

68128-1

68128-1

NO. 68128-1
COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

EDDIE MARTIN RICHTER, et al,

Appellants

vs.

THE PORT OF SEATTLE,

Respondent

APPELLANTS' REPLY BRIEF

Harold Chesnin, WSBA #398

Law Office of Harold Chesnin

1810 – 43rd Avenue E. #203

Seattle, WA 98112

Telephone 360-661-1020

Fax 206-861-8116

Email Pateus@aol.com

Attorney for Appellants

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 30 PM 2:26

TABLE OF CONTENTS

	Page
I. Introduction	1
Argument	2
II. The Port admits that the contract of July 22, 1996 was a “bilateral contract”	2
III. The discussion of the meaning of the Birmingham Steel Bankruptcy and the use of the Bankruptcy as an excuse for not closing is a red herring	5
IV. The Port’s claim that there was never a second required authorization for this transaction is patently untrue	6
V. The Port and the asserted claim that expending monies now would violate public policy	7
VI. The Statute of Frauds and the doctrine of part performance Controversy between the parties.	10
VII. The case law cited by the Port allegedly to support its Statute Of Frauds and Part Performance analysis	14
VIII. The Exchange Agreement satisfies the terms of the Contract with respect to a Real Estate Purchase and Sale Agreement	16

IX.	Promissory Estoppel	17
X.	The Port's attempt at "do overs" is not supported by the Procedural record	19
XI.	Conclusion	20

TABLE OF AUTHORITIES

Page

CASES

Emrich v. Connell,
105 Wn.2d 551, 716 P.2d 863 (1986)15

Granquist v. McKean,
29 Wn. 2d 440, 187 P. 2d 623(1947)15

Key Design, Inc. v. Master,
138 Wn. 2d 875 (1999).....14

Martin v. Seigel,
35 Wn.2d 223, 212 P.2d 107 (1950)14

McCormick v. Lake Washington Sch. Dist.,
99 Wn. App. 107, 992 P. 2d 511 (1999)17

Richardson v. Taylor Land & Livestock Co.,
25 Wn 2d 518, 171 P.2d 703 (1946)13

STATUTES

RCW 53.08.0908

I. Introduction

This case involves a sophisticated real estate transaction that has been methodically and steadily moving towards closing since 1996. The Port of Seattle (hereinafter “Port”), a seasoned performer in the area of time consuming real estate transactions, delegated the project to its sophisticated and professional real estate staff. That staff, on behalf of the Port, has taken this transaction from an offer to a contract to multiple instances of continuing performance over a 12 to 13 year period.¹ However, at literally the last moment before complete performance, the Port is now attempting to disavow its own performance and contractual obligations. The Port does not deny that it received the benefit of its bargain, but having achieved its contractual objectives now wishes to deny the Richter family (collectively “Richter”) the reciprocal benefit of the bargain.

In the Opening Brief, Richter addressed most of the legal issues that the Port has raised, particularly the argument that either the writing of July 22, 1996 (hereinafter the “Contract”) fails because it was only an

¹ The Port admits that this transaction is not unique. This is not the only street vacation that the Port has been methodically pursuing for as much as 15 years in order to complete its three Terminal expansion projects. Port’s Response Brief, p. 8, p. 16.

agreement to agree or because of the application of the Statute of Frauds.² The principal focus of this Reply Brief, therefore, will be to examine the flaws in the Port's analysis as it relates to the facts claimed to support the legal principles the Port asks this Court to adopt.

ARGUMENT

II. The Port admits that the contract of July 22, 1996 was a "bilateral contract."

The Port's Statement of the Case admits that the Port and Richter each promised to mutually perform a real estate transaction that would leave the Port with a constructed wall extending on to a vacated 29th Avenue SW to meet its own, unrelated obligation and Richter would obtain an exchange of square footage, with certain ancillary rights, for the square footage it would give up to the wall construction from its anticipated side of the centerline of a vacated street. In fact, the Port does not deny that the agreement between the parties was a bi-lateral contract, but in the perfect symmetry of a tautological argument says "But describing a writing as a

² Much to Appellant's surprise, the Port, in spite of the legal standards of a summary judgment, now seeks to argue in the alternative on appeal: either the Port should prevail because there are no material facts at issue or, if the Port does not prevail, there are materials facts at issue. Just as it has sought to enjoy the benefit of its Contract without paying the price, the Port now wants to argue summary judgment both ways. Port's Response Brief, p. 36-37.

“unilateral” or “bilateral” contract does not address the central issues here, ... **whether it was actually the final contract** or merely an agreement to agree....” Port’s Response Brief at p. 24 (emphasis added).

The Port and Richter agree that on July 22, 1996, before the Contract was fully binding upon the parties as a bilateral contract, the Port created a condition precedent. That condition was the approval of the Port Commissioners to the Contract. That approval was sought by the Port staff and obtained on August 27, 1996. Had the Port backed out of the real estate transaction prior to the Port Commissioners’ authorization, Richter would not be seeking specific performance. However, when the Port Commissioners approved the July 22, 1996 writing, it became the bilateral contract that the Port has acknowledged. See Exhibit G, CP 268-272 and Exhibit H, CP 273-288.

While trying to extricate itself from the Contract which it made in 1996, the Port’s Response Brief fails to consider the terms of the approval for this Contract that the staff sought and obtained from the Port Commissioners. That approval provided that the staff had the authority to “Execute All Documents Necessary” to accomplish the terms of the Contract. Exhibits G and H, CP 268-288.

Unlike what the Port wishes to assert now, the authorization of August 27, 1996, was not to keep working to form a contract and not an acknowledgment that the document before the Port Commissioners was an agreement to agree. The authorization was for the staff to act, expend monies and perform under the Contract to the fullest extent necessary to bring the matter to a closing. The staff, on behalf of the Port, took the bilateral contract, knew what had to be done to get to closing, and performed.

Once parties have created a bilateral contract, the next step is to perform to completion. Here, again, the Port mischaracterizes what has transpired between the parties over the course of a 12 to 13 year period. There was no ambiguity, no lack of understanding which “portions” of the Richter property were to be exchanged for which portions of the properties acquired by the Port. At each step along the way, the Port and Richter did what was necessary to do to move the contract through the stages of partial performance to completion. Totally lacking from the record prior to the shocking decision to disavow the Contract is any inquiry, statement or writing from the Port questioning how to proceed. The parties knew what the Contract meant, performed activities such as title investigations, grading, wall building, steps toward street vacation of 29th Avenue SW, all of which show partial performance and a clear understanding of all the

steps necessary to close. In reality, the Port's staff acted as authorized and as a competent staff of real estate professionals would in order to accomplish the completion of the project by going through each step and document required to get to the final closing.

- III. The discussion of the meaning of the Birmingham Steel bankruptcy and the use of the Bankruptcy as an excuse for not closing is a red herring.

The Port goes to great lengths to justify its position on the Contract by reciting with particularity its relationship with Birmingham Steel³ and Birmingham Steel's subsequent bankruptcy. It argues that it can't go through with the Contract because, as a result of Birmingham Steel's bankruptcy, it cannot recoup the payment it made under a totally separate contract.

First, the Contract between Richter and the Port did not contain any reference to the contractual relationship between the Port and Birmingham Steel. It was not a condition of the Contract here that the Port recoup its payment to Birmingham Steel. The Port could have made that a condition

³ It is interesting to note that the Port's Response Brief at p. 8 identifies the operative contractual closing document between the Port and Birmingham Steel as an exchange agreement. This is the same document that the Port drafted and Richter accepted as the document leading to the anticipated closing in this case. See the discussion of the Exchange Agreement below.

precedent to closing, but did not. The record contains no contemporaneous references from the Port to the Birmingham Steel bankruptcy as a deterrent to closing. When the Port finally rejected the Contract, it did not cite the Birmingham Steel bankruptcy as the cause or even a factor in the rejection, even though the Port now wishes to try to emphasize that event.

Richter is not responsible for the fact that the Port took so long to perform its obligations under the Birmingham Steel contract that it was required to pay money to that company. Richter is not responsible for the fact that the Port took so long to perform its obligations that it lost the opportunity to recoup those monies. The Port's unrelated troubles are not a basis for rejecting the Contract and failing to complete the transaction with Richter.

IV. The Port's claim that there was never a second required authorization for this transaction is patently untrue.

The Port never addresses the clearly expressed intent of the staff, when asking for, and the Port Commissioners, when granting, the broad authority granted in the vote of August 27, 1996. It could certainly be argued that a second approval was unnecessary. However, that argument is not required here because the Port admitted in its 30(b)(6) deposition that the staff had obtained the second authorization. See Exhibit O, CP

324-328. This came when the staff working on the 29th Avenue SW street vacation, sought the reauthorization for all funds necessary to complete the 29th Avenue SW street vacation. When coupled with the original authorization, the entire transaction between Richter and the Port, as specified in the Contract has been officially approved. At the time of the reauthorization, the Port had already produced the Exchange Agreement, obtained the preliminary title, graded the Richter property, and built the wall. The remaining documentation was already fully authorized in August, 1996 and all that was left to be accomplished was now re-authorized the funding to complete the closing. The Contract was ready for completion.

- V. The Port and the asserted claim that expending monies now would violate public policy.

The Port fails to see the two primary flaws in its proffered analysis that to comply with the Contract to which it is bound would violate public policy. First, the Port expended public funds for 12 to 13 years on a project based upon the existence of a Contract which it now rejects, yet somehow it believes that only future expenditures would violate any statute or ordinance. The violation, illogically, it asserts would come if it expended any new funds. Secondly, the Port argues that the property which it would be required to contribute would be giving away far greater

public funds than it would receive.⁴ However, when taken in its component parts, this assertion proves unlikely if not outright untrue:

1. The Contract requires a square foot for square foot exchange. At a minimum the exchange would be of equal value and the Port would not be “giving away” public funds.
2. Arguably, the land the Port would receive in its exchange from Richter would be far more valuable economically than the land the Port gave up. Having constructed the wall without first vacating 29th Avenue SW, the east half of a vacated street will belong to Nucor, Birmingham Steel’s successor. The west half of the vacated street which would belong to Richter, therefore, is essential to the Port’s ability to avoid an immediate encroachment with the wall. Thus, the Richter property acquired from the street vacation as a result of a Contract closing would actually correct the Port’s *ultra vires* act and avoid the costs of damage, litigation and wall removal. As such, the Richter portion of the exchange is far

⁴ The Port argues that it would be required to declare the property to be exchanged surplus citing RCW 53.08.090. Port’s Response Brief at p. 14. The scope of Richter’s request for specific performance requires the Port to take the necessary steps to complete the Contract and the exchange. Thus, specific performance would require the Port to declare the exchange portions of the properties in question surplus together with the completion of the street vacation of 29th Avenue SW

more valuable economically than the Port's corresponding square footage exchanged.

3. The right of first refusal is virtually worthless economically and certainly doesn't swing the pendulum of excess value in the direction of the Port. It is literally just an opportunity to match any offer of a third party and not a giving away of value by the Port.
4. The Port has already acknowledged in its Response Brief that Richter has used the designated property for parking for more than a decade. Clearly, while it was part of the consideration to Richter under the Contract, the use of these properties had and has virtually no value otherwise. According to the Port, it would already have had to surplus the property. It didn't surplus the property and adding an easement for ingress and egress to a property with little or no value to the Port when compared with the avoidance described in paragraph 2 above, again does not reverse the fact that the value to Richter of the Contract is ultimately less than the value to the Port.
5. Finally, the value to the Port in completing the Contract between the parties is not just the encroachment jeopardy it faces from Richter if the street is vacated, but also the economic losses it faces

had to do so little. This, argues the Port, can't be what the doctrine of part performance was intended to accomplish.

The Court needs merely to look at the negotiations of the Contract, the skills of the respective parties and the results the parties hoped to achieve in order to understand why the Port agreed to assume the roles of which it now complains. The Port admits that following initial contact from Richter, the issue of an agreement languished until the Port hired an outside consultant to get a deal done. Port's Response Brief at p.10, CP 175-176. The Port needed the Contract more than Richter because, without it, the Terminal 5 Project could not have been completed. Without the wall, the pre-existing contract with Birmingham Steel would have gone into default, the Birmingham Steel use of an area of its property that the Port needed for the Terminal 5 Project would not have been cleared for the Port's use and, at the time the Port entered into the Contract, the Port by its own admission was trying to avoid the financial penalty which it ultimately paid. Richter, on the other hand, got benefits, but clearly less than the economic impact of finishing the Terminal 5 Project. This disparity in the financial benefit is not a basis to ignore part performance, but, just as in other situations, an example of arms length negotiations in which the parties were willing to settle for the benefits which each had negotiated.

The overwhelming need of the Port to enter into a binding contract gave Richter the leverage to require two conditions of its own before signing the Contract. These conditions were made absolutely clear in the discussions, the first draft and the faxes between the parties just prior to July 22, 1996. See Exhibit E., CP 249-262. The Port had far greater capacity and expertise to perform the necessary tasks in a complicated real estate transaction, including but not limited to a professional real estate staff and the ability to fund the third party professional assistance needed such as surveying services. Thus, Richter insisted that the transaction be cost free to them.⁶

The second condition goes to the heart of refuting the Port's claims that the doctrine of part performance is inapplicable here. While the Port put one condition on the formation of the Contract, the subsequent approval of the Port Commissioners, Richter did not sign the first "offer" proffered by the Port. The reason was clearly stated: the writing between the parties must be a contract and binding on the parties before Richter would sign. See Exhibit E., CP 249-262. The Port, through its professional staff, understood that it was entering into a contract and that it

⁶ Although at various times, according to the Second Declaration of Richter, Richter did expend monies in furtherance of the completion of the Contract. CP 366-370.

would perform many of the steps and all of the technical steps that were required to close the transaction.

Finally, the Port seeks to avoid the doctrine of part performance by pointing out that because of the nature of old plats, it will be “extremely difficult” to obtain a proper metes and bounds description. Port’s Response Brief, Footnote 7, p. 13. Note that the Port never said that it was impossible, which could have relieved it of the part performance doctrine. This unique transaction was clearly difficult because it has taken a decade and a half to get to this point. However, the Port can scientifically determine through the required survey the metes and bounds legal description required by the part performance doctrine.

The doctrine of part performance is intended to relieve any unfair and unintended effects of the Statute of Frauds. See Richardson v. Taylor Land & Livestock Co., 25 Wn. 2d 518, 527. Specific performance is an equitable doctrine. This case is deserving of the application of the doctrine of part performance: Richter insisted that only a contract would entice them to move forward. The parties, by the Port’s own admission performed from 1996 to 2008 or 2009 identifying the properties accurately, doing surveys, title analysis and constructing the wall on the

very portion of the parcel that the Port required.⁷ The Port wants this Court to believe that after 12 to 13 years of performance, there was no meeting of the minds. The parties knew on July 22, 1996, that they had contracted, the steps that needed to be performed and the physical location of each of those steps.

VII. The case law cited by the Port allegedly to support its Statute of Frauds and Part Performance analysis.

Richter's Opening Brief at p. 15-18, addressed the issue of the lack of applicability of the Statute of Frauds to this case. The Brief addressed Key Design, Inc. v. Master, 138 Wn. 2d 875 (1999) and Martin v. Seigel, 35 Wn. 2d 223 (1950) and, although applicable to the Port's assertions in its Response Brief, won't be reiterated here. However, there are a number of additional distinguishing features in this case that differentiates it from the generic discussion in Key Design and Martin. First, the Port is no ordinary real estate transaction participant. It is a public entity with a dedicated professional real estate staff. It not only identified the properties in the Contract, but acted at every stage of the 12 to 13 years of performance in a manner consistent with the specific identification of the parcels in question. The record in this case does not contain a single

⁷ See, *inter alia*, Exhibit I, CP 289-291; Exhibit J, CP 292-304; Exhibit K, CP 305 – 309; and Exhibit Q, CP 334-342.

email, letter, conversation or declaration in which the Port has asserted confusion about the property and portions of property addressed by the Contract and, later, the Exchange Agreement. Furthermore, the mere fact that, during the course of this matter, the Port built the wall and its exact location and the size of the parcel to be exchanged is determinable through a survey removes all uncertainty that would have prompted a question of the Statute of Frauds.

The Port's other legal attack relates to the doctrine of part performance, which in any event, would remove this case from the issues raised by the Port concerning the Statute of Frauds. The Port relies on Granquist v. McKean, 29 Wn. 2d 440, 187 P. 2d 623 (1947). Granquist, however, is a case about an oral contract. Here there is a clear and unambiguous writing. Granquist and its discussion of specific performance is inapplicable here. The Port also relies on Emrich v. Connell, 105 Wn. 2d 551, 716 P. 2d 863 (1986). Interestingly, the Port fails to recite for the Court the following analysis from the Emrich court:

If, however, the court finds that the parties intended the writing to be a final expression of the terms it contains but not a complete expression of all terms agreed upon— *i.e.*, *partially integrated*— then the terms not included in the writing may be proved by extrinsic evidence *only insofar as they are not inconsistent with the written terms*. Emrich at p. 557.

Under the Emrich analysis, the Contract, the Exchange Agreement and part performance lead to only one conclusion: Richter is entitled to specific performance here.

VIII. The Exchange Agreement satisfies the terms of the Contract with respect to a Real Estate Purchase and Sale Agreement.

The Port Commissioners authorization on August 27, 1996 was to document this transaction by any and all means necessary to accomplish the transaction contemplated by the Contract. The Exchange Agreement, clearly intended to be executed by the Port and Richter at closing, was the equivalent of and substitution for the Real Estate Purchase and Sale Agreement. It was the mechanism submitted to Richter and required by the Port to be the final document to accomplish the result intended by the parties when the Contract was formed. Had the Port not prepared the Exchange Agreement or had Richter not accepted the Exchange Agreement,⁸ then the Port's assertions about the Real Estate Purchase and Sale Agreement might have greater force. As for the descriptions to be filled in at closing, that just awaited the completion of the survey made possible by the Port's construction of the wall. Had the wall not been completed by the Port, then the specificity of the legal description might

⁸ The Port does not deny that Richter approved the Exchange Agreement with only a clerical correction and returned it to the Port accepting the documentation required to replace the Real Estate Purchase and Sale Agreement.

have been guesswork and not worthy of this Court's determination in favor of specific performance. However, having settled through continuing performance on the language of the operative document, the Exchange Agreement, and having the existence of the wall for the creation of an accurate survey and the legal description, the parties have been left with achievable conditions to be fulfilled, principally the Port's completion of the vacation of 29th Avenue SW. Notwithstanding the Port's protest, this Court can clearly see that fact from the actions of Port staff when, after all the performance taken and documentation created and drafted, the Port went back to the Commissioners and reauthorized the funding for the completion of the Terminal 5 Project, including the contractual obligation to vacate 29th Avenue SW. See Exhibit O, CP 324-328.

IX. Promissory Estoppel

The Port has correctly identified the doctrine of Promissory Estoppel, but fails to properly apply the facts in this case to the doctrine. The five elements of the doctrine, see McCormick v. Lake Washington Sch. Dist., 99 Wn. App. 107, 992 P. 2d 511 (1999), and the corresponding facts from this case are as follows:

1. A promise. Not only was there a Contract, but the promise of good faith performance which was reinforced by actual performance of the parties.
2. That promisor should reasonably expect to cause the promisee to change his position. The Port's expectation was that Richter would change their position by allowing the Port to build the wall on the vacated or unvacated 29th Avenue SW, one half of which would be or, when completed was a part of the Richter Property.
3. The promisee actually changed his position. What greater change than Richter allowing the Port to access their existing property to actually build the wall and obtain the benefit of the bargain before Richter received the reciprocal benefits.
4. The promisee justifiably relied on the promise. Richter would not make the Contract unless it was more than a mere discussion. No contract, no wall. Richter was justified in relying on the promise of the Port because it immediately began to perform various parts of the Contract, the grading, surveying, acquiring the exchange parcels, and building the wall. The justifiable reliance was in front of Richter every day of the 12 to 13 years of performance.
5. Injustice can only be avoided by enforcement of the promise. The Port perpetrated an injustice when it took the contractually bound

steps to obtain the benefit of its bargain, building the wall, and then reneged on its promise to Richter, leaving them without the benefits to be derived from the Contract.

When properly analyzed, clearly the doctrine of Promissory Estoppel applies here and the Port should be estopped from denying the enforceability of the Contract and the subsequent acts of part performance.

X. The Port's attempt at "do overs" is not supported by the procedural record.

This case is before the Court of Appeals because both parties moved for Summary Judgment, not Partial Summary Judgment. Both Richter and the Port had other issues which they each pled. However, strategically, both parties represented to the Court through their motion and cross-motion that there were no material issues of fact in dispute. If the Port wished to seek the right for the trial court to hear material issues of fact, it could have withheld its Motion for Summary Judgment and attempted to defeat the Richter's Summary Judgment or moved for Partial Summary Judgment. If the Port wanted to oppose the Richter's appeal as a matter of right, then it could have moved in this court to determine that, since the case below was not over, the appeal was at best interlocutory and

discretionary with the Court. The Port took none of these procedural steps to protect its right to be remanded for a second bite at the Richter's apple should the Port lose on appeal. Procedurally, the Port and Richter chose to waive revisiting the trial court and causing the other party more time and expense. A loss here is not an invitation to go back and start over. The only direction a loss can move procedurally is to the Washington State Supreme Court.

XI. Conclusion

Relief Requested: Richter requests that the Court order specific performance of the Contract between Richter and the Port. To that end, Richter requests that the Port perform the following tasks and close the real estate transaction:

1. The Port retains a surveyor to produce a survey of the wall constructed by the Port and develop the final legal description for the exchange provided for in the Contract;
2. The Port causes the surveyor to produce the legal descriptions for the easements to the exchange parcels to enable Richter to ingress and egress to the existing parking areas described in the Contract;
3. The Port goes through the procedures to surplus those portions of the properties associated with the Contract requiring surplus status;

4. The Port vacates 29th Avenue SW.
5. The Port inserts the legal descriptions in the Exchange Agreement and takes the necessary steps to accomplish the exchange and the documentation for the closing under the terms of the Contract and Exchange Agreement.
6. Finally, Richter waives it right to have the Right of First Refusal documented and recorded.

Respectfully submitted this 30th day of April, 2012.

Law Office of Harold Chesnin

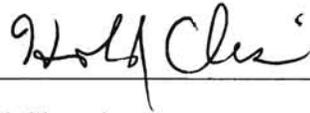
By: 
Harold Chesnin, WSBA #398
Attorney for Appellants
Eddie M. Richter, et al

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2012, I caused to be served the foregoing Appellants' Reply Brief on the following party at the following address:

Elaine Spencer
Graham & Dunn
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121
espencer@grahamdunn.com

By hand delivery and email



Harold Chesnin

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 APR 30 PM 2:26