70064-2

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No. 70064-2

WASHINGTON COURT OF APPEALS
DIVISION ONE

THE MCNAUGHTON GROUP, LLC, A Washington Limited Liability Company,

Respondent

v.

HAN ZIN PARK AND REGINA KYUNG PARK, Husband and Wife, and the Marital Community Property Comprised Thereof,

Appellants

Appeal from Washington Superior Court
for Snohomish County
No. 06-2-11471-8

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

REPLY TO RESPONDENT'S BRIEF

Summary

The appellants, Han and Regina Park (Parks), wanted to sell their homestead after retiring from careers in medicine at the University of Washington, as researcher and research assistant. Eventually they negotiated with the respondent, The McNaughton Group, LLC (TMG), and entered into a very poorly written Vacant Land Purchase and Sale Agreement (VLPSA or "contract") that did not have a legal description of the property being sold, made references to documents that did not exist, included unenforceable agreements to agree, and did not have the original signature of the buyer. The contract did not proceed to closing and this case was initiated. The matter proceeded to trial over six years after the failed closing, resulting in a jury verdict in favor of TMG. The Parks appeal that verdict and the orders leading up to, and following, that verdict.

Procedural Posture

The Parks have arranged their brief in this matter on three major points. They were:

1. The trial court erred by allowing this matter to go to trial when the underlying contract was void as a matter of law;
2. TMG failed to prove that the Parks were not ready, willing, and able to close, as is their duty under case law; and
3. The trial court erred by allowing, and then limiting, the testimony of former counsel and for allowing inadmissible prejudicial character evidence.

The Parks believe that the contract with TMG is void due to numerous and cumulative violations of the statute of frauds. If this court disagrees with the Parks and believes that the contract is complete then the court can skip the Parks second argument. The remaining issue would then be whether the trial court's errors were so prejudicial that the Parks were denied a fair trial.

If the court agrees with the Parks that the contract is void due to the statute of frauds then the court would normally undertake a second analysis of whether, despite the invalidity of the contract, the sellers still remained ready, willing, and able to sell. In this case, the second analysis is unnecessary as TMG has not argued that the Parks were not ready, willing, and able to sell the property. The court would only have to overturn the trial court and vacate the judgment against the Parks.

TMG has chosen to provide a renewal of their trial brief, rather than to respond individually to the points made by the Parks, so TMG's response does not line up to the Parks appeal brief. With that in mind, the Parks will endeavor to bring the points made by TMG in line with the arguments presented by the Parks.

Statement of Facts

The Parks rely on the statement of facts that they put in their opening brief. TMG has presented virtually the same facts, as the case is a documents case and the documents speak for themselves, but has put a different spin on the same facts. It is anticipated that the court will rely on the actual documents and not on the claims of fact of the parties.

Reply to Response to Assignments of Error

ASSIGNMENT OF ERROR 1: THE VOID CONTRACT

It is acknowledged between the parties, and is obvious on the face of the document, that the contract between the Parks and TMG does not contain a legal description within its many pages. Therefore, TMG had to find some way to fall under an exception to the rule found in *Martin v. Seigel*, 212 P.2d 107, 35 Wn.2d 223 (Wash. 1949), (followed recently in *Kofmehl v. Baseline Lake,* LLC, 285 P.3d 885, 175 Wn.2d 1005 (Wash. 2012)) which case holds that a purchase and sale agreement that does not

contain an adequate legal description is a void contract. TMG has made two efforts at falling under the exceptions to the rule.

The first effort claims that the agreement contains the property tax numbers and the tax numbers have been found to be sufficient for a legal description. *Bingham v. Sherfey*, 234 P.2d 489, 38 Wn.2d 886 (Wash. 1951). But the *Bingham* case only applies to metes and bounds property and does not apply to platted property. The Parks have platted property so this exception to *Martin v. Seigel* does not apply in this case.

TMG also relies on the case of *City of Centralia v. Miller*, 197 P.2d 244, 31 Wn.2d 417 (Wash. 1948), for the argument that a legal description, apparently including a tax number, need not be exact but can simply be "close" in order to satisfy the legal description requirement. This case was issued by the court in 1948. The court more or less overruled itself in 1949 with the *Martin v. Seigel* case, supra.

The *Centralia* case appears to be an aberation in the line of cases on this point. Prior to this case the court held:

> It is too clear for argument that, under these decisions, the description of the land in the agreement under consideration is not sufficiently definite to comply with the statute of frauds.

Martinson v. Cruikshank, 101 P.2d 604, 3 Wn.2d 565 (Wash. 1940).

After the *Centralia* case, the court solidified its position by saying:

In the interests of continuity and clarity of the law of this state with respect to legal descriptions, we hereby hold that every contract or agreement involving a sale or conveyance of **platted** real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county and state. In so far as the Thompson case, supra, conflicts with this rule, it is hereby overruled. (bold added)

Martin v. Seigel, supra.

The era of having a legal description that was "close enough" was over.

The Parks also showed that the mere existence of the tax numbers in a contract is insufficient to show the legal description. TMG must use those tax numbers as a reference to the correct legal description in the office of the County assessor. *Asotin County Port Dist. v. Clarkston Community Corp.*, 472 P.2d 554, 2 Wn.App. 1007 (Wash.App. Div. 3 1970). In that case the appellant argued that they had the correct tax numbers in the contract, but when they went to the county assessor's office they were unable to use the tax numbers to locate a good legal description. The court held that the tax numbers are only a reference and that the reference must be followed to obtain an accurate legal description. The tax numbers, standing alone, are insufficient.

Here, TMG did not make this critical connection. TMG rested its case without ever showing or alleging that it went to the county assessor to see if there was a proper legal description in the county records. RP 361-

364. TMG responds in its brief by stating that the trial court saw the tax numbers, inaccurate as they were, and, in conjunction with other documents, found that the existence of the legal description was a jury question. That is incorrect and is a major point in the Parks appeal. The existence of a legal description is a question of law. TMG appears to be attempting to use the trial court as its authority on this point. The purpose of this appeal is to show that the trial court was in error.

The court is reminded that the tax references in the contract were inexact, included an additional property, and were part of an "agreement to agree" which is unenforceable in this state.

In summary on this point, then, TMG is asking that the court find that the inexact tax number reference to the property is complete and accurate. If the court makes that finding then TMG asks that the court allow the tax numbers to be used as the legal description as an exception to the *Martin v. Seigel* case. If that is agreeable to the court, then TMG asks that the court ignore the requirements of the case of *Asotin County Port Dist.* and take the tax numbers as the equivalent of the legal descriptions. That, of course, would leave the court and the parties with no legal description at all. TMG is asking this court to make the three leaps to come up with the decision that is opposite to the historical position

taken in Washington, that a contract must have a clear legal description to be valid. The Parks do not expect the court to take any of those leaps.

The second effort by TMG is to claim that the inexact reference in their "Addendum B" is sufficient to draw in the legal descriptions that were found in the papers of the uncompleted negotiations from 2004.

In this effort, as with the first effort, TMG is looking for the court to make three leaps, all in their favor, in order to find the legal description in this contract. The first leap is to find that Addendum B is even a part of the contract. There is no reference anywhere in the contract to this unattached Addendum B. The only reference that TMG points to is the language on the first page of the contract which states that the contract includes a "counter addendum and three pages of prior addendum." TMG has argued that their Addendum B is really the "counter addendum" because Addendum B includes the handwritten words "this counteroffer is good til to 2/28/05." This argument requires impermissible oral testimony to prove that Addendum B is the counter addendum.

> In a long line of decisions we have held that, in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony.

Martinson v. Cruikshank, supra, quoting a long line of cases.

TMG may not present evidence to show that their Addendum B is

really the counter addendum mentioned on Page 1 of the contract.

The second leap is to find that the language of Addendum B actually refers the reader to another document. As shown by the Parks opening brief, the language of Addendum B does not direct any party to the location of a legal description but only makes limited reference to other documents in case of a dispute. (The absence of the legal description is not a dispute.) The third leap is for the court to agree that the incomplete negotiations between the parties in 2004 can be the subject of a reference for the legal description. The Parks agree that reference can be made to another document to find the legal description but the other document has to exist. In this case, there was no agreement made in 2004 and no document was created.

Unless the court is willing to make all three leaps of judgment to find that the tax numbers are the same as a legal description or, secondly, is willing to make all three leaps of judgment to find that the Addendum B is a part of the contract and makes good reference to an existing document, the contract between TMG and the Parks has no legal description and is therefore void. *Martin v. Seigel.*

The Parks also argue that there are numerous other errors in the contract that should not exist in a contract that is drafted by a company the

size of TMG. The document should be construed against the drafter.

ASSIGNMENT OF ERROR 2: READY WILLING AND ABLE

To the Parks surprise, TMG did not address this issue. If this court refuses to find that the tax numbers are an adequate rendering of the legal description or if the court refuses to find that Addendum B is a part of the contract, makes an accurate reference to another document, or that other document actually exists, or if the court finds other errors with the contract, then the contract is void. If that is the case, as is expected by the Parks, then the only way to gain the recovery sought by TMG would be to show that the Parks were not ready, willing, and able to close the transaction, that the sellers had defaulted on the contract.

III. Kofmehl Bore the Burden of Proving that Baseline Was Not Ready, Willing, and Able to Perform

Kofmehl argues that even if Schweiter applies, it is not his burden to prove that Baseline repudiated or that Baseline was not ready, willing, or able to perform. In the past, this court has required a purchaser to prove the vendor's breach when attempting to recover earnest money on a land sale contract. *Soules v. Cox,* 53 Wn.2d 598, 600, 335 P.2d 476 (1959). In Soules, we held that even assuming the purchaser's reading of the contract was correct, the purchaser had failed to prove that the vendor breached the

agreement. Such proof, we held, was "essential to entitle appellant to rescind the earnest-money agreement."

Kofmehl v. Baseline Lake, supra

The Parks have always declared that they were ready, willing, and able to close the transaction. And, the Parks were held to be ready, willing, and able, even if it was not their choice, due to the filing of the lis pendens by TMG.

TMG has the burden of proving that the Parks were not ready, willing, and able to close the sale, and did not make that proof at trial, except to state that TMG held a closing that was not attended by the Parks. *Kofmehl v. Baseline Lake,* supra. Since TMG does not oppose this point TMG is agreeing that the Parks were ready, willing, and able to close.

ASSIGNMENT OF ERROR 3: TRIAL COURT ERRORS

The Parks argued three separate areas of error by the trial court during the trial, including ordering the Parks former counsel to testify, permitting irrelevant and highly prejudicial evidence to be presented by TMG, and errors in jury instructions. TMG has not briefed the issue of jury instructions so this reply will be limited to the first two points.

The Parks believe that this appeal could have been brought on these points alone, that the errors in the presentation of evidence that were allowed by the court were at the same time so erroneous and so prejudicial that the verdict and judgment of the court must be overturned and a new

trial granted, but for the errors shown earlier in this brief that require a reversal of the trial court.

The first area that was briefed by the Parks in this section concerned Mr. Home, who is the former counsel to the Parks. This error by the trial court was particularly damaging. The public is well aware of the secrecy of the attorney-client relationship, as well as the doctor-patient relationship and the right of privacy between married couples. When the jury sees the court overruling the repeated objections of the Parks the jury can infer that the Parks are trying to hide something and that the court will not allow the Parks to invoke the privilege. Then, when the attorney is sworn in as a witness the court refuses to allow the Parks to present the only document for which the attorney is a witness, his opinion letter. This action shows obvious favoritism by the court for TMG and against the Parks.

The rule on the attorney-client privilege states that:

> In general, this privilege protects confidential attorney client communications from discovery or public disclosure so that clients will not hesitate to speak freely and fully inform their attorneys of all relevant facts. *Coburn v. Seda,* 101 Wash.2d 270, 274, 677 P.2d 173 (1984). The privilege is subject to exceptions, however, and "must be strictly limited to the purpose for which it exists." *Dike v. Dike*, 75 Wash.2d 1, 11, 448 P.2d 490 (1968).

Escalante v. Sentry Ins., 743 P.2d 832, 49 Wn.App. 375 (Wash.App. Div. 1 1987).

In this case, and contrary to their brief, TMG introduced Mr. Home to the case against the objections of the Parks. RP 231. And the opinion letter that was written by Mr. Home was available to both sides so there was no need for Mr. Home to be present in the courtroom. This same testimony could have come from Mr. Park. However, despite significant opposition by Mr. Park, the court ordered the former counsel to appear and to testify. The Parks believe that the court improperly ordered their former counsel to testify.

TMG argues in its brief that the door was opened regarding Mr. Home. And, the jury felt that the matter was sufficiently significant that they wrote the question to the judge regarding the written opinion of Mr. Home. The court ordered Mr. Home to testify. But then, after Mr. Home had testified, the trial court would not allow the Parks to enter the opinion itself in evidence. The Parks believe this is the second error the trial court made relative to Mr. Home. To quote the very language of the TMG brief, "he could not be permitted to disclose so much of the transaction as he saw fit and then withhold the remainder." *State v. Vandenberg*, 10 Wn. App. 182, 575, P. 2d. 254 (1978). Once the judge ordered Mr. Home to testify the Parks should have been allowed to present the whole issue, rather than just the prejudicial parts that TMG wanted to get before the

jury. But when the Parks offered the written opinion of Mr. Home, TMG objected, claiming relevance, and the court refused to put the opinion into evidence. That allowed TMG to prejudice the jury with privileged information but did not allow the Parks to clear the air.

The Parks believe that the trial court erred in ordering Mr. Home to testify, but once he was testifying the Parks should have been allowed to enter the opinion document upon which all of his testimony rested. The court erred in refusing that offer of evidence. The Parks believe that this item alone is reversible error and is grounds for a new trial.

The second area that was briefed by TMG was the trial court conduct in allowing two pieces of evidence that the Parks believed violated the rules of evidence. The trial court allowed evidence regarding an unrelated transaction between unrelated parties on different land that occurred 34 years earlier. No effort of any kind was made by TMG to satisfy the rules of evidence. The Rule states that "evidence of other crimes, wrongs, or ask is not admissible to prove the character of a person in order to show action in conformity therewith. Rule 404 (b) ER. Yet, the only purpose for presenting this ancient dispute was to show conformity of actions.

The evidentiary rule allows for exceptions to the rule. It states "it

may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404 (b) ER. TMG argued that the action from 34 years earlier was a common plan with the current transaction. The trial court agreed, but the trial court's agreement was without any analysis of any kind. This was significantly damaging to the Parks as it held the Parks out as lifelong abusers of real estate contracts. Even if it had been relevant, this item should have been restricted by the court as being overly prejudicial in light of its evidentiary value. Rule 403 ER

The trial court also allowed evidence regarding an unrelated transaction between unrelated parties that had occurred three years before TMG became involved. None of this evidence should have been allowed as it was irrelevant to the case at bar. But, more importantly, TMG then used this evidence, for the additional purpose of showing "prior bad acts" on the part of the Parks, in violation of the Rules of Evidence. The analysis with the Rules of Evidence is the same for this evidence.

Once these pieces of evidence were entered into the record in front of the jury TMG then argued that both of the transactions failed because the Parks wanted to change the terms of the agreements. TMG had no other witnesses on either of these matters and made no effort to make any

showing that any changes were requested by the Parks. After simply asking the questions TMG, having prejudiced the jury, moved on to other matters.

These two pieces of evidence should have been rejected by the trial court but, once they were allowed in as evidence, the court should have restricted their use to avoid the violation of the second evidentiary rule concerning prior bad acts. The court erred twice, by refusing to limit the allowance of this evidence and in refusing to limit its scope. The Parks believe that these items alone are reversible error and are grounds for a new trial.

At this point the court has forced the Park's former counsel to appear against the objections of the Parks. He has testified to the existence of the attorney's opinion that he gave to the Parks but then the Parks are prohibited from revealing that document, the document that would have shown their reliance on their lawyer's opinion. Then the court allows testimony regarding a real estate transaction that did not involve the Park's property and did not involve TMG, having occurred 34 years earlier. There could be no common scheme or plan here. TMG then presented damning allegations regarding a sale in 2001 but no actual proof. Each of these errors are reversible errors, by themselves, but in

combination they impermissibly crushed the Park's case, denying the Parks a fair and unbiased trial on the actual merits of the issues between the parties.

Reply to Extra Response Arguments

EXTRA ARGUMENT-STATUTE OF FRAUDS

Next, under the Argument section of its brief, TMG argues that the Parks may not claim of violation of the statute of frauds because they never pled the statute of frauds as an affirmative defense, a requirement of Rule 8 (c) CR. TMG is not allowed to make this argument unless it can also claim that it was surprised by the Parks actions in claiming a violation of the statute of frauds.

> It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless.
>
> *Henderson v. Tyrrell*, 910 P.2d 522, 80 Wn.App. 592 (Wash.App. Div. 3 1996) quoting *Tillman v. National City Bank*, 118 F.2d 631, 635 (2d Cir.1941) [cert. denied, 314 U.S. 650, 62 S.Ct. 96, 86 L.Ed. 521 (1941)].

Here, TMG was not surprised that the Parks were arguing the statute of frauds and TMG never argued the absence of the affirmative defense of statute of frauds. In fact, the only party to argue the lack of the affirmative defense of statute of frauds was the Windermere defendant. In all pleadings, TMG fully briefed and argued the validity of the contract

and contested the Parks arguments relative to the merits of the contract.

Also, objection to a failure to comply with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense. *Henderson*, supra, quoting *Joyce v. L.P. Steuart, Inc.*, 227 F.2d 407 (D.C.Cir.1955).
At no time was TMG surprised by the Parks actions. TMG is attempting to ride the coattails of Windermere on this advantageous finding that has no application to it.

EXTRA ARGUMENT – DEFENSE OF UNCERTAINTY

TMG then argues that the Parks never presented a defense of uncertainty. While it is true that the Parks never presented at defense of uncertainty, undersigned counsel acknowledges that he is unfamiliar with the doctrine of uncertainty. It does not appear readily in research texts so the Parks will not address that point further.

EXTRA ARGUMENT–LIS PENDENS FORCING READY SELLER

There is one point that the counsel for the Parks had hoped would be addressed by this court. Under the *Kofmehl* case, supra, if the real estate contract is invalid then the only way for a buyer to get its earnest money back is to prove that the seller was unable to complete the transaction. Immediately after the failed closing between these parties, TMG filed this lawsuit and also filed a notice of lis pendens on the Parks property. The question by counsel is:

Can a buyer file a Notice of Lis Pendens, virtually holding the sellers' property legally hostage, and also argue that a seller is not "Ready, Willing, and Able to sell?

Is the filing of the lis pendens conclusive proof, or at lease prima facie proof, that the sellers were forced to remain ready, willing, and able to sell? A notice of lis pendens warns all potential interested parties that this land is subject to litigation and perhaps subject to a superior claim than they could obtain. TMG has not argued this point so the court may not feel it necessary to review the point.

Conclusion

The six hundred pound elephant in the room is the fact that the splintered and incompetently drafted purchase and sale agreement between the parties to this case is void as against the Statute of Frauds since the agreement does not contain a legal description and does not fit under either of the exceptions. This fact should have been seen by the trial court early in this case and the case should have been dismissed on summary judgment in favor of the Parks. If the court agrees then the court would then make the second analysis, whether the sellers were ready, willing, and able to close. Although this point was not argued, the court may choose to look at it and decide counsel's question regarding a notice of lis pendens.

If the court determines that the contract is complete in all respects an is therefor enforceable, then the court would have to determine whether the Parks were given a fair hearing. Due to the multiple errors of evidence caused by the trial court, such a finding would be impossible. A new trial would have to be ordered.

DATED this 25th day of October, 2013

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