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NO. 70466-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EAST WEST BANKCORP, INC., a Delaware corporation,
d/b/a EAST WEST BANK,

Plaintiff/Respondent,

v.

KRK HOLDINGS, LLC, a Nevada limited liability company

Defendant/Appellant

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant KRK Holdings, LLC (“KRK”) appeals from the trial court’s order granting summary judgment to Respondent East West Bancorp, Inc. (“EWB”). The trial court agreed with EWB that, as a matter of law, the real estate purchase and sale agreement signed by the parties was rendered a nullity when (1) the parties agreed that time was of the essence and (2) the closing date passed without fulfillment of a condition precedent to closing, viz., a title commitment.

KRK, the buyer, argued in opposition to summary judgment that EWB was “responsible” for paying off a monetary obligation arising from an access restriction agreement entered into by a prior owner of the property, which KRK contended was the sole impediment to obtaining insurable title. However, KRK merely alleged that EWB “could have” discharged the access restriction agreement by paying the monetary obligation, and failed to cite any support in the purchase and sale agreement for its contention that EWB was *required* by the terms of the purchase and sale agreement to do so. KRK also failed to explain the fact that the only admissible evidence in the record regarding the allocation of responsibility to resolve the access restriction agreement issue, shows that KRK signed a separate agreement to clear the access restriction agreement monetary obligation in question by agreeing to make a \$750,000 payment

to the access restriction holder. KRK offered no evidence at all that EWB ever agreed to pay off the access restriction agreement monetary obligation.

KRK's briefing on appeal represents an effort to start over in two respects. First, KRK simply ignores the arguments EWB made to the trial court in its motion for summary judgment, *i.e.*, that when a purchase and sale agreement makes time of the essence, sets a closing or termination date, and there is no conduct giving raise to estoppel or waiver, the purchase and sale agreement becomes legally defunct upon the stated termination date if performance is not tendered. KRK both ignores the cited authorities, which resolve this case in EWB's favor when applied to the undisputed facts, and offers no evidence to support its amorphous allegations of waiver or estoppel. In other words, KRK failed to come forth with even a sliver of evidence that the parties even discussed an extension of the closing date.

Second, KRK now seeks to further "reboot" its summary judgment opposition by introducing legal arguments that were not made to the trial court and points to a provision of the purchase and sale agreement that was not cited to the trial court in its opposition to EWB's summary judgment motion. These maneuvers are unavailing. KRK argues that a newly-relied upon term of the purchase and sale agreement

“unambiguously” assigns responsibility to EWB to resolve the access restriction agreement issue. The actual language of the cited provision does not, however, assist KRK. In fact, it specifically carves out from Seller’s duties all monetary obligations “assumed by Buyer.” The only evidence in the record regarding monetary obligations that were “assumed by Buyer” shows that KRK signed an agreement to pay \$750,000 to discharge the access restriction agreement monetary obligation. There is not one iota of evidence in the record that implies—let alone proves—that EWB agreed to pay off the access restriction agreement monetary obligation. In short, KRK offers nothing on appeal by way of contract terms or extrinsic evidence to support its assertion that EWB agreed to pay or otherwise resolve the access restriction agreement monetary obligation. It was inappropriate to offer new evidence and arguments on appeal, but even then the cited language, in light of the uncontested extrinsic evidence, fails to raise a genuine issue of material fact and therefore does not provide a basis for reversing the trial court.

KRK also challenges the trial court’s rulings regarding the granting of EWB’s motion to strike, the denial of KRK’s request for a summary judgment hearing continuance, and the award of attorneys’ fees and costs to EWB. KRK’s appeal should be denied and trial court’s orders affirmed.

II. ASSIGNMENTS OF ERROR

KRK makes three assignments of error as follows.

1. The trial court erred in entering its Order Granting Plaintiffs Motion To Strike And Granting Plaintiffs Motion For Summary Judgment. (CP 1-2)

2. The trial court erred in declining to rule on KRK's request for a continuance under CR 56(f). (CP 47)

3. The trial court erred in entering its Order Awarding Attorney's Fees And Costs And Order Of Disbursement Of Funds Held In Interpleader Matter No. 13-2-02081-3. (CP 165-66)

Brief of Appellant ("BOA"), p. 2.

EWB makes no assignment of error, firmly believing the decisions and orders of the trial court to be legally correct in all respects. EWB respectfully requests an award of its attorneys' fees and costs on appeal.

III. STATEMENT OF THE CASE

A. Factual Background.

In March 2011, EWB as seller and KRK as buyer entered into a Vacant Land Purchase and Sale Agreement (the "PSA") for the sale of parcels of real property located in Snohomish County (the "Property"). CP 122-141. EWB had acquired the property via foreclosure. CP 135. Under the terms of the PSA, the purchase price was to be \$1,750,000.00. CP 122. KRK paid \$90,000.00 of earnest money, which was held by the closing agent, Chicago Title Insurance Company. CP 122; CP 77 (Complaint, ¶3.3); CP 82 (admitted in Answer, ¶3.3); CP 182. Under

specific term 10 of the PSA, the closing date was to occur “15 days after [the] feasibility release.” CP 122; CP 77 (Complaint, ¶3.4); CP 82 (admitted in Answer, ¶3.4); CP 182. The PSA further provided that “Monetary encumbrances not assumed by Buyer, shall be paid or discharged by Seller on or before Closing.” CP 123 (general term c; emphasis added). General term d of the PSA further provided that “If title cannot be made so insurable prior to the Closing Date, then as Buyer’s sole and exclusive remedy, the Earnest Money shall, unless Buyer elects to waive such defects and encumbrances, be refunded Buyer . . . and this Agreement shall thereupon be terminated. Buyer shall have not right to specific performance or damages as a consequence of Seller’s inability to provide insurable title.” CP 123. Addendum A to the PSA discloses that EWB acquired the property via foreclosure and puts KRK on notice that EWB is selling the property “as is and with all faults” and that Buyer “assumes the risk regarding adverse physical, environmental, economic or legal conditions. . . .” CP 135.

On March 29, 2010, EWB’s agent Joseph Coakley hand delivered to KRK’s agent a binder of documentation which explicated development costs for which EEI sought repayment through a document denominated “Declaration of Access Easement” (the “Access Restriction Agreement”). CP 34, 37. Mr. Coakley’s cover letter expressly stated: “The obligation to

reach a settlement of the costs would fall upon your client [Appellant KRK] as a cost of acquisition of the parcel.”

On April 22, 2011, KRK manager Jimmy Drakos executed an agreement (the “Access Restriction Purchase Agreement”) to pay \$750,000 to the holder of the “Access Restriction Agreement to satisfy certain monetary obligations related to the development of the Property. CP 11-32. The Access Restriction Purchase Agreement recites KRK’s intention to purchase the Property from EWB and provides that KRK will pay the Access Restriction Agreement holder, East Everett Investments, LLC (“EEI”) as follows: “At closing, KRK shall pay EEI the sum of Seven Hundred Fifty Thousand Dollars (\$750,000).” CP 12 (Section 3). On April 22, 2011, Benjamin Durham, a real estate consultant working on behalf of KRK forwarded the signed Access Restriction Purchase Agreement to EEI via email with the following note: “Here is an executed copy of the agreement for the purchase of the Access restriction that is in place for the property under East West Bank control and that we have under contract for purchase.” CP 9. Durham had received the signed Access Restriction Purchase Agreement from Jimmy Drakos, who had signed it on behalf of KRK. *Id.*

On or about June 24, 2011, KRK waived the Feasibility Contingency set forth in general term v of the PSA, and closing was set

for July 11, 2011 pursuant to specific term 10 of the PSA. CP 126 (general term v of the PSA); CP 122 (specific term 10 of the PSA); CP 117; CP 77 (Complaint, ¶3.5); CP 83 (admitted in Answer, ¶3.5).

On July 8, 2011, EWB informed KRK that despite prompt and diligent efforts to obtain a title insurance commitment, none of six area title insurance companies contacted by EWB were willing to issue an insurable title commitment. CP 143-44.

KRK refused to waive the marketability/access issue and the sale did not close on July 11, 2011, or thereafter. CP 78 (Complaint, ¶3.8); CP 83 (admitted in Answer, ¶3.8). General term k of the PSA states that “[t]ime is of the essence” with respect to performance of the PSA. CP 124.

B. Procedural History.

On October 30, 2012, EWB sued KRK for breach of contract and sought a declaratory judgment that (1) by failing to close on the date specified by the PSA, KRK had breached the PSA; (2) by operation of the express terms of the PSA, the PSA had been terminated; and (3) KRK be entitled only to a refund of the \$90,000.00 earnest money deposited with Chicago Title as its sole remedy. CP 156-64. EWB also sought an award of attorneys’ fees, pursuant to general term p of the PSA. CP 164.

On January 28, 2013, KRK answered the Complaint. CP 82-85. KRK asserted three affirmative defenses: (1) waiver, (2) unclean hands, and (3) prevention of performance. CP 84. Notably, KRK's did not plead counterclaims against EWB for either money damages or for specific performance of the PSA. In fact, KRK did not allege any counterclaims.

1. EWB's Motion for Summary Judgment.

On March 27, 2013, nearly five months after the case had been filed, EWB moved for summary judgment in the form of a declaratory judgment as follows:

(a) judicially terminating a Vacant Land Purchase and Sale Agreement (PSA) executed by the parties; (b) declaring the PSA to be of no further force and effect; (c) relieving Plaintiff from further performance of the PSA, and (4) [sic] establishing refund of the \$90,000.00 earnest money deposited by Defendant (less any costs incurred by interpleader Chicago Title) as Defendant's sole recompense.

CP 145-46. EWB's summary judgment motion was based on the undisputed facts that under the PSA the parties agreed to a specific time for closing and further agreed that "time is of the essence." CP 151. Consequently, the PSA became a nullity when the sale did not close on the date specified: "When a purchase and sale agreement makes time of the essence, sets a closing or termination date, and there is no conduct giving raise to estoppel or waiver, the purchase and sale agreement becomes legally defunct upon the state termination date if performance is not

tendered.” CP 151 (citing cases). EWB further pointed out the absence of any evidence to support KRK’s affirmative defenses. CP 151-52. EWB sought an award of its attorneys’ fees pursuant to the PSA. CP 153.

2. KRK’s Response.

KRK’s response to the summary judgment motion (“Response”) argued that under the PSA, EWB had the “responsibility” for clearing the Access Restriction Agreement monetary obligation, the same Access Restriction Agreement payment that KRK had agreed to make pursuant to the Access Restriction Purchase Agreement which Mr. Drakos signed:

Defendant asserts that it was Plaintiff’s responsibility under the PSA to pay the amount necessary to resolve the access/marketability issues created by the Easement. Presumably, Plaintiff’s position is that general term d of the PSA meant that Plaintiff was to obtain an insurable title commitment for free. Nothing in the PSA supports such a position. CP 46 (emphasis in original). Thus, KRK argued that EWB had the “responsibility under the PSA” to pay off the Access Restriction Agreement monetary obligation, notwithstanding KRK’s unequivocal agreement to pay \$750,000 dollars to satisfy the monetary obligation as expressly set forth in the Access Restriction Purchase Agreement.

Not only did KRK’s interpretation of the duties under the PSA fly in the face of its own Access Restriction Purchase Agreement, it was unclear what language in the PSA KRK was ostensibly looking to in order to support its interpretation. KRK cited only general term d of the PSA in

support of this contention regarding “responsibility” under the PSA for clearing the Access Restriction Agreement monetary obligation. CP 45, 46. General term d, however, does not assign responsibility for discharging encumbrances to title or other monetary obligations related to acquisition of the property. *See* CP 123. General term d deals with title insurance and authorizes “Buyer’s lender or Closing Agent, at Seller’s expense, to apply for the then-current ALTA form of standard title insurance” *Id.* General term d further provides that the preliminary title commitment must meet specific conditions by the closing date, failing which, the PSA is terminated and the buyer’s remedy is limited to the return of its earnest money:

If title cannot be made so insurable prior to the Closing Date, then as Buyer’s sole and exclusive remedy, the Earnest Money shall, unless Buyer elects to waive such defects and encumbrances, be refunded Buyer . . . and this Agreement shall thereupon be terminated. Buyer shall have not right to specific performance or damages as a consequence of Seller’s inability to provide insurable title.

CP 123. Thus, KRK’s Response offers no support in the cited language of the PSA, *i.e.*, general term d, for its contention that it was EWB’s “responsibility under the PSA” to pay off the Access Restriction Agreement monetary obligation. Rather, KRK made the leap that (1) the only barrier to obtaining title insurance was the payment of the Access Restriction Agreement monetary obligation and (2) because EWB *could*

theoretically have paid off the Access Restriction Agreement monetary obligation, therefore, it was KRK's duty under the PSA to do so. CP 46. As noted, KRK failed to cite any contract language even hinting that EWB assumed the duty to resolve the Access Restriction Agreement monetary obligation, while entirely ignoring KRK's own agreement to pay \$750,000 to do so. The mere unsupported allegation that EWB "could" have cleared the Access Restriction Agreement monetary obligation told the trial court nothing about the parties' intentions as to which party was *required* to do so under the PSA.

Moreover, KRK failed to present admissible evidence that the only barrier to obtaining title insurance was payment of the Access Restriction Agreement monetary obligation. In support of its Response, KRK offered the Declaration of Benjamin R. Durham (the "Durham Declaration"). Mr. Durham had previously forwarded via email an executed copy of Access Restriction Purchase Agreement wherein KRK agreed to pay \$750,000 for assignment of EEI's interest in the Access Restriction Agreement. CP 9. In his declaration, Mr. Durham conspicuously refrained from providing any evidence as to whose responsibility it was under the PSA to pay off the Access Restriction Agreement monetary obligation. Instead, Mr. Durham confined his testimony to the unsupported hypothetical proposition that EWB "could have" obtained

insurable title if it had paid off the Access Restriction Agreement monetary obligation: “It is my understanding that Plaintiff EWB could have obtained an insurable title commitment, but for a price.” CP 49, ¶ 10. Obviously, Durham’s conclusory and unsupported statement missed the point. Alleging that a party “could have” performed an act does not resolve the question as to whether it was that party’s contractual *obligation* to do so. Even then, Mr. Durham did not allege any foundation for his subjective “understanding” that EWB could have obtained an insurable title commitment “for a price,” and related assertions such as: “The access issue created by the [Access Restriction Agreement] was the only issue to be resolved before an insurable title commitment could be issued.” CP 49, ¶ 6. *See also* CP 49, ¶¶ 7-9. Mr. Durham did not explain in his declaration how he had personal knowledge that the Access Restriction Agreement was the sole but-for cause of the failure to obtain title insurance, given that EWB contacted six area title insurance and none were willing to issue an insurable title commitment. CP 143-44. Mr. Durham did not state that he personally participated in each of these six negotiations between EWB and the title insurance companies. Even then, Mr. Durham’s declaration did not offer evidence that EWB agreed to pay off the Access Restriction Agreement monetary obligation. The Durham Declaration’s testimonial “evidence” consists of merely his

immaterial supposition that EWB “could have” done so. Indeed, any person or entity with sufficient funds “could have” done so.

In sum, KRK’s Response offered no contract language to support its bare allegation that EWB had assumed the “responsibility” to discharge the Access Restriction Agreement monetary obligation and Mr. Durham’s declaration offered no admissible evidence in support of the contention.

Although EWB had pointed out in its motion the absence of any evidence to support KRK’s affirmative defenses and sought award of its attorneys’ fees, KRK did not offer any evidence to prove the essential elements of its affirmative defenses, nor did KRK submit any argument on the issue of attorneys’ fees.

KRK’s Response included a section requesting denial of EWB’s motion under CR 56(f). CP 47. KRK did not, however, serve and file a separate CR 56(f) motion and did not support the request for additional time to conduct discovery with an affidavit or declaration. *Id.* KRK failed to identify any specific evidence that might or would be obtained through additional discovery. KRK did not identify any person whom it believed necessary to depose or any documents to be obtained by subpoena. KRK did not state what discovery it had previously sought, what discovery had been provided, or what discovery was pending. KRK merely offered the unsupported statement that “Discovery has yet to be completed, and thus

Defendant would need additional time to obtain and gather evidence to present additional affidavits in response to Plaintiff's Motion for Summary Judgment." CP 47. KRK's *de minimis* submission was not enough to warrant a continuance of the summary judgment hearing.

3. EWB's Reply in Support of Summary Judgment.

EWB's reply noted that (1) KRK had failed to plead a cause of action for specific performance in its Answer, a compulsory counterclaim under CR 13(a), (2) it was undisputed that "the sale of the subject property did not close at the time specified in the PSA and that time was of the essence," and (3) that KRK had failed to submit any proof whatsoever, especially any admissible evidence, to support its contention that EWB had the obligation to discharge the Access Restriction Agreement monetary obligation. CP 39.

EWB further moved to strike certain paragraphs of the Durham Declaration because such failed to meet the admissibility requirements of CR 56(e):

CR 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." To satisfy CR 56(e), declarations submitted in a summary judgment proceeding must contain "facts to which the affiant can testify from personal knowledge and which would be admissible in evidence." A corollary of the requirement that affidavits (or declarations) be made on personal knowledge is that they may not

be made upon hearsay, belief, or understanding. Unsupported conclusory allegations are not enough to defeat summary judgment.

CP 40 (citations omitted). EWB moved to strike paragraphs 7-11 of the Durham Declaration on grounds that “(1) the statements lack foundation showing that the declarant has testimonial knowledge of the particular matters therein; (2) they are hearsay; (3) they are speculative; and (4) they are conclusory.” CP 40. *See* CP 7 (annotated Durham Declaration setting forth EWB’s specific evidentiary objections).

EWB further noted that under well-established Washington law the PSA became a nullity when it failed to close on the agreed date because it had a “time is of the essence” clause and because there had been no waiver or estoppel. CP 40-41. EWB noted that KRK failed to offer any admissible evidence of EWB’s waiver of the right to terminate the PSA upon failure of the sale to close on the closing date established by the terms of the PSA. CP 40-41.

To the extent that KRK’s Response could have been construed as making an estoppel argument, it was predicated on the bare allegation that EWB did not pay off the Access Restriction Agreement monetary obligation. CP 41. EWB argued that KRK ignored the fact that “KRK, through documents it executed, has expressly admitted that it solely assumed the obligation to resolve the Declaration of Access Easement

issue, not Plaintiff.” *Id.*, citing the Access Restriction Purchase Agreement (CP 11-32) and Mr. Durham’s transmittal email (CP 9). Thus, “[KRK] has expressly admitted the obligation to resolve the [Access Restriction Agreement] issue rested solely with [KRK].” CP 42.

4. The Trial Court’s Summary Judgment Rulings.

On May 9, 2013, the trial court granted EWB’s motion for summary judgment, declaring the PSA a nullity, relieving EWB of any further obligation to perform under the PSA, and declaring refund of the earnest money to be KRK’s sole remedy. CP 2. The court also granted EWB’s motion to strike and its request for an award of attorneys’ fees. CP 2. On May 31, 2013, the trial court granted EWB’s unopposed attorneys’ fee application. CP 165-66.

IV. ARGUMENT

A. Standard of Review.

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that material facts are in dispute. *Atherton*, 115 Wn.2d at 516. If the nonmoving party fails to do so, summary judgment is proper.

Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Review of a summary judgment order is de novo and the appellate courts perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). A court should grant summary judgment if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26.

B. Summary of KRK’s Arguments on Appeal.

As noted above, KRK’s summary judgment Response offered no evidence whatsoever that it was EWB’s obligation under the PSA to discharge the Access Restriction Agreement monetary obligation. KRK’s sole citation to the PSA was to general term d, which said nothing about the issue. KRK offered no explanation of the fact that it was KRK, not EWB, who signed an express agreement to pay \$750,000 to pay the Access Restriction Agreement monetary obligation. Instead, KRK offered the speculative and conclusory contention that problems with the

insurance of title “could have” been resolved if EWB were willing to pay off the holder of the Access Restriction Agreement, a contention that was both irrelevant to the actual issue of which party had in fact *agreed* to do so, and inadmissible as speculative, conclusory and lacking in foundation and personal knowledge.

In the face of its failure in responding to EWB’s motion for summary judgment, KRK has altered course and taken a new tack on appeal. KRK now focuses on a previously unmentioned provision of the PSA, general term c, which KRK did not call to the attention of the trial court when it opposed summary judgment. *See, e.g.* BOA, p. 3. KRK now argues that general term c sets forth EWB’s “contractual obligation to have ‘paid or discharged’ ‘[m]onetary encumbrances or liens.’” *Id.*, p. 9. Thus, KRK now contends that trial court misconstrued the PSA because it “rendered East West’s promise to ‘pa[y] or discharge[]’ ‘[m]onetary encumbrances or liens’ and to obtain title insurance meaningless and illusory.” BOA, p. 11, citing CP 123. In the alternative, KRK argues that EWB’s argument “was premised on extrinsic evidence” which “could not override the unambiguous language in the PSA imposing that obligation [to clear the Access Restriction Agreement] on East West” (BOA, p. 12) and there is a genuine issue of fact as to the parties’ intent: “In light of the PSA’s unambiguous language requiring East West to pay or discharge all

encumbrances or liens, there is at the very least a genuine issue of material fact regarding the parties' intent." BOA, p. 15.

KRK's argument is a curious one. KRK repeatedly cites the "unambiguous language" of the PSA that allegedly sets forth EWB's "promise to 'pa[y] or discharge[]' '[m]onetary encumbrances or liens.'" BOA, p. 12, 15, citing CP 123. If such language existed, why is KRK only raising this argument for the first time on appeal? Why did KRK fail to allege to the trial court, more than a year after the sale failed to close, the more obvious theory of breach of contract, given this allegedly "unambiguous language" supposedly requiring EWB to discharge the Access Restriction Agreement monetary obligation? The actual language of general term c regarding the obligation to "pa[y] or discharge[]" "[m]onetary encumbrances or liens" is as follows: "Monetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before Closing." CP 123 (emphasis added). This language from general term c does not support KRK's argument that "The trial court ignored the plain language of the PSA, in which East West promised to have 'paid or discharged' '[m]onetary encumbrances or liens' and to obtain title insurance prior to closing." BOA, p. 7. KRK overlooks that (1) it failed to cite this "plain language" to the trial court, and (2) EWB only agreed to pay for "[m]onetary encumbrances or liens" that were "*not*

assumed by Buyer,” and thus there is no “plain” or “unambiguous” language placing the obligation to discharge all liens or monetary encumbrances on EWB. Fatally for KRK, the only evidence in the record regarding the allocation of responsibility to discharge the Access Restriction Agreement monetary obligation shows that KRK alone assumed this responsibility by agreeing to pay \$750,000 under the terms of the Access Restriction Payment Agreement, which it signed. KRK did not submit any evidence to the trial court—and points to no such evidence on appeal—to support its position that EWB agreed to assume and pay the Access Restriction Agreement monetary obligation. Instead, KRK now cites contract language that expressly carves out from EWB’s performance duties those liens and monetary encumbrances that were “assumed by Buyer,” language that is consistent with KRK’s express assumption in the Access Restriction Payment Agreement of the duty to pay this monetary obligation.

KRK also makes an alternative argument that is more closely related to the one it offered to the trial court. KRK contends that EWB’s failure to clear the Access Restriction Agreement monetary obligation “frustrat[ed] the procurement of title insurance, a condition precedent to closing” (BOA, p. 17):

. . . this court should refuse to allow East West to benefit from its own frustration of the condition precedent to its obligation to close, *i.e.*, that it obtain title insurance. (CP 123, 149, 161) East West could have eliminated the only obstacle to title insurance — discharge of the access easement — from the proceeds at closing, but without explanation it refused to do so. (CP 16, 49, 123, 143-44)

BOA, p. 18. Here, KRK reverts to the argument that EWB “could have” paid for the removal of the access restriction, without explaining where in the PSA the parties agreed that EWB would do so. This is essentially the argument made to the trial court, albeit now supported by a new legal theory—frustration of a condition precedent.

Finally, KRK argues that the trial court’s rulings regarding the motion to strike, KRK’s request for a continuance of the summary judgment hearing, and the award of attorneys’ fees and costs were in error. These arguments are addressed below.

C. KRK Presents New Evidence and New Arguments on Appeal, But Fails to Address EWB’s Arguments That Prevailed in the Trial Court.

As noted above, KRK’s briefing on appeal represents an entirely new approach that essentially ignores the arguments and supporting evidence EWB presented to the trial court. Regarding the PSA, KRK makes two arguments assigning error to the trial court: (1) illusory contract, based on the allegedly “plain language” of general term c, and (2) frustration of a condition precedent. These are legal theories that

simply were not presented to the trial court and rely on contract language (*i.e.*, general term c) that was not cited to the trial court in KRK's summary judgment Response.

Arguments not raised below need not be considered on appeal unless they concern a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 108 Wn. App. 198 (2001) (“We will not review an issue, theory, argument, or claim of error not presented at the trial court level.”).

In presenting these new theories and new evidence, KRK has neglected to address the arguments made by EWB that prevailed at the trial court level. In moving for summary judgment, EWB argued—based on well-established Washington law—that absent evidence of waiver or estoppel, a purchase and sale agreement where time of is of the essence becomes a nullity where timely performance is not tendered.

When a purchase and sale agreement makes time of the essence, sets a closing or termination date, and there is no conduct giving rise to estoppel or waiver, the purchase and sale agreement becomes legally defunct upon the state termination date if performance is not tendered.

CP 151, citing *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968).

“[O]nce a termination date expires, in the absence of an existing waiver or estoppel, the agreement is dead.” *Mid-Town Partnership v. Preston*, 69

Wn. App. 233, 227, 848 P.2d 1268 (1993); *see also Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991) (cited at CP 151).

KRK's appeal briefing entirely fails to address these arguments and authorities. KRK did not present the trial court with any evidence whatsoever of waiver or estoppel and KRK's Response to summary judgment also offered no argument as to waiver. CP 44-47. Waiver is the intentional abandonment or relinquishment of a known right, and intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive. *Harmony at Madrona Park Owner's Association v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008). Even if it were appropriate for KRK to present new arguments regarding waiver on appeal, the record is devoid of supporting evidence, and KRK's arguments under CR 56(f) did not address waiver. CP 47.

As to estoppel, KRK's Response to summary judgment (and its arguments on appeal) may be generously construed to suggest, in effect, that EWB should be estopped from asserting the PSA has been nullified because EWB did not pay off the Access Restriction Agreement monetary obligation. *See* CP 41. However, in order to raise an issue of fact as to estoppel, it was incumbent on KRK to present competent evidence to the trial court that EWB indicated willingness to extend the closing date.

Estoppel has three elements: (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Mid-Town P'ship, 69 Wn. App. at 234 (citations omitted). The court in *Mid-Town P'ship* noted that, similar to the instant case, none of evidence presented related to an “extension of a closing date” prior to the expiration of said date. *Id.* at 234-35. “[O]nce a termination date expires, in the absence of an existing waiver or estoppel the agreement is dead.” *Id.* (citations omitted; emphasis added). “In the absence of an express agreement, for waiver of a time limit in a real estate sales agreement to apply, the seller must ‘unequivocally evince an intention to waive the time limit’ in the contract, ‘or by his conduct lead purchasers to their default to support waiver or estoppel.’” *Uznay v. Bevis*, 139 Wn. App. 359, 161 P.3d 1040 (2007), citing *Artz v. O'Bannon*, 17 Wn. App. 421, 425, 562 P.2d 674 (1977); *Nadeau v. Beers*, 73 Wn.2d 608, 440 P.2d 164 (1968). *See also Chg Int'l v. Robin Lee*, 35 Wn. App. 512, 514, 667 P.2d 1127 (1983) (“Robin Lee did not agree to waive the July 31 closing date nor did it engage in any conduct which would constitute an estoppel precluding it from asserting the July 31 closing date.”).

KRK submitted no evidence that the parties ever discussed extending the closing date of the PSA. The only evidence in the record is

unequivocal proof that EWB did not waive the closing date. On July 8, 2011, EWB's attorney set forth his client's position regarding KRK's options in light of the looming closing date:

To date, none of these [above-listed title insurance] companies is willing to issue such a commitment. Unless one of them has a complete change of heart between now and the July 11 closing date, we must conclude that East West Bank, despite its best efforts, will not be able to provide a commitment for title acceptable to your client.

...

Unfortunately, the time has now arrived where your client must decide whether it wishes to waive the access/marketability issue and proceed to closing or have its earnest money returned.

CP 143-44. KRK has offered no evidence that any party even discussed extending the closing date and entirely failed to address this issue in the trial court and now on appeal. KRK has failed to explain why the trial court erred in granting summary judgment when KRK did not offer any legal authorities to challenge the cases cited by EWB or submit even a morsel of evidentiary grist that the parties discussed extending the closing date, much less that EWB "unequivocally evince[d] an intention to waive the time limit."

D. KRK's Newly-Hatched Illusory Promise Argument Fails.

Having looked away when faced with the argument and authorities EWB presented to the trial court, KRK now attempts to make a fresh start on appeal. Where in the trial court KRK argued that EWB "could have"

discharged the access restriction, KRK now contends that EWB was *required* to do so. EWB's new argument is as follows: "This court should reverse the trial court's summary judgment order because it rendered East West's promises illusory and allowed East West to back out of its agreement with KRK without consequence." BOA p. 9-10 (emphasis added). Of course, KRK's illusory promise argument assumes the existence of a "promise" by EWB to discharge the Access Restriction Agreement monetary obligation, but as noted above, KRK has never offered any evidence that EWB ever promised to do so. This flaw brings down the entire edifice of KRK's new theory.

Interpretation of a contract provision is a question of law when "(1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003), quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Therefore, "summary judgment is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning." *Id.*, quoting *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997).

Thus, it is well-established that “where only one reasonable inference may be drawn from the extrinsic evidence,” summary judgment is proper. In a real estate purchase dispute regarding allocation of responsibility for a leaking oil tank, the trial court properly determined a question of contract interpretation on summary judgment by looking to uncontested extrinsic evidence. “The trial court did not rely upon any contested extrinsic evidence to interpret the parties’ agreement. It properly resolved the contractual allocation issue on summary judgment.” *Grey v. Leach*, 158 Wn. App. 837, 853, 244 P.3d 970, (2010) (interpretation of a contract provision is a question of law where “only one reasonable inference can be drawn from the extrinsic evidence.”). In *Grey*, the court determined as a matter of law that the REPSA did not permit the “detailed testing the Leaches insist the Greys had a duty to perform,” that the inspection report offered no evidence that would allow the buyers to terminate their obligation to purchase under the inspection contingency, and that the uncontested evidence showed that the sellers erroneously confirmed that no abandoned oil tank existed. *Id.* at 850-53. See also *Spectrum Glass v. PUD of Snohomish*, 129 Wn. App. 303, 317, 119 P.3d 854 (2005) (“The only reasonable inference [from extrinsic evidence] is that while Spectrum told the PUD it wanted a fixed rate for the Bridge Contract, the PUD did not agree to a fixed rate. The Bridge

Contract incorporates Schedule 35, and Schedule 35 is subject to change. We affirm the trial court's decision to dismiss Spectrum's breach of contract claim on summary judgment.").

In this case, "only one reasonable inference can be drawn from the extrinsic evidence." General term c of the PSA provides that "Monetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before Closing." CP 123 (emphasis added). The only evidence in the record regarding monetary encumbrances or liens to be assumed by the buyer is the Access Restriction Payment Agreement, pursuant to which KRK agreed to pay \$750,000 to discharge the monetary obligation related to the Access Restriction Agreement. CP 11-32. KRK has not attempted to controvert this evidence. KRK has offered no evidence that EWB agreed to discharge the Access Restriction Agreement payment obligation or any explanation as to why KRK would sign such an agreement if EWB had the responsibility to clear the Access Restriction Agreement under the PSA.

Instead, KRK asserts misleadingly (1) that the agreement is "unexecuted," where in fact it was KRK that signed the agreement, not the Access Restriction Agreement holder, and (2) that "This evidence could not override the unambiguous language in the PSA imposing that obligation on East West." BOA, p. 12. But this "unambiguous language"

cannot be found. The “unambiguous language” of general term c in fact unambiguously carves out from EWB’s obligations the monetary encumbrances or liens “assumed by Buyer.” To ignore this language, as KRK does, is to “adopt a contract interpretation that renders a term absurd or meaningless.” *Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 270, 274, 711 P.2d 361 (1985). The only evidence in the record regarding the allocation of responsibility for discharging the Access Restriction Agreement, evidence which unambiguous and uncontroverted, takes the form of a contract signed by KRK to pay \$750,000 to the Access Restriction Agreement holder. “Only one reasonable inference can be drawn from the extrinsic evidence”: that KRK assumed the duty clear the Access Restriction Agreement.

KRK argues that it was improper for EWB to offer extrinsic evidence, such as the Access Restriction Payment Agreement because “This evidence could not override the unambiguous language in the PSA imposing that obligation on East West.” BOA, p. 12. But KRK has only cited general term c in support of its argument, which carves out from EWB’s obligations the liens “assumed by Buyer.” There is no inconsistency between general term c and the Access Restriction Payment Agreement wherein KRK agreed to discharge the Access Restriction Agreement monetary obligation. This extrinsic evidence does not, as

argued by KRK, violate the rule that “Extrinsic evidence, such as the declaration of a party to a contract, may not be used (1) to establish a party’s unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word.” *Graoch Associates No. 5 Ltd. P’ship v. Titan Const. Corp.*, 126 Wn. App. 856, 866 n. 15, 1115, 109 P.3d 830 (2005), citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999), cited at BOA, p. 12. Of course, it is well-established that “Absent accident, fraud, or mistake, extrinsic evidence cannot be admitted if it adds to or contradicts the written agreement.” *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990). But the Access Restriction Payment Agreement does not add to or contradict general term c, it merely shows by the uncontroverted objective manifestations of KRK that payment to resolve the Access Restriction Agreement was a monetary obligation “assumed by Buyer.”

KRK further contends that where an integrated agreement is at issue, summary judgment may not be granted where the moving party relies on “on inadmissible extrinsic evidence to add to the contract and to contradict the contract’s integration clause.” BOA, p. 13, quoting *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 851, 158 P.3d 1265 (2007). In *Nishikawa*, the buyer attempted to add an environmental

indemnity agreement to an integrated purchase and sale agreement and refused to close the sale even though all contingencies were satisfied. Here, the Access Restriction Payment Agreement does not add a new term to the PSA, but merely illuminates the parties' intentions as to which monetary encumbrances or liens were "assumed by Buyer" pursuant to general term c. The existence of an integration clause does not change the principle that summary judgment is appropriate where "only one reasonable inference can be drawn from the extrinsic evidence" *Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003) (where the agreements at issue contained integration clauses, summary judgment was proper where the extrinsic evidence was consistent with the contract terms: "the extrinsic evidence submitted by C I Host does not change the result"). It is black letter law that interpretation of an integrated agreement is determined as a matter of law where it does not depend on the credibility of extrinsic evidence or a choice of reasonable inferences from such evidence:

A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise, a question of interpretation of an integrated agreement is to be determined as a question of law.

Vacova Co. v. Farrell, 62 Wn. App. 386, 402, 814 P.2d 255 (1991) citing, Restatement (Second) of Contracts § 212(2) (1981); *Berg*, at 668. Here, KRK has not challenged the credibility or authenticity of the Access Restriction Payment Agreement it signed or offered any alternative (reasonable or otherwise) to the inescapable inference that it evidences KRK's intent to discharge the Access Restriction Agreement's monetary obligation consistent with the PSA's general term c.

Because EWB did not, as a matter of law, "promise" to discharge the Access Restriction Agreement's monetary obligation, this disposes of KRK's argument that the "trial court's grant of summary judgment was in error because it rendered East West's promise to 'pa[y] or discharge[]' '[m]onetary encumbrances or liens' and to obtain title insurance meaningless and illusory." BOA, p. 11, citing CP 123. First, as to the Access Restriction Agreement, there was no promise that could have been rendered illusory. Second, as to KRK's secondary argument, that EWB was required to obtain title insurance under the PSA, this is unsupported by any citation to the record. Arguments that are not supported by any reference to the record or by citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Moreover, examination of the PSA term regarding title insurance discloses no support for KRK's position. See general term d,

CP 123. General term d imposes the obligation on the *buyer* to apply for title insurance: “Seller authorizes Buyer’s lender or Closing Agent, at Seller’s expense, to apply for the then-current ALTA form of standard title insurance.” CP 123. KRK’s position that EWB was required under the PSA to apply for *and* obtain title insurance is manifestly lacking in support in the plain language of the PSA. The fact that EWB undertook the task of seeking title insurance for the Property cannot be construed as a waiver of its right to terminate the agreement when no title insurance commitment could be obtained. *See* CP 143-44 (letter of EWB’s attorney explaining that given the failure to obtain a commitment: “the time has now arrived where your client must decide whether it wishes to waive the access/marketability issue and proceed to closing or have its earnest money returned.”).

Finally, KRK has cited no authority that supports the proposition that the trial court’s interpretation rendered the contract illusory, *i.e.*, that the termination of the PSA upon the occurrence of a certain condition, *viz.*, the failure to obtain adequate title insurance, notwithstanding EWB’s uncontested good faith efforts in approaching numerous title insurance companies, renders EWB’s obligations under the PSA illusory. KRK’s primary case authority, *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 770-71, 1125, 145 P.3d 1253 (2006), *rev. denied*,

161 Wn.2d 1012 (2007) stands for the proposition that where the parties “clearly intended the pricing agreement to be binding,” the plaintiff’s position that it could charge an additional amount on top of the proposed price renders the agreement illusory because then “Cascade’s promise to accept the proposed prices in exchange for work performed would be optional.” There is no evident connection between these facts and this case. KRK does not dispute that the PSA did in fact require EWB to sell the property to KRK if adequate title insurance could be obtained by the closing date, and KRK has offered no argument to suggest that such a performance was somehow rendered optional by the trial court’s ruling.

More to the point, in *Omni Group v. Seattle-First Nat’l Bank*, 32 Wn. App. 22, 25, 645 P.2d 727 (1982), the court rejected the argument that an earnest money agreement was rendered illusory because the purchaser’s duty to buy was conditioned on two conditions precedent: receipt of an engineer’s and architect’s feasibility report and that the report be satisfactory to the buyer. “Omni has, by the quoted language, reserved to itself a power to cancel or terminate the contract. . . . Such provisions are valid and do not render the promisor’s promise illusory, where the option can be exercised upon the occurrence of specified conditions.” *Id.* at 28, citing 1A A. Corbin, *Contracts* § 265 (1963). Similarly, EWB’s duty to sell, and KRK’s duty to buy, were subject to the condition

precedent of obtaining adequate title insurance. “A promise for a promise is sufficient consideration to support a contract.” *Id.* at 24, citing *Cook v. Johnson*, 37 Wn.2d 19, 221 P.2d 525 (1950).

However, if KRK’s position were accepted and general terms c and d somehow rendered either party’s performance “optional,” then the contract is unsupported by consideration and unenforceable.¹ “If, however, a promise is illusory, there is no consideration and therefore no enforceable contract between the parties.” *Omni Group*, 32 Wn. App. at 24, citing *Interchange Assocs. v. Interchange, Inc.*, 16 Wn. App. 359, 557 P.2d 357 (1976). Thus, whether the PSA was terminated by its terms upon the non-occurrence of a condition precedent, or whether it was illusory *ab initio* because these conditions somehow rendered one or both of the parties’ performances optional, the result—an unenforceable contract—is the same.

E. KRK’s “Frustration” Argument Fails.

As set forth above, KRK’s argument in the “illusory contract” section is premised on EWB’s alleged responsibility under the PSA to discharge the Access Restriction Agreement monetary obligation pursuant to general term c, such that any other interpretation would render EWB’s

¹ A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5.

alleged “promises” illusory. In KRK’s alternative argument, frustration of a condition precedent, KRK recasts the formulation presented to the trial court with a new legal theory, *i.e.*, that EWB “could have” obtained title insurance if it had undertaken to discharge the Access Restriction Agreement, and therefore, EWB’s failure to do so frustrated a condition precedent to obtaining title insurance, which was itself a condition precedent to closing. BOA, p. 15-19.

Of course, a party may argue in the alternative, but the incongruity between KRK’s alternative arguments raises the question whether KRK understands paying off the Access Restriction Agreement monetary obligation to be an *obligation* assigned to a party or one that somehow devolves to one of them to avoid “frustrating” the closing? Regarding the latter possibility, how do we know which party has the duty to avoid such frustration? None of KRK’s frustration cases places an *affirmative duty* on a party to facilitate the achievement of a condition precedent, rather they are *prohibitory* in nature in that they prevent the active “frustration” of a condition. If KRK’s argument were accepted, either party could *ex post facto* impose a duty on the other to make sure that the condition occurs, claiming that failing to do was “frustration.” Since the argument could as easily be made by either party, it is of no assistance in

ascertaining the parties' intentions regarding the allocation of responsibility to perform *affirmative actions*.

In *Highlands Plaza, Inc. v. Viking Inv. Corp.*, 72 Wn.2d 865, 877, 435 P.2d 669 (1967), the seller stood in the way of the buyer's efforts to obtain the consent of the holder of an undivided one-quarter interest in the subject property to certain extension agreements: "Respondent seller had instructed appellant not to deal with Olson directly, and at least impliedly promised that it, respondent, would take care of Mr. Olson." Thus, the seller frustrated the condition precedent of obtaining the needed consent of Mr. Olsen by affirmatively requesting that the buyer not deal with him and then failing to obtain his consent. Here, KRK has failed to offer evidence that EWB stood in the way of KRK's efforts to clear the Access Restriction Agreement monetary obligation—via the Access Restriction Payment Agreement, or otherwise.

In the other primary case authority cited by KRK, *Cavell v. Hughes*, 29 Wn. App. 536, 629 P.2d 927 (1981), the defendant seller actively frustrated the closing, having decided that the price was too low. As stated by KRK:

The defendant in *Cavell* contracted to sell his house to the plaintiff, conditioned on the local country club approving plaintiff's membership application. After deciding he wanted out of the deal, the defendant, a director on the club's board, prevented the club from approving the plaintiff's application. This court reversed the

trial court's dismissal of plaintiff's specific performance action because defendant's actions were not in good faith, but rather for "the specific purpose of frustrating the sale . . . because he felt he had made a bad bargain."

BOA, p. 17-18, citing *Cavell*, 29 Wn. App. at 539. Again, KRK has failed to cite any evidence that EWB took any action to thwart the accomplishment of any condition precedent to obtaining a title commitment, including the Access Restriction Agreement.

In another case cited by KRK, the court set forth the general principle vindicated in these "frustration" cases: "Where liability under a contract depends upon a condition precedent one cannot avoid his liability by *making the performance of the condition precedent impossible*, or by *preventing it*." *Refrigeration Eng'g Co. v. McKay*, 4 Wn. App. 963, 970, 486 P.2d 304 (1971), citing 5 S. Williston, *Contracts* § 677 (3d ed. 1961) at 224 (emphasis added). There is no support for KRK's creative reinterpretation of these frustration cases to somehow allocate to one of the parties an affirmative duty to ensure that a condition precedent occurs. Moreover, KRK has offered no evidence that EWB acted to prevent, or to make impossible, a condition precedent.

F. The Trial Court Did Not Err in Striking Portions of the Durham Declaration.

A "ruling on a motion to strike is discretionary with the trial court," and a "court may not consider inadmissible evidence when ruling

on a motion for summary judgment.” *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). “A trial court’s decision to admit or exclude evidence lies within its sound discretion.” *Int’l Ultimate v. St. Paul Fire & Marine*, 122 Wn. App. 736, 744, 122 Wn. App. 736 (2004). “We will not overturn evidentiary rulings unless the trial court has manifestly abused its discretion.” *Id.*, citing *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). The trial court properly granted EWB’s motion to strike portions of the Durham Declaration and certainly did not “manifestly abuse[]” its discretion in so ruling. *See* CP 2, 7, 39-40.

In the paragraphs at issue, Mr. Durham declared his subjective belief that the failure to resolve the Access Restriction Agreement issue was the but-for cause of each of the six title companies’ failure to issue a title commitment: EWB “could have obtained an insurable title commitment upon payment of the fee referenced in the [Access Restriction Agreement] . . . the [Access Restriction Agreement] was nothing more than a financial encumbrance, which could have been resolved at closing through the payment of funds by Plaintiff.” CP 7, ¶¶ 7, 8. Mr. Durham further opined that it was his “understanding” that this but-for causation was the case as to all six companies: “For reasons unknown to me, Plaintiff chose not to resolve the [Access Restriction

Agreement] access issue, and informed KRK Holdings LLC that the transaction could not be closed. . . . It is my understanding that Plaintiff could have obtained an insurable title commitment, but for a price.” CP 7, ¶¶ 9, 10 (emphasis added).

KRK now contends that it was error for the trial court to grant EWB’s motion to strike these statements as “replete with speculation, conclusory statements, opinions couched as facts, and hearsay.” BOA, p. 21, quoting CP 40. It is KRK’s position that an adequate foundation for these statements was established merely by Mr. Durham’s statement that “I worked directly on the transaction that is the subject of [this] litigation, and that I have personal knowledge of the matter attested to herein.” *Id.*, quoting CP 48. However, Mr. Durham did not declare that he personally participated in each of the negotiations between EWB and the six title insurance companies that EWB approached regarding the title commitment issue. *See* CP 143-44. Therefore, the basis of Mr. Durham’s “understanding” is neither established nor sufficient.

KRK also endeavors once again to change the subject, contending that EWB’s submission of the Declaration of Joseph Coakley was objectionable. BOA, p. 22, citing CP 33-37. “Coakley’s statements went far beyond Durham’s description of East West’s refusal to obtain title insurance despite its ability to do so, and instead purported to interpret the

contract itself.” *Id.*, citing CP 34. In the first place, KRK’s objection to Mr. Coakley’s declaration is untimely. The Supreme Court of Washington has stated that it “will not consider objections to the evidence unless they have been brought to the attention of the trial court, and that court given an opportunity to rule thereon; nor will [it] consider grounds not presented to the trial court.” *Symes v. Teagle*, 67 Wn.2d 867, 873, 410 P.2d 594 (1966). Second, Mr. Coakley did not “interpret” the PSA, but rather testified that that EWB did not “undert[ake] or assume[] the obligation to make payment to EES (sic) (successor to Dujardin Development Co.) to resolve the Declaration of Access Easement issue to clear title.” CP 33-34, ¶¶ 2-3. Moreover, Mr. Coakley established a proper foundation for this testimony by alleging that he had personal knowledge of the transaction as a broker representing EWB in the transaction at issue.

In contrast, it is not established how Mr. Durham arrived at his subjective “understanding” that for each of the six title insurance companies, the Access Restriction Agreement issue was the sole impediment to issuing a title commitment, since he did not allege any participation in these discussions. ER 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). CR 56(e) requires that affidavits submitted in summary judgment proceedings be made on

personal knowledge and set forth such facts as would be admissible in evidence. It is not enough that the affiant be “aware of” or be “familiar with” the matter; personal knowledge is required. *Guntheroth v. Rodaway*, 107 Wn.2d 170, 178, 727 P.2d 982 (1986). Where a declarant stated that “My understanding is that the MARKS had no interest in the receipt of payments from BENSON and DOTY that would be superior to Seattle-First National Bank’s,” the evidence was inadmissible: “Since the specific facts upon which his understanding was based are not set forth, his conclusional statement is unsupported and should not have been considered.” *Marks v. Benson*, 62 Wn. App. 178, 182 (1991) (citation omitted). When Mr. Durham testified that “It is my understanding” that the Easement issue was the sole impediment to issuing a title commitment as to all six companies, which EWB “could have” cured “for a price,” the basis for the “understanding” was not established and these statements were properly stricken.

G. The Trial Court Did Not Err in Not Granting KRK a Summary Judgment Hearing Continuance.

A ruling on a motion for a continuance is reviewed for manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). A court does not abuse its discretion if (1) the requesting party does not offer a good reason for the delay in obtaining the desired

evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). A continuance is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery. *Id.* See also *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986).

KRK contends that the trial court abused its discretion in not granting a continuance of the summary judgment hearing. BOA, p. 23-25. But KRK does not show that it offered the trial court any “explanation of the evidence to be obtained through additional discovery.” *Lewis, supra*. In fact, the record is barren of any specification of the evidence to be sought or the identity of the person or entity from whom it might be obtained. See CP 47. KRK also failed to explain how much discovery had been sought, or was completed, or was pending. CP 47. Moreover, KRK did not offer the following: (1) “a good reason for the delay in obtaining the desired evidence” or (2) an explanation as to how such unspecified “desired evidence will raise a genuine issue of material fact.” See *Turner, supra*. KRK did not make a separate motion or support the request with any affidavit. *Landberg v. Carlson*, 108 Wn. App. 749, 756, 33 P.3d 406 (2001) (“CR 56(f) requires a proper motion supported by

affidavit”); CR 56(f) (“Should it appear from the affidavits of a party opposing the motion . . .”). Any of these reasons provide sufficient grounds for denial of KRK’s request. “Vague, wishful thinking is not enough to justify a continuance.” *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 401, 928 P.2d 1108 (1996). Furthermore, KRK’s contentions that EWB moved for summary judgment “before any significant discovery” or when “little discovery had taken place” are unsupported by any evidence in the record. *See* BOA, p. 23, 24. Arguments that are not supported by any reference to the record or by citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

H. The Trial Court Did Not Err in Awarding Fees to EWB and EWB Requests an Award of Fees and Costs on Appeal.

Whether a contractual provision authorizes the award of attorney fees is a question of law reviewed de novo. *Renfro v. Kaur*, 156 Wn. App. 655, 666-667, 235 P.3d 800 (2010). The trial court awarded EWB’s unopposed request for fees and costs. CP 2 (citing general term p of the PSA, see CP 125), CP 153, CP 165-66. KRK argues that the trial court erred granting summary judgment and therefore also erred in awarding fees and costs to EWB as the prevailing party pursuant to general term p. BOA, p. 25. KRK further seeks its fees on appeal: “A contract that

provides for attorney fees at trial also supports such an award on appeal.” BOA, p. 25, citing *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 241, 287 P.3d 606 (2012). For the reasons set forth above, the trial court was correct in granting summary judgment to EWB and therefore correctly awarded fees to EWB as the prevailing party. KRK’s request for fees on appeal likewise must fail because KRK has not set forth grounds establishing the trial court’s error in any respect.

EWB respectfully requests an award of its fees and costs as the prevailing party on appeal, pursuant to RAP 18.1 and general term p of the PSA. CP 125. “A party may be awarded attorney fees based on a contractual fee provision at the trial and appellate level.” *Renfro*, 156 Wn. App. at 666-667, citing *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785, 197 P.3d 710 (2008).

V. CONCLUSION

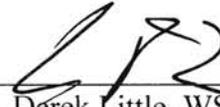
EWB respectfully requests that KRK’s appeal be denied in all respects and requests an award of its reasonable attorneys’ fees and costs on appeal.

DATED this 27th day of January, 2014.

Respectfully submitted,



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DECLARATION OF SERVICE

I, Heather White, declare and state that on the date set forth below, I caused the foregoing document to be served on the parties listed below in the manner indicated.

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- Via Hand Delivery
- Via Electronic Mail
- Via Overnight Mail
- CM/ECF via court's website
- Via Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Signed on this ^{22nd} ~~13th~~ day of January, 2014, at Seattle, Washington.



Heather White