NO. 33537-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

WILL T. PAYNE,

Appellant/Plaintiff,

vs.

JOHN STACY RUEGSEGGER and SHARIE KAY RUEGSEGGER,

Respondents/Defendants.

BRIEF OF APPELLANT WILL T. PAYNE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Other Case Law

Constitutional Provisions

Court Rules

Treatises

A. ASSIGNMENTS OF ERROR

1. The superior court of Spokane County, State of Washington, erred in entering its oral decision on March 13, 2015, in cause no. 14-2-01944-5, wherein defendants' motion for summary judgment [CP 16-17, 18-25, 26-53, 54-66] was granted by the court, while plaintiff's cross-motion for summary judgment including equitable theories of recovery [CP 187-96, 197-205, 206-07], was denied and, thus, depriving any plaintiff of any form of remedy whatsoever, either legal or equitable, as against the defendants which grounds for recovery were raised and fully outlined by plaintiff in his briefing and supporting affidavit. [Id.; RP 2-7].

2. The superior court of Spokane County, State of Washington, in turn erred in entering its "order granting defendants' motion for summary judgment" on April 3, 2015, in cause no. 14-2-01944-5, wherein plaintiff's complaint was ultimately denied. [CP 208-10, 232-34].

3. The superior court of Spokane County, State of Washington, erred in entering its "order denying reconsideration" on May 15, 2015, with regard to plaintiff's motion for the same [CP 211-15, 221-24] in cause no. 14-2-01944-5. [CP 228-29, 235-36].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the challenged decisions of the superior court in cause

no. 14-2-01944-5 are subject to reversal insofar as they violated the tenets of CR 56©, by way of the improper grant of defendants' motion for summary judgment [CP 16-17, 18-25, 26-53, 54-66], while plaintiff's cross-motion for summary judgment [CP 187-96, 197-205, 206-07], was in turn erroneously denied thus depriving plaintiff of any form of recovery or remedy as against the defendants? [Assignment of Error nos. 1 and 2].

2. Whether the superior court further erred and abused its discretion on May 5, 2015, in denying plaintiff's CR 59(a) motion of reconsideration? [Assignment of Error no. 3].

C. STATEMENT OF THE CASE

This matter concerns the issue whether the plaintiff and appellant herein, WILL T. PAYNE, is entitled to some form of remedy or monetary recovery regarding his sale of certain real estate located in the State of Alaska which he sold to, and was purchased by the defendants and respondents herein, JOHN STACY and SHARIE KAY RUEGSEGGER, husband and wife, but upon which said purchasers eventually chose, due to their unrelated financial woes, to renege upon said bargained-for agreement while, in turn, refusing to return possession and title to said property to Mr. PAYNE, and for which the superior court on summary judgment declined to intervene or provide appellant with any remedy whatsoever.

1. Factual Background. On February 5, 2008, at the office of

defendant, JOHN STACY RUEGSEGGER, the parties executed a document entitled "addendum" to a real estate purchase agreement for the purchase of real property, situated in an area known as Whale Passage, Petersburg District, Alaska, and legally described as "Lot 9-B, B Portion of lot 9, Block 13, ASLS 2000-26 as shown on Plat no. 2000-20 Petersburg Recording District, Alaska," for the sum of $60,000.00 with a down payment of $12,000.00, and the remainder payable in certified funds for 15 years at a rate of 9% interest. [CP 8, 187, 188, 189]. The agreement provided in addition that the property was being sold "as is" including power at the property line as shown. [CP 188, 191]. However, all payments which were made by respondents were in cash with the exception of the down payment. [CP 188].

In the formation of the agreement, Mr. RUEGSEGGER read from the corresponding plat document and dictated the details of the sale. [CP 188, 191]. At no time since execution of this sale on February 5, 2008, did either respondent notify Mr. PAYNE either in writing or orally that they were unhappy or displeased with the purchase of the subject land. [CP 188]. In April 2008, the respondents accompanied Mr. PAYNE so as to view the property and, during which time, Ms. RUEGSEGGER took pictures of the property. [CP 188, 192-93]. Once again, they seemed pleased with their purchase, and made periodic payments of $500.00 towards the balance owed. [CP 188, 189].

Later on, however, the appellant was informed by Mr.

RUEGSEGGER that his business was exercising financial problems and, also, money was needed for legal expenses to assist his son in a custody battle with the later's ex-spouse. [CP 188]. In this regard, the respondent advised that he would have to resell the property purchased from Mr. PAYNE, the appellant herein. [CP 188]. The respondents then got behind in payments. [CP 188]. Mr. RUEGSEGGER once more represented to Mr. PAYNE that he intended to sell the land at issue and a for sale sign was later posted on the property which contained the respondent's name and business phone number. [CP 188].

Respondents continued to exercise dominion and exclusive control over the property and, at some point, Mr. RUEGSEGGER represented to appellant that he and his sons could build a cabin on the land. [CP 189]. Again, there is power to the property. [CP 188, 189, 190]. The is also access to a water supply. [CP 189].

On May 11, 2009, Mr. PAYNE executed a statutory warranty deed transferring title to the property to respondents. [CP 189, 194]. Eventually, however, respondents fell behind in their payments [CP 189], and Mr. PAYNE was forced to file suit to recovery the outstanding sum owed him the RUEGSEGGERs, after having notified them of their delinquency on numerous occasions and having exercised the utmost patience under the circumstances. [CP 1-8, 189]. Ultimately, respondents' chose to repudiate their contract with him. [CP 1-8, 189].

2. Procedural History. On May 29, 2014, Mr. PAYNE filed suit

against the RUEGSEGGERs. [CP 1-8]. In response, the latter answered denying the existence of any enforceable contract between the parties and counterclaiming for the return of payments, et al., based upon their claims of deception, fraud and misrepresentation involving the actual nature and character of the property, as well as its alleged "inflated" value in contrast to its actual fair market value of $48,000.00. [CP 13-15].

On January 16, 2015, the defendants filed a motion for summary judgment claiming, inter alia, that they had been "duped" into purchasing the Alaska property as being a viable short-term investment and, further, that the sale failed to satisfy the legal requirements so as to constitute a valid real estate transaction, nor was the plaintiff, Mr. PAYNE, entitled to file suit against them insofar as there was no "acceleration clause" in the parties' agreement and said balance of $48,000.00 was not due for 15 years in terms of the contract. [CP 16-17, 26-53, 54-64, 123-27]. Mr. PAYNE responded by filing a cross-motion for summary judgment [CP 206-07], a supporting affidavit and exhibits [CP 187-96], and a memorandum in opposition to defendants' motion for summary judgment. [CP 197-205]. Essentially, the gravamen of his argument was that the RUEGSEGGERs' claims of fraud and dissatisfaction with the parties' agreement were both contrived and disingenuous. Rather, the parties had an enforceable real estate contract [CP 199-200, said agreement was supported by adequate consideration, and was not illusory as claimed by the defendants [CP 200-02], and the defendants' actions constituted a breach of contract [CP 202-

03] entitling the plaintiff to file suit regardless of any absence of an "acceleration clause." [CP 203]. The plaintiff further pointed out that, at a minimum, he should be afforded a remedy in equity if the court should determine there was no enforceable contract. [CP 204-05]

On March 11, 2015, these opposing summary judgment motions were heard by the superior court. [RP 1, et seq.]. Following oral argument, the court ruled there was no "appropriate real estate contract" in this case, nor was there any acceleration clause requiring the defendants to make payments until the 2023 deadline." [RP 2-4]. Consequently, defendants motion to dismiss Mr. PAYNE's suit was granted. [CP 4]. In turn, the court denied the later's cross-motion for summary judgment indicating that he had no right of recovery "on any equitable basis." [RP 5]. A order to this effect was entered by the superior court on April 3, 2015. [CP 210-10].

Thereafter, on April 13, 2015, Mr. PAYNE filed a motion for reconsideration under Rule 59 of the Washington Civil Rules for Superior Court [CR]. [CP 211-15, 221-24]. Defendants opposed the motion. [CP 216-20]. On May 15, 2015, the court denied Mr. PAYNE's motion. [CP 228-29]. On the day prior, the court granted the defendants' motion to dismiss their counterclaim without prejudice.

This appeal followed. [CP 230-36]. Additional facts are set forth below as they relate to a particular issue presented herein.

D. STANDARD OF REVIEW

1. Standards governing review of a ruling and decision entered on summary judgment [CR 56(c)]. In reviewing the propriety of a decision on summary judgment, the appellate court engages in the same inquiry as the superior court. See, Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The record on appeal consists of the documents that were considered by the trial court in making its ruling with the exception that the reviewing court may take judicial notice of other matters as well. See generally, Am. Universal Inc. Co. v. Ranson, 59 Wn.2d 811, 815-16, 370 P.2d 867 (1962).

In accordance with Rule 56(c) of the Washington Civil Rules for Superior Court [CR], summary judgment will be entered when the pleadings, together with the evidentiary facts submitted, demonstrate there is no genuine issue of material fact in dispute and the moving party is entitle to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the litigation depends in whole or in part. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990); Morris v. McNichol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). All facts submitted, and all reasonable inferences therefrom, are to be considered in the light most favorable to the non-moving party. Summary judgment will only be granted when reasonable persons could

reach but one conclusion, i.e., that the moving party is entitled to judgment as a matter of law. Wilson, at 437; Morris, at 494-95. Otherwise, the case and controversy can only be resolved by trial. Id.

On summary judgment, the moving party has the burden to prove his right to summary judgment irrespective of which party would have the ultimate burden of proof if the case were to go to trial. Preston v. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). Furthermore, where the operative or dispositive facts are "particularly with the knowledge" of the moving party, the cause should be allowed to proceed to trial in order that the non-moving party is afforded the opportunity to disprove the movant's facts by way of cross-examination and that party's demeanor of the witness stand before the trier of fact. United States v. Logan Co., 147 F.Supp. 330 (W.D.Pa. 1957); Felsman v. Kessler, 2 Wn.App. 493, 496-97, 468 P.2d 691 (1970); see also, Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955). Similarly, any element of proof concerning a part's veracity, motive, intent, knowledge, or the reasonableness and good faith nature of his actions or conduct are generally understood to lie within this exception to summary judgment. Id.; see also, LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975); Morris, at 495; Preston, at 682.

Lastly, CR 56© may not be used to try an issue of fact. Thoma v. C. J. Montag & Sons, Inc., 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Suffice it to say, conflicting assertions of fact in opposing affidavits will normally give raise to issues of witness credibility and the weight to be

given such contradicting evidence, and goes beyond the proper pale of a summary judgment proceeding and the authority of the trial court. See, Balise v. Underwood, 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963). This consideration also holds true on de novo review by the appellate court. Barker v. Advanced Silicon Materials, LLC., 131 Wn.App. 616, 128 P.3d 633, review denied, 158 Wn.2d 1015 (2006).

2. Standards governing review of denial of post-trial relief [CR 59(b)]. With respect to issue concerning the proper exercise of discretion by the trial court in granting or denying post-trial relief [CR 59(b)], such decision is ultimately examined by the reviewing court for manifest abuse of discretion. See, Weems v. North Franklin School District, 109 Wn.App. 767, 37 P.3d 354 (2002); State v. Dawkins, 71 Wn.App. 902, 863 P.2d 124 (1993). However, errors of law encompassed therein are generally reviewed under the de novo standard. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 158, 776 P.2d 676 (1989); Lyster v. Metzger, 68 Wn.2d 216, 226-27, 412 P.2d 340 (1966). In this regard, the superior court abuses its discretion when acting on untenable grounds or for untenable reasons, or has otherwise misinterpreted, misapplied or otherwise ignored the governing law. See, State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also, Pybas v. Paolino, 73 Wn.App. 393, 399, 869 P.2d 427 (1994); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990).

E. ARGUMENT

Issue no. 1 [erroneous rulings on summary judgment]. The appellant, WILL T. PAYNE, submits that, contrary to the rulings of the superior court, the respondents, JOHN "STACY" and SHARIE KAY RUEGSEGGER, husband and wife, cannot and did not effectively establish, by way of any competent, admissible evidence, the claimed unenforceability of the subject contract nor the relevancy of any lack of an acceleration clause in terms of the parties' agreement. Furthermore, under the law identified below and earlier cited in his memorandum in opposition to summary judgment [CP 197-205], Mr. PAYNE continues to maintain that he is so entitled to judgment as a matter of law as against these defendants either on the basis of an enforceable contract which was clearly breached by defendants or, alteratively, on the equitable grounds of equitable estoppel, unjust enrichment, restitution and imposition of constructive trust. Unfortunately, the decisions entered by the trial court deny him any remedy whatsoever including, but not limited to, the return of possession and title to the subject real property by defendants without full compensation to the plaintiff for the same. See, CP 8, 187, 188, 189.

PLAINTIFF'S REMEDIES AT LAW

a. Under governing legal principles, the parties had a binding and enforceable agreement. The gravamen of defendants' motion for summary judgment was based upon their bare, and unsubstantiated, allegations that

the subject contractual relationship between the parties does not specify (a) the time and manner for transferring title to the subject real estate, (b) the procedure for declaring forfeiture, and © the time and place for monthly payments, as discussed in Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). [CP 61]. In addition, defendants opined that the so-called "Addendum" [CP 8, 187, 188, 189] is required to contain a proper disclosure of encumbrances, and it dos not do so in this case. [CP 62]. Further, they claimed that said "Addendum" contained no real estate purchase and sale agreement. [CP 63]. Finally, defendants RUEGSEGGER argued they were entitled to dismissal of Mr. PAYNE's complaint because the terms of the subject transaction contained no "acceleration clause." [CP 64].

These claimed infirmities constitute nothing short of the classic case of buyer remorse and nothing more. Contrary to respondents' self-serving reliance upon irrelevant and immaterial facts and circumstances, the governing law demonstrates the parties have a binding and enforceable agreement in this matter. In short, there was a mutually accepted and biding contract as between these parties which included the necessary offer, acceptance and consideration. See, King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994).

As to the Kruse case, upon which respondents mistakenly relied, that case was based upon the underlying decision in Hubbell v. Ward, 40 Wn.2d 779, 782-83, 246 P.2d 468 (1952). Respondents have distorted and

misapplied both Kruse and Hubbell. This is borne out when the decision in Hedges v. Hurd, 47 Wn.2d 683, 289 P.2d 706 (1955), is taken into account with respect to the circumstances of this case.

Notwithstanding, the fact certain terms were missing in the initial contract, addendum or earnest money agreement, it is clear such terms were obviously to be provided at a later date. In this vein, the Hedge court, at 684-87, held without hesitation that the "earnest money receipt and agreement in [that] case adequately describe[d] the subject matter of the sale as [to] certain real estate." As to other requirement of the sale, all required legal documents or instruments, including all terms relative to the transaction, were clearly to be provided by the time the transaction was completed. Hedge, at 686-87. Consequently, the purchasers in Hedge were not allowed by the court to back out of their agreement since it was clear that all missing and required terms would be provided later on. Id. In terms of its rationale for this decision, the Hedge court, at 685-86, took into account such factors as custom and usage, and the parties' course of dealings.

Here, the parties' "course of dealings," as well as various factors associated with custom and usage in the real estate sales industry, lend themselves to the fact the parties mutually understood and had treated their agreement or real estate transaction as a viable and binding contract as between them. See generally, Geonerco, Inc. v. Grand Ridge Properties IV, L.L.C., 146 Wn.App. 459, 465-69, 191 P.3d 76 (2008). As in

Geonerco, Inc., the written agreement or instrument drafted by the defendants, along with its provision for future insertion of a more specific legal description of the land, is not inadequate as the defendants now baldly claim and, does not violate the statute of frauds or any other requirement pertaining to an enforceable real estate transaction. Id.; see also, Noah v. Montford, 77 Wn.2d 459, 463, 463 P.2d 129 (1969); see generally, Nishikawa v. United States Eagle High, L.L.C., 138 Wn.App. 841, 845-46, 849-50, 158 P.3d 1265, (2007), review denied, 163 Wn.2d 1020 (2008).

b. The parties' agreement was fully integrated and supported by adequate consideration given. Once again, Furthermore, by the terms of the parties's written contract, said contract was a fully integrated agreement concerning the sale and purchase of the subject real estate. The long-standing rule in Washington is that a written agreement to which the parties have contracted, evidence of a contemporaneous or prior oral agreement contradicting or altering the terms of the writing is prohibited and inadmissible. Buyken v. Ertner, 33 Wn.2d 334, 345, 205 P.2d 628 (1949); Brother's Intern. Corp. v. Nat'l Vacuum & Sewing Machine Stores, Inc., 9 Wn.App. 154, 159, 510 P.2d 1162 (1973). In other words, while parol evidence is generally admissible to construe a fully integrated written agreement and to determine the intent of the parties, parol evidence cannot add to, modify, or contradict the terms of that contract. See, Berg v. Hudesman, 115 Wn.2d 657, 669-70, 801 P.2d 222 (1990); Lopez v.

Reynoso, 129 Wn.App. 165, 167, 118 P.3d 398 (2005).

Here, the subject agreement was drafted by the defendants themselves, and in the event it could be said that a ambiguity existed notwithstanding the use of extrinsic evidence to clarify the agreement, it is a long-standing rule that any such remaining ambiguity must be construed against defendants as the drafters herein. See, King v. Rice, 146 Wn.app. 662, 671, 191 P.3d 946 (2008), review denied, 165 Wn.2d 1049 (2009).

Like the terms of an agreement, the issue whether a contract is supported by adequate consideration poses a question of law for the courts to decide. Keeter v. John Griffith, Inc., 40 Wn.2d 128, 130, 241 P.2d 213 (1952). Consideration is defined as any act, forbearance or promise given in exchange thereof. King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994); see also, Alexander & Alexander v. Wohlman, 19 Wn.App. 670, 682, 578 P.2d 530 (1978); Restatement of Contracts (1932), § 75. However, before an affirmative act, forbearance or promise can constitute consideration, it must be bargained for and be given in exchange for something which in turn constitutes consideration. Simply put, a bargained for exchange is one that has been sought by the promisor in return for his promise, and it is given by the promisee in return for that promise. Browning v. Johnson, 70 Wn.2d 145, 148, 422 P.2d 314 (1967). In this contest, the requirement of consideration can be met by a showing of a detriment to the promisee and in turn a benefit to the promisor, but either way it must be a bargained for exchange. King, at 505; Guenther v.

Fariss, 66 Wn.App. 691, 696-97, 833 P.2d 417 (1992), review denied, 120 Wn.2d 1028 (1993).

Here, there is no question that there was bargained-for consideration as between the parties in exchange for the sale and purchase of the subject real estate. Hence, there was a binding and fully enforceable agreement as between these parties. Id.

c. Consequently, the subject agreement cannot be deemed "illusory" or unenforceable in any sense of the word. A supposed contract or promise will be deemed illusory only if it is so indefinite that it cannot be enforced, or if its performance is somehow deemed optional or discretionary on the part of the promisor or one of the contracting parties unilaterally. Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 317, 103 P.3d 753 (2004). Stated differently, an illusory agreement is by its very nature meaningless and incapable of enforcement because, by its very terms or lack thereof, it is without any decree of certainty as to the consideration being given and the rights of the parties thereunder. See, Quandrant Corp. v. American States Ins., 154 Wn.2d 165, 184-85, 110 P.3d 773 (2005). In other words, such contract will be considered unenforceable for lack of the requisite consideration given. St. John's Med. Ctr. v. DSHS, 110 Wn.App. 51, 68, 38 P.3d 383, review denied, 146 Wn.2d 1023 (2002); see also, Olympic S. S. Co. v. Centinenial Ins. Co., 117 Wn.2d 37, 51, 811 P.2d 673 (1991); McMahan & Baker, Inc. v. Continental Cas. Co., 68 Wn.App. 537, 578-70, 843 P.2d 1133 (1993).

With these additional considerations in mind, a simple review of the subject agreement leaves once again no doubt this was an enforceable rather than an illusory contract as defendants might wish to baldly suggest.

d. In relation with their contractual obligations, respondents owed Mr. PAYNE an implied duty of good faith and fair dealing which was without question breached in this case. It is clear that Washington recognizes, in the context of an existing contract, an implied duty of good faith and fair dealing. See generally, 25 DeWolf & Allen, "Contract Law and Practice," Wash. Prac., § 5.12 (2007 & Supp. 2008-2009); see also, WPI 302.11 and comment. Namely, inherent in every contract is the requirement that the parties cooperate and act fairly and refrain from bad faith activities, so each may ultimately obtain the full benefit of performance by the other party. Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). In other words, a party to a contract is not allowed to throw up an obstacle to his performance where one neither legitimately or genuinely exists under the circumstances. Id.

e. Thus, respondents' undisputed actions and conduct constituted a breach of contract. Once again, the undisputed facts established that the plaintiff and defendants had, in fact, entered into a binding relationship with respect to the purchase and sale of the subject real property. Hence, there is no doubt whatsoever that plaintiff was throughout this relationship performing all contractual obligations which were owed these defendants. However, defendants in turn failed to perform their contractual obligations

resulting in their now being in breach of contract towards plaintiff. Thus, it is clear that Mr. PAYNE suffered resulting damages and injury as a proximate consequence of defendants' breach of their contract with him.

In sum, as to this controversy, Mr. PAYNE should have been granted summary judgment against defendants. CR 56©. Under the common law, the essential elements to establish liability for breach of contract are the existence of a valid and enforceable contract between the parties, the defendant has breached that agreement, and the plaintiff has suffered damages as a proximate result or consequence of such breach. Richardson v. Taylor Land & Livestock Co., 25 Wn.2d 518, 532, 171 P.2d 703 (1946); Northwest Independent Forest Mfrs. v. Dept. of Labor & Industries, 78 Wn.App. 707, 712, 899 P.2d 6 (1995); see generally, 25 "Contract Law and Practice, Wash. Prac, § 1.1.

f. Lastly, whether the agreement did, or did not, contain an "acceleration clause" is entirely irrelevant in light of respondents' undisputed repudiation of their contract. Intent to repudiate may be either expressly asserted or circumstantially manifested by a party's conduct. Crown Plaza v. Synapse Software, 87 Wn.App. 495, 502, 962 P.2d 824 (1997); CKP, Inc. v. GRS Constr. Co., 63 Wn.App. 601, 620, 821 P.2d 63 (1991). Here, it is clear the defendants repudiated, and without justification, their agreement with Mr. PAYNE resulting in his being entitled to bring suit on the terms of the agreement regardless of any ill-conceived and trumped up claim that the agreement lack any reference to

an "acceleration cause." In other words, it is axiomatic that respondents' breach of the parties' contract in itself caused the subject debt and obligation to be accelerated and become due as of the time of this lawsuit. The trial court was thus in error in choosing to hang its hat on this mere technicality and stumbling block set up by respondents in bad faith.

Thus, as a matter of law, Mr. PAYNE satisfied his initial prima facie burden of proving a lack of any genuine issue of material fact being in dispute, whereas the defendants failed to offer any factual or legal ground to prevent the entry of summary judgment against them by the trial court. See, CR 56© and (e).

PLAINTIFF'S REMEDIES IN EQUITY

Even assuming, arguendo, that there was no proof of or legal grounds upon which to find an enforceable agreement in this case, this does not in any way equate with defendants' misplaced and self-serving claims before the trial court that they were entitled to dismissal of plaintiff's lawsuit. On appeal, it remains Mr. PAYNE's position that he was entitled to judgment as against these defendants either (a) on the basis of an enforceable contract which has clearly breached and wrongfully ignored by defendants simply because of their unrelated financial woes [CP 188] or, alternatively, (b) on equitable bases of estoppel, unjust enrichment, restitution and imposition of constructive trust as is discussed and outlined below.

a. Equitable estoppel foreclosed the respondents from denying their liability to appellant. The principle of equitable estoppel is based upon the reasoning that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). Equitable estoppel is established when (a) there is an admission, statement or act inconsistent with a claim afterwards asserted by the offending party, (b) action by the aggrieved party in reasonable reliance on that admission, statement or inconsistent act, and © injury to the party who relied if the offending party is allowed to contradict or repudiate the prior act, statement or admission. Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318, cert. denied, 506 U.S. 1028 (1992). Here, there is clear, cogent and convincing evidence establishing each of the elements of equitable estoppel in terms of the undisputed facts contained and set forth in plaintiff's accompanying "CR 56 Statement of Undisputed Facts," which has been filed with this court on the same date as this "memorandum."

b. Unjust enrichment and restitution are further equitable grounds upon which plaintiff was entitled to recovery as against these defendants. The question whether equitable relief is appropriate in a given case poses once again a question of law for the court to decide. Niemann v. Vaughn Community Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). In this vein, the defendants received a benefit conferred upon them by the

plaintiff, with full appreciation and knowledge of such benefit and, under the circumstances, their acceptance and retention of the same make it inequitable or "unjust" for them to be allowed to retain the same without either payment and compensation or the return of the real property to the claimant. Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008); Cox v. O'Brien, 150 Wn.App. 24, 36, 206 P.3d 682 (2009); Dragt v. Dragt/DeTray, 139 Wn.App. 560, 576, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1047 (2008); Ellensburg v. Larson Fruit Co., Inc., 66 Wn.App. 246, 250, 865 P.2d 225 (1992); Bailie Communications Ltd. v. Trend Business Systems, Inc., 61 Wn.App. 151, 159-60, 810 P.2d 12 (1991); see also, Restatement (Third) of Restitution and Unjust Enrichment, § 1 & comm. b (Discussion Daft 2000). Accordingly, under the undisputed and documented facts, plaintiff PAYNE was entitled to restitution of the property. Id.

Thus, even assuming, arguendo, that the subject transfer of possession and title to the subject real estate is not adequately supported by law, it remains subject to Mr. PAYNE's equitable claim based on unjust enrichment. Id. In other words, the effect or result of such transaction should have been ruled a nullity by the trial court and deemed legally ineffective so as to not deprive the appellant of his right of ownership to the same. Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 188, 157 P.3d 847 (2007); Dragt, at 576.

c. At the very minimum, the undisputed facts required the

imposition of a constructive trust as against the respondents herein. Lastly, there is an additional, equitable remedy inherently intertwined with the respondents' breach of their combined fiduciary obligations to the plaintiff. It is the law that, in the context of restitution, a constructive trust may be utilized by the court so as to marshall back funds, property or other assets held by a third-party and, for which, that party, or in this case the RUEGSEGGERs, has no legal or equitable right to otherwise claim or possess the same.

Simply put, a constructive trust will be imposed when the property is acquired under circumstances such that the holder thereof would be unjustly enriched at the expense of another. Huber v. Coast Inv. Co., 30 Wn.App. 804, 810, 638 P.2d 609 (1981). A finding of a constructive trust amounts to a holding that the offending party ought to be treated as if he had been a trustee for the beneficiary, in this case Mr. PAYNE, from the time the offending party's retention and holding of the property became unconscionable. Id.

In this vein, a constructive trust may arise even though the acquisition itself was not initially wrongful as in this case. Mehelich v. Mehelich, 7 Wn.App. 545, 551, 500 P.2d 779 (1972). Again, the law governing this case should require the imposition of a constructive trust against the defendants.

For these reasons, respondents did not even begin to satisfy their initial prima facie burden of proving a lack of any genuine issue of

material fact being in dispute. They also failed to offer legal ground or theory so as to overcome or defeat any of the foregoing equitable remedies raised by Mr. PAYNE in this case. CR 56© and (e). Accordingly, there is no basis whatsoever upon which the RUEGSEGGERs should have been granted relief on their corresponding motion for summary judgment. Id. Instead, Mr. PAYNE's cross-motion should have been granted under the undisputed facts presented to the superior court.

Finally, with regard to the foregoing, identified equitable remedies, it should be borne in mind that the Washington judiciary have consistently held to the view that a forfeiture will be abhorred by the courts. In this vein, it has also been a longstanding principle of law that the Washington courts have the inherent authority to protect individual citizens from injury caused by the arbitrary and capricious conduct of others and are thus vested with the power to create a remedy even where one might not otherwise exist. See, Williams v. Seattle Sch. Distr., 97 Wn.2d 215, 222, 643 P.2d 426 (1982); see also, Devine v. Dept. of Lic., 126 Wn.App. 941, 110 P.3d 237 (2005).

In more recent years, the Washington supreme court, in Saldin Sec., Inc. v. Snohomish Cy., 134 Wn.2d 288, 292, 949 P.2d 370 (1998), has further elaborated that such equitable authority to intervene and create an individual remedy where needed is wholly mandated by article 4, section 6, of the Washington state constitution. See also, U.S.Const., amend. 5 & 14. Thus, given the identified injustices in this case, the

superior court should have afforded Mr. PAYNE with some form of remedy so that the respondents were not allowed to both have the title and possession to Mr. PAYNE's property without providing, in turn, some form of consideration or remuneration for such benefit. Id. At a minimum, the superior court should have returned the parties to their original positions before the contract, which the court did not do.

Accordingly, this reviewing court should now, at the very minimum, remand this case to the superior court with directions requiring said court to formulate an appropriate remedy in favor of the plaintiff. See, RAP 12.2. Fundamental fairness requires nothing less.

2. Issue no. 2 [erroneous denial of post-judgment relief]. A motion for reconsideration of a final decision of the superior court is governed by the defined criteria set forth in Rule 59(a) of the Washington Civil Rules for Superior Courts [CR]. In this particular instance, the plaintiff, WILL T. PAYNE, is relying upon the provisions of sub-sections (1), (3), (8) and (9) of that rule which provide, in pertinent part:

> (1) Irregularities in the proceedings of the court . . . by which such party [aggrieved thereby] was prevented from having a fair trial [or, in this case, a fair summary judgment hearing];
>
> . . .
>
> (3) . . . [S]urprise which ordinary prudence could not have guarded against;
>
> . . .
>
> (8) Error of law occurring at the trial [or, in this case, during summary judgment] and objected to at the time by

the party making the application;

. . .

(9) That substantial justice has not been done.

Appellant PAYNE respectfully submits that in light of the foregoing guide-lines and criteria, either considered together or separately, relief by way of reconsideration under CR 59(b) was fully warranted in this instance. The operative facts and governing law bear this out.

In this vein, plaintiff's February 29, 2015, "memorandum in opposition to defendants' summary judgment motion and in support of plaintiff's cross motion for summary judgment [CR 56©]," [CP 197-205], wherein a number of theories were raised entitling plaintiff to at least some form of equitable remedy, even in the event the court found that from a legal standpoint there was no enforceable contract. Nevertheless, the record reflects that the superior court simply chose to ignore out-of-hand these alternative, equitable remedies. [RP 5]. Mr. PAYNE now maintains that this failure and neglect on the part of the court resulted in his being denied a remedy of any kind.

Once again, at the very minimum, Mr. PAYNE should have been granted the right to recovery possession and title to said real estate. As it stands now, the RUEGSEGGERs continue to maintain a cloud over the property insofar as they still hold the statutory warrant deed to the property. [CP 194].

For this reason alone, reconsideration was fully warrant on at least equitable grounds identified by Mr. PAYNE. See, CR 59(a) and (b). Accordingly, this further error of the superior court should serves as one more basis for this reviewing court to now intervene and reverse the superior court in this case. See, RAP 12.2.

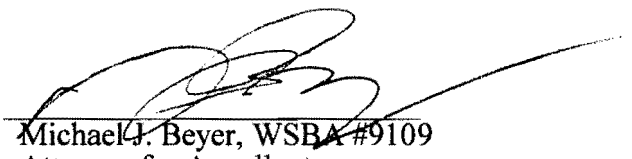
F. CONCLUSION

Based upon the foregoing points and authorities, appellant, WILL

T. PAYNE, respectfully requests that the challenged decisions of the superior court of Spokane County, State of Washington, in cause no. 14-2-01944-5, as identified above in appellant's "assignments of error," be reversed in their entirety with instructions on remand that plaintiff's cross-motion for summary judgment be granted by the superior court, whereas defendants' corresponding CR 56© motion for summary judgment should be denied for the reasons set forth above in this opening brief. Alternatively, at a very minimum, this case should be remanded with directions to the court that Mr. PAYNE be afforded some form of equitable remedy as against these respondents as was wholly contemplated by the supreme court in Williams v. Seattle Sch. Distr., 97 Wn.2d 215, 222, 643 P.2d 426 (1982). Fundamental fairness and due process require nothing less.

DATED this 28th day of September, 2015.

Respectfully submitted:



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