to the court. If not as a matter of law, did those facts create issues of fact that need to be determined at trial as opposed to on summary judgment?

III. STATEMENT OF THE CASE

A. Facts.

This case involves the right to purchase 163.78 acres of farmland located in Walla Walla County near Pasco, Washington. (CP 112). Of that land, 153 acres are irrigable, and approximately 135 acres were actually irrigated. (CP 119). The irrigable property was utilized to grow various row crops, on a rotational basis which would include potatoes, corn, grass seed and timothy grass hay. (CP 119,128).

The primary value of this property to Burbank Properties was to grow early season potatoes. (CP 129). However, one cannot plant and grow potatoes every year. Rather, a farmer must plant the land to different crops in subsequent years for a period of time (rotation of crops). The reason for the rotation of crops on the land is to rid the

soil of diseases brought about by the growing of potatoes and to recondition the soil. Accordingly, Burbank Properties planted the land to other crops during those rotational years. (CP 128).

Burbank Properties leased this land from a previous owner/landlord in the years 2000-2012. (CP 104). Burbank Properties purchased the land from that landlord in March 2012. (CP 104). The crop rotation is: one crop year growing potatoes followed by up to two crop years of another rotational crop. The property is then planted to potatoes again and the process continues. (CP 128). This process has been followed from 2000 through today. (CP 128).

After the potato crop year, Burbank Properties has used either grass seed or timothy hay plantings on the acreage during the rotational years. (CP 128). Historically, the crop rotation was one crop year of potatoes followed by two years of grass seed or hay and then back to potatoes. (CP 128, 154). That's how it was represented in the sales information Burbank Properties gave to Borton in September 2015. (CP 154). However, Burbank Properties' sole member, Mr. Rogers, testified in his deposition that he has now changed the rotation so that it is one crop year of potatoes and then

three years of hay and then back to potatoes. (CP 127-128). The record does not reflect when this change was made.

As noted above, Burbank Properties purchased this property in March 2012. Mr. Rogers, the sole member of Burbank Properties also owns multiple other LLCs which are involved in the farming business. (CP 103). In 2014-2015, Mr. Rogers' farming operations faced serious cash flow issues. This resulted in Mr. Rogers' bank filing several different lawsuits against his various farming entities. Mr. Rogers was able to resolve these lawsuits but one of the conditions was to sell the Burbank Properties land in order to generate cash. (CP 104)

The property was listed for sale at a sales price of \$1,575,000. (CP 154). The offer also requested a three-year lease back of the property plus a repurchase option at \$1,825,000 at the end of the lease. (CP 154). Borton made an offer the day after the listing. (CP 145).

Borton paid Burbank Properties \$1,550,000 for the property. (CP 68). Borton also agreed to the three-year lease of the property to Burbank Properties for a rental rate of \$78,775 per year. The lease expires on December 31, 2018. (CP 10). Borton also agreed to an

option for Burbank Properties to repurchase the property. This option is the reason for this lawsuit.

The option states that Burbank Properties has the option to repurchase the property for \$1,800,000. (CP 12).

Lessee [Burbank Properties] may exercise its option to purchase the Property **at any time prior to December 31, 2017**. Lessee's election to exercise this option must be evidenced by a written notice addressed to Lessor [Borton], sent by registered or certified mail to Lessor to Lessor's last known address. (emphasis added)

(CP 12).

If the option is timely exercised, the closing of the sale must occur no later than December 31, 2018. (CP 13). The property at issue in this case is located immediately adjacent to existing orchard land owned by Borton. (CP 67, 135). Borton's primary reason to buy the property was to expand existing orchard operations. It provided a cost effective way to expand because Borton owned 500 acres of orchard adjacent to this property. (CP 135-36).

Borton intended to develop the property into new orchard land. This would require a significant modification of the existing irrigation system. (CP 68). Borton would also have to order the fruit trees to plant at least a year before they were planted. (CP 138). This is why

Borton insisted on (and Burbank Properties agreed to) a one-year advance notice to exercise the option, even though the transaction may not close until the end of the lease, one year later. (CP 68).

The sale of the property from Burbank Properties to Borton for the purchase price of \$1,550,000 closed on February 25, 2016. (CP 68). That was also the beginning of the lease between the parties. (CP 15). The record does not contain evidence of what Burbank Properties grew on the land for crop year 2016. However, for crop year 2017, Burbank Properties planted the land to potatoes. (CP 159). Presumably, Burbank Properties would next plant rotational crops, such as timothy hay on the land for crop year 2018 (the last year of the lease). (CP 128).

From the time that the lease containing the option to purchase agreement was signed on February 25, 2016 until the time the option expired on December 31, 2017, the defendant had 674 days to exercise the option. It is undisputed that it did not do so.

Eight days after the option period expired, on January 8, 2018, Borton received a “notice” from Burbank Properties attempting to exercise the option. The “notice” was mailed via regular mail on

January 4, 2018. (CP 69, 72). Defendant admits that the notice was late. (CP 129). Defendant claims (without proof) that it drafted the notice on December 28, 2017 (which is why that date appears on the notice) but admits that it was not actually mailed until the next week. (CP 129). There is no dispute that the option to purchase was not timely or properly exercised by certified mail.

B. Procedural Background.

Plaintiff initiated this Declaratory Judgment action against Defendant on January 29, 2018, seeking a declaration from the court that Defendant had not timely exercised the option to purchase and that the lease would expire, by its terms, on December 31, 2018. (CP 6). The matter was then presented to Walla Walla Superior Court Judge M. Scott Wolfram on cross motions for summary judgment made by the parties. (CP 327-28).

The court granted Defendant's motion for summary judgment and denied the Plaintiff's motion for summary judgment. The court held, in its order that: (1) Defendant was entitled to an equitable grace period to exercise the option to purchase and that the option was then exercised during that grace period; and that (2) accordingly,

Defendant was entitled to purchase the property at issue for the payment of \$1,800,000 with closing of the sale to occur no later than December 31, 2018. (CP 329). Defendant was also awarded a judgment for its attorney's fees incurred in the action. (CP 316-17). Plaintiff moved for reconsideration of the decision. The motion was denied. (CP 334-35). This appeal follows. (CP 321).

IV. ARGUMENT

A. **Standards Applicable to Summary Judgment.**

When considering this appeal, the Court must remember that both parties moved for summary judgment. Summary judgment standards apply differently, depending on which motion this Court is considering. Ultimately, this Court reviews a grant or denial of a summary judgment order and judgment *de novo*. See *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). An appellate court engages in the same inquiry as the trial court when reviewing an order on summary judgment. See *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

In a summary judgment motion, the moving party has the initial burden of showing the absence of an issue of material fact. This burden can be met by showing that there is an absence of evidence supporting the nonmoving party's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225-26, 770 P.2d 182 (1989).

The moving party must still, however, identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Baldwin v. Sisters of Providence, Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989). If the moving party does not meet this initial burden, summary judgment may not be entered, regardless of whether the opposing party submitted responding materials. *Jacobsen v. State*, 89 Wash.2d 104, 108, 569 P.2d 1152 (1977); see also *Baldwin*, 112 Wash.2d at 132, 769 P.2d 298.

With respect to Burbank Properties' motion, it is the moving party and on the record, has not met its burden to identify the portions of the pleadings, depositions, answers to interrogatories, and

admissions which demonstrate the absence of a genuine issue of material fact. Specifically, as will be outlined below, there are no undisputed facts to show Burbank Properties will incur an inequitable forfeiture if it is not allowed to exercise its option to purchase late, or that it was able to buy the property when the option was exercised. Having failed to meet its initial burden, this Court should reverse the trial court order granting Burbank Properties' motion.

Even if the moving party meets its initial burden, the opposing party may then set forth specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion. The moving party is entitled to summary judgment only when there is a "complete failure of proof concerning an essential element of the nonmoving party's case [which] necessarily renders all other facts immaterial." *Cho v. City of Seattle*, 185 Wn.App. 10, 15, 341 P.3d 309 (2014) review denied, 183 Wn.2d. 1007 (2015) (quoting *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). On a motion for summary judgment, **the court must draw all inferences from the admissible evidence in the light most favorable to the**

non-moving party. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012)(emphasis added).

Where any issues of material fact are present, the motion for summary judgment should be denied. While it is not impossible for issues of fact to be decided on a summary judgment motion, it is extremely difficult. Issues of fact can be determined as a matter of law on a summary judgment motion only when reasonable persons could reach only one conclusion from those facts. *See Owen v. Burlington N. Santa Fe R.R.* 153 Wn.2d. 780, 788, 108 P.3d 1220 (2005). The Court's function on summary judgment is to determine whether genuine issues of material fact exist. The Court's job at this stage is not to judge or resolve those factual issues. *See Jones v. Dep't of Health*, 140 Wn. App. 476, 487, 166 P.3d 1219 (2007). Summary judgment must be denied "if the record shows any reasonable hypothesis which entitles the nonmoving party to relief." *White v. Kent Medical Center*, 61 Wn. App. 163, 175, 810 P.2d 4 (1991). Recall this case centers on the granting of equitable relief. That, by its nature involves issues of fact. Thus, if any such issues of fact are

presented, summary judgment would not be appropriate unless the above cited standards apply.

This case presents a unique, if not a legally implausible situation. The trial court, on summary judgment, viewed the record, ignored clear deadlines in an unambiguous written contract, and ordered equitable relief. Because this is a summary judgment appeal, the trial court's decision is due absolutely no deference. The review standard is *de novo*.

B. It is Undisputed that Burbank Properties Failed to Timely Exercise the Option to Purchase in Violation of the Parties' Written Contract.

Burbank Properties had a fixed date option to purchase the property in the lease. It is undisputed that Burbank Properties had 674 days to exercise that option by providing the requisite written notice called for in the lease/option agreement. By the express terms of the option, it expired on December 31, 2017. It is further undisputed that Burbank Properties did not give its attempted notice to exercise the option to Borton until January 8, 2018.

The option in this case is set forth in a written lease between the parties. Those parties negotiated and agreed upon the terms of the

contract. The rule with respect to such option contracts is stated in *Whitworth v. Enitai Lumber, Co.*, 36 Wn.2d 767, 220 P.2d 328 (1950). It's not complicated.

The option contract contains an option for the optionee to purchase the property within a specified time and upon specified terms and conditions contained in the contract. *Whitworth*, 36 Wn.2d at 770. The option contract is unilateral in the sense that it binds the owner not to withdraw the option to purchase for the specified time, but does not require the optionee to exercise the option. It simply gives the optionee the ability, but does not require, the optionee to elect to purchase the property within the time stated in the contract. *Whitworth*, 36 Wn.2d at 770.

The exercise of the option must be unconditional. If the option is not exercised in strict accordance with its terms, all rights under the option cease to exist:

On the other hand, if the optionee fails to elect to purchase within the time specified, all of his rights under the option contract cease, and, in addition thereto, he forfeits the consideration he paid for the entering into the option contract.

Whitworth, 36 Wn.2d at 770-71.

Options contracts must be strictly construed, and time is of the essence related thereto. *See Pardee v. Jolly*, 163 Wn.2d 558, 572, 182 P.3d 967 (2008). The point of this analysis is to remind the Court that this a contract action involving the right to buy real estate. It is a contract that must be in writing and is to be strictly construed. It is not this Court's function nor job to re-write the party's unambiguous contract.

Furthermore, courts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves. *Clements v. Olsen*, 46 Wash.2d 445, 448, 282 P.2d 266 (1955). Courts may not interfere with the freedom of contract or substitute their judgment for that of the parties to rewrite the contract or interfere with the internal affairs of corporate management.

McCormick v. Dunn & Black, P.S., 140 Wn. App. 873, 891–92, 167 P.3d 610, 619 (2007).

In addition, Washington courts have re-enforced the proposition that parties are free to contract in any manner they see fit.

It may not be the best contract, but it's their choice:

The constitution guarantees every person the liberty to do what is economically foolish as well as what may be generally considered prudent and wise.
Douglas County Mem'l Hosp. Ass'n v. Newby, 45 Wash.2d 784, 792, 278, P.2d 330 (1954).

Wallace v. Kuehner, 111 Wn. App. 809, 817, 46 P.3d 823 (2002)(emphasis added).

As stated in the introduction to this brief, this Court should not forget the primary rule in this case with respect to the option agreement. The rule is clear. Under the facts of this case, Burbank Properties failed to timely and properly exercise the option to purchase this property. The option ceased by its terms. That's the contract the parties entered into in this case.

C. Defendant Cannot Make a Threshold Showing that it is Entitled to Equitable Relief.

Burbank Properties argued, and the trial court held on summary judgment, that the contract entered into by the parties should be changed to allow for an "equitable grace period," to extend the date on which the option to purchase could be exercised. Burbank Properties was allowed an equitable "do-over," to allow it to exercise the option under new time deadlines not agreed to by the parties.

This is not the rule. It is the exception to the rule and is only applicable in very narrow circumstances not present in these parties' lease relationship. The origin and parameters of the exception will be

discussed below but, it must be remembered that there is no requirement that courts apply the exception and whether to apply an equitable grace period will be largely dependent on the facts and circumstances of that case.

Nothing in Corbin or *Wharf* suggests that a trial court *must* allow the late exercise of an option. The general rule is that an option must be exercised timely or it is lost. Under Corbin and *Wharf*, there is an exception only when equity requires it. Whether equity requires it is in large part a matter addressed to the discretion of the trial court, with discretion to be exercised in light of the facts and circumstance of the particular case.

Heckman Motors, Inc. v. Gunn, 73 Wn. App. 84, 88, 867 P.2d 683 (1994).

Only in “special circumstances” should equitable relief to excuse a party’s failure to timely exercise an option even be considered. Even if such consideration is undertaken, it should only be granted in “limited circumstances.” See *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 610-11, 605 P.2d 334 (1979). The Courts have been clear. The exception cannot not swallow the rule, yet alone without a trial or as a matter of law. Yet, that is what the trial court did in this case.

With that brief background in mind, the “exception to the rule” has its beginning in Washington in 1979 with the *Wharf* decision from Division 1. *Wharf* involved a situation where a tenant failed to timely exercise its contractual right to renew a lease. Wharf personnel “simply forgot to do so,” under the terms of the option. *Wharf*, 24 Wn. App. at 603. A 2 ½ week bench trial eventually ensued where the trial court ruled that Wharf was allowed its grace period to exercise the option to renew the lease.

The Court began by stating the general rule set forth above. It also stated that it was only in very limited circumstances where such equitable relief could even be considered. *Wharf*, 24 Wn. App. at 610-11.

The *Wharf* Court first noted the competing legal principles at issue if such a limited exception was recognized:

The courts which have considered this problem have not found the solution simple. On the one hand is equity's abhorrence of a forfeiture. On the other hand is the general reluctance of courts to relieve a party from its own negligent failure to timely exercise an option, when to do so might tend to introduce instability into business transactions and disregard commercial realities.

Wharf, 24 Wn. App. at 610.

The second part of this quote is particularly applicable here. Plaintiff entered into a specific option to purchase and relied on Burbank Properties to exercise it (if at all) by a specified date. Burbank Properties shouldn't be relieved from its own negligent failure to exercise the option on time.

The genesis for considering this equitable exception was the contractual treatise by Corbin on Contracts. The Court stated:

Professor Corbin in his treatise on the law of contracts in our opinion best expresses this rule and its limitations:

There is one sort of case in which it has been held that the power of acceptance continues to exist for a short time after the expiration of a time limit expressly set by the offeror and known to the offeree. The only cases known to the writer, in which it has been so held, were cases of option contracts creating an irrevocable power, and in which the holder of the option neglected to give notice of acceptance within the time fixed **although he had made valuable permanent improvements with intention to give the notice.**

Thus, it was held that the power of the holder of an option to buy or renew, contained in a lease, is not necessarily terminated by failure to give notice within the specified time. If, in expectation of exercising the power, the lessee has made valuable improvements, and the delay is short without any change of position by the lessor, the lessee will be given specific performance of the contract to sell or

to renew. **This is for the purpose of avoiding an inequitable forfeiture. Where no inequitable forfeiture will occur, the same rule is applicable to an option contract as to a revocable offer; a time limit, expressly stated, is controlling. The mere fact that a price was paid for the option does not result in forfeiture.** If one pays five hundred dollars for a thirty day option to buy land for twenty thousand dollars, the power to accept for thirty days is the exact agreed equivalent of five hundred dollars. An extension of the power, even for a moment of time, by action of a court, is compelling the offeror to give something for nothing.

(Footnotes omitted.) 1 A. Corbin, Corbin on Contracts s 35, at 146-47 (1963). *See also Twyford v. Whitchurch*, 132 F.2d 819, 822 (10th Cir. 1942); *Gloyd v. Midwest Refining Co.*, 62 F.2d 483, 486-87 (10th Cir. 1933).

Wharf, 24 Wn. App. at 611-12 (emphasis added).

The *Wharf* court then identified the five “special circumstances” that it found in that case which it held justified the granting of an equitable grace period. *Wharf*, 24 Wn. App. at 612-13. That was a decision that the trial court made in that case, based on the special circumstances of that case, in the exercise of the court’s discretion.

The next case to discuss equitable grace periods in a substantive way was *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84,

88, 867 P.2d 683 (1994). This was a Division II case and again was an appeal after a trial. Like in *Wharf*, *Heckman* also involved an option to renew a lease. The lease agreement stated the last day to exercise the option was August 1, 1990. Heckman, incorrectly, thought it could exercise the option any time between August 1 and October 31, 1990. It did so on September 14, 1990. *Heckman*, 73 Wn. App. at 86.

The *Heckman* court ultimately ruled that the trial court did not abuse its discretion in ruling that no grace period would be allowed. There was no inequitable forfeiture in that case. The real issue was whether Heckman could continue to profit from its arrangement to charge more rent to its subtenant if the lease was renewed. That was not a forfeiture. *Heckman*, 73 Wn. App. at 88-89.

The next case to weigh in on the issue is the one and only Supreme Court decision, *Pardee v. Jolly*, 163 Wn.2d 558, 182 P.3d 967 (2008). In *Pardee*, the Court accepted review to consider whether an equitable grace period might apply. Because of the posture of the case, the issue was never addressed by the trial court. The Supreme Court reversed that decision and remanded the case back to the trial

court to consider whether an equitable grace period might apply. However, the manner it did so, and methodology that it used, was important. *Pardee* recognized that trial courts can't rewrite contracts and consider equitable grace periods unless certain threshold showings are made.

The agreement at issue in *Pardee* was "unique." The agreement allowed Pardee an option to purchase property for \$300,000. He was required to make \$16,000 worth of payments as an option payment. He was required to elect to exercise the option at the same time he made the last option payment. He was also expressly allowed the right to occupy and improve the property during the option period. *Pardee*, 163 Wn.2d at 563-64. The Court ultimately held that Pardee had not properly exercised the option, per the terms of the option agreement. *Pardee*, 163 Wn.2d at 571-72. However, because the trial court did not address the issue, the case was remanded to consider whether an equitable grace period should be applied. *Pardee*, 163 Wn.2d at 573.

The primary importance of *Pardee* is the methodology the Court used in analyzing when court's equitable jurisdiction can be

used to change or ignore dates in contracts. The first part of the Court's analysis was to examine whether the facts presented would even allow for equitable principles to be applied. In other words, it applied a threshold analysis to see if a remand was necessary to even consider an equitable grace period. *Pardee*, 163 Wn.2d at 574.

The Court first analyzed what type of contract was presented. It could be a pure option, a real estate contract or a lease with an option to purchase. That's what the parties argued. *Pardee*, 163 Wn.2d at 573.

The Court did not accept any of these alternatives. Rather, it found that this was a "unique" situation which justified the application of the equitable principles dealing with forfeitures:

The contract in question is not a real estate contract because it does not provide for the actual sale of real property. While the boilerplate form used by the parties proclaims the contract to be an option to purchase real estate, a handwritten provision provides Pardee with the right to occupy and improve the property during the option period. **Because of this provision, the contract is a hybrid of a lease with an option to purchase and a pure option contract. Because of this unique fact and contractual provisions in this case, the equitable principles regarding forfeitures apply.**

Pardee, 163 Wn.2d at 574 (emphasis added).

In other words, the contract itself has to contemplate or allow improvements to the property which might be forfeited. That is one threshold before invoking an equitable analysis. The first consideration was the unique nature of the agreement involved.

Jolly argues *Wharf Restaurant* does not apply because Pardee did not forfeit ownership in an asset; instead, the option merely terminated. **As noted earlier, the law regarding equitable forfeitures applies in this case because of the unique provisions of the option.**

Pardee, 163 Wn.2d at 576.

The facts of this case do not pass the *Pardee* threshold analysis for two reasons. First, there is no such “unique” provision in this case. There is nothing in the lease/option agreement that “allows” Burbank Properties to make any improvements. This case involves only a short-term lease with an option to purchase. The lease is for 3 years and the land is to be used for agricultural purposes. (CP 10-11). There is no provision in the lease allowing for improvements lasting beyond the lease term.

There is no “unique” situation in this case. Burbank Properties leased this land for three years to grow rotating agricultural crops, which is exactly what it did. It presumably planted crops consistent

with what it had done for the past 20 years on the property. There is no evidence in the record that it has done anything new to the property to come within the threshold determination to allow for equitable relief. The trial court erred in granting such relief as a matter of fact and law.

The second reason precluding consideration of an equitable grace period under *Pardee* is that there is no evidence in the record of anything that could be considered “forfeited.” No substantial, permanent improvements were made in contemplation of exercising the option. As noted above, in order to even request a court to consider an equitable grace period, the optionee must have made “valuable permanent improvements with intention to give notice.” *Wharf*, 24 Wn. App. at 611 (quoting Corbin on Contracts).

There is simply no such evidence in this record. First, there is no evidence in the record of any improvement to the property, let alone a substantial or permanent improvement. The lease in question was for crop years 2016, 2017, and 2018. The record on summary judgment has no reference as to how the property was farmed in 2016. In 2017, Burbank Properties planted potatoes (an annual crop). The

record on summary judgment has no reference as to how the property was farmed in 2018.

The only reference in the record is to what has historically been done on the property. Historically, on the property, a crop rotation is done with potatoes planted one year followed by two years of a rotational crop which, historically has been grass seed or timothy hay. That's the extent of the record. There is no evidence on the summary judgment record that this rotation was actually followed, other than potatoes were planted in crop year 2017.

Martin Luther was once asked what he would do if he knew that the world was ending tomorrow. His response was, "I'd plant a tree." When asked why he would plant a tree, his response was, "That's what I was planning on doing tomorrow anyway." The same concept is true here. Burbank Properties has, at best, done nothing more than it would have done anyway under this agricultural lease. It plants potatoes one year and then a rotational crop for the next two years. That's what happened. That's what Burbank Properties was "going to do anyway."

There is no evidence in the summary judgment record as to what, if anything, was planted on the land for crop year 2018, whether it would last beyond the lease term and what it would be worth. There is no evidence in the summary judgment record as to the cost of such planting or the expected revenue it would generate. There is no evidence in the summary judgment record that Burbank Properties would not have had to plant a crop again in crop year 2019. In short, there is absolutely nothing in the summary judgment record as to the use of the land for crop year 2018 going forward. On this record, Burbank Properties' summary judgment must be denied and Borton's must be granted. Burbank Properties has presented no evidence of any forfeiture, yet above an inequitable one.

Burbank Properties has not come close to meeting any conceivable threshold showing to be even considered for equitable relief in this case. It had no right to do anything with the property other than grow agricultural crops. It did not lose or forfeit anything. At best, it simply planted another agricultural crop which was the whole purpose of the lease. The summary judgment record does not show any permanent improvement to the property. It shows no

improvement to the property whatsoever. The contract should be enforced as it was written and agreed to by the parties. The option period expired and it was error for the trial court to grant the defendant's motion.

D. Even if the Court were to Determine that an Equitable Relief Analysis is Applicable, Such Relief is not Warranted.

Even if this Court were to conclude its equitable jurisdiction could be invoked, Burbank Properties would still not be entitled to such relief, as a matter of law. Recall that this an appeal from a summary judgment ruling. The review standard is de novo; not an abuse of discretion. The trial court's decision under this standard is due no deference. It must also be remembered that, with respect to the Defendant's motion, all inferences are to be made in favor of Borton.

Borton respectfully submits that the record is undisputed that it is entitled to summary judgment because, as outlined above, there is no evidence presented on summary judgment that Defendant had any right to improve the property and there is no evidence as to any improvement made to the property. At the very least, issues of fact

would be present as to Burbank Properties' motion that would require a trial to allow for the judge to actually exercise discretion after the presentation of evidence.

Because the Defendant below argued certain subjective intent issues (such as its alleged intention to exercise its option), it is first appropriate to address standards of contract interpretation in Washington. With respect to contract interpretation, Washington has adopted the "context rule" in construing contract provisions. While extrinsic evidence is admissible to illuminate the meaning of what was written, it is not admissible for the purpose of ascribing meaning that is not set forth in the written document.

Unfortunately, there has been much confusion over the implications of *Berg*.

In *Hollis*, we sought to clarify the meaning of *Berg*:

Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation.

During the past eight years, the rule announced in *Berg* has been explained and refined by this court,

resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis v. Garwall, Inc., 137 Wash.2d 683, 693, 974 P.2d 836 (1999)

(citations omitted).

Since Berg, we have explained that surrounding circumstances and other extrinsic evidence are to be used "to determine the meaning of specific words and terms used" and not to "show an intention independent of the instrument" or to "vary, contradict or modify the written word." *Id.* at 695-96, 974 P.2d 836 (emphasis added).

Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn. 2d 493, 502-03, 115 P.3d 262, 266-67 (2005)(emphasis added).

More specifically, it is not the function of the court to "create" the contract for the parties. Extrinsic evidence is not to be used to show what the parties intended to write or do, but did not.

Our holding in *Berg* may have been misunderstood as it implicates the admission of parol and extrinsic evidence. We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wash.App. 593, 602, 815 P.2d 284 (1991). We impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wash.2d

678, 684, 871 P.2d 146 (1994). Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad*, 95 Wash.2d 853, 855, 631 P.2d 366 (1981). We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wash.App. 634, 637, 745 P.2d 53 (1987). We do not interpret what was intended to be written but what was written.

Hearst Commc'ns 154 Wn. 2d at 503-04 (emphasis added).

Under the concepts set forth above, Burbank Properties' subjective intent as to what it wanted to do in this case is irrelevant and self serving. It only becomes relevant if it discussed those issues with Borton and the record is undisputed that it did not do so.

Normally, any equitable analysis that may occur at one party's request to ignore deadlines in contracts and excuse its own failure to comply with those deadlines is, by nature, going to be fact specific to the situation presented. *Wharf, supra*, identified five issues or areas of inquiry that were relevant to the decision that the court made in that case. Those same issues, may, or may not be relevant to this Court in this situation.

Burbank Properties admittedly and negligently failed to timely exercise its option. Borton did absolutely nothing to contribute to the delay in the exercise of the option. It was totally Burbank Properties' fault. The lease was three years and it had two years to exercise its option. Burbank Properties was 8 days late in exercising the option.

As noted above, Burbank Properties made no valuable improvements to the property and certainly did not do so in any anticipation of exercising the option. The record contains no such evidence. If Burbank Properties planted something for crop year 2018 it was done so as the normal planting of an agricultural crop and not in anticipation of exercising the option to purchase.

There are simply no equitable factors in play in this case to justify the granting of an equitable grace period. Defendant did nothing to the property that would be forfeited. There is no forfeiture, let alone some sort of "inequitable forfeiture."

E. It was Legal Error to Grant Burbank Properties' Summary Judgment for Specific Performance where the Record Shows it was not "Ready, Willing and Able" to Purchase the Property and where its Attempted Late Exercise was Not Unconditional.

Even if the Court were to consider an equitable grace period to exercise the option to purchase, Burbank Properties' motion should still have been denied as a matter of law because its attempted exercise did not satisfy the legal requirements of a proper exercise. *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn. App. 296, 628 P.2d 638 (1981) is instructive in this regard. In *Kaufman*, like here, one party argued that the exercise of the option should not be recognized since the optionee did not have funds available to exercise the option. *Kaufman*, 29 Wn. App. at 301. The *Kaufman* court noted there was no requirement that the money be paid at the time of the notice of the exercise of the option, only at closing. However, it still confirmed the optionee had to prove it was "ready, willing and able" to close the transaction and buy the property. In *Kaufman*, there **was** specific evidence on the record that, at the time of exercise, the optionee "could have received third party financing." *Kaufman*, 29 Wn. App. at 301 & n. 5. Subsequent Washington cases have confirmed that

buyers attempting to specifically enforce rights to buy property must meet the “ready, willing and able” test set forth above. *See, e.g., Kreger v. Hall*, 70 Wn.2d 1002, 1009, 425 P.2d 638 (1967); *Sienkiewicz v. Smith*, 97 Wn.2d 711, 717, 649 P.2d 112 (1982).

No such evidence exists in this case. Just the opposite is true. Burbank Properties has admitted on this record that it does not have the cash available for the purchase and has not even attempted to obtain financing. (CP 128). Thus, even if an equitable grace period was permitted, on this record Burbank Properties cannot legally be granted specific performance because it failed to establish it was “ready, willing and able” to do so.

In addition, a corollary to the “ready, willing and able” test as it applies to the exercise and closing of options to purchase is that an exercise of an option must be “unconditional.” *Pardee*, 163 Wn.2d at 568; *see also Whitworth v. Enitai Lumber Co.*, 36 Wn.2d 767, 769, 220 P.2d 328 (1950). The only evidence in this record is that Burbank Properties does not have the money to buy the property, does not know where it is going to get the money, and had not sought financing for its purchase. In other words, Burbank Properties admitted its late

exercise of the option was “contingent upon” obtaining third party financing. By its own admission, Burbank Properties failed to **unconditionally** exercise the option which precludes a court from granting specific performance as a matter of law.

F. The Court Erred in Denying Borton’s Motion for Reconsideration. At the Very Least, Issues of Fact Exist that Would Require the Reversal of the Trial Court and a Remand of this Case back for Trial.

The standard of review for the denial of a motion for reconsideration is that this Court will review that decision for an abuse of discretion. *See Nichols v. Peterson N.W., Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2017). Borton incorporates all of the arguments set forth above into this section of the brief. In addition, Borton submitted the Declarations of Daniel Bowton (CP 233-35) and Byron Borton (CP 236-51) in support of its motion for reconsideration.

Mr. Bowton states in his declaration that the timothy hay crop was planted as a rotational crop and not as a permanent crop for the property. Timothy hay is typically only left in the ground one year and then the ground is rotated to another crop. (CP 234). Mr. Bowton further confirmed that the property was purchased by Borton to expand its orchard operations because it was adjacent to existing

orchard and, any timothy hay crop would be of no value to Borton and would be tilled under to plant the orchard. (CP 234). This fact that the property was adjacent would probably save Borton about 20-30% in costs. (CP 239).

Mr. Borton testified that his operations do not include row crops and that the timothy hay planted on the property has no value to Borton. He also states that Burbank Properties made absolutely no improvements to the property. (CP 237)

Mr. Borton also testified that upon purchase of the property, he immediately started to acquire orchard trees to enable him to plant the land to orchard some three years down the road. This was done because orchard trees must be purchased 2-3 years before being needed to be planted. (CP 238). It has purchased over 400,000 such trees at a cost of \$800,000. (CP 238).

Borton insisted on the one-year option exercise period for this precise reason. It had to order the orchard trees ahead of time and needed to be able to plant them. If they cannot be planted now, an additional 1-2 years will be added to the process. That's why the one-year time frame on the exercise of the option was so important to

Borton. (CP 240-41). Borton has been prejudiced by the Court allowing this grace period.

These additional facts should have been considered by the Court below and entered into the decision process. These facts are consistent with the arguments above and should have mandated that the Borton motion be granted and the Burbank Properties motion be denied. At the very least these declarations would create issues of fact which would evidence that the Court abused its discretion in denying the Borton motion. It was error for the trial court to deny the motion and this court should reverse that decision and, at the very least, remand the issue back for decision by the trial court.

G. The Court Erred in Awarding Fees to Defendant.

Attorney's fees and costs may be awarded when authorized by a contract, statute, or some recognized ground in equity. *See Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785, 197 P.3d 710 (2008). This issue presents an issue of law for the Court to decide and is reviewed de novo. *Kaintz*, 147 Wn. App. at 785. As is outlined below, the contract in this case does include an attorney's fee provision. However, even if the Defendant were to prevail in this case, that

success would have nothing to do with the contract. It is undisputed that Defendant did not comply with the contract. Rather, the success of any claim would be grounded in equity. There is no recognized ground in equity to award fees for the imposition of a grace period to exercise an option to purchase. Accordingly, it was error for the court to award fees to Defendant even if this court were to affirm the decision of the trial court as to the equitable grace period.

H. Borton is Entitled to an Award of Attorney's Fees.

Pursuant to RAP 18.1, Borton requests an award of attorney's fees in this case. The Lease and Option Agreement signed by the parties has an attorney's fee provision that states that the unsuccessful party in an action will pay the successful party's attorney's fees. If the trial court is reversed and the Borton's motion is granted, Borton is entitled to such an award and will comply with RAP rules as to submitting documentation.

V. CONCLUSION

The trial court's order and judgment should be reversed and judgment should be entered in favor of Borton declaring that the option to purchase in this case has expired. It is undisputed that

Defendant failed to timely exercise the option to purchase. Defendant cannot make even a threshold showing to invoke the Court's equitable jurisdiction to consider a grace period to exercise the option to purchase. Even if such an inquiry were to be undertaken, Defendant should not be granted an equitable grace period. The trial court erred in granting the same as a matter of law. Even if such a grace period were granted, the Defendant did not unconditionally exercise the option after admitting that it was not ready, willing and able to purchase the property at the time of the exercise. At the very least, issues of fact are presented which would require reversal and remand of this case for a determination on the merits. Finally, the trial court erred in awarding attorney's fees to Defendant since there is no recognized ground in equity to do so. Borton is entitled to an award of attorney's fees in this action.

DATED this 14 day of September, 2018

HALVERSON | NORTHWEST Law Group P.C.
Attorneys for Appellant Borton & Sons, Inc.

By: _____

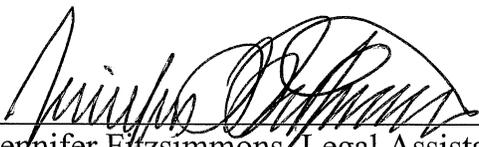
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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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DATED at Yakima, Washington, this 14th day of September, 2018.



Jennifer Fitzsimmons, Legal Assistant
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