

70466-4

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No. 70466-4

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

KRK Holdings, LLC, a Nevada limited liability company,

Appellant,

vs.

EAST WEST BANCORP, INC., a Delaware corporation, d/b/a EAST
WEST BANK,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
THE HONORABLE JANICE E. ELLIS

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

As respondent East West Bank concedes, and indeed actively argues, the trial court's interpretation of the Purchase and Sale Agreement ("PSA") assigning to appellant KRK Holdings LLC responsibility for discharging an easement restricting access to the property rests entirely on extrinsic evidence that KRK made efforts to clear the access easement after the parties signed the PSA. But that evidence conflicts not only with the plain language of the PSA, in which East West agreed to have "paid or discharged" "[m]onetary encumbrances or liens" before closing, but also with other extrinsic evidence that East West admitted that despite its "best efforts" to have title companies "review the access issue" it would not be able to provide title insurance that "expressly insured access to the subject lots."

The trial court erred by resolving on summary judgment the reasonable competing interpretations of the PSA. This court should reverse the trial court's summary judgment order, reverse the award of attorney's fees to East West, and remand for further proceedings consistent with the enforceability of the PSA.

II. REPLY ARGUMENT

- A. East West presents the evidence in the light most favorable to itself in defending the trial court's summary judgment order that rendered East West's promises illusory and wrongly allowed East West to benefit from its breach of the PSA.**
- 1. East West points to no language in the PSA that KRK "assumed" the obligation to clear title to the property. The conflicting extrinsic evidence it relies on underscores the necessity of a trial.**

East West relies on the PSA's language that it did not have responsibility to pay or discharge monetary encumbrances "assumed by Buyer," but then fails to point to any language in the PSA in which KRK "assumed" responsibility for discharging the access easement. East West instead relies on conflicting extrinsic evidence to argue that the parties intended that KRK would discharge the access easement. But that evidence, viewed in the light most favorable to KRK, creates a genuine issue of a material fact regarding the parties' intent that must be resolved by a jury, which could easily reject East West's interpretation of the PSA because it would render illusory its promise to clear title before closing.

The PSA required that "[m]onetary encumbrances or liens not assumed by Buyer [KRK], shall be paid or discharged by Seller

[East West] on or before Closing.” (CP 123)¹ KRK did not “assume” the obligation to discharge the access easement anywhere in the PSA. East West relies entirely on extrinsic evidence to argue that KRK “assumed” responsibility for discharging the access easement (Resp. Br. 28), but that evidence must be rejected because it conflicts with the PSA’s language requiring East West to discharge all encumbrances, which is not modified by any language in which KRK agreed to discharge the access easement. *Graoch Associates No. 5 Ltd. P’ship v. Titan Const. Corp.*, 126 Wn. App. 856, 866 n. 15, ¶ 20, 109 P.3d 830 (2005) (“Extrinsic evidence . . . may not be used . . . to show an intention independent of the instrument; or . . . to vary, contradict, or modify the written word.”) (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695–96, 974 P.2d 836 (1999)) (App. Br. 12).

Even if this court looks to the extrinsic evidence cited by East West – a subsequent agreement between KRK and the access easement holder, and the unilateral statements of East West’s attorney and real estate broker – it does not establish *as a matter of law* that KRK “assumed” responsibility for discharging the access

¹ KRK’s repeated citation to this language in its opening brief refutes East West’s assertion that KRK did not “explain[] where in the PSA the parties agreed that [East West]” would clear the access easement. (Resp. Br. 21)

easement. “[I]nterpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993); *Grey v. Leach*, 158 Wn. App. 837, 853, ¶ 30, 244 P.3d 970 (2010) (trial court could interpret contract on summary judgment because it “did not rely upon any contested extrinsic evidence”) (Resp. Br. 27). When interpreting a contract, a court must consider all extrinsic evidence. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 675, 911 P.2d 1301 (1996) (trial court erred by granting summary judgment after “consider[ing] only some of the extrinsic evidence offered”). Where a party offers extrinsic evidence to establish the meaning of a contract, “the ‘context rule’ to contract interpretation tends to favor fact finding rather than summary resolution of these contract disputes.” *Neuson v. Macy’s Dep’t Stores Inc.*, 160 Wn. App. 786, 796, ¶ 22, 249 P.3d 1054, *rev. denied*, 172 Wn.2d 1005 (2011); *Lokan & Associates, Inc. v. Am. Beef Processing, LLC*, 177 Wn. App. 490, ¶¶ 11-13, 311 P.3d 1285 (2013) (App. Br. 8-9).

Here, *all* of the extrinsic evidence supports more than one reasonable interpretation regarding which party bore responsibility for discharging the access easement. East West *also* tried to resolve the access easement, but it concluded that despite its “best efforts” to have title companies “review the access issue” it would not be able to provide title insurance that “expressly insured access to the subject lots.” (*Compare* CP 143 *with* Resp. Br. 3 (“KRK offers nothing on appeal by way of contract terms or extrinsic evidence to support its assertion that [East West] agreed to pay or otherwise resolve the access restriction.”)) Indeed, East West contradicts itself by arguing that any effort by KRK to discharge the access easement establishes that the parties agreed KRK would assume that obligation (despite the PSA’s language to the contrary), while ignoring its own “best efforts” to resolve the “access issue.”

East West’s inconsistent argument underscores that a trier of fact should resolve the competing inferences raised by extrinsic evidence. A trier of fact could easily reject East West’s interpretation of the PSA, which would render illusory its promises to pay or discharge “[m]onetary encumbrances or liens” and obtain title insurance. (CP 123) Under East West’s interpretation of the PSA, East West could ignore its obligation to pay off the access

encumbrance, cause title insurers to be unwilling to insure the property, and escape from its agreement to sell the property to KRK. (App. Br. 11-12) But the court must “interpret contract provisions to render them enforceable whenever possible,” and thus reject “interpretations that would render contract obligations illusory.” *Schnall v. AT & T Wireless Servs., Inc.*, 171 Wn.2d 260, 266, ¶ 6, 259 P.3d 129 (2011) (App. Br. 10); *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340, *rev. denied*, 132 Wn.2d 1009 (1997) (App. Br. 11); *see also Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 770, ¶ 25, 145 P.3d 1253 (2006) (App. Br. 11-12; Resp. Br. 33-34), *rev. denied*, 161 Wn.2d 1012 (2007).²

East West misplaces its reliance on *Omni Group v. Seattle-First Nat’l Bank*, 32 Wn. App. 22, 645 P.2d 727 (Resp. Br. 34), *rev. denied*, 97 Wn.2d 1036 (1982). *Omni Group* involved a contract that expressly granted the buyer discretion to cancel the purchase if an engineer’s and architect’s feasibility reports were not

² East West’s assertion that “there is no evident connection” between this case and *Cascade* (Resp. Br. 34) ignores that *Cascade* rejected the interpretation offered by one party because it rendered that party’s promise optional when the parties “clearly intended the [contract] to be binding.” 135 Wn. App. at 770, ¶ 25 (App. Br. 11-12). Likewise, here East West offers an interpretation that renders its obligation to discharge monetary encumbrances optional.

“satisfactory.” 32 Wn. App. at 28 (“Omni has, by the quoted language, reserved to itself a power to cancel or terminate the contract”). Here, in contrast, East West failed to reserve to itself the right to cancel the contract and thus it must resort to extrinsic evidence to argue that it had no obligation to resolve the access easement, which was undisputedly a “monetary encumbrance” that it could have discharged with funds received from KRK at closing. (CP 123)

East West mischaracterizes KRK’s position in arguing that the trial court’s summary judgment order should be affirmed even “if KRK’s position were accepted” and the PSA “somehow rendered either party’s performance ‘optional’” because “then the contract is unsupported by consideration and unenforceable.” (Resp. Br. 35) The PSA did not render East West’s promises optional – East West’s promises are optional only under its interpretation of the PSA, and KRK argued *against* East West’s interpretation for precisely that reason.

KRK fully preserved for review its argument that East West agreed to discharge the access easement and that the PSA was still enforceable despite the failure to close because East West’s misconduct prevented the PSA from closing. (CP 46 (response to

summary judgment: “[KRK] asserts that it was [East West]’s responsibility under the PSA to pay the amount necessary to resolve the access/marketability issues created by the Easement.”; “the Easement was nothing more than a financial encumbrance, which could have been resolved at closing through payment of funds by Plaintiff”), 84 (answer: alleging as affirmative defense that “[East West] has prevented [KRK] from performing under the PSA”) East West acknowledges that “KRK argued [in its response on summary judgment] that [East West] had the ‘responsibility under the PSA’ to pay off the Access Restriction Agreement monetary obligation.” (Resp. Br. 9 (quoting CP 46); *see also* Resp. Br. 23 (KRK argued “that [East West] should be estopped from asserting the PSA has been nullified because [East West] did not pay off the Access Restriction”)) KRK was not required to “prove” – on summary judgment – “that [East West] agreed to pay off the access restriction.” (Resp. Br. 3) KRK was required to, and did establish, that the evidence created two reasonable interpretations that should be resolved by a trier of fact.

2. East West’s obligations under the PSA were not excused by its own failure to obtain title insurance, a condition precedent to closing.

The trial court also erred by accepting East West’s argument that its obligations under the PSA were excused because “the closing date passed without fulfillment of a condition precedent to closing, viz., a title commitment.” (Resp. Br. 1) The evidence viewed in the light most favorable to KRK establishes that East West could have eliminated the only obstacle to title insurance – discharge of the access easement – from the proceeds at closing, but without explanation it refused to do so. East West should not be allowed to benefit from its own frustration of the condition precedent.

East West concedes that a party’s frustration of a condition precedent prevents it from relying on the failure of the condition precedent to excuse its contractual duties. (Resp. Br. 38 (“one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it”) (emphasis removed)) But East West then mistakenly argues there is no “*affirmative duty* on a party to facilitate the achievement of a condition precedent” (Resp. Br. 36) (emphasis in original). See *Egbert v. Way*, 15 Wn. App. 76, 79, 546 P.2d 1246 (1976) (“Each

party has the *affirmative good faith* obligation to perform conditions precedent under a contract and cannot be excused from performance by his own misconduct.”) (emphasis added and in original) (App. Br. 17); Restatement (Second) of Contracts § 245 comment a (1981) (party may be required to “tak[e] *affirmative* steps to cause . . . occurrence” of conditions precedent) (emphasis added).

Here, East West concedes that it did not obtain title insurance (Resp. Br. 1, 7), and claims that “KRK’s position that [East West] was required under the PSA to apply for *and* obtain title insurance is manifestly lacking in support in the plain language of the PSA.” (Resp. Br. 33 (emphasis in original)) But East West admitted in both its complaint and motion for summary judgment that “[b]y general term d of the PSA, [East West] was obligated to obtain and pay for title insurance.” (CP 149, 161) East West also concedes that it “undertook the task of seeking title insurance for the Property.” (Resp. Br. 33) The PSA itself is ambiguous, both “authoriz[ing] Buyer’s lender or Closing Agent, at Seller’s expense, to apply for the then-current ALTA form of standard form owner’s policy of title insurance,” and recognizing the possibility that “Seller previously received a preliminary commitment from a Title

Insurance Company.” (CP 123)³ East West’s own interpretations of the PSA and its own conduct create a genuine issue of material fact regarding which party bore responsibility for obtaining title insurance and whether KRK justifiably relied on East West’s representations that East West would obtain title insurance. *Scott Galvanizing*, 120 Wn.2d at 582.

Regardless which party bore responsibility for procuring title insurance, it would be inequitable to allow East West to benefit from its frustration of the title insurance condition. Title insurance would have been obtained had East West discharged the access easement, which it could have done with proceeds from closing. (CP 16, 49, 143-44) East West asserts that the access easement was not “the sole but-for cause of the failure to obtain title insurance” (Resp. Br. 12), but it fails to suggest any other cause. Moreover, East West’s assertion conflicts with its own statement that it would “not be able to provide a commitment for title” because no title company was “willing to issue a commitment which expressly insured access to the subject lots” after “review[ing] the access issue.” (CP 143) Likewise, East West told KRK that it could

³ The PSA also ambiguously states that “the party applying for title insurance shall pay any title cancellation fee.” (CP 123)

“proceed to closing” by “waiv[ing] the access/marketability issue.” (CP 144) Thus, by East West’s own admissions the “access issue” was the “but for” cause of the failure to procure title insurance.

East West argues that unlike the cases cited in KRK’s opening brief, “KRK has failed to cite any evidence that [East West] took any action to thwart the accomplishment of any condition precedent to obtaining a title commitment.” (Resp. Br. 37-38) But KRK did just that, when it argued that the access issue was the last impediment to title insurance and that closing would have occurred had East West not anticipatorily breached the contract by asserting that KRK must assume the monetary obligation necessary to remove the access easement. (App. Br. 18-19; CP 44-47 (East West “could have obtained an insurable title commitment . . . and . . . closing could have occurred if [East West] had paid the amount referenced in the Easement. The access issue created by the Easement was essentially the last issue to be resolved Such conduct was a breach of the PSA, which relieved [KRK] of its ability to close the transaction by the scheduled closing date.”))

East West also claims the failure to close for lack of title insurance nullified the PSA because the parties agreed “time is of the essence.” (Resp. Br. 22-25) But whether “time was of the

essence” is immaterial if, as KRK asserts, East West’s misconduct estops it from excusing its contractual duties based on the failure to close. (App. Br. 15-19) *See also Egbert*, 15 Wn. App. at 82 (“the time limits in the contract, even though made of the essence, do not operate to excuse Mrs. Way from specific performance when the breach is the result of her own bad faith and lack of diligence in clearing the title”). East West concedes as much. (Resp. Br. 2 (“conduct giving raise to estoppel or waiver” nullifies rule that contract “becomes legally defunct upon the stated termination date”)) East West’s other allegations regarding the timing of closing are immaterial for the same reason. (Resp. Br. 2 (“KRK failed to come forth with even a sliver of evidence that the parties even discussed an extension of the closing date”), 21-25)

East West could have obtained title insurance by discharging the access easement with a portion of the proceeds received from KRK at closing, but without explanation it refused to do so. This court should reverse the trial court’s summary judgment order that allowed East West to benefit from its unjustified rejection of a clear avenue for obtaining title insurance and fulfilling its contractual obligations under the PSA.

B. The trial court erred by striking the declaration of KRK's real estate consultant that was based on his personal knowledge and consistent with East West's own statement that title insurers would not insure the property because of the "access issue."

The trial court erred when it struck portions of the declaration of Benjamin Durham, KRK's real estate consultant, based on East West's assertion that he had no basis for testifying that title insurers refused to insure the property because East West failed to clear the access easement. Durham's statements were supported by his personal knowledge, East West's statements to KRK, and the plain language of the access easement.

East West asserts that Durham could not testify from personal knowledge about its failure to obtain title insurance because he "did not declare that he personally participated in each of the negotiations between [East West] and the six title insurance companies." (Resp. Br. 40) But Durham testified, "I worked directly on the transaction that is the subject of [this] litigation, and I have personal knowledge of the matter attested to herein." (CP 48) In working directly on this transaction, he would have learned from East West itself that despite its "best efforts" it could not obtain title insurance because of the "access issue." (CP 143) Moreover, East West contradicts itself by arguing that Durham's

statement he “worked directly on the transaction” is insufficient, but that its own witness “Mr. Coakley established a proper foundation for this testimony by alleging that he had personal knowledge of the transaction as a broker representing [East West] in the transaction at issue.” (*Compare* Resp. Br. 40 *with* Resp. Br. 41)

Durham, or anyone, could have learned by reading the access easement that it “was nothing more than a financial encumbrance, which could have been resolved at closing through the payment of funds by [East West].” (Resp. Br. 39; CP 16 (access would be restricted “until that obligation is paid and/or acceptable arrangements are made for the payment of the balance owing” which was currently \$500,000)) East West’s own statement that six title insurers refused to “issue a commitment which expressly insured access to the subject lots” after reviewing the “access issue” (CP 143) refutes its objection to Durham’s statement that it “could have obtained an insurable title commitment, but for a price.” (Resp. Br. 40)

The trial court erred by striking portions of the Durham declaration and by entering summary judgment after excluding Durham’s statements. *Sun Mountain Prods., Inc. v. Pierre*, 84 Wn.

App. 608, 619-20, 929 P.2d 494 (reversing summary judgment order based on improper exclusion of declarations), *rev. denied*, 132 Wn.2d 1003 (1997).

C. The trial court erred by ignoring KRK's request for a continuance under CR 56(f).

KRK requested a continuance under CR 56(f) because it needed further discovery regarding “1) [East West’s] ability to obtain an insurable title commitment; 2) [East West’s] decision to forego payment of the amount needed to resolve the access/marketability issue; and 3) the parties’ intent as to how the access/marketability issue would be resolved.” (CP 47) Despite this clear statement in the summary judgment record, East West claims KRK “[did] not show that it offered the trial court any explanation of the evidence to be obtained through additional discovery.” (Resp. Br. 43 (quotation removed)) This court should reject East West’s argument, which is contradicted by the record, and reverse the trial court’s summary judgment order entered before KRK had the opportunity to complete discovery.

KRK “offer[ed] a good reason for the delay in obtaining the desired evidence” (Resp. Br. 42-43) when it explained in its request for a continuance that it “need[ed] additional time to obtain and

gather evidence” because “[d]iscovery has yet to be completed.” (CP 47) East West moved for summary judgment less than five months after commencing this action against KRK, a foreign defendant. KRK also explained “what evidence would be established through the additional discovery” (Resp. Br. 43) when it stated that it would seek additional discovery regarding: 1) East West’s assertion that it was unable to obtain title insurance, 2) why East West failed to clear title to the property, and 3) the parties’ intent regarding who bore responsibility for discharging the access easement. The trial court erred by not granting KRK a continuance to obtain this critical discovery, which bears directly on the issue of who the parties intended to bear responsibility for discharging the access easement.

D. The trial court erred by awarding East West its attorney’s fees.

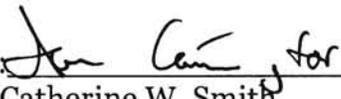
As East West concedes, the trial court’s award of attorney’s fees must stand or fall based on its underlying summary judgment order. (Resp. Br. 45) Because the trial court erroneously granted East West’s motion for summary judgment it also erred in granting East West its attorney’s fees below.

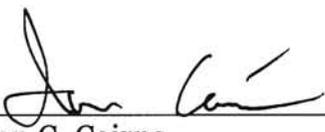
III. CONCLUSION

This court should reverse the trial court's Order Granting Plaintiff's Motion To Strike And Granting Plaintiff's Motion For Summary Judgment, reverse the award of attorney's fees to East West, and remand for further proceedings consistent with the enforceability of the PSA.

Dated this 14th day of March, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 14, 2014, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 14th day of March,
2014.



Victoria K. Vigoren