74510-7

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NO. 74510-7-I

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

KEN HATCH and CATHI HATCH,

Appellants,

v.

CARY FALK,

Respondent

2016 OCT 28 PM 4:06

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

INTRODUCTION..... 1

ASSIGNMENTS OF ERROR..... 1

RESTATEMENT OF ISSUES..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT.....16

AUTHORITY & ARGUMENT..... 17

Orders On Summary Judgment Are Reviewed De Novo.....17

Hatch Failed To Plead Or Prove They Were Ready, Willing, And Able To Close Rendering A Request For The Return Of The Earnest Money Unavailable As A Matter Of Law..... 17

The Respa Did Not Become Defunct Or Void When Hatch Repudiated The Agreement And Failed To Obtain Financing.....20

Hatch Repudiated The Contract To Purchase Falk's Home Therefore Falk Was Completely Relieved Of His Duty To Subsequently Perform.....22

Authority Cited By Hatch Does Not Support The Argument Of Hatch That Falk Needed To Tender The Performance Required Of A Seller To Retain The Deposit.....28

The Earnest Money Agreement Is Valid And Binding On The Parties.....38

The Parties Entered Into A Valid Contract Which Did Not Become A "Nullity" Or Void, Therefore Equitable Relief Is Not Available.....42

Attorney Fees Were Properly Awarded To Falk.
Falk Should Be Granted Leave To Apply For
Additional Attorney Fees Incident To This Appeal..... 43

CONCLUSION..... 44

Table of Authorities

Washington Cases

Artz v. O'Bannon,

17 Wn. App. 421, 422-423, 562 P.2d 674 (1977)..... 35, 36

Ashley v. Lance,

80 Wash.2d 274, 280, 493 P.2d 1242 (1972).....40

Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.,

61 Wn. App. 151, 160, 810 P.2d 12 (1991).....42

Baker v. Shaw,

78 Wash. 233, 138 P. 888 (1914).....17

Bendon v. Parfit,

74 Wash. 645, 134 P. 185 (1913).....23

CKP, Inc. v. GRS Constr. Co.,

63 Wn. App. 601, 620, 821 P. 2d 63,
review denied 120 Wn.2d 1010 (1992)..... 22

Dolan v. Baldridge,

165 Wash. 69, 84, 4 P.2d 871 (1931).....11

Ellingsen v. Landre,

40 Wn.2d 116, 119, 241 P.2d 207 (1952).....23

Home Realty Lynnwood, Inc. v. Walsh,

146 Wn.App. 231, 240, 189 P.3d 253 (2008).....18

Jensen v. Richens,

74 Wn.2d 41, 46, 442 P.2d 636 (1968).....23

Keck v. Collins,

184 Wn.2d 358, 370, 357 P.3d 1080 (2015)……..17

Kofmehl v. Baseline Lake, LLC,

177 Wn.2d 584, 596, 305 P.3d 230 (Wash. 2013)……18, 19, 20, 40

Lovric v. Dunatov,

18 Wn. App. 274, 282, 567 P.2d 678 (1977)……23

Management, Inc. v. Schassberger,

39 Wn.2d 321, 326, 235 P.2d 293 (1951)……..40

Mid-Town Ltd P'ship v. Preston,

69 Wn. App. 227, 235, 848 P.2d 1268 (1993)…….. 21

Nadeau v. Beers,

73 Wn.2d 608, 610, 440 P.2d 164 (1968)……..21

O'Connor v. Jackson,

23 Wash. 224, 62 P. 761 (1900)……17

Olsen Media v. Energy Scis., Inc.,

32 Wn.App. 579, 585, 648 P.2d 493 (1982)……..27

Reichenbach v. Sage,

13 Wash. 364, 368, 43 P. 354 (1896)……41

Schweiter v. Halsey,

57 Wn.2d 707, 712, 359 P.2d 821 (Wash. 1961)……...18, 19

Soules v. Cox,

53 Wn.2d 598, 601, 335 P.2d 476 (Wash. 1959)……...18, 19, 20

State v. LG Elecs., Inc.,

185 Wn. App. 394, 403, 341 P.3d 346 (2016).....11

Vacova Co. v. Farrell,

62 Wn.App. 386, 814 P.2d 255 (1991).....21

Versuslaw, Inc. v. Stoel Rives, LLP,

127 Wn. App. 309, 321, 111 P.3d 866 (2005).....23

Wallace Real Estate Inv. Inc. v. Groves,

124 Wn.2d 881, 898, 881 P.2d 1010 (1994)..... 27, 28, 29, 30, 31, 32, 33, 36, 37

Watson v. Ingram,

124 Wn.2d 845, 850, 881 P.2d 247 (Wash. 1994).....40, 41, 42

White & Bollard, Inc. v. Goodenow,

58 Wn.2d 180, 188, 361 P.2d 571 (1961)..... 23, 33, 34, 35, 36, 37

Willener v. Sweeting

107 Wn.2d 388, 730 P.2d 45 (Wash. 1986)..... 18, 20, 23

Young v. Young,

164 Wn.2d 477, 484 191 P.3d 1258 (Wash. 2008).....42, 43

Statutes

RCW 64.04.005..... 39, 40

Court Rules

RAP 18.1.....44

INTRODUCTION

Hatch appeals Orders on Summary Judgment Dismissing Hatchs' lawsuit to recover a non-refundable deposit released to Falk weeks prior to closing as (a) consideration for a price reduction, and (b) for preservation of the Closing Date notwithstanding the event that (c) Hatch was unable to obtain financing to purchase Falk's home. (CP 142-144; 145-147, 208-209). Hatch argues Falk is not entitled to keep the $35,000.00 non-refundable deposit because despite Hatchs' repudiation of the contract, on the day scheduled for Closing, Falk did not execute the warranty deed and tender it to escrow. Hatch claims Falk had a duty to execute and tender a deed even though: 1) Hatch did not have the ability to close because of the lack of financing; 2) at Hatchs' direction, their real estate agent had informed Falk there would be no closing; and 3) Hatch had rented substitute housing all prior to closing.

A. ASSIGNMENTS OF ERROR

Respondent Falk acknowledges the Assignments of Error at Appellant's Opening Brief at page 3.

B. RESTATEMENT OF ISSUES

1. Is a seller legally excused from further performance after the seller receives reliable notice the purchaser cannot and will not perform and

provide payment as stated in the contract for the sale and purchase of real estate?

2. When a purchaser's real estate agent testifies that agent imparted a clear understanding to the seller that the purchaser (a) has not obtained funding, (b) cannot close as scheduled, and (c) that purchaser desires to renegotiate existing agreement, is it appropriate to conclude purchaser anticipatorily repudiated the contract?

3. When the purchasers' complaint admits purchasers' failure to perform, must the seller, notwithstanding such admission, prove seller's ability to perform?

4. When purchasers fails to perform their contractual duties without legal excuse, does the purchasers' breach of duty extinguish the contract or render the contract a "nullity" such that purchaser has no remedy at law and is thereby entitled to relief in equity; e.g restitution or disgorgement of unjust enrichment?

C. STATEMENT OF THE CASE

On October 29, 2014, Falk and Hatch entered into a Real Estate Purchase & Sale Agreement (REPSA) for the sale of Falk's home to Hatch. (CP 41- 57). The purchase price was $1,156,000. (CP 41). Hatch and Falk chose January 5, 2015 as the Closing date. (CP 2, 41). Closing was contingent upon Hatch obtaining conventional financing (CP 46-47)

and their satisfaction with the inspection report (CP 54-55). In the REPSA, Hatch promised to apply for conventional financing within five days following mutual acceptance. (CP 46-47, 114-115). There is no evidence Hatch timely applied for the loan. The Complaint Hatch filed does not allege this condition was satisfied, or that financing was ever obtained. (CP 1-2). Hoffman, as real estate agent for Hatch, testified:

> Q: Ok. The earliest e-mail here, starting at the bottom of the first page appears to be an e-mail from you to Cathi Hatch; is that correct?
>
> A: Correct
>
> Q: And you're asking if she's secured her lender?
>
> A: Correct
>
> Q: Why were you asking that?
>
> A: Because I hadn't heard whether they had or hadn't
>
> **Q: Based on the summary that you prepared in the previous exhibit, this was past the deadline for the financing waiver? Is that correct?**
>
> **A: Correct**
>
> Q: And her response is no. You understood that to mean that she had not yet secured a lender?
>
> A: That Ken had not yet secured the lender, correct.
>
> (CP 29).

The record is uncontroverted: Hatch failed to meet the financing deadline. The Complaint of Hatch admits "**Hatch did NOT perform the**

Agreement on or before the closing date" and Hatch admits that Hatch "**did not tender performance on or before the closing date**." (CP 2).

To keep Falk's house under contract and off the market, Hatch waived the financing contingency. Hatch obtained the home inspection and requested Falk make repairs or reduce the price. Falk agreed to reduce the price but requested that Closing be advanced to December 05, 2014. Falk proposed two options. Falk emailed Hoffman (agent for Hatch) November 23, 3:55 p.m.:

> "That being said, without arguing over any details, I am willing to agree to the Hatch's (sic) $17,000 concessions subject to Hatch's (sic) agreeing to one of the two options below:
>
> a. That the $20,000 be released non-refundable upon acceptance of this concession as previously agreed and that the Hatch's (sic) close on the house by December 5th or;
>
> b. **That the Hatch's (sic) release, non-refundable, the entire $35,000 earnest money upon acceptance of this concession.**
>
> That Hatch's (sic) want to ensure they are getting funds to have a perfect house. **The seller, me, wants to ensure that the house will close as agreed**." (CP 72) (Emphasis added).

Hatch informed Hoffman by email of November 23, 2014 at 7:25 pm that Hatch was unwilling to advance the Closing Date from January 5, 2015 to December 05, 2014.

> "And unfortunately, Ken (Hatch) at is not agreeing to either Option A or B but instead wants Option C which is:
>
> **c. That the $20,000 be released non-refundable upon acceptance of this $17,000 concession and that the Hatch's (sic) close on the house by the original agreed upon closing date of January 5th.**
>
> Ken's rationale is that even though we don't close until January 5th, that Cary is getting rent for that period due to the $20,000 in non-refundable earnest money he (Falk) is receiving **prior to the closing date**." (CP 70) (Parenthetical and emphasis added).

After Hoffman received this email from Hatch, Hoffman replied to Hatch by email that that same day, November 23, 2014 at 10:33 p.m.:

> "Let me simply describe the next steps;
>
> If he (Falk) doesn't agree with what you want and sends back an alternative you do not like, your options are to try one more time for an agreement and then the deal is dead. Please read carefully the attached addendum with the options. At this point, the discussion you have been having with him via email doesn't count as one of the options does it until you write up the request"
>
> "Please note that 30 days after the mutual acceptance date, (note in the timeline that I sent to you), that they (Falk) can ask you waive your financing contingency. I believe that is in slightly less than 2 weeks. He (Falk) asked me today if I were (sic) in touch with your lender. I only bring that up because he certainly has the option per the contract. If he (Falk) asks you to waive it and you decline then he (Falk) has the option of terminating the contract. We are still working on the financing though I don't think that you should share that with him. I think that you are doing fine with your explanation that you stay out of your friends' financial business. Please advise as soon as possible." (CP 75) (Parenthetical added for clarity).

The next day, Hoffman had the answer from Hatch. Hoffman emailed Falk on November 24, 2014 at 12:13 PM:

> "I just got word that the Hatch's (sic) will go with Option B of releasing the $35,000 earnest money to you and keeping the closing date of January 5th. We are still stipulating that the furnaces, air conditioners, be serviced and air filters cleaned. That Hatch's (sic) would also like to be certain that they will have access to the house up until closing so they can meet with contractors, etc. so that the work can commence immediately upon closing...I will be writing up the paperwork and getting them to sign it later today. Cathi is out all day at meetings and she won't be back until around six to sign the documents." (CP 72)

Hoffman, as agent for Hatch, used Inspection Response Form 35 to communicate the decision of Hatch to Falk. The option selected by Hatch was written by Hoffman as follows:

> Purchase price shall be $1,139,000 Seller to provide access to property until close date.
>
> **Earnest monies of $35,000 <u>to be released to Seller</u>, non-refundable to Buyer, once inspection is agreed upon.** All furnaces, air conditioners and air filters to be serviced and repaired, if necessary by licensed and bonded HVAC contractor / Seller to provide receipts of work done.
> (CP 63) (Emphasis added)

By this process, the REPSA was amended reducing the price of the house in lieu of repairs to satisfy the inspection contingency. Even though Hatch did not have financing, Falk agreed to retain the January 5, 2015 Closing Date in exchange for the immediate (pre-closing) release of the $35,000.00 deposit to Falk. The record includes Hoffman's testimony

explaining these email exchanges and the change made by Inspection Response for Form 35. Hoffman:

> Q: What was the benefit to Mr. and Mrs. Hatch of the terms that were agreed in the Inspection Response Form?
>
> A: We took a reduction in price versus having Cary fix things, because traditionally sellers fix on the cheap and buyers want Cadillac version.
>
> So it seemed that it would be best for all involved that we just take the approximate price that the Hatchs thought would need—that there would be a need for repairs and reflect that in the purchase price.
>
> **Q: Ok. And so what was – what was the benefit exchange for? The reduction in purchase price, what did—**
>
> **A: For the release of the earnest money, for the complete release.** (Emphasis added) (CP 34).
>
> ~o0o~
>
> Q: Based on the terms that were agreed to, did you believe that the earnest money was to be released to Cary Falk?
>
> A: Yes.
>
> Q: And the money was, in fact, released to Cary Falk?
>
> A: Yes. (CP 35)

Hatch admits: "**Pursuant to the Agreement**, plaintiffs (Hatch) deposited earnest money in the amount of $35,000 with their real estate agent (Hoffman)." (Parentheticals added for clarity) (CP 1). Hatch admits

disbursement of the deposit to Falk was proper: "**In accordance with the terms of the Agreement,** Coldwell Banker Bain released the earnest money to the defendant **(Falk).**" (Parenthetical added for clarity) (CP 1). The admission that Hoffman properly released the deposit to Falk, appears in the Complaint of Hatch of dated **April 2, 2015.** (CP 1-2). The date of this crucial admission is important because this admission (propriety of disbursement) was made **after** Hatch asked Hoffman to explain how the deposit was handled and released to Falk prior to the Closing Date.

On **March 5, 2015**, Hatch wrote to Hoffman. This email asked Hoffman to explain why the Hatch deposit had been released to Falk prior to the Closing Date. Cathi Hatch wrote:

> "Hi Toni~
>
> Ken asked me to send you a quick email **since it just came to our attention today from your broker and our attorney that our $35,000 earnest money check has already been cashed.** We were very surprised to hear this, because Ken and I were under the impression that you had told us the check could not be cashed without our written permission to do so, because you specifically set it up that way. We did not sign the release on the check because we were still waiting for the green light from our attorney.
>
> Can you please explain to us what happened?
>
> Thank you,
> Cathi"

(Emphasis added.) (CP 116).

Hoffman replied to Hatch by email on March 7, 2015:

"Cathi and Ken:

I apologize for not responding to this earlier....

In trying to address the confusion regarding this issue, I want to clarify that the release form, that was sent to you **after you couldn't get a loan and didn't intend to purchase the home, was simply to allow the seller to put his house back on the market, instead of leaving it in a pending status for additional days. That didn't impact your earnest money, as you had agreed to release it to the seller previously, at two different times.**

1. At the initial offer, because you preferred a longer close than what the seller preferred, $20,000.00 of the $35,000.00 was written in as non-refundable. I remember that you likened it to 2 months of rent. At that time, I had written it in, in a loosely worded form – not specifically saying it would be released to the seller and non-refundable to the buyer trying to give you some wiggle room.

The original $20,000.00 was to be released upon satisfaction of the inspection."

"I also recall having a very specific conversation with you Cathi, at the Polo house while we were in the inspection period talking about how once we negotiated the inspection, if you couldn't get a loan, that you would most likely lose your earnest money. **Your inspection 'out' was your last 'get out of jail free' card.** I was greatly concerned that you didn't have financing and we went over the particulars at that time, including an idea that you had regarding your contract pay. As was explained to you at the time I wrote the offer, as well as explained in the timeline I sent to you after getting mutual acceptance, your financing addendum allowed five days for you to apply for a loan and after that you needed to alert the seller you were changing lenders. You were confident that Ken could get the loan for the house, at that time. (As we all were)

> 2. As we went forward with the transaction and both of you felt strongly that there were a lot of things that needed fixing in the home, we felt it was better getting a reduction in the price rather than having the seller fix the items. The seller was insisting on seeing the inspection report and the EIFS report and fixing things himself. The discussion centered partially around how sellers will fix things on the 'cheap' and buyers wanted things done with a higher degree of care. With the option of reducing the selling price, the seller was particularly adamant that if you were to get the $17,000 reduction in price that you asked for, he wanted the rest of the earnest money. ($15,000)
>
> **Our inspection response was written to release, non-refundable to the buyer, the entire earnest money to the seller. At this time, with my understanding of the financing addendum, you didn't have an out with the financing anyway and were still confident the loan could be secured.** (please note the Summary of Offer document with regard to the financing addendum). We also took full advantage of the entire extended time frame for the inspection-asking for the maximum additional days. We had mutual acceptance on the 7th and didn't have to have our response back until the 24th. We had written the original offer on the 29th of October. I have also attached the summary of the offer that was sent to you shortly after we had mutual acceptance." (Emphasis Added) (CP 114-115).

On **March 5, 2015**, Hatch questioned Hoffman concerning the propriety of releasing of the Hatch deposit to Falk. (CP 115-116). On **March 7, 2015**, Hoffman answered Hatch explaining how the deposit was released and why. (CP 114-115). On **April 2, 2015**, after receiving Hoffman's explanation, Hatch filed their Complaint in this lawsuit

admitting that the earnest money was released "in accordance with the terms of the agreement." (CP 2). [1]

The record confirms Hatch could not close. The record confirms Hoffman advised Falk that the Hatch would not close. Hoffman's deposition testimony of record confirmed:

> Q: What was the original closing date of this transaction supposed to be?
>
> A: The date on the contract, January 5, 2015
>
> Q: And did it close on that day?
>
> A: No.
>
> **Q: Do you know why it didn't close on that day?**
>
> **A: The Hatchs couldn't get a loan.** (Emphasis added) (CP 27).

When Hatch could not get a loan, Hatch wanted to re-write the REPSA to delete conventional financing and all cash at closing and substitute a lease with purchase option. Hoffman deposition testimony discloses:

> Q: At the bottom of (exhibit 18) of the first page is an e-mail from you to Cary Falk on Friday, December 26, 2014 at 2:47 p.m.
>
> A: Yes

[1] The allegations of the Hatch Complaint should be deemed a verity on appeal. See State v. LG Elecs., Inc., 185 Wn. App. 394, 403, 341 P.3d 346 (2016); Dolan v. Baldridge, 165 Wash. 69, 84, 4 P.2d 871 (1931).

> Q: You're asking for his (Falk's) phone number and you state that, "Ken would like to speak to you directly about the purchase of the house." What specifically, if you know, did Ken want to speak with Mr. Falk about?
>
> A: About a lease purchase.
>
> Q: Why did he (Hatch) want to speak about a lease purchase?
>
> **A: Because he (Hatch) wasn't getting a loan through Banner Bank.**
>
> **Q: How do you know he (Hatch) wasn't getting a loan through Banner Bank?**
>
> **A: Because he (Hatch) told me that.** (CP 36) (Parentheticals for clarity) (Emphasis added).

Following receipt of this instruction from Hatch, Hoffman followed up with Falk advising that the sale would not close because Hatch "**wasn't getting a loan**".

> **Q: Did you express to Mr. Falk or his wife, who was his agent, that they couldn't get a loan?**
>
> **A: Yes.**
>
> Q: What did you tell them?
>
> A: I had sent an e-mail to Cary telling him that Ken Hatchs wanted to speak with him, and not referencing why, and could I give him his phone number?
>
> **And Cary at that time called me and said basically, "What's the matter? Can't he close?" and I said, "He'd like to talk to you about a lease purchase."** And Cary said, "No offense, I'm sure he's a really nice guy, but I don't want to talk to him about anything other than closing my house."

Q: And you said he asked you "Can't he close?" Is that what he asked?

A: You know, and kind of backing up to my previous answer about telling him he couldn't get a loan I'm not certain I ever said those words to Cary. I believe I said, "He'd like to talk to you about a lease purchase."

Q: Why were you asking about a lease purchase?

A: Because I'd been told they couldn't get a loan.

Q: Did Cary, Mr. Falk, specifically ask if they could get a loan?

A: I don't believe so.

Q: Did you tell him why you were asking about a lease purchase?

A: I honestly don't remember every single word of that conversation. **I think it was clear that the Hatchs weren't prepared to close on the house and they wanted to find an alternative way of purchasing the home.**

Q: When you say "Weren't prepared to close on the house": what do you mean by "weren't prepared"?

A: Couldn't get the loan that was stated in the contract...<u>it was clear to him that they weren't going to buy the house and close.</u> (Emphasis Added) (CP 29-30)

By December 27, 2014 Hatch re-directed Hoffman to find a rental house so Hatch would have a place to live. Hatch emailed Hoffman to search for a rental house for Hatch. That December 27, 2014 email from Hatch to Hoffman appears in the record at CP 66:

> Hi Toni…
>
> I am really concerned about switching to someone else at this stage of trying to solve this very time sensitive problem. **Can you actually recommend someone who specializes in rentals?** I don't think it will be very efficient or successful for me to try and find something on my own by going to individual agents. I do appreciate having you follow up on the Gene Juarez home and the new construction home because likely either one of them would work if they are available. Can you get at least some ongoing commission if you arrange the rental? I realize that it is probably a pittance compared to what you are used to receiving for sales however. **But even though we can't complete the sale now, that won't be forever hopefully…**
>
> Please hang in there with me just a little longer. We don't have time for this to be an extended project like house hunting for a house to buy was so I hope that I am asking you for only a very limited amount of time." (Emphasis added).

Hoffman testified about being redirected to find a rental house for Hatch:

> Q: …So at this point, this is December 27, 2014, had you been instructed to start searching for rentals?
>
> A: Yes.
>
> **Q: Why was it you were searching for rentals for the Hatchs?**
>
> **A: Because they weren't going to purchase the Falk home.**
>
> **Q: How do you know they weren't going to purchase the Falk home?**
>
> **A: Because they told me they couldn't get a loan.**

> **Q: At this point in time were they searching for rentals, were they still under contract with the Falks?**
>
> **A: Yes.**
>
> **Q: <u>And had it been expressed to Cary Falk at that point that they were not going to close on the transaction?</u>**
>
> **A: <u>Yes</u>.** (Emphasis Added) (CP 37)

Between December 27, 2014 and December 31, 2014, Hatch found a rental house and signed the rental papers so they would have somewhere to live. Again, Hoffman's deposition testimony:

> Q: All right. I am just referring to the email at the top (Exhibit 25) from Cathi Hatch to you; correct?
>
> A: Correct.
>
> Q: With a copy to Ken Hatch?
>
> A: Correct.
>
> Q: And this is dated **December 31, 2014**?
>
> A: Correct.
>
> Q: Mrs. Hatch states, "Just signed the paperwork on the Enatai house ten minutes ago!! Whew! I am so relieved." Do you know what she is referring to with respect to the Enatai house?
>
> A: Yes, that's the house they rented.
>
> Q: So when she says, "Signed the paperwork," do you know what that means?
>
> A: I believe I took that as signing the paperwork for the rental agreement.

> Q: And this is prior to the planned closing date of the transaction they had with Falk? Correct?
>
> A: Yes. (Emphasis added) (CP 38).

D. SUMMARY OF ARGUMENT

Hatch recognizes and admits that a party is legally excused from performance required by a written contract when the other party repudiates the contact. Hatch argues that the conduct of Hatch and statements made to Falk by the agent for Hatch were insufficient to excuse Falk's performance. The first page of Hatchs' Opening Brief states:

> "The duties of the parties to a Real Estate Purchase and Sale Agreement are concurrent. This rule has two consequences. First, for either party to declare the other in breach, that party must first either perform its own obligation **or have a legal excuse for not doing so**.... Second, when neither party performs **nor has a legal excuse for not performing** and the closing date passes, the agreement simply expires by its terms and becomes a nullity."[2] (Emphasis added)

The record shows there is no genuine issue of material fact: Falk was clearly informed Hatch could not and would not close. After that notification, Falk's performance was excused or would have been a useless act not required by law.

Breach of the contract by Hatch does not render the contract a "nullity" as Hatch claims. To the contrary, material breach of a contract by one party releases the other party from performing. Because the contract

[2] Hatch Opening Brief, Page 1.

was not rendered "nullity," it is impermissible to deny the contractual relationship. Hatch had contract remedies at law and therefore has no entitlement to equitable relief. Judgment was properly entered against Hatch for Falk's attorney fees. The Orders of the trial court should be affirmed and Falk granted leave to apply for attorney fees and cost on appeal.

E. AUTHORITY & ARGUMENT

1. Orders on Summary Judgment are reviewed de novo.

The cross motions for summary judgment were decided on affidavits. There was no live testimony. A ruling on summary judgment is reviewed de novo. "We review summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party." Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

2. Hatch failed to plead or prove they were ready, willing, and able to close rendering a request for the return of the earnest money unavailable as a matter of law.

The rule that the petitioner must affirmatively plead and show that they are "ready, willing, and able" has long been established in this state. Baker v. Shaw, 78 Wash. 233, 138 P. 888 (1914) citing O'Connor v. Jackson, 23 Wash. 224, 62 P. 761 (1900). To recover his earnest money,

purchaser has the burden to show that the seller repudiated or was not ready, willing, or able to perform. Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 596, 305 P.3d 230 (Wash. 2013), see Schweiter v. Halsey, 57 Wn.2d 707, 712, 359 P.2d 821 (Wash. 1961), see also Soules v. Cox, 53 Wn.2d 598, 601, 335 P.2d 476 (Wash. 1959). This rule is applied in all areas of real estate law, and is not limited to cases involving the statute of frauds, as Hatch claims. See Willener, Watson, White, infra.

Proof of the purchaser's ability to perform is essential to entitle the purchaser to rescind the earnest money agreement; the purchaser may even need to show they actually performed and tendered the purchase price. See Kofmehl at 595. "[A] purchaser should not be allowed to use his own breach to escape his contractual obligations-in effect, to have an election not to perform what he has agreed to do." Home Realty Lynnwood, Inc. v. Walsh, 146 Wn.App. 231, 240, 189 P.3d 253 (2008) (citation omitted).

In Soules, the purchaser failed to tender the purchase price by the closing date. Soules at 600. The purchaser then tried to recover their earnest money claiming that the title was not insurable and therefore the seller had breached the contract. Id. The court found that the burden of proving the seller breached the agreement fell on the purchaser, and the purchaser failed to show the seller breached the agreement. Id. The seller as therefore entitled to keep the earnest money as a result of the purchaser's failure to close. Id. Hatch has placed himself similarly to the

buyer in Soules. He failed to obtain financing, and now seeks to relieve himself of his breach by claiming the burden is now on Falk while ignoring his own burden.

In Kofmehl, the Supreme Court overruled the trial court's decision to return money to a buyer who had failed to close due to the purchaser's claim of defects. 177 Wn.2d at 596. The Supreme Court held that the purchaser cannot receive restitution under a sale contract under the statute of frauds unless the seller has repudiated the contract. Kofmehl at 597. A similar result occurred in Schweiter: a buyer is not entitled to the return of earnest money, despite a defect, when the seller tendered performance and the buyer did not. Schweiter at 709.

Schweiter and Kofmehl are similar in this regard. Supra. Both cases involve disputes over property descriptions or the language of the contract, where the purchaser failed to close due to that dispute. Id. The important analysis the court provided in these cases is this: if a buyer has refused to proceed and failed to tender his performance, he is not entitled to a return of his earnest money because he *may not benefit from his own breach.* Kofmehl at 595. In comparison to these cases, this case is quite straightforward. Hatch had no dispute; they simply did not have the money to close. Hatch has the absolute burden to show that they had the ability to perform; Hatch must absolutely show they had financing available at the time of closing and have failed to do.

Hatch relies on Willener v. Sweeting to support their contention that the burden is on Falk to prove his performance was excused. 107 Wn.2d 388, 730 P.2d 45 (Wash. 1986). The Willener case is easily distinguished: the buyer in Willener not only had financing, but testified he was ready, willing, and able to perform. Id. at 398. The burden then shifted to the seller to prove their ability to perform Id. Both parties testified they were ready and willing to sign and therefore the court had no choice but to cancel the contract and return the earnest money to the buyer because their duties remained concurrent. Id. at 396.

The Willener holding supports the line of cases which require a buyer to plead and prove their ability to perform before the burden may shift to the seller. See Kofmehl at 596, see also Soules at 601. Hatch has failed to (a) plead or (b) prove that they were ready, willing, or able to perform. Therefore, Willener is not applicable in this case because the Hatches have failed to meet their burden.

3. The RESPA did not become defunct or void when Hatch repudiated the agreement and failed to obtain financing.

Hatch asks the court to review cases in which the purchaser sues for specific performance to support their contention that the RESPA expired upon its terms. For the purposes of specific performance, when neither party performs by the closing date, a purchase and sale agreement become

defunct. Nadeau v. Beers, 73 Wn. 2d 608, 610, 440 P.2d 164 (1968), Mid-Town Ltd P'ship v. Preston, 69 Wn. App. 227, 235, 848 P.2d 1268 (1993).

In Nadeau v. Beers, the contract called for a promissory note to be paid within 60 days. 73 Wn.2d at 609. When the note was not paid within 60 days, the sellers sent the escrow agent and realtor a letter stating they did not wish to proceed with the sale. Id. The buyers later tendered the full purchase price into escrow three days after the 120-day deadline. Id. The sellers refused to complete the sale. Id. The buyers filed an action for specific performance and the court found the contract expired. Id. at 609-610. The court noted that the contract was free from ambiguity regarding the 120-day deadline, and the buyers were not entitled to ask for specific performance when they tendered the purchase price after the deadline. Id. at 610.

A similar fact pattern was presented to the court in Mid-Town. A buyer's complaint for specific performance and damages for a real estate contract was denied when the buyer did not tender their performance by the closing date. Id. at 235. The seller was awarded attorney's fees. Id.

In Vacova Co. v. Farrell, a purchaser was required to make several deposits of earnest money. 62 Wn.App. 386, 814 P.2d 255 (1991). When the purchaser failed to make the deposits in a timely manner, the seller sued to rescind the contract, but did not sue for damages. Id. at 406. The

purchaser attempted to claim the seller waived the provisions. Id. at 407. The court held that time was of the essence in the payment of the three day note and granted the seller's rescission of the contract. Id.

Hatch claims these cases show the Agreement expired when neither party performed, however, Hatch is not seeking specific performance of this contract. Damages were only claimed by the buyer in Mid-Town, and were denied by the court. Id. at 236. Further, in all three cases presented by Hatch, the court ***found in favor of the seller*** when neither party performed. Hatchs' argument that the contract expired based on this legal analysis is not only improperly placed, but supports the dismissal of the action in favor of the seller, Falk.

4. **Hatch repudiated the Contract to purchase Falk's home and therefore Falk was completely relieved of his duty to subsequently perform.**

Repudiation of a contract by one party may be treated by the other as a breach that will excuse the other's performance. CKP, Inc. v. GRS Constr. Co., 63 Wn. App. 601, 620, 821 P. 2d 63, review denied 120 Wn.2d 1010 (1992). An anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance. Lovric v. Dunatov, 18 Wn. App. 274, 282, 567 P.2d 678 (1977).

In a real estate contract, the purchaser and seller have concurrent duties. Bendon v. Parfit, 74 Wash. 645, 134 P. 185 (1913). The purchaser must tender payment and the seller must tender the deed and other required documents. Id. "It is, of course, true that where a seller announces in advance that he will not complete the transaction, the purchaser is excused from making a tender of the money. No one is required to do a vain thing." Ellingsen v. Landre, 40 Wn.2d 116, 119, 241 P.2d 207 (1952). 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 Wn.2d at 395 citing Jensen v. Richens, 74 Wn.2d 41, 46, 442 P.2d 636 (1968): [A] contracting party is not required by law to do a useless act and tender performance where the other contracting party cannot or will not perform his part of the agreement." Id. The purchaser must be ready, willing, and able to complete the transaction. Ellingsen, 40 Wn.2d at 119. See also White & Bollard, Inc. v. Goodenow, 58 Wn.2d 180, 188, 361 P.2d 571 (1961).

To repudiate an agreement, a contracting party must make a clear and positive statement or action manifesting an intent not to perform. Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 321, 111 P.3d 866 (2005). Failure to perform is justified when based on information that the other party will not perform. White & Bollard at 188.

A substantial portion of Appellants' Opening Brief argues Hatch did not repudiate the contract. (Hatch Opening Brief, 15-19). Hatch does not argue that Hatch was ready, willing, and able to perform. Hatch cannot make that argument because their Complaint concedes they could not perform and did not tender performance (CP 2). Hatch argues that the communication received by Falk did not provide sufficient notice of repudiation upon which Falk could rely. Stated differently, while conceding they could not perform, Hatch asserts that their inability to perform was not unequivocally communicated to Falk in a manner sufficient to legally excuse Falk's performance. Hatch Opening Brief at page 16-17 asserts:

> There is no evidence of any "positive statement or action by the promissor" that was known to Falk. A repudiation "must be a clear and positive statement that expresses an intention not to perform the contract.....The Hatches never made any statements of any kind to Falk Their apparent rental of another house was not known to him. Although Hoffman did testify that was "expressed to Cary Falk at that point that they were not going to close on the transaction," she never explained what was said or how it was "expressed" CP 37 Moreover, whatever Hoffman may have said was not a statement by the Hatches. Even if one accepted Hoffman's statement that it was expressed to Falk that Hatches would not perform, there is no evidence that the express was distinct and unequivocal."

Hatch has never denied that Toni Hoffman was the buyer's authorized agent. Hatch has never asserted that Hoffman exceed her authority. Hatch

never disavowed any statement by Hatch. Uncontroverted evidence of record proves Falk clearly understood Hatch did not have the money, Hatch could not close and that Hatch wanted to speak with Falk concerning a possible lease purchase option because Hatch could not get the loan. After this communication, Hatch did nothing to correct Falk's clear belief of repudiation when Hatch received the termination notice.

Hoffman testified:

> Q: Did you express to Mr. Falk or his wife, who was his agent, that they couldn't get a loan?
>
> A: Yes.
>
> Q: What did you tell them?
>
> A: I had sent an e-mail to Cary telling him that Ken Hatchs wanted to speak with him, and not referencing why, and could I give him his phone number?
>
> **And Cary at that time called me and said basically, "What's the matter? Can't he close?" and I said, "He'd like to talk to you about a lease purchase."**
>
> And Cary said, "No offense, I'm sure he's a really nice guy, but I don't want to talk to him about anything other than closing my house."
>
> Q: And you said he asked you "Can't he close?" Is that what he asked?
>
> A: You know, and kind of backing up to my previous answer about telling him he couldn't get a loan I'm not certain I ever said those words to Cary. I believe I said, "He'd like to talk to you about a lease purchase."
>
> **Q: Why were you asking about a lease purchase?**

> **A: Because I'd been told they couldn't get a loan.**
>
> Q: Did Cary, Mr. Falk, specifically ask if they could get a loan?
>
> A: I don't believe so.
>
> Q: Did you tell him why you were asking about a lease purchase?
>
> A: I honestly don't remember every single word of that conversation. **I think it was clear that the Hatchs weren't prepared to close on the house and they wanted to find an alternative way of purchasing the home.**
>
> **Q: When you say "Weren't prepared to close on the house": what do you mean by "weren't prepared"?**
>
> **A: Couldn't get the loan that was stated in the contract...it was clear to him that they weren't going to buy the house and close. (Emphasis Added) (CP 29-30)**

Hoffman's testimony is unequivocal: **it was clear to him (Falk) that they (Hatch) weren't going to buy the house and close.** (Parentheticals added for clarity).

> Q: Why was it you were searching for rentals for the Hatchs?
>
> A: Because they weren't going to purchase the Falk home.
>
> Q: How do you know they weren't going to purchase the Falk home?
>
> A: Because they told me they couldn't get a loan.

> Q: At this point in time were they searching for rentals, were they still under contract with the Falks?
>
> A: Yes.
>
> **Q: And had it been expressed to Cary Falk at that point that they were not going to close on the transaction?**
>
> **A: Yes.** (Emphasis Added) (CP 37)

The point is this: Hatch nowhere controverts Hoffman's testimony. Hoffman testified that, by Hoffman's communication, Falk was imparted an unqualified understanding Hatch did not have the money to close and there would be no closing.

Repudiation must consist of a "positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations." Wallace Real Estate Inv. Inc. v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994) (quoting Olsen Media v. Energy Scis., Inc., 32 Wash.App. 579, 585, 648 P.2d 493 (1982)). A party's "doubtful and indefinite statements" suggesting only that it may not perform do not demonstrate repudiation. Wallace at 898.

Hatch strains to make much of the fact that Hoffman does not remember every word of her conversations with Falk. However, Hoffman is unequivocal concerning the substance of those conversations: Hatch did not have the money. Hatch could not close. Hatch wanted a new

agreement with a lease purchase option. At no time did Hoffman infer that Hatch might still come through. There was no "maybe" or "might" in Hoffman's communication with Falk; just the hard fact that Hatch could not and would not perform.

Because there is no genuine issue of material fact whether Hatch repudiated the contract, Hatch next argues that: Even takes if Falk reasonably relied on Hoffman's statements as repudiation by Hatch, Falk still needed to see it through and tender the seller's performance. However, the cases on which Hatch relies do not support their argument.

5. Authority cited by Hatch does not support the argument of Hatch that Falk needed to tender the performance required of a seller to retain the deposit.

Hatch depends on Wallace to support their position. 124 Wn.2d 881, 881 P.2d 1010 (1994). Wallace almost mirrors the facts in this case. Wallace simply does not support Hatch. Wallace supports Falk's retention of the non-refundable deposit. Wallace is persuasive that the Orders on Summary Judgment (CP 142-144 and 145-147) were clearly proper and should be affirmed on this appeal.

In Wallace, the sellers (like Falk) entered into an agreement for the sale of property. 124 Wn.2d at 884. That agreement contained an addendum which allowed the purchaser additional 30 days extensions for $15,000. Id. After twelve extensions, the parties negotiated a second

addendum with payments of $30,000 and established a new closing date. Id. The agreement contained a liquidated damages provision that the sellers (like Falk) would keep the payments if the purchaser (like Hatch) failed to close. Id.

In Wallace, the closing date was set for December 17. On December 13, the purchaser sent a letter to the sellers stating he could not close. Purchaser also requested a new agreement. The sellers refused. Id. at 885. On December 17, the purchaser sent a fax to the sellers stating purchaser could not close because there were problems with the title. On the same day, December 17, two of the three sellers appeared at the closing. Id. The third seller was absent due to a back injury. Id. The third seller executed the documents by mail, which was sent to the closing office arriving a few days later. The purchaser then argued that his letter of December 13 was not an anticipatory breach because it was not a clear and definite statement that he would not close; it was merely a statement that purchaser wanted a new closing date and a new agreement. Purchaser attempted to argue that the fax sent on December 17 identifying alleged problems with the title rescinded any prior anticipatory breach. Id. at 889.

The purchaser in Wallace sued the sellers claiming he was "entitled to a return of payments forfeited because the sellers failed to concurrently perform under the purchase and sale agreement." Id. In

Wallace, purchaser argued that the failure of the seller to perform on the date of closing "places the seller in default and warrants a return of all payments made to [the sellers]." Id. at 897. The court disagreed; the letter of December 13 relieved the sellers of their duty to perform. Id. at 899. The court found buyer's letter to the seller notifying the seller of the buyer's intent not to perform ***relieved the seller of any duty to perform***. Id. at 898.

The court found that the seller was not required to show up on the closing date because they "were not required to do a useless act." Id. The court's holding in Wallace was that the purchaser's letter "constituted an anticipatory breach of the agreement, [and] we find the sellers' subsequent performance of their contractual obligations was irrelevant." Id. at 899. The court awarded the entire amount to the sellers. Id.

Upon review, the Supreme Court affirmed both the Court of Appeals and trial court's determination. There was no need to address "sellers' subsequent performance" because the court found the seller to be relieved of any duty to perform. This determination is important because Wallace (like Hatch in this case) scrutinized the sellers' performance or lack of performance after Wallace had repudiated. Wallace took the position: Well, if I did repudiate, that did not release the sellers from their

duties to fully perform. Let us watch as the drama continues to unfold in Wallace.

Purchaser Wallace argued that he was not really refusing to close, he wanted a new agreement – just like Hatch wanted to negotiate a lease purchase option with Falk. Wallace further argued that his fax of December 17 rescinded any anticipatory breach from the December 13 letter. The fax of December 17th stated that Wallace was only refusing to close because of a title problem. Stated differently, If Wallace repudiated or breached the contract on December 13, the fax of December 17 revoked the repudiation or cured the breach. The court rejected Wallace's argument and declared that "sellers' subsequent performance" after December 13 was irrelevant, that sellers were not required to do a useless act. The Wallace decision quoted the trial court's oral decision of record:

> **The sellers would have been perfectly entitled in not even showing up themselves on the 17th. They were not required to do a useless act.** They were told that payments into escrow would not be made; that the defendant would not tender into closing; and they were entitled to rely on that information. Everything in the history of their dealing with this purchaser supported the conclusion that when he said he wasn't going to be there with his $1.5 million, then he wasn't going to be there. **Their performance, in a sense, was excused by the prior breach, the anticipated breach, by the buyer/plaintiff. (Emphasis supplied).**
>
> Wallace at 898.

Hatch makes precisely the same argument that was rejected by the court in Wallace. Hatch argued to the trial court:

> MR. DAVIS: Because pleading that my clients were prepared to perform is a predicate to bringing an action for contractual relief against Mr. Falk for breach of his duties. I'm not doing that. He's the one doing that. I'm not doing that at all. I'm saying nobody performs so the agreement dies. That's a completely and utterly different thing. What I'm saying is you didn't perform, I didn't perform; the agreement ceased to exist, it doesn't matter any more what it says. The only thing that matters is whether your failure to perform was excused.
>
> THE COURT: I don't see it that way.
>
> MR. DAVIS: Well, that's what the law says, Your Honor. Not just a little bit of it.
>
> THE COURT: No, that's not how I see it.
>
> MR. DAVIS: How do you see then?
>
> THE COURT: I'm going to pull up your complaint. I want to see what you did plead. If the computer will let me.
>
> THE CLERK: (Inaudible).
>
> THE COURT: Would you do that? All right.
>
> MR. DAVIS: I am making a very technical argument, I don't dispute that. **My clients got lucky Mr. Falk did not show up at closing.** I don't dispute that either. (VR 20-21)

Wallace thought he got lucky when one of the sellers had a back injury and failed to appear at closing. Like Wallace, Hatch told the court Hatch

"got lucky" because "Mr. Falk did not show up at closing." Just as the court rejected Wallace's argument, the argument of Hatch must fail.

In this case, Falk expressed his desire to close by the deadline when the parties renegotiated a new, lower price and made the entire deposit nonrefundable. When Hatch could not close, Hoffman, at the request of Hatch, pursued Falk for seller financing by means of a lease purchase option. Here, just as in Wallace, the continued failure of Hatch to get financing repudiated the agreement and the "history of their dealing with this purchaser supported the conclusion [they] were not going to be there [with the funds]." Id. at 898. Falk, just as the sellers in Wallace, was released, excuse and relieved of any further duty to perform. Wallace does not support Hatch.

After this exhaustive analysis of Wallace, it is reasonable to assume that this appeal by Hatch can be dismissed. Nothing more is needed. However, to err on the side of caution and in anticipation that Hatch will accuse Falk of failing to address the other legal authority cited by Hatch, Falk's analysis necessarily continues.

The next case cited by Hatch is White & Bollard. White is lawsuit brought by a disappointed real estate agent seeking to collect a commission after the seller breached an agreement to convey property. 58 Wn.2d at 187. White involves the rights of a purchaser and seller, but only

tangentially to the claim of the real estate agent. The focus of White concerns what the real estate agent needed to plead and prove that the purchaser was ready, willing, and able in order to obtain judgment for the commission. Purchaser and seller entered into a contract giving the purchaser ninety days to obtain financing. Id. Before the financing period ended, seller sold the property to an unrelated third party. Id. at 187. Once the property had been sold, the court held purchaser was not required to pursue financing. Id. at 188. The Court stated:

> "Applying the rule to the facts, we find that the respondent (seller) manifested that she would not perform her agreement when she sold her property to others. She did not retract this manifestation, and the performance of the condition imposed on the appellant (buyer) was excused; that is, the purchaser was not required to secure satisfactory financing for a building which he could not erect." (Parentheticals added for clarity).

In White, the real estate broker's complaint alleged that at all times the purchaser was "ready willing, and able to perform." Id. at 187. The court found that the sale of the property excused the purchaser from pursuing financing, but that the buyer and the agent "could not maintain a suit for damages against the [seller] without showing that, had [the seller] not disposed of the property and that [the buyer] could and would have secured financing." Id. at 188. The broker was not entitled to recover fees

for the seller's breach without first proving that the purchaser was at all times ready and willing to perform. Id. at 189.

In this case, Falk was told that Hatch had not obtained financing and would not close. This was confirmed when Hatch rented a substitute house prior to the date set for closing the Falk to Hatch conveyance. Just as the purchasers in White were not required to obtain financing after the seller sold the property, Falk was not required appear for closing when Hatch could not close.

About the most that can be gleaned from White is that: If a purchaser sues for damages or specific performance or if a real estate agent sues for a commission, then the purchaser or real estate agent must plead and prove that the purchaser would have closed except for the seller's breach. It is uncontested, Hatch did not plead they could close. To the contrary, the complaint of Hatch confesses Hatch "...did not perform the Agreement on or before the closing date" and as a separate allegation that Hatch "did not tender performance of the Agreement" (CP 2: 6-7). White requires (a) pleading **and** (b) proof purchaser would have performed. Hatch did not satisfy either requirement. White is either inapplicable or of no help to Hatch.

Hatch next cites Artz v. O'Bannon, 17 Wn.App. 421, 422-423, 562 P.2d 674 (1977). In Artz, the purchasers notified sellers that funds would

not be available on the day of closing. Purchasers claimed they were entitled to the return of the earnest money because seller had not obtained title insurance or delivered a real estate contract. Id. The Court ruled that: By reason of purchasers' announced inability to timely close, sellers were excused from furnishing title insurance and delivering a real estate contract, and entitled to keep the earnest money. Id. at 427. The Court reasoned:

> Assuming arguendo that defendants' obligations to provide title insurance and deliver a real estate contract are conditions precedent, the obligations did not arise in this case. Plaintiffs' consistent inability to obtain the amount of down payment communicated to defendants throughout several months, and finally just prior to September 1, excused the conditions precedent. **Thus, plaintiffs cannot now claim failure of conditions precedent to support performance where their own conduct excused performance of the conditions precedent**. Id. at 426.

Just as in Artz, Hatch cannot now claim failure of conditions precedent to support performance when it was their conduct that excused Falk form any obligation to perform the conditions precedent.

Wallace, White or Artz hold that repudiation by one party release the other party from any obligation to perform, especially from the obligation to perform a useless act. None of these cases adopted the novel theory proffered by Hatch that when neither party performs a contract the contract is a nullity as if it never existed.

The cases cited by Hatch and analyzed above all hold that repudiation or breach excuse the other party from subsequent performance. Wallace, White and Artz. Yet, Hatch assert that, although Hatch could not and did not perform and although the Hatchs' agent clearly told Falk Hatch could not close, Falk's subsequent failure to appear at closing, wait for Hatch to show up, look at his watch, decide how long to wait and then walk out the door or the closing office somehow becomes legal excuse of non-performance by Hatch. The argument of Hatch attempts to revise the sequence of legal excuses so that Falk's subsequent reliance on Hoffman's statements and Falk's resulting inaction mystically reaches back in time and provides Hatch with a legal excuse for Hatch's earlier breach or repudiation of the agreement.

In Wallace, the purchaser made this same argument, that: Purchaser's letter of repudiation sent four days prior to closing was undone by one of the three sellers failure to appear and closing and was undone by purchaser's subsequent letter raising issue with title. The Wallace court held that sellers had no duty to perform after repudiation or anticipatory breach was communicated. Like the purchaser in Wallace, Hatch cannot transport Falk's subsequent non-performance at closing back in time and claim it is their legal excuse. There is no such thing as a

doctrine of retroactive legal excuse. Contrary to what Hatch told the trial court, Hatch did not just get "lucky" when Falk failed to appear at closing.

6. The earnest money agreement is valid and binding on the parties.

In Appellants' Opening Brief, Hatch argues that: "When the agreement expired and ceased to exist, it could no longer provide the basis for Falk to claim the earnest money. To the extent the terms of the agreement continued to matter at all, they provided for Falk to retain the earnest money only if the Hatches failed to close without legal excuse. Falk's own failure to close and the resulting expiration of the agreement provided Hatches with that legal excuse. To the extent that the terms because wholly inoperative, Falk has no grounds to retain money that belongs to the Hatches." This is the argument of Hatch. It appears at page 22 of Appellants' Opening Brief.

Hatch emphasizes that "calling the earnest money nonrefundable changes nothing." Appellants Opening Brief, 19-21. Hatch consistently labels the deposit as earnest money and, indeed it was initially earnest money. (CP 41). It became a non-fundable deposit when Hatch sought to avoid termination of the contract by Falk when Hatch failed to timely obtained financing. For convenient reference Hoffman email to Hatch is displayed again. Hoffman replied to Hatch by email that that same day, November 23, 2014 at 10:33 p.m.:

> "Let me simply describe the next steps; …
>
> **"Please note that 30 days after the mutual acceptance date, (note in the timeline that I sent to you), that they (Falk) can ask you waive your financing contingency. I believe that is in slightly less than 2 weeks. He (Falk) asked me today if I were (sic) in touch with your lender. I only bring that up because he certainly has the option per the contract.** If he (Fak) asks you to waive it and you decline then he (Falk) has the option of terminating the contract….." (CP 75) (Emphasis Added).

To avoid termination of the contract, Hatch agreed to the immediate release of the deposit. The deposit was released by Hoffman (not by any closing agent) directly to Falk and without the necessity of waiting for closing. As noted: Hatch concedes that the release of the deposit was made pursuant to the Agreement. (CP 2).

Whether labeled earnest money, whether labeled non-refundable, the deposit by Hatch served as consideration for Falk's agreement to keep the house off the market and under contract. If Hatch wishes to emphasize the label "earnest money" then RCW 64.04.005 is relevant. That statute states:

> "A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable, regardless of whether the other party incurs any actual damages."

RCW 64.04.005.

Provisions in real estate contracts which provide for the forfeiture of an earnest money deposit are valid under Washington law. RCW 64.04.005. A purchaser's failure to perform under the Agreement will result in a forfeiture of the earnest money. Id. The courts will not interfere with valid agreements where the purchaser has failed to perform their duties. See Watson, 124 Wn.2d at 855; Management, Inc. v. Schassberger, 39 Wn.2d 321, 326, 235 P.2d 293 (1951).

Earnest money is consideration supporting an agreement for the purchase of real estate. Kofmehl, 177 Wn.2d at 598. Earnest money clauses work as liquidated damages clauses. Watson v. Ingram, 124 Wn.2d 845, 850, 881 P.2d 247 (Wash. 1994). Liquidated damages clauses are favored in Washington, and courts will uphold them if the sums involved do not amount to a penalty or are otherwise unlawful. Ashley v. Lance, 80 Wn.2d 274, 280, 493 P.2d 1242 (1972).

In Watson, the buyer of a home asked the seller for an extension because he did not have the financing available to close on the purchase on time. Watson, 124 Wn.2d at 847. The seller refused to modify the agreement. Id. The court found the earnest money was clearly intended by the parties to be non-refundable, and was a reasonable forecast of damages. Id. at 854-55. The language of the earnest money deposit stated

"[i]n the event of default by Buyer, the earnest money shall be forfeited to Seller as liquidated damages...." Id. at 847.

On the other hand, if the earnest money by Hatch became consideration for Falk's agreement to keep the house under contract and off the market until January 05, 2015, then Falk is still entitled to the deposit.

The parties themselves know best what motivations and considerations influenced their bargaining, and, while, "[t]he bargain may be an unfortunate one for the delinquent party, ... it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence ...." Watson, 124 Wn.2d at 250 [citations omitted]. "[W]e are loathe to interfere with the rights of parties to contract as they please between themselves ...." Management, Inc at 326. It is not the role of the court to enforce contracts so as to produce the most equitable result. See Reichenbach v. Sage, 13 Wash. 364, 368, 43 P. 354 (1896).

In this case, the parties agreed to a purchase price of $1,156,000 on November 7, 2014. They executed an Agreement which provided for $35,000 in earnest money, $20,000 non-refundable to buyer. The Agreement stated that in the event of a default by the purchaser, the deposit is non-refundable as liquidated damages. Hatch requested a reduction in the purchase price. Falk agreed to reduce the purchase price if

1) the closing date was moved closer or 2) the entire earnest money deposit became non-refundable and payable immediately. Hatch agreed to make the deposit non-refundable. In consideration for the reduction of the purchase price, Falk received the deposit.

The parties bargained for the release of the funds. Hatch received a reduction in the purchase price. Therefore, this court should not disturb the contract to "relieve the parties of their own improvidence." Watson, 124 Wn.2d at 847. The parties made a valid contract and the Plaintiffs forfeited the earnest money by breaching that contract. Courts do not interfere with valid Agreements where the purchaser has failed to perform their duties. See Watson at 855; Management, Inc. at 326.

"Non-refundable earnest money" versus a pre-closing disbursed deposit; the label makes no difference and Falk remains entitled to the funds.

7. The parties entered into a valid contract which did not become a "nullity" or void, and therefore equitable relief is not available.

Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 61 Wash.App. 151, 160, 810 P.2d 12 (1991). Unjust enrichment occurs when a contract is implied in law but not in fact. Young v. Young,

164 Wn.2d 477, 484 191 P.3d 1258 (Wash. 2008). To fashion a remedy, the court finds that a quasi-contract exists between the parties, founded in equity, because of the notions of substantial justice. Id.

The first requirement for relief on a theory of unjust enrichment is the absence of a contractual relationship. Id. Plaintiffs' claim for unjust enrichment fails on this first requirement.

This is not a case in equity, this is a contract case. The parties entered into a contractual agreement for the purchase and sale of land. The Agreement specified the terms of the sale and listed the remedies available to Falk if Hatch breached the Agreement. Because the Agreement entered into by the two parties was a written contract, unjust enrichment cannot apply, and Hatch cannot recover under this theory.

8. Attorney fees were properly awarded to Falk and Falk should be granted leave to apply for additional attorney fees incident to this appeal.

Falk was entitled to an award of attorney's fees and costs at summary judgment and is entitled to an award of attorney's fees and costs on appeal.

The earnest money and sale agreement provided for an award of attorney's fees. The General Addendum/Amendment to Purchase and Sale Agreement (CP 57) provides:

> In any dispute related to this Agreement or the Property, regardless of the legal theory upon which any claim is based, the substantially prevailing party shall be entitled to its reasonable attorneys fees incurred prior to, during and in lieu of any proceeding (litigation, mediation, arbitration, bankruptcy, etc. on appeal and in the collection of any award.

Pursuant to this agreement and RAP 18.1, Falk respectfully requests this court affirm the lower court's award of attorney's fees and grant Falk leave to submit an application for additional fees and costs on this appeal.

F. CONCLUSION

Hatch entered into a contract to purchase real estate but failed to obtain financing to close. Hatch directed their agent to inform the seller Falk of this fact. Due to Hatchs' breach of the contract and failure to obtain financing, Falk is entitled to a retention of the earnest money deposit.

Based on the facts of record, the concessions in the complaint filed by Hatch to commence this action, the legal authority presented herein, the decision of the trial court should be affirmed, Falk should be granted additional fees on appeal with suitable leave to file an application for fees and costs.

Dated: October 28, 2016.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

KEN HATCH and CATHI HATCH, husband and wife, and the marital community composed thereof, Plaintiffs, v. CARY FALK, Defendant.	No. 15-2-11416-6 SEA Court of Appeals, Division One No. 74510-7-I DECLARATION OF SERVICE

2016 OCT 28 PM 4:06

DECLARATION OF SERVICE

I, Debi Ryan, declare under penalty of perjury under the laws of the state of Washington that on the date below, that I personally served a copy of **(1) RESPONDENT'S BRIEF, AND this (2) DECLARATION OF SERVICE** upon the following:

Mr. Matthew Davis Davis Leary, LLC 2775 Harbor Avenue Southwest, Suite D Seattle, WA 98126 WSBA #20939 matt@davisleary.com	Delivered Via: ☐ First Class Mail ☐ Facsimile ☐ Messenger/Next Day ☐ Hand Delivered ☑ Email
Ms. Melanie A. Leary Davis Leary, LLC 2775 Harbor Avenue Southwest, Suite D Seattle, WA 98126 WSBA #21050 c/o matt@davisleary.com	Delivered Via: ☐ First Class Mail ☐ Facsimile ☐ Messenger/Next Day ☐ Hand Delivered ☑ Email

LAW OFFICES OF
NATHAN JAMES NEIMAN
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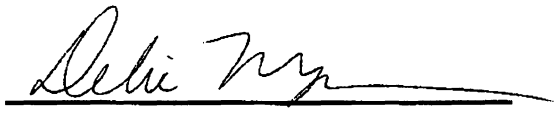
DATED this 28th day of October, 2016 at Redmond, Washington.



Debi Ryan, Legal Assistant

(10282016 Falk Dec of Svc)

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