

NO. 69856-7-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

ROGER BEL AIR and NICK BRINEY, doing business as  
BEL AIR & BRINEY, a Washington general partnership,

Appellant,

v.

1<sup>ST</sup> SECURITY BANK OF WASHINGTON,

Respondent.

On Appeal from King County Superior Court  
Honorable Julie Spector

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANT

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**ORIGINAL**

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## I. SUMMARY

In Washington, as established by the only published authority that applies to this case, *Knight v. Seattle-First National Bank*, 22 Wn. App. 493, 589 P.2d 1279 (1979), the offeror can revoke its offer under a unilateral contract until or unless the offeree begins the invited performance or tenders part of performance, at which time an irrevocable option contract is created. If or when the latter occurs, the offeree must take reasonable steps to complete performance within a reasonable time, during which time the offeror cannot deprive the offeree of the opportunity to complete performance.

Here, the parties entered into such a unilateral contract: Respondent 1<sup>st</sup> Security Bank of Washington (“the Bank”) offered to deliver the Assignment of a Judgment to Appellant Bel & Briney if the latter delivered a \$30,000 cashier’s check to the Bank by May 31, 2012.

By Friday morning, May 11, 2012, almost three weeks before the deadline and before the Bank made any attempt to revoke the contract, Bel Air & Briney partner Nick Briney had acquired the cashier’s check and left two telephone messages asking the Bank to tell him what time that day he should deliver the check to the Bank office and pick up the Assignment.

Bel Air & Briney either began performance or partially performed

by the morning of Friday, May 11, converting the unilateral contract to an irrevocable option contract for a reasonable period of time.

The transaction was not completed only because after knowing Bel Air & Briney was ready to pay \$30,000 for the Assignment of the Judgment on May 11, the Bank instead used that knowledge to negotiate the sale of the Judgment to the Judgment debtor for \$32,000, notifying Mr. Briney of the revocation of the contract at around 5:00 that afternoon while he was waiting to be told what time he was to deliver the check to the Bank.

Because the Bank attempted to revoke what had become an irrevocable contract before giving Bel Air & Briney an adequate opportunity to finish performance within a reasonable time, the order of summary judgment dismissal granted by the Trial Court should be reversed. And, since there are no genuine issues of material fact and a hearing on Bel Air & Briney's Motion for Summary Judgment was scheduled to be heard two and one-half months later, this Court should grant summary judgment in favor of Bel Air & Briney.

## **II. REPLY STATEMENT OF FACTS**

In its Response Brief, although the Bank makes numerous efforts to disparage Bel Air & Briney it raises no genuine issues of a single material fact stated in Bel Air & Briney's opening Brief.

As of Monday, May 7, 2012, the Bank's Paula Smith and Bel Air & Briney's Nick Briney still agreed that had Mr. Briney delivered a \$30,000 cashier's check to her, she would have given him the signed Assignment of Judgment. *Brief, pages 9, 10.*

On the evening of Wednesday, May 9, Mr. Briney decided to complete the transaction. *Brief, page 10.*

On the afternoon of Thursday, May 10, Mr. Briney purchased the cashier's check and promptly responded to Ms. Smith's 3:24 p.m. email at 3:48 p.m. with a voice mail asking her to call him, which Ms. Smith did not return. *Brief, page 11.* Instead, Ms. Smith talked to Robert Wilson, the attorney for the Yagi family, against whom the Bank held the Judgment. *Id.*

On the morning of Friday, May 11, Mr. Briney left a second voice mail message for Ms. Smith telling her that he was ready to come to her office and complete the transaction. *Brief, page 12.* Ms. Smith and her supervisor agreed that they were still "good to go" with the assignment of the Judgment to Bel Air & Briney in return for the payment of \$30,000, but first gave Mr. Wilson one last opportunity to beat Bel Air & Briney's offer by the end of the day. *Brief, pages 12-13.*

By 4:10 p.m. on May 11 Mr. Wilson and the Bank agreed that the Yagis would purchase the Judgment for \$32,000. *Brief, page 13.* Later

that afternoon Ms. Smith called Mr. Briney and told him the Bank would not be engaging in the transaction with him. *Id.*

### III. REPLY ARGUMENT

A. **Bel Air & Briney Sufficiently Began Performance or Performed in Part to Convert the Unilateral Contract to an Irrevocable Option Contract by the Morning of May 11.**

1. **Bel Air & Briney Were Required to Begin Performance of or Partially Perform, Not Fully Perform.**

Although its discussion of this issue in its Response Brief is somewhat confusing, it appears that the Bank contends that Bel Air & Briney had to deliver the entire \$30,000 to the Bank before the contract was revoked: “[i]n this case, only full payment of \$30,000 by B&B would obligate the Bank to perform, at which point the contract is created. Because the only consideration for the Bank’s promise of performance is B&B’s full performance (i.e. payment), the Bank could revoke its unilateral offer at any time before that performance.” *Resp. Brief, page 13.*

However, the Bank also acknowledges that “Washington courts have recognized that ‘part performance’ by the offeree may preclude withdrawal of an offer of unilateral contract. *Knight v. Seattle First National Bank*, 22 Wn. App. 493, 589 P.2d 1279 (1979).” *Resp. Brief, page 15.*

Later in its Response Brief the Bank states that “[w]here the offer of unilateral contract calls solely for payment of money, part performance must include an actual tender of money” and “. . . receipt by the offeror of some part of the requested performance is necessary in order to invoke a claim of part performance and thereby limit revocation of an otherwise fully revocable offer.” *Resp. Brief, pages 17, 18.* (emphasis added)

Since the Bank contends that Bel Air & Briney had to deliver \$30,000 to the Bank, part performance could only occur if Bel Air & Briney delivered some, but not all, of the \$30,000 to the Bank. But the Bank never even implies that had Mr. Briney delivered anything less than \$30,000, the Bank would not be able to revoke the contract.

In fact, the Bank later argues that “[t]he application of part performance to unilateral contracts is limited to offers that will take time and expense on the part of the offeree to perform”, and since “[t]endering money is not an undertaking that takes time or expense, . . . a unilateral offer calling for the tender of money is not the type of undertaking requiring the application of past performance. *Resp. Brief, pages 20-31.*

The Order granting the Bank’s Motion for Summary Judgment Dismissal, which was prepared by the Bank, also contains references to both full and partial performance. The Court’s legal conclusion that the unilateral contract between the parties could “only be accepted by full

performance” is consistent with its factual finding that “Plaintiff failed to fully perform as required in the Bank’s offers”. *CP 200*. However, the Court also found “that Plaintiffs [sic] efforts in obtaining a cashier’s check and placing phone calls to the Bank were merely preparations to perform, and do not constitute part performance of the Bank’s unilateral offer; . . .” *Id.*

It is therefore unclear whether the Bank or the Court believes Bel Air & Briney could have partially performed its obligations under the contract. It is however certain, as the Bank states in its Brief at page 16, that “[b]oth parties agree that the opinion of this Court in *Knight* controls the determination of B&B’s claims in this case.” And under *Knight*, Bel Air & Briney sufficiently performed its obligations to create an option contract that the Bank could not revoke on the afternoon of May 11.

On page 18 of its Response Brief the Bank quotes an excerpt from the initial Restatement of Contracts §45 drafted in 1932 which is found in *Knight*, at page 497, stating that performance of a unilateral contract “is bound” if “part of the consideration requested in the offer is given or tendered by the offeree . . .”

On the following page of its Brief the Bank quotes another excerpt from the same page in *Knight*, in which the 1957 edition of Williston on Contracts discusses whether the offeror has the right to revoke his offer

even after the offeree's part performance. The Court of Appeals noted in *Knight* at page 497 that in 1957 Williston suggested that "if the consideration . . . will necessarily take time and expense for its performance" the offer should be kept "open for a reasonable time in consideration of the beginning of performance of the offeree." *Resp. Brief at page 19.*

In its Response Brief the Bank cited the first two sections of the *Knight* analysis of the 1932 Restatement §45 of Contracts without even mentioning the next, more important, section of the *Knight* opinion:

Not satisfied with the statement of the rule promulgated in the Restatement, the drafters of the Restatement (Second) of Contracts §45 (Tent. Draft No. 1, 1964) conceiving the problem in terms of an option contract, write as follows:

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it.

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.  
*Knight* at page 497. (emphasis added)

The entire discussion in *Knight* of the initial (1932) and second draft (1964) Restatement of §45 is quoted verbatim at pages 20-21 of the Appellants' opening Brief because by only quoting that portion of *Knight*

describing the law of partial performance between 1932 and 1957 the Bank misstates the current state of the law in the state of Washington as adopted by *Knight* in 1979: “**an option contract is created when the offeree begins the invited performance or tenders part of it.**” *Knight* at page 497. *Brief*, at page 21.<sup>1</sup> (emphasis added)

Neither *Knight* nor the draft Second Restatement of §45 distinguishes between types of consideration for performance of unilateral contracts: any unilateral contract becomes irrevocable if/when the offeree begins the invited performance or tenders part of it.

2. **Bel Air & Briney’s Conduct Constituted the Beginning of Performance or Partial Performance.**

In *Knight* this Court also adopted the draft Second Restatement’s discussion of the six factors to be considered in deciding whether the acts of the offeree constituted the beginning of performance or “mere preparations”. The parties agree that those same six factors apply here.<sup>2</sup>

The offeree’s conduct is clearly referable to the offer. It is undisputed that Mr. Briney’s purchase of the cashier’s check and telephone calls to the Bank were clearly referable to the Bank’s offer to assign the Judgment in return for the \$30,000 payment.

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<sup>1</sup> As stated in the opening Brief at page 21, the Second Restatement of Contracts §45 was approved in its present form in 1981: it is identical to the draft applied in *Knight* except it included a third example of performance: when the offeree tenders performance.

<sup>2</sup> Opening Brief page 23, Response Brief page 20

The offeree's conduct was definite and substantial. The Bank claims that obtaining the cashier's checks and calling the Bank to schedule the time of delivery constitutes insufficient "definite and substantial conduct" because the acts took so little time. *Resp. Brief, page 21.* However, these comprised all of the acts Bel Air & Briney needed to perform in order to complete the transaction other than to deliver the check to the Bank when Mr. Briney's voice mails were returned. Reviewed in the context of the scope of their duty to perform, Bel Air & Briney's conduct was both definite and substantial.

The conduct was of actual or prospective benefit to the offeror rather than the offeree. "Second, and most important", the Bank asserts in its Brief at pages 21-22, "obtaining a check without also tendering it had no actual or prospective benefit to the Bank." Not true. In fact the benefit to the Bank was exactly \$2,000, because its knowledge that Mr. Briney was waiting to be told when to bring his \$30,000 to the Bank allowed it to extract \$32,000 from the Yagi family.

The Bank's internal records indicate that on the morning of Friday, May 11, Ms. Smith and her boss were "good to go" with Mr. Briney and his \$30,000, *CP 110*, which enabled Ms. Smith to send Mr. Wilson an email that is quoted on page 13 of the opening Brief, giving Mr. Wilson until the end of the day to beat Bel Air & Briney's \$30,000 offer. Ms.

Smith added the not-so-subtle reminder that for its \$30,000 Bel Air & Briney would receive an Assignment of the (\$61,000) Judgment against Mr. Wilson's client. *CP 127; Brief, page 13*. The Yagis capitulated and paid the Bank \$32,000, saving themselves \$29,000 and allowing the Bank to receive \$2,000 more than it was going to receive from Bel Air & Briney. Conversely, Mr. Briney's acquisition of the cashier's check and calling the Bank was of no benefit whatsoever to Bel Air & Briney.

The terms of the communications between the parties, their prior course of dealing, and any relevant usages of trade. The Bank made no attempt to disagree with Bel Air & Briney's contentions that the other beginning preparations factors in *Knight* were satisfied. *Opening Brief, pages 26-27*.

The two Vermont cases cited by the Bank at page 23 of its Response Brief, *Ragosta v. Wilder*, 156 Vt. 390, 592 A.2d 367 (1991) and *State v. Delaney*, 157 Vt. 247, 598 A.2d 138 (1991) simply demonstrate – as does *Knight* — the differences between mere promises or preparation to perform, and the performance carried out by Bel Air & Briney.

In *Ragosta*, the purchaser merely proved it had obtained financing and assured the seller it could pay the purchase price, but “never tendered to defendant or even began to tender the \$88,000 purchase price” of a real estate parcel before the seller revoked the transaction two days before the

date the purchasers claimed they intended to complete the purchase. *Ragosta* at page 394. (emphasis added) The Vermont Supreme Court properly concluded “plaintiffs were merely engaged in preparation for performance.” *Id.*

In *State v. Delaney*, the Vermont Supreme Court applied *Ragosta* to dismiss the lawsuit filed by the state government to enforce a contract for the purchase of land for \$1.2 million that the seller revoked two days before the deadline for the payment of the funds. Although the state government had enacted a joint resolution on short notice to purchase the property, the resolution did not appropriate any money, and its agent was still attempting to negotiate several material terms of the purchase and sale agreement. *Delaney*, at pages 253-254. The Court said at page 254 of *Delaney*, as it held in *Ragosta*, that “[i]n the absence of extraordinary circumstances, not present here, efforts to obtain financing will not constitute part performance of a unilateral offer to sell real estate.”

Bel Air & Briney had done far more than obtain financing to acquire the Assignment of Judgment: they had the money, in the form of a cashier’s check. They had not merely promised to complete the transaction: Mr. Briney told the Bank he was ready to complete the transaction immediately, as soon as the Bank told him what time on Friday, May 11 to come to its office. Unlike the Vermont defendants who

revoked the transaction two days before the offerees were prepared to perform, Bel Air & Briney were prepared to perform 26 hours before the Bank tried to revoke the deal.

The Court of Appeals used the phrases “beginning of performance” and “part performance” somewhat interchangeably in *Knight*: they employed the former when quoting or discussing the draft Second Restatement §45 at pages 497 and 498, and the latter when it concluded that the Knights’ conduct represented mere preparations “and did not constitute part performance which would require enforcement of the Bank’s offer” at page 499.

Bel Air & Briney’s conduct constituted beginning of or partial performance which required enforcement of the Bank’s offer as an option contract, according to subsection (2) of the draft Restatement (Second) of Contracts as adopted in *Knight* at page 497.

As the Bank correctly stated in its Motion for Summary Judgment, “An option contract is a promise which meets the requirements of the formation of a contract and limits the promisor’s power to revoke and offer. *Restatement (Second) of Contracts §25 (1981)*.” CP 64. *Knight* quotes and applies the draft Restatement (Second) §45: the beginning of, or partial, performance by the offeree of a unilateral contract provides the necessary consideration for the creation of an option contract.

**B. The Bank Revoked the Option Contract Before Bel Air & Briney Had A Reasonable Opportunity to Complete Performance.**

*Knight* makes it clear not only that mere promises or preparations are insufficient but that “beginning of performance implies a promise to complete performance.” *Knight*, at page 498. As stated earlier in this Brief, the initial Restatement of Contracts §45 provided that if partial performance is given in a unilateral contract, the offeror “is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.” *Knight* at page 497.

Either implicitly or explicitly, it is fair to read *Knight* to require the partially performing offeree to nevertheless “give or tender . . . the full consideration . . . within a reasonable time” thereafter.

Contrary to the Bank’s assertion at page 22 of its Response Brief, Bel Air & Briney does not suggest nor has ever suggested that once it obtained the cashier’s check and called the Bank but never delivered it, such an “unscrupulous offeree” like Bel Air & Briney “would thereby have the ability to tie up the offeror without ever transmitting any value; without having obligated himself in any way, standing by to scuttle any

other deal the offeror might make, if it suits his purposes.”

Bel Air & Briney merely contend, consistent with *Knight* and common sense, that it was reasonable for Mr. Briney to wait throughout Friday, May 11 for the Bank’s Ms. Smith to return his voice mails and tell him what time he was to drive to her office, deliver the check, and pick up the Assignment.

The Bank contends in its Brief at page 31 that Mr. Briney had several other options, including personally delivering the check to the Bank, mailing it to the Bank, or wiring the funds to the Bank. However, all of those options involved Bel Air & Briney paying \$30,000 without receiving in return the Assignment of Judgment which the \$30,000 was designed to purchase.

Perhaps it would have been unreasonable for Mr. Briney to wait several more days for Ms. Smith to call before attempting to deliver the check. However, this Court can and should find that when Ms. Smith revoked the contract on the afternoon of the same day Mr. Briney reasonably expected to deliver the check and complete the transaction, the Bank had not given Bel Air & Briney the reasonable amount of time to which it was entitled under *Knight* to complete performance.

This is the significance of *Wolk v. Bonthius*, 13 Wn. 2d 217, 127 P.2d 1023 (1942), in which the parties entered into a contract where the

plaintiff agreed to construct a cold storage plant upon a portion of a lot owned by the defendant, who later demanded that the plaintiff also put in a sidewalk which had not been called for in the contract. When the plaintiff refused the defendant kicked the plaintiff off the property.

The plaintiff successfully sued and the Washington State Supreme Court upheld the ruling, holding at page 219 that “one of the parties to a contract cannot avail himself of nonperformance where the nonperformance is occasioned by his acts. That is, a party may not benefit by his wrongful acts.” (citations omitted)

Once Bel Air & Briney began performance or had partially performed by the morning of May 11 at the latest, under *Knight* the unilateral contract had been replaced by an option contract which the Bank could not breach during the reasonable amount of time it would take for Bel Air & Briney to deliver the check to the Bank in exchange for the Assignment of the Judgment. The Bank’s “wrongful act” consisted of failing to return Mr. Briney’s call and arrange for the exchange of the \$30,000 and the Assignment, instead using its knowledge of Bel Air & Briney’s commitment to “persuade” the Yagis to pay an additional \$2,000.

Once Bel Air & Briney began performance or had partially performed by the morning of May 11 at the latest, both parties assumed contractual duties: Bel Air & Briney to undertake reasonable efforts to

complete performance within a reasonable time, and the Bank to not deprive Bel Air & Briney of the opportunity to do so. By reasonably spending the day waiting for Ms. Smith's telephone call Mr. Briney fulfilled the duty of Bel Air & Briney; by calling Mr. Briney that afternoon not to arrange for him to complete the transaction but to revoke it, the Bank breached its obligation.<sup>3</sup>

**C. This Court Can, and Should, Grant Summary Judgment to Bel Air & Briney.**

As stated throughout the briefs, there are no disputed material facts in this case. The Bank is the source for virtually all of the facts pertinent to its Motion for Summary Judgment and this appeal: its own internal workflow history, *CP 110-111*; letters, emails, and other documents it sent or received, *CP 123-131, 147, 161- 180*; and transcripts of the depositions of its employees, *CP 133-145*. In its Reply Memorandum in Support of its Motion for Summary Judgment, the Bank admitted that "there are no material facts in dispute on the issue of Plaintiffs' alleged part performance." *CP 181*.

The Washington State Supreme Court has entered summary judgment in favor of the nonmoving party where the material facts are not

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<sup>3</sup> Contrary to the Bank's contention at pages 26 – 29 of the Response Brief that Bel Air & Briney had not previously discussed the Bank's wrongful acts of May 11, 2012, the conduct described in pages 12 – 14 of the Appellant's Brief was based on 31 references to the record below contained in those three pages.

in dispute. *Impecoven v. Department of Revenue*, 120 Wn. 2d 357, 365, 841 P.2d 752 (1992), citing *Leland v. Fragge*, 71 Wn.2d 197, 427 P.2d 724 (1967); *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 660 P.2d 1124 (1983).

There being no disputed material facts here, summary judgment is appropriate.

DATED this 12<sup>th</sup> day of June, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 12, 2013, the original and one copy of the accompanying Reply Brief of Appellant Bel Air & Briney were given to ABC Legal Messengers for delivery and filing on June 12, 2013, with the Court of Appeals, Division I. I also certify that on June 12, 2013, a copy of the Brief of Appellant was delivered by legal messenger to the attorneys for Respondent.

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