72258-1

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ORIGINAL

NO. 72258-1

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

SAK & ASSOCIATES, INC., a Washington corporation,

Appellant,

vs.

FERGUSON CONSTRUCTION, INC., a Washington corporation

Respondents.

APPELLANT'S BRIEF

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INTRODUCTION

This is an appeal from the trial court's order granting summary judgment in favor of Respondent and dismissing Appellant's Complaint. Appellant, SAK & Associates, Inc. ("SAK") is a subcontractor who contracted with Respondent Ferguson Construction, Inc. ("Ferguson"), the prime contractor, on a project called the Quad 7 Redevelopment project. SAK agreed to provide concrete materials and paving services.

SAK dedicated resources, management, and workers for the project, took all necessary steps to perform its contract obligations, and mobilized to the site. The contract to be performed was for work quantities identified and a contract price of $836,744.00. SAK's pricing, bid, and contract award was based on the agreed quantities.

SAK performed its work on schedule and in full compliance with contract obligations. However, after SAK mobilized, set up, and commenced work, and after Ferguson had opportunity to examine the means and methods used by SAK while also having time to bid shop for prices from other concrete firms, Ferguson terminated the contract via a letter Ferguson titled as a Notice of Termination.

When Ferguson sent the unilateral Notice of Termination, SAK had completed only 24% of the contract values. Ferguson admits that there were no problems with SAK's work, and attempts to justify the

termination based on a termination for convenience clause. If limitations are not applied and enforced, a termination for convenience clause becomes an unenforceable clause because it renders contracts illusory when interpreted to mean that one party can cancel a contract at its whim, without limitations.

Draft versions of the Notice of Termination letter show that Ferguson considered notifying SAK that the reduction of work was made necessary by the project owner. That language was removed before the Notice of Termination letter was sent. There is no evidence of record to show that the reduction of work was made necessary by the Owner or by project changes. There is no evidence of record to show that Ferguson had a genuine basis to terminate for convenience; instead, the evidence of record shows that Ferguson was simply bid shopping and terminating the SAK convenience for Ferguson's self-interest when the work to be performed by SAK was still necessary for project completion.

Upon receiving the Notice of Termination, SAK demobilized from the site and stopped performing work. At that time, SAK did not have knowledge of what work scope, or how much, was being reduced from the project. Also, SAK did not have knowledge of the reasons for the Termination for Convenience other than as represented by Ferguson.

SAK later discovered that other subcontractors were performing

the same work scopes that SAK had been told were being removed from the project. After it became apparent that, notwithstanding Ferguson's representations in its Notice of Termination, there was not a substantial reduction in SAK's scope of work and that Ferguson instead hired other subcontractors to perform SAK's work, SAK filed suit.

The trial court granted Ferguson's Motion for Summary Judgment and dismissed SAK's Complaint. It rejected SAK's arguments that Ferguson's Notice of Termination was improper and inadequate as it falsely stated the grounds of the termination and that the particular circumstances of the invocation of the termination for convenience clause rendered the contract illusory. This Court should reverse the trial court's dismissal of SAK's Complaint and remand for further proceedings and for trial. Also, because the fee award to Ferguson below was based on the Court's dismissing of the Complaint, the fee award should also be vacated.

ASSIGNMENTS OF ERROR

1. The trial court erred by granting summary judgment against SAK and dismissing SAK's Complaint when there was evidence that Ferguson's notice of termination was pretextual and inaccurate. If Ferguson's notice of termination was pretextual it did not constitute proper notice of a termination.

2. The trial court erred in granting summary judgment against SAK and dismissing SAK's Complaint by deciding, as a matter of law, that Ferguson's invocation of the termination for convenience clause in the particular circumstance did not make the parties' contract illusory. Under Washington law, the fact that Ferguson terminated the contract based on its own self-interest renders the contract illusory and entitles SAK to damages.

3. Because the dismissal was in error, the fee award was also in error and should be vacated.

STATEMENT OF FACTS

A. Factual History

This case arises out of a termination for convenience by the defendant of its subcontract with SAK. On or about April 19, 2012, SAK and Ferguson entered into a Subcontract in connection with a Quad 7 Redevelopment project in Seattle.[1]

SAK bid the project according to the agreed volume and was to provide materials and services for Ferguson, as the general contractor, on the project totaling $836,744.00.[2] SAK entered a subcontract agreement to provide cement concrete paving services per a scope of work established by Exhibit C to the Subcontract.[3]

SAK performed all set-up and mobilization tasks necessary to start the project and successfully utilized its means and methods to timely and satisfactorily complete approximately 24% of the contractual work.[4] While SAK performed work at the beginning of the project, Ferguson was able to observe the means and methods utilized by SAK to perform this project. During that same time, rather than simply honor its contract

[1] CP 89–102 (Subcontract)
[2] CP 136-38, 331; CP 89-102
[3] CP 136-44
[4] CP 137, 331

commitments to SAK, Ferguson started to bid-shop by obtaining "confirmations" of bids for concrete work.[5]

After SAK completed one portion of the contractual work scope, Ferguson had SAK's work slow to a stand-still while hiding from SAK the actual reason for the slow-down and instead reporting that Ferguson was not ready for SAK's work.[6] At that time, unbeknownst to SAK, Ferguson was taking internal steps to prepare to bid shop and eventually terminate SAK despite the fact that SAK was performing as required. On July 11, 2012, Ferguson sent SAK an email telling SAK to not order any more dowel rods, tie bars or baskets.[7]

In a draft letter dated July 17, 2012, which was obtained only through discovery, Ferguson used language suggesting that termination of SAK was "in the Owner's and our best interest." That letter was never sent to SAK.[8] A similar draft was prepared on July 25, 2013. In the midst of working on drafts of termination letters, an internal email to and from Greg Williams states the plan to "get July's payment request submitted asap (by Wednesday of next week)."[9] Rather than communicate openly with SAK about decisions affecting SAK's

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[5] CP 328-29; 332-37
[6] CP 328-29
[7] CP 329-30, 346-47
[8] CP 329, 348-50
[9] CP 330, 351-52

contract, Ferguson was confirming other bids and secretly planning to terminate SAK for its own self-interest.

On July 27, 2013, Ferguson unilaterally issued a Notice of Termination terminating SAK. The Notice of Termination abandons the contention that termination is in the best interest of the "Owner" and stated factual reasons for termination:[10]

> Ferguson Construction has determined that SAK's services for this project are no longer required. Due to overall phasing restrictions, site logistics, and basic convenience, it has become apparent that it is in the best interest of the project to complete the site concrete paving with Ferguson's own forces. This decision is ***not*** based upon SAK's work performed to date.
>
> Pursuant to Section 7 of the Subcontract General Conditions, the subcontract is terminated, effective immediately. . . .

The recited reasons for termination are contested. Evidence in discovery tended to show that upon terminating SAK during a stand-still, Ferguson immediately commenced activities on concrete work.[11]

SAK understood, from the clear language of the notice, that the contracted for scope of work for SAK's services had been substantially reduced due to phasing restrictions and site logistics, and that,

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[10] CP 104. [emphasis in original]

[11] CP 330-31, 361-67 (daily reports showing Ferguson resumed concrete activities by 7/31 and had King Concrete on site by 8/3)

accordingly, Ferguson would complete whatever work was still to be performed without completing the entire project. SAK later learned that there are substantial questions about the accuracy of Ferguson's representations and even whether they were genuine.[12]

SAK initially relied upon Ferguson's stated reasons in its Notice of Termination and therefore did not provide Ferguson notice at that time of any claim or dispute because there was no claim or dispute if Ferguson's representations were accurate and the work scope for SAK's services was being reduced due to phasing restrictions and site logistics.[13] Ferguson has since admitted that SAK's "work was not being deleted from the project."[14] In response to Requests for Admission Ferguson admitted the following[15]:

> No. 6: Admit that after it terminated SAK for convenience Ferguson proceeded to self-perform or re-procure the work scope terminated from SAK.
> Answer: ...Ferguson admits only that after it terminated SAK's subcontract for convenience, Ferguson self-performed some of the remaining concrete work on the project and subcontracted with others for some of that work.

[12] CP 328-331
[13] CP 136-38; 328-330
[14] CP 232
[15] CP 330, 353, 357-58

B. The Subcontract

Ferguson unequivocally and unilaterally terminated SAK claiming it was for convenience. The Subcontract provides that[16]:

> In addition to the rights listed above, Contractor may, after providing Subcontractor with written notice, terminate (without prejudice to any right or remedy of Contractor) the Subcontract, or any part of it, for its own convenience and require Contractor to immediately stop work. In such event, the Contractor shall pay the Subcontractor for the work actually performed in an amount proportionate to the total Subcontract price. Contractor shall not be liable to the Subcontractor for any other costs, including anticipated profits on work not performed or unabsorbed overhead.

C. Relevant Procedural History

1. Ferguson's Motions for Summary Judgment and for Reconsideration

On or about December 20, 2013, Ferguson filed its Amended Motion for Summary Judgment contending that the SAK's claim should be dismissed because SAK failed to comply with notice and claim procedures set forth in its agreement with SAK.[17] The Court denied Ferguson's motion by its Order dated January 22, 2014, stating in its oral decision that there was a genuine issue of material fact regarding when

[16] CP 94
[17] CP 4-24

SAK should have known about the claim.[18] The trial court was correct to deny Ferguson's motion because the July 27 notice cannot stand on its own. Evidence regarding subsequent bid shopping confirmations and evidence that the grounds recited for termination were neither genuine nor accurate evidence genuine issues of material fact as to whether Ferguson's Notice of Termination was either pretextual or ambiguous. A genuine question regarding when SAK knew that it had a claim as to the termination and whether the basis for the termination was even genuine or, conversely, a wrongful breach of contract.

Ferguson asked the trial court to revisit the issue in its Motion for Reconsideration, filed January 27, 2014.[19] Ferguson specifically invited the Court to adopt Ferguson's own view of the Notice of Termination: namely that the Notice explicitly stated that SAK's work, and not the work scope itself was being deleted and that the work scope would be completed by other means.[20] The Court declined to adopt Ferguson's factual view about the notice and denied the Motion for Reconsideration by Order dated March 18, 2014.[21] Ferguson revisited the same issue in

[18] CP 220-22
[19] CP 225-34
[20] *Id.*
[21] CP 268

its second motion for summary judgment, resulting in the order dismissing SAK's Complaint.[22]

2. SAK's Motion for Partial Summary Judgment

On or about December 20, 2013, SAK filed its Motion for Partial Summary Judgment.[23] SAK requested that the Court hold the termination for convenience provision in the Subcontract invalid as a matter of law because as written Ferguson could use it to terminate the contract and avoid its obligations for any and all reasons, rendering its promises illusory.[24] While the trial court did not make factual decisions in that hearing, the Court declined to hold that, as a matter of law, the termination for convenience provision of the Subcontract was invalid. The trial court noted, *inter alia*, in its oral decision that:

> Without Washington precedent on point, I don't know how in the world I could rule as a matter of law that plaintiff's partial summary judgment and its interpretation of what the law ought to be could be granted, and I decline that invitation.[25]

What was not before the trial court on SAK's Motion was the factual determination of whether the Ferguson's particular termination of SAK in the circumstances was proper under the termination for

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[22] CP 271-84
[23] CP 122-33
[24] *Id.*
[25] CP 285, 390-93

convenience provision in the Subcontract, or, conversely, whether it was pretextual, inaccurate and wrongful.

3. Ferguson's Second Motion for Summary Judgment

On or about May 23, 2014 Ferguson filed its second motion for summary judgment.[26] Ferguson argued that its Notice of Termination was proper and complied with the contract's termination for convenience provision because all that was required was written notice that the contract was being terminated for convenience, and the contents of the notice were not specified in the contract thus the July 27 letter was proper notice.[27] Neither Ferguson nor the trial court in its later order addressed the false information in the letter Notice of Termination nor its pretextual nature.[28]

SAK argued in opposition to Ferguson's motion for summary judgment, and maintains here, that false and pretextual notice cannot be proper notice and that invocation and enforcement of the termination for convenience provision of the contract under the circumstances here renders the contract illusory.[29]

On June 27, 2014 the court filed a summary order granting Ferguson's motion and dismissing SAK's Complaint.[30] In the Order, the

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[26] CP 271-84
[27] *Id.*
[28] *Id.*; CP 386-88
[29] CP 307-26
[30] CP 386-88

trial court explained its decision only by noting that: "the Court has duly considered whether the implied covenants of good faith and fair dealing would render the termination for convenience clause, and notice given here, illusory or invalid. No WA appellate case so concludes, especially in contracts between private entities. See, also, Vila & Son vs. Posen Const., 99 So. 3d 563."[31] The trial court provided no further opinion.

AUTHORITY

The trial court erred in determining that Ferguson had given proper notice of termination to SAK and in determining that a termination for convenience under the circumstances did not render the contract illusory. This resulted in the erroneous dismissal of SAK's Complaint. Also subject to this Court's review is the trial court's award of fees to Ferguson as prevailing party under the parties' Subcontract. A decision in favor of SAK on this appeal properly requires reversal of the fee award.[32]

A. Standard of Review of Summary Judgment Order Dismissal

Summary judgment can only be granted when "the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment

[31] CP 387
[32] CP 442-43

as a matter of law."[33] The moving party must demonstrate that there is "no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party," and "should be granted only if, from all the evidence, a reasonable person could reach only one conclusion."[34] This Court must engage in the same inquiry as the trial court in reviewing its order granting Ferguson's motion for summary judgment.[35]

B. Because Ferguson's Notice of Termination was pretextual, Respondent did <u>not</u> provide proper notice of a termination under the parties' agreement and did <u>not</u> fulfill one of the conditions to invoke the termination for convenience clause.

1. <u>Proper notice was a condition precedent to termination.</u>

A condition precedent is a fact or event subsequent to the making of a contract that "must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.[36] A condition is "an operative fact or event, an act or performance by a promisee upon which the existence of

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[33] CR 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (citing *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 345, 349, 588 P.2d 1346 (1979))
[34] *Id.* (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 350, 588 P.2d 1346 (1979))
[35] *Id. See also Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 215-16, 242 P.3d 1 (Div. I, 2010) ("The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion") (citing *Folsom*, 135 Wn.2d at 663).
[36] *Ross v Harding*, 64 Wn.2d 231, 236, 291 P.2d 526 (1964) (citing 3A Corbin, Contracts § 628, p.16; *Partlow v. Mathews*, 43 Wn.2d 398, 261 P.2d 394 (1953)

some particular legal relationship depends."[37] When performance or a right is dependent on some other event it will create a condition.[38]

Section 7 of the Subcontract, upon which Ferguson specifically relied in its Notice of Termination, states, *inter alia*, that "Contractor may, *after* providing Subcontractor with written notice, terminate . . . the Subcontract . . . for its own convenience . . . ."[39] Proper notice was a condition necessary for Ferguson to invoke termination for convenience.[40]

The timeliness of the notice required of SAK for a claim or dispute to be reimbursable[41] is dependent upon SAK being aware of said claim or dispute. It is evident from this scheme that the Notice of Termination is an important document, since it is intended to trigger the 14 or 21-day period for submitting "timely notice" of a claim or dispute. The notice cannot stand on its own because a party's obligations will not be triggered and rights dismissed until a party has fair, actual notice of events and circumstances.

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[37] *Prager's, Inc. v. Bullitt Co.*, 1 Wn. App. 575, 583-84, 463 P.2d 217 (1969) (citing 3A A. Corbin, Contracts § 627 (1960); 5A A. Corbin, Contracts § 1175 (1960)

[38] *See Ross*, 64 Wn.2d at *id.* (citing Williston, Contracts (3d ed.) § 663, p. 127. "[W]ords such as . . . 'after' . . . are often used." *Id*, at 237 (citing 12 Am.Jur. § 295, p. 849; 5 Williston, Contracts (3d ed.) § 671, p.161))

[39] CP 99 (Subcontract, ¶ 7 E)

[40] *See Ross*, 64 Wn.2d at 236

[41] CP 99 (Subcontract, ¶ 20)

2. Reasonable, non-pretextual notice is required.

Reasonable notice is "[s]uch notice or information of a fact as may fairly and properly be expected or required in the particular circumstances."[42] In *Lano*, although the parties' contract expressly gave Contractor the right, after reasonable notice, to take over Subcontractor's work, Contractor's notice of termination was deemed unreasonable by the Washington Supreme Court, and the dismissal of Subcontractor's claim against Contractor was reversed and the case was remanded to trial court for trial on the question of damages to Subcontractor for breach of contract by Contractor.[43] In the instant case, reasonableness of Ferguson's notice does not turn upon whether SAK was given sufficient time to correct any defects in performance because, in fact, there were no defects in performance. Reasonableness turns on the content of the notice: were the grounds cited in the notice genuinely accurate and was SAK notified of the termination in such a matter that it was able to take action to protect its rights under the contract

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[42] *Lano v. Osbert Const. Co.*, 67 Wn.2d 659, 663, 409 P.2d 466 (1966) (notice not reasonable where Contractor's condition for Subcontractor to avoid termination was unreasonable) (quoting Black's Law Dictionary (4th ed.) p. 1211); *see Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 767, 145 P.3d 1253 (2006) (reasonable notice is notice "fairly to be expected or required under the particular circumstances", and depends on the circumstances surrounding the transaction) (citing Black's Law Dictionary at 1091 (8th ed. 1999)); *Associated Petroleum Prods., Inc. v. Northwest Cascade, Inc.*, 149 Wn. App. 429, 434, 203 P.3d 1077 (2009) (before terminating a terminable at will contract a party must give reasonable notice to such party) (citing *Cascade Auto Glass*, 135 Wn. App. at 766)

[43] 67 Wn.2d at 663-65

Although Ferguson argued below that the parties' agreement did not state any requirements as to the contents of the notice, reasonable notice is required under established Washington law. At the very least, an untruth cannot be reasonable. Once Ferguson undertook to provide a reason or explanation of the termination of SAK's contract, a false and pretextual notice should not be deemed, as a matter of law, reasonable.

3. Whether Ferguson breached the Subcontract by providing a pretextual notice of termination was a genuine issue of material fact that should have precluded summary judgment.

Reasonableness is generally a question for the trier of fact.[44] Here there was a disputed issue of fact regarding reasonableness of Ferguson's Notice of Termination that should have precluded summary judgment.

Ferguson did not provide proper notice of termination under ¶ 7 of the Subcontract and therefore did not comply with one of the conditions of the termination for convenience provision therein. In its Notice of Termination, Ferguson invoked Section 7 of the Subcontract. Ferguson sent SAK a Notice of Termination at a time when SAK's work was at a stand-still, and it had completed only 24% of the project. Ferguson's Notice of Termination created the impression that SAK's work scope was

[44] *See Service Chevrolet, Inc. v. Sparks*, 99 Wn.2d 199, 204, 660 P.2d 760 (1983) (question of what length of time a secured party is permitted to hold collateral before it is deemed to have exercised its right to retain collateral in satisfaction of obligation is a question of fact); *McChord Credit Union v. Parrish*, 61 Wn. App. 8, 12, 809 P.2d 759 (1991) (question of reasonableness of disposition of collateral is question for trier of fact).

being deleted or very substantially reduced.[45] In relevant part, the Notice states:

> Ferguson Construction has determined that SAK's services *for this project are no longer required. Due to overall phasing restrictions, site logistics*, and basic convenience, it has become apparent that it is in the best interest of the project to complete the site concrete paving with Ferguson's own forces. This decision is ***not*** based on SAK's work performed to date.[46]

The references to services "no longer" being "required," "overall phasing restrictions" and "site logistics" were all designed to create the belief that there had been a major change in work scope, and that Ferguson would be finishing up whatever work remained after the change in scope. But the answers to Requests for Admission established this was not the case.

SAK later learned the same project scope that was claimed to have been reduced was actually being completed without SAK's participation. Ferguson's pretextual Notice of Termination was improper notice and thus Ferguson failed to comply with the termination for convenience clause.[47]

SAK relied upon the false statements in the Notice of Termination and believed that the termination of its services was due to a legitimate

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[45] CP 238-41
[46] CP 104 (emphasis in first and second sentence added)
[47] *See Ross*, 64 Wn.2d at 236

reduction or elimination of its work scope. Because Ferguson's Notice of Termination was pretextual and did not notify SAK of the true grounds for termination of the Subcontract, Ferguson failed to invoke the Subcontract's termination for convenience clause and breached the contract.

Whether Ferguson failed to comply with the termination for convenience provision because of the improper Notice of Termination is a disputed question of fact, not able to be determined on summary judgment. Our courts have consistently ruled that a dispute over whether grounds are "pretextual" precludes summary judgment because that is a factual determination.[48]

C. The trial court erred in granting summary judgment because application of the termination for convenience provision in this situation was illusory, and Ferguson's Notice of Termination constituted a breach of contract.

1. A contract is illusory and fails for insufficient consideration if performance is optional for one party

"For a valid contract to exist, there must be mutual assent, offer, acceptance, and consideration."[49] To be enforceable, every contract must

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[48] *See Dumont v. City of Seattle*, 148 Wn. App. 850, 866, 200 P.3d 764 (2009); *see also Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 120 P.3d 579 (2005); *accord Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 60 P.3d 106 (2002) and *Barker v. Advanced Silicon Materials, LLC,* 131 Wn. App. 616, 624, 128 P.3d 633 *review denied* 158 Wn.2d 1015, 149 P.3d 377 (2006).

[49] *In re Marriage of Obaidi*, 154 Wn. App. 609, 616, 226 P.3d 787 (2010).

be supported by consideration.[50] Where there is an illusory promise, where performance is "optional with the promisor," consideration is insufficient.[51]

> An "illusory promise" is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance. When a "promise" is illusory, there is no actual requirement upon the "promisor" that anything be done because the 'promisor' has an alternative which, if taken, will render the "promise" nothing. When the provisions of the supposed promise leave the promisor's performance optional or entirely within the discretion, pleasure and control of the promisor, the 'promise' is illusory.[52]

More succinctly, a party that "promises to do a thing only if it pleases him to do it, is not bound to perform it at all, as his promise is illusory."[53]

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[50] *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994) (citing *Dybdahl v. Continental Lumber Co.*, 133 Wash. 81, 85, 233 P. 10 (1925)). "Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." *Id.* (citing *Huberdeau v. Desmarais*, 79 Wn.2d 432, 439, 486 P.2d 1074 (1971); *Guenther v. Fariss*, 66 Wn. App. 691, 676, 833 P.2d 417 (1992) *review denied*, 120 Wn.2d 1028, 847 P.2d 480 (1993)); *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 766, 106 P.3d 290 (2005) (citing *King* at *id.*) (no consideration and no contract because company's right to payment flowed from a statute and not from a promise made by the city).

[51] *See Mithen v. Board of Trustees of Central Wash. St. College*, 23 Wn. App. 925, 932, 599 P.2d 8 (1979) (cited with approval in *King County v. Taxpayers of King County*, 133 Wn.2d 584, 600, 949 P.2d 1260 (1997) (*en banc*)).

[52] *Interchange Assoc. v. Interchange, Inc.*, 16 Wn. App. 359, 360-61, 557 P.2d 357 (Div. 1, 1976) (reh'g denied 1977); *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 458, 287 P.2d 734 (1955).

[53] *Winslow v. Mell*, 48 Wn.2d 581, 584, 295 P.2d 319 (1956) (as amended on rehearing). *See Interchange Assoc.*, 16 Wn. App. at 361 ("An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise,

While Washington courts have not yet been presented with the same question for a clause titled termination for convenience in construction contracts, our courts have already ruled that there cannot be a contract clause that reserves the right "to cancel at his pleasure."[54] A logical extension of established Washington law is that a termination for convenience clause, applied incorrectly, can result in a breach of contract. Because facts show that due to what Ferguson did here, a genuine issue of material fact exists regarding the application of the termination for convenience clause.

2. Under the particular factual circumstances of this case, the termination for convenience clause, as applied by Ferguson, was illusory

The parties' Subcontract was for a specified scope of work.[55] SAK agreed to perform the scope of work for the agreed upon price. This was beneficial to both parties at the time of the contract – Ferguson locked in SAK's time and materials at the agreed upon price and in the agreed upon amount, and SAK secured work on a project in its line of business. SAK did not agree to perform portions of its scope of work piecemeal, at the option of Ferguson – that is why a scope of work was negotiated as part of the Subcontract. Nor did SAK merely agree to make its services available

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although often called an illusory promise.") (quoting Restatement of Contracts § 2, cmt. B (1932)).

[54] *Mithen* at *id.*

[55] CP 140-44

at the option of Ferguson. In terminating SAK, there was no material change in the Project, Ferguson merely sought to avoid its obligations to SAK to look for a better deal, by either performing the work itself or by finding other, cheaper contractors

A finding that the clause, as Ferguson tried to apply it, renders the particular termination for convenience provision in this Subcontract illusory would not be inconsistent with Washington law. In fact, a determination that the termination for convenience provision is illusory under the facts at issue would be in conformance with established contract law

No published Washington State case has been found where a court has ruled on the applicability of a termination for convenience clause in a similar situation. In *Myers v. State of Washington*, the court enforced a termination for convenience provision in a situation where a worker contracted with DSHS to provide a certain number of hours per month of in-home care for an apparently unspecified duration of time. Although the Court assumed the validity of the operative termination for convenience provision, Meyers did not challenge it or its effect in her particular situation, so there is no relevant analysis of it in the opinion.[56]

[56] *Meyers v. State of Washington*, 152 Wn App. 823, 825-27, 218 P.3d 241 (2009).

Likewise, *Lampson Universal Rigging, Inc. v. Washington Public Power Supply System* is factually distinct: the termination of Lampson was due to a partial suspension of the project, and Lampson did not challenge the validity of the termination for convenience clause. In fact, Lampson was actually awarded the damages it sought in the lawsuit for the termination.[57] These Washington state cases do not constitute authority against SAK.

The Court should decide this matter upon established contract law even if precedent does not specifically concern termination for convenience clause disputes. Established contract law shows that the termination for convenience provision is illusory under the particular set of facts pursuant to which Ferguson has exercised it against SAK.

Ferguson conceded in its briefing of the motion for summary judgment that the clause might be illusory if it stated that Ferguson had the right to cancel or choose not to use SAK before it began performance of its work.[58] However, this would not be substantially different than

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[57] *Lampson Universal Rigging, Inc. v. Washington Public Power Supply Sys.*, 44 Wn. App. 237, 240, 721 P.2d 996 (1986).

[58] Apparently, Ferguson analogizes to an employment-at-will situation where an employer is only required to allow the employee to show up for work before terminating. This type of implicit analogy is inapposite, since, as stated, SAK did not agree to do its work on an as-needed or piecemeal basis. It is undoubtedly true that had Ferguson terminated SAK from the project before it started, absent a material change in the project, it would have rendered the Subcontract illusory. However it is not, therefore, the case that simply because Ferguson allowed SAK to perform a portion of

allowing SAK to bear the high costs of mobilizing and kicking-off a project only to cancel the contract after SAK was set up and had completed only 24% of the work. A factual determination of where on a sliding scale there was enough work performed to justify the application of a termination for convenience clause without it rendering promises illusory, was inappropriate on summary judgment.

Had there been some change to the Project which resulted in a material change in the scope of work (the type of change involving "overall phasing restrictions, site logistics, and[/or] basic convenience," (as stated in Ferguson's notice letter) termination for convenience might have been warranted. Here, although there was apparently no material change in the cement concrete paving services that the parties had contracted for SAK to provide – Ferguson merely changed its mind about using SAK. What Ferguson attempts to call "convenient" is what our courts call an "efficient breach." Our courts allow an efficient breach, but in that circumstance the breaching party is still obligated to pay the contract losses to the other party who in this dispute is SAK.

> An economically efficient breach is one where the breaching party's gains exceed the injury party's losses. Traditional contract damages deter economically

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its work it could decide to renege on its obligations under the Subcontract with impunity.

> inefficient breaches by fully compensating the injury party.[59]

As applied by Ferguson, the termination for convenience clause gave Ferguson the absolute and unconditional right to terminate the contract at Ferguson's sole discretion *without prejudice to any of its rights and remedies*. In other words, as applied, the termination for convenience provision would retain for Ferguson the absolute right to cancel the contract at its option, at its sole discretion, leaving SAK with no remedy. The termination for convenience provision, as applied, makes Ferguson's promise to purchase and pay for the $836,744 of materials and services illusory, because Ferguson is not, in fact bound to do.[60]

Ferguson's attempted use of the termination for convenience provision to avoid its obligations under the contract to SAK rendered the clause illusory in this particular situation. The Court should reverse the trial court's and remand for trial where, based on the facts of this particular case, SAK will be able ask the trial court to rule that, as specifically applied, the termination for convenience clause did not have a legitimate basis and rendered the contract illusory.

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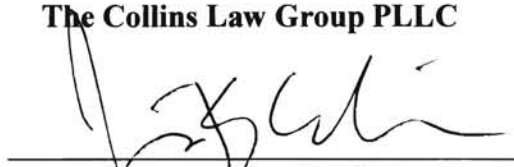
[59] *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 453, 815 P.2d 1362 (1991) (dissent).
[60] *See Mithen*, 23 Wn. App. at 932.

CONCLUSION

In sum, since there are disputed issues of fact regarding whether Ferguson's Notice of Termination was not reasonable and whether Ferguson's termination for convenience in this particular circumstance renders the clause illusory, this Court should reverse the trial court's order granting summary judgment and reinstate SAK's Complaint so that its claims can go to trial. As part of that ruling, this Court should also vacate the fee award that was based on dismissal.

DATED this 17th day of October 2014.

The Collins Law Group PLLC



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PROOF OF SERVICE

I certify under penalty of perjury that on the 9th day of October, 2014, I served a copy Appellant's Brief via email, per agreement of the parties, on the following:

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