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No. 72800-8-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of

SOHRAB MOSHIRI

Respondent/Trial Court Petitioner,

and

DELTA Y. MOSHIRI

Appellant/Trial Court Respondent.

BRIEF OF APPELLANT DELTA Y. MOSHIRI

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DIVISION I

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I. INTRODUCTION

The case involves summary judgment rulings on two distinct claims for which no complaint was ever filed. Instead, Sohrab Moshiri D.D.S. filed for dispositive relief in this dissolution action that was filed in 2007 to dissolve the marriage of Dr. Moshiri and Delta Yassman Moshiri. That dissolution action was concluded in January 2009 when the Dissolution Decree and related Findings and Conclusions were filed.

Dr. Moshiri and Ms. Moshiri subsequently entered into an agreement to deal with Dr. Moshiri's default under a promissory note owed to Ms. Moshiri. Under this agreement the term of the note was extended from May 2009 to July 2018 and a 7.5% interest in a Bellevue commercial property was conveyed to Ms. Moshiri.

The Bellevue commercial property sold in June 2014 and a disagreement arose over the division of proceeds. Rather than pursue arbitration as provided for in the parties' agreement, or filing a complaint, Dr. Moshiri filed a six day motion in this dissolution action for an order declaring that Ms. Moshiri's interest in the property was "net" not "gross." Although a response was filed by Ms. Moshiri in which numerous objections and concerns were raised, the trial court inexplicably granted Dr. Moshiri's motion without oral argument. In its order the trial court did not address the absence of a claim under CR 8(a), the lack of compliance

with CR 56, the arbitration clause in the parties' agreement, or the irreconcilable conflicts created in the parties' agreement by the court's ruling.

In the same six day motion, Dr. Moshiri also alleged that he loaned Ms. Moshiri \$30,000 in March 2011 and requested an order compelling that it be repaid. Again, Ms. Moshiri raised numerous objections and concerns, including the absence of a claim under CR 8(a), the lack of compliance with CR 56, the need for discovery, and the fact that Dr. Moshiri's claim was likely barred by the statute of limitations. Without addressing any of the issues raised by Ms. Moshiri, the court granted Dr. Moshiri's motion.

This Court should reverse the trial court's summary judgment order. If Dr. Moshiri wishes to pursue claims against Ms. Moshiri he should be required to assert a claim under CR 8(a), and thus allow Ms. Moshiri an opportunity to file an answer, assert affirmative defenses and conduct discovery, or pursue arbitration as provided for in the parties' agreement.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

I. The trial court erred by entering its October 21, 2014 Order (CP 190-91) (Appendix A).

2. The trial court erred by entering its November 21, 2014 Order Denying Motion for Reconsideration (CP 192-93) (Appendix B).

B. Issues Pertaining To Assignments Of Error.

1. Whether this Court should reverse the trial court's decision to disregard the pleading requirements of CR 8(a) and enter a dispositive final judgment (CP 80-83, 190-93) on new claims for relief which Dr. Moshiri never pled (let alone pled properly) in the Petition for Dissolution (CP 3-6) or otherwise? (*See Section IV.A, infra*)

2. Whether this Court should reverse the trial court's decision to enter a dispositive final judgment (CP 80-83, 190-93) construing the Post Decree Agreement (Appendix C) and its interrelated Tenancy in Common Agreement (Appendix D) where the determination of such issues is subject to arbitration under the Dispute Resolution provision in Section 13 of the Post Decree Agreement? (*See Section IV.B, infra*)

3. Whether this Court should reverse the trial court's decision to enter a dispositive final judgment (CP 80-83, 190-93) where Dr. Moshiri failed to provide the 28 days' notice for such a summary judgment ruling as required by CR 56(c) and King County Local Civil Rule ("KCLCR") 56(c)(2)? (*See Section IV.D, infra*)

4. Whether this Court should reverse the trial court's decision to enter a dispositive final judgment (CP 80-83, 190-93) on issues for

which Ms. Moshiri raised genuine issues of material fact which preclude summary judgment? (*See* Section IV.E, *infra*)

5. Whether this Court should award Ms. Moshiri her attorneys' fees and expenses under RAP 18.1? (*See* Section V, *infra*)

III. STATEMENT OF THE CASE

A. This dissolution action was resolved on the merits in January 2009 after a four day trial.

This Dissolution Action was filed in August 2007 and tried over the course of four days in December 2008. (CP 1, 3, 14, 97). A Decree of Dissolution was then entered on January 23, 2009 together with Findings of Fact and Conclusions of Law. (CP 7-32, 90-109).

In the Dissolution Decree, Ms. Moshiri was awarded "cash payments" in the form of three promissory notes in the amounts of \$1,099,899.00, \$471,254.00 and \$347,549.00, respectively. *See* Dissolution Decree at 4-5 (CP 10-11, 93-94); *see also* Sohrab Moshiri Decl. at 1 (CP 84). The \$1,099,899 Note was due and payable on May 26, 2009, and was secured with a deed of trust filed against commercial property in Bellevue (the "Bellevue Property") that was awarded to Dr. Moshiri in the divorce decree. *Id.* at 4 (CP 10, 93).

B. Dr. Moshiri defaulted on his obligations under the Dissolution Decree and the parties entered into a Post Decree Agreement in 2011.

Dr. Moshiri failed to timely pay the \$1,099,899 Note which led the parties to negotiate an agreement to address the payment default. *See* Delta Moshiri Decl. at 1-2 (CP 137-138); *see also* Sohrab Moshiri Decl. at 1 (CP 84). In July 2011, the parties executed a Post Decree Agreement dated June 30, 2011 to resolve a number of issues, including Dr. Moshiri's delinquency under the \$1,099,899 Note. *See* Delta Moshiri Decl., ¶3 (CP 138); *see also* Post Decree Agreement (CP 111-16, 141-46).¹ Under the Post Decree Agreement Ms. Moshiri extended the term of the \$1,099,899 Note to July 1, 2018, and Dr. Moshiri agreed to convey a 7.5% interest in the Bellevue property, agreeing that "[s]uch interest shall be evidenced by a Quit Claim Deed in the form of Exhibit A and a Tenant in Common Agreement in the form of Exhibit B." *See* Post Decree Agreement at 3 (CP 113, 143).

The Tenancy in Common Agreement referenced in the Post Decree Agreement was also executed by the parties in July 2011. (CP 118-22, 148-152). In the Tenancy in Common Agreement the parties agreed to a number of terms, including the following:

¹ The Post Decree Agreement is attached as Exhibit 2 to the Declaration of Sohrab Moshiri and as Exhibit A to the Declaration of Delta Moshiri (CP 85, 111-16, 138, 141-46).

- Per § 2 Dr. Moshiri agreed to pay all property taxes, insurance premiums and assessments affecting the Property, and to maintain the Property, paying for repairs, improvements, and additions. (CP 118, 148)
- Per § 3 Dr. Moshiri agreed to be solely responsible for any indebtedness secured by a lien on the Property, and was granted the right to refinance existing indebtedness and obtain a new loan to make improvements. (CP 118, 148)
- Per § 4 Ms. Moshiri had no right to use the property. (CP 118, 148)
- Per § 5 Dr. Moshiri was entitled to all of the income produced by the property. (CP 118-19, 148-49)

C. The Bellevue Property sold but the parties disagree on how to allocate responsibility for certain amounts paid at closing.

The Bellevue Property was sold to a third party on June 30, 2014, and Dr. Moshiri and Ms. Moshiri, as sellers, financed a substantial portion of the purchase price. *See Seller's Settlement Statement (CP 124-25).*

As shown on the Seller's Settlement Statement, a number of liens and encumbrances were paid at closing, including a secured loan to Washington Federal, \$106,499.58 to Dr. Moshiri's attorneys who secured their fees with deed of trust filed against the Bellevue Property, taxes for

2013 and 2014 (including penalties and interest), and closing costs. (CP 124-25). Ms. Moshiri and Dr. Moshiri agreed that each was responsible for a share of closing costs such as sales commissions, title insurance and excise tax. *See* Delta Moshiri Decl., ¶7 and Ex. C (CP 139 and 154). The parties disagreed, however, on allocating responsibility for other amounts paid at closing such as the Washington Federal loan and property tax liens. *Id.*

Specifically, Dr. Moshiri relies upon § 7 of the Tenancy in Common Agreement which provides that upon a bona fide sale of the property the proceeds shall be applied first to the costs of sale and to pay off any unassumed liens on the property, with the remainder distributed to co-owners in accordance with their pro rata interest. *See* Motion for Reimbursements and Attorney Fees, § III (CP 80-83). On the other hand, Ms. Moshiri argues that this interpretation of the parties' agreement is contrary to the parties' intent and is in conflict with § 2 of the Tenancy in Common Agreement which provides for Dr. Moshiri to pay all property taxes, insurance premiums and assessments affecting the Property, and § 3 which provides for Dr. Moshiri to be solely responsible for any indebtedness secured by a lien on the Property. *See* Response of Delta

Moshiri in Opposition to Motion for Reimbursements and Attorney Fees (CP 128-136) *and* Delta Moshiri Decl. (CP 137-154).²

Dr. Moshiri himself recognized that his interpretation of § 7 of the Tenancy in Common Agreement could not be consistently applied when he agreed that he is solely responsible to pay his attorneys' fees which he secured with a deed of trust against the Bellevue Property. *See* Reply Declaration of Petitioner at 5:17-19 (CP 167). This concession is consistent with Ms. Moshiri's position that the pro rata distribution of sale proceeds occurs after the expenses and liens are allocated to the responsible party. *See* Delta Moshiri Decl., ¶7 and Exh. C (CP 139 and 154).

D. Rather than file a complaint or arbitration demand, Dr. Moshiri utilizes this long resolved dissolution action as a vehicle to pursue dispositive relief on unrelated claims not previously pled.

On September 29, 2014, using this long resolved dissolution action as a vehicle to obtain relief, Dr. Moshiri filed a motion before the King County Superior Court Chief Civil Judge requesting that the court declare Ms. Moshiri's interest in the Bellevue Property to have been a "net" not "gross" interest. *See* Motion for Reimbursements at 1 (CP 80). Although

² The provisions of § 2, § 3, and § 7 of the Post Decree Agreement can be read so that the sections are consistent with each other if § 7 is read as regulating the timing of payments rather than allocating responsibility for particular encumbrances.

the motion requested a dispositive ruling on this contract interpretation issue, it was filed as a “six day” motion per KCLCR 7 rather than as a dispositive motion per CR 56 and KCLCR 56. *See* Motion for Reimbursements Court Filings (CP 80, 128, 163, 191).

In his motion, Dr. Moshiri also alleged for the first time in any pleading that he loaned \$30,000 to Ms. Moshiri in March 2011, more than two years after the Decree of Dissolution was entered. *See* Motion for Reimbursements at 1 (CP 80). Dr. Moshiri requested that the trial court order Ms. Moshiri to repay the alleged loan “as part of the sale proceeds.” *Id.* Lastly, Dr. Moshiri requested his fees and costs for the Motion for Reimbursements. *Id.*

Again, although the motion requested a dispositive ruling that (i) a \$30,000 oral loan agreement was made in March 2011, (ii) the alleged debt was outstanding, and (iii) that no defenses to collection exist, the motion was filed on six days’ notice per KCLCR 7(b)(4)(A) rather than as a dispositive motion per CR 56 and KCLCR 56. *Id.* (CP 80); *see also* Motion for Reimbursements Court Filings (CP 80, 128, 163, 191).

E. Ms. Moshiri responded to Dr. Moshiri’s dispositive motion, raising a number of procedural and substantive objections.

On October 3, 2014 Ms. Moshiri, through counsel, timely filed her response in opposition to Dr. Moshiri’s motion and supported her response

with her declaration and a declaration of counsel. *See* Ms. Moshiri's Response in Opposition to Motion for Reimbursement (CP 128-136). In her opposition Ms. Moshiri first advised the court that any dispute concerning the division of proceeds was subject to arbitration per § 13 of the Post Decree Agreement. *Id.*

Section 13 provides in part that "[i]f any dispute, controversy or claim arises between the parties out of or in relation to this Agreement ..." the parties shall first attempt to resolve such dispute, controversy or claim through negotiation. *See* Post Decree Agreement, ¶13 (CP 114-15, 144-45). If the parties fail to reach a settlement, the next step is binding arbitration, with Judicial Arbitration and Mediation Services, Inc. as the default arbitrator. *Id.* As Ms. Moshiri argued to the court, the dispute over the Bellevue Property arises "out of or in relation" to the Post Decree Agreement which provided for the transfer to Ms. Moshiri of a 7.5% interest in the property and execution of the Tenancy in Common which was used to define the scope of the interest transferred. *See* Ms. Moshiri's Response in Opposition to Motion for Reimbursement (CP 128-136).

Assuming that the court assumed jurisdiction despite the arbitration clause, Ms. Moshiri raised a number of procedural and factual issues in opposition to what was in essence a summary judgment motion on the dispute involving the division of sale proceeds. *See* Delta Moshiri

Decl., (CP 137-154). Ms. Moshiri pointed out that interpreting § 7 of the Tenancy in Common Agreement to mean that the Ms. Moshiri was liable for a 7.5% share of all liens was in conflict with those sections of the Tenancy in Common Agreement that provided for Dr. Moshiri to be solely liable for all loans against the property, as well as taxes and assessments. *Id.*

Ms. Moshiri also raised a number of issues with respect to the claim she that was liable for repayment of an alleged loan made more than three years previously. *Id.* Ms. Moshiri pointed out that during the period Dr. Moshiri allegedly made the loan he was routinely late in paying obligations under the Decree of Dissolution and it was possible the \$30,000 was in payment of his obligations and not a loan which would be consistent with the notation on the check presented by Dr. Moshiri which said "Payment." *Id.* In order to evaluate this Ms. Moshiri requested time to obtain and review records.

Ms. Moshiri also argued that the loan issue should be pursued in a separate action and not on a six day motion in the dissolution case so that discovery could be conducted and defenses raised, including applying the three year statute of limitations under RCW 4.16.070(3). *Id.*; *See also* Response in Opposition to Motion for Reimbursement (CP 128-136).

F. The trial court granted all of Dr. Moshiri's requested relief without oral argument and without addressing the arbitrability, procedural or substantive issues raised by Ms. Moshiri.

On October 21, 2014, without oral argument, the court granted Dr. Moshiri's Motion for Reimbursements by entering Dr. Moshiri's proposed order, except the court interlineated the word "mortgage" in § 1 of the Order as follows: "Pursuant to Section 7 of the parties' 2011 Joint Tenancy in Common Agreement, Ms. Moshiri's 7.5% interest in Mr. Moshiri's building is a "net" not "gross" interest, and thus her payout from the building's sale proceeds shall not be calculated until all of the property's mortgage and liens have been taken into account." *See* Order on Motion for Reimbursements, §1 (CP 190-91) (emphasis added). The trial court's Order did not carve out the deed of trust securing Dr. Moshiri's attorneys' fees despite Dr. Moshiri's admission that he was solely responsible to satisfy that obligation, and the court did not carve out tax liens for prior years that were not paid contrary to the terms of the Tenancy in Common Agreement. *Id.* (CP 190-91).

In § 2 of the Order the Court ruled: "Now that Ms. Moshiri has received building sale proceeds and is able to pay, she shall repay Mr. Moshiri the \$30,000 that he loaned to her." *See* Order on Motion for Reimbursements, §2 (CP 191).

In § 3 the court awarded fees in the amount of \$1,775 and costs of \$22.49, basing the award on § 15 of the Tenancy in Common Agreement and "... case law [that] also provides for attorney fees against an intransigent party to make whole the harmed party." *See* Order on Motion for Reimbursements, §2 (CP 191).

The Order did not address any of the issues raised by Ms. Moshiri, and the Court did not describe any actions of Ms. Moshiri that the court found to be "intransigent" which was used in part to justify an award of fees. *See* Order on Motion for Reimbursements, §2 (CP 191).

On October 14, 2014 Ms. Moshiri, through counsel, filed a Motion for Reconsideration, raising again the issues of arbitration, material issues of fact on the claims presented, the lack of any pleading containing the claims asserted, and the need for discovery. (CP 175-86). On November 21, 2014 the Motion for Reconsideration was denied without any revision to the original Order. (CP 192-93). Delta Moshiri timely appealed the court's October 21, 2014 Order. (CP 187-193).

IV. ARGUMENT

A. The Trial Court Erred By Considering Claims For Relief Not Previously Raised In Any Pleading.

1. The de novo standard of review applies to this appeal involving a question of law related to the propriety of pleading under CR 8(a).

As set forth more fully in Section IV(C)(2), *infra*, this appeal is subject to the de novo standard of review because it arises from an order on a dispositive motion for summary judgment. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 776, 249 P.3d 1044 (2011) (citation omitted). The de novo standard of review also applies because, as set forth in Sections IV(A)(2)-(4), this appeal involves review of the applicability of the CR 8(a) pleading standard with respect to a dispositive trial court ruling. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 865-66, 309 P.3d 555, 567-68 (2013) *review granted*, 179 Wn.2d 1008, 316 P.3d 495 (2014) and *aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014) applying de novo standard of review to order on CR 12(b)(6) motion involving CR 8(a) pleading issues). The de novo standard of review also applies because this appeal involves a question of law. *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637, 640 (2005) (citation omitted).

2. Claims for relief must be raised in a pleading in a way to give notice to the court and opponent of the claim asserted.

It is axiomatic that a claim for relief must be set forth in a “pleading”, *i.e.*, “[t]he formal allegations by the parties of their respective claims and defenses, for the judgment of the court.” *Tiffin v. Hendricks*, 44 Wn.2d 837, 842-43, 271 P.2d 683, 686 (1954)(quoted authority omitted);³ *see also* CR 8(a).

Claims for relief contained in a pleading must also satisfy the “short and plain statement” requirements of CR 8(a) which states as follows:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Under CR 8(a), pleadings are “intended to give notice to the court and the opponent of the general nature of the claim asserted”. *Lightner v. Balow*, 59 Wn.2d 856, 858, 370 P.2d 982, 984 (1962). While a pleading “may contain inexpert pleading, it may not contain insufficient pleading.”

³ The *Tiffin v. Hendricks* opinion further provides as follows: “The term ‘pleadings’ has a technical and well-defined meaning. Pleadings are written allegations of what is affirmed on one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties.” *Tiffin*, 44 Wn.2d at 842-43(quoted authority omitted).

Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C., 177 Wn. App. 828, 853, 313 P.3d 431, 442-43 (2013) (citation omitted). “A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.” *Williams v. W. Sur. Co.*, 6 Wn. App. 300, 304-05, 492 P.2d 596, 599 (1972) (citation omitted).

3. Dr. Moshiri’s raised his contract interpretation and unpaid loan claims for the first time in his September 2014 motion.

Dr. Moshiri’s September 29, 2014 motion was the first time he asserted in any court document that Ms. Moshiri’s interest in the Bellevue Property should be judicially declared to be a “net” not “gross” interest, and that Ms. Moshiri is liable for \$30,000 allegedly loaned to her in March 2011. If Dr. Moshiri had properly pled his new claims for relief, Ms. Moshiri would have been afforded a 20 day period in which to submit a responsive pleading and raise applicable affirmative defenses. *See* CR 4(a)(2) and 8(b); *see also* Summons at 2 (CP 2). Ms. Moshiri would also have been able to conduct basic discovery per the applicable civil rules.

Because Dr. Moshiri sought judgments from the court on claims that had never before been asserted, the trial court should have dismissed the September 2014 motion on that basis alone. The issues presented were simply not properly before the court. Before the court can take any action

on the claims at issue, Dr. Moshiri must first raise the claims per CR 8 and other applicable civil rules.

4. Bringing new claims in this action which are unrelated to the Decree of Dissolution is not appropriate, but if allowed, the civil rules governing notice are applicable.

Marital dissolution actions are governed in Washington by Chapter 26.09 of the RCW, entitled Dissolution Proceedings. In this case a Decree of Dissolution was entered in January 2009 dissolving the parties' marriage per RCW 26.09.150 and disposing of the property and liabilities of the parties per RCW 26.09.080. See Decree of Dissolution, CP 7-13. Once the Decree of Dissolution was entered this dissolution action ended, subject to limited exceptions set forth in RCW Chapter 26.09, none of which are applicable here.⁴

The trial court erred by allowing Dr. Moshiri to use this dissolution action, concluded in 2009, as a vehicle to seek relief on unrelated matters. However, even if use of this dissolution action to pursue unrelated claims is appropriate, Dr. Moshiri is not excused from following the civil rules. With limited exceptions, a marital dissolution action is governed by the rules of practice otherwise applicable to civil actions. *See* RCW 26.09.010(1) which states that “[e]xcept as otherwise specifically provided

⁴ For example, RCW 26.09.170 allows a party to modify maintenance, and RCW 26.09.160 allows a party to enforce monetary awards in a decree.

herein, the practice in civil action shall govern all proceedings under this chapter, except that trial by jury is dispensed with.” Thus, Dr. Moshiri must still be required to give appropriate notice of claims and appropriate notice if dispositive relief is sought.

B. The Trial Court Erred By Granting Dr. Moshiri’s Motion On The Contract Dispute Claim Because Such Claim Is Subject To Arbitration.

1. The contract interpretation claim is subject to arbitration under the Post Decree Agreement as it arises “out of or in relation” to the Post Decree Agreement

The underlying contract dispute concerns Ms. Moshiri’s interest in the Bellevue Property conveyed to her per the terms of the Post Decree Agreement. *See* Post Decree Agreement, ¶7 (CP 114-15, 144-45). Paragraph 13 of the Post Decree Agreement provides that “[i]f any dispute, controversy or claim arises between the parties out of or in relation to this Agreement ... both parties by mutual negotiation shall attempt to come to a reasonable settlement ... [and] [i]f no settlement is reached the same shall be settled by binding arbitration ...” *Id.*, ¶13 (CP 114-15, 144-45).

The Tenancy in Common Agreement which contains the specific language relied upon by Dr. Moshiri was referenced as an exhibit to the Post Decree Agreement and was used to define the scope of Ms. Moshiri’s interest in the Bellevue Property granted per the terms of the Post Decree Agreement. Thus, any dispute between the parties concerning Ms.

Moshiri's interest in the Bellevue Property, whether under the Tenancy in Common Agreement or otherwise, necessarily relates to the Post Decree Agreement.

In Washington, “[i]f any doubts or questions arise with respect to the scope of an arbitration agreement, the agreement is construed in favor of arbitration, unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute.” *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 886, 224 P.3d 818 (2009) *aff'd on other grounds*, 173 Wn.2d 451, 268 P.3d 917 (2012). Further, “...an arbitration clause that encompasses any controversy “relating to” a contract is broader than language covering only claims “arising out” of a contract.” *Id.* (citing *McClure v. Tremaine*, 77 Wn. App. 312, 314, 890 P.2d 466 (1995)).

Here, as in the *Townsend* case, the arbitration clause contains both phrases – “arising out” and “relating to” – suggesting it has a very broad scope. *Townsend*, 153 Wn. App. at 886. The expansive scope of the arbitration clause encompasses any dispute involving the scope of Ms. Moshiri's ownership interest in the Bellevue Property which is the core of Dr. Moshiri's motion.

2. Ordering arbitration in this case is in accord with the parties' agreement and Washington's strong public policy in favor of arbitration.

Washington courts repeatedly recognize a strong public policy favoring arbitration of disputes. See, e.g., *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997). "Among other things, arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation." *Munsey v. Walla Walla Coll.*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995); see also *Perez*, 85 Wn. App. at 765 ("The purpose of arbitration is to avoid the formalities, the expense, and the delays of the court system."); *Clearwater v. Skyline Const. Co., Inc.*, 67 Wn. App. 305, 314, 835 P.2d 257 (1992)(arbitration is a highly favored method of dispute resolution).

Because of this strong public policy, Washington courts consistently enforce arbitration agreements. See, e.g., *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001)(reversing denial of motion to compel arbitration; "[a]s a rule, a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute"); *W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco*, 47 Wn.

App. 681, 685, 736 P.2d 1100 (1987)(noting an "inexorable presumption" in favor of arbitration).

3. The trial court erred by not addressing the arbitrability of the claim, and by exercising jurisdiction over the contract dispute.

Here, despite the fact that Ms. Moshiri raised the arbitration issue in her opposition to Dr. Moshiri's motion, the trial court made no findings regarding the applicability of the arbitration clause to the contract interpretation dispute at issue. CP 128-136; CP 175-186. The failure to address the arbitration issue was error. The trial court's October 21 Order should therefore be reversed with instructions to stay any further proceedings until after the parties have complied with the dispute resolution terms set forth in the Post Decree Agreement.

C. Although Not Treated As A Summary Judgment Motion By Dr. Moshiri Or The Trial Court, The Court Issued A Summary Judgment Order Which Is Subject To The De Novo Standard Of Review.

1. The Order on Appeal is a Summary Judgment Ruling.

The relief Dr. Moshiri sought in his motion was (i) that the trial court declare Ms. Moshiri's interest in the Bellevue Property to be a "net" not "gross" interest, and (ii) that the trial court order Ms. Moshiri to repay an alleged loan from Dr. Moshiri in the amount of \$30,000. Although not denominated as such, Dr. Moshiri's motion was one for summary judgment as he sought to obtain a declaratory judgment on the contract

interpretation claim, and a final determination that Ms. Moshiri was liable to repay a loan allegedly made more than three years earlier. See CR 56(a).

Although also not denominated as such, the court's granting of the relief requested by Dr. Moshiri is an order on summary judgment as it "...constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Nw. Youth Servs.*, 97 Wn. App. 226, 233, 983 P.2d 1144, 1148 (1999) (citing *Lee v. Ferryman*, 88 Wn. App. 613, 622, 945 P.2d 1159 (1997); *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998)). See also CR 54(a) ("[a] judgment is the final determination of the rights of the parties in the action..."). (CP 190-901).

2. The court's order is subject to the de novo standard of review.

Because a grant of summary judgment "constitutes a final judgment on the merits," the standard of review for summary judgment motions applies to this appeal. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 97 Wn. App., 233(citing *Lee*, 88 Wn. App., 622; *Nielson By & Through Nielson*, 135 Wn.2d, 264).

Motions for summary judgment are reviewed de novo. *Frisino*, 160 Wn. App., 776 (citation omitted). The appellate court engages in the same analysis as the trial court. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996) (citations omitted).

In the trial court, summary judgment is proper if there are no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; *see also* CR 56(c). The trial court must view “all reasonable inferences from the facts...in the light most favorable to the nonmoving party.” *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004) (citing *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 398, 54 P.3d 1186 (2002)).

D. The Trial Court Erred By Considering Dr. Moshiri’s Dispositive Motion As It Failed to Comply with the Requirements of CR 56 and KCLCR 56.

1. The Notice Required By CR 56(c) Was Not Provided.

Summary judgment proceedings in the trial court are governed by CR 56 and KCLCR 56(c), including, but not limited to, the notice requirement that “[t]he motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing” on the summary judgment motion. *See* CR 56(c) (brackets added).

As a dispositive motion, Dr. Moshiri's motion for relief on both his claims should have been considered under CR 56(c). Instead the motion was filed improperly as a "six day motion" under KCLCR 7(b)(4)(A). Consequently, Ms. Moshiri was forced to respond within four days.

If it is found that Dr. Moshiri's claims were properly raised, and the trial court had jurisdiction to consider them, the court's October 21, 2014 Order should still be set aside for failing to comply with notice requirements of the applicable civil rules. It was error for the trial court to deny Ms. Moshiri protections afforded by the notice requirements of CR 56(c), including the right to request time under CR 56(f) to conduct needed discovery.

2. The trial court erred when it issued its dispositive order without oral argument.

KCLCR 56(c) provides that "[t]he court shall decide all summary judgment motions after oral argument, unless the parties waive argument." Ms. Moshiri never waived oral argument. In fact, in her Motion for Reconsideration Ms. Moshiri emphasized that the court's Order was dispositive and should have been treated as a motion under CR 56 with oral argument as provided for in the King County local rules. CP 175-186 at page 182. The trial court erred by refusing to allow oral argument.

E. The Trial Court Erred By Granting Dr. Moshiri's Motion As Genuine Issues Of Material Fact Precluded Entry Of Summary Judgment On Both Claims.

1. Genuine issues of material fact precluded entry of summary judgment on the interpretation of the parties' Tenancy in Common Contract.

The trial court interpreted the parties Tenancy in Common Agreement by finding that “[p]ursuant to Section 7 ... Ms. Moshiri’s 7.5% interest in Mr. Moshiri’s building⁵ is a “net” not “gross” interest, and thus her payout from the building’s sale proceeds shall not be calculated until all of the property’s **mortgage and** liens have been taken into account.” See Order on Motion for Reimbursements at 1-2, ¶1 (trial court’s interlineations emphasized for clarity) (CP 190-91).

In reaching this conclusion the trial court did not address or appear to appreciate the obvious conflicts the court created between § 7 of the Tenancy in Common Agreement and (i) § 2 in which Dr. Moshiri agreed to pay all property taxes, insurance premiums and assessments affecting the Bellevue Property, and (ii) § 3 in which Dr. Moshiri agreed to be solely responsible for any indebtedness secured by a lien on the Property. The trial court’s order is also inconsistent with Dr. Moshiri’s concession that he was solely responsible to pay his attorneys’ fees which he secured

⁵ Referring to the Bellevue Property as “Mr. Moshiri’s Building” is not accurate. While Dr. Moshiri may have had a majority interest, the Bellevue Property was owned jointly by Ms. Moshiri and Dr. Moshiri.

with a deed of trust against the Bellevue Property. *See* Reply Declaration of Petitioner at 5:17-19 (CP 167).

In case there was any doubt that Ms. Moshiri disagreed with Dr. Moshiri's interpretation of the Tenancy in Common Agreement, Ms. Moshiri confirmed in her Declaration that it was her understanding that Dr. Moshiri agreed to pay the taxes, assessments and insurance, and to be personally responsible for the debt on the property. *See* Decl. of Delta Moshiri, ¶4, CP 137. Thus, liens and mortgages need to be properly allocated per the terms of the Tenancy in Common Agreement before proceeds are distributed per § 7.

Despite the conflicts created by Dr. Moshiri's interpretation of § 7, and Ms. Moshiri's Declaration, the trial court modified the contract on summary judgment. In doing so the trial court unnecessarily created significant and irreconcilable conflicts within the contract. Moreover, the court interpreted the a contract by resolving disputed issues of fact, and without applying the "context rule."

In Washington "[t]he primary objective in contract interpretation is to ascertain the mutual intent of the parties at the time they executed the contract." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116, 120 (2014) (brackets added) (citation omitted). To that end, Washington courts utilize the "objective manifestation theory" which

focuses on the “reasonable meaning of the contract language”. *Id.* at 712-713 (citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005)).

Under the context rule adopted by the Washington state supreme court in *Berg v. Hudesman*, 115 Wn.2d 657, 668-69, 801 P.2d 222, 229 (1990), extrinsic evidence is admissible “‘to determine the meaning of *specific words and terms used*’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” *Hearst Commc'ns, Inc.*, 154 Wn.2d at 503 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)) (emphasis in original). Whether a court should modify a contract term based on extrinsic evidence is a question of fact not properly decided on summary judgment. *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013).

“Under the context rule, extrinsic evidence relating to the context in which a contract is made may be examined to determine the meaning of specific words and terms.” *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn. App. 389, 399-400, 245 P.3d 779 (2011) (citations omitted). “Extrinsic evidence includes 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, and the reasonableness of the respective interpretations urged by the parties.” *Id.* at 400.

In this case, both parties should have the opportunity to present extrinsic evidence to assist the trier of fact determine the meaning of the specific words and terms used. Before making a factual finding as to the meaning of the terms used in Tenancy in Common Agreement, the trier of fact should have the benefit of hearing testimony bearing on the objective of the contract, the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations. *See Id.* Extrinsic evidence is essential in this case given the obvious differences in the parties’ interpretations of the Tenancy in Common Agreement, and the conflicts created if Dr. Moshiri’s interpretation is accepted. It was error for the court to issue a declaratory judgment in this case without considering extrinsic evidence, or even allowing extrinsic evidence to be presented.

2. Genuine issues of material fact preclude entry of summary judgment on Dr. Moshiri’s claim that a \$30,000 loan made in March 2011 is due and payable; or alternatively Ms. Moshiri should have been granted additional time to conduct discovery as she requested.

Even assuming (but not conceding) that the trial court properly disregarded procedural rules applicable to summary judgment motions,

Ms. Moshiri raises genuine issues of material fact sufficient to defeat Dr. Moshiri's Motion for Reimbursements if the motion had been (properly) treated as a dispositive motion under CR 56(c). *See* Delta Moshiri Decl. (CP 137-40). For example, Dr. Moshiri alleges he made a loan to Ms. Moshiri on March 17, 2011, but no note or written exists to document the terms of the loan. *See* Sohrab Moshiri Decl. at 4 *and* Ex. 4 (CP 87, 126-27); *see also* Delta Moshiri Decl., ¶8 (CP 139). As Ms. Moshiri points out in her Declaration, she does not dispute receiving a \$30,000 payment but believes this payment may have been a repayment of what was owed to her, and not a loan. *See* Delta Moshiri Decl., ¶8 (CP 139).

In this regard, Ms. Moshiri further explains that Dr. Moshiri is habitually late with maintenance and interest payments and it is likely that the payment was in satisfaction of past due payments, or credit was subsequently given. *Id.* (CP 139). This determination is supported by the fact that although the "loan" was allegedly made in March 2011 it was not mentioned in the Post Decree Agreement signed four months later. *See* Post Decree Agreement (CP 111-16, 141-46). Ultimately, because Ms. Moshiri's testimony raises genuine issues of material fact with respect to whether Dr. Moshiri loaned Ms. Moshiri \$30,000, the trial court erred by deciding that issue on summary judgment. *See* CR 56(c); *see also* October 21, 2014, Order ¶2 (CP 191).

If the Declaration of Ms. Moshiri is found to be lacking, then Ms. Moshiri should be granted time to obtain and evaluate financial records as she requested. Delta Moshiri Decl., ¶8 C (CP 139), and Response in Opposition to Motion for Reimbursement, § D (CP 134). Additional discovery is also warranted by the fact that on its face Dr. Moshiri's claims appears to be barred by the three year statute of limitations set forth in RCW 4.16.070(3).

V. ATTORNEY FEES AND EXPENSES

Paragraph 11 of the Post Decree Agreement provides that the prevailing party on any action thereon is "entitled to recover from the other party the costs and expenses, including attorneys' fees, incurred in such suit of on appeal...." (CP 114, 144) Paragraph 15 of the Tenancy in Common Agreement also provides for an award of attorney's fees and costs to the substantially prevailing party. (CP 120, 150) Thus, pursuant to RAP 18.1, Ms. Moshiri requests, and should be entitled to, an award of attorney fees and expenses on appeal. *See, e.g., Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 51-54, 811 P.2d 673, 680-82 (1991); *Butzberger v. Foster*, 151 Wn.2d 396, 413-14, 89 P.3d 689 (2004).

VI. CONCLUSION

As set forth above, this Court should reverse the trial court's October 21, 2014 Order (CP 190-91) (Appendix A) and November 21, 2014 Order Denying Motion for Reconsideration (CP 192-93) (Appendix B). On remand, Dr. Moshiri should be required to properly plead any new claim for relief relating to the Post Decree Agreement and the interrelated Tenancy in Common Agreement and resolve any such claims through arbitration under Post Decree Agreement ¶ 13. This Court should further require Dr. Moshiri to properly plead his new claim for relief related to reimbursement for an alleged \$30,000 loan in a separate civil action. This long decided dissolution action is not the proper forum for these new claims for relief.

Respectfully submitted this 3rd day of March, 2015.

Peterson Russell Kelly PLLC

By 

David C. Kelly, WSBA 13534
Joshua D. Brittingham, WSBA 42061
Attorneys for Appellant Delta Y. Moshiri
10900 NE Fourth Street, Ste. 1850
Bellevue, WA 98004-8341
425-462-4700

APPENDIX A

1 and thus her payout from the building's sale proceeds shall not be calculated until all
2 of the property's ^{mortgage and} liens have been taken into account.

3
4 2) Now that Ms. Moshiri has received building sale proceeds and is able to pay, she
5 shall repay Mr. Moshiri the \$30,000 that he loaned to her.

6 3) Ms. Moshiri shall pay ^{\$ 1,797.49} ~~\$2,797.49~~ to Mr. Moshiri to reimburse him for his attorney fees
7 and costs that he had to incur to bring this motion to court. Section 15 of the parties'
8 Tenancy in Common Agreement provides for the substantially prevailing party in
9 any suit pertaining to the agreement to be reimbursed his/her reasonable attorney
10 fees and costs incurred relative to such suit, and case law also provides for attorney
11 fees against an intransigent party to make whole the harmed party.
12

13
14 DATED this ^{21st} ~~7th~~ day of October, 2014.



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17 Judge ~~Susan Craighero~~, Chief Civil Judge
18 Mariane C. Spearman
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APPENDIX B

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7. Respondent's Motion for Reconsideration

After a review of the above-entitled documents and the court file, the Court has determined that the Respondent's Motion for Reconsideration should be DENIED.

IT IS SO ORDERED.

DATED this 21st day of November, 2014.



The Honorable Mariane C. Spearman

Judge Mariane Spearman
516 3rd Avenue, Room C203
Seattle, Washington 98104
(206) 477-1647

APPENDIX C

POST DECREE AGREEMENT

THIS POST-DECREE AGREEMENT ("Agreement") is made effective as of June 30, 2011, between Sohrab Moshiri ("Sohrab Moshiri"), and Delta Moshiri ("Delta Moshiri").

RECITALS

A. On January 23, 2009 a Decree of Dissolution (the "Decree") was entered in the matter of In re the Marriage of Sohrab Moshiri (Petitioner) and Delta Yassman Moshiri (Respondent), under King County Cause Number 07-3-05903-6 SEA.

B. In the Decree, Delta Moshiri is entitled to spousal maintenance of \$6,000 per month for 92 consecutive months, commencing February 2009 and terminating after receipt of the September 2016 payment. Maintenance is due on the first day of each month.

C. In the Decree, Delta Moshiri was awarded, among other properties and assets, the following:

- a. A house located at 3405 Evergreen Point Road, Medina, Washington (the "Medina House").
- b. The house located at 2826 Calle Guadalajara, San Clemente, California (the "California House").

D. In the Decree, Sohrab Moshiri was awarded, among other properties and assets, the following:

- a. The house located at 14010 SE 44th Place, Bellevue, Washington (the "Somerset House").
- b. The office building located at 10232 NE 10th Street, Bellevue, Washington (the "Bellevue Office Building").

E. In the Decree, Sohrab Moshiri executed the following promissory notes:

- a. A promissory note dated January 23, 2009, in favor of Delta Moshiri in the principal amount of \$1,099,899. The \$1,099,899 note was due on or before May 26, 2009. If not paid timely, the note bears interest at 6% per annum retroactive to January 26, 2009.
- b. A promissory note dated January 23, 2009 in favor of Delta Moshiri in the principal amount of \$347,549. The \$347,549 was due on or about December 31, 2016, with interest accruals at 5% from January 1, 2009 to present.
- c. A promissory note dated January 23, 2009 in favor of Delta Moshiri in the principal amount of \$471,254. The \$471,254 was due on or before December 31,

2010, with interest accruals at 10% if not timely paid. Sohrab Moshiri was entitled to a credit against the \$471,254 note equal to the amount of mortgage payments and real estate taxes he paid on or after February 1, 2009 for properties awarded to Delta Moshiri in the Decree, minus any rent he received on or after February 1, 2009 attributable to such properties.

F. The three notes referenced in "E" above (collectively, the "Notes") are individually and collectively secured by a Second Deed of Trust (the "Deed of Trust") filed against the Bellevue Office Building.

G. The parties desire to obtain an agreement to forbear either a spousal maintenance modification action or an exercise of the rights and remedies under the Notes, subject to the terms, conditions, and provisions hereinafter set forth. This Agreement ceases any past default claims by Delta Moshiri, or any future spousal maintenance modification claims by Sohrab Moshiri, and but for this removal of additional litigation claims this Agreement would not have been entered into.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

1. **Interest on the \$1,099,899 Note.** Delta Moshiri agrees to extend the term of the \$1,099,899 Note to July 1, 2018 (the "Extension Period"). During the Extension Period Sohrab Moshiri shall continue to pay interest on the \$1,099,899 Note per the terms of such Note. A minimum of \$5,499.50 shall be paid on the 26th day of each month towards the \$1,099,899 Note. Any monthly payment not made within five (5) days of the date it is due may be assessed a late charge equal to 5% of the overdue payment in order to defray Delta Moshiri's expenses incident to such delay. This provision for a late charge is not permission to make a late payment.

2. **Amounts Owning under the \$471,254 Note.** As of December 31, 2010 all amounts payable under the \$471,254 Note were due. The Note bears interest at 10% of the unpaid balance as of January 1, 2011. Sohrab Moshiri shall, within 15 days from the date of this Agreement, provide an accounting showing mortgage payments and taxes paid, and rent received and imputed, on or after February 1, 2009 with respect to properties awarded to Delta Moshiri in the Decree that Sohrab Moshiri believes should be deducted from the \$471,254 Note pursuant to the terms thereof. Delta Moshiri shall have 15 days to object to the accounting. If an objection is not provided timely, then the balance of the Note shall be determined per the accounting provided by Sohrab Moshiri. If an objection is timely provided, then the parties shall attempt to come to an agreement regarding the balance of the \$471,254 Note as of January 1, 2011. If an agreement cannot be reached within 15 days, then either party may request that the amount due under the \$471,254 Note shall be determined in accordance with the dispute resolution procedures set forth below.

3. **Spousal Maintenance.** Sohrab Moshiri shall continue to make spousal maintenance payments in the amount and duration as provided in the Decree (\$6,000 a month

through September 2016). If any monthly spousal maintenance payment is not made within five (5) days of the date it is due, Delta Moshiri may assess a late charge equal to 5% of the overdue payment in order to defray the expenses incident to such delay. This provision for a late charge is not permission to make a late payment.

4. **Medina House.** Delta Moshiri shall quit claim to Sohrab Moshiri all of her ownership interest in the Medina House. Delta Moshiri shall execute such document(s) as Sohrab Moshiri reasonably requests to effectuate such transfer, and all costs related to the transfer shall be paid by Sohrab Moshiri. Effective March 1, 2010, Sohrab Moshiri shall be responsible for all costs and expenses relating to the Medina property, including without limitation, mortgage payments, insurance, and taxes. Sohrab Moshiri shall indemnify, defend, and hold Delta Moshiri harmless from and against and any and all liability, losses damages, costs, and expenses arising with respect to the Medina House as a result of assessments, acts, or omissions occurring on or after March 1, 2010, except to the extent such liability, losses, or damages arise as a result of Delta Moshiri's own negligence or willful misconduct.. Sohrab Moshiri shall not be entitled to any credit for any mortgage payment made on or after February 1, 2010.

5. **California House.** Delta Moshiri shall quit claim to Sohrab Moshiri all of her ownership interest in the California House. Delta Moshiri shall execute such document(s) as Sohrab Moshiri reasonably requests to effectuate such transfer, and all costs related to the transfer shall be paid by Sohrab Moshiri. Sohrab Moshiri shall be responsible for all costs and expenses relating to the California House, including without limitation, mortgage payments, insurance and taxes. Sohrab Moshiri shall indemnify, defend, and hold Delta Moshiri harmless from and against and any and all liability, losses damages costs and expenses arising with respect to the California House, except to the extent such liability, losses or damages arise as a result of Delta Moshiri's own negligence or willful misconduct. Sohrab Moshiri shall not be entitled to any credit for any mortgage payment made on or after February 1, 2010.

6. **Somerset House.** Sohrab Moshiri shall quit claim to Delta Moshiri all of his ownership interest in the Somerset House. Sohrab Moshiri shall execute such documents as Delta Moshiri reasonably requests to effectuate such transfer, and all costs related to the transfer shall be paid by Delta Moshiri. Effective as of October 15, 2010, Delta Moshiri shall be responsible for all costs and expenses relating to the Somerset property, including without limitation, current mortgage payments, insurance and taxes. Delta Moshiri shall indemnify, defend, and hold Sohrab Moshiri harmless from and against and any and all liability, losses damages costs and expenses arising with respect to the Somerset House as a result of assessments, acts or omissions occurring on or after October 15, 2010, except to the extent such liability, losses or damages arise as a result of Sohrab Moshiri's own negligence or willful misconduct.

7. **Bellevue Office Building.** Sohrab Moshiri agrees to convey to Delta Moshiri SM ~~25%~~ SM interest in the Bellevue office building. Such interest shall be evidenced by a Quit Claim Deed in the form of Exhibit A and a Tenant in Common Agreement in the form of Exhibit B.

8. **No Impairment of Lien.** Nothing in this Agreement shall alter or impair the lien

priority of the lien of the Deed of Trust.

9. **No Modification.** This Agreement does not constitute a novation as to Notes and does not modify, alter, amend, or in any way affect the terms and conditions of the Notes, Deed of Trust and Decree or any of them except as expressly and specifically stated herein.

10. **Entire Agreement.** This Agreement contains the entire agreement of the parties with regard to the subject matter hereof and, except as otherwise expressly stated in this Agreement, supersedes any and all prior agreements and understandings with respect to the subject matter hereof. This Agreement may not be amended, modified, or revoked except by means of a written document executed by the party against whom the amendment, modification, or revocation is sought to be enforced.

11. **Attorneys' Fees.** If any party hereto brings suit to enforce its rights under this Agreement, or to recover damages for the breach hereof, the prevailing party shall be entitled to recover from the other party the costs and expenses, including attorneys' fees, incurred in such suit or on appeal or in any bankruptcy or other insolvency proceedings.

12. **Notices.** All notices required or permitted to be given hereunder shall be sufficiently given for all purposes if in writing and (i) delivered personally, (ii) sent by certified or registered mail, postage prepaid, return receipt requested, or (iii) by overnight delivery (FedEx, UPS or similar service), addressed to the party at his or her address set forth below, or such other address as a party may subsequently designate in writing. Notices sent by registered or certified mail, postage prepaid, return receipt requested, or by a courier or overnight delivery service will be deemed to have been given upon acknowledged receipt or upon refusal of addressee to receive such correspondence. Either party may change his or her address for purposes of this Agreement by giving the other written notice of such change in the manner provided in this section.

Initially, the addresses for notices shall be:

(a) Delta Moshiri
14010 SE 44th Pl.
Bellevue, WA 98006

With a copy to:

David C. Kelly
Peterson Russell Kelly, PLLC
10900 NE 4th Street, Suite 1850
Bellevue, WA 98004

(b) Sohrab Moshiri:
10232 NE 10th Street
Bellevue, WA 98004

With a copy to:

Brook A. Goddard
Goddard Wetherall Wonder, PSC
155 108th Avenue NE, Suite 700
Bellevue, WA 98004

13. **Dispute Resolution.** If any dispute, controversy or claim arises between the parties out of or in relation to this Agreement, or the breach, termination or invalidity thereof, both

parties by mutual negotiation shall attempt to come to a reasonable settlement of the same as soon as possible. If no settlement is reached within thirty (30) days from the first notification of the same in writing by either party, the same shall be settled by binding arbitration before such dispute-resolution organization as parties may so agree, and if the parties cannot agree then by the Judicial Arbitration and Mediation Services, Inc. ("JAMS") located in Seattle Washington. The award rendered by the arbitrator shall be final and binding upon both parties concerned, and judgment upon the award may be entered in any court having jurisdiction thereof. The allocation of the expenses of the arbitration shall be effected by the arbitration decision.

14. **Time.** Time is of the essence of this Agreement. Any failure by any party to fully perform that party's obligations at or prior to the time required by this Agreement shall be conclusively deemed to be a material breach of this Agreement.

15. **Governing Law.** This Agreement is made in, and shall be governed and interpreted in accordance with, the internal laws of the State of Washington.

16. **Binding Effect.** This Agreement shall be binding upon the parties hereto and their respective heirs, successors, personal representatives, and assigns.

17. **Execution in Counterparts.** This Agreement may be executed in any number of counterparts and by each party on separate counterparts, each of which when so executed and delivered shall be deemed an original and all of which taken together shall constitute but one and the same agreement.

18. **Independent Legal Counsel.** Delta Moshiri and Sohrab Moshiri each acknowledge, represent, and agree that he or she as the case may be, has read this Agreement and fully understands the terms hereof, that each of Delta Moshiri and Sohrab Moshiri has been fully advised by his or her legal counsel with respect hereto, and that the same is executed by each of Delta Moshiri and Sohrab Moshiri upon the advice and recommendation and with the approval of such independent legal counsel.

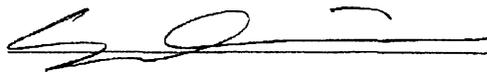
DATED this 9th day of July, 2011.

DELTA MOSHIRI



Dated this 1st day of July, 2011.

SOHRAB MOSHIRI



STATE OF WASHINGTON

ss.

COUNTY OF KING

I certify that I know or have satisfactory evidence that Sohrab Moshiri is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 1st day of July, 2011.

Brook Goddard
(Signature of Notary)

Brook Goddard
(Legibly Print or Stamp Name of Notary)
Notary public in and for the State of Washington,
residing at Seattle, WA
My appointment expires 1/27/13

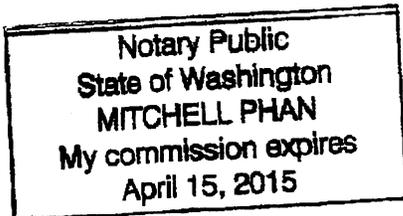
STATE OF WASHINGTON

ss.

COUNTY OF KING

I certify that I know or have satisfactory evidence that Delta V Moshiri is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 9th day of July, 2011.



Mitchell Phan
(Signature of Notary)

Mitchell Phan
(Legibly Print or Stamp Name of Notary)
Notary public in and for the State of Washington,
residing at Bellevue WA
My appointment expires April 15, 2015

APPENDIX D

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TENANCY IN COMMON AGREEMENT

This Tenancy in Common Agreement ("Agreement") is entered into on the below date by Sohrab Moshiri, a married man as to his separate estate ("Sohrab Moshiri"), and Delta Moshiri, a single person ("Delta Moshiri").

RECITALS

WHEREAS, Sohrab Moshiri and Delta Moshiri (individually a "Co-Owner" and collectively, the "Co-Owners") own that certain real property legally described in Exhibit "A" attached hereto and incorporated herein by this reference ("Property").

WHEREAS, Sohrab Moshiri and Delta Moshiri desire to own, use, maintain, improve, and transfer the Property as tenants in common in accordance with the terms of this Agreement ("Tenancy");

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, the sufficiency which is hereby acknowledged, the Co-Owners agree as follows:

1. Ownership Interest. Sohrab Moshiri owns an undivided ninety-five percent (95%) interest in the Property and Delta Moshiri owns an undivided five percent (5%) interest in the Property. The relationship of the Co-Owners with respect to the Property is that of tenants in common and not as joint tenants, partners, or joint venturers. SM
92.5 Y-M

2. Financial Responsibilities. Sohrab Moshiri shall pay, when due, all property taxes, insurance premiums and assessments of any kind and nature affecting the Property. Sohrab Moshiri shall be responsible to maintain the Property and pay all repairs, improvements, and additions. SM
Y-M

3. Provisions for Financing. Sohrab Moshiri shall be solely responsible for any indebtedness secured by a lien on the Property. Sohrab Moshiri may obtain financing for the Property and place a lien on the Property to secure such lien provided the lien secures a bona fide loan obtained for the purpose of refinancing existing indebtedness and/or to make improvements to the Property. Delta Moshiri shall not be responsible to personally pay any loan secured by a lien on the Property, but agrees to consent to encumber her 5% interest to secure a bona fide loan to Sohrab Moshiri for the aforementioned purposes. 7.5 SM X. M

4. Property Use. Subject to the limitations set forth in this Agreement, Sohrab Moshiri shall have the right to use and enjoy the entire Property. Delta Moshiri shall not have the right to use the Property.

5. Distribution of Net Income. In any calendar year in which the Property produces net

income as determined by generally acceptable accounting methods, the net income, if any, shall be distributed solely to Sohrab Moshiri, provided that this provision shall only be effective for as long as the Property remains in its present or substantially similar configuration.

6. Termination of Tenancy. This Tenancy shall terminate upon the sooner of the following:

- (a). The sale of one Co-Owner's interest in the Property to the other Co-Owner,
- (b). The sale of the Property by all of the Co-Owners to a third party, or
- (c). Upon mutual written agreement of the Co-Owners.

7. Sale of Property. If Sohrab Moshiri decides to sell the Property, Delta Moshiri's interest shall be sold as well. Upon the bona fide sale of the Property by the Co-Owners to an unrelated third party, the proceeds from the sale of the Property shall be applied first to the costs of sale including, but not limited to, real estate commissions, prorated taxes, excise tax, title insurance, and required work orders ("Closing Costs") and to pay off any liens on the Property not assumed by the purchaser. The remainder of the sale proceeds ("Net Proceeds"), if any, shall be distributed to the Co-Owners in accordance with their pro rata interest in the Property.

8. Waiver of Partition. Each Co-Owner waives their right to seek partition of the Property as otherwise available under applicable law. Upon the commencement of an action for partition by either Co-Owner, the defending Co-Owner shall be entitled to such injunctive or equitable relief as may be deemed proper by a court of competent jurisdiction. Such injunctive or equitable relief shall be in addition to any other relief allowed under law.

9. Foreclosure of Deed of Trust. The Co-Owners acknowledge that Delta Moshiri is the beneficiary of a Deed of Trust filed against the Property to secure certain obligations of Sohrab Moshiri under the terms of the Decree of Dissolution (the "Decree") entered in the matter of *In re the Marriage of Sohrab Moshiri (Petitioner) and Delta Yassman Moshiri (Respondent)*, under King County Cause Number 07-3-05903-6 SEA, as modified by that certain Post-Decree Agreement dated July, 2011. The parties specifically acknowledge that the transfer of a 5% interest in the Property to Delta Moshiri is intended to affect Delta Moshiri's right to foreclose the Deed of Trust in accordance with the terms of the Deed of Trust and applicable state law. The acceptance by Delta Moshiri of the Deed does not however prejudice, limit, restrict, or affect Delta Moshiri's claim of priority under the Deed of Trust over any other liens, claims or encumbrances of kind whatsoever.

10. Authority. Neither Co-Owner shall have the authority to bind the other Co-Owner to any agreement relating to the Property. The Co-Owners acknowledge that the Tenancy may create an appearance of an agency relationship between the Co-Owners upon which a third party may rely. Each Co-Owner hereby agrees to hold harmless, indemnify, and defend the other Co-Owner for any obligations, liabilities and claims made by third parties as a result of the actions of that Co-Owner, including reasonable attorneys fees.

11. Written Notices. All notices required by this Agreement shall be considered properly delivered (1) when personally delivered, or (2) when transmitted by facsimile showing date and time of transmittal, or (3) on the second (2nd) day following mailing.

12. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Co-Owners, and their respective heirs, devisees, administrators, personal representatives, successors, and assigns.

13. Integration. This Agreement sets forth the entire agreement between Co-Owners and all agreements, covenants, representations, and warranties, express and implied, oral and written, between the Co-Owners with regard to the Tenancy are contained herein. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants and warranties with respect to the Tenancy are waived, merged and superseded with and by this Agreement.

14. Modifications. No change or modification of this Agreement shall be binding upon the Co-Owners, nor shall any waiver of any term or condition hereof be deemed a waiver of such term or condition in the future, unless change, modification or waiver is agreed to in writing by the Co-Owners.

15. Attorneys Fees. If any suit or other proceeding is instituted by either party to this Agreement arising out of or pertaining to this Agreement or the Property, including but not limited to filing suit or requesting arbitration, mediation, or other alternative dispute resolution process (collectively "Proceeding"), and appeals and collateral actions relative to such a suit or Proceeding, the substantially prevailing party as determined by the court or in the Proceeding shall be entitled to recover its reasonable attorneys fees and all costs and expenses incurred relative to such suit or Proceeding from the substantially non-prevailing party, in addition to such other relief as may be awarded.

16. Governing Law. This Agreement shall be governed and construed in accordance with the laws of the State of Washington. Venue shall lie in King County.

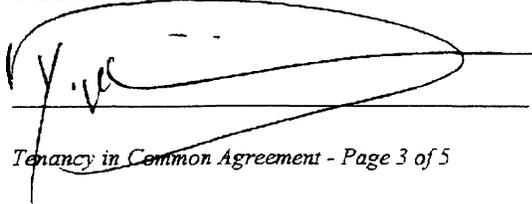
17. Severability. If for any reason any portion of this Agreement shall be held to be invalid or unenforceable, the holding of invalidity or unenforceability of that portion shall not affect any other portion of this Agreement and the remaining portions of this Agreement shall remain in full force and effect.

DATED this 9th day of July, 2011.

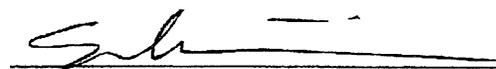
Dated this 1st day of July, 2011.

DELTA MOSHIRI

SOHRAB MOSHIRI



Handwritten signature of Delta Moshiri, consisting of a stylized cursive script, positioned above a horizontal line.



Handwritten signature of Sohrab Moshiri, consisting of a stylized cursive script, positioned above a horizontal line.

STATE OF WASHINGTON

ss.

COUNTY OF KING

I certify that I know or have satisfactory evidence that Delta Moshiri is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 9th day of July, 2011.

Notary Public
State of Washington
MITCHELL PHAN
My commission expires
April 15, 2015


Signature and Name of Notary
Notary public in and for the State of Washington,
residing at Bellevue, WA
My appointment expires April 15, 2015

STATE OF WASHINGTON

ss.

COUNTY OF KING

I certify that I know or have satisfactory evidence that Sohrab Moshiri is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 15th day of July, 2011.


Brook A. Goddard
Notary public in and for the State of Washington,
residing at Seattle, WA
My appointment expires 1/27/13

EXHIBIT A

ADDRESS: 10224 and 10232 N.E. 10th Street, Bellevue, Washington 98004.

KING COUNTY PROPERTY TAX PARCEL NUMBER: 570900-0060-00

LEGAL DESCRIPTION: The south 146.5 feet of the east half of the west half of the northeast quarter of the southwest quarter of the southwest quarter of Section 29, Township 25 North, Range 5 East, W.M., in King County, Washington;

EXCEPT the east 25 feet thereof and the south 25 feet thereof;

ALSO EXCEPT that portion thereof as conveyed to the City of Bellevue for street purposes by document under King County recording number 9104250909.

(BEING KNOWN AS Lot 1, Block 3, Mountain View Tracts, according to the unrecorded plat thereof.)

No. 72800-8-I

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

In re the Marriage of

SOHRAB MOSHIRI

Respondent/Trial Court Petitioner,

and

DELTA Y. MOSHIRI

Appellant/Trial Court Respondent

CERTIFICATE OF SERVICE

Peterson Russell Kelly PLLC
David C. Kelly, WSBA 13534
Joshua D. Brittingham, WSBA 42061
Attorneys for Appellant

10900 NE Fourth Street, Suite 1850
Bellevue, WA 98004-8341
425-462-4700

FILED
JUL 11 11 39 AM '09
CLERK OF COURT
SUPERIOR COURT
COUNTY OF KING
WASHINGTON

I, Ana Maria Garnier, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am employed with the law firm of Peterson Russell Kelly PLLC, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to this action, and am competent to be a witness herein.

I hereby certify that on March 3, 2015, I caused to be served a copy of Brief of Appellant Delta Y. Moshiri and this Certificate of Service to all parties of record and the Court of Appeals via the methods indicated below:

Attorney For Appellee:
Brook A. Goddard
Goddard Wetherall Wonder, PSC
155 108th Ave NE, Suite 700
Bellevue WA 98004

Via:
 U.S. Mail, Postage Prepaid
 Hand Delivered
 Fax
 Email:
brookgoddard@gwwp.com

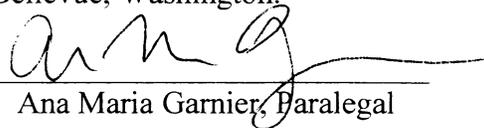
Catherine W. Smith
Valerie A. Villacin
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109-3007

U.S. Mail, Postage Prepaid
 Hand Delivered
 Fax
 Email:
cate@washingtonappeals.com
valerie@washingtonappeals.com

Court of Appeals, Division I
600 University St
Seattle, WA 98101-1176

Original for Filing and one
copy via US Mail
 Hand Delivered
 Fax

Dated: March 3, 2015, at Bellevue, Washington.



Ana Maria Garnier, Paralegal