

64038-1

64038-1

NO. 64038-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JOINT VENTURE FOURPLAY,

Appellant

v.

VERONIKA E. LOISTL,

Respondent

RECEIVED
COURT OF APPEALS
DIVISION ONE

FEB 01 2010

BRIEF OF APPELLANT

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I. INTRODUCTION

In the spring of 2003, plaintiff Joint Venture Fourplay and defendant Veronika Loistl entered into a contract under which Fourplay agreed to pay off the existing mortgage on a house owned by Ms. Loistl. Fourplay also agreed to advance additional money for repairs and improvements to the property, in order to increase its value and to ready it for sale. The total amount that Fourplay advanced to Ms. Loistl to pay off the underlying mortgage and to complete the repairs and improvements was \$178,702.95. In return, Ms. Loistl agreed (1) that she would sell the property; (2) that the proceeds would be used to repay the principal she now owed to Fourplay, together with interest at the rate of 6% per annum, and (3) that any profit (after deducting the amount advanced plus interest) would be split 50/50 between the parties.

Fourplay performed its obligations under the contract. Ms. Loistl did not. Fourplay brought this action to recover damages for Ms. Loistl's breach of the contract. After a bench trial, the court concluded that Ms. Loistl was liable to Fourplay for the principal amount of \$178,702.95 that Fourplay had advanced to her, plus interest at 6% per annum up to the time of trial. This produced a total amount of \$227,282.51. The court entered judgment in favor of Fourplay in that amount.

But the trial court erred or abused its discretion in three major respects. First, although the promissory note signed by Ms. Loistl included a provision for attorneys' fees and although Fourplay was clearly the prevailing party as defined in RCW 4.84.330, the court erroneously concluded that there was no prevailing party and refused to award Fourplay its reasonable attorneys' fees.

Second, the trial court abused its discretion in determining that Frank Colacurcio, Sr. was a speaking agent of Joint Venture Fourplay and in admitting into evidence Ms. Loistl's testimony concerning out-of-court statements allegedly made by Mr. Colacurcio.

Third, the court erred by concluding that Fourplay was not entitled to any relief beyond the \$227,282.51 in unpaid principal and interest. It erred by failing to find and conclude: (1) that the contract required the sale of the property, (2) that under the contract any profit (after deducting from the sale proceeds the amount that Fourplay had advanced to Ms. Loistl, plus interest) would be split 50/50 between the parties, (3) that the reasonable time for Ms. Loistl's performance of that obligation was mid-2005 to mid-2006, and (4) that Fourplay was entitled to a 50% share of the profit that would have been generated if the property had been sold at that time.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error¹

1. The trial court erred, in Conclusion of Law No. 4, in concluding that there was no prevailing party, in failing to conclude that Fourplay was the prevailing party, and in failing to rule that Fourplay was entitled to an award of reasonable attorneys' fees.
2. The trial court abused its discretion in admitting and considering the alleged out-of-court statements of Frank Colacurcio.
3. The trial court erred in making Finding of Fact No. 4 to the extent it found that Fourplay's agreement was "Based on Mr. Colacurcio's promise to assist defendant," and to the extent it found that Mr. Colacurcio "said he would help her."
4. The trial court erred in making Finding of Fact No. 4 to the extent it found that "The rest of the terms are, at best, ambiguous, such as how, if and when profits would be divided."
5. The trial court erred in making Finding of Fact No. 6 to the extent it found that "The remaining terms of the agreement are beyond repair by this court due to the very poor drafting of the original agreement."
6. The trial court erred in Conclusion of Law No. 1 to the extent it concluded that the agreement between Ms. Loistl and Fourplay was

¹ The trial court's Findings of Fact and Conclusions of Law are included in the Appendix.

ambiguous and to the extent it construed the contract against Fourplay without first considering all the relevant evidence concerning the interpretation of the contract.

7. The trial court erred in Conclusion of Law No. 3 to the extent it concluded that Fourplay was not entitled to any other relief beyond the \$227,282 in principal and accrued interest.

8. The trial court erred in making Finding of Fact No. 7 to the extent it found that when Ms. Loistl tried in 2006 to refinance and pay Fourplay, Fourplay “would not cooperate or provide a pay-off amount.”

B. Issues Pertaining to Assignment of Error

1. When a contract includes a provision authorizing one of the parties, but not the other, to recover attorneys’ fees, RCW 4.84.330 requires the trial court to award reasonable attorneys’ fees to “the party in whose favor final judgment is rendered.” The promissory note in this case included such a clause obligating Ms. Loistl to pay Fourplay’s reasonable attorneys’ fees and costs. The trial court entered final judgment in favor of Fourplay. Is Fourplay entitled to an award of attorneys’ fees and costs? (Assignment of Error No. 1).

2. To establish that a purported agent is a speaking agent of his or her principal, so as to exempt the agent’s out-of-court statement from the hearsay rule, the party offering the statement may not rely solely

on the agent's alleged statements by themselves. Instead, the proponent of the evidence must show that the *principal* made objective manifestations of the agent's authority to the proponent. The only evidence of Frank Colacurcio's alleged authority as a speaking agent for Fourplay consisted of his alleged out-of-court statements. Did the trial court abuse its discretion by admitting and considering Ms. Loistl's testimony concerning those statements? (Assignments of Error Nos. 2 and 3).

3. Did the trial court err in finding and concluding that Fourplay was not entitled to any relief other than the \$227,282 in principal and interest? Should the trial court have found and concluded instead: (a) that the contract required Ms. Loistl to sell the property within a reasonable time; (b) that the reasonable time for Ms. Loistl's performance of that obligation was mid-2005 to mid-2006; and (c) that Fourplay was entitled to a 50% share of the profit (after deducting from the sale proceeds the amount that Fourplay had advanced to Ms. Loistl, plus interest) that would have been generated if the property had been sold at that time? (Assignments of Error Nos. 4, 5, 6, and 7).

4. Since Ms. Loistl presented no evidence that any lender was actually prepared to refinance her debt in 2006, did the trial court err in finding that Fourplay "would not cooperate or provide a pay-off amount" (Finding of Fact No. 7)? (Assignment of Error No. 8).

III. STATEMENT OF THE CASE

A. Facts

Ms. Loistl owned a house on 8th Avenue NW in the Shoreline area of King County. Ex. 17. Over time, she experienced increasing difficulty making the mortgage payments on the house. Exs. 7, 11, & 17. Her inability to pay was the subject of started and stopped foreclosure proceedings on three occasions between 1997 and 2003. Id. This last notice was issued on March 10, 2003, and stated that the property was to be sold at a Trustee's sale to be held in June of that year. Ex. 17. It required that Ms. Loistl pay over \$25,000.00 in past due payments, other arrearages, and Trustee's expenses in order to prevent the sale and reinstate the loan. Ex. 17. She did not have the money:

Q: What you realized when you got this notice of trustee sale in 2003 was that if you didn't come up with 25 thousand dollars and change fairly quickly, you were not going to hang onto that house; right?

A: Yes, I guess that's what they wanted.

Q: So this is the third time around on this same-

A: Ugly loan, yes.

Q: Well, same notice of the trustee sale process, only this time the debt is deeper and the number is taller?

A: It is higher, yes.

Q: You didn't have 25 thousand dollars, did you?

A: No.

I RP at 40, 41.²

Plaintiff Joint Venture Fourplay is a real estate investment business with four members. I RP at 127. One of its members is Frank Colacurcio, Sr. *Id.* Ms. Loistl was acquainted with Mr. Colacurcio because she was a travel agent and had made travel arrangements for him in the past. I RP at 40.

After she had received the notice of the impending June 2003 Trustee's sale, Ms. Loistl approached Mr. Colacurcio and explained her situation. I RP at 43. Ms. Loistl testified, over Fourplay's objection, that in that conversation Mr. Colacurcio allegedly told her that he would help her. *Id.* at 89.

David Ebert is another member of the Fourplay investment group. I RP at 126-127. Mr. Ebert is the principal operating member of the group. *Id.* at 127-128. Mr. Ebert and Ms. Loistl were also acquainted with each other because Ms. Loistl had made travel arrangements for Mr. Ebert and/or other people in his office. *Id.* at 40-41, 129. Before the events related to the present case, she had occasionally visited that office. *Id.* at 129.

² Two different court reporters reported the proceedings of the one-day trial. The report from the first part of the trial, consisting of 143 pages, is identified as "I RP." The report from the second part, consisting of 17 pages, is identified as "II RP."

After Mr. Colacurcio's meeting with Ms. Loistl, Mr. Ebert obtained approval from all of Fourplay's members for an arrangement under which Fourplay would advance the funds necessary to pay off the full balance of Ms. Loistl's then-existing loan on the 8th Avenue property. I RP at 130-131, 137. Under this arrangement, Fourplay would also advance the funds for improvements necessary so that the house could be prepared for sale and rented to a third party in the interim. Id. The anticipated total of the funds to be advanced for paying off the existing loan and making the necessary improvements was about \$175,000. Id.

Under the arrangement as contemplated by Fourplay, the money generated by the sale of the property would be used to repay to Fourplay the funds that it had advanced, together with interest at the rate of 6% per annum. I RP at 130-131, 137. The remainder of the money generated by the sale of the property would be divided equally between Ms. Loistl and Fourplay. Id.

The prospect of receiving 50% of the anticipated profit from the sale of the property (after repayment of the funds advanced, together with interest at 6%) was critical to Fourplay's willingness to enter into the transaction. I RP at 133. The interest rate of 6%, by itself, was not attractive. Id. And Fourplay was not interested in making long-term loans, especially at such a low rate of interest. Id. At the time, spring of

2003, Mr. Ebert and the other members of his group anticipated that the residential real estate market was going to boom. Id. at 133-134. Thus, it was the 50% share of the expected profit from the sale that made the arrangement attractive to Fourplay. Id.

Before any documents were signed, Mr. Ebert met with Ms. Loistl and explained the proposed arrangement. I RP at 132-136. Mr. Ebert made it clear to Ms. Loistl that the house was to be sold and that after Ms. Loistl's debt to Fourplay had been paid back from the proceeds, the parties would split the remaining amount equally.

Q: Let's back up. Did you talk about the fact that the agreement required Ms. Loistl to sell the house to pay the debt back and to split the profit with your partners?

A: Sure. That was the whole deal.

* * *

Q: In discussing this with Ms. Loistl, did you use the word "sale," that "You will be selling this house to pay us back"?

A: Without a doubt. That was part of the agreement.

Q: Did she say, "Oh, no, no, this is my family home. I have had this home since 1983. I couldn't possibly permit it to be sold"?

A: No, there was no objections to any of that.

I RP at 133-134. Ms. Loistl, however, denies that this conversation took place. II at RP 7-8. She testified that with respect to the arrangements concerning the 8th Avenue property, her first meeting with Mr. Ebert was when she signed the documents that Mr. Ebert presented to her. Id.

In the spring of 2003, when Ms. Loistl received the Notice of Trustee's Sale and when she entered into the agreement that is the subject of this case, Ms. Loistl was not living at the house on 8th Avenue, and had not lived there for several years.

Q: Okay. Can we agree that in the 2000-to-2004 time frame you essentially were not living in the house on 8th, you were sleeping at the house where your mother lived with your daughter; and you believe you were making efforts to improve the property on 8th so you could return to it; is that right, ma'am?

A: I guess I will agree with that.

I RP at 33-34. Mr. Ebert testified that when he met with Ms. Loistl to discuss the proposed agreement, Ms. Loistl said that she would continue to live at her mother's house. I RP at 140. That would allow Ms. Loistl to rent the 8th Avenue property to a third party after the completion of the contemplated improvements and until the time of the anticipated sale. I RP at 130-131, 140. This arrangement would work to Ms. Loistl's benefit because she could apply the rental income to reduce the amount of the debt that she would owe to Fourplay. I RP at 140-141.

To memorialize the agreement of the parties, Ms. Loistl signed three documents – a Promissory Note (Ex. 21), a Contract for Improvement of Property (Ex. 19), and a Deed of Trust (Ex. 18). The Promissory Note provided that the money advanced by Fourplay was to be repaid, with interest at 6% per annum, "From the proceeds received by the

borrower for the sale of said property, which will consist of 50% of the proceeds.” Ex. 21. The Promissory Note also included the following provision: “In the event this note is in default, and placed with an attorney for collection, then the undersigned agree to pay all reasonable attorneys’ fees and costs of collection.” Id.

The Contract for Improvement of Property³ provided that Fourplay would make improvements to the property that it deemed reasonable and that Ms. Loistl would pay Fourplay the expenses that it incurred in doing so, plus interest at 6% per annum. Ex. 19. It also stated that the purpose of the improvements to be made by Fourplay was “to increase the value of the property.” Id. The Contract for Improvement of Property also recited that it would “terminate upon the sale of the house on the property and the satisfaction of the promissory note held by Fourplay from Ms. Loistl and the payment of balance owed to Fourplay for improvements to the property.” (Emphasis supplied). Ex. 19 (p. 2, ¶ 5).

Ms. Loistl also signed a Deed of Trust by which her indebtedness to Fourplay was secured. Ex. 18. Fourplay was the Beneficiary under the Deed of Trust. Id. In addition to standard provisions common in such

³ The Contract for Improvement of Property mistakenly states that it relates to improvements to property at 1153 N. 165th Street in Shoreline. Ex. 19. This was the address of Ms. Loistl’s mother and was where Ms. Loistl lived at the time these agreements were signed. CP at 117 (Finding of Fact No. 2). There is no dispute, however, that the Contract for Improvement of Property actually related to the property at issue in this case – that is, the property located at 19015 8th Avenue NW.

documents, this one included the following language: “Grantor [Ms. Loistl] will not contract with any party for the sale or transfer of her 50% interest, and will abide by the beneficiary’s [Fourplay’s] sale, so long as it is commercially reasonable at the time of sale.” Ex. 18, page 2, ¶ 2. (Emphasis supplied).⁴

Mr. Ebert testified that Fourplay’s lawyer, Mr. Ross Radley, prepared the three documents. I RP at 137. Mr. Ebert also testified that before the day on which Ms. Loistl signed the documents, he gave them to her so that she would have an opportunity to review them. I RP at 138. Ms. Loistl, however, testified that the first time she saw the documents was the day she came to Mr. Ebert’s office to sign them. II RP at 8.

Nonetheless, Ms. Loistl read the documents or at least had an opportunity to read them, and she signed them. I RP at 52-53, 58-59, 62-64, 67, 99. At the time she signed the documents, Ms. Loistl saw that there would be a split of profit if there was profit on the sale of the property. I RP at 49, 64. She knew that she had the right to say that the documents did not reflect her intention and the right to refuse to sign them. I RP at 54. It is undisputed that she signed all three documents.

On April 3, 2003, Fourplay paid the entire balance of Ms. Loistl’s existing mortgage on the property, in the amount of \$173,144.81. Ex. 20.

⁴ The Deed of Trust also included a clause obligating Ms. Loistl to pay all costs, fees, and expenses in connection with the deed of trust, including attorneys’ fees. Ex. 18., p. 2 ¶ 5.

Over the next several months Fourplay also paid for repairs and improvements to the property, including a new roof and landscaping, to ready the property for sale. Ex. 45. This brought the total amount that Fourplay had advanced on Ms. Loistl's behalf to \$178,702.95. Ex. 45.

The Promissory Note called for no periodic payments. Ex. 21. Instead, the time for satisfaction of Ms. Loistl's debt to Fourplay was keyed to the anticipated sale of the property. Exs. 19 (p. 2, ¶ 5), & 21; I RP at 130-131. But the documents failed to specify a particular date by which the property was to be sold. Exs. 19, 21. Fourplay argued at trial that where a contract fails to specify a particular time for a party's performance, the law will presume that the parties intended a reasonable time. CP at 154-155, 157-162 (Fourplay's trial brief, pp. 2-3, 5-10).

Improvements to the property were completed in August of 2003. Ex. 45. Thus, the property could have been sold at any time from then forward. Fourplay presented expert evidence that in order to maximize the sale price, the optimum time to sell the property would have been in 2005 or 2006. Ex. 49 (p. 10). There was no evidence to the contrary. Although Ms. Loistl contended that the agreement did not call for the sale of the property at all, she offered no evidence to dispute Fourplay's position that if the agreement did in fact require a sale, the reasonable time for performance of that act was sometime in 2005 or 2006.

As to the time when she was required to repay the \$178,702.95 that Fourplay had advanced on her behalf, plus interest, Ms. Loistl took the position in her Answer to the Complaint and in her Trial Brief that her debt was not yet due and payable. CP at 9-10, 101-102. Accordingly, she contended that Fourplay's complaint should be dismissed and that Fourplay should recover nothing. Id. In other words, Ms. Loistl took the position that she had an unlimited amount of time to repay the debt.

But at trial Ms. Loistl's admitted that the arrangement was "temporary."

The Court: In your mind, you would be allowed to live in this house indefinitely; is that correct? In other words, if you didn't refinance 10 years from now, you could decide it was time to sell and at that point pay back the loan with interest. Is that what you understood the agreement to be?

A: In the very beginning, sir?

The Court: Yes.

A: My understanding was that this would be—this was a mortgage note that would carry me over until I had a regular mortgage.

The Court: So in your mind it was temporary, and your obligation was to repay the loan with 6 percent interest.

A: That's what I thought I was doing.

The Court: All right.

A: There was no time frame, there was no sense of urgency. It was just—work on it when you get it.

The Court: If it took you 10 years, that would have been okay in your mind under the agreement?

A: I wouldn't want that. Would it be okay?

The Court: Thank you.

II RP at 10-11 (emphasis supplied).

It is undisputed that Ms. Loistl never took any steps to sell the 8th Avenue property. In late 2004 or early 2005, Ms. Loistl moved into the house on that property. I RP at 81-82. She has apparently continued to live there ever since. I RP at 65.

Since the spring of 2003 when Fourplay advanced Ms. Loistl more than \$178,000, the only payment she has ever made was a single payment in June 2005, in the amount of \$20,776. Exs. 30, 45.

B. Contentions of the Parties

1. Complaint and Answer/Counterclaims

In 2007, Fourplay sued Ms. Loistl for breach of contract. CP at 3-5. Ms. Loistl contended in her Answer that payment of her debt to Fourplay was not due and payable, and that Fourplay's claims should be dismissed in their entirety. CP at 9-10. She also asserted counterclaims for usury and violation of the Consumer Protection Act. CP at 10.

2. Trial

a. Fourplay's contentions

The trial took place on July 23, 2009. Fourplay contended that under the contract, (1) the property was to be sold, (2) the proceeds would be used to repay the principal Ms. Loistl owed to Fourplay, together with interest at the rate of 6% per annum, and (3) any profit (after deducting for

advances and interest) would be split 50/50 between the parties. CP at 154 (Fourplay trial brief, p. 2); I RP at 130-131, 137.

Fourplay argued that where a contract fails to specify a particular time for a party's performance, the law will presume that the parties intended a reasonable time. CP at 155-161 (Fourplay trial brief, pp. 3-9). Thus, Ms. Loistl's duty to sell the property matured a reasonable time after completion of the improvements paid for out of the funds that Fourplay advanced on her behalf. CP at 156, 161-162 (Fourplay trial brief, pp. 4, 9-10). Since payment of the total \$178,702.95 that Fourplay had advanced, plus interest, was keyed to the sale of the property, payment of the debt was also required within a reasonable time. A reasonable time for sale of the property and payment of the debt, Fourplay argued, was approximately 24-30 months after completion of the improvements in the latter part of 2003, or sometime between mid 2005 and mid 2006. CP at 161-162 (Fourplay trial brief, pp. 9-10). This was the optimum time to sell the property, Ex. 49 (p. 10), and was consistent with the goal of selling at the best possible price. I RP at 130-131. Fourplay contended that by mid-2006, Ms. Loistl had breached the contract by failing to sell the property and failing to repay the debt. CP at 156, 162 (Fourplay trial brief, pp. 4, 10).

Fourplay sought damages measured by the lost benefit of its bargain. CP at 162-165 (Fourplay trial brief, pp. 10-13). Uncontested evidence showed that the market value of the property in 2005 was between \$465,000 and \$470,000. Ex. 49 (pp. 4-5); I RP at 5-6. The same evidence showed that the property's market value in 2006 was between \$490,000 and \$495,000. Ex. 49 (pp. 5-6); I RP at 5-6.

The mid-point between mid-2005 and mid-2006 (the reasonable period during which Ms. Loistl was to have performed her duty of selling the property) was January 1, 2006. The mid-point between the low end of the 2005 market value (\$465,000) and the high end of the 2006 market value (\$495,000) is \$480,000. CP at 162-163 (Fourplay trial brief, pp. 10-11). Thus, if the property had been sold in January 2006, the net sale price (after deducting the 8.5% cost of sale)⁵ would have been \$480,000 minus \$40,800.00 or \$439,200.00. Id.

At that same time (Jan. 1, 2006), Ms. Loistl's debt to Fourplay, with accrued interest, stood at \$187,795.35. CP at 163-164 (Fourplay trial brief, pp. 11-12). Deducting the total amount of Ms. Loistl's indebtedness from the net sale price of the property (again as of January 1, 2006) would have produced a profit as follows: \$439,200.00 minus \$187,795.35 = \$251,404.65. CP at 163-164 (Fourplay trial brief, pp. 11-12). If that

⁵ The parties stipulated that 8.5% of the sale price was an appropriate measure of the cost of any sale of the property. I RP at 96.

amount were split, 50/50, between Fourplay and Ms. Loistl, each party would have received \$125,702.32 of profit. CP at 164 (Fourplay trial brief, p. 12). In summary, if Ms. Loistl had not breached the contract, Fourplay would have received as of January, 2006:

| | |
|---|---------------------|
| Repayment of Ms. Loistl's Indebtedness, with 6% interest per annum | 187,795.35 |
| Plus 50% of profit from sale | + <u>125,702.32</u> |
| Total | = \$ 313,497.67 |

CP at 164-165 (Fourplay trial brief, pp. 12-13).

As a consequence of Ms. Loistl's refusal to sell the property within a reasonable time (i.e., by January 2006), Fourplay's damages have increased. As of the time of trial, the total principal for the advances and accrued interest was \$227,282.51. Ex. 45; I RP at 6-7. In addition, Fourplay lost profit of \$125,702.32. CP at 164 (Fourplay trial brief, p. 12). On that lost profit of \$125,702.32, 6% interest accrues at the rate of \$7,532.13 annually. CP at 164 (Fourplay trial brief, p. 12). Interest on the lost profit from January, 2006 (when Fourplay would have received the profit but for Ms. Loistl's breach) through the date of trial totaled \$26,397.48. Id. Adding those sums together, Fourplay's damages came to a total of \$379,382.31. CP at 164 (Fourplay trial brief, p. 12).

b. Ms. Loistl's contentions

At trial Ms. Loistl continued to assert that she “owes the plaintiffs money when she sells her house,” and that because she had not yet done so, Fourplay’s complaint should be dismissed. I RP at 4; CP at 101-102. In other words, Ms. Loistl took the position that she was legally entitled to postpone the sale of the property, and the payment of her debt to Fourplay, for as long as she wished. See *Id.* Ms. Loistl also continued to assert her counterclaim for usury. CP at 101.

C. The Trial Court's Decision

The trial court entered Findings of Fact and Conclusions of Law on July 27, 2009. CP at 116. It found that the funds advanced by Fourplay on Ms. Loistl’s behalf were to carry interest at the rate of 6% APR and were to be paid back from the proceeds of sale of the property or from rental income. CP at 117 (Finding of Fact No. 4). It also found that there was no rental income. *Id.* Consistent with Ex. 45, the court further found that the amount of the principal loaned to Ms. Loistl in 2003 was \$178,702.95. CP at 118 (Finding of Fact No. 6). It found that the principal and interest owed to Fourplay at the time of trial was \$227,282.51. CP at 119 (Finding of Fact No. 8).

But the trial court found that “the rest of the terms are, at best, ambiguous, such as how, if and when profits would be divided.” CP at

117 (Finding of Fact No. 4). It also found that “the remaining terms of the agreement are beyond repair by this court due to the very poor drafting of the original agreement.” CP at 118 (Finding of Fact No. 6).

The trial court concluded that \$227,282 was due and owing from Ms. Loistl, that Fourplay was entitled to recover that amount, and that judgment in that amount should be entered in Fourplay’s favor. CP at 120-121 (Conclusions of Law Nos. 2 & 4). But it concluded that Fourplay was not entitled to any other relief. CP at 120 (Conclusion of Law No. 3). The court also concluded that the agreement between the parties was ambiguous, and should be construed against Fourplay, the drafting party. CP at 119 (Conclusion of Law No. 1). Finally, the court concluded that there was no prevailing party and that no attorneys’ fees should be awarded. CP at 121 (Conclusion of Law No. 4).

On August 10, 2009, the trial court entered judgment in favor of Fourplay and against Ms. Loistl in the amount of \$227,282. CP at 114-115.

IV. ARGUMENT

A. The Trial Court Erred by Refusing to Award Attorneys' Fees to Fourplay

1. Standard of review

The question of whether a party is entitled to an award of attorneys' fees is a question of law. Ethridge v. Hwang, 105 Wn.App. 447, 460, 20 P.3d 958 (2001). The trial court's decision on this issue is subject to a *de novo* standard of review. *Id.*

This Court reviews the determination of the prevailing party under an error of law standard. Kyle v. Williams, 139 Wn.App. 348, 356, 161 P.3d 1036 (2007); Trotzer v. Vig, 149 Wn.App. 594, 612, 203 P.3d 1056 (2009). Alleged errors of law are reviewed *de novo*. Trotzer, 149 Wn.App. at 612.

The *amount* of an attorneys' fee award, on the other hand, is within the trial court's discretion, and this Court reviews the amount awarded by the trial court for an abuse of that discretion. Ethridge, 105 Wn.App. at 460. In this case, of course, the trial court never reached the question of the appropriate amount of attorneys' fees. Its determination that there was no prevailing party, and thus that Fourplay was not the prevailing party, is subject to *de novo* review by this Court.

2. An Award of Attorneys' Fees to the Prevailing Party Was Mandatory

Where a contract provides for an award of attorneys' fees to one specified party, the trial court is required to award fees to the prevailing party in an action arising out of the contract. Singleton v. Frost, 108 Wn.2d 723, 742 P.2d 1224 (1987). In Singleton, Allen Shontz loaned money to Frost and made a claim against Frost for sums due under the related promissory note. *Id.* at 725. A clause in the note provided that the lender/note-holder's attorney's fees and costs expended in collecting on the note would be paid by the debtor. *Id.* at 729.⁶ There was no reciprocal provision allowing the debtor to collect attorneys' fees from the lender/holder of the note. The trial court entered judgment in favor of Shontz for amounts due under the note, but did not award Shontz his reasonable attorney's fees. *Id.* at 725-726.

The Singleton court reversed the trial court's denial of an attorneys' fee award. 108 Wn.2d at 727, 730. The court relied on RCW 4.84.330, which provides:

In any action on a contract or lease . . . , where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the

⁶ The note stated that "if this note shall be placed in the hands of an attorney for collection or suit shall be brought to collect any of the principal or interest of this note I [the debtor] promise to pay a reasonable attorney's fee." 108 Wn.2d at 729.

contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

...

As used in this section “prevailing party” means the party in whose favor final judgment is rendered.

RCW 4.84.330 (emphasis supplied). The Singleton court held that the statutory language “shall be entitled to reasonable attorneys’ fees” was clearly mandatory. 108 Wn.2d at 728-729. Thus, the trial court was required to award attorneys’ fees to Shontz as the prevailing party. *Id.* at 730, 732-33.

Later cases have held that where the attorneys’ fee clause in the contract is by its own terms reciprocal or “bilateral,” RCW 4.84.330 does not apply. In other words, if the contract expressly authorizes *either* party to recover its attorneys’ fees if it wins, then RCW 4.84.330 does not control the issue of the fee award. E.g., Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 490, 200 P.3d 683 (2009).

But RCW 4.84.330, including its definition of “prevailing party,” *does* apply to contractual attorney’s fee clauses that are unilateral. Wachovia, 165 Wn.2d at 489 (“the attorney fees provisions at issue are unilateral. . . . Therefore, RCW 4.84.330 applies”). In both Singleton and Wachovia the attorney fee provisions were unilateral since they authorized the lender to recover from the debtor the attorneys’ fees that the lender

incurred in collecting the debt, but did not authorize the debtor to recover attorneys' fees from the lender. Singleton, 108 Wn.2d at 729; Wachovia, 165 Wn.2d at 485 & n.1. Thus, RCW 4.84.330 applied.

As in Singleton and Wachovia, the promissory note in the present case included a unilateral provision for an award of attorneys' fees to the lender. The note provided that "In the event this note is in default, and placed with an attorney for collection," then Loistl would pay all reasonable attorneys' fees and costs of collection.⁷ Ex. 21. The note did not include a reciprocal provision authorizing Loistl to recover attorneys' fees. RCW 4.84.330 therefore applies here. And because the statute declares that the prevailing party "shall be entitled to reasonable attorneys' fees," an award of attorneys' fees to the prevailing party was mandatory in the present case. Singleton, 108 Wn.2d at 728-730 (emphasis supplied).

3. Fourplay was the prevailing party

As Fourplay has explained above, RCW 4.84.330 applies to this case. See Singleton, 108 Wn.2d at 729-730. Where RCW 4.84.330 applies, its definition of "prevailing party" also applies. Wachovia, 165 Wn.2d at 489-492. That statute expressly defines "prevailing party" as "the party in whose favor final judgment is rendered." RCW 4.84.330. It

⁷ Since it concluded that Fourplay was entitled to the \$227,282 of principal and interest that Loistl owed, the trial court necessarily found and concluded that Ms. Loistl was "in default" under the note.

is undisputed that the trial court rendered final judgment in favor of Fourplay, and against Loistl, in the amount of \$227,282.00. CP 114-115. Ms. Loistl asserted that no due date existed, that the action was premature, that Fourplay should recover nothing and its complaint should be dismissed, and that Ms. Loistl should recover on her counterclaim for usury. Obviously the trial court disagreed, since it awarded nearly a quarter million dollars to Fourplay.

Fourplay is “the party in whose favor final judgment [was] rendered.” RCW 4.84.330. Under the plain language of RCW 4.84.330, Fourplay is the prevailing party. The trial court erred by concluding that there was no prevailing party and by failing to conclude that Fourplay was the prevailing party.

B. The Court Abused Its Discretion by Allowing Loistl to Testify Concerning the Alleged Statements of Frank Colacurcio, Sr.

Over Fourplay’s objection, the trial court allowed Ms. Loistl to testify about statements that Frank Colacurcio, Sr. had allegedly made to her. E.g., I RP at 89-92, 101-102, 104-106. Fourplay objected to this testimony as hearsay. I RP at 42, 50. Ms. Loistl argued that Mr. Colacurcio had apparent authority to speak for the joint venture. I RP at 51. The trial court agreed with Ms. Loistl’s argument, I RP at 51, and

ultimately made findings of fact about what Mr. Colacurcio allegedly said. CP at 117 (Finding of Fact No. 4).

Unless it comes within a recognized exception to the rule, hearsay is not admissible. ER 802. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(a). Mr. Colacurcio’s alleged statements were offered to prove the truth of the matter asserted.

A statement is an admission of a party-opponent, and thus is not hearsay, if the statement is offered against a party and is “(iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party.” ER 801(d)(2).

Washington courts have generally treated subsections (iii) and (iv) of ER 801(d)(2) as expressing the same principle. Condon Bros., Inc. v. Simpson Timber Co., 92 Wn.App. 275, 284-285 & n. 20, 966 P.2d 355 (1998). Under either of these subsections, the statement is an admission of a party only if the declarant was a speaking agent for the party. *Id.*

In Washington at least, both [subsections] are grounded on the RESTATEMENT OF AGENCY, which provides that the “statements of an agent to a third person are admissible in evidence against the principal to prove the truth of the facts asserted in them ... if the agent was authorized to make the statement or was authorized to make, on the

principal's behalf, any statements concerning the subject matter.”

92 Wn. App. at 284-285 (quoting RESTATEMENT (SECOND) OF AGENCY § 286).

Here, the only evidence offered by Ms. Loistl to prove Mr. Colacurcio’s alleged authority consisted of the out-of-court statements themselves. The trial court apparently considered this evidence sufficient to establish the scope of Mr. Colacurcio’s authority for the joint venture. “As for the speaking agent, at least the argument from the defense is that he at this point held himself out to be.” I RP at 51

But the agent’s alleged statements, by themselves, are insufficient to establish his or her authority to make them. Passovoy v. Nordstrom, Inc., 52 Wn.App. 166, 171-172, 758 P.2d 524 (1988). “An agent has apparent authority to act for a principal only when the *principal* makes objective manifestations of the agent's authority” to a third person. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 555, 192 P.3d 886 (2008). “Manifestations of authority by the purported agent do not establish apparent authority to act.” *Id.*

Mr. Ebert testified that he (Mr. Ebert) was “more or less in charge” of the joint venture, and that he was its principal operating member. I RP at 127-128. There was no evidence to the contrary. And there was no

evidence whatsoever – except for the alleged out-court statements recited by Ms. Loistl – that the joint venture had given Mr. Colacurcio authority to bind the organization with his statements. Nor was there any evidence of manifestations by the joint venture (the principal) to Ms. Loistl (the third party) that Mr. Colacurcio (the agent) had authority to speak on behalf of the joint venture in this matter. See Ranger, 164 Wn.2d at 555.

Ms. Loistl failed to carry her burden of establishing that Mr. Colacurcio was a speaking agent for the joint venture. Thus, Mr. Colacurcio’s alleged statements were hearsay, and the trial court abused its discretion by admitting them and considering them. Since these statements were inadmissible, there was no evidence to support the trial court’s findings of fact that they were in fact made.

C. Fourplay Was Entitled to Recover the Profit It Lost As a Result of Ms. Loistl’s Breach of Her Duty to Sell the Property at a Commercially Reasonable Time

The trial court properly found as a fact that under the contract between the parties, the advances that Fourplay made on Ms. Loistl’s behalf in 2003, along with interest, “were to be paid back from the proceeds of the sale of the property or from rental income.” CP at 117 (Finding of Fact No. 4).⁸

⁸ There wasn’t any rental income, CP at 117 (Finding of Fact No. 4), so payment was to come from the sale proceeds.

In addition, the trial court at least implicitly found and concluded that the contract required Ms. Loistl to repay these advances and interest within a reasonable time. Ms. Loistl contended in her Answer and her Trial Brief that nothing was due and owing either at the time the action was commenced or at the time of trial. She relied on the fact that the documents neglected to specify a particular date by which the sale must be completed and by which her debt must be paid. But by entering judgment in favor of Fourplay for \$227,282, the trial court properly rejected Ms. Loistl's position. Instead, the trial court implicitly concluded, as Fourplay had argued, that the law imposed a *reasonable time* for performance. Since the trial court concluded that the \$227,282 in principal and interest was due and owing, it necessarily concluded that the reasonable time for Ms. Loistl's performance had passed.

Having made these two findings/conclusions, the trial court effectively found and concluded that the contract required Ms. Loistl to sell the property within a reasonable time. Since the trial court found that Ms. Loistl was to pay the principal and interest from the sale of the property, and since it implicitly concluded that she was required to pay the money within a reasonable time, it follows that the contract required Ms. Loistl to sell the property within a reasonable time.

Fourplay offered evidence that the optimum time for selling the property in order to maximize the sale price, and thus the reasonable time for doing so, was in the year 2005 or 2006. There was no evidence to the contrary.

The documents reflecting the agreement clearly support the conclusion that the contract called for the sale of the property. The Promissory Note states that Ms. Loistl was to pay the \$173,144.81 (the amount spent by Fourplay in paying off Ms. Loistl's underlying mortgage) plus interest "From the proceeds received by the borrower for the sale of said property, which will consist of 50% of the proceeds." (Emphasis supplied). Ex. 21. The Contract for Improvement of Property states: "This agreement will terminate upon the sale of the house on the property and the satisfaction of the promissory note held by Fourplay from Ms. Loistl and the payment of balance owed to Fourplay for improvements to the property." Ex. 19 (Emphasis supplied). By stating that the purpose of the improvements was "to increase the value of the property," this document further reflects the parties' intention that the property was to be readied for sale. Id. And the Deed of Trust in this case provided that "Grantor [Ms. Loistl] . . . will abide by the beneficiary's [Fourplay's] sale, so long as it is commercially reasonable at the time of sale." Ex. 18, page 2, ¶ 2 (emphasis supplied). This is not the typical provision authorizing

the *trustee* to sell the property in the event of the grantor's default. And this provision did not require default on the part of Ms. Loistl in order to come into effect. On the contrary, it reflects the intention of the parties that a central element of the contract was the anticipated sale of the property.

The remaining question is how the proceeds of the sale were to be allocated. One possible interpretation is that the sale proceeds, after deducting the cost of the sale, were to be split 50/50 between Fourplay and Ms. Loistl, and *then* Ms. Loistl's debt was to be paid out of her share. It is Fourplay's position that the sale proceeds, less the cost of sale, were to be applied to Ms. Loistl's debt *first*, and then the remaining profit was to be divided equally between the parties.

The trial court concluded that the words of the contract were ambiguous on this issue, and then proceeded to construe the contract against the party who drafted it – Fourplay. But the rule calling for construction of a contract against the drafter is a rule of last resort. There is no need to resort to that rule if the court can determine the intent of the parties “by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the

parties.” Roberts, Jackson & Associates v. Pier 66 Corp., 41 Wn.App. 64, 69, 702 P.2d 137 (1985).

Fourplay advanced funds which enabled Ms. Loistl to stave off a foreclosure which would most likely have deprived her of equity, if any in her home, would have resulted in a forced sale of the property, and would have occurred on a time frame undesirable to Ms. Loistl. Fourplay substituted its funds for the mortgage lender, but did so as a business investment. As Fourplay's representative testified, there was no value in loaning money at 6% interest in 2003, but there was value in fashioning a business agreement with Ms. Loistl which allowed her to improve the home, sell it, pay back advances and interest on advances, and then allowed the parties to split the remaining profit.

In addition, rather than suffer the economic harm which would come from foreclosure of the property, Ms. Loistl would share in profit on the sale of the home. Once Fourplay's advances plus interest were recouped, Fourplay and Ms. Loistl would share the profit 50/50. Depending upon when the house sold, it surely would have generated profit if sold within two to three years of the agreement with Ms. Loistl.⁹ In 2005 the property was worth between \$465,000 and \$470,000. Ex. 49

⁹ Fourplay introduced a chart at trial which compared the total of advances plus accrued interest with the home's market value, over time. Ex. 48. At its highest, the difference between advances which were to be recouped and market price was over \$300,000.00 (March, 2006).

(p. 5). And at the high point of the market in 2006, the property value was \$492,500.00. CP at 118 (Finding of Fact No. 7).

In other words, interpreting the contract as calling for payment of Ms. Loistl's debt out of the net sale price first, and then splitting the remaining profit, makes sense from the perspective of both parties and is the more reasonable interpretation. If the property had been sold in January 2006, the net sale price (after deducting the 8.5% cost of sale) would have been \$439,200.00. CP at 162-163 (Fourplay trial brief, pp. 10-11). As of that time, Ms. Loistl's debt to Fourplay, with accrued interest, stood at \$187,795.35. CP at 163-164 (Fourplay trial brief, pp. 11-12). Deducting the total amount of Ms. Loistl's indebtedness from the net sale price of the property (again as of January 1, 2006) would have produced a profit as follows: \$439,200.00 minus \$187,795.35 = \$251,404.65. CP at 163-164 (Fourplay trial brief, pp. 11-12). If that amount were split, 50/50, between Fourplay and Ms. Loistl, each party would have received \$125,702.32 of profit. CP at 164 (Fourplay trial brief, p. 12). Ms. Loistl would have walked away from the deal with no debt and more than \$125,000 in the bank. And Fourplay would have recovered the money it advanced to Ms. Loistl, together with interest at a very modest rate and its \$125,702.32 of profit.

The Findings and Conclusions of the trial court that this was merely a loan, and not an investment, and that Fourplay did not suffer investment losses by virtue of Ms. Loistl's failure to sell the property at a commercially reasonable time, are not supported by substantial evidence. The trial court erred by applying the rule of construction against the drafter without first attempting to determine the intent of the parties from all the relevant evidence.

D. The Trial Court Erred by Finding that Fourplay "Would Not Cooperate" When Ms. Loistl Tried to Refinance in 2006

The trial court found: "In 2006, defendant tried to refinance and pay plaintiff, but plaintiff would not cooperate or provide a pay-off amount." CP at 118 (Finding of Fact No. 7). But Ms. Loistl offered no evidence, other than her own unsupported claim that she had "loan commitments," to establish that any lender was actually willing to refinance her debt. Fourplay had no duty to "cooperate" by responding to general inquiries from lenders, and it certainly had no duty to provide precise pay-off information until such time as a lender indicated that it was actually prepared to make a loan to Ms. Loistl.

Moreover, as Fourplay has explained above, the agreement with Ms. Loistl called for a sale of the property and split of the profits, not a refinancing arrangement.

E. This Court Should Award Fourplay Its Attorneys' Fees Incurred on Appeal

If attorneys' fees are allowable in the trial court, the prevailing party may recover fees on appeal as well. Landberg v. Carlson, 108 Wn.App. 749, 758, 33 P.3d 406 (2001), review denied, 146 Wn.2d 1008 (2002). As Fourplay has explained above, it was entitled to an award of attorneys' fees in the trial court under the terms of the promissory note and RCW 4.84.330. This Court should therefore award Fourplay its fees incurred on review. RAP 18.1; In re Guardianship of Wells, 150 Wn.App. 491, 503, 208 P.3d 1126 (2009).

V. CONCLUSION

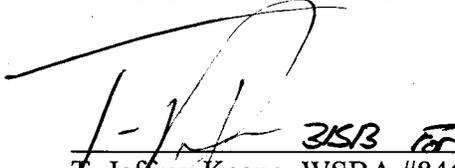
This Court should reverse the trial court's refusal to award Fourplay its reasonable attorneys' fees and costs. The Court should remand the case to the trial court for a determination of the appropriate amount of Fourplay's fee award. This Court should also award Fourplay its reasonable attorneys' fees incurred on appeal.

In addition, this Court should reverse the trial court's conclusion that Fourplay's recovery of damages is limited to the \$227,282 in principal and interest owed by Ms. Loistl. This Court should hold that Fourplay is also entitled to recover damages for the profit it lost as a result of Ms. Loistl's refusal to sell the property at a commercially reasonable time.

Since Ms. Loistl presented no evidence at trial to dispute the *amount* of Fourplay's lost profit, but instead simply contended that Fourplay was entitled to no recovery at all, this Court should remand the case to the trial court with instructions to modify the judgment so that the amount of Fourplay's damages, exclusive of attorneys' fees, is \$379,382.

Respectfully submitted this 1st day of February, 2010.

KEANE LAW OFFICES



T. Jeffrey Keane, WSBA #8465
Attorney for Appellant

VI. APPENDIX

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The Hon. Steven González
Trial: July 22, 2009

2009 JUL 21 PM 4: 26

KING COUNTY
SUPERIOR COURT

FILED
KING COUNTY, WASHINGTON

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SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOINT VENTURE FOURPLAY,

Plaintiff,

vs.

VERONIKA E. LOISTL, a single person,

Defendant.

No. 07-2-02016-1 SEA

(Proposed)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come on for trial, the court having heard testimony from witnesses, reviewed agreed facts, considered all contested facts, having reviewed the exhibits admitted as evidence, the court hereby enters the following findings of fact:

FINDINGS OF FACT

1. In 2003 Veronika Loistl was in default on a mortgage against her house located at 19015 8th Avenue NW, Shoreline, Washington. She had acquired the house in a sequence of transaction dating to the 1980's, in conjunction with her parents. In 1994, Ms. Loistl obtained a \$142,000.00 mortgage against the property. She sufficiently defaulted on

1 mortgage payments on two occasions in the 1990's to receive notice of foreclosure sales of the
2 property. Defendant went to one of the members of plaintiff for
3 advice. He said he would help her. He did not testify at trial.

4 2. Ms. Loistl, and her daughter, did not live at the property which was rented to
5 various others at various times. Ms. Loistl lived with her parents and, following the death of
6 her father, lived with her mother at 1153 N. 165th Street, Shoreline, Washington in order to
7 assist her aging mother with her living needs.

8 3. In early 2003, Ms. Loistl was approximately \$25,000.00 in default on her
9 mortgage, an amount which represented multiple months of failure to make her payments.
10 She approached plaintiff and sought relief from a pending foreclosure sale of her residence.
11 She did not want to lose the house in a foreclosure sale;

12 *Based on Mr. Colacucci's promise to assist defendant, (Sc)*
4. The plaintiff group agreed to loan her sufficient money to forestall foreclosure,

13 and agreed to loan her sufficient additional money to improve the property to increase its sale
14 value. These advances were to carry interest at the rate of 6% APR and were to be paid back,
15 *or from rental income.* (Sc)

16 ~~first, from the proceeds of sale of the property. The parties were then to split the remaining~~
17 ~~There never was any rental income.~~
18 ~~proceeds of sale 50/50, meaning the parties would each receive 50% of the net profit from the~~ (Sc)

19 ~~sale following receipt of sale proceeds. The parties contest whether this was an 'investment'~~
20 ~~property or whether this was simply a loan which would be repaid and, when repaid, the~~
21 ~~house would remain a residence for Ms. Loistl. The more reasonable interpretation of the~~
22 ~~evidence, considering all of the evidence, is that this was an investment property which the~~

23 ~~defendant did agree to sell. (Sc) The rest of the terms are, at best,~~
24 ~~profits would be divided. ambiguous, such as how, if and when (Sc)~~

25 5. The agreements relating to this arrangement were drafted by counsel for the
plaintiff. ~~The agreements lack overall clarity but refer to investment, 50/50, interest, and~~
~~improvement expense. In sum, the agreements support the plaintiff's interpretation of this~~

Defendant did not have counsel. Plaintiff referred her to
arrangement with defendant more than they support defendant's interpretation of this
one of its own lawyers to review the agreement. She did
arrangement; not consult him.

6. There is a missing term in the agreements, which is a term providing for when
sale should occur. The Court finds that the time when sale should occur is that time when it
Plaintiff loaned defendant \$178,702.95 in 2003 at 6.00%.

was commercially reasonable to sell the property for maximum benefit to all of the parties to
The remaining terms of the agreement are beyond
the agreements;
repair by this court due to the very poor drafting of the
original agreement.

7. The Court has heard testimony regarding valuation of the subject property,
which has varied greatly during the time frame between March, 2003, about the time the
agreement was reached with defendant, and July, 2009, the time of trial in this matter. Based
upon market analysis provided by the plaintiff, the property value ranged from about
\$265,000 at the time when this agreement was reached, to the high point of \$492,500 in 2006,
to approximately \$275,000 at the present time. The Court agrees that the range of values
provided by plaintiff is a fair assessment of the market value of the property during the time

frame referenced. Defendant made an interest payment in 2005 of
\$20,776. In May of 2006 plaintiff demanded
payment but did not say how much was owed.

8. The Court finds that it would have been commercially reasonable to sell the
property during its highest valuation period, from mid 2005 to mid 2006. The market value of
the property in mid 2005 (net of 8.5% costs of sale) was \$427,762.50. The market value in
mid 2006 (net of 8.5% cost of sale) was \$450,637.50. The average of those figures is
\$439,200.00. As of the mid point between mid 2005 and mid 2006, Ms. Loistl's debt to
plaintiff, with accrued interest, stood at \$187,795.35 (January, 2006). That amount deducted
from the total projected realized cost of a sale in early 2006 leaves a difference of
\$251,404.65. If that amount were split, 50/50, between plaintiff and defendant, each party
would receive \$125,702.32;

In 2006, defendant tried to refinance and pay plaintiff, but plaintiff would not cooperate or provide a pay-off amount.

8.9. Plaintiff has provided the Court, and defendant has not contested, that the principal and interest owed to plaintiff as of the start of trial, ~~exclusive of lost profits from the lack of sale,~~ is \$227,282.51.

~~10. Plaintiff also lost payment of what would have been its profit, in 2006, in the amount of \$125,702.32. 6% interest on that amount is \$26,397.48. (January, 2006 to July, 2006 or 42 months at \$628.51 per month). Plaintiff's combined losses, then are comprised of the absence of repayment of advances, plus interest on same, plus lost profit from 2006, plus interest on same to the date of the trial. This figure totals \$379,382.31.~~

CONCLUSIONS OF LAW

The Court having made the foregoing Findings of Fact, the Court now enters the following Conclusions of Law:

1. Plaintiff and defendant, in 2003, entered into ^{an ambiguous} ~~a binding~~ agreement which created an obligation for defendant to sell ^{re} the property located at 19015 8th Avenue NW, Shoreline, Washington, ~~as investment property. The parties did not include the date when the~~ ^{The ambiguous contract is construed against plaintiff, the drafting party.} property should be sold, and the proceeds divided under the agreement.

~~2. The Court is required, under the applicable law, to declare when a reasonable time to sell the property would be. In making this determination, the Court examines the property as an investment property and examines what a reasonable investor would do with this property in light of market conditions between 2003 and the present time. The Court finds the plaintiff's interpretation of the agreements more reasonable than the defendant's interpretation. Under the defendant's interpretation of the agreement, there is never a time when defendant is required to sell the property. No reasonable investor would enter into such~~

1 ~~an agreement since it means that the investor has no time when it will realize on its~~
2 ~~investment;~~

3 ~~3. A 'reasonable time,' taking into account how the market was behaving, and~~
4 ~~whether the improvements to the property were in place a sufficient time for the property to~~
5 ~~increase in value, is between mid 2005, two years after this Agreement was reached, and mid~~
6 ~~2006, which was three years after this agreement was reached. Using the data provided by~~
7 ~~plaintiff concerning the market value of the property, the market value in mid 2005 (net of~~
8 ~~8.5% costs of sale) was \$427,762.50. The market value in mid 2006 (net of 8.5% cost of sale)~~
9 ~~was \$450,637.50. The Court will average those figures to arrive at a projected sale recovery~~
10 ~~of \$439,200.00. As of the mid point between mid 2005 and mid 2006, Ms. Loistl's debt to~~
11 ~~plaintiff, with accrued interest, stood at \$187,795.35 (January, 2006). That amount deducted~~
12 ~~from the total projected realized cost of a sale in early 2006 leaves a difference of~~
13 ~~\$251,404.65. If that amount were split, 50/50, between plaintiff and defendant, it would mean~~
14 ~~plaintiff received \$125,702.32 and defendant received \$125,702.32;~~

15
16 4. If the transaction had occurred as described in paragraph 3, above, in January
17 2006 plaintiff would have received recovery of all monies advanced, \$187,795.35, plus half
18 ~~the profit from the sale of \$125,702.32, which is \$313,497.67.~~

19 2.5. Plaintiff has computed what the amount not repaid from defendant, ~~exclusive~~
20 ~~of sales proceeds~~ would be through the date of trial. That figure is \$227,282.51. Plaintiff ~~is~~
21 ~~entitled to this amount. It is due and owing.~~

22 3.6. Plaintiff is ~~also~~ ^{not} entitled to ~~monetary relief in the amount of the 'lost profits' not~~
23 ~~achieved by sale in 2006. That amount, \$125,702.32, should accrue interest also at 6% in~~
24 ~~accord with the contract of the parties, 6% simple interest not compounded, on \$125,702.32,~~
25 ~~for the period between January, 2006 and July, 2009 (42 months) is \$26,397.48.~~

any other relief.

1 4. In light of the foregoing, plaintiff should receive a judgment in the amount of
2 ~~\$379,382.31~~ \$227,282.00. There is no prevailing party in
3 this case. No fees are awarded.

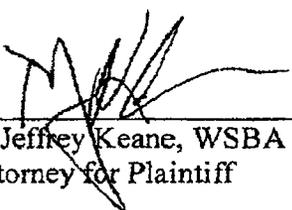
4 5.8. The contract between the parties called for an award of attorneys' fees to the
5 prevailing party. ~~Plaintiff is the prevailing party. Plaintiff should, within 10 days of this~~
6 ~~order, submit a request for attorney's fees. Defendant shall have 7 days within which to object~~
7 ~~to the requested fee amount. Thereafter the Court will either make an award of fees or will set~~
8 ~~a time for argument prior to making such award.~~

9 Dated this 29th day of July, 2009.

10
11 
12 Judge Steven Gonzalez

13 Presented By:

14 KEANE LAW OFFICES

15 
16
17 T. Jeffrey Keane, WSBA #8465
18 Attorney for Plaintiff

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

| | | |
|--------------------------------------|---|-----------------------|
| JOINT VENTURE FOURPLAY, |) | |
| |) | |
| Appellant, |) | CERTIFICATE OF |
| |) | SERVICE |
| vs. |) | |
| |) | |
| VERONIKA E. LOISTL, a single person, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

The undersigned declares under penalty of perjury, under the laws of the State of Washington that the following is true and correct:

That on February 1, 2010 I sent, via facsimile and U.S. Mail, postage prepaid, a true and correct copy of Brief of Appellant to:

Mr. James J. Jameson
3409 McDougall Avenue, Suite 201
Everett, WA 98201

DATED at Seattle this 1st day of February, 2010.



Donna M. Pucel