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No. 63790-8-I, consolidated with 63792-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CORNISH COLLEGE OF THE ARTS, a Washington public benefit
corporation,

Respondent,

v.

1000 VIRGINIA LIMITED PARTNERSHIP, a Washington limited
partnership; DONN ETHERINGTON, JR., an individual,

Appellants.

OPENING BRIEF OF APPELLANT 1000 VIRGINIA LIMITED
PARTNERSHIP

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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 JAN 13 PM 2:52

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I. INTRODUCTION

This case involves a summary grant of extra-contractual and extraordinary relief in the face of inequitable conduct and noncompliance with express terms of a written purchase option between 1000 Virginia Limited Partnership (“Virginia Limited”) and Cornish College of the Arts (“Cornish”). No evidentiary hearing to consider relevant facts or balance of equities between the parties was permitted.

Virginia Limited complied with the carefully negotiated terms of its agreement and expected and was entitled to exact performance by Cornish. Cornish failed to comply with its unambiguous obligations, then brought this action seeking to be excused from its contractual requirements.

The trial court’s orders, findings and conclusions resulted in a windfall recovery for Cornish and the complete loss of a multi-million dollar property by Virginia Limited without compensation. Taken together, the trial court’s decisions effected a fundamental unfairness and disregard for the solemnity of contracts.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting Cornish extraordinary equitable relief.
2. The trial court erred in granting Cornish’s Motion for

Partial Summary Judgment for an equitable grace period to extend a purchase option period, and denying Virginia Limited's own Motion for Partial Summary Judgment.

3. The trial court erred by granting Cornish's Motion for Specific Performance.

4. The trial court erred by granting Cornish' Motion for Partial Summary Judgment for Wrongful Eviction.

5. The trial court erred by granting Cornish's Motion for Summary Judgment dismissing Virginia Limited's counterclaim for tortious interference.

6. The trial court erred in awarding monetary damages to Cornish in addition to specific performance.

7. The trial court erred in awarding attorneys' fees and costs to Cornish.

8. The trial court erred by entering Findings of Fact Nos. 2, 5-9 and 11-22 and the related Conclusions of Law Nos. 4-17 based upon these findings.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Before granting Cornish all of its requested relief in equity, did the trial court err in failing to balance the equities of the parties and consider the inequitable conduct of Cornish? (Assignment of Error 1.)

2. Did the trial court err in summarily granting Cornish an extra-contractual grace period in which to extend an expired purchase option period when Cornish (a) did not satisfy the conditions precedent to the option; (b) had engaged in inequitable and equivocal conduct regarding the option; and (c) negligently failed to comply with the express option deadlines? (Assignment of Error 2.)

3. Did the mailing of an uncertified, untimely and defective \$50,000 check by Cornish after the agreed deadline to extend the option period satisfy the payment requirement under the parties' agreement? (Assignments of Error 2 and 3.)

4. In the absence of full consideration of all the facts, did the trial court abuse its discretion in ordering Virginia Limited to convey its property to Cornish under different terms than the parties' agreement, when compliance with the trial court's order by Virginia Limited was impossible? (Assignment of Error 3.)

5. Did the trial court err in entering judgment and damages against Virginia Limited for wrongful eviction in the amount of \$69,600 when the eviction was as a result of the structural failure of the building due to preexisting defects caused by negligent third party construction, a condition that was fully disclosed to and accepted by Cornish? (Assignment of Error 4.)

6. Did the trial court err in dismissing Virginia Limited's counterclaim against Cornish for tortious interference when virtually all material facts were disputed? (Assignment of Error 5.)

7. Did the trial court err in awarding future consequential damages in addition to specific performance when compliance with the trial court's specific performance order was impossible and no evidence of unwarranted delay was presented? (Assignment of Error 6.) (Findings of Fact Nos. 21 and 22; Conclusions of Law Nos. 4 and 13.)

8. Did the trial court abuse its discretion by awarding Cornish attorneys' fees in an action brought by Cornish to excuse Cornish from its admitted failure to comply with express contractual obligations? (Assignment of Error 7.)

9. Did the trial court err in awarding Cornish attorneys' fees and costs in the amount of \$645,466.85 without (a) allocation of fees between successful and unsuccessful claims; (b) entering necessary specific findings to explain the bases of the award; and (c) excluding fees incurred in connection with Virginia Limited's bankruptcy petition? (Assignment of Error 7.)

10. Does substantial evidence support the trial court's Findings of Fact Nos. 2, 5-9 and 11-22 to justify the trial court's Conclusions of Law Nos. 4-17 based on these findings? (Assignment of Error 8.)

11. Does substantial evidence support the trial court's Findings and Conclusions that Virginia Limited caused or interfered with Cornish's untimely exercise or extension of the option period? (Assignment of Error 8.) (Finding of Fact No. 15; Conclusion of Law No. 6.)

12. Did the trial court abuse its discretion in finding that Cornish could exercise its purchase option through December 31, 2007, when under the agreement it expired on December 31, 2006 absent timely and proper extension? (Assignment of Error 8.) (Finding of Fact No. 11; Conclusion of Law No. 10.)

13. Did the trial court err by admitting, over objection, evidence of consequential damages? (Assignment of Error 8.) (Findings of Fact Nos. 21, 22; Conclusions of Law Nos. 14, 15.)

14. Does substantial evidence exist to support the trial court's Findings that Virginia Limited's delay in complying with the specific performance order was unwarranted? (Findings of Fact Nos. 13, 17, 18, 19.) Were the related Conclusions error? (Conclusions of Law Nos. 5, 8, 9.) (Assignment of Error 8.)

IV. STATEMENT OF THE CASE

A. Factual Background.

This case arises out of a dispute over an option to purchase property ("Property") in downtown Seattle on which a now uninhabitable

building is situated. (CP 24-37; CP 1392:9; CP 2008:22-25.) The Property is owned by Virginia Limited, a single purpose entity named after the location address of the Property. (CP 1377:21-24.) The managing partner is Virginia Terry, LLC, a limited liability company, of which Donn Etherington, Jr. (“Etherington”) and his family are members.¹ (CP 1377:23-26; CP 2359:19-20.)

The Property consists of a six story building, with two lower floors made of concrete construction and four upper floors of wood-frame construction. (CP 1392:9; RP 36:12-19²). Virginia Limited, as fee owner, and Etherington, as sublandlord, agreed to sublease the lower two floors of the Property to Cornish for up to 42 months. (CP 24-25, Sections 1 and 3.2.) Virginia Limited also agreed to grant Cornish a non-binding option to purchase the Property, provided that Cornish comply with certain conditions precedent and perform according to specific deadlines. (CP 32-33, Sections 4.1 and 4.3.) After extensive negotiations and due diligence by Cornish, these agreements were memorialized in the Commercial Sublease With Option to Purchase dated April 29, 2005 (referred to as the “Agreement” or “Sublease” or “Option Agreement”, as the context may

¹ Virginia-Terry, LLC is the managing agent of Virginia Limited, thus Virginia Limited challenges finding of fact 6. (CP 1031.) *Am. Nursery Prods. Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).

² All references to the report of proceedings refer to April 21 – 23, 2009 unless otherwise noted.

require). (RP 31:22-315:4; CP 2846:10-14; RP 130:25-131:5; CP 24-37.)

The surrounding circumstances were unusual. First, the upper four floors of the building suffered from severe structural defects resulting from negligent construction by third parties.³ (CP 2349:5-11; CP 2359:21-2360:23.) Deterioration of the building was ongoing, which engineers advised would cause the entire building to become uninhabitable at some point. *Id.*; (CP 2606-2608; CP 2360:26-2361:2.) The cure for the defects required complete reconstruction. (CP 2360:8-12; RP 380:11-24.) Virginia Limited lacked sufficient resources and did not intend to undertake this cure, and communicated this to Cornish in early written correspondence. (CP 2493; RP 376:11-24.) Several provisions in both the sublease and option portions of the Agreement reflected the parties' awareness of the inevitability of building failure.⁴ (CP 2947:23-2948:1; CP 1378:6-14; RP 344:25-345:19; RP 338:17-339:11; RP 344:25-345:19; CP 2360:20-23.)

Second, the Property is subject to an Extended Use Agreement

³ Virginia Limited, not Etherington, acted as general contractor. (RP 246:25-247:13.) Virginia Limited challenges finding of fact 2. (CP 1030.) *Am. Nursery Prods. Inc.*, 115 Wn.2d at 222.

⁴ If substantial destruction occurred at the Property, the parties agreed that Virginia Limited may elect, by giving written notice to Cornish within 30 days of such event, to terminate the Sublease. (CP 27, Section 3.11(b).) If Virginia Limited gave Cornish notice that vacation of the upper four floors was required, then the purchase option would terminate by a date certain unless Cornish first exercised the same. (CP 32, Section 4.1.) If the purchase option was exercised, the parties agreed that the upper four floors of the Property would be demolished. (CP 35, Section 4.22.) Since the Agreement was also structured around the condition of the building, Virginia Limited challenges finding of fact 7. (1031.) *Am. Nursery Prods. Inc.*, 115 Wn.2d at 222.

with the Washington State Housing Finance Commission (“WSHFC”) under which Virginia Limited was obligated to dedicate the upper four floors to low-income residential housing for a certain term of years. (CP 1438-1465.) The Extended Use Agreement was publicly recorded against the Property in 1992 and a copy was hand-delivered to Cornish representatives in October 2002. (CP 1378:18-21.) Early termination of this agreement was possible under its express terms and was necessary if Cornish exercised the option. (CP 1380:8-19; CP 1452, Section 4.3.) Virginia Limited informed Cornish of the contractual provisions which permitted early termination during the parties’ discussions. (CP 2895:12-25; CP 2348:23-2349:4; CP 2493.) These provisions were material factors in fixing the dates for the option, exercise, extension and closing in the Option Agreement. (CP 1378:6-14; RP 144:20-145:21; RP 146:11-17.)

Between execution of the Option Agreement and expiration of the option period, the value of the Property unexpectedly doubled or tripled as a result of rezoning by the City of Seattle. (CP 1382:21-26; CP 1626; CP 1411:1-3.)

Shortly before the option period expired, Cornish attempted to renegotiate the terms of the Agreement and threatened to sue Virginia Limited if it did not cooperate. (CP 1380:24-1381:20.) The December 31, 2006 option deadline passed without exercise or extension by Cornish.

(CP 1707:14-25; CP 1230:1-3.)

Several days after the option period expired, Cornish attempted to pay for an extension. *Id.* Its payment was not only untimely, but the check was also uncertified and insufficient for lack of proper signatures. (CP 1593; CP 1699:11-17; CP 1695:8-16.) Further, Cornish's failure to comply with its Sublease obligations prevented it from having any right to extend or exercise the option at all. (CP 32, Section 4.1; CP 1379:1-1380:7.) Virginia Limited rejected Cornish's late and defective payment. (CP 1382:12-14; CP 1708:10-14.) Cornish made no attempt to cure the defective check. (CP 1700:5-1703:17; CP 1657:3-1659:8.)

In March 2007, Cornish advised Virginia Limited that it would not purchase the Property on the terms of the Option Agreement and disclaimed that any option extension payment was required. (CP 1597-1599; CP 1601-1602.) On December 20, 2007 (11 months after the option period expired), Cornish attempted to replace the defective extension check and exercise the expired option, which was rejected by Virginia Limited as untimely. (CP 1634-1635; CP 1637-1639.)

On the same day as Cornish's attempt to exercise the expired option, Virginia Limited was advised by its structural engineer that the condition of the building had deteriorated to a "dangerous" level. (CP 2717.) Virginia Limited promptly provided this letter to Cornish, and

undertook efforts to mitigate the dangers present at the Property and ensure the safety of its tenants. (CP 2841:22-25; CP 2364:18-21; RP 254:7-14; RP 258:7-16; RP 309:12-14.) After three months, it became clear that Virginia Limited's mitigation efforts were insufficient to make the building safe. (CP 2365:6-7.) Virginia Limited then sent a Notice of Termination to Cornish pursuant to the Sublease, offering relocation accommodations and free rent.⁵ (CP 2610-2612; CP 2364:17-2365:9; RP 307:19-308:21.) Cornish declined to leave and remained at the Property for four more months. (CP 239:6-11.)

B. Procedural History.

Cornish commenced this lawsuit against Virginia Limited and Etherington in early 2008. (CP 1188-1207.) Virginia Limited and Etherington asserted several counterclaims. (CP 2299-2308.) The parties filed cross-motions for summary judgment on whether Cornish was entitled to an equitable period of grace to extend the option period. (CP 1352-1373; CP 1388-1416.) The trial court granted Cornish an equitable period of grace for its late option extension payment and shortly thereafter, ordered Virginia Limited to convey the Property to Cornish.⁶ (CP 1919-

⁵ Virginia Limited challenges conclusion of law 12, which reviewed *de novo*, is error. *Am. Nursery Prods. Inc.*, 115 Wn.2d at 222.

⁶ Virginia Limited sought review of the specific performance order. (CP 2058-2059.) The Court of Appeals held the appeal was discretionary based on Cornish's representation that it would not oppose a stay of the order until resolution of the remaining issues in the

1922; CP 2028-2030.)

Cornish moved for summary judgment on its claim for wrongful eviction and dismissal of Virginia Limited's and Etherington's counterclaims for tortious interference, breach of lease, and slander of title. (CP 226-234; CP 211-222.) The trial court granted both of Cornish's summary judgment motions, dismissing appellants' counterclaims and holding both liable for wrongful eviction. (CP 414-420.) Due to its lack of operating funds, Virginia Limited filed for bankruptcy, which was dismissed in April 2009. (RP 303:14-21; RP 395:16-20; RP 273:1-5.)

The parties proceeded to trial. (RP 4.) The trial court granted Virginia Limited's motion to dismiss Cornish's claim for breach of contract for monetary damages. (CP 421-428; RP 5:1-19:14.) The trial court then determined that specific performance may include additional damages. (RP 19:1-9; CP 762-763.) It also granted Virginia Limited's motion regarding the measure of damages for wrongful eviction. (RP 19:10-14; CP 762-763.) The parties then stipulated as to the amount of wrongful eviction damages, subject to appellants' rights to appeal from the liability determination on summary judgment. (RP 22:5-23:15.)

case and upon posting of an appropriate supersedeas bond. (CP 2327-2329.) Thereafter, Virginia Limited moved for a stay, offering the Property as security. (CP 100-107.) Cornish opposed, and the trial court denied Virginia Limited's motion absent posting a multi-million dollar supersedeas bond. (CP 108-119; CP 2353-2354.) Virginia Limited

Over Virginia Limited's objection, the trial court determined that it would proceed immediately in equity to hear testimony and evidence regarding "what damages, if any, flow from [the breach of the Option Agreement] in addition to specific performance." (RP 19:1-9; RP 23:16-24:16; RP 18:14-24; RP 71:16-72:16; RP 3:15-20, April 24, 2009.) After two and a half days, the trial court awarded Cornish approximately \$2.4 million in monetary damages in addition to specific performance. (CP 1039-1041.) Post-trial, the trial court awarded Cornish over \$640,000 in attorney fees and costs. (CP 1164-1166.) Virginia Limited appeals from each of the above orders. (CP 1074-1076; CP 1167-1169.)

To date, Cornish has never tendered the purchase funds required by the Option Agreement. (RP 168:10-13; RP 397:24-398:2.)

V. AUTHORITY

A. The trial court erred in summarily granting an equitable grace period to Cornish for its late and ineffective attempt to extend the purchase option term and denying Virginia Limited's cross motion for summary judgment.

1. The standard of review on summary judgment is *de novo*.

Summary judgments are reviewed *de novo*, engaging in the same analysis as the trial court. *See e.g. Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Both the law and the facts will be

requested clarification and also moved for reconsideration, both of which the trial court denied. (CP 412-413.)

reconsidered by the appellate court. Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788, 791 P.2d 526 (1990). Summary judgment is appropriate only “if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1 (2006) (quoting Dep't of Labor & Indus. v. Fankhauser, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993)).

A trial court's factual findings on summary judgment are superfluous and entitled to no weight. Hamilton v. Huggins, 70 Wn. App. 842, 848-49, 855 P.2d 1216 (1993). In reviewing summary judgment, an appellate court considers all facts and reasonable inferences in a light most favorable to the nonmoving party. Cowlitz Stud, 157 Wn.2d at 573. Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 295, 745 P.2d 1 (1987). Decisions must be based only on evidence presented in the summary judgment motion and may not be modified or bolstered by evidence presented at trial.

2. As a threshold matter, Cornish is not entitled to any equitable relief.

Courts often balance the equities when granting an equitable remedy by taking into consideration the relief sought by the plaintiff and the hardship imposed on the defendant. *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 846-47, 999 P.2d 54 (2000). Cornish commenced this action in equity seeking to be excused from its failure to comply with its express written contractual obligations. (CP 13-14; CP 1352-1373.) Without weighing or balancing the equities of the parties or considering the relevant facts, the trial court summarily granted equitable relief to Cornish, resulting in significant inequity and hardship to Virginia Limited. (CP 1919-1922; CP 2028-2030; CP 1029:12-15.) Reviewed *de novo*, the trial court's failure to address whether Cornish qualified for equitable relief was error.

- a. *Cornish is not entitled to any equitable relief because it did not have clean hands and did not act equitably toward Virginia Limited.*

A plaintiff seeking equitable relief “must have acted in good faith, must come into equity with clean hands, and do what is just and equitable to defendant.” *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 711, 184 P.2d 90 (1947) (quoting *58 C.J. 1063*, § 314). An equitable remedy may not allow a person to profit from his own wrongdoing. *State v. Tyler*, 138 Wn. App. 120, 129, 155 P.3d 1002 (2007). Because Cornish was not

innocent in its dealings with Virginia Limited, it was not entitled to equitable intervention by the trial court.

In the final three months before the original option period expired, Cornish implemented a strategy to renegotiate the option due to its lack of available purchase funds. (CP 1380:24-25; CP 1555 (“budget shortfall for academic year 2006”).) Seeking “significant concessions”, Cornish proposed a variety of modifications to the option terms, including amendment of the Agreement, purchase of the underlying 99 year master lease, and ultimately a “poison pill” strategy designed to circumvent the WSHFC rights under the Extended Use Agreement. (CP 1380:24-1381:20; CP 1560; CP 1575-76; CP 1580-81; CP 1583-84; CP 1586-88; CP 1674:13-1678:24; CP 1668:3-1680:5; CP 2820:17-2824:3.) After Virginia Limited declined each of these proposals, (CP 1381; 2, 9-10, 13-14, 20) Cornish decided to “play hardball.” (CP 1584.) Instead of exercising or extending the purchase option, Cornish threatened to sue Virginia Limited and Etherington if they refused to amend the terms of the Agreement. (CP 1381:15-20.)

Cornish’s claim that these strategies were designed to help Virginia Limited clear the WSHFC obligations from title by the agreed closing date is not supported by the facts. (CP 1361:24-1362:21.) Any concern with clearing title was premature, since Virginia Limited had no

obligation to do so unless and until Cornish exercised the purchase option, and then not until the agreed closing date. (CP 32-33, Sections 4.3 and 4.6; CP 1380:8-23.) If Cornish timely and unequivocally exercised the option, Virginia Limited intended to clear the WSHFC obligations from title pursuant to the express early termination provisions in the Extended Use Agreement.⁷ *Id.* Finally, Cornish had knowledge of the method and risks related to clearing the WSHFC obligations at the time it signed the Agreement.⁸ (CP 2492-2494; CP 2348:23-2349:4; RP 402:15-404:20.)

Additionally, Cornish did not have clean hands because it continuously disregarded its Sublease obligations. Cornish failed to: (i) obtain required permits for modifications to the Property (CP 26, Sections 3.4, 3.9 and 3.10; CP 1385-1386; CP 1379:9-25; CP 2853:9-25); (ii) obtain written consent before penetrating the exterior of the building and interior concrete floors, which compromised the firewalls of those membranes (CP 26, Section 3.10; CP 1688:5-13; CP 1492; CP 1379:16-21); (iii) timely pay rent and related late penalties; (CP 1467-1469; CP 1471; CP 1681:4-17; CP 1682:3-7); (iv) pay utilities (CP 29, Section 3.20; CP 2855:1-7); (v) provide insurance policies (CP 28, Section 3.15(d); CP 1379:5-8; CP 1683:11-20; CP 1684:15-20); and (vi) obtain consent before

⁷ *Infra* at 44-45 for a summary of the Extended Use Agreement terms.

⁸ Virginia Limited challenges finding of fact 9 since Cornish understood the risk of the WSHFC finding a replacement buyer. (CP 1032.) *Am. Nursery Prods. Inc.*, 115 Wn.2d at

recording the Memorandum of Lease with Option.⁹ (CP 36, Section 5.7; CP 1614-1615; CP 1380:1-7.)

- b. *Cornish is not entitled to any equitable relief because it did not act with vigilance.*

It is an ancient maxim that “equity aids the vigilant, not those who slumber on their rights.” Leschner v. Dep’t of Labor and Indus., 27 Wn.2d 911, 927, 185 P.2d 113 (1947). This rule “operates throughout the entire remedial portion of equity jurisprudence, ... as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs.” Id. (quoting 2 Pomeroy’s Equity Jurisprudence (5th ed.) 169, § 418). Equitable relief is only available to those who have shown a disposition to help themselves, and does not allow a person to profit from his own wrongdoing. Teeter v. Brown, 130 Wash. 506, 510, 228 P. 291 (1924); Tyler, 138 Wash App. at 129.

Under the unambiguous terms of the Option Agreement, if Cornish had not exercised its option to purchase the Property as of December 31, 2006, then on January 1, 2007 Cornish could pay \$50,000 to extend the option term through December 31, 2007. (CP 32-33, Section 4.3.) If such

222.

⁹ Cornish claimed that its failures to comply were immaterial “breaches” that did not invalidate its purchase option. (CP 1853:11-1860:9.) However, these defaults were material, especially Cornish’s unpermitted alterations at the Property, which exposed all tenants to additional risk and further compromised the integrity of the building. In any event, a dispute as to materiality misses the point. Cornish’s disregard of its lease obligations is relevant in equity as evidence of unclean hands. (CP 32, Section 4.1; CP

a payment was not timely paid, the parties expressly agreed that the purchase option expired on December 31, 2006.¹⁰ *Id.*

Cornish admits it was aware of the option in all of the terms of the option and payment obligations necessary to extend the option period. (CP 1672:1-20.) However, it was not vigilant in several ways: (i) its option extension payment was late; (ii) the payment was defective; and (iii) it waited nearly one year before offering to cure its defective payment and attempting to exercise the option.¹¹

First, the option extension check was untimely. While Cornish was trying to renegotiate with Virginia Limited, Cornish CFO Jeff Riddell printed the extension check on December 20, 2006. (CP 1695:17-1696:17.); *supra* at 15. After the option period lapsed, Virginia Limited called Cornish to inquire as to its intentions, which were now unclear in light of Cornish's multiple proposals and threatening statements during its renegotiation attempt. (CP 1382:4-12.) Only then did Cornish mail the check to Virginia Limited on January 5, 2007. (CP 1230:1-3.) It arrived January 7th. (CP 1382:12-14.)

1887.)

¹⁰ Virginia Limited challenges finding of fact 11 and the related conclusion of law 10. (CP 1032; CP 1036.) *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222. The Agreement expressly provides that the option expired as of December 31, 2006 if Cornish did not extend the option term by January 1, 2007. (CP 32-33, Section 4.3.)

¹¹ Virginia Limited challenges finding of fact 12, since Virginia Limited's testimony was that timely action by Cornish was critical to its ability to terminate the Extended Use

Second, the check was defective and for lack of two signatures. RCW 62A.3-403(b) (“the signatory of the organization is unauthorized if one of the signatures is lacking”). On its face, the validity of the check was expressly conditioned with the words “two signatures required over \$7,500.” (CP 1593.) The extension check was in the amount of \$50,000, but contained only one signature. *Id.*; (CP 1699:11-17.)

Third, the check was uncertified. (CP 1593.) Cornish’s incomplete and uncertified check was not payment required by law. RCW 62A.3-310(b)(1).

For each of these reasons, Cornish’s late and defective extension check was promptly rejected and returned by Virginia Limited.¹² (CP 1382:12-14; CP 1700:2-4.) Cornish deliberately chose to remain silent and did not cure the defects. (CP 1700:5-1703:17; CP 1657:3-1659:8.) No reason exists why Cornish, having missed the option deadline, did not immediately replace the defective extension check and communicate its intent to exercise the option, even late. Prompt and unequivocal performance by Cornish was critical to Virginia Limited’s own ability to

Agreement. (CP 1032; RP 402:25-403:9; CP 1378:6-14.) *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222.

¹² Virginia Limited challenges finding of fact 16 and the related conclusion of law 7. *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222. (CP 1033; CP 1035.) It is not bad faith for a party to demand exact performance of contract terms. Virginia Limited had a right to reject Cornish’s untimely performance and to insist upon compliance with express terms of sublease obligations as a condition of any option. It had a right also to insist upon timely performance to pay for an extension of the option term.

perform. (CP 1378:6-14; RP 410:5-15; RP 356:18-358:5.)

Instead, in March 2007, Cornish notified Virginia Limited that the option price “is no longer as specified in the Option Agreement” and disclaimed that any option extension payment was required. (CP 1597; CP 1601.) Cornish continued to propose new terms upon which it would be willing to purchase the Property at a substantially reduced price. (CP 1382:16-20.) In August, Cornish claimed it would not purchase the Property unless Virginia Limited provided an indemnification guaranty not contained in the Option Agreement. (CP 1383:17-22.)

It was not until 50 weeks after the option period expired that Cornish ever attempted to cure its defective extension payment and exercise the option. (CP 1634-1635.) Virginia Limited promptly rejected both. (CP 1637-1639.)

The trial court appears to have determined that (i) Cornish’s extension check was delivered within a three day grace period, and (ii) its tender of an untimely and defective check was proper “payment.” (CP 1921.) This conclusion is reversible error. The actual effect of the trial court’s decision was to allow Cornish a 50-week equitable grace period, not a three-day grace period.

There was no innocence or inadvertence by Cornish missing the deadline. (CP 1696:18-24; 1699:11-17; 1705:7-1707:18); *infra* at 24.

There was no inability of Cornish to comply. *Id.* In the absence of any willingness to help itself, equitable relief from Cornish's own mistakes is not available.

3. Cornish is not entitled to any exception to the general rule of strict contract enforcement.

- a. *Virginia Limited is entitled to summary judgment because Cornish failed to strictly comply with the terms of the Option Agreement.*

As a general rule, "courts will uphold whatever lawful agreement the parties made with each other." *Redford v. City of Seattle*, 94 Wn.2d 198, 206, 615 P.2d 1285 (1980) (quoting *Dix Steel Co. v. Miles Constr., Inc.*, 74 Wn.2d 114, 119, 443 P.2d 532 (1968)). Absent illegality or a violation of public policy, courts will not interfere in the agreement of competent parties. *Redford*, 94 Wn.2d at 206.

Option contracts are to be strictly construed and time is of the essence. *Pardee v. Jolly*, 163 Wn.2d 558, 572, 182 P.3d 967 (2008).¹³ Courts generally will not save optionees from their own negligence. *Otis Housing Ass'n, Inc. v. Ha*, 140 Wn. App. 470, 475, 164 P.3d 511 (2007) (option lapsed when no notice of exercise was given by the deadline).¹⁴

¹³ A "time is of the essence" provision was expressly included in the Agreement. (CP 36, Section 5.5.)

¹⁴ See also *Gray v. Lipscomb*, 48 Wn.2d 624, 627, 296 P.2d 308 (1956) (even though the optionee simply forgot to exercise the purchase option, its attempted exercise 11 days later was too late); *Wax v. Northwest Seed Co.*, 189 Wash. 212, 218-19, 64 P.2d 513 (1937) (offer required acceptance by 1:00 p.m. on day 1; purported acceptance on Day 2 is too late); *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 783 P.2d 82 (1989)

Option contract terms are applied strictly because “any relaxation of terms would substantively extend the option contract to subject one party to a greater obligation than he bargained for.” *Pardee*, 163 Wn.2d at 572.

Equity, like it does in all other express contracts in which the terms of the contract are clear and plain, follows the law, and the courts have no authority on any equitable principle to rewrite the contract for the parties.

Pac. Fin. Corp. v. Snohomish County, 160 Wash. 384, 389, 295 P. 110 (1931).

Further, all conditions precedent must occur before there is a right to performance. *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556-57, 730 P.2d 1340 (1987); accord, 13 Williston on Contracts § 38:7 (4th. ed.). Compliance with all provisions of the Sublease was an express condition precedent to any right to extend or exercise the purchase option. (CP 32, Section 4.1.)

Cornish failed to deliver timely or sufficient payment to Virginia Limited to extend the purchase option period, and failed to satisfy the conditions precedent to the option. *Supra* at 16-19. Its purchase option expired under the express terms of the Option Agreement. (CP 32-33, Section 4.3.) The trial court erred in rewriting the Option Agreement.

(option to purchase required payments of \$1,000 each on October 31 and December 1; tender of \$2,000 on December 19 too late).

b. *Cornish is not entitled to an equitable grace period.*

Washington courts have upheld one narrow exception to the general rule of strict construction. In certain limited and special circumstances, and depending on consideration of all equities in each particular case, equitable grace periods may be available for innocent parties to avoid the harshness of forfeitures and the hardship that may result from strict enforcement. *Pardee*, 163 Wn.2d at 574-75; *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 609-11, 605 P.2d 334 (1979). In crafting this narrow exception, the *Wharf* court reemphasized the traditional rules of strict construction in option contracts, since “an extension of the power [to exercise a right], even for a moment of time, by action of a court, is compelling the offeror to give something for nothing.” *Id.* at 611.

The trial court misapplied *Wharf* case in granting an equitable grace period to Cornish. It interpreted *Wharf* as a safe harbor, giving a party automatic relief from contractual option obligations if some of the *Wharf* factors are present. (CP 1919-1922.) However, the *Wharf* exception is much more narrow and limited. It requires an in-depth review of the circumstances of each individual case. *Wharf Rest., Inc.*, 24 Wn. App. at 609-11. In *Wharf*, the court only granted an equitable grace period after a two and a half week trial. *Id.* at 604. This trial court made its

determination on summary judgment. (CP 1919-1922.)

The undisputed facts and circumstances of this case are very different from those in *Wharf*:

- i. There was no misunderstanding of the date the extension payment was due. (CP 32-33, Section 4.3; CP 1685:1-5.)
- ii. Cornish had no reason to believe timely payment was not required. (CP 1685:6-9.)
- iii. Based upon its course of dealing with Etherington, Cornish knew strict compliance was expected. (CP 1685:10-14; CP 1378:15-17.)
- iv. No inability to timely mail existed. (CP 1685:15-20.)
- v. No inability to physically deliver timely payment existed. (CP 1686:7-17.)
- vi. The Option Agreement was never amended so that timely payment was not required to extend the option period. (CP 1686:25-1687:10.)

Even if the “special circumstances” in *Wharf* are treated as factors for comparison against the facts of this case, equitable excuse of Cornish’s untimely performance was error. The trial court’s determination that the *Wharf* factors were met is not supported by the facts. (CP 1922; CP 1033:12-16.)

1. Cornish’s failure to deliver timely and sufficient payment to extend the option was not purely inadvertent. Cornish was aware the check was due, prepared it days in advance, chose not to deliver it or provide the requisite signatures, and refused to cure the defects. *Supra* at

18-20. In contrast, the tenant in *Wharf* “simply forgot to exercise” its option to renew a lease, and unequivocally exercised the option immediately after discovering its oversight. *Wharf Rest., Inc.*, 24 Wn. App. at 606, 612. Cornish waited another 11 months after its untimely effort to extend before attempting to cure its late and defective extension check, and then only after renegotiation efforts proved unsuccessful. *Supra* at 20.

2. Under the circumstances, it is not inequitable for Cornish to forfeit its improvements at the Property. In *Wharf*, the tenant’s permanent improvements were deemed to have been in anticipation of the tenant’s exercise of its option. *Wharf Rest., Inc.*, 24 Wn. App. at 612. Here, Cornish’s improvements are not conclusive evidence that it intended to extend or exercise the option: (i) it made improvements with only a non-binding option to purchase (CP 32, Section 4.1), and (ii) it made substantial improvements in at least three other leased properties where no purchase option exists. (CP 2512-2587; CP 476:24-25.); *infra* at 37.

3. Cornish’s delay prejudiced Virginia Limited by depriving it of enough time to clear the WSHFC obligations from title. (CP 1380:16-23; RP 356:18-358:5; RP 409:14-410:15; RP 287:4-12.) By the time Cornish attempted to exercise the purchase option, 11 months had passed since the original deadline, making a timely closing impossible. *Id.*; (CP

2714-2715; CP 2028-2030.)

4. Unlike *Wharf*, Cornish's Sublease was short-term, only 42-months. (CP 25, Section 3.2.) Over the course of the 25 year *Wharf* lease, the landlord had a demonstrated history of accepting late exercises of prior options. *Wharf Rest., Inc.*, 24 Wn. App. at 613. No such history existed here. (CP 1378:15-17; CP 1685:10-14.)

5. In *Wharf*, the conduct of the landlord "substantially contributed to cause the delay", because after a pattern of accepting late option exercises, it changed its policy to require strict compliance. *Wharf Rest., Inc.*, 24 Wn. App. at 613. Here, Cornish knew that Virginia Limited always insisted on strict compliance. (CP 1378:15-17; CP 1685:10-14.) The trial court initially found no evidence that Virginia Limited contributed to Cornish's delay, but later reversed that finding after trial without citing any supporting evidence.¹⁵ (CP 1922; CP 1033:12-16; CP 1035:18-22.)

Finally, *Wharf* involved equitable relief for failing to *exercise* an option, not failing to *extend* an option period. *Wharf Rest., Inc.*, 24 Wn. App. at 609-11. Here, Cornish had not only failed to exercise its option,

¹⁵ No evidence was presented at trial that Virginia Limited caused or was at fault for Cornish's delay in extending the purchase option. (RP 1-435.) The trial court cited none in its oral ruling or in its findings of fact. (RP 3-15, April 24, 2009; CP 1033.) The trial court erred in bolstering its decision on summary judgment with evidence presented at

but also failed to timely *extend the option term*. *Supra* at 18-19. Saving a party from its own failure to extend an option term does not have the same equitable and fairness considerations as saving a party from its failure to exercise an option.

Reviewed *de novo*, the trial court's grant of an equitable grace period to Cornish and denial of Virginia Limited's summary judgment motion are reversible errors. No remand is necessary because the undisputed facts show that Cornish failed to properly and timely pay for the purchase option extension to Virginia Limited's detriment, and did not meet the equitable requirements of clean hands, innocence, good faith and vigilance.¹⁶

trial. Therefore, Virginia Limited challenges finding of fact 15 and the related conclusion of law 6. (CP 1033; CP 1035.) *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222.

¹⁶ The equities do not support the relief granted to Cornish; Virginia Limited challenges conclusion of law 11. (CP 1036.) *Am. Nursery Prods. Inc.*, 115 Wn.2d at 222. In the event this Court determines remand is appropriate, the trial court should be instructed to consider all relevant facts and circumstances and to balance the equities between the parties.

B. The trial court abused its discretion in granting specific performance to Cornish without consideration of the impossibility of performance, hardship to Virginia Limited or the equities between the parties.

1. The standard of review for the trial court's grant of specific performance is abuse of discretion.

Appellate courts review the authority of a trial court to fashion equitable remedies for an abuse of discretion. *Rabey v. Dep't of Labor & Indus. of State of Washington*, 101 Wn. App. 390, 397, 3 P.3d 217 (2000); *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (a trial court abuses its discretion if its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons). The trial court's order of specific performance is reviewed for an abuse of discretion.

2. Cornish has no right to specific performance because Virginia Limited did not breach or threaten to breach its obligations under the Agreement.

A court may only award specific performance if: (a) there is a binding contract; (b) a party has committed or is threatening to commit a breach of its contractual duty; (c) the terms of the contract are definite and certain; and (d) the contract is free from unfairness, fraud and overreaching. *Craft v. Pitts*, 161 Wn.2d 16, 24, 162 P.3d 382 (2007).

Cornish has no right to specific performance because Virginia Limited did not commit or threaten to commit a breach of the Option

Agreement. Virginia Limited's entitlement and insistence on exact performance by Cornish is not a breach of contract.

Although the trial court's specific performance order referenced a "breach of contract", the so-called breach was based upon "Virginia Limited's failure to honor Cornish's election to exercise the option and sell the [Property] in accordance with the terms of the Option Agreement." (CP 2029.) This obligation was non-existent until the trial court granted an extra-contractual grace period. (CP 1919-1922.)

3. Failure to balance the equities was an abuse of discretion.

The equitable remedy of specific performance has limited application; any such award is subject to a higher burden of proof and is only available if there is no adequate remedy at law. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993); *Town Concrete Pipe of Washington, Inc. v. Redford*, 43 Wn. App. 493, 498, 717 P.2d 1384 (1986).

Specific performance is governed by equitable principles. *Cascade Timber Co.*, 28 Wn.2d at 711. When granting equitable remedies, courts often balance the equities between the parties. *Wilhelm*, 100 Wn. App. at 846-47. The trial court abused its discretion in failing to balance the equities and consider the hardship to Virginia Limited that would, and in fact did, result from specific performance.

- a. *Compliance with the order of specific performance was impossible.*

“... [I]f the evidence establishes that the breaching party has the ability to perform the duties under the contract, equity requires done that which ought to be done.” *Egbert v. Way*, 15 Wn. App. 76, 79, 546 P.2d 1246 (1976). Here, it was impossible for Virginia Limited to comply with the specific performance order.

The trial court required Virginia Limited to convey the Property free and clear of liens and encumbrances on February 2, 2009.¹⁷ (CP 2029.) Although the Option Agreement expressly authorized Virginia Limited to use Cornish’s purchase funds to clear title to the Property, Cornish refused to tender these funds into escrow.¹⁸ (CP 33, Section 4.6; RP 168:10-13; CP 2002:23-2003:5; RP 397:17-398:2.) Absent those funds, Virginia Limited could not clear the existing encumbrances from title. *Id.*; (RP 381:17-382:6; CP 103:21-104:3; RP 303:23-305:8.)

Before the specific performance order, Virginia Limited had undertaken informal efforts to buy out the Extended Use Agreement with its own funds. (RP 293:3-7.) The WSHFC in turn demanded \$1.8 million

¹⁷ “Specific performance” denotes performance as specifically agreed. *Haire v. Patterson*, 63 Wn.2d 282, 386 P.2d 953 (1963). There is no indication that the trial court considered (i) whether February 2, 2009 was a closing date reasonably equivalent to the original July 2008 date, or (ii) that the parties had already expressly agreed to an alternative extended closing date of May 2009. (CP 33, Section 4.5; CP 35, Section 4.21.)

“contribution” as a condition for terminating the Extended Use Agreement.¹⁹ (CP 2733-2735.) Since this amount was significantly more than Virginia Limited was able to pay, it formally exercised the early termination provisions under the Extended Use Agreement on February 21, 2008. (CP 2364:1-7; CP 2653-2655.)

The WSHFC initially agreed, as required by the Extended Use Agreement, to cooperate in the early termination process. (CP 2361:22-2362:1; CP 2684; CP 1452-1453, Section 4.3.) Several months later, after interference by Cornish during undisclosed meetings and discussions, the WSHFC refused to process Virginia Limited’s early termination application. *Infra* at 45; (CP 2745-2746; CP 2348:13-16.) Without access to the purchase funds and absent early termination of the Extended Use Agreement, it was impossible for Virginia Limited to obtain clear title by the Court ordered closing date.

Further, the trial court’s order required Virginia Limited to demolish the upper four floors of the building and construct a temporary roof within four months. (CP 2029:17-22.) In addition to not having the

¹⁸ The refusal of Cornish to even tender the purchase funds resulted in nonpayment to an underlying lender and a separate judicial foreclosure action now pending under King County Superior Court No. 09-2-21115-9 SEA.

¹⁹ The WSHFC had never before conditioned release of these obligations on a payment of money. (CP 2934:4-19.) Virginia Limited challenges finding of fact 14 since no penalty payment was required under the Extended Use Agreement. (CP 1033.) *Am. Nursery Prods. Inc.*, 115 Wn.2d at 222.

funds to accomplish this, there was insufficient time to complete the necessary demolition permit application process, conduct the demolition and the partial construction rebuild (which also required permits) in the time ordered by the trial court.²⁰ (RP 266:15-269:4; RP 196:17-20.) Moreover, the demolition requirement was in express derogation of the Extended Use Agreement and outstanding demands of the WSHFC that the building be repaired. (CP 2757; CP 2348:17-19; RP 299:11-17; RP 269:2-4; CP 1438-1465.)

These competing and inconsistent demands were irreconcilable and rendered compliance with the specific performance order impossible. No evidence was presented in any motions or at trial that compliance was possible. (CP 2019-2025; CP 1964-1978; CP 1992-2007; RP 1-435.) Virginia Limited's delay in fully performing under the specific order was not due to any recalcitrance, but impossibility.²¹ (RP 381:17-382:6; RP 299:2-17; RP 359:24-360:8; CP 2002:13-22.) The failure of the trial court to fashion an order for which compliance was possible was an abuse of discretion.

²⁰ The trial court's order that Virginia Limited demolish the upper four floors was also in contradiction to the express terms of the Option Agreement, which contemplated that the closing could occur with or without demolition by Virginia Limited, and Virginia Limited was not obligated to construct a roof. (CP 35, Section 4.22.) The court's order was not performance as agreed. *Haire*, 63 Wn.2d 282.

²¹ Virginia Limited therefore challenges conclusions of law 5 and 9, and reviewed *de novo*, are error. (CP 1035; CP 1036.) *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222.

- b. *The specific performance order resulted in extraordinary inequity and hardship to Virginia Limited, and a significant windfall to Cornish.*

In awarding specific performance, a court must ensure that “enforcement will not be oppressive, unconscionable, or result in undue hardship to any party involved.” *Tyler*, 138 Wn. App. at 129; *Craft*, 161 Wn.2d at 24. Here, the trial court’s order of specific performance was inequitable.

All parties entered into the Option Agreement understanding the risks and contingencies associated with this unusual transaction and Property. They knew that the building was failing, and that eviction before the expiration of the Sublease or exercise of the option was a real possibility. *Supra* at 7; *infra* at 40. They understood, or should have understood, the risk that the WSHFC may find a replacement buyer during the early termination process, which would jeopardize Cornish’s purchase option and Virginia Limited’s ability to clear title. (CP 2348:23-2349:4; RP 402:15-404:20.)

These circumstances, coupled with the trial court’s order of specific performance, denied Virginia Limited any compensation for its Property and additionally left it owing millions of dollars to Cornish in monetary damages. (CP 2029; RP 168:10-13; CP 1039-1041.) Meanwhile, Cornish, which failed to either timely exercise or extend the option, was

rewarded with ownership of the Property, a multi-million dollar judgment, and the unexpected windfall of additional value in the building resulting from the City rezone.²² *Id.*; *supra* at 8 and 18-19.

For all of the above reasons, the trial court's specific performance order is reversible error. Remand is unnecessary because none of the prerequisites for an award of specific performance are met, and any such award under the circumstances is oppressive.

C. The trial court erred in awarding consequential damages in addition to specific performance.

1. The trial court's award of consequential damages in addition to specific performance is reviewed *de novo*.

Whether the trial court erred in awarding Cornish consequential damages in addition to specific performance is a question of law reviewed *de novo*. *McCallum v. Allstate Prop. And Cas. Ins. Co.*, 149 Wn. App. 412, 420, 204 P.3d 944 (2009); *Trotzer v. Vig*, 149 Wn. App. 594, 612, 203 P.3d 1056 (2009).

2. Upon Cornish's election and award of specific performance, it was not entitled to additional consequential damages, in law or equity.

Real estate contract vendees can elect between three different

²² Virginia Limited is entitled to the benefit of the increased value of the Property because Cornish did not comply with the terms of the Option Agreement. The trial court failed to consider this interest. In light of the windfall to Cornish resulting from the trial court's orders, Virginia Limited challenges finding of fact 20 and conclusion of law 11. (CP 1034; CP 1036.) *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222.

remedies when an executory contract for the sale of real estate is breached by the seller: specific performance, or damages resulting from the breach, or for rescission of the contract. Willis T. Batcheller, Inc. v. Weldon Constr., Co., 9 Wn.2d 392, 403, 115 P.2d 696 (1941). The adoption of one of the two or more inconsistent remedies by a party “is a conclusive and irrevocable bar to his resort to an alternate remedy.” Holt Mfg. Co. v. Strachan, 77 Wash. 380, 137 P. 1006 (1914). Said differently, “the prosecution to final judgment of any one of the remedies constitutes a bar to the others.” Stewart & Holmes Drug Co. v. Reed, 74 Wash. 401, 405, 133 P. 577 (1913).

The remedy of specific performance is inconsistent with damages for breach of contract. Restatement (Second) of Contracts, § 378, cmt. d. An “election” under the doctrine of election of remedies is “a choice shown by an overt act between two or more inconsistent rights either of which may be asserted at the will of the chooser.” Boeing Aircraft Co. v. Aeronautical Indus. Dist. Lodge of Int’l Machinist, 91 F.Supp. 596, 613 (W.D. Wash. 1950).

The purpose of the election of remedy doctrine is the prevention of double redress for a single wrong. Wilkinson v. Smith, 31 Wn. App. 1, 639 P.2d 768 (1982). When a litigant has an option to definitely pick the property right without reference to the consent or wishes of the other party

to the transaction, he is bound by the exercise of that right. *Id.*

Despite Cornish's election and award of specific performance, the trial court awarded consequential damages of \$2,425,474.64 to Cornish. (CP 1034:1-7; CP 1036:14-21; CP 1037:25-1038:2; CP 1040:25.) Such an award is barred by the election of remedies doctrine. Additional damages are also inconsistent with Cornish's pleadings and the trial court's own rulings. (CP 2029:11-13; CP 14:23-15:13; CP 21; CP 14:1-2; CP 1973:21-1974:7.)

3. Even if equitable damages were available, the trial court erred in its measurement of damages.

Courts have limited powers to adjust the equities when a contract is enforced retrospectively. *Rekhi v. Olson*, 28 Wn. App. 751, 758, 626 P.2d 513 (1981). "Damage" awards are permitted only where the delay is significant or unwarranted. *Id.* Such damages may be awarded, not for breach of contract, but so that that injured party, unable to have exact performance by the specific performance decree, may have an accounting of the losses caused by the delay in implementing the decree. *Id.* at 757; *see also Carpenter v. Folkerts*, 29 Wn. App. 73, 79-80, 627 P.2d 559 (1981) (equitable compensation in addition to specific performance available only to the extent defendant is able to perform).

Because equitable damages may not be awarded in addition to

specific performance where specific performance itself is not possible, the trial court erred in awarding equitable damages. *Supra* at 30-32. Even assuming *arguendo* that specific performance was possible, no evidence was presented at trial regarding whether Virginia Limited's delay in conveying the Property by February 2, 2009 was unwarranted.²³

Before trial, the Court dismissed Cornish's breach of contract claims, but determined that it could hear evidence regarding "what damages, if any, flow from [the breach of the Option Agreement] in addition to specific performance." *Supra* at 12.

Cornish then presented evidence of damages consisting mostly of future rents for five years at three different sites, plus over \$700,000 in tenant improvement costs it allegedly expended at these sites.²⁴ (RP 68:21-93:9; RP 101:17-123:2; RP 154:17-167:18; RP 206:18-208:9; RP 224:15-230:8; RP 232:5-233:21.) All of this evidence goes to breach of contract or consequential damages, not damages attributable to unwarranted delay in complying with the specific performance order. (CP 1034:1-2; CP 1036:1-3; CP 1037:25-1038:2); *Crest Inc. v. Costco Wholesale Corp.*, 128

²³ Absent such evidence, no basis for a finding of unwarranted delay exists. Virginia Limited challenges findings of fact 8, 11, 13, 17, 18, 19, 21 and 22, and conclusions of law 4, 5, 8, 9, 10, 13, 16 and 17. (CP 1031-1034; 1035-1038.) *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222.

²⁴ The court erred in admitting specific trial exhibits containing evidence of consequential damages in violation of ER 901, ER 904 and ER 1006. (RP 75:2-84:14; RP 110:7-111:15; RP 412:19-413:18; RP 415:6-7.) Thus, Virginia Limited challenges findings of

Wn. App. 760, 764, 115 P.3d 349 (2005); 25 Washington Practice § 14.7 (2009) (and the cases cited therein).

Over Virginia Limited's standing objection, the trial court improperly admitted all evidence of consequential damages. (RP 71:16-72:16.) Ultimately, the trial court held Virginia Limited liable for all of Cornish's claimed long-term lease rents from July 2008 and improvements at unrelated locations as damages, all of which are breach of contract damages not awardable in addition to specific performance. (CP 2029; RP 19:1-9; CP 1037:3-21.)

In doing so, the trial court abused its discretion in fashioning an equitable remedy where the law expressly denies it. *Rabey*, 101 Wn. App. at 397; *Town Concrete*, 43 Wn. App. at 498; *In re Marriage of Scanlon & Witrak*, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001) Its award of monetary damages should be reversed.

D. Reviewed *de novo*, the trial court's summary judgment of wrongful eviction was error.²⁵

1. Virginia Limited is not liable for wrongful eviction because the conditions complained of were caused by third parties.

There can be no constructive eviction unless the landlord is at fault; no action can be maintained against the landlord for wrongful acts of

fact 21 and 22, and conclusions of law 14, 15 and 16. (CP 1034; CP 1037.) *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222.

²⁵ See *supra* at 12-13 for full discussion of the summary judgment standard of review.

strangers not authorized or sanctioned by the landlord. Olson v. Scholes, 17 Wn. App. 383, 394, 563 P.2d 1275 (1977); see Cherberg v. Peoples Nat. Bank of Wash., 88 Wn.2d 595, 564 P.2d 1137 (1977); see also Income Properties, Inc. Corp. v. Trefethen, 155 Wash. 493, 284 P. 782 (1930).

It is undisputed that the defective and deteriorating condition of the building was due to the negligent construction by third parties. *Supra* at 7. Cornish entered into the Sublease after being expressly advised that the building would continue to deteriorate, and that Virginia Limited did not have the resources or plans to remedy the problem. *Id.*

Virginia Limited cannot be held liable for wrongful eviction because (i) Cornish's loss of use was attributable to pre-existing and disclosed conditions, and (ii) Virginia Limited did not warrant that the building would not eventually fail. (CP 2360:20); Magenstaedt v. Eric Co., 64 Wn.2d 298, 309, 391 P.2d 533 (1964).

2. Cornish knowingly assumed the risk of early termination due to pre-existing conditions.

Tenants who have prior knowledge of a defective condition of property are presumed to have assumed the risk of loss, which relieves the landlord of liability and prevents the tenant from recovering damages. Mammoth Storage Warehouse, Inc. v. Woodhouse, 136 N.Y.S.2d 594, 597

(1954); Hogue v. Metro. Bldg. Co., 120 Wash. 82, 206 P. 959 (1922); Sogren v. Properties of Pac. Northwest LLC, 118 Wn. App. 144, 75 P.3d 592 (2003); Richardson v. Brower, 71 Wash. 192, 196, 127 P. 1098 (1912).

It is undisputed that Cornish knew about the deteriorating condition of the building when it entered into the Sublease. *Supra* at 7; (CP 232:22-24; CP 2492-2494; CP 2589 (“exceedingly bad shape”); CP 2591 (“truly disastrous condition”); CP 2904:1-14; CP 2907:16-23; CP 2606-2608.)

Cornish conducted 14 months of its own due diligence regarding the condition of the building. (CP 2846:10-14.) Its Board of Trustees authorized execution of the Sublease with a full understanding of “the four floors of disintegrating apartments.” (CP 2599.) With knowledge of the Property’s inevitable failure, Cornish expressly accepted the condition of the building as part of the bargain in exchange for the below market rent and an option. (CP 2360:24-2361:3.) With this knowledge, Cornish assumed the risk of early termination.

3. Cornish waived any claim for wrongful eviction by remaining in the leased premises months after the termination notice.

Since there can be no eviction without a surrender of possession by the tenant, a tenant who continues to occupy the property for an

unreasonable length of time after the acts or omissions that constitute an eviction waives the eviction. *Thompson v. R. B. Realty Co.*, 105 Wash. 376, 382, 177 P. 769 (1919) (tenant waived the acts complained of when it retained possession of the leased property for six weeks after the time it claimed constructive eviction by landlord's repairs).²⁶

Cornish remained at the Property for four months after the notice of termination.²⁷ (RP 194:1-3.) During this time, it held public exhibitions and receptions at the Property without taking any steps to protect its patrons, students and staff. (CP 2834-2838; RP 310:19-311:15.) Because reasonable minds could differ whether Cornish's delay in vacating the Property constituted a waiver, granting a summary judgment was error.

4. Genuine issues of material fact existed with respect to the timing of the substantial destruction.

Genuine issues of material fact existed as to when "substantial destruction" occurred at the Property, barring summary judgment. Virginia Limited asserted "substantial destruction" occurred when mitigation efforts by Virginia Limited were unsuccessful, not the date of the structural engineer's report which triggered them.²⁸ (CP 2364:18-21; CP

²⁶ See also *Tennes v. Am. Bldg. Co.*, 72 Wash. 644, 646-47, 131 P. 201 (1913) (no constructive eviction without a surrender of the possession of the premises by tenant); *Buerkli v. Alderwood Farms*, 168 Wash. 330, 334, 11 P.2d 958 (1932) (tenant may maintain an action for constructive eviction only if he abandons the premises to landlord).

²⁷ The termination notice was given April 3, 2008. (CP 2610-2612.)

²⁸ Virginia Limited challenges finding of fact 16 and the related conclusion of law 7. *Am. Nursery Prods., Inc.*, 115 Wn.2d at 222. (CP 1033; CP 1035.) Virginia Limited's efforts

2365:3-9.) Cornish claimed that “substantial destruction” occurred, if at all, on December 20, 2007, the date on which Virginia Limited’s structural engineer opined that the building was “dangerous.”²⁹ (CP 227:7-8.)

Even though Virginia Limited was entitled to the benefit of all reasonable inferences, the trial court adopted Cornish’s position. *Cowlitz Stud*, 157 Wn.2d at 573. By concluding that Virginia Limited failed to deliver the Notice of Lease Termination within 30 days of an event of “substantial destruction,” the trial court erred as a matter of law.³⁰ (CP 419:1-3.)

For all of the above reasons, this Court should reverse the trial court’s determination of wrongful eviction liability and damages, or at a minimum, remand for full consideration of the relevant facts.

to remove tenants from a building upon receipt of notice of “dangerous” structural degradation is not bad faith.

²⁹ Cornish’s own conduct and statements do not support its position. Cornish received the memo from Virginia Limited’s structural engineer in late January 2008 and immediately began looking to move. (CP 2449:21-23; CP 2841:22-2843:9.) Then upon receipt of the termination notice, Cornish refused to leave. (RP 194:1-3.)

³⁰ This finding is entitled to no weight and highlights the fundamental unfairness in the trial court’s inconsistent treatment of Cornish and Virginia Limited. *Hamilton*, 70 Wn. App. at 848-49. When Cornish missed deadline for extending the option term, it asked the trial court to excuse it from compliance with the express terms of the Option Agreement. (CP 1356:5-9.) The trial court did so, granting a “grace period” to avoid forfeiture. (CP 1921.) But for its claim of wrongful eviction, Cornish then urged that the trial court to strictly enforce the Option Agreement, directly opposite to its previous position. (RP 5:24-6:1 and RP 17:16-24, March 27, 2009.) The trial court did so, enforcing a technical 30 day notice provision even though Virginia Limited had terminated the Sublease because the building was too dangerous for occupancy. (CP 417-419; CP 2364:19-21; CP 2365:4-6.)

E. Reviewed *de novo*, the trial court erred in dismissing Virginia Limited's counterclaim for tortious interference on summary judgment.³¹

It is undisputed that Cornish had repeated communications and meetings with numerous representatives of the WSHFC over an extended time, all of which was unknown and unconsented to by Virginia Limited. (CP 2362:6-12; CP 2362:21-26; CP 2363:1-2; CP 2364:9-16; CP 217:23-25; CP 219:11-18; CP 217:7-9.) Whether the nature and substance of those communications was wrongful is a question of fact. Quadra Enterprises, Inc. v. R.A. Hason Co., Inc., 35 Wn. App. 523, 527, 667 P.2d 1120 (1983).

Virtually every single fact related to whether Cornish's communications were wrongful and caused harm to Virginia Limited was disputed by the parties, barring summary judgment. Despite Virginia Limited's entitlement to the most favorable view and inferences of the facts, the trial court improperly dismissed its counterclaim. Cowlitz Stud., 157 Wn.2d at 573.

Washington has adopted the Restatement (Second) of Torts § 767 in determining whether a party's conduct in intentionally interfering with a contract is improper, which takes into account the entire context of the circumstances including: (i) the nature of the actor's conduct; (ii) the

³¹ See *supra* at 12-13 for full discussion of the summary judgment standard of review.

actor's motive; (iii) the interest of the other with which the actor's conduct interferes; (iv) the interest sought to be advanced by the actor; (v) the social interest in protecting the freedom of action of the actor and the contractual interests of the other; (vi) the proximity or remoteness of the actor's conduct to the interference; and (vii) the relation of the parties. Plumbers and Steamfitters Union Local 598 v. Washington Public Power, 44 Wn. App. 906, 928, 724 P.2d 1030 (1986).

Under the Extended Use Agreement, Virginia Limited agreed to provide multifamily residential housing to low-income families in exchange for certain tax credits. (CP 1438-1465.) The maximum term is 30 years, with an option of early termination after 14 years of service. (CP 1443, Sections 1.12 and 1.16.) Virginia Limited's 14-year service period expired December 31, 2006.³² (RP 240:2-8.)

On February 21, 2008, Virginia Limited formally applied for early termination under the express provisions of the Extended Use Agreement and paid the required \$33,500 application fee. (CP 2653-2655.) If the WSHFC did not find a buyer for the Property who would continue providing low-income housing, then the Extended Use Agreement would automatically terminate. (CP 1453, Sections 4.3.2 and 4.3.4.) The WSHFC

³² This date made a timely decision by Cornish in exercising its option critical to Virginia Limited's ability to apply for early termination in order to terminate the Extended Use Agreement before the parties' contemplated July 2008 closing. (RP 409:14-410:15.)

stopped processing Virginia Limited's early termination application after a series of meetings with Cornish representatives. (CP 2348:13-16; CP 2745-2746.) It never did present a buyer within the 12-month period.

1. Cornish's intent was not to help Virginia Limited clear title to the Property.

Cornish ignored Virginia Limited's express request to not contact the WSHFC regarding the Extended Use Agreement, and conducted a number of undisclosed meetings with the WSHFC regarding the same during 2006 and 2007. (CP 2364:8-16; CP 2810-2812; CP 2362:6-2363:16; CP 2666; CP 2908:4-2909:18; CP 2921:18-2922:16; CP 2924:4-21; CP 2737.) Cornish's purpose was to influence the WSHFC to take an adverse position against Virginia Limited.³³ Cornish did not want Virginia Limited to exercise its early termination rights because it could not control the process, and wanted the WSHFC to agree to a change of use for the apartments. (CP 2663-2664; CP 2822:3-12; CP 2868:7-12; CP 2690; CP 2694-2695.)

Although a good faith exercise of one's legal interests is not improper interference, Cornish's interference with the WSHFC was not in good faith. 16A Wash. Prac. § 22.5 (2009). It cited no evidence or

³³ Virginia Limited challenges finding of fact 12 on the basis that it was not that the WSHFC refused to process its application because Cornish did not exercise the option early, but because Cornish wrongfully interfered. (CP 1032.) Am. Nursery Prods., Inc., 115 Wn.2d at 222.

testimony in support of such a claim. (CP 219:11-13; 219:24-25.)
Cornish's assertion that its purpose was to understand the low-income housing obligations and find a way to clear title to the Property is not supported by the evidence. (CP 217:5-9.)

2. Cornish made many material misrepresentations in its private discussions with the WSHFC which adversely affected the relationship with Virginia Limited.

In an email to the WSHFC in April 2007, Cornish made a number of material misrepresentations and omissions that constitute wrongful interference: (CP 2694-95)

- i. Cornish claimed it had a purchase and sale agreement when Cornish only had a Sublease, since it had failed to timely extend or exercise the purchase option. *Supra* at 18-19; (CP 2861:5-2862:7; CP 2363:7-8.)
- ii. Cornish represented that the building was unsafe. Even though the condition of the building was poor at that time, it was still safe for occupancy. (CP 2363:10; *see* CP 2364:18-21.)
- iii. Cornish failed to disclose the dispute surrounding the purchase option and any right to purchase. (CP 2864:9-19; CP 2878:25-2879:19; CP 2363:12-15.)
- iv. Cornish's wrongfully implied to Virginia Limited authority to disclose the costs of repair and misstated them. (CP 2363:11-12.)

Cornish acknowledged these misrepresentations, but dismissed them as immaterial to the WSHFC's decisions. (CP 2953:21-23.)
Cornish's misrepresentations raised genuine issues of material fact,

barring summary judgment.

3. Cornish's interference with the WSHFC caused it to change its position toward Virginia Limited.

Cornish relied solely on the WSHFC's director's self-serving testimony that none of Cornish's communications influenced the WSHFC's decision to refuse to process Virginia Limited's early termination application. (CP 218:11-219:5.) With all facts and inferences viewed most favorably to Virginia Limited, the totality of the evidence calls this testimony into question and raises genuine issues of material fact. *Cowlitz Stud*, 157 Wn.2d at 573.

It was the WSHFC that originally invited Virginia Limited to proceed under the qualified contract process. (CP 2684; CP 2361:22-2362:5.) Only after multiple meetings and communications with Cornish did the WSHFC stop processing Virginia Limited's early termination application. *Supra* at 45; (CP 2745-2746.) The WSHFC cited Cornish's *lis pendens*, the lawsuit and the condition of the building as the reasons for its rejection, but it had known of these issues long before Virginia Limited submitted its application, and could cite no rule or precedent that permitted rejection of an application on such grounds. *Id.*; (CP 2938:23-2940:6; CP 2721-2724; CP 2728; RP 399:4-16.)

Then, in October 2008, the WSHFC demanded that Virginia

Limited either rebuild or repair the upper four floors, or face litigation, a complete reversal from its previous position and conflicting with the trial court's order to demolish the upper four floors. (CP 2757; CP 2361:22-24; CP 2684.) This demand adversely affected Virginia Limited's ability to comply with the specific performance order. (RP 299:11-17.)

In light of the numerous issues of fact regarding Cornish's wrongful interference with Virginia Limited's contractual relationship with the WSHFC, summary judgment was reversible error. Dismissal of Virginia Limited's claims should be reversed and remanded for a full trial.

F. The trial court's award of attorney fees and costs to Cornish was error under *de novo* review.

1. Cornish is not entitled to attorney fees and costs under equitable principles.

This Court should reverse and vacate the trial court's award of attorneys' fees and costs to Cornish. The trial court based the award solely on the attorneys' fee provision in the Agreement for actions to "enforce any rights [there]under." (CP 36-37, Section 5.9.) This was not an action to enforce the Agreement, but rather to be excused from the requirements of the contract. Where equity allows extra-contractual relief, no right to attorneys' fees under the contract should be awarded.

The purpose of a contractual attorney fee provision is to ensure that complying parties forced to sue those in breach receive the benefit of

the bargain and are made whole. Non-complying parties, like Cornish, cannot use such a provision as a sword to obtain a fee award after being equitably excused from its own contract obligations. Holmes Harbor Water Co., Inc. v. Page, 8 Wn. App. 60, 605, 508 P.2d 628 (1973) (even if a party has a legal right, courts may refuse to enforce such a right if a party uses it as a weapon of oppression rather than in defense of a just claim). To allow such an award undermines the sanctity of contracts and encourages noncompliance by parties with disparate economic advantage. It is also inconsistent with equitable principles of fairness, clean hands and the practice of balancing of interests.

2. Even if an award of attorney fees and costs is appropriate, the trial court erred in failing to (a) apply the proportionality rule and (b) enter adequate findings.

Virginia Limited expressly adopts Argument Section A of Appellant Etherington's Opening Brief. In determining the correct award of attorney fees and costs, the trial court should be instructed to apply the proportionality rule and enter detailed findings and conclusions regarding any award based on billing records with fee allocations as to each claim sufficient to permit meaningful review. Finally, the trial court erred in awarding Cornish \$55,559.30 in attorneys' fees and costs it incurred in federal bankruptcy court related to Virginia Limited's bankruptcy. (CP 3117-3120; CP 1162:18-22.) It had neither jurisdiction nor authority to

make such an award.

G. Virginia Limited should be awarded its reasonable attorneys' fees and expenses incurred in connection with this appeal.

Pursuant to RAP 18.1, Virginia Limited requests an award of reasonable attorneys' fees and expenses as prevailing party on appeal, on any issues to which it is entitled based upon the Court's decision. (CP 36-37, Section 5.9.)

VI. CONCLUSION

Based upon the foregoing, Virginia Limited requests that the (i) late option summary judgment order, the specific performance decree, and the award of consequential damages be vacated and reversed; (ii) the judgment for wrongful eviction be reversed; (iii) the tortious interference dismissal be reversed and remanded for trial; (iv) and the attorneys' fee and cost award be vacated and reversed.

DATED this 13th day of January, 2010.

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DECLARATION OF SERVICE

I declare that on the 13th day of January, 2010, I caused to be served the foregoing document on counsel listed below at the following addresses as noted:

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Dated: January 13, 2010

Place: Seattle, WA

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