No. 33537-2-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

WILL T. PAYNE,
Plaintiff/Appellant,

v.

JOHN "STACY" and SHARIE KAY RUEGSEGGER,
Defendants/Respondents.

BRIEF OF RESPONDENTS

Michael H. Church, WSBA # 24957
Melody D. Farance, WSBA # 34044
Stamper Rubens, P.S.
Attorneys for Respondents Ruegsegger
720 West Boone Avenue, #200
Spokane, WA 99201
Telephone: (509) 326-4800

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

COURT RULES:

SECONDARY AUTHORITIES:

I. INTRODUCTION

This case involves a suit brought by the Plaintiff in an attempt to collect monies alleged to be owed to him by the Defendants, the Ruegseggers, for their purchase of real property in Alaska from him. The Plaintiff bases his claim on a document that fails to include many of the required elements of an enforceable contract for the purchase and sale of real estate. In addition, the document does not provide for payments at any kind of interval, nor does it include an acceleration clause providing for acceleration of the entire amount due under the "contract" if a payment is missed.

The Superior Court dismissed the Plaintiff's Complaint on the Ruegsegger's motion for summary judgment, finding that the document in question did not contain all the necessary terms of a contract for the purchase and sale of real estate, as a matter of law. In addition, the Superior Court held that, due to the lack of an acceleration clause in the document, any amounts allegedly owed by the Ruegseggers to the Plaintiff were not yet due. This provided another basis for the dismissal of Plaintiff's Complaint.

The Superior Court also denied a cross-motion for summary judgment brought by the Plaintiff, including claims for equitable relief raised by the Plaintiff for the first time in his cross-motion. Plaintiff's

request for reconsideration of each of the trial court's rulings was also denied.

The Plaintiff has appealed the trial court's decisions, essentially re-hashing the same arguments raised at the Superior Court level. The Plaintiff still fails to show there were any genuine issues of material fact in this case that would have precluded summary judgment as a matter of law, however. Defendants, therefore, request that this Court affirm the trial court's orders dismissing Plaintiff's claims and denying reconsideration of its orders.

II. STATEMENT OF THE CASE

A. FACTS

In about January of 2008, the Defendants (Respondents for purposes of this appeal), Stacy and Sharie Ruegsegger, were visiting the home of their friend, Plaintiff (Appellant for purposes of this appeal) Will T. Payne, when the Plaintiff approached them about purchasing some real property in Alaska. The Plaintiff claimed he owned four lots in Alaska, and that if the Ruegseggers were interested in an investment they could purchase one of the lots from Plaintiff. *CP 27, 85.* Exploiting his friendship with them, the Plaintiff then undertook to persuade the Ruegseggers to purchase a lot as a short-term investment property. *CP 27.* The Plaintiff verbally described the property to the Ruegseggers. He also

showed them a hand-drawn map which indicated the property was on the ocean front with a view of the ocean, and had road access. *CP 27, 33.* The Plaintiff later showed the Ruegseggers a professional drawing of the property, which also depicted access from the county road to the property. *CP 27, 35.*

In his effort to entice the Ruegseggers, Plaintiff told them he would sell them the lot for $48,000. However, he explained that in order to set the value for all other properties in the area, including the adjacent lots he owned, he would draw up a written agreement that would overstate the sales price to the Ruegseggers at $60,000. He then assured them the lot could be resold in the summer of 2008 for $90,000. *CP 27.*

The Plaintiff urged the Ruegseggers to hurry and make the deal if they were interested in the investment, because he had other potential buyers for the property. He even told them if they purchased the lot at that time, during the winter, they would not have to pay for the land. He said one of the other interested buyers would likely buy the lot from the Ruegseggers in the summer for a greater amount than what the Ruegseggers had paid. In fact, he told the Ruegseggers he already had a buyer for the lot. *CP 27.*

In reliance upon the Plaintiff's representations about the property, the Ruegseggers signed a document provided to them by the Plaintiff on February 8, 2008. Entitled, "Addendum," the document stated the

Ruegseggers agreed to pay $60,000 for Lot 9B. The Ruegseggers were to pay $12,000 as a down payment, and the balance of $48,000 was to be paid over 15 years. *CP 28, 37.*

The Addendum also referenced a real estate purchase and sale agreement, a promissory note, and an addendum. However, none of those documents actually exist. The Addendum itself lacked several provisions necessary to a contract for the sale and purchase of real estate. For example, the Addendum did not include a disclosure of existing encumbrances on the property nor provide that title would be subject to those existing encumbrances and to subsequent encumbrances that may attach by or through the acts of the seller. It stated only that "[t]he property is sold as is including power at property line shown in addendum A." Of course, there was no addendum A. The Addendum did not state the amount of each installment payment nor when installments must be paid, except that the balance was "to be paid . . . for 15 years." Furthermore, there was nothing in the Addendum providing that Plaintiff would give the Ruegseggers a fulfillment deed when their purchase of the property was fully performed. *CP 28, 37.*

The Ruegseggers signed the Addendum and paid the $12,000 down payment to the Plaintiff on February 8, 2008, in reliance on the Plaintiff's representations and promises. *CP 28.* The Ruegseggers began making additional payments to the Plaintiff in March 2008. *CP 29.*

In April of 2008, the Ruegseggers, along with the Plaintiff, flew to Alaska to inspect the property the Ruegseggers had supposedly agreed to purchase. When they drove to the property, the Ruegseggers discovered the access road the Plaintiff had described does not connect with the lot the Ruegseggers were supposedly purchasing. Thus, the only way to access the lot is to walk to it from the county road that runs alongside it. The Ruegseggers also discovered the "view" of the ocean from the lot was blocked by tall brush and trees from the opposite side of the county road down to the water. *CP 2, 105-06.*

The property was obviously not as Plaintiff had represented to them, and Stacy Ruegsegger was very unhappy. However, since the Ruegseggers never intended to own the property for the long term, but instead to have the Plaintiff sell the property during the summer of 2008 at a profit (as had been promised by the Plaintiff), the condition of the property did not really matter at that time. *CP 28.*

Contrary to Plaintiff's promises and representations, the Ruegseggers subsequently learned the Plaintiff did not have a buyer for the lot in the summer of 2008. The lot did not sell. *CP 28.* Even though they were unhappy with the property, they continued to make the payments because the Plaintiff continued to lead them to believe he was working to sell the lot. *CP 29-30; CP 109-10, 115.*

The additional payments made by the Ruegseggers to the Plaintiff were made at irregular intervals – sometimes monthly, or every other month, or every few months. The amounts of the payments varied from $500 to $900 to $1,000, and even $1,500. The Plaintiff accepted all payments made by the Ruegseggers, and provided receipts for some, but not all of them. *CP 28-30.*

The Ruegseggers ultimately paid the Plaintiff a total of $39,286.95. *CP 29.* Plaintiff transferred his interest in the lot to the Ruegseggers by statutory warranty deed recorded in May 2009. *CP 30, 53.*

B. PROCEDURAL HISTORY

On May 29, 2014, the Plaintiff filed the Complaint and commenced this action. *CP 3-8.* The Complaint states a claim for damages. It requests judgment against the Defendants in the principal amount of $38,000 with prejudgment interest. *CP 5.* It also requests an award of attorney fees and costs, and asks "for judgment for such other and further relief as the courts deem just and proper." *CP 5.* The Complaint contains no claims, causes of action, or requests for any sort of equitable relief. *CP 3-6.*

The Ruegseggers filed an *Answer and Counter-Claims to Plaintiff's Complaint* on July 10, 2014. *CP 9-15.* The Ruegseggers denied all allegations of the Plaintiff's Complaint and alleged

counterclaims for violation of Washington's Consumer Protection Act, RCW 19.86.090; constructive fraud; and unjust enrichment. *CP 13-14.* No answer to the Ruegseggers' Counter-Claims was ever made by the Plaintiff.

On January 15, 2015, the Ruegseggers filed a *Motion for Summary Judgment*, seeking dismissal of the Plaintiff's claim for damages on two bases: first, that the Addendum at issue was not enforceable because it lacked the necessary elements of a contract for the purchase of real estate; and second, that the dispute was not "ripe," because the Addendum did not contain an acceleration clause. *CP 54-55.*

In response, the Plaintiff filed *Plaintiff's Cross Motion for Summary Judgment* on February 27, 2015. *CP 206-207.* On the same date, he filed *Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross- Motion for Summary Judgment [CR 56(c) (sic)]. CP 197-205.* In this document Plaintiff, for the first time, alleged claims for equitable estoppel, unjust enrichment and restitution, and constructive trust. *CP 203-05.*

At the March 13, 2015 hearing on the cross motions for summary judgment, Judge John O. Cooney found as a matter of law that the Addendum at issue was not an appropriate real estate contract because it lacked the essential elements. Judge Cooney also found that there was no

acceleration clause in the Addendum. He granted the Ruegseggers' Motion for Summary Judgment. *RP 3-4.*

As to the *Plaintiff's Cross-Motion for Summary Judgment*, Judge Cooney stated: "This is an issue of statute and case law. I don't know that equity applies to this. So the Court will deny any relief on an equitable basis." *RP 5.* On April 3, 2015, an *Order* granting the Ruegseggers' *Motion for Summary Judgment* and denying the *Plaintiff's Cross-Motion for Summary Judgment* was entered. *CP 208-210.*

The Plaintiff filed a *Motion for Reconsideration* on April 13, 2015. *CP 211-215.* After full briefing by both parties (*CP 216-224*), the Court entered an *Order Denying Reconsideration* on May 15, 2015. *CP 228-29.* In the Court's *Order Denying Reconsideration*, Judge Cooney stated: "The Motion for reconsideration is denied on the basis that the Plaintiff did not make any equitable claims in the complaint." *CP 228.*

III. ARGUMENT

A. The trial court properly entered summary judgment in favor of the Ruegseggers, because there were no genuine issues of fact and the Addendum was unenforceable as a contract for the purchase and sale of real estate as a matter of law.

An order of summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). In seeking summary judgment, the moving party bears the initial burden of showing there is no issue of

material fact. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party makes this initial showing, the burden then shifts to the nonmoving party to show there is a genuine issue of material fact. Id. The nonmoving party may not rely on speculative or argumentative assertions that unresolved factual issues remain. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the nonmoving party does not meet its burden to show there is a genuine issue of material fact, summary judgment is appropriate. Young, 112 Wn.2d at 225; CR 56(c).

In this case, the trial court properly entered summary judgment in favor of the Ruegseggers, based on the unenforceability of the Addendum as a matter of law. Although the Plaintiff attempted to obscure the issues by misstating facts and relying on inapposite legal concepts and case law, none of the issues he raised at the trial court level were material to the factual and legal determination of 1) whether the Addendum contained the required elements of a valid contract for the sale and purchase of real estate; and 2) whether there was a meeting of minds between Plaintiff and the Ruegseggers as to the essential terms of the agreement.

1. No question of fact existed as to whether the Addendum contains the essential elements of a contract for the purchase and sale of real estate; it is, therefore, unenforceable.

Washington's Supreme Court has enumerated a number of specific, material terms that must be included in a real estate contract for it to be valid and enforceable:

> (a) time and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.

Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (citing *Hubbell v. Ward*, 40 Wn.2d 779, 782–83, 246 P.2d 468 (1952)). Where a writing does not refer to or attach an agreed-upon real estate form, and the writing itself does not contain the terms necessary under *Hubbell*, no meeting of the minds has occurred as to material and essential terms, and the writing cannot be enforced. *Kruse*, 121 Wn.2d at 723.

The Addendum in this case does not establish a contract for the purchase and sale of real estate because it does not state all essential real estate contract terms. For example, the Addendum does not include a time or manner for transferring title or even the Plaintiff's promise to transfer his interest in the lot to the Ruegseggers in exchange for the purchase price. In other words, the Addendum does not provide for Plaintiff to give any consideration for sale of the property. *CP 37.* "A contract must be supported by consideration to be enforceable." *FDIC v. Uribe*, 171 Wn.

App. 683, 688, 287 P.3d 694 (2012). Where a contract is not supported by consideration, summary judgment is proper. *Id.* at 689.

The Addendum also lacks a process for declaring forfeiture *(CP 37)*, which is particularly significant here. The Plaintiff in this case has instituted the current action in an attempt to accelerate the alleged amount owing under the Addendum. However, without a process for declaring forfeiture in the Addendum, there has been no agreement that would allow Plaintiff to take such action against the Ruegseggers.

The Addendum does not include the amount, a time, or place for monthly payments. It states only that the balance of $48,000 is "to be paid . . . for 15 years." *CP 37.* The sporadic timing and varying amounts of the payments made by the Ruegseggers further confirm that the parties did not mutually agree to amount or time for payments. *CP 28-29.*

"A real estate contract also must list all existing encumbrances subject to which the purchaser agrees to take title. The clause that contains the seller's promise to convey needs to provide that title will be subject to those existing encumbrances and to subsequent encumbrances such as may attach by or through acts of the seller." 18 WAPRAC, Real Estate § 21.6 (2d ed.) (2014). The Addendum at issue here does not contain a proper disclosure of encumbrances. It states only that "[t]he property is sold as is including power at property line as shown on addendum A." *CP 37.* Of course, there is no addendum A. This is quite clearly insufficient

to properly disclose any encumbrances to the Ruegseggers and insufficient to establish the encumbrances subject to which the Ruegseggers agreed to take title.

The Plaintiff produced no evidence of any other written agreements that would have provided the terms that are missing from the Addendum. Thus, there was no genuine issue of fact as to whether the Addendum lacked many missing terms essential for a valid and enforceable contract. The trial court correctly determined the Addendum is unenforceable as a contract for the purchase and sale of real estate, as a matter of law, and properly granted summary judgment to the Ruegseggers on that issue.

2. No question of fact existed as to whether the parties contemplated signing additional documents that would have required a further meeting of the minds; therefore, the Addendum on its own is unenforceable.

To determine whether a contractual relationship has been established by informal writings when the parties contemplate a subsequent signing of a formal written contract, "it is necessary to inquire, (a) whether the subject-matter has been agreed upon, (b) whether the terms are all stated in the informal writings, and (c) whether the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract." *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 520-21, 408 P.2d 382 (1965) (quoting Restatement (Second) of Contracts, § 26 cmt. a

(1932)). *"[A]n* agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete is unenforceable." *Sandeman v. Sayres,* 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957). In other words, "if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract." *Plumbing Shop*, 67 Wn.2d at 520 (quoting *Loewi v. Long*, 76 Wn. 480, 484, 136 P. 673 (1913)).

The first line of the Addendum attached to Plaintiff's Complaint confirms that the parties intended to have a real estate purchase and sale agreement ("REPSA"):

> ADDENDUM to that ***Real Estate Purchase and Sale Agreement*** dated February 5th, 2008, between Will T. Payne hereinafter known as the Seller; and J. Stacy and Sharie Ruegsegger hereinafter known as the Purchaser of the property.

Complaint, Exhibit (emphasis added). No RESPA was ever prepared and/or signed by the parties. *CP 28.*

The second paragraph of the Addendum reveals the parties intended to sign a promissory note and include an addendum A to the Addendum as well:

> SAID AGREEMENT is hereby amended to read as follows:
>
> The following purchase is agreed upon between seller and buyer as above in the amount of $60,000.00 with $12,000.00 down (check) and a balance of $48,000.00 to be paid in certified funds at 9% for 15 years to be carried by seller per ***promissory note*** attached.
>
> The property is sold as is including power at property line as shown in ***addendum A.***

(Emphasis added). *CP 37.* There is no factual dispute that neither a promissory note nor an addendum A were attached to the Addendum. In fact, the parties are in agreement that none of the referenced documents exist. *CP 28, 188.* The Plaintiff produced no evidence that would have established the parties' intent to prepare and sign the referenced documents at some time in the future.

Even if there were evidence that the parties contemplated signing the referenced documents subsequent to signing the Addendum, "'[t]he fact that the parties do intend a subsequent agreement to be made is strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance.'" *Pacific Cascade Corp. v. Nimmer,* 25 Wn. App. 552, 556, 608 P.2d 266, 269 (1980) *(quoting Coleman v. St. Paul & Tacoma Lumber Co.,* 110 Wn. 259, 272, 188 P. 532 (1920)). Thus, the Addendum's reference to other, non-existing agreements, shows that the Addendum was merely preliminary, and that

the Plaintiff and the Ruegseggers did not intend the terms to be a proposal and/or acceptance.

Therefore, the trial court correctly found the Addendum is unenforceable as a matter of law, and entry of summary judgment on that issue was proper.

B. Plaintiff's claim was properly dismissed on summary judgment because there is no acceleration clause in the Addendum and the claim was not ripe for judicial review.

Claims are ripe for judicial review if the issues raised are primarily legal and do not require further factual development. *Lewis County v. State*, 178 Wn. App. 432, 440, 315 P.3d 550 (2013). A claim that is speculative and hypothetical is not ripe. *Id.* It is error for a court to enter judgment in favor of a plaintiff for payments which have not yet accrued at the time of judgment, where the agreement does not contain an acceleration clause. *Meyers v. Western Farmers Assn.*, 75 Wn.2d 133, 136, 449 P.2d 104 (1969).

The Addendum in this case states that "a balance of $48,000.00 to be paid in certified fund[s] at 9% for 15 years" is to be paid by the Ruegseggers to the Plaintiff. *CP 37.* But, the Addendum does not require periodic installment payments. *CP 37.* Further, the promissory note referred to in the Addendum, which would likely have set out the terms of the Ruegseggers' alleged payment obligation in more detail, does not exist. *CP 28, 188.* Since there is no requirement for periodic installment

payments, there is also no provision for the Plaintiff's right to accelerate the full amount due under the Addendum if a payment is missed. In fact, based on the Addendum's plain language, the balance alleged by the Plaintiff to remain owing would not be due until 2023, the end of 15 years. *CP 37.*

As the facts plainly show, the Plaintiff's claim for damages was based purely on speculation that the remainder of the $48,000 balance would not be paid in full by February 5, 2023. Almost eight years of further factual development would be required before Plaintiff's claim was ripe for judicial consideration. On these undisputed facts, the trial court correctly recognized the absence of an acceleration clause in the Addendum, and correctly found the Plaintiff's claim for monies owed was not yet ripe as a matter of law.

C. The legal theories and case law espoused by the Plaintiff in support of his appeal are inapposite to the facts and issues before the trial court.

At the trial court level, the Plaintiff attempted to obscure the issues by misstating facts and relying on inapposite legal concepts and case law. Continuing in that vein, Plaintiff offers the same opposition to the trial court's decision in the *Brief of Appellant, Will T. Payne ("Appellant's Brief).*

In support of his appeal in this matter, the Plaintiff has cited to various concepts of contract law and cases supposedly supporting those

concepts which, he claims, establish that the trial court in this case improperly granted summary judgment to the Ruegseggers. A cursory review of those arguments, however, immediately reveals that the concepts and cases are not applicable to the issue of whether 1) the Addendum was an enforceable contract for the sale of real estate and 2) the lack of an acceleration clause in the Addendum defeats Plaintiff's claim for damages.

1. Plaintiff's reliance on basic contract law, Hedges, and the parties' "course of dealings" is misguided.

The Plaintiff initially argues that the Addendum was an enforceable contract because it included the necessary offer, acceptance, and consideration required to form a contract. This argument fails at the outset because there is no question that the Addendum makes no provision for the time and manner in which Plaintiff was to transfer title to the property (the Plaintiff's consideration) to the Ruegseggers. Furthermore, even if the Addendum did include a provision for consideration, it still does not address the other essential elements of an enforceable contract for the purchase and sale of real estate (as distinguished from other types of contracts), as noted in Section III A.1 above.

The Plaintiff also relies, as he did at the trial court level, on the decision in *Hedges v. Hurd*, 47 Wn.2d 683, 289 P.2d 706 (1995), in arguing that "all terms relative to the transaction, were clearly to be

provided by the time the transaction was completed." *Brief of Appellant Will T. Payne, p. 12.* However, a review of the *Hedges* case discloses that its facts are clearly distinguishable from those present here. In *Hedges,* the purchasers sued the seller of a rental duplex for damages after the seller backed out of her contract with the purchasers in order that she could sell the duplex to a third party. Significantly, the earnest money agreement in the *Hedges* case included the amount and time of the monthly payments (which are lacking from the Addendum in this case); a closing date 15 days after the furnishing of a title report (the Addendum at issue here fails to provide the time or manner for transferring title); a provision stating the purchasers would get possession of the property upon the date of closing (there is nothing in the Addendum to indicate when the Ruegseggers were to have possession of the property); a provision stating that taxes, rent, insurance, interest, water, and other utilities were to be prorated as of the date of closing (also missing from the Addendum); and an instruction that the necessary legal documents and funds relative to the transaction were to be deposited in escrow with a named escrow company, with the cost of the escrow to be apportioned equally. The *only* thing missing was a second contract for conveying the property by warranty deed to the purchaser, which was referred to in the earnest money agreement. Under these circumstances, the court found the document sufficient for a contract for the sale of land. *Hedges,* 47 Wn. 2d at 688.

The *Hedges* case involved purchasers who sought damages for the seller's refusal to convey real estate to them. The court in *Hedges* found the contract in question contained the essential elements for a contract for the sale of real estate where the purchaser is seeking damages for non-performance. *Id.* at 687. In contrast, this suit involves the opposite situation – a seller who is seeking damages for non-payment under a document which lacks the required elements of a contract for the purchase and sale of real estate. The Addendum in this case fails to provide for the "seller" to give *any* consideration for sale of the property, a process for declaring forfeiture, the amount, time, and place for monthly payments, a list of the encumbrances attached to the property, an indication of when the purchaser was to obtain possession, and a provision addressing responsibility for prorating liens, taxes, and assessments. *CP 37.* Therefore, the facts and holding in *Hedges* are inapposite and completely unpersuasive here.

Likewise, the Plaintiff argues the parties' "course of dealings" were sufficient to establish that the parties understood their agreement as a viable and binding contract between them. *Appellant's Brief, p. 12.* However, the cases relied on by Plaintiff are, once again, factually distinguishable from this case. For example, in *Geonerco, Inc. v. Grand Ridge Properties IV, LLC,* 146 Wn. App. 459, 191 P.3d 76 (2008), there was no dispute that the REPSA entered into between the parties contained

all essential elements of an enforceable real estate contract. The only dispute was whether the legal description in the REPSA, which was a metes and bounds description, had to be replaced by the final legal description obtained upon plat approval in order to make it an enforceable contract. The court in that case noted that throughout their dealings with each other the parties had always shown the intention to convey the entire tract, and on that basis the REPSA was enforceable. *Id.* at 467. The plaintiff in *Noah v. Montford*, 77 Wn.2d 459, 463 P.2d 129 (1969), another case cited by Plaintiff in his opening brief, was a realtor who sought payment of real estate commissions from the defendants. The defendants claimed two of the earnest money agreements obtained by the plaintiff did not describe the property being sold and were, therefore, unenforceable. There were no allegations of any other deficiencies in the essential terms of the earnest money agreements. The court in *Noah* noted that the plaintiff realtor in the case had been expressly authorized to insert the legal description of the properties over the signatures of the parties to the earnest money agreements. *Id. at 463.* On that basis, the court found the earnest money agreements enforceable and affirmed the trial court's judgment awarding the plaintiff his real estate commission. *Id.*

Likewise, the issue in *Nishikawa v. U.S. Eagle High, LLC,* 138 Wn. App. 841, 158 P.3d 1265 (2007), also cited by Plaintiff, was whether a purchase and sale agreement was legally binding where the agreement

stipulated that the parties' dual agent would add the property's legal description as a contract addendum. No other essential terms of the REPSA were at issue. The court in that case held that the defendant, which backed out of the agreement before the dual agent added the legal description, had contracted away its right to revoke the dual agent's authority to add the legal description. *Id. at 845.* Accordingly, the court found the purchase and sale agreement was valid and binding under the statute of frauds. *Id.*

None of the cases cited by the Plaintiff are factually similar to this case, where the writing in questions is missing several of the elements of a valid and enforceable contract for the purchase and sale of real estate. Thus, the concepts and cases cited by the Plaintiff do not apply to the circumstances present here.

2. The concepts of full integration, the parol evidence rule, and ambiguity in a contract are not relevant to the issues present in this case. The Plaintiff also fails to cite to any evidence in the record to establish the Addendum was supported by adequate consideration.

Next, the Plaintiff argues that the parties' agreement was "fully integrated" and cites to case law addressing the parol evidence rule. However, the Plaintiff's arguments and the case law he cites to are simply not applicable to this case, as the question of whether parol evidence modifies or contradicts the terms of the Addendum is not an issue in this case. The Plaintiff then refers to Washington law providing that any

ambiguity in a contract must be construed against the drafter. But for this principle to apply, there must first be an ambiguity, and Plaintiff has failed to point to any ambiguity in the Addendum. Furthermore, the relevant inquiry here is not whether the provisions of the Addendum are ambiguous, but rather, whether the Addendum contains the provisions required by Washington law for a valid and enforceable contract for the purchase and sale of real estate.

The Plaintiff then, once again, raises the issue of whether there was consideration for the sale of the Plaintiff's property to the Ruegseggers, and concludes "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." *Appellant's Brief, p. 15.* Aside from citing to various cases on the issue of consideration, however, the Plaintiff fails to mention ***what*** the bargained-for consideration is or where reference to the consideration may be found in the Addendum. As explained in Section III. A.1 above, this argument fails as well.

3. Plaintiff's discussions on illusory contracts and lack of consideration do not relate to the issues in this case.

Plaintiff then moves on to discuss the concepts of illusory contracts, and the unenforceability of contracts for lack of consideration. Again, these arguments have no specific relevance to the issues presented by the Defendants' *Motion for Summary Judgment* (*CP 54-66*) and

whether the trial court correctly found that the Addendum was unenforceable.[1]

4. The implied duty of good faith and fair dealing is applicable only to an enforceable contract.

Plaintiff also accuses the Ruegseggers of violating their implied duty of good faith and fair dealing. This argument fails because the concept relates only to situations in which an enforceable contract exists. The trial court correctly determined that the Addendum was not an enforceable contract for the purchase and sale of property, so this argument simply does not apply.

5. The Ruegseggers could not have breached a contract that is unenforceable.

In a weak attempt to turn the tables, Plaintiff also accuses the Ruegseggers of having breached a contract with him. *Appellant's Brief, pp. 16-17.* Of course, the Defendants cannot have breached a contract that was unenforceable in the first place, as the trial court correctly established. Thus, Plaintiff's argument in that regard is unavailing.

6. There is no legal support for Plaintiff's claim that Defendants' supposed repudiation of the contract entitles him to accelerate the amount claimed due.

---

[1] In fact, the case law cited by the Plaintiff in his Brief generally supports the trial court's finding that the Addendum was unenforceable "because, by its very terms or lack thereof, it is without any degree of certainty as to the consideration being given and the rights of the parties thereunder." *Quadrant Corp. v. American States Ins.*, 154 Wn.2d 165, 187-85, 110 P.3d 773 (2005).

In response to the issue of whether the lack of an acceleration clause renders the Plaintiff's claim unripe the Plaintiff makes the rather fanciful argument that the Defendants "repudiated" the contract and the Plaintiff is thus entitled to accelerate the remaining unpaid balance, despite the absence of an acceleration clause. *Appellant's Brief,* p. 17. The case law cited in support of Plaintiff's argument, however, is inapposite. The case of *CKP, Inc. v. GRS Const. Co.,* 63 Wn. App. 601, 821 P.2d 63 (1991) did not involve claims for damages for non-payment of an amount claimed due. Instead, that case established that repudiation of a contract by one party is viewed as a breach excusing the other party from performance. *Id.*, at 620 (holding that where a general contractor repeatedly threatened to withhold payment to a subcontractor unless the subcontractor agreed to sign a contract modification, the subcontractor was justified in walking off the job). Likewise, there was no acceleration clause at issue in the other case cited by Plaintiff, *Crown Plaza v. Synapse Software*, 87 Wn. App. 495, 503, 962 P.2d 824 (1997) (holding there was a genuine issue of material fact as to whether a lessee breached the original lease or was merely carrying out the terms of an oral agreement for early termination).

Established Washington case law ***does*** say, however, that it is error to enter a judgment for payments that have not accrued at the time of entry of judgment, where the agreement providing for payments does not

contain an acceleration clause. *Myers v. Western Farmers Ass'n.*, 75 Wn.2d 133, 136, 449 P.2d 104 (1969). Plaintiff's attempts to persuade the trial court otherwise were unavailing, and the trial court correctly held that the lack of an acceleration clause in the Addendum was fatal to Plaintiff's claim. *RP 4.*

D. Denial of Plaintiff's Cross-Motion for Summary Judgment was appropriate because Plaintiff failed to plead equitable claims in his Complaint.

Pleadings are primarily intended to give notice to the court and to the opposing party of the general nature of the claims asserted. *Dumas v. Gagner*, 137 Wn.2d 268, 282, 971 P.2d 17 (1999). However, even Washington's liberal rules of pleading require a plaintiff to include direct allegations in his complaint sufficient to give notice to the court and the defendant of the nature of the plaintiff's claims. *Berge v. Gorton,* 88 Wn. 2d 756, 762, 567 P.2d 187 (1977). A pleading is insufficient when it does not give the opposing party fair notice of what the claims are and the grounds upon which they rest. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was the case all along. *Dewey v. Tacoma School Dist. No. 10,* 95 Wn. App. 18, 26, 974 P.2d 847 (1999). *See Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir.1996) ("a plaintiff may not

amend his complaint through arguments in his brief in opposition to a motion for summary judgment.").

Plaintiff filed a "*Complaint for Monies Owed*" in this case. His sole claim was for damages for the amount alleged to be owing to him under the Addendum. He made no equitable claims of any sort in his *Complaint*. *CP 3-8.* He never attempted to amend his *Complaint* to assert any equitable claims.

Despite this fact, the Plaintiff asserted his right to summary judgment under the equitable theories of estoppel, unjust enrichment, and constructive trust. These equitable arguments were raised for the first time in his *Memorandum In Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment*. *CP 203-20* .

The trial court, however, correctly noted that Plaintiff's equitable theories of recovery had not been pled in his Complaint. *CP 228.* Denial of Plaintiff's *Cross-Motion for Summary Judgment* was, therefore, appropriate.

E. Even if Plaintiff had adequately pled equitable theories of recovery, he failed to make any meaningful argument in that regard.

It is well-settled in Washington that an appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."

RAP 10.3(a)(6). Arguments not supported by any reference to the record or by citation to authority need not be considered. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

As noted above, the Plaintiff argued in his *Cross-Motion for Summary Judgment,* that he was entitled to relief under the equitable theories of estoppel, unjust enrichment/restitution, and constructive trust. However, he failed to make any meaningful argument in support of those claims. *CP 203-208-*. He similarly fails to provide meaningful argument on appeal.

For example, with regard to the claim for equitable estoppel, the Plaintiff cites to several cases concerning the theory of equitable estoppel, but never analyzes how those cases apply to his cases by referencing the record. Instead, he merely asserts there was evidence establishing each of the elements of equitable estoppel in his "CR 56 Statement of Undisputed Facts." *Appellant's Brief, p. 19.* But, no such statement was ever filed with the trial court.

Likewise, Plaintiff argues that the equitable grounds of unjust enrichment and restitution entitle him to recovery, and then cites several cases discussing various concepts under those equitable theories. But, instead of analyzing how those concepts apply to his case, and pointing to facts in the record that support the required elements of a claim for unjust

enrichment and/or restitution, the Plaintiff merely concludes it would be "inequitable or 'unjust' for [the Ruegseggers] to be allowed to retain the [property] without either payment and compensation or the return of the real property to the claimant." *Appellant's Brief, pp. 19-20.*

The Plaintiff also argues he is entitled to a constructive trust on the property. After citing to cases addressing the equitable remedy of constructive trust, the Plaintiff fails to analyze how the case law applies to the facts of the case and makes no reference to facts contained in the records. He simply concludes ". . . the law governing this case should require the imposition of a constructive trust against the defendants." *Appellant's Brief, p. 21.*

Clearly, the Plaintiff made no meaningful arguments in support of his claims for equitable relief, either at the trial court level or in this appeal. Therefore, pursuant to *Cowiche Canyon Conservancy v. Bosley,* cited above, this Court should disregard the Plaintiffs' claims for equitable relief.

F. Plaintiff's new arguments on "inherent right of judicial review" were not raised at the trial court level and should not be considered on appeal.

Finally, Plaintiff argues the Washington judiciary has "the inherent authority to protect individual citizens from injury caused by the arbitratory and capricious conduct of others and are thus vested with the

power to create a remedy even where one might not otherwise exist." *Appellant's Brief, p. 22.* In support of that argument, the Plaintiff cites to a case addressing whether the court had an inherent right of judicial review of an administrative agency's decisions (*Williams v. Seattle Sch. Distr.*, 97 Wn.2d 215, 222, 643, P.2d 426 (1982)), and the Washington State and United States Constitutions.

The Plaintiff then claims:

> Thus, given the identified injustices in this case, the superior court should have afforded [the Plaintiff] with some form of remedy so that the respondents were not allowed to have both title and possession to [the Plaintiff's] property without providing, in turn, some form of consideration or remuneration for such benefit. (Citation omitted.) At a minimum, the superior court should have returned the parties to their original positions before the contract, which the court did not do.

Appellant's Brief, pp. 22-23. This argument was not raised in the trial court by the Plaintiff, either in connection with the motions for summary judgment or upon reconsideration.

RAP 2.5(a) states: "**Errors Raised for the First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court." The rule goes on to provide several exceptions to this general rule, none of which apply here. It has been said that an "important factor" in implementing RAP 2.5(a) is "the consideration that the opposing parties should have an opportunity at trial to respond to

possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal." 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed.).

Because the Plaintiff failed to raise this last argument at the trial court level (or to provide any meaningful argument or citation to authority or the record, pursuant to *Cowiche Canyon Conservancy v. Bosley* in this appeal), the Court should not consider the argument on appeal.

G. The trial court properly denied the Plaintiff's Motion for Reconsideration, as he failed to establish any of the grounds upon which reconsideration is warranted under CR 59.

CR 59 (a) states:

> **Grounds for New Trial or Reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or nay other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

The rule goes on to list nine different bases upon which a motion for reconsideration may be made.

At the trial court level, the Plaintiff asserted that his *Motion for Reconsideration* (*CP 21-215*), was based on subparagraphs (1), (3), (8), and (9) of CR 59. However, rather than pointing out to the court exactly

how the court's decision was based on "irregularities in the proceedings of the court" (subparagraph (1)), or "surprise which ordinary prudence could not have guarded against" (subparagraph (3)), or "error of law" (subparagraph (8)), or "that substantial justice had not been done" (subparagraph (9)), the Plaintiff merely reargued his equitable claims.

Just as he did at the trial court level, the Plaintiff has utterly failed to point out how the proceedings of the trial court met any of the bases upon which reconsideration might have been warranted pursuant to CR 59. Once again, the Plaintiff failed to make any meaningful "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992). He clearly did not meet his burden of showing his right to reconsideration of the Court's *Order Granting Defendant's Motion for Summary Judgment* and denying Plaintiff's cross motion for summary judgment. *CP 208-210.* The trial court, therefore, properly denied Plaintiff's *Motion for Reconsideration. CP 211-215.*

IV. CONCLUSION

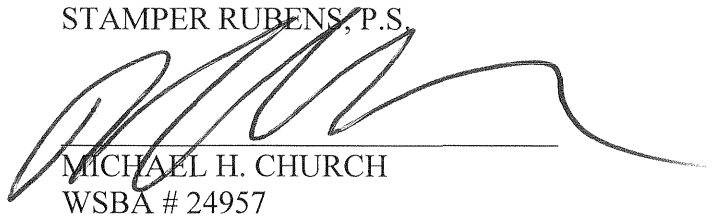
The trial court in this case correctly found that the Addendum at issue did not include all essential elements of a valid and enforceable contract for the purchase and sale of real estate, as a matter of law. The

trial court was also correct in finding that the lack of an acceleration clause in the Addendum defeated the Plaintiff's claims for money due. Finally, the trial court correctly found that the Plaintiff's claims for equitable relief were properly denied, because he had never pled them in his Complaint.

Entry of summary judgment denying the Plaintiff's claims as a matter of law was appropriate, as was the denial of his cross-motion for summary judgment. The Ruegseggers respectfully request this Court to affirm the trial court's decisions in all respects.

DATED this 28th day of October, 2015.

STAMPER RUBENS, P.S.



MICHAEL H. CHURCH
WSBA # 24957
MELODY D. FARANCE
WSBA # 34044
720 W Boone, Suite 200
Spokane, WA 99201
(509) 326-4800
Attorneys for Respondents
Ruegsegger

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2015, I caused to be served a true and correct copy of the foregoing BRIEF OF RESPONDENTS by the method indicated below, and addressed to the following:

Michael J. Beyer Attorney at Law 810 S. Cannon Street Spokane, WA 99204	_X_ U.S. mail, postage prepaid ____ Hand-delivered ____ Overnight delivery ____ Facsimile: _X_ E-mail:

Tiffany M. Ford