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COURT OF APPEALS
NO. 34479-3-II
STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HANS RAUTH and MELITTA L. HOLLAND, Respondents
v.
LAWRENCE H. EVANS, JULIA R. EVANS, and the marital community
thereof, Appellants.

NO. 34479-3-II

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court erred by granting plaintiffs' motion for partial summary judgment.

2. The trial court erred by denying defendants' motion for summary judgment.

3. The trial court erred by ordering specific performance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When appellants contracted to sell property to respondents no problems with the septic were known. (It was inspected less than a year earlier). Sellers warranted that, to the best of their knowledge, the property complied with all government regulations. Before closing, while having the septic pumped, the parties learned the septic failed. Having a new system installed in the two weeks before closing was impossible. They discussed a later closing date but never came to an agreement. Did defendants breach the contract?

2. Because defendants could not convey the property, with a working septic system, by the agreed upon closing date, was their performance excused by the doctrine of impossibility?

3. Buyers were informed that the septic could not be repaired by the agreed upon closing date. After the closing date passed buyers then suggested a later closing date. Can the buyers claim that sellers repudiated the contract before closing?

4. Where time is of the essence and performance cannot occur, through no bad faith of the sellers, and there is no agreement to extend the closing date, is specific performance available?

II. STATEMENT OF THE CASE

A. SUMMARY

Mr. and Mrs. Evans contracted to sell a commercial property to Mr. Rauth and Ms. Holland. Closing was set for February 28, 2005.¹ A few weeks before that, the Evanses had the septic system pumped. They then learned the system failed because a previous tenant had dumped grease into the system.²

The Evanses immediately contacted a septic design and installation professional to design and install a new system.³ This, unfortunately, could not occur before the agreed upon closing date.⁴ The closing date came and went. Neither party tendered performance. After the closing

¹ CP 58.

² CP 41.

³ CP 17.

⁴ CP 41.

date the buyers proposed new closing terms.⁵ The Evanses made a counteroffer.⁶ The parties could not agree on terms to close the transaction. Buyers filed this suit.⁷

B. FACTS

1. The Property

The Evanses live in Spokane. They own an improved commercial property in Belfair.⁸ On the property is a building and an espresso stand business.⁹ In January 2004 they leased the building to a tenant who operated “Wild Willy’s South Shore Smoke House” on the property. In March 2004 the septic system was inspected as a condition necessary for the business to open. That inspection did not reveal any problems.¹⁰

Less than a year later the business moved out.¹¹ The Evanses listed the property and coffee business for sale. At that time they were unaware of any problem with the septic system.¹²

⁵CP 109.

⁶ CP 110.

⁷ CP 149-157.

⁸ CP 40.

⁹ CP 58.

¹⁰ CP 40.

¹¹ CP 40.

¹² CP 41.

2. The Contracts

Hans Rauth and Melitta Holland entered into two agreements with the Evanses.¹³ A purchase and sale agreement for the coffee business, and a purchase and sale agreement for the real property.¹⁴ Doug Kitchens and Emma LaDeaux from Reid Real Estate, Commercial, Inc. acted as dual agents in the transaction.¹⁵ The agreements were on boilerplate, pre-printed forms.¹⁶ Each agreement was contingent upon the other.¹⁷ Time was of the essence.¹⁸

The Commercial and Investment Real Estate Purchase and Sale Agreement had several terms that are relevant:

OPERATIONS PRIOR TO CLOSING

Prior to closing, Seller shall...maintain the Property in the same or better condition that as existing on the date of mutual acceptance of this Agreement, but shall not be required to repair material damage from casualty....

SELLERS REPRESENTATIONS AND WARRANTIES

Seller represents and warrants to Buyer that, to the best of Seller's knowledge each of the following

¹³ CP 58-117.

¹⁴ Id.

¹⁵ CP 74.

¹⁶ CP 58-117.

¹⁷ CP 69.

¹⁸ CP 72.

is true and shall be true as of closing:...(c) The Property and the business conducted thereon comply with all applicable laws, regulations, and ordinances....¹⁹

The contract also had a thirty-day inspection contingency.²⁰ During this thirty-day period the buyers identified some wetland issues.²¹ As a result, the parties agreed to amend the original contract. On February 7, 2005, the parties agreed to the following:

1. To change the closing date to *February 28, 2005*.
2. To lower the price by \$20,000.00.
3. The buyer “waived all contingencies”; and
4. Seller agreed to have the septic tank pumped and inspected prior to closing.²²

3. The Problem

The Evanses arranged to have the septic pumped and inspected.²³ The inspection revealed that the Evanses’ tenant had dumped large amounts of grease into the septic system causing it to fail.²⁴ On February 14, 2005, the Evanses contacted a septic design and installation

¹⁹ Id.

²⁰ CP 71.

²¹ CP 41.

²² CP 41, 92.

²³ CP 41.

²⁴ Id.

professional.²⁵ They learned it would take four to six weeks to have a system designed and approved by the County.²⁶ Even then they would need dry weather (and more time) to install it.²⁷

4. Buyers' Response to the Problem

On *February 18, 2005*, Mr. Rauth was aware of the problem and wrote the agent:

...[W]hat's the status on...the septic system repairs? I need to get my permit application in place with the county so I need that documentation. We're quickly approaching the closing date that the Evans wanted.²⁸

That same day, the agent replied:

....The Evans are working on getting a new design done. It will then need County approval and the new system will need to be installed. This is not going to be completed by the closing date of Feb 28 so we will need to extend until the end of March sometime...I have spoken with [Ms. Holland], who informs me she will be back from her trip on March 19th, I'm thinking we should be ready to close more or less on her return....

I will keep you up to date as things go along & will have an extension addendum drawn up as soon as possible.²⁹

²⁵ CP 17.

²⁶ CP 17-18

²⁷ Id.

²⁸ CP 105.

²⁹ Id.

The closing date came and went with no objection to this plan from the buyers. Buyers did not tender performance.

On *March 1, 2005*, the Buyers proposed extending closing to March 21, 2005 to allow for repair or replacement of the septic and drainfield.³⁰ Unfortunately, this was impossible. The Evanses had consulted with a septic installer. During the winter rainy months it was not possible to have a new system designed, approved, and installed that quickly.³¹ *On March 2, 2005* the Evanses proposed to have the new septic designed and approved by March 21, 2005.³² (Design and approval are not contingent on dry weather, as is installation.)

On *March 8, 2005* the agent wrote Mr. Rauth:

Did you and [Ms. Holland] come to a decision on whether or not to extend your offer to give the Evans time to install the septic or rescind your offer? Sorry to pressure, but I have to let the other interested party know the position since we are technically out of contract....³³

Mr. Rauth responded:

We're waiting on a response regarding the time it will take to make the necessary repairs. I believe you guys were going to research that and let us know....

³⁰ CP 109.

³¹ CP 17-18.

³² CP 110.

³³ CP 16.

Also, we made an extension request based on the contingency that they have the system completed by 3/21. They need to come back at us with a counter based on their understanding of the time it will take to get the system in, or another proposal if they choose. Then we can consider further options....³⁴

The agent replied:

Their counter was "Closing date shall be on or before March 21, 2005, provided septic system is designed & approved by 3.21.05" I have faxed you a copy. It was my understanding from conversations with [Ms. Holland] and yourself that this was unacceptable and that you will not close before the septic is installed. The alternative addendum would say...

"closing to be 15 day after installation of the septic system, in any event, by May 31, 2005."³⁵

No agreement on a new closing date was reached.³⁶ Because the parties could not agree on a closing date the Evanses returned the buyers' earnest money deposit.³⁷ Buyer initiated this action for breach of contract and specific performance³⁸ claiming that the Evanses "refused to bring the property to a lawful state."³⁹

³⁴ CP 15.

³⁵ CP 15.

³⁶ CP 41.

³⁷ Id, CP 111.

³⁸ CP 149-157.

³⁹ CP 51.

C. PROCEDURE

The complaint alleging breach of contract and requesting specific performance was filed on May 9, 2005.⁴⁰ The defendants filed their answer and counterclaims on June 13, 2005.⁴¹

On September 1, 2005 plaintiffs filed a motion for partial summary judgment seeking an order determining that defendants breached the contracts by “refusing to repair the septic system” and “refusing to consummate the sale of the property....”⁴² They also sought dismissal of the counterclaims and specific performance of the contract.⁴³ Neither the plaintiffs’ summary judgment motion nor their complaint alleged that their failure to tender performance was excused by the doctrine of anticipatory repudiation.⁴⁴

On September 26, 2005, defendants filed their motion for summary judgment seeking dismissal of all plaintiffs’ claims and an award of attorney’s fees under the contracts.⁴⁵

On October 13, 2005, defendants filed their opposition to plaintiffs’ motion for summary judgment.⁴⁶ Defendants noted that

⁴⁰ CP 149-157.

⁴¹ CP 123-148.

⁴² CP 56.

⁴³ Id.

⁴⁴ CP 149-155, CP 50-117.

⁴⁵ CP 43-49.

⁴⁶ CP 26-31.

plaintiffs' claims should fail because they did not tender performance by the closing date.⁴⁷ A hearing on both motions was heard on October 24, 2005.⁴⁸ In response to defendants' arguments regarding failure to tender performance, plaintiffs asserted anticipatory repudiation. Because this issue was raised for the first time at argument, the Court allowed further briefing regarding this issue⁴⁹ and set a hearing for November 7, 2005.⁵⁰

The court found that defendants anticipatorily breached the agreement and granted plaintiffs' motion.⁵¹

III. ARGUMENT

A. STANDARD OF REVIEW

An appellate court reviews a summary judgment order de novo.⁵² The appellate court performs the same inquiry as the trial court.⁵³ Summary judgment is appropriate when no genuine issue of material fact exists.⁵⁴ While all the evidence must be construed in a light most

⁴⁷ *Id.*

⁴⁸ CP 10.

⁴⁹ CP 19-25.

⁵⁰ CP 10.

⁵¹ CP 10-13.

⁵² *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 483, 78 P.3d 1274, 1276 (2003).

⁵³ *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002).

⁵⁴ *Police Guild v. Seattle*, 151 Wash.2d 823, 92 P.2d 243 (2004).

favorable to the nonmoving party, if reasonable persons could reach only one conclusion, summary judgment must be granted.⁵⁵

B. BECAUSE THE TRANSACTION DID NOT CLOSE ON FEBRUARY 28, 2005 THE CONTRACT BECAME DEFUNCT.

“[W]hen an agreement makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered.”⁵⁶ This is exactly what happened here.

It is undisputed that 1) the agreement made time of the essence;⁵⁷ 2) the termination date was fixed;⁵⁸ and 3) there is no allegation or facts that support estoppel or waiver as to the termination date.

Because of the problem with the septic, no one could have expected to close the transaction on time. But the parties attempted to negotiate extending the closing date, implicitly recognizing that the closing date was fixed and needed renegotiation. After the closing date had passed, Mr. Rauth acknowledged that the choice not to close by the closing date was, at least in part, the buyers:

[W]e made an extension request based on the contingency that they have the system completed by 3/21. They need to come back at us with a

⁵⁵ Id.

⁵⁶ *Langston v. Huffacker* 36 Wash.App. 779, 788, 678 P.2d 1265, 1271 (1984).

⁵⁷ CP 72.

⁵⁸ CP 92.

counter based on their understanding of the time it will take to get the system in, or another proposal if they choose. Then we can consider further options....⁵⁹

This email and those around it show that the parties continued to negotiate. Because time was of the essence and the buyer did not tender performance, the agreement became defunct.

[I]f time is made essential by the agreement, neither the vendor nor the purchaser can enforce the contract specifically after the agreed day if it is then still wholly executory on both sides.⁶⁰

As such, the Evanses did not breach the agreement and cannot be compelled to specifically perform the agreement. On these undisputed facts defendants are entitled to summary judgment.

C. ANTICIPATORY REPUDIATION IS NOT APPLICABLE

In response to the above arguments the buyers asserted anticipatory repudiation. They alleged this theory late, after their motion was filed. The facts, however, do not support this theory. In order to assert an anticipatory breach buyers have to establish that, prior to February 28, 2006 sellers unilaterally indicated that, in spite of buyers

⁵⁹ CP 15.

⁶⁰ *Mid-Town Limited Partnership v. Preston*, 69 Wash.App. 227, 233, 848 P.2d 1269 (1993) quoting S. Williston, *Contracts* § 852, at 208-209 (3d ed. 1962).

willingness to close, they would not. But the *only* evidence is that *both* parties contemplated closing at some later date, on new terms:

Mr. Rauth wrote:

Also, we made an extension request based on the contingency that they have the system completed by 3/21. They need to come back at us with a counter based on their understanding of the time it will take to get the system in, or another proposal if they choose. Then we can consider further options....⁶¹

Buyers *requested* an extension on new terms. But an agreement to come to a later agreement is unenforceable.⁶²

Here, the parties agreed, as evidenced by Mr. Rauth's admission, to attempt to resolve the septic and closing date issues and come to a later agreement. That agreement is agree is unenforceable.

An anticipatory breach is a "positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot perform any of his contractual obligations."⁶³ A party's intent to not perform their obligations may not be implied from "doubtful and indefinite statements that the performance may or may not take place."

⁶¹ CP 15.

⁶² *Keystone land and Dev. Co. v. Xerox corp.*, 152 Wn.2d 171,94 P.2d 954 (2004)

⁶³ *Lovric v. Donatov*, 18 Wn.App. 274, 282, 567 P.2d 678 (1977).

The trial court held that the February 18, 2005 email from the dual agent was an anticipatory repudiation. But it was obviously not taken as one. This is because it was simply informing the buyer of an undisputable fact that it would take more than two weeks to design, have approved, and install a new septic system.

“Repudiation of a contract by one party *may* be treated by the other as a breach which will excuse the other’s performance.”⁶⁴ Here the evidence is unequivocal that the plaintiffs did not treat this as a breach. Mr. Rauth did not indicate in any of his emails that he took the Evanses’ good faith actions to fix the septic system as a breach.⁶⁵ They proposed the closing extension after the agreed closing date had past.⁶⁶ Now, with 20/20 hindsight they contend that the Evanses repudiated the contract. This is false and they should be estopped from making the claim. After the problems with the septic were discovered, both parties agreed to try to resolve the issues and close later. First the Evanses proposed the closing occur before repairs were made. Then they proposed a closing date in May. This was obviously not agreeable, because they could not agree on a later date and the transaction died.

⁶⁴ *CKP, Inc. v. GRS Construction Co.*, 63 Wn.App. 601, 821 P.2d 63 (1991).
Emphasis added.

⁶⁵ CP 14- 16.

⁶⁶ CP 109-110.

D. ANTICIPATORY REPUDIATION CANNOT BE A BASIS FOR SUMMARY JUDGMENT IN THIS CASE

An anticipatory repudiation “requires a positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.”⁶⁷ The only communication that could conceivably be a repudiation was the communication of the fact that it was impossible to design, approve and install a septic system during two weeks in February. This is not a repudiation, it is exactly the opposite. It is evidence of a good faith desire to complete the transaction. The Court should reject this argument in its entirety because there was no anticipatory repudiation. But if this theory is available to buyers there is at very least a fact question as to whether the statements made by the agent taken in context with the other communications was a repudiation. Taking the facts in a light most favorable to the Evanses, the email from LaDeux was not a repudiation.

For the Evanses to not be in breach (according to buyers) they would have had to design, have approved, and install a new functioning septic system in less than two weeks. This was not impractical, it was impossible.⁶⁸

⁶⁷ *Lovric v. Donatov*, 18 Wash. App. 274, 282, 567 P.2d 678 (1977).

⁶⁸ For the opposite result, see *Langston v. Huffacker*, 36 Wash.App. 779, 678 P.2d 1265. In that case the vendor *could have* cleared title by the closing date.

E. IMPOSSIBILITY EXCUSES PERFORMANCE

Impossibility of performance excuses a party's performance of a contract. The doctrine encompasses both strict impossibility and impracticality due to extreme and unreasonable difficulty, expense, injury or loss.⁶⁹ A party is discharged from its contractual obligations when a basic assumption of the contract is destroyed and such destruction makes performance impossible or impractical, provided the party seeking relief does not bear the risk of the unexpected occurrence.⁷⁰ At the time the contract was executed the Evanses thought the septic was in proper working order. This was based on a recent inspection. So, they represented that at the time the contract was signed and at the time of closing the property would comply with all applicable regulations. After the contract was signed they learned that a basic assumption of the contract, that the property complied with regulations, was destroyed. Performance was literally impossible. It is undisputed that the Evanses could not possibly have the septic system repaired by the agreed upon closing date.

And they did not bear the risk of the unexpected occurrence. The representations they made were qualified that they were made "to the best

As such, specific performance was appropriate. Here it is undisputed that the septic *could not have* been repaired by the agreed upon closing date.

⁶⁹ *Oneal v. Colton School Dist.*, 16 Wash.App. 488, 557 P.2d 11 (1976).

⁷⁰ *Tacoma Northpark, LLC. v. NW LLC*, 123 Wash.App. 73, 96 P.3d 454 (2004).

of their knowledge.” There is no evidence or allegation that the Evanses knew of the problems. The representations were based on a recent inspection. This is not a case of willful ignorance. It is undisputed that the Evanses could not possibly have repaired the septic by closing.

Further as will be discussed below, the contract did not place this risk on the Evanses. The Evanses had no duty to repair defects from casualty or found in inspections.

Because a basic condition of the contract was impossible performance should have been excused and the Evanses are entitled to specific performance.

F. SPECIFIC PERFORMANCE IS UNAVAILABLE

Where time is of the essence and performance cannot occur because a condition precedent has not been met (through no bad faith of the seller), and there is no agreement to the extend the closing date there is no breach and specific performance is unavailable. And while there is no Washington directly on point with the facts of this case, there are numerous examples where this principle is demonstrated.

*Local 112 IBEW Bldg. Ass'n v. Tomlinson Dari-Mart, Inc.*⁷¹ is a perfect example. In that case, as here, there was an agreement to sell

⁷¹ 30 Wash.App. 139, 632 P.2d 911 (1981).

property with a specified closing date with time of the essence. The seller, Tomlinson, was required to obtain title from the bankruptcy court. After several agreed upon extensions of the closing date (made necessary because Tomlinson could not get clear title) Tomlinson refused to another extension. IBEW sought, and the trial court ordered, specific performance.

The Court of Appeals reversed. They concluded that time was of the essence in the agreement and the contract becomes legally defunct unless “the failure to meet the time limit is the result of one of the parties’ bad faith or lack of due diligence. The Court stated:

Here, time was of the essence; performance could not occur because title had not been cleared from the bankruptcy court, a condition of the agreement; there was no mutual agreement to extend the closing date; and the court found Tomlinson had made a good faith effort to clear the title. There is no finding or evidence of bad faith or lack of diligence by either party.⁷²

Here, the facts are functionally identical. Time was of the essence; performance could not occur because the septic could not be repaired, a condition of the agreement; there was no mutual agreement to extend the closing date; and there is no evidence of bad faith or lack of diligence. On

⁷² *Id* at 143.

the contrary, the only evidence is that Evanses were making good faith efforts to repair the septic system.

G. THERE IS NO BREACH OF CONTRACT

The case should be dismissed because the most basic premise behind it – that the Evanses breached the contract-is faulty. Respondents’ argument goes like this:

1. The Evanses warranted that the septic system met all applicable codes and regulations.
2. The septic system did not meet those codes and regulations.
3. The Evanses breached the warranty.

But this logic ignores several things. It ignores the plain contract language and the fact that because the transaction never closed, the warranty was never breached.

The contract states:

Seller represents and warrants to Buyer that, to the best of Seller’s knowledge each of the following is true and shall be true as of closing:...(c) The Property and the business conducted thereon comply with all applicable laws, regulations, and ordinances....⁷³

There are two representations and warranties. 1) The sellers represent that at the time of closing they know of no defects. And 2) they

⁷³ Id.

warrant that at the time of closing there will be no defects known to sellers. The representation and warranty are made to the best of Seller's knowledge. And it is undisputed that the Evanses had a reasonable belief that the septic was in compliance with all regulations based on the recent inspection. So, by making the representation that *before* closing the septic was working was not a breach because they had no knowledge that the statement was false. That is, there is no evidence of misrepresentation. Respondents would have the Court ignore the limiting language, "to be best of Seller's knowledge." But an interpretation which gives effect to all words in a contract provision is favored over one which renders some of the language meaningless or ineffective:

"Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it." *Wagner v. Wagner*, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980). An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective. *Wagner*, at 101, 621 P.2d 1279.⁷⁴

This limiting language had meaning. It was part of how this contract allocated risk.

⁷⁴ *Seattle first National Bank v. Westlake Park Association*, 42 Wash.App. 269, 711 P.2d 361 (1986)

H. THE CONTRACT ALLOCATED THIS RISK TO BUYER.

The contract allocated the risk of unknown defects to the buyers. The contract had no provision that required sellers to make repairs. The intent and language of the contract was exactly the opposite. First, the warranty was to the best of sellers knowledge. This, and the contingency clause place the burden of investigating the property's condition on buyers. Second, the contract provides that seller does not have to make repairs due to casualty. And finally, there is an "As-Is" clause.⁷⁵

Sellers generally do not want to have liability to make repairs for unknown defects. This is because the negotiated purchase price is based on their reasonable belief about the condition of the property. And buyers want sellers to let them know of any known defects.

If a pre-closing inspection reveals needed repairs, the contract provides mechanisms for the Buyer to terminate the contract. If the Buyer does not give notice of his satisfaction with the condition of the property, the agreement terminates to be renegotiated.

If the septic problems had been discovered during an inspection by buyers during the feasibility period there should be no question that the Evanses would not have a duty to repair the septic. Why then, does the duty arise after the buyer waives contingencies?

⁷⁵ CP 13.

Evanses would not have a duty to repair the septic. Why then, does the duty arise after the buyer waives contingencies?

If we follow the buyers logic, almost any defect discovered during a feasibility study would require the seller to make repairs.

For example, say the buyer had hired a building inspector during the feasibility period. The inspector finds defects that violate the building code. The seller warranted that the property complied with laws, regulations and ordinances. The building code is a regulation. So, following buyers arguments, seller would have to fix them or be in breach of contract. This, of course, is not what the contract intended. The contract intended that if defects were found the buyer could rescind the contract or it could be renegotiated. The Evanses did not breach the agreement by their good faith, mistaken representation.

Next, did they breach the second promise? Did they breach the warranty that, at closing, the property would meet codes and regulations? Because the transaction never closed that portion of the warranty never became applicable. Under respondents view, however, the Evanses breached the contract the moment they signed it. Because the septic, at that time, unbeknownst to them, had failed. They could not have fixed in time to close even if they knew.

I. THE WARRANTY DID NOT BIND SELLER TO MAKE REPAIRS TO UNKNOWN DEFECTS

The contract did not allocate the risk of unknown defects to the Evanses. First, the contract provided that the seller “shall not be required to repair material damage from casualty.”⁷⁶

Second, as in most purchase and sale agreements, this contract had an inspection contingency. If, prior to the Buyers waiving the contingencies they had the septic inspected and learned it had failed they would have been able to disapprove the contingency and terminate the agreement. The Seller would then have had the option of offering to repair the septic. Buyer could not have compelled Sellers to make the repairs.

Respondents must argue that the Evanses breached the contract because they agreed to provide a property with a working system by the agreed upon closing date. But plaintiffs performance was impossible. (Not impractical or difficult). It is undisputed that it is literally impossible to design and install a septic system in the wet months in the time frame it would have been necessary to close the transaction in time. So, under respondents argument the minute the Evanses signed the contract they unknowingly were in breach of contract.

⁷⁶ CP 72.

This is not what the parties bargained for and it is not what the contract provided.

Washington law does not hold a seller liable for this type of breach:

[A] real estate buyer is not entitled to recover for breach of warranty unless the seller makes representations about the property on which the buyer justifiably relies.⁷⁷

Here, the buyer did not rely on the representation. They required an inspection. The inspection revealed a defect that neither party contemplated or was aware of when they negotiated the contract. Repairing the defect was not possible within the time frame allowed by the contract. The buyers' remedy at this point was rescission. But they rejected this option and sued for specific performance instead.

J. THIS IS NOT A CASE OF NEGLIGENT OR INTENTIONAL MISREPRESENTATION

Respondents rely on to *Olmstead v. Mulder*⁷⁸ for the proposition that even though the defendants thought the septic was working properly they are liable to plaintiffs for the breach of that warranty.

⁷⁷ *Atherton Condominium Apartment-Owners Ass'n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 535, 799 P.2d 250 (1990).

⁷⁸ 72 Wn.App.169, 863 P.2d 1355 (1993).

But *Olmstead* does not say that. In that case the seller *was aware* of the defects and tried to insulate himself from the warranties he made by inserting an “as-is” clause:

The court found that *Mulder had knowledge of the defects*, that the defects were dangerous to the buyers' life or health, that a reasonable inspection would not disclose the defects, and that the value of the property was adversely affected.⁷⁹

Here, it is undisputed that sellers did not know about the defect. And closing never occurred, so the warranty never came into effect.

They had no knowledge of the defect and their lack of knowledge was reasonable because the septic had been recently inspected. The contract provided no obligation for the seller to make any repairs.

Summary judgment against the buyers is appropriate.

K. ATTORNEY'S FEES

A prevailing party is entitled to fees on appeal if permitted by contract.⁸⁰

The purchase and sale agreement provided:

If Buyer or Seller institutes suit concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.⁸¹

⁷⁹ *Id at 175.*

⁸⁰ RAP 18.1; *Bayo v Davis*, 127 Wn. 2d 256, 264, 897 P.2d 1239 (1995); RCW 4.84.330.

⁸¹ CP 74.

IV. CONCLUSION

Sellers had the septic inspected about nine months before they represented its condition. Unfortunately, the septic was destroyed by a third-party. Under the contract the seller had no obligation to repair the septic. The septic could not be repaired in time to close. Sellers offered to repair the septic and close later. The parties tried, but failed, to negotiate a later closing. Buyers then sued for specific performance and damages. Responding to the argument that when time is of the essence and performance is not tendered the contract is defunct the buyers asserted anticipatory repudiation.

Buyers claim anticipatory breach because they can try to bend the facts to fit this legal theory. But the problems with this theory are many. First, there was no breach. Second, there was no repudiation. And even if there were words that could have been taken as one, the only evidence in the record is that the plaintiffs did not take it as one.

The trial court should be reversed. Buyers' claims should be dismissed with prejudice and the sellers awarded their attorneys' fees in this court and the trial court.

Dated this 5th day of May, 2006.

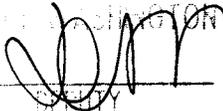
LAW OFFICE OF
DAVID P. HORTON, INC. P.S.

A handwritten signature in black ink, appearing to be "D. Horton", written over a horizontal line.

David P. Horton, WSBA 27123
Attorney for Appellant

FILED
COURT OF APPEALS
WASHINGTON

06 MAY -8 AM 10:06

STATE OF WASHINGTON
BY 

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

LAWRENCE H. EVANS, JULIA R. EVANS,
and the marital community thereof

Appellants,

vs.

HANS RAUTH and MELITTA L. HOLLAND,

Respondents.

NO. 34479-3-II

DECLARATION OF SERVICE

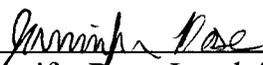
I am the Legal Assistant for the Law Office of David P. Horton, Inc. P.S. on the 5th day of May, 2006, and in the manner indicated below, I caused a copy of Brief of Appellants, a copy of Declaration of Service to the Court of Appeals and Copy of this Declaration of Service to be served on:

Charles Shane
PO Box U
Cosmopolis, WA 98537

By US Mail.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Silverdale, Washington this 5th day of May, 2005.


Jannifer Rose, Legal Assistant

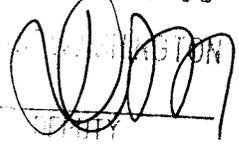
DECLARATION OF MAILING -1

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Court of Appeals Division II
950 Broadway Suite 300 MS-TB 06
Tacoma, WA 98402-4454

By Legal Messenger.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Silverdale, Washington this 5th day of May, 2005.


Jannifer Rose, Legal Assistant