

69927-0

69927-0

No. 69927-0-1  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

RECEIVED  
SUPERIOR COURT  
NOV 21 2:14 PM  
2016

---

CHICAGO TITLE INSURANCE COMPANY,

Plaintiff,

v.

RICHARD CAMPBELL and REBECCA LEE MARCY,

Appellants, and

ROSALIND M. GREENBERG,

Respondent.

---

**BRIEF OF RESPONDENT**

---

Christina A. Cowin, WSBA No, 42701  
DEMCO LAW FIRM, P.S.  
5224 Wilson Avenue South, Suite 200  
Seattle, WA 98118  
(206)203-6000

ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW .....1

III. COUNTERSTATEMENT OF THE CASE.....2

IV. STANDARD OF REVIEW .....4

V. ARGUMENT .....6

A. Campbell Misstates The Terms of the Financing  
Contingency. ....6

B. Campbell Has No Evidence That Greenberg Failed to Act  
in Good Faith. ....7

C. Greenberg Was Not Required to Deposit the Down  
Payment.....10

D. Greenberg Should Be Awarded Fees on Appeal. ....11

VII. CONCLUSION .....12

**TABLE OF AUTHORITIES**

***Washington Cases***

*224 Westlake, LLC v. Engstrom Properties, LLC*,  
169 Wash. App. 700, 727, 281 P.3d 693, 708 (2012).....10, 11

*City of Sequim v. Malkasian*,  
157 Wn.2d 251, 261, 138 P.3d 943 (2006).....4

*Rivas v. Overlake Hosp. Med. Ctr.*,  
164 Wn.2d 261, 267, 189 P.3d 753, 755 (2008).....5

*Salvo v. Thatcher*,  
128 Wn.App. 579, 587, 116 P.3d 1019, 1023 (2005).....6, 7, 9

*W. Coast Stationary Engineers Welfare Fund v. City of Kennewick*,  
39 Wash.App. 466, 477, 694 P.2d 1101, 1108 (1985).....11

*Willener v. Sweeting*,  
107 Wash.2d 388, 730 P.2d 45 (1986).....11

*Young v. Key Pharmaceuticals, Inc.*,  
112 Wn.2d 216, 225, 770 P.2d 182 (1989).....5

***Court Rules***

RAP 2.5.....5

## **I. INTRODUCTION**

Reading the Brief of Appellants Campbell and Marcy (“Campbell”), one could easily get the idea that the subject sale failed to close because Respondent Greenberg (“Greenberg”) changed her mind about buying the property and fabricated an excuse not to close. In fact, it would be almost impossible to reach any other conclusion from the brief. As much as Campbell may want to tell that story, it simply is not true.

The sale did not close on the closing date because Greenberg could not get financing by the deadline. But she did not change her mind. She asked for a short extension and offered to close the sale as soon as the financing could be arranged. The sale did not close because Campbell demanded \$10,000 for the 22-day extension.

Campbell was not obligated to extend the closing date. However, his insinuation that Greenberg changed her mind about the purchase tests the limits of honest advocacy. Greenberg’s obligation to close was contingent on her obtaining financing by the closing date. She was unable to obtain that financing, and she is entitled to the return of her earnest money.

## **II. COUNTERSTATEMENT OF ISSUES FOR REVIEW**

1. Has appellant Rosalind Greenberg (“Greenberg”) met her burden of demonstrating the absence of evidence supporting an element of Campbell’s claim?

2. Has Campbell presented admissible evidence sufficient to defeat summary judgment?

## **II. COUNTERSTATEMENT OF THE CASE**

The facts relevant to this appeal are few and undisputed. The parties entered into a purchase and sale agreement for real property on May 1, 2011. Brief of Appellant at 5. The Agreement contained a financing contingency. Brief of Appellant at 5-6. The closing date was June 8, 2011. Brief of Appellant at 5. Greenberg did not obtain financing by June 8, 2011, and the agreement did not close “due to Greenberg’s failure to obtain the required financing and lack of providing the down payment funds.” Brief of Appellant at 1.

The sole issue in the case is Campbell’s contention that Greenberg did not act with the requisite good faith in seeking financing for the property. Campbell mistakenly suggests that the relevant question is whether there is “substantial evidence in the case at bar to support the finding that Greenberg met her duty of good faith to obtain third party financing.” That is not the question here. The question instead is whether Campbell has presented sufficient evidence that Greenberg breached her duty under the financing contingency.

The evidence cited by Campbell establishes that Greenberg applied for financing even before the property was listed for sale. Several days after the agreement was executed, Greenberg’s broker sent an email to

Greenberg asserting that she “needed an approval letter from the lender showing an approval for \$200,000 and ‘another \$170,000 in the bank for down payment.’” Brief of Appellant at 7, citing CP 129. The financing contingency, however, contains no such requirement. *See* CP103-104.

On May 6, 2011, Greenberg exchanged emails about the loan for the subject property with her lender, Merrill Lynch. Brief of Appellant at 7, citing CP 127-30. On May 17, 2011, Merrill Lynch issued a preapproval letter for a loan for the subject property. Brief of Appellant at 8, citing CP 146-50. Greenberg then proceeded to have the property inspected and negotiated a price reduction because of anticipated repairs. Brief of Appellant at 8, citing CP 91.

On June 1, 2011, Merrill Lynch said that it could not close the transaction by the June 8 closing date and requested an extension to June 30, 2011. CP 1564-165. Campbell insinuates in his Brief that Greenberg instigated or caused this delay, but there is no evidence in the record to that effect. To the contrary, when Merrill Lynch announced that it required more time to make the loan, Greenberg promptly proposed an extension of the closing date on the same terms to permit the financing process to be completed. Brief of Appellant at 8-9.

Additionally, the documentation provided by Merrill Lynch includes notes from their internal records log which show that Merrill Lynch was actively reviewing Greenberg’s application and financials from April 26,

2011 onward. Including tax returns, income, and account statements. There are no notes or emails obtained from Merrill Lynch which show any outstanding requests or failure on the part of Greenberg only Merrill Lynch's efforts to verify Greenberg's income and assets versus those of her late husband Martin. CP 132-142.

In response, Campbell first requested information and documents about the loan, which were provided to him. CP 163-164. During this time, Greenberg also sought financing from other sources, including Windermere Mortgage, but was told that the loan could not be funded by the June 8 closing date. CP 176-177. In addition, Campbell himself sought financing from other sources up to the closing date. CP 179. Campbell never signed the extension.

Despite the efforts of the parties up to the closing date, the agreement did not close. However, on June 8, Campbell did present a new proposed purchase and sale agreement for the property with the same June 30 closing date as the extension. The new agreement was for a net price \$10,000 more than the original agreement. CP 181-183. When Greenberg declined to pay more for the property, Campbell demanded the earnest money.

#### **IV. STANDARD OF REVIEW**

The standard of review is *de novo*. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). The defendant moving for summary

judgment has the initial burden to demonstrate the absence of a material question of fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant can meet its initial burden in one of two ways.

First the defendant can present undisputed evidence establishing a defense to the claim. *Id.* For example, a defendant asserting a statute of limitations defense would present undisputed evidence that the claim arose outside the limitations period. The defendant bears the burden of proof on the statute of limitations defense. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753, 755 (2008). The focus therefore is on whether the defendant has presented uncontroverted evidence establishing a defense. *Id.*

Alternatively, the plaintiff can challenge the sufficiency of the evidence supporting the plaintiffs case. *Young*, 112 Wn.2d at 225. In that kind of motion, the focus is on the sufficiency of the plaintiff's evidence on elements for which the plaintiff has the burden of proof. *Id.* To avoid summary judgment, the plaintiff must present admissible evidence sufficient to support a finding in its favor at trial on the disputed elements. *Id.*

This motion we brought under the second approach. Although the earnest money is held in trust for the transaction, it belongs to Greenberg. Campbell asserts that he is entitled to the earnest money because Greenberg

breached the agreement. As the party asserting breach of the agreement, he bears the burden of proof on that contention. This motion tests the sufficiency of his evidence to establish breach by Greenberg. The focus there is solely on the evidence presented by Campbell. *Young*, 112 Wn.2d at 225.

The question in this case is not the sufficiency of the evidence demonstrating Greenberg's good faith efforts to obtain financing, but instead the sufficiency of the evidence that she did not. Greenberg need only show that she could not obtain financing, which Campbell concedes to be true. Campbell asserts that this was the result of bad faith on Greenberg's part, and he must present admissible evidence to support that assertion.

## **V. ARGUMENT**

### **A. Campbell Misstates The Terms of the Financing Contingency.**

The financing contingency used by the parties was discussed at length by this Court in *Salvo v. Thatcher*, 128 Wn.App. 579, 587, 116 P.3d 1019, 1023 (2005). As explained in *Salvo*, the financing contingency makes the buyer's duty to close contingent on obtaining financing. If the buyer cannot obtain financing by the closing date, then the agreement terminates, and the earnest money is refunded to the buyer. *Id.* at 586. Termination under those circumstances occurs without action by the parties. *Id.*

The contingency also provides for termination of the agreement before the closing date once it becomes clear that financing will not be available. *Id.* at 586 (“These provisions allow both the Seller and the Buyer to terminate the REPSA before the closing date.”). When a party terminates under the financing contingency before the closing date, it must give written notice. *Id.* at 586-87. However when a party continues to seek financing up to the closing date, no notice is required. *Id.* (Salvo was not required to give notice of his intent to terminate under Paragraph 3 when he made good faith efforts to obtain financing but was unable to purchase the property on the closing date.”).

It is true that Greenberg had “a duty to act in good faith to attempt to obtain third-party financing” for the transaction. *Id.* at 585. Campbell admits that Greenberg could not get financing on the closing date (Brief of Appellant at 1). He asserts that Greenberg breached her duty to act in good faith to obtain financing, and as the party asserting breach, he has the duty to present admissible evidence to prove it.

**B. Campbell Has No Evidence That Greenberg Failed to Act in Good Faith.**

Campbell presented no evidence of his own in the trial court, and instead relied on the evidence submitted by Greenberg. The arguments that he makes in this appeal bear little if any resemblance to the arguments he

made below and should not even be considered by this Court. RAP 2.5(a). However, even if those arguments are considered, they fall far short.

Campbell first points out that Greenberg actually applied for financing even before she made the offer on the subject property. Brief of Appellant at 6. Campbell actually appears to find fault with this application as being too early and not being specifically for the subject property. *Id.*

The financing contingency gave Greenberg 5 days to apply for financing for the subject property. CP 103. It is undisputed that Greenberg was corresponding with her lender about the loan for the subject property within that 5-day period. Brief of Appellant at 7. *See also*, CP 127-129.

A preapproval for the subject property was received on May 17, 2011. Brief of Appellant at 21. *See also*, CP 144-150. Campbell's brief makes no substantive argument that Greenberg failed to act in good faith through her receipt of the preapproval letter on May 17.

Campbell's argument seems to be based on the terms of the preapproval letter. According to Campbell, the preapproval letter contained a checklist of Greenberg's duties in the loan approval process. Campbell asserts that Greenberg did not act in good faith to meet the requirements of the checklist. This should be the point where Campbell identifies the requirements and presents evidence that Greenberg failed to meet them. But he does no such thing.

Instead, he complains that Greenberg failed to present evidence that she met some unidentified requirements.

Greenberg claims that that she did make efforts after the May 17<sup>th</sup> to obtain the financing and actually get approved for the loan and this point was specifically argued at the summary judgment hearing (RP 7). **However, no evidence whatsoever was presented by Greenberg to prove this.**

Brief of Appellant at 8.

There is no substantial evidence in the case at bar to support the finding that that Greenberg met her duty of good faith to obtain third party financing.

Brief of Appellant at 17. The question is not whether Greenberg presented evidence that she pursued financing in good faith, but instead whether Campbell presented evidence that she did not. He presented no such evidence.

Campbell does present evidence that the lender took time to process the loan application, but nothing in that evidence ties the delays to Greenberg. There is no evidence of a request to Greenberg for information or documents that went unanswered. There were no delays in paying loan fees. There is simply evidence that the lender took time to process the application.

Inability of a lender to process a loan by the closing date is precisely one of the risks that is covered by the financing contingency. Absent any evidence that Greenberg caused or procured those delays, the financing

contingency provides legal excuse not to close. *Salvo*, 128 Wash.App. at 586.

To the extent that the Court wanted to see evidence of Greenberg's good faith, it is abundant. She applied in accordance with the agreement. When the lender could not fund the loan by the closing date, she did not terminate the agreement, but instead sought an extension so that it could close. When the extension was rejected, she sought financing from other sources. The transaction did not close because Campbell wanted more money, and for no other reason.

**C. Greenberg Was Not Required to Deposit the Down Payment.**

Campbell next argues that he is entitled to the earnest money because Greenberg did not tender her down payment to escrow after being told that financing was not available. Essentially, Campbell argues that Greenberg was obligated to tender the down payment into escrow despite that fact that loan was not available. Campbell identifies no purpose for making this deposit. It would have been a futile act. The law does not require a tender when it would be a futile act.

A party is "not required by law to do a useless act and tender performance where the other party cannot or will not perform that party's part of the agreement." *Willener*, 107 Wash.2d at 395, 730 P.2d 45

*224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wash. App. 700, 727, 281 P.3d 693, 708 (2012).

Campbell likewise argues that Greenberg's evidence that she could have made the tender was equivocal. However, Greenberg is not asserting a claim for breach of the agreement by Campbell. She merely seeks the return of her own earnest money. Greenberg's obligations under the purchase and sale agreement were contingent on her obtaining financing. Those obligations included placing the down payment into escrow. The inability to get financing excused her duties under the agreement, including the duty to tender the down payment. The law does not require a futile act. *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wash.App. 700, 727, 281 P.3d 693, 708 (2012) ("A party is "not required by law to do a useless act and tender performance where the other party cannot or will not perform that party's part of the agreement." *Willener*, 107 Wash.2d at 395, 730 P.2d 45.").

**D. Greenberg Should Be Awarded Fees on Appeal.**

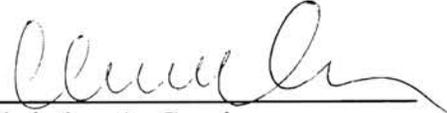
The purchase and sale agreement provides for an award of attorney fees in an action concerning the Agreement. CP 101. "A contractual provision for an award of attorney's fees at trial supports an award of attorney's fees on appeal under RAP 18.1." *W. Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wash.App. 466, 477, 694 P.2d 1101, 1108 (1985). Pursuant RAP 8.1, Greenberg requests an award of attorney fees in this appeal.

## **VII. CONCLUSION**

The earnest money belongs to Greenberg. It is subject to forfeiture to Campbell if Greenberg breaches the agreement. To be entitled to the earnest money, Campbell must prove that Greenberg breached the agreement. He instead argues that Greenberg failed to prove that she did not breach the agreement. Campbell makes the wrong arguments and presents no evidence relevant to the question before the Court. The summary judgment should be affirmed, and Greenberg should be awarded attorney fees on appeal.

DATED this 29<sup>th</sup> day of October, 2013.

**DEMCO LAW FIRM P.S.**

By   
Christina A. Cowin

DECLARATION OF SERVICE

I, Linda Fierro, state: On this day I caused to be delivered by ABC Messenger Service for delivery no later than October 31, 2013 the Brief of Respondent to the Court of Appeals Division I and to:

Christine Mehling  
Mehling Law Firm, PLLC  
10900 NE 4<sup>th</sup> St., Suite 2300  
Bellevue, WA 98004

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30<sup>th</sup> day of October, 2013 at Seattle, Washington.

  
\_\_\_\_\_  
Linda Fierro