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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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No. 63422-4

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

FF REALTY LLC,

Appellant,

v.

KIMSCHOTT FACTORIA MALL, LLC,

Respondent.

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

FF Realty's attempt to close on its \$14.3 million purchase of a part of the Factoria Mall in Bellevue remains frustrated by Kimschott's deceitful actions and willful refusal to perform under the contract. In reliance on Kimschott's assurances that the transaction was about to close, FF Realty forfeited a \$775,000 non-refundable loan commitment fee and now stands to lose its \$4,000,000 development investment in the site based on Kimschott's misplaced contract interpretation that time has expired and on its unsubstantiated assumption that FF Realty was incapable of paying the agreed-upon purchase price.

Kimschott's principal argument on summary judgment was that Safeway's refusal to approve the release of its signature on the required Reciprocal Easement Agreement simply blocked the closing. However, what Kimschott and the trial court failed to recognize is that the Purchase and Sale Agreement expressly provided that it was Kimschott's responsibility to use commercially reasonable efforts to secure an amendment to the Reciprocal Easement Agreement in a form approved by FF Realty. That approval was undermined both by Kimschott's secret withdrawal of its own signature from escrow and by Kimschott's unexplained passivity in the face of its contractual duty to use

commercially reasonable efforts to secure approval of a Reciprocal Easement Agreement from others, including Safeway.

The trial court failed to employ the proper standard for a summary judgment motion. It failed to recognize that there were material facts in dispute about the contract; it failed to recognize that Kimschott had not made a showing on which “there can be no doubt” that Kimschott had used reasonable efforts to secure Safeway’s approval of the REA Amendment; and it failed to recognize that Kimschott had not produced any evidence showing that FF Realty was unable to pay for the purchase.

Accordingly, the summary judgment order should be reversed and the case sent back for a trial on the merits.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in granting summary judgment where Kimschott failed to produce any evidence that it used reasonable efforts to secure a fully executed REA Amendment, as it was required to do under the Agreement, and where Kimschott actively prevented that Amendment from being executed?

2. Did the trial court err in granting summary judgment based on an assumption that the Agreement automatically terminated on October 31, 2008 despite the fact that the Agreement expressly extended the closing until 15 days after the completion of the REA Amendment?

3. Did the trial court err in granting summary judgment based on Kimschott's unsubstantiated assumption that FF Realty lacked sufficient funds to pay the agreed-upon purchase price?

4. Did the trial court err in granting summary judgment by ignoring the remedy of specific performance expressly available to FF Realty under the Purchase and Sale Agreement, thereby forcing FF Realty to forfeit its substantial investment in the project without even allowing FF Realty to conduct additional discovery?

III. STATEMENT OF THE CASE

A. Summary

The parties in this case are the Plaintiff/Appellant, FF Realty LLC ("FF Realty"), a Delaware limited liability company, and Defendant/Respondent, Kimschott Factoria Mall, LLC ("Kimschott"), a Delaware limited liability company.¹

FF Realty's complaint seeking specific performance results from the refusal of Kimschott to close on FF Realty's intended \$14.3 million purchase of part of Factoria Mall in Bellevue for the purpose of constructing a residential development. As a result of Kimschott's

¹ The Court should note that in many of the records from the trial court, Kimschott is referred to as "Kimco" and letters on behalf of Kimschott are sent from "Kimco Realty Corporation." (e.g., CP 452) The Purchase and Sale Agreement provided that notification to Kimschott be sent c/o Kimco Realty Corporation. (CP 28)

actions, FF Realty lost a non-refundable loan commitment fee of \$775,000.00, and over \$4,000,000 preliminary investment in the development, as well as anticipated profits from sale of the residential units. Under terms of the Purchase and Sale Agreement, FF Realty seeks specific performance.

Despite the existence of critical and material facts that remain in dispute, the trial court granted summary judgment to the defendant, Kimschott. FF Realty asks this Court to reverse the trial court's summary determination and to send the case back to King County Superior Court for trial on the merits.

B. FF Realty agrees to purchase part of Factoria Mall from Kimschott on which to build multifamily residential units

A purchase and sale agreement between the buyer, FF Realty, and the seller, Kimschott, for a portion of Factoria Mall in Bellevue was first entered into on September 21, 2006. (CP 16-40) FF Realty's objective in purchasing the property was to convert the southwest corner of Factoria Mall from commercial use to residential use of not less than 450 multifamily residential housing units.² (CP 24-25, ¶11) The initial

² A site map is attached to the initial purchase and sale agreement (CP 36), but the clearest graphic representation of the planned residential development in the context of the Factoria Mall property can be seen at CP 228-229.

purchase price for the property was to be at least \$15,750,000. (CP 16-17, ¶2)

October 12, 2007 was set as the outside closing date for the purchase and sale of the Factoria Mall property under the original Purchase and Sale Agreement. (CP 22, ¶7.1) But the project moved more slowly than anticipated and more than nine months after the “outside closing date” of October 12, 2007 had passed, FF Realty and Kimschott amended the purchase and sale agreement in the form of a “First Amendment” on August 31, 2008. (CP 42-93) The new closing date was October 31, 2008. (CP 43, ¶5)

In this First Amendment, the purchase price was reduced to \$14,315,000. (CP 42, ¶3) In addition, certain obligations were recognized as having been completed (CP 42, ¶2) and the Reciprocal Easement Agreement (“REA Amendment”) provision was modified. (CP 42, ¶4)

C. Obtaining an amendment to the REA was a key responsibility of the seller, Kimschott

At the heart of this dispute are the actions of the parties to complete the REA Amendment incorporated in Paragraph 6.3 of the initial

purchase and sale agreement (CP 21), and modified in Paragraph 4 of the First Amendment to the Purchase and Sale Agreement. (CP 42)³

Securing approval of the REA Amendment was a fundamental responsibility of the seller, Kimschott. “Seller shall use commercially reasonable efforts to cause the other owners of a portion of the Project or other property subject to the REA Amendment (and any other lenders or other parties whose consent may be required) to finalize an amendment to the REA Amendment (the ‘REA Amendment’) in form approved by Buyer, such approval not to be unreasonably withheld, conditioned or delayed, releasing the Property from the REA Amendment and permitting multifamily housing on the Property.” (CP 21, ¶6.3; Exhibit A)

D. Signatures on the REA Amendment were on file in escrow

As part of the First Amendment to the Purchase and Sale Agreement (“First Amendment”), FF Realty agreed to both (1) waive the benefit of the Review Period and (2) approve the form of Amendment No. 7 to the Reciprocal Easement Agreement. (CP 42; Exhibit A)

The signatories to the REA Amendment in turn agreed to (1) release the portion of the Factoria Mall to be purchased by FF Realty from the real property subject to the REA (CP 354, ¶2), and (2) waive any

³ For the convenience of the Court, Paragraph 6.3 of the purchase and sale agreement (CP 21) and Paragraph 4 of the first amendment (CP 42) are highlighted and attached as Exhibit A to this brief.

objection to use of the FF Realty parcel for residential purposes. (CP 354, ¶3).

Kimschott was in fact able to secure the notarized signatures of all the necessary signatories.⁴ (CP 353-368) But after the sale failed to close and this lawsuit was filed, it was disclosed that Safeway had issued instructions to Chicago Title, the escrow agent, to hold its signature on REA Amendment No. 7 related to Parcel No. 1 until additional conditions were satisfied involving Target Corporation's approval of changes to a separate REA for Parcel No. 2 (CP 213-214, ¶5) and a separate lease agreement with Kimschott. (CP 216-217) Notably, however, Target Corporation is not listed in the Purchase and Sale Agreement as one of the signatories required to approve Amendment No. 7 to the REA.

E. On Kimschott's assurances, FF Realty made a non-refundable loan commitment payment

On the basis of assurances from Kimschott that closing would occur in September 2008, FF Realty invested over \$750,000 in non-refundable construction loan guarantee with its anticipated lender.

⁴ The necessary signatures are listed in the first paragraph of Amendment No. 7 (CP 353) and were received from, Kimschott (CP 355), Thrifty Payless, Inc., (CP 357), Safeway, Inc. (CP 358), Washington Mutual Bank (CP 356), and Factoria Properties LLC (CP 359). In addition, Amendment No. 7 was also signed by Massachusetts Mutual Life Insurance Company – the holder of a deed of trust recorded in 2005 (CP 360).

(CP 448, ¶20)⁵ The records of the escrow agent, Chicago Title confirm that investment. Chicago Title shows that FF Realty deposited \$850,000 into escrow on September 9, 2008, for a non-refundable loan commitment fee of \$775,098 and other loan related expenses. (CP 415) In addition, FF Realty had worked on the project for years, investing more than \$4,000,000 in pre-development costs. (CP 445, ¶3.)

F. Kimschott then secretly withdrew its own signatures from escrow

On the FF Realty side of the transaction, elements for closing by the end of September were put in place, but on the other side of the transaction, Kimschott engaged in covert manipulation of the escrowed documents.

On September 18, 2008, the attorneys for Kimschott sent an e-mail to the Chicago Title escrow officers instructing Chicago Title to (1) hold all Kimschott signature pages and (2) refrain from disclosing the request from any other parties: (CP 411)⁶

“Just so you know, we expect that we will ultimately close this escrow but our client has asked us to hold his signature pages until we are ready to do so. We hereby request that you regard this

⁵ Declaration of Mark Faulkner.

⁶ A copy of the e-mail string between Kimschott’s attorney and Chicago Title of September 18 and September 19 is attached and highlighted for the convenience of the Court as Exhibit B.

request as confidential and that you do not disclose this request/
action to the other parties.” [Emphasis added.]

Kimschott continued to hide its unilateral and secret withdrawal of signatures from FF Realty. A week later, in an e-mail letter from Bill Brown of Kimschott to Mark Faulkner of FF Realty, Kimschott informed FF Realty that the purchase might not close until mid-October. (CP 452)⁷ In this letter Kimschott informed FF Realty that the deal is being held up by Kimschott because of a concern for the overall “Investment Return” for Kimschott and a need to record Amendment 8 to the REA. But nowhere is reference to either Kimschott’s “Investment Return” or to Amendment No. 8 to be found in the Purchase and Sale Agreement between Kimschott and FF Realty. Nor is there reference to any approval required by Target.

While notifying FF Realty that it had its own, newly labeled “Investment Return” concerns, Kimschott requested that “all stakeholders maintain their signatures in escrow as currently submitted.” But while making this request of “all stakeholders,” Kimschott failed to disclose that Kimschott itself had covertly confirmed that its signature had been removed upon its secret instructions of the week before. (CP 413).

⁷ A copy of this letter (CP 452) is attached for the convenience of the Court as Exhibit C.

G. FF Realty received direct assurances from Target that it was not standing in the way of the FF Realty closing, but Kimschott apparently did nothing further to secure approval

In response to Kimschott's reference to its "Investment Return" and its reliance on Target's reported "due diligence" (CP 452), FF Realty contacted Target directly. (CP 249) Mark Faulkner's e-mail to Bill Brown of September 30, 2008, advises Kimschott that Target's representative, Greg Struve, had made it clear to FF Realty that Target was not opposed to the FF Realty closing and that he wanted to know how he could help get FF Realty's deal closed. (CP 454)

In response to that overture from Target to close the FF Realty deal, Kimschott apparently did nothing. There is no evidence in the record to show that Kimschott took an active role with either Target or Safeway to secure approval of REA Amendment No. 7, as it was required to do so under the Purchase and Sale Agreement. In fact, Kimschott appeared to support inaction by stating on September 24 that "Kimschott supports Target's due diligence." (CP 452; Exhibit C). On October 3, Kimschott's attorney informed the escrow agent that "my understanding is that the conditions to closing are not satisfied yet." (CP 252) But again there is no evidence that Kimschott took an active role in trying to secure approval of REA Amendment No. 7.

H. FF Realty was still intent on closing and waived any remaining rights related to site preparation

Despite the loss of its construction loan commitment and the loss of its non-refundable deposit of \$775,000, FF Realty was still intent on closing the transaction. FF Realty's lawyer sent notice to Kimschott on October 9, 2008, that it would perform all conditions required of it under the Purchase and Sale Agreement and close the transaction by October 31, 2008. (CP 95)⁸ The notice to Kimschott specifically waived FF Realty's rights to Kimschott's site preparation obligations under both Sections 6.2 (CP 21) and 7.4.3 (CP 23) of the Purchase and Sale Agreement.

Despite the loss of its loan deposit, FF Realty had every reason to go forward with the closing, as it had worked on the project for years, investing more than \$4,000,000 in pre-development costs. (CP 445, ¶3.) And, in fact, FF Realty was ready, willing and able to close the purchase without the construction loan in place. (CP 448, ¶¶20-21)

I. Kimschott responded more than a week later claiming a lapse of time

Eight days later, on October 17, Kimschott responded, stating that the REA Amendment "appears" not to have been completed. (CP 97-98)⁹ This was a surprise to FF Realty, as, prior to this, Kimschott repeatedly assured FF Realty that the deal would close. We now know that

⁸ Attached as Exhibit D for the convenience of the Court.

⁹ Attached as Exhibit E for the convenience of the Court.

Kimschott concealed and misrepresented multiple material facts, including that Kimschott secretly pulled its own signature out of escrow because it did not want the transaction to close on time. (CP 411; Exhibit B)

Moreover, this passive statement about lack of completion makes no mention of any active effort Kimschott has made or is making to secure approval of REA Amendment No. 7.

After informing FF Realty that the REA Amendment did not “appear” to have been approved, Kimschott then claimed to rely on a provision in the First Amendment to the Purchase and Sale Agreement to state that the Purchase and Sale Agreement would simply lapse at the end of October. Kimschott asserted that FF Realty had failed to give notice to terminate the agreement and receive \$200,000 return of expenses or extend the closing until 15 days following completion of the REA Amendment. (CP 97) And, despite concealing that Kimschott rescinded its approval of the REA Amendment by removing and continuing to hide its own signature of approval, Kimschott asserted that without a completed REA Amendment by October 31, the Purchase and Sale Agreement will terminate. (CP 98)

J. FF Realty pointed out the REA Amendment had in fact been signed and delivered and demanded to close the transaction

FF Realty responded to Kimschott's letter on October 23. (CP 100-CP 101)¹⁰ At this point, after checking with Chicago Title in response to Kimschott's statement that it "appears" that the REA Amendment had not been completed, FF Realty finally understood that it was Kimschott that had attempted to rescind its own REA Amendment approval. "We were able to confirm through Mr. Smouse that all signatures required to finalize the REA Amendment were tendered by Seller in escrow, until recently, when Seller demanded the return of its signature pages." (CP 100, ¶3) This information came from Mr. Smouse at Chicago Title through Michael Kuntz, the lawyer for FF Realty identified as a recipient of all notices under the Purchase and Sale Agreement. (CP 29) "Mr. Kuntz called Mr. Smouse to ask about the REA. Mr. Smouse told Mr. Kuntz that seller had delivered to escrow the final and recordable REA, with all necessary signatures, but had returned the Defendant's signed originals to Defendant at its request." (CP 202)¹¹

It was also not disclosed to FF Realty before or at this time that Safeway had conditioned release of its signature on a separate transaction

¹⁰ Attached as Exhibit F for the convenience of the Court.

¹¹ FF Realty LLC's Responses to Defendant's First Discovery Requests to Plaintiff at 7.

with Kimschott as well as a separate transaction with Target. (CP 216-217)

FF Realty then pointed out that the completion of the REA Amendment as described in the Purchase and Sale Agreement had been accomplished when the REA Amendment in the form approved by FF Realty in the First Amendment had been signed and delivered to escrow by Kimschott. (CP 101) Therefore, no official call upon the options provided under Section 4 of the Purchase and Sale Agreement was required. (CP 101, ¶3) In closing, FF Realty asked for a response before being required to seek specific performance under the contract.

K. Kimschott responded with a blanket rejection

On October 31, 2008, Kimschott responded to FF Realty, but with a letter of rejection. (CP 103-CP 104)¹² Kimschott rebuffed FF Realty's request to close, asserting that (1) no extension of time was requested and none would be offered; (2) the REA Amendment did not come together by September 30; (3) FF Realty was required by Section 4.b to choose to terminate the Purchase and Sale Agreement within five days of September 30; (4) the Purchase and Sale Agreement automatically terminates on its "Outside Closing Date;" and (5) FF Realty couldn't perform in any case, because it didn't have the money. (CP 103)

¹² Attached as Exhibit G for the convenience of the Court.

IV. ARGUMENT

A. Summary

Each of the five assertions in Kimschott's rejection letter of October 31, 2008 noted immediately above are disputed assertions of material fact that should have been viewed in the light most favorable to the non-moving party - FF Realty - and therefore reserved for trial. The trial court never should have granted summary judgment when there are these and other material facts in dispute about Kimschott's obligation to act in good faith and in accord with the specific terms of the contract.

Kimschott provided no evidence that it took any kind of affirmative action to secure Safeway's agreement to release its signature from escrow, nor did Kimschott provide any evidence that it followed up on Target's expressed willingness to help close the FF Realty purchase. Moreover, Kimschott's covert withdrawal of its own signature of approval of the REA Amendment is itself *per se* evidence of Kimschott's lack of commercially reasonable efforts and its lack of good faith. Indeed, Kimschott offered no testimony from any percipient witnesses, relying entirely on a few documents and a non-substantive attorney declaration.

Furthermore, there has been no evidence presented at the trial court to substantiate Kimschott's unfounded claim that FF Realty could not have produced the funds necessary to meet the agreed upon purchase price at

closing. The trial court's order on summary judgment should be reversed, and the case sent back for trial on the merits.

B. The standard of review is de novo and all material facts and inferences must be considered in favor of the non-moving party

The standard of review on appeal of a summary judgment ruling is de novo, even when the trial court has provided an explanation of its ruling. *Ellis v. City of Seattle*, 142 Wash.2d 450, 458 13 P.3d 1065 (2000) (reversing the Court of Appeals' and the trial court's summary judgment ruling in favor of the City on the issue of wrongful discharge). But here there is no explanation of the trial court's ruling to even reference. There is no verbatim transcript of the summary judgment argument on March 27, 2009, and the trial court gave no explanation whatsoever as to its reasoning. The trial court neither ruled from the bench, nor provided any reasoning to explain its later, pro forma, written order granting summary judgment in favor of Kimschott. (CP 466-467) Similarly, the trial court provided no explanation for its order of April 14, 2009, denying FF Realty's motion for reconsideration. (CP 528)

This Court recently reiterated the standard of review on summary judgment in *Momah v. Bharti*, 144 Wn. App. 731, 739, 182 P.3d 455 (2008) (reversing the trial court's order on summary judgment in favor of defendant lawyer in a defamation action and remanding for trial). "When

reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court.” *Thompson v. Peninsula School District*, 77 Wn. App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Civil Rule (CR) 56(c). The moving party bears this burden of proof. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). ‘A material fact is one upon which the outcome of the litigation depends.’ *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment. *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). All facts and inferences are considered in the light most favorable to the nonmoving party. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 565 P.2d 1224 (1977).

C. In reliance on Kimschott’s assurances, FF Realty paid and then was forced to forfeit a \$775,000 non-refundable construction loan commitment and now is threatened with forfeiture of its \$4 million development investment

In August 2008, Kimschott assured FF Realty that it would close the transaction by the end of September and that the deal was on track. (CP448, ¶20) In reliance on those assurances, FF Realty not only waived its unilateral review period and agreed on the form of the REA

Amendment No. 7 (CP 42, ¶4.b), but it paid a \$775,000 non-refundable deposit on a \$70 million construction loan. (CP 448, ¶20)

Kimschott of course knew that FF Realty's loan fee was in peril, (CP 252), but through its covert withdrawal of its own signatures; its protection of its own "Investment Return"; and its passivity with respect to Safeway's approval, Kimschott knowingly let FF Realty's non-refundable loan period lapse.

But even with the apparent loss of its loan commitment fee, FF Realty did not waiver on its side of the Purchase and Sale Agreement obligations. FF Realty directly communicated its determination to go forward with the transaction. (CP 95) And even when FF Realty assured Kimschott that it truly and categorically waived all site preparation requirements that Kimschott had not undertaken (CP 101), Kimschott reneged on its obligations under the Purchase and Sale Agreement. Kimschott continued in its refusal to return its signatures to escrow, continued to protect its "Investment Return" with respect to a third party transaction outside the Purchase and Sale Agreement, and continued its refusal to use commercially reasonable efforts to obtain Safeway's approval. As a consequence, Kimschott put FF Realty in a position where it was threatened with forfeiture of not only its non-refundable loan

commitment fee of \$775,000, but its \$4,000,000 investment in preparing the property for development. (CP 445, ¶3)

D. Forfeiture is never a favored outcome

“[F]orfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Hyrkas v. Knight*, 64 Wn.2d 733, 734, 393 P.2d 943 (1964) (quoting *State ex rel. Foley v. Superior Court*, 57 Wn.2d 571, 574, 358 P.2d 550 (1961)). “In order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement thereof, the courts have frequently granted a ‘period of grace’ to a purchaser before a forfeiture will be decreed.” *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 783, 215 P.2d 425 (1950); *see also Dill v. Zielke*, 26 Wn.2d 246, 252-53, 173 P.2d 977 (1946). Whether a grace period is warranted depends on the equities in each particular case. *Moeller*, 35 Wn.2d at 783, 215 P.2d 425. *Pardee v. Jolly* 163 Wn.2d 558, 574, 182 P.3d 967, 976 (2008).

In fact, until Kimschott actively withdrew its own signatures from escrow on September 18, 2008 (CP 411, Exhibit B) to prevent any closing, FF Realty had demonstrated a pattern of providing grace periods and repeatedly extending the closing dates, chiefly because Kimschott was the reason for the delays. (CP 446, ¶4) Yet when it came time for reciprocal action in October 2008, Kimschott abruptly refused to perform under the

Purchase and Sale Agreement and declared that FF Realty had forfeited its rights. (CP 103) The equities here are not with Kimschott.

E. Kimschott, and the trial court, disregarded FF Realty's automatic right to extend until 15 days after the completion of the REA Amendment

The gravamen of Kimschott's motion, and presumably the Court's ruling, was that the contract would automatically terminate on October 31, 2008 if Kimschott failed to fulfill its obligation to obtain a recordable REA Amendment. What this argument overlooks is that Section 4.b of the First Amendment specifically provides that, if Kimschott fails to timely obtain the REA Amendment, then FF Realty may receive a refund of up to \$200,000 or extend the closing until 15 days after completion of the REA Amendment. Importantly, the First Amendment does not require that official notice be given to extend the closing until the REA Amendment is completed. Nor could FF Realty have been expected to give notice when Kimschott concealed and misrepresented material facts. Section 4.b of the First Amendment itself provided for an automatic extension if the buyer did not officially terminate the transaction within 5 business days. It was a choice to give notice of termination within 5 business days or to just extend.

As Mark Faulkner, who negotiated the First Amendment for FF Realty testified in his declaration: "We amended the original "Outside

Closing Date” in the PSA to October 31, 2008, but also provided that closing could be extended to 15 days beyond satisfaction of the REA Amendment.” (CP 446, ¶6) “[T]o the extent that the REA Amendment took longer than expected the automatic 15-day extension beyond closing to address this issue would extend closing until the REA Amendment was satisfied.” (CP 447, ¶11; emphasis added) Kimschott did not offer any evidence whatsoever disputing Mr. Faulkner’s testimony concerning the parties’ intent when they executed the First Amendment.

Moreover, while Section 5 of the First Amendment (CP 43) has a heading of “Outside Closing Date,” that is only a heading, and is not defined in the Amendment in any way that would make it a “drop dead” closing date. Further, the text of Section 5 provides that the closing will be on October 31, but modifies that closing date by providing that “In any event, Closing shall be subject to the satisfaction or waiver of the conditions set forth in Article 7.4 of the purchase agreement.” And Article 7.4.1 required Kimschott to deliver a recordable REA Amendment. (CP 23)

If Section 4.b did not extend the October 31, 2008 closing date, then what was it referring to? That was the only “Closing Date” set forth in the First Amendment. Indeed, to accept Kimschott’s and the trial court’s interpretation that the “outside closing date” was a hard and fast

“drop-dead” date would render the language in Section 4.b extending the closing date absolutely meaningless. It is axiomatic that “[a]n interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279, (1980). Accordingly, the trial court erred in ruling that the Agreement automatically terminated on October 31, 2008.

At the very least, the court erred in not finding that the contract was ambiguous. Where a contract is ambiguous and there is a genuine factual issue as to its meaning, summary judgment should be denied. *Peoples Mort. Co. v. Vista View Builders*, 6 Wn. App. 744, 750 496 P.2d 354 (1972) (citations omitted). See also *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 495, 116 P.3d 409 (2005) (“Because more than one reasonable interpretation [of the contract] is possible here, the trial court erred when it granted the County’s motion for summary judgment”); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003) (“[S]ummary judgment is proper if the parties’ written contract, viewed in light of the parties’ other objective manifestations, has only one reasonable meaning.”) (Citations omitted).

F. It was Kimschott's affirmative responsibility to obtain the REA Amendment

In its motion for summary judgment, Kimschott argued that the contract obligation to secure the REA Amendment was not satisfied because Safeway never gave its authorization to record its signature to the amendment. What Kimschott, and the trial court, failed to recognize, however, was that the Agreement expressly provided that it was Kimschott's responsibility, and its alone, to use “reasonable commercial efforts” to secure an amendment to the Reciprocal Easement Agreement in a form approved by FF Realty. (CP 21, ¶6.3)

Whether a person breached a duty – here Kimschott's contractual duty to use “commercially reasonable efforts” to obtain the REA Amendment – is usually a question of fact, to be decided by a jury, unless reasonable minds could not differ on the issue. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Ebey Shingle Co. v. Snohomish River Boom Co.*, 73 Wn. 52, 131 P. 466 (1913) (the question of the reasonableness of the efforts made by respondents to [deliver materials] and also the question of the extent of the efforts ... were questions for the jury.). In the UCC context,¹³ whether efforts are

¹³ The UCC does not apply directly to real estate transactions but a court may apply it by analogy if that will improve existing law or fill in gaps where there is no law. *Olmsted v. Mulder*, 72 Wn. App. 169, 178, 863

“commercially reasonable” is almost always a question of fact. “[T]he issue of commercial reasonableness is a question of fact to be determined by the trier of fact.” *Mount Vernon Dodge, Inc. v. Seattle-First Nat’l Bank*, 18 Wn. App. 569, 587, 570 P.2d 702 (1977) (citing cases); *see also, Service Chevrolet, Inc. v. Sparks*, 99 Wn.2d 199, 204-05, 660 P.2d 760 (1983) (“Such traditionally factual questions should be determined as a matter of law only in the ‘clearest of cases’”) (*citing Browning v. Ward*, 70 Wn.2d 45, 48, 422 P.2d 12 (1966)); *Timms v. James*, 28 Wn. App. 76, 79, 80, 621 P.2d 798 (1980). And again, there is no evidence in the record showing Kimschott used commercially reasonable efforts to obtain the REA Amendment. So, how could the trial court have concluded that there was no issue of fact that Kimschott satisfied its contractual obligations?

1. Kimschott cannot use its failure to perform as a defense to specific performance

Case law in Washington holds that a Seller cannot avoid specific performance simply by failing to perform conditions precedent until time runs out. *Egbert v. Way*, 15 Wn. App. 76, 546 P.2d 1246 (1976) In *Egbert*, the defendant Way had a contractual obligation under the purchase and sale agreement to clear a flaw in the title (clearing Washington State

P.2d 1355 (1993) (citing 1 Washington State Bar Ass’n, Commercial Law Deskbook 3.2(3), at 3-4 to 3-5 (1987)), *rev. den.*, 123 Wn. 2d 1025, 875 P.2d 635 (1994).

Inheritance and Federal Estate Tax liens) to her deceased husband's interest in the property within one year. The Court of Appeals reversed an award of only damages to Egbert, and allowed for specific performance. The Court noted that "Though the time for performance has expired under the Offer to Purchase, Mrs. Way should not be excused from further performance when she failed to exercise good faith in performance of the condition precedent." *Egbert v. Way*, 15 Wn. App. at 81-82.

Here, Kimschott demonstrated a similar lack of diligence, if not outright hostile efforts, in following through with good faith to secure approval of REA Amendment No. 7, when it informed FF Realty that Kimschott was not only putting any effort to secure that approval on hold, but that Kimschott affirmatively "supports Targets [sic.] due diligence action". (CP 452, Exhibit C) As in *Egbert v. Way*, Kimschott's attempt to use its own bad faith and lack of diligence as an excuse to let the time for performance lapse, warrants specific performance.

The Court of Appeals reached the same result and ordered specific performance for lack of diligence in *Langston v. Huffacker*, 36 Wn. App. 779, 678 P.2d 1265 (1984). In *Langston*, the Court reversed the judgment of the trial court and found that title to the property could have been cleared through reasonable diligence on the part of the seller who tried to claim that it was the real estate agent's fault that the transaction had not

closed by the termination date and thus had the effect of terminating the purchase and sale contract. “Both Huffacker’s argument here and the trial court’s conclusion below are incorrect because Huffacker had a legal duty to timely clear the title if it could be done by the exercise of reasonable diligence.” *Langston v. Huffacker*, 36 Wn. App. at 788, citing *Kolosoff v. Turri*, 27 Wn.2d 81, 176 P.2d 439 (1947) and *Hudesman v. Foley*, 4 Wn. App. 230, 480 P.2d 534 (1971). Relying also on *Egbert v. Way*, discussed above, the *Langston* Court held that since the failure to meet the time limit for closing was the result of seller’s lack of diligence, the purchasers were entitled to specific performance. 36 Wn. App. at 789.

Of course, at this juncture, this Court need not determine whether Kimschott did or did not use reasonable efforts to secure a finalized, recordable amendment to the REA. What is important is that Kimschott offered no evidence in support of its motion for summary judgment showing that it used reasonable efforts to obtain the amendment to the REA. As a result, Kimschott did not meet its burden, and whether it used reasonable efforts is a material issue to be decided after a trial on the merits.

2. The inferences from Kimschott's inaction must be made in favor of FF Realty

Whether Kimschott exercised a good faith effort or not will depend on the proof ultimately submitted at trial, but certainly the inference from a failure to accomplish this crucial obligation is that those efforts were not expended. This Court recently endorsed the definition of good faith in Black's Law Dictionary as "a state of mind consisting in (1) honesty of belief in purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *Morris v. Swedish Health Services*, 148 Wn. App. 771, 777-78, 200 P.3d 261 (2009) (overruling summary judgment ruling and remanding for trial on the merits based on plaintiff's apparent reasonable good faith in filing only one certificate of merit rather than two asserting that defendants did not meet reasonable care and the resultant tolling of the statute of limitations). But as the *Morris* Court pointed out, "good faith is usually a question of fact," although "it may be resolved on summary judgment where no reasonable minds could differ on the question." *Morris v. Swedish Health Services*, 148 Wn. App. at 778, citing *Marthaller v. King County Hosp. Dist. No. 2*, 94, Wn. App. 911, 916, 973 P.2d 1098 (1999).

Here, the question is whether Kimschott made the required commercially reasonable efforts to secure the REA Amendment from Safeway. Unlike the situation in *Morris*, it was impossible for the trial court to conclude that no reasonable minds could differ on this question because Kimschott put no evidence in the record to support its position.

Kimschott argued to the trial court that it was Safeway that refused to authorize recording its signature on REA Amendment No. 7. (CP 458) Kimschott provides no evidence that it tried in anyway to secure Safeway's approval once it learned that the issues with Target posed a problem with recording Safeway's signature to the Amended REA. Indeed there is no evidence in the record that Kimschott did anything at all to attempt to secure the final approval of REA Amendment No. 7, despite the report from FF Realty that Target itself was actively willing to support closing FF Realty's separate transaction. (CP 454) No court should be able to find from this sequence of events with regard to Safeway's approval and Kimschott's inaction, that "all inferences were considered in the light most favorable" to the plaintiff, FF Realty, so that "no reasonable minds could differ on the question" of Kimschott's "commercially reasonable effort" to secure final agreement on REA Amendment No. 7. By these facts alone, therefore, summary judgment was inappropriately granted to Kimschott.

3. Further, it was error not to allow FF Realty to conduct additional discovery on these disputed issues

Given the absence of any credible evidence showing that Kimschott made any efforts - much less commercially reasonable efforts - to secure agreement from Safeway's approval of the REA Amendment, it was also error for the trial court to refuse FF Realty's request to at least conduct additional discovery on that issue before ruling in Kimschott's favor. FF Realty appealed to the trial court for time to conduct additional discovery (CP 439-440), but its request was ignored without comment by the trial court.

Civil Rule 56(f) is to be applied with a spirit of liberality. When the trial court has been shown good cause, the Court has a duty to accord the parties reasonable opportunity to make their record complete before ruling on the motion. *Cogle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990); emphasis added. Continuances should particularly be granted when the continuance would not result in further delay of the trial. *Cofer v. Pierce County*, 8 Wn. App. 258, 505 P.2d 476 (1973). Here, the discovery cutoff was months away. (CP 440, l. 22)

G. Kimschott not only ignored the fact that it had an affirmative contractual duty to secure the REA Amendment but actively undermined its approval

The record shows that Kimschott not only passively supported Target's "due diligence" delay, but that Kimschott actively blocked the

closing. Its own purposes are revealed in its e-mail letter of September 24. There Kimschott stated that it had other concerns outside its obligations under the Purchase and Sale Agreement:

“. . . As we have previously discussed, this effort must be and has been a collective effort of all to insure success for each parties [sic.] business planning. With respect to the overall Investment Return for Kimschott, the economics require concurrent documentation, recordation and execution of all stakeholder programs. . .”

(CP 452; Exhibit C; emphasis added; upper-case used in the original)

It was thus Kimschott’s own “Investment Return,” not its contractual obligations, that drove its actions to actively undermine approval of the REA Amendment. Indeed, Kimschott’s duplicity with respect to its contractual obligations is further exposed in its September 24 e-mail when Kimschott’s representative asks that everyone keep their documents in escrow pending the expected closing:

“In the meantime my request (hope) is that all stakeholders maintain their documents in escrow as currently submitted in an effort to close the concurrent transactions by mid October.”

(CP 452; Exhibit C; emphasis added)

This overture to FF Realty and other stakeholders was made nearly a week after a critical stakeholder – Kimschott itself - had surreptitiously removed its own signature from escrow. Thus, not only had Kimschott already abandoned its own “hope,” it was deliberately misleading FF Realty about its true actions.

The only inference from Kimschott’s secret removal of its own signatures on the REA Amendment –minimally the inference that is most favorable to the non-moving party - is that Kimschott actively worked against securing approval of the REA Amendment in order to protect its own, separate economic interests that it decided were not otherwise protected in the Purchase and Sale Agreement with FF Realty.

Kimschott’s actions in this case are parallel to the actions of U.S. Eagle in *Nishikawa v. U.S. Eagle High, LLC*, 128 Wn. App. 841, 158 P.3d 1265 (2007). There U.S. Eagle, the seller, attempted to repudiate the real estate transaction with Nishikawa, because it belatedly decided it wanted an environmental indemnity clause in the purchase and sale agreement. 128 Wn. App at 844. The way U.S. Eagle sought to renegotiate the deal was to attempt to revoke its previous authorization to the real estate agent to insert the property description in the purchase and sale agreement. In response Nishikawa sued for specific performance. *Id.* But the Court of Appeals rejected U.S. Eagle’s unilateral attempt to

change the deal and held that “when it signed the purchase and sale agreement, U.S. Eagle contracted away its right to revoke the dual agent’s authority to attach the legal description and summary judgment to U.S. Eagle was therefore erroneous.” 138 Wn. App. at 848.

Similarly in this case, when Kimschott (a) agreed to secure approval of the REA Amendment from other parties as part of the Purchase and Sale Agreement (CP 21, ¶6.3); when (b) FF Realty later waived its Review Period (CP 42, ¶4.a) and (c) agreed to the exact form of “Amendment No. 7 to Reciprocal Easement Agreement” (CP 42, ¶4.b); and when (d) Kimschott in turn reiterated its obligations to secure approval of REA Amendment No. 7 from others (CP 42; ¶4.b), Kimschott contracted away any right to revoke its own approval of REA Amendment No. 7.

The Court’s ruling in *Nishikawa* against the self serving arguments of U.S. Eagle did not result in summary judgment for Nishikawa. Instead, the Court sent the case back for trial, and dissolved the attorney fee award pending trial pointing out that while the waiver of a right to revoke its authorization to add the property description was clear, there were other factual issues, and “The trial court could properly grant summary judgment to the Nishikawas only after allowing U.S. Eagle to present evidence that material facts were in dispute.” 138 Wn. App. at 852, citing

Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In this case, the Court of Appeals should likewise reverse the unwarranted summary judgment ruling of the trial court in favor of Kimschott, dissolve the attorney fee award, and send the case back for trial.

H. Every contract requires a duty of good faith

The Washington Supreme Court has often reiterated the core principle that all contracts contain an implied covenant of good faith. *In re Matter of Hollingsworth's Estate*, 88 Wn.2d 322, 329, 560 P.2d 348 (1977), citing *Miller v. Othello Packers Inc.*, 67 Wn.2d 844, 410 P.2d 33 (1966). The *Hollingsworth* court also cited *Restatement (Second) of Contracts § 231*, revised and edited, § 205 *cmt. d.*, which calls specific attention to subterfuge as a per se mark of bad faith:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. (Emphasis added.)

Kimschott's subterfuge in secretly removing its own signatures from escrow and otherwise supporting a third party's effort to block the

closing of FF Realty's transaction thus violated the underlying standard of good faith and fair dealing that is an implied covenant for all contracts in Washington. Minimally, it is compelling proof of Kimschott's lack of "commercially reasonable" efforts.

I. Specific performance is a remedy expressly provided in the Purchase and Sale Agreement

What is without question in the Purchase and Sale Agreement is the specifically negotiated right of FF Realty to sue for specific performance. Section 18.2 of the Agreement reads in part as follows:

"18.2 Default by Seller. If Seller fails without legal excuse to complete the sale of the Property in accordance with the terms of this Agreement, Buyer may elect one of the following remedies: (a) specific performance of this Agreement (provided an action thereon is commenced within sixty (60) days following Seller's failure to perform);"

(CP 28)

FF Realty sought that specified remedy against the Seller, Kimschott, within four days of when Kimschott sent its final notice of repudiation to FF Realty. FF took action to enforce a remedy explicitly provided by the Purchase and Sale Agreement. Kimschott had failed without legal excuse to use commercially reasonable efforts to provide

final approval of the REA Amendment when it actively sabotaged that REA Amendment by surreptitiously removing its own approval of the REA Amendment from escrow. Kimschott apparently took these actions for its own economic interests, separate from the negotiated terms of the Purchase and Sale Agreement with FF Realty, and despite being informed by FF Realty that Target had no objection to going forward with FF Realty's purchase of Parcel No. 1. (CP 447-448, ¶¶14-17)

The Court of Appeals in both *Langston* and *Egbert* upheld the right of specific performance against sellers who attempted to use the passage of a closing date to escape their obligations under a purchase and sale agreement, without any indication there had been contractual provisions allowing for that remedy. Surely here, where specific performance is an explicit contract remedy available to FF Realty against Kimschott, the trial court should have not granted summary judgment.

J. FF was, at all times, ready, willing and able to close on the transaction

Kimschott ended its last letter of repudiation to FF Realty by saying, "Kimschott has also been informed that your client may be financially unable to close this transaction, even if the REA Amendment issues had all been resolved." (CP 103) Yet nowhere in the summary judgment proceedings did Kimschott ever produce evidence to back up

that unsubstantiated assertion, even though it relied on it in part to reject FF Realty's demand that the transaction go forward to closing.

On the other hand, FF Realty did provide evidence in the record to refute that assertion. In his declaration, Mark Faulkner, FF Realty's representative, stated "To be clear, FF Realty had the funds necessary to close on the purchase of the Property, even though Kimschott's delays and efforts to avoid selling us the Property had caused the lender to revoke its commitment for the construction loan on October 6th." (CP 448, ¶20)

Where duties are concurrent, neither party can place the other in breach for failure to perform without a tender of its own performance. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986); *see also Monroe St. Properties, Inc. v. Carpenter*, 407 F.2d 379, 380-381 (9th Cir. 1969). Here, Kimschott had a duty to deliver the REA Amendment to escrow in recordable form. Upon meeting the conditions to close, FF Realty had an obligation to tender its performance, *i.e.* pay the purchase price. And FF Realty was ready, willing and able to perform, and gave notice of that to Kimschott. (CP 448-449, ¶¶21-22)

Accordingly, Kimschott's assertion that FF Realty was unable to pay the purchase price at closing as a reason for Kimschott's refusal to perform fails as a matter of contract law. Because Kimschott failed to perform, it cannot assert that FF Realty would have been in breach of the

Purchase and Sale Agreement. In fact, had FF Realty attempted to unilaterally condition closing on obtaining a construction loan it would have failed. Just as Kimschott's separate deals with Target and Safeway were not part of the Purchase and Sale Agreement, FF Realty's construction loan was not a condition of that Agreement.

V. CONCLUSION

For the reasons set forth above, the trial court never should have granted summary judgment to Kimschott on these disputed, material facts. This Court should therefore reverse the order on summary judgment, together with the associated attorney fee award, and send the case back for trial on the merits.

RESPECTFULLY SUBMITTED this 10th day of July, 2009.

FOSTER PEPPER PLLC



Bradley P. Thoreson, WSBA No. 18190
William H. Patton, WSBA No. 5771
Attorneys for Appellants

EXHIBIT A

Buyer, and the parties shall have no further rights or obligations under this Agreement except for obligations that expressly survive the termination of this Agreement.

In the event the Land Division has not been approved by September 28, 2007 ("Land Division Date"), Buyer may at Buyer's option and upon notice to Seller given within five (5) business days after the Land Division Date, terminate this Agreement (in which case all rights to acquire the Property will be terminated) and obtain a refund of the Earnest Money and reimbursement from Seller of Buyer's expenses up to an amount not to exceed Two Hundred Thousand Dollars (\$200,000), or in the alternative Buyer may elect to extend Closing for the Property until fifteen (15) days following the completion of the Land Division. For these purposes, the Land Division shall be deemed approved when the work required to be completed to effect the Land Division has been completed by Seller and accepted and approved by the agencies with jurisdiction (or bonded over in a manner acceptable to such agencies). In the event that the Land Division has been approved by the appropriate governmental agency but an appeal to the approval or to the SEPA determination upon which the approval was based has been filed and is not resolved in a manner reasonably acceptable to Buyer and Seller by the Land Division Date, then Buyer may elect to terminate this Agreement by giving notice of such election to Seller on or before five (5) business days after the Land Division Date (in which case all rights to acquire the Property will be terminated) and obtain a refund of the Earnest Money but shall not be entitled to any reimbursement of expenses.

6.2 Site Preparation Matters. The Purchase Price for the Property is based upon the delivery to Buyer of a "rough grade" pad. For such purposes, a "rough grade" pad means Seller has, at no additional cost to Buyer, rerouted or capped and abandoned the utilities within the Property serving the Project and removed the existing building improvements (but not the parking lot nor any lighting nor utility systems themselves, which Buyer hereby acknowledges will remain in abandoned but AS-IS condition) and disposed of all debris in full compliance with applicable laws and regulations (collectively, the "Site Preparation Requirements"). If the Site Preparation Requirements have not been fulfilled with respect to the Property prior to the Closing, Buyer may at its option upon notice given to Seller at least two (2) days prior to the scheduled Closing, elect to extend the Closing until fifteen (15) days after completion of the Site Preparation Requirements.

6.3 REA Amendment. Buyer and Seller acknowledge that the Property is currently subject to a reciprocal easement agreement (the "REA Agreement") relating to the Property and the Project. On or before the expiration of the Review Period, Seller shall use commercially reasonable efforts to cause the other owners of a portion of the Project or other property subject to the REA Agreement (and any lenders or other parties whose consent may be required) to finalize an amendment to the REA Agreement (the "REA Amendment") in form approved by Buyer, such approval not to be unreasonably withheld, conditioned or delayed, releasing the Property from the REA Agreement and permitting multifamily housing on the Property. In the event the REA Amendment has not been finalized and executed prior to expiration of the Review Period, the Review Period shall be extended until ten (10) days following the finalization and execution of the REA Amendment. The parties hereto acknowledge and agree that the REA Amendment will not be recorded in the official records of the applicable county recorder except in connection with, and at the time of, the Closing of the sale of the Property.

FIRST AMENDMENT
TO
PURCHASE AND SALE AGREEMENT
(Portion of Factoria Square Mall)

This First Amendment (this "Amendment") is made as of the 31st day of August, 2008, by and between FF Realty LLC, a Delaware limited liability company ("Buyer"), and Kimschott Factoria Mall, LLC, a Delaware limited liability company ("Seller"), to amend the Purchase and Sale Agreement between Buyer and Seller dated September 21, 2006 (the "Purchase Agreement"). Capitalized terms not defined in this Agreement shall have the meanings set forth in the Purchase Agreement.

1. Land. The Land shall be that portion of the Project more particularly described in Attachment A hereto. Attachment A replaces Exhibit A of the Purchase Agreement in its entirety. Attachment A-1 hereto is hereby inserted in lieu of Exhibit A-1 to the Purchase Agreement and Attachment A-1 replaces Exhibit A-1 to the Purchase Agreement in its entirety.

2. Land Division. Pursuant to Section 6.1 of the Purchase Agreement, Seller was obligated to complete the Land Division in accordance therewith. The parties agree that Seller met such obligation by recording on November 19, 2007 that certain Boundary Line Adjustment No. 07-11571-LW as Document Number 20071119900006.

3. Purchase Price. The Purchase Price for the Property shall be \$14,315,000.

4. Waiver of Review Period; REA Amendment.

a. By execution of this Amendment, Buyer waives the benefit of the Review Period set forth in Section 5.2 of the Purchase Agreement.

b. Notwithstanding the foregoing, Seller remains obligated to complete the REA Amendment in accordance with the provisions of Section 6.3 of the Purchase Agreement. Buyer hereby approves the form of REA Amendment attached hereto as Attachment C (which REA Amendment is in the form of an "Amendment No. 7 to Reciprocal Easement Agreement"). In the event the REA Amendment has not been completed by September 30, 2008 (the "REA Amendment Date"), Buyer may at Buyer's option and upon notice to Seller given within five (5) business days after the REA Amendment Date, terminate this Agreement (in which case all rights to acquire the Property shall be terminated) and obtain a refund of the Earnest Money and reimbursement from Seller of Buyer's expenses up to an amount not to exceed Two Hundred Thousand Dollars (\$200,000), or, in the alternative, Buyer may elect to extend Closing for the Property until fifteen (15) days following the completion of the REA Amendment.

EXHIBIT B

Smouse, Scott

From: Farrell, Teresa J. [TFarrell@gibsondunn.com]
Sent: Friday, September 19, 2008 8:34 AM
To: Savidis, Daryl; Sheckler, Erin; Barth, Sarah; Smouse, Scott; Campbell, David - Seattle
Cc: Wasser, Lesley V.
Subject: Re: Factoria

AMYL = LES

Any signature pages signed by Bill (William) Brown at Kimscott. You can keep the documents. Thanks.

ES CROW - 10

----- Original Message -----

From: Savidis, Daryl <Daryl.Savidis@ctt.com>
To: Farrell, Teresa J.; Sheckler, Erin <Erin.Sheckler@ctt.com>; Barth, Sarah <Sarah.Barth@ctt.com>; Smouse, Scott <Scott.Smouse@ctt.com>; Campbell, David - Seattle <David.Campbell@ctt.com>
Cc: Wasser, Lesley V.
Sent: Fri Sep 19 08:14:36 2008
Subject: RE: Factoria

Can you give me some idea of just what title documents you are referring to? Dave will be back on Monday and since this deal is in several files on his desk I don't want to risk sending something that should not come back. If you can be very specific I will see what I can do to send the documents out today but if it can wait till Monday Dave will have a better idea I am sure.

Thanks!

Daryl Savidis
Sr. Title Officer/Unit Manager
Commercial Title
Chicago Title Insurance
701 5th Avenue 34th Floor
Seattle, WA 98104
206-628-5610 (phone)
206-628-9717 (fax)

From: Farrell, Teresa J. [mailto:TFarrell@gibsondunn.com]
Sent: Thursday, September 18, 2008 6:41 PM
To: Sheckler, Erin; Barth, Sarah; Savidis, Daryl; Smouse, Scott; Campbell, David - Seattle
Cc: Wasser, Lesley V.
Subject: RE: Factoria

Just so you know, we fully expect that we will ultimately close this escrow but our client has asked us to hold his signature pages until we are ready to do so. We hereby request that you regard this request as confidential and that you do not disclose this request/action to the other parties.

All parties have been informed by our client that there will be a delay in the closing due to issues on Target's side. As always, thank you for your cooperation and assistance.

om: Wasser, Lesley V.

EXHIBIT C

From: Brown, Bill
Sent: Wednesday, September 24, 2008 4:44 PM
To: Mark Faulkner
Subject: Marketplace @ Factoria Redevelopment

Good Afternoon,

Over the past several weeks there has been a tremendous effort to get the Marketplace @ Factoria documentation to the start line for a redevelopment launch. As we have all previously discussed, this effort must be and has been a collective effort of all to insure success for each parties business planning. With respect to the overall Investment Return for Kimschott, the economics require concurrent documentation, recordation and execution of all stakeholder programs. This is especially true with the recording of Amendments 7&8 and the Target Parcel closing.

Yesterday, Target requested additional time to reconfirm its financial model based upon a changing Puget Sound construction market. With local activity at record highs, the costs associated with new projects are increasing dramatically. Target has conveyed its commitment to the Factoria Mall Redevelopment, however was not prepared to execute its closing as planned. Kimschott supports Targets due diligence action and expects that within the next two weeks, Target will confirm its future intent.

In the meantime, my request (hope), is that all stakeholders maintain their documents in escrow as currently submitted in a effort to close the concurrent transactions by mid October. I apologize for the late notice and look forward to executing the work of many over the past three years.

I am available to discuss any questions or concerns at your convenience.

Thank you for your commitment to this effort.

Bill

Bill Brown
Kimco Realty Corporation
3535 Factoria Blvd. Suite 420
Bellevue WA 98006

Cell: 425-864-1106
Office: 425-641-9716
E-fax: 516-336-2171
bbrown@kimcorealty.com

EXHIBIT D



FOSTER PEPPER PLLC

Direct Phone 206-447-3867
Direct Facsimile 206-749-1923
E-Mail thorb@foster.com

October 9, 2008

Ms. Teresa J. Farrell, Esq.
Gibson, Dunn & Crutcher LLP
3161 Michelson Drive
Irvine, CA 92612-4412

Re: FF REALTY LLC/Kimschott Factoria Mall, LLC
Demand for Specific Performance of September 21, 2006 Purchase & Sale Agreement Obligations

Dear Ms. Farrell:

Foster Pepper PLLC represents FF Realty LLC (the "Buyer") with regard to its rights under that certain Purchase and Sale Agreement dated September 21, 2006 and First Amendment to Purchase and Sale Agreement dated August 31, 2008 (collectively the "PSA") with Kimschott Factoria Mall, LLC (the "Seller"). All future communication on this matter should be directed to the undersigned.

Please accept this letter as formal notice that the Buyer has performed, or will perform, all conditions to closing set forth in the PSA on or before October 31, 2008. Please also accept this letter as formal notification that, with respect to the timing of the Seller's Site Preparation Obligations set forth in Section 6.2 of the PSA, the Buyer hereby waives as a condition to close, the requirement referenced in Section 7.4.3 of the PSA. Seller's Site Preparation Obligations under the PSA can be addressed after closing.

By this letter, Buyer makes demand on Seller that it tender all performance required by the PSA to complete Closing by October 31, 2008. Any failure of Seller to perform will constitute a breach of the PSA and will entitle Buyer to bring an action for specific performance in accordance with Section 18.2 of the PSA. Should Seller fail to perform, the specific performance action will be commenced in King County Superior Court on November 1, 2008. The Buyer sincerely hopes that will not be necessary.

Sincerely,

Bradley P. Thoreson

cc: Mark Faulkner
Mike Kuntz
Scott Smouse

TEL: 206.447.4400 FAX: 206.447.9700 1111 THIRD AVENUE, SUITE 3400 SEATTLE, WASHINGTON 98101-3299 WWW.FOSTER.COM

SEATTLE WASHINGTON SPOKANE WASHINGTON PORTLAND OREGON

EXHIBIT E

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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TFarrell@gibsondunn.com

October 17, 2008

Direct Dial
(949) 451-3895Fax No.
(949) 475-4634Client No.
R 50325-00075VIA TELEFAX (206) 447-9700Bradley P. Thoreson, Esq.
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299

Re: *Purchase and Sale Agreement Dated September 21, 2006 between FF Realty LLC ("Buyer") and Kimschott Factoria Mall, LLC ("Seller") as amended by First Amendment to Purchase and Sale Agreement dated August 31, 2008 (collectively, the "Purchase Agreement")*

Dear Mr. Thoreson:

I am writing in response to your letter dated October 9, 2008 with respect to the referenced Purchase Agreement demanding a closing under the Purchase Agreement on or before October 31, 2008. As a preliminary matter, we note that your October 9, 2008 letter contains less than a full waiver by Buyer of the condition to closing defined as "Site Preparation Obligations" in the Purchase Agreement.

However, without waiving any other claims or defenses available to Seller, it appears that another condition to the closing is the fact that the REA Amendment was not completed by the time frame contemplated by Section 4b of the First Amendment to the Purchase Agreement. As a matter of fact, such condition has not been completed to date.

The First Amendment provides that in the event the REA Amendment is not completed by September 30, 2008, Buyer shall either (i) terminate the Purchase Agreement and obtain a refund of the earnest money and reimbursement from Seller of Buyer's expenses in an amount not to exceed \$200,000 or (ii) elect to extend the closing until 15 days following the completion of the REA Amendment. Such notice was to have been given by Buyer to Seller within five business days after September 30, 2008. To date we have not received any such notice from

LOS ANGELES NEW YORK WASHINGTON, D.C. SAN FRANCISCO PALO ALTO LONDON
PARIS MUNICH BRUSSELS DUBAI SINGAPORE ORANGE COUNTY CENTURY CITY DALLAS DENVER

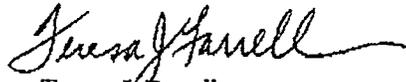
GIBSON, DUNN & CRUTCHER LLP

Bradley P. Thoreson, Esq.
October 17, 2008
Page 2

Buyer. The completion of the REA Amendment is clearly a condition to closing and until it has been satisfied no closing can be accomplished. It is Seller's position that if the condition has not been accomplished by the outside closing date specified in the First Amendment to the Purchase Agreement that, absent modification to the Purchase Agreement by the parties, the Purchase Agreement will terminate.

Please contact me should you wish to discuss this matter further.

Very truly yours,


Teresa J. Farrell

TJF/jc
cc: Bill Brown
Kevin J. Smith, Esq

100539460_1.DOC

EXHIBIT F

October 23, 2008

Teresa J. Farrell, Esq.
Gibson, Dunn & Crutcher LLP
4 Park Plaza
Irvine, CA 92614

Re: FF Reality LLC/Kimschott Factoria Mall LLC:

Response to October 17, 2008 Correspondence

Dear Ms. Farrell:

We received your letter of October 17, 2008, and strongly disagree with its assertions. We suspect that you did not have the pertinent information in your possession prior to drafting and sending the letter, as certain known facts undermine the legal conclusions you reached. Please allow us to fill in the blanks.

The Purchase and Sale Agreement (the "PSA") required the seller to

"use commercially reasonable efforts to cause the other owners of a portion of the Project or other property subject to the REA Agreement (and any lenders or other parties whose consent may be required) to finalize an amendment to the REA Agreement (the "REA Amendment") in form approved by buyer, said approval not to be unreasonably withheld, conditioned or delayed, releasing the property from the REA Agreement and permitting multifamily housing on the property. In the event the REA Amendment has not been finalized and exercised prior to the expiration of the review period, the review period shall extend until ten (10) days following the finalization and execution of the REA Amendment".

See § 6.3 of the PSA (emphasis supplied).

The designated closing agent for this transaction is Chicago Title Insurance Company and its representative, Scott Smouse. See § 3 of the PSA. We were able to confirm through Mr. Smouse that all signatures required to finalize the REA Amendment were tendered by Seller and in escrow, until recently, when Seller demanded the return of its signature pages. Once the fully executed REA Amendment was tendered to escrow by Seller, the § 6.3 and § 7.4 conditions were satisfied.

Teresa J. Farrell, Esq.

October 23, 2008

Page 2

7.4.1 REA Amendment. Seller shall have delivered the recordable REA Amendment in form and substance reasonably acceptable to Buyer and Seller to escrow.

See § 7.4.1 of the PSA (emphasis supplied).

Therefore, as the REA Amendment condition has been met, the only other condition relates to the site preparation requirements set forth in §'s 6.2 and 7.4.3 of the PSA. Please accept this letter as the Buyer's unequivocal waiver the obligations imposed on the Seller by Section 6.2 and 7.4.3 of the PSA. Accordingly, all conditions to closing have been satisfied, other than the performance required at closing.

Section 4 of the First Amendment to Purchase and Sale Agreement has no effect on this analysis, as the final REA Amendment was in fact finalized and delivered to escrow. If you have information suggesting the REA Amendment was not, at some point in time, finalized and delivered to escrow, we would very much like any information you have on this subject.

To conclude, your assertion in the October 17, 2008 correspondence that "the REA Amendment was not completed" is simply incorrect. Given the above, and substantial risk to your client, perhaps its representatives should contact our client and make a proposal before we are required to commence litigation.

Very truly yours,



Bradley P. Thoreson

BPT:ayk

cc: Mark Faulkner
Pat Gavin
Mike Kuntz
Rod Dembowski
Laura Karassik

EXHIBIT G



MILLER NASH
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FAX 206.622.7485

Daniel A. Brown
dan.brown@millernash.com

October 31, 2008

VIA FACSIMILE AND US MAIL

Bradley P. Thoreson
Foster Pepper
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Subject: FF Realty LLC/Kimschott Factoria Mall, LLC ("Kimschott")

Dear Mr. Thoreson:

We represent Kimschott and this letter is in further response to your letter to Ms. Farrell dated October 9, 2008. Regarding the Outside Closing Date as referenced in paragraph 5 of the parties' First Amendment to Purchase and Sale Agreement (the "Amendment"), it is currently fixed as "October 31, 2008" – today. By your letter, we are assuming that your client is not seeking an extension of that deadline, and Kimschott does not offer such an extension.

As the REA Amendment did not come together by September 30, 2008, as contemplated by the parties as a precondition to closing, despite more than commercially reasonable efforts by Kimschott, and because your client did not choose to terminate the Purchase and Sale Agreement within five days of that date pursuant to paragraph 4.b of the Amendment, the Purchase and Sale Agreement automatically terminates as Closing did not occur by the Outside Closing Date. As a result, your client is entitled only to the release and return of its escrow funds. Kimschott has also been informed that your client may be financially unable to close on this transaction, even if the REA Amendment issues had all been resolved. Accordingly, by copy of this letter to the escrow company, Kimschott hereby authorizes such funds to be released as of tomorrow as your client further directs.

SEADOCS:364240.1



MILLER NASH^{LLP}
ATTORNEYS AT LAW

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CENTRAL OREGON
WWW.MILLERNASH.COM

Bradley P. Thoreson
October 31, 2008
Page 2

It is unfortunate that this deal could not come together and Kimschott wishes your client the best in future endeavors. Despite your threat of legal action as set forth in your October 9th letter, Kimschott does not believe FF Realty LLC can legitimately and in good faith assert any legal claims under the circumstances. However, if your client is insistent on proceeding with litigation in this matter, I am authorized to accept service on Kimschott's behalf.

Very truly yours,



Daniel A. Brown

cc: Client
Scott Smouse, Chicago Title Insurance Company

SEADOCS:364240.1