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NO. 64198-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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KEN JACOBSON,

Appellant,

v.

WILLIAM C. COWIN and REBECCA NYBERG, husband and wife;
GEORGE CODDINGTON and KAY CODDINGTON, husband and wife;
and BCSCBN, INC., a Washington corporation,

Respondents.

Appeal from the Superior Court for King County
Cause No. 07-2-35604-5 SEA

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. ARGUMENT IN REPLY TO RESPONDENTS' BRIEF

A. BCSCBN Prematurely Terminated the Monthly Fee Payments to Jacobson

In his opening brief, Jacobson submitted that BCSCBN was not entitled to terminate the monthly fee payments due to him under the parties' April 2006 Term Outline (Ex. 21 and 137), until BCSCBN and its owner William Cowin declared the Vantage Bay project to be non-viable. Brief of Appellant, Section IV.B. In response to this position, BCSCBN argues that the fee obligation to Jacobson was terminable at will, and that even if it were terminable only for "cause," sufficient cause was established through the evidence presented at trial. Respondents' Brief at 17-31. These arguments do not stand scrutiny.

The Term Outline represents the parties' rather crude attempt to confirm their agreements regarding the purchase and development of the Vantage Bay Property. It states that "Ken Jacobson entity will receive a fee of \$6,500 per month starting on April 1, 2006." Ex. 21. As BCSCBN acknowledges (Respondents' Brief at 17), the Term Outline does not specify an ending date for the payments to Jacobson, nor does it specify a mechanism for terminating them. In fact, the parties never discussed those topics. *Id.* at 25. While the Term Outline describes Jacobson's anticipated duties, it does so only in the vaguest of terms, and does not

impose any particular level of time commitment by Jacobson to the project.

In support of its “at will” termination argument, BCSCBN in effect contends that the sentence in the Term Outline granting Jacobson the right to receive the monthly payments should be treated as a stand-alone independent contractor agreement, as if it were the only provision of the Term Outline. BCSCBN argues that this Court should interpret the sentence in isolation, under the rule that where a contract for continuing performance fails to specify the intended duration, it must be construed to be terminable at will by either party, after a reasonable time, upon reasonable notice. Id. at 20, citing Cascade Auto Glass, Inc. v. Progressive Casualty Ins. Co., 135 Wn.App. 760, 767, 145 P.3d 1253 (2006).

In pursuing this argument, BCSCBN seeks to avoid the holding in Malarkey Asphalt Co. v. Wyborne, 62 Wn.App. 495, 814 P.2d 1291 (1991), that a contract for services is not terminable at will by the recipient of the services, where consideration in addition to services themselves has been given, i.e., where the services are only one element of a larger transaction. In Malarkey, a plant manager’s employment was held subject to termination only “for cause” because he had provided consideration in addition to his personal services, by investing money in and loaning

money to the employer, and by selling an ownership interest in another business to accept his position with the employer.

BCSCBN's attempt to divorce Jacobson's right to monthly payments from the rest of the Term Outline's provisions not only defies common sense but is contrary to well established Washington case law, which requires the intent of the parties to contract to be determined viewing contract as a whole, taking into account the subject matter and objective of contract, as well as all the circumstances surrounding its making. Tanner Electric Cooperative v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

At the time the Term Outline was signed, Jacobson held the right to purchase the Vantage Bay property under a signed Purchase and Sale Agreement with Palelek (the "Palelek PSA," Ex. 100). Jacobson, Cowin and Coddington had protracted discussions over a period of months regarding the terms under which Jacobson would assign the Palelek PSA to BCSCBN, Cowin and Coddington would provide the funding for development of the project which the parties envisioned for the property, and the parties would work together to accomplish that development. Appellant's Brief at 8.

The purpose of the Term Outline was to confirm the rights and obligations which would flow from Jacobson's assignment of the Palelek

PSA to BCSCBN. The first sentence of the second paragraph of the Term Outline states that “the vested owner [of the property] will be BCSCBN.” The only way that BCSCBN could acquire that ownership was through an assignment of the Palelek PSA by Jacobson, so that BCSCBN could exercise the rights of the Buyer thereunder and close the purchase of the property. The very next sentence of that paragraph refers to the fact that Jacobson would in turn receive his monthly fee payments and share of development profits through BCSCBN. In reliance upon the signed Term Outline, the following day Jacobson executed the Assignment of the Palelek PSA to BCSCBN. Ex. 139. Clearly, the assignment of the Palelek PSA represented “additional consideration” provided by Jacobson in exchange for the right to receive the \$6,500 monthly payments and other consideration described in the Term Outline.

BCSCBN argues that the Malarkey case should not be applied here, because it involved an employment contract rather than an independent contractor agreement. Respondents’ Brief at 19-20. However, there is no reason to draw such a distinction. The contracts in both Malarkey and the present case involved the performance of services - by an employee in Malarkey and by an independent contractor here. Under the prevailing general rules, both types of relationships are normally terminable at will. Thompson v. St. Regis Paper Co., 102

Wash.2d 219, 233, 685 P.2d 1081 (1984); Cascade Auto Glass, *supra*. Indeed, Cascade Auto Glass has been cited as authority for that proposition in an employment termination case. Duncan v. Alaska USA Federal Credit Union, 148 Wn.App. 52, 73, 199 P.2d 991 (2008).

But just as the Court found that the employee “purchased a job” in Malarkey, 62 Wn.App. at 506, Jacobson purchased his right to a consulting relationship and the attendant monthly payments by assigning the Palelek PSA to BCSCBN. That assignment was not the “type of decision which would ordinarily be made in the absence of something more than the offer of at will employment,” *Id.* -- or in this case, something more than an at will consulting relationship terminable by Cowin whenever he felt like doing so.

Even if the rule in Cascade Auto Glass, *supra*, were applied here, it would not support the result reached by the trial court. That case stands for the proposition that an independent contractor agreement of indefinite duration can be terminated after a “reasonable” period of time, upon notice which is “reasonable” under the circumstances. 135 Wn.App. at 766. It is undisputed that BCSCBN provided no notice of termination to Jacobson. It simply stopped making payments in September 2006, and then filed its Complaint for Declaratory Relief in November 2006, seeking a Court ruling that payments were no longer required. The Trial Court did not

purport to apply the standards in Cascade Auto Glass. It made no findings on the question of what represented a reasonable period of time for duration of the contract, nor what reasonable amount of notice of termination was necessary.

BCSCBN also devotes a substantial amount of space in its brief to arguing that sufficient “cause” to terminate the fee payments existed. Brief of Respondents at 23-31.¹ It effectively contends that Bill Cowin’s subjective beliefs or expectations regarding Jacobson’s performance of consulting services should control the issue of “cause,” and that if Cowin was not “satisfied” then “cause” for termination existed. Respondents’ Brief at 25-26. However, it is well established that “ ‘[J]ust cause’ is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power... [A] discharge for “just cause” is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts

¹ In support of its argument, Respondents note that Jacobson did not expressly assign error to FF 5.17(b), 5.29 or 5.32. For the reasons discussed in Appellant’s Brief at 24-27, the fact that Jacobson did not form a separate legal entity (FF 5.29) is not disputed but does not support termination of the payments due to him. Nor can it be supported by the relative amounts of work done on entitlements by Jacobson as opposed to Coddington (FF 5.32). Id. FF 5.17(b) states that “Although no end date for the payment of the monthly fee is specified, the parties intended that such fees would continue so long as work was productive and was satisfactory to Cowin.” As Respondents acknowledge in their brief, the parties to the term outline never discussed the period for which fee payments would be due to Jacobson. Respondent’s Brief at 25. There was simply no objectively manifested intent on the issue, which the Trial Court could have used to support a conclusion as to terminability of the payments. See Go2Net, Inc. v. C.I. Host, Inc., 115 Wn.App. 73, 84, 60 P.3d 1245 (2003). A “finding” which is actually a conclusion of law will be treated as such. State v. Niedergang, 43 Wn.App. 656, 719 P.2d 576 (1986) (“If the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.”)

(1) supported by substantial evidence and (2) reasonably believed by the employer to be true.” Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 139, 769 P.2d 298 (1989). BCSCBN never purported to terminate his monthly payments “for cause.” It simply stopped making monthly payments to Jacobson in September 2006. Prior to doing so, it never articulated any fair, honest and non-arbitrary basis for termination, nor did it threaten to terminate the relationship if any such defaults were not cured.

Jacobson’s performance of his consulting duties under the Term Outline is summarized at pages 13-14 of Appellant’s Brief. The after-the-fact pretexts for termination asserted by BCSCBN at trial are discussed in detail in that brief at 24-28. Those pretexts were insignificant, and/or occurred long before the decision to stop paying Jacobson and cannot be considered “just cause” for doing so. The Trial Court’s decision to deny Jacobson’s claim to additional monthly payments should accordingly be reversed.

B. Recoverable Development Costs Should Not Include “Accrued Shareholder Loan Interest,” nor to Artificial “Lease” or “Insurance” Payments

The Term Outline required Jacobson to “reimburse” BCSCBN for 33% of the development “costs expended to date” following a declaration by Cowin that the Vantage Bay project was non-feasible. In Section IV.C

of the Appeal Brief, Jacobson submitted that such costs cannot include “accrued shareholder loan interest” which had not actually been paid and which was not a recoverable cost under the Term Outline. Jacobson also argued that it should not include “lease” and “insurance” payments which were not supported by copies of any actual lease or insurance policy, and which BCSCBN essentially paid to itself.

In response, BCSCBN argues that Jacobson did not properly assign error on those issues in its opening brief, that the Term Outline does not require proof that alleged development expenses were actually paid, and that Jacobson did not properly bring his position on such issues to the attention of the trial court.

As to the first BCSCBN argument, the Trial Court’s error in assessing such costs against Jacobson was referenced in Jacobson’s Assignment of Error 2. The “accrued interest,” “lease,” and “insurance” costs in question are specifically referenced in his Issue 2 pertaining to that Assignment of Error. Section IV.C of Appellant’s Brief specifically references and discusses Finding of Fact 5.33 regarding the total development costs determined by the Trial Court. See pages 29 ff. There should be no question but that the issue of the recoverability of such “costs” has been properly preserved for this appeal.

BCSCBN's claim to "accrued shareholder loan interest" must fail on at least three grounds. First, nothing in the Term Outline authorized BCSCBN to charge interest on any of its own funds "loaned" for use in pursuing the Vantage Bay project. Such an alleged right was not even mentioned in Plaintiff's Trial Brief. Nor was there any discussion of "interest" provisions in the Term Outline during the testimony at trial, and no finding or conclusion interpreting any Term Outline provision relating to interest was entered by the Trial Court. Second, there is no evidence that BCSCBN actually made any such loans, as opposed to borrowing money from third parties.² BCSCBN presented no evidence as to the principal amount of any funds allegedly "loaned," or the interest rate which should apply to such loans, or to the period for which it should be payable. Third, nothing in the Term Outline requires Jacobson to reimburse as "development costs" any amounts which were not actually spent by BCSCBN. See more detailed discussion of all these issues at pages 28-31 of Appellant's Brief. It was clear error for the Trial Court to award judgment against Jacobson for "accrued shareholder loan interest."

² Jacobson does not contest BCSCBN's right to be reimbursed for interest actually paid to Charter Bank and Frontier Bank on the credit lines used to fund development costs, and those interest payments are separately accounted for in the calculation approved by the Trial Court. See Brief of Appellant, Appendix C, first page summary and detailed listings.

At pages 33-34 of the Brief of Respondents, significant space is devoted to arguing that words of a contract must be accorded their ordinary, usual and popular meaning, in the absence of evidence of a contrary intent. Jacobson agrees with those authorities, but submits that BCSCBN misreads the Term Outline by focusing on the words “cost” and “incurred” in arguing that it is entitled to recover judgment for costs it did not actually pay. While the Term Outline refers to BCSCBN’s delivery of a summary of “all costs incurred to date,” what it obligates Jacobson to do is “reimburse” BCSCBN for “costs expended to date.” “Expend” means “to pay out; spend.” Merriam-Webster Online Dictionary. “Reimburse” means “to pay back to someone; repay.” Id. In other words, the Term Outline makes Jacobson liable to repay 33% of the development costs paid out by BCSCBN.³ There is no room within the ordinary meaning of such words to conclude that the Term Outline authorizes judgment against Jacobson for amounts that were not actually spent by BCSCBN. Nor does the Term Outline contain any language authorizing BCSCBN to charge interest to Jacobson on those development costs which it did pay.

³ However, that obligation should be enforced only after BCSCBN has sold the Vantage Bay property and related rights, to the extent that such development costs have not been reimbursed through the proceeds of sale. See Section I.D, below.

BCSCBN does not dispute that in writing checks to “IGEL,” it was essentially paying itself because the companies share the same address and are both wholly owned by Cowin and his wife. Nor does it deny that it failed to offer a copy of any actual lease or insurance policy into evidence at trial, to support the contention that it actually expended money to third parties for lease or insurance costs. Appellant’s Brief at 31-32. Instead, despite the lack of substantial evidence supporting those alleged costs, it argues that Jacobson somehow did not make his repeated objections to admission of BCSCBN’s development cost exhibits during trial clear enough, and that the Trial Court properly ignored his post-trial, pre-judgment submissions on the issue. Those arguments should be rejected.

Appellant’s Brief at pages 31-34 discusses the trial record in detail regarding those development cost exhibits and their ultimate admission into evidence over Jacobson’s objections, long after BCSCBN had rested its case. After the Trial Court announced its oral decision to accept BCSCBN’s cost figures, Jacobson timely filed his Response Re: Form of Judgment and Supplemental Motion for Reconsideration. CP 231. At pages 2-6 of that Response, he specifically listed the “development costs” at issue, and explained why they should not be included in the total awarded by the Trial Court. This Court should correct the errors made below.

C. Granting Jacobson Only 36 Days to Exercise and Close a Purchase Pursuant to His Right of First Refusal Was an Abuse of Discretion by the Trial Court

In Section I.D of Appellant's Brief, Jacobson submitted that the Trial Court erred in granting him only 36 days following the entry of the Declaratory Judgment in which to exercise his first right of refusal and close a \$4.25 to \$5.18 million purchase of the Vantage Bay Property and related rights. The Brief of Respondents at pages 38-41 argues that the time provided was reasonable and that Jacobson forfeited any right to argue otherwise by failing to submit a post trial brief on the issue. Those arguments are unfounded.

Closing arguments for the trial were not reported, but at their conclusion, the Trial Court apparently requested submissions from the parties on the questions of whether it had discretion to impose a deadline for payment of the Motel 6 Note and a timeframe for exercise of Jacobson's first right of refusal, and regarding the standards for determining the time periods to be permitted. BCSCBN et al. submitted Plaintiffs' Post-Trial Brief via email,⁴ citing Noord v. Downs, 51 Wn.2d 611, 320 P.2d 632 (1958) and other cases for the proposition that where no time for performance is specifically agreed upon, a reasonable time for performance under the circumstances is presumed to be intended by the

⁴ A copy is attached as Exhibit B to Appellant's Motion and Declaration to Supplement Clerk's Papers, which motion was subsequently granted by the Clerk of the Court.

parties to the contract, and that what constitutes a reasonable period of time is to be determined from the subject matter of the contract, the situation of the parties, and the circumstances attending performance. Post-Trial Brief at pages 5-7.

However, Cowin et al. then ignored those legal principles and argued that the Trial Court should simply refuse to enforce Jacobson's first right of refusal, without addressing what a reasonable time period for exercise would be. *Id.* at page 11. In his emailed submissions to the Court,⁵ Jacobson did not disagree with "reasonable period of time" case authority, but like Cowin et al. focused his comments on whether the first right of refusal was enforceable, not the time period which should be allowed for exercise.

After receiving those submissions, the Trial Court entered its Findings of Fact and Conclusions of Law concluding that Jacobson was entitled to enforce the first right of refusal, but only if he closed the purchase by September 30, 2009. CL 5.f. No further evidentiary submissions were requested by the Court on the reasonable time period issue, nor did the Court enter any findings of fact regarding the criteria it was required to consider under Noord v. Downs, supra. Its unsupported conclusion of law was accordingly entered in error.

⁵ See Exhibits C and D to Appellant's Motion and Declaration to Supplement Clerk's Papers.

Cowin et al. also argue that the time period allowed for exercise should be considered reasonable because the deadline was 70 days after the Trial Court's entry of the Findings and Conclusions on July 21, 2009, "almost a halfway point between the zero days argued by Respondents and the 192 days (in effect) advocated by Jacobson." Respondents' Brief at 40. This argument ignores the facts that Jacobson's first right of refusal was then not yet confirmed by the entry of judgment; that only in Section 4.f of the Declaratory Judgment did the Trial Court define with specificity the amount of money Jacobson was required to pay to exercise the right; and that Jacobson's motions for reconsideration and objections to the proposed form of Declaratory Judgment were not heard and decided by the Trial Court until the hearing of August 24, 2009, the day prior to entry of the that judgment in final form.

D. The Trial Court Erred in Failing to Direct BCSCBN to Sell the Vantage Bay Property and Related Rights, Prior to the Entry of any Judgment Against Jacobson for his 33% Share of Development Costs

As discussed in Section I.E of Appellant's Brief, the Trial Court also erred in failing to direct BCSCBN to sell the Vantage Bay Property and related rights, before entering judgment against Jacobson for one third of any development costs which remained unreimbursed after application of the proceeds from such sale. The Trial Court's decision to grant

BCSCBN judgment for one third of the development costs following trial, while also allowing BCSCBN to keep 100% of the proceeds of any subsequent sale without any obligation to account to Jacobson therefore, and without any restriction against resuming development (if it indeed ever stopped), will result in a windfall double recovery to BCSCBN.

In its brief, BSCSBN argues that imposing such a sale requirement would be unreasonable and would “re-write” the Term Outline agreed upon by the parties. Respondents’ Brief at 41-44. Those contentions are without merit. First, the Term Outline failed to address the question of when and how Jacobson’s obligation to “reimburse” BCSCBN for 33% of its development costs would be enforced. Nor did it specify what would happen to the Vantage Bay Property and related rights, in the event Cowin determined that the project was no longer “viable.” There was nothing to “re-write” on those issues and instead terms addressing them had to be implied by the Trial Court as part of its interpretation of the Term Outline.

The Term Outline envisions a windup of the parties’ financial relationships following a declaration of non-feasibility by Cowin, including reimbursement to BCSCBN of the costs it had occurred in pursuing development to the point at which it was abandoned. The logical primary means for recouping those costs would be to require the sale of the Vantage Bay Property and related rights as they existed at the time of

Cowin's declaration of non-feasibility, so that the proceeds of sale could be applied to that cost reimbursement.

Here, BCSCBN spent at least \$800,000⁶ to obtain preliminary plat approval, secure water rights and access easements, design and apply for grants to fund sewer system improvements, and other steps to secure "entitlements" for the project. According to the trial testimony of respondents' own witnesses, those development cost expenditures and resulting entitlements, including preliminary plat approval, access easements and water rights, added substantial value to the Vantage Bay Property above its acquisition price as raw land. 714RP 7-17 and 73-109. Such added value would necessarily be reflected in what BCSCBN will receive from any resale of the property, and its development expenses will accordingly be recouped in part if not in full through a resale of the Vantage Bay Property and related rights by BCSCBN.⁷

⁶ \$1,041,613 total as determined by the Trial Court, less \$183,816 in shareholder "loan interest accrual which BCSCBN has no right to recover under the Term Outline, less \$54,970 in arbitrarily determined vehicle "lease" and "insurance" costs which BCSCBN essentially paid to itself. See Brief of Appellant, Section IV.C, and expense summary attached thereto as the first page of Appendix B.

⁷ At page 43 of Respondents' Brief, they argue that they face "a possible, if not probable, loss on the substantial investment" made by BCSCBN. They also argue that the likelihood of BCSCBN selling the Vantage Bay Property for enough money to "recapture the \$3.7M in acquisition costs, much less putting a dent in the \$1.0M of development costs is remote." *Id.* at 44. However, there was no appraisal or other evidence presented at trial as to its then current market value. The only evidence before the Trial Court was the testimony of respondents' witnesses, describing BCSCBN's actions in obtaining entitlements for the property and enhancing its value through its payment of the development costs.

Under BCSCBN and Cowin's interpretation of the Term Outline, however, BCSCBN is entitled to keep the property and rights indefinitely, with no obligation to actually terminate development, no prohibition against resuming development once terminated, no obligation to sell the property, and no duty to account to Jacobson for the proceeds received from any sale. Meanwhile, Jacobson is obligated to pay 33% of the development costs to BCSCBN, with no right of reimbursement to the extent such costs are later recouped through a sale.

A reasonable contract interpretation must be adopted over an unreasonable one. Fisher Properties, Inc vs. Arden-Mayfair, Inc., 106 Wn.2d 826, 837 (1986) ("When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.") Here, BCSCBN's interpretation, adopted by the Trial Court, was unreasonable, achieves a patently unjust result, and should be reversed on appeal.

E. The Trial Court Erred in Setting a Due Date for Payment of the Motel 6 Note, Without Also Directing Cowin to Sign the Short Plat Required to Make the Motel 6 Property Lots Legally Salable

As discussed in Section I.F of the Brief of Appellant, the Court below erred in setting a June 30, 2010 due date for payment of the Motel 6

Note, without also requiring Respondent Cowin to promptly sign the mylars for the short plat of the Motel 6 property. Such signature was required before the short plat could be recorded to create three separate lots that could be individually sold to generate funds to pay the note, and is the only remaining obstacle to such recording. Jacobson asks this Court to reverse that decision and remand the case for establishment of a due date for the Motel 6 Note that is a reasonable period of time after Cowin finally signs the short plat mylars.

In the Brief of Respondents at 45-46, Cowin et al. attempt to argue that the trial court's decision should not be changed, because "it is wrong for the courts to impose terms not agreed to by the parties," and because Jacobson somehow failed to present the issue to the trial court in a clear and timely fashion.

As to the first prong of Respondents' argument, the Trial Court established a due date for the Motel 6 Note precisely because no specific date for payment was provided in either of the two forms of note signed by the parties. (Ex. 15 and 16). Plaintiff's Post-Trial Brief for the first time argued to the trial court that where no time for performance is specifically agreed upon, a reasonable time for performance under the circumstances is

presumed to be intended by the parties to the contract. citing several cases including Noord v. Downs, 51 Wn.2d 611, 320 P.2d 632 (1958).⁸

Jacobson does not disagree with that legal principle, but submits that one of the factors which the trial court should have considered in making its “reasonable time” determination was the need for Cowin to sign the short plat mylars. Although the Motel 6 Note did not have an express due date, it did refer specifically to short platting. By its terms the Note was payable through one of the three mechanisms set forth in Exhibit C to the note (See Ex. 16 and page 4 of Ex. 17). The first of those mechanisms was as follows:

The parcel will be short platted into 3 or 4 separate parcels and either sold or leased. All net proceeds from the sale of lease of such parcels will be paid and applied to the note. (emphasis added)

It should be obvious that the individual lots in the short plat would be more readily salable and for a higher price than the entire unplatted parcel. Cowin’s arbitrary and capricious refusal to sign the short plat mylars should not be permitted to frustrate the parties clearly stated intent in that regard.

Although Respondents argue that the individual lots can be sold without recording the short plat, that simply ignores the provisions of RCW 58.17.065, which states that “Each short plat and short subdivision

⁸ Exhibit B to Appellant’s Motion and Declaration to Supplement Clerk’s Papers.

granted pursuant to local regulations after July 1, 1974, shall be filed with the county auditor and shall not be deemed 'approved' until so filed." The auditor will not accept the short plat mylars for recording without Cowin's signature, because he holds a deed of trust against the property securing payment of the Motel 6 Note.

Contrary to Respondents' contentions, this issue was repeatedly brought to the attention of the Trial Court. In his opening statement, Jacobson advised the Trial Court that "I took the [Motel 6] property, it's short platted, all Bill has to do now is sign a Mylar and we have to present it [for recording]." 713RP at 43-44. The matter was addressed again in the cross examination of Jacobson by Respondents' counsel:

Q. And that [the Motel 6 property], as I understand it, has been short platted -- is in the process of being short platted now?

A. It only requires Bill's signature on the Mylar.

Q. Okay. And he's agreed to do that.

A. There has been correspondence between Dean [Messmer and counsel for Respondents], it's just a matter of getting the document in front of him.

Q. And once that happens then the short plat is complete?

A. After it's filed, obviously.

716RP at 55-56.

It was only after the conclusion of trial that the Trial Court announced its intent to establish a fixed due date for the Motel 6 Note. In

response to the Court's request for submissions by the parties on that issue, Jacobson advised the Court as follows:

Your Honor, Per Mr. Olson's brief, I would like to clarify the status of the Motel 6 property. The Motel 6 site is the best commercial parcel in the City of Vantage. It has taken me this long to get short plat mylars for Cowin to sign that can be filed with Kittitas County... I would like the court to direct him to sign so the three lots will then be salable and I will put them on the market.

Motion to Supplement Record, Exhibit C. June 30, 2010 cannot be considered a reasonable due date for payment of the Motel 6 Note, given the Trial Court's failure to direct Cowin to sign the short plat mylar so that the short plat lots would be come legally salable to generate the funds needed to pay off the Motel 6 Note as intended by the parties.

II. CONCLUSION

For all the reasons stated above, the Declaratory Judgment and Supplemental Judgment entered in this matter should be reversed, and the case remanded to the Trial Court for further proceedings to correct the errors made in those judgments and the findings and conclusions entered to support them.

RESPECTFULLY SUBMITTED this 2nd day of June, 2010.

LASHER HOLZAPFEL
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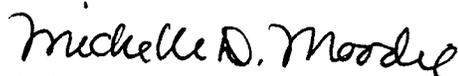
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DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on June 2, 2010, I caused to be served a copy of the Reply Brief of Appellant upon the following, by legal messenger:

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