

**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 martial community
thereof, Appellants

NO. 34479-3-II

BRIEF OF RESPONDENTS

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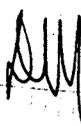
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I. STATEMENT OF THE ISSUES

1. Did the Appellants make a warranty to deliver the property to the Respondent's in a state that was in compliance with the law? YES.
2. Was the warranty that was made contingent upon the Appellant's knowledge? NO.
3. Did the Appellants anticipatorily breach the warranty and the contract? YES.
4. Does the defense of impossibility apply to the Appellants? NO.
5. Is specific performance an available remedy to the Respondents? YES.

II. STATEMENT OF THE CASE

The Appellants entered into an agreement (herein the “Agreement”) to sell commercial property to Respondents (herein “Rauth”) in Mason County. *See* CP 14, Exhibit “A” (the fully executed Agreement) and Exhibit “B” (a clearer copy of the Agreement that was executed by Melitta Holland, a buyer). In Paragraph twelve of the Agreement they made the following warranty, “Seller represents and warrants to Buyer that, to the best of Seller’s knowledge, each of the following is true as of the date hereof and shall be true as of closing...The Property and Business thereon comply with all applicable laws, regulations, codes and ordinances[.]” CP 14, Exhibit “B”. On February 18, 2005, ten days before closing, Hans Rauth received an email from Emma LaDeaux, the real estate agent for the Appellants, stating that the drainfield of the septic system failed and they would not be able to replace and install it by the 28th of February. *See* CP 14, Exhibit “E” (indicating a closing date of February 28, 2005) and Exhibit “G” (email of the real estate agent). They anticipatorily breached the contract at that point.

The Appellants conceded that the condition of the drainfield made the property not in compliance with applicable laws, regulations, codes and ordinances. *See* Brief of Appellants, pages 5-6; *see also* CP 2, paragraph 3.22 (Plaintiffs’ Complaint which states that the septic system

was not in compliance with the laws) and CP 5, paragraph 4.3 (responding to Plaintiffs assertion in the affirmative). Rauth attempted to work with the Appellants to allow them time to fix the problem. When asked about extending closing, Rauth stated “We are waiting on [the Appellant’s] 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...” CP 34.

Despite Rauth’s best efforts to allow the Appellant’s time to comply with the warranty, the Appellant’s made it clear to Rauth that they felt they did not have to comply. Rauth sent a proposed addendum allowing the Appellants to close at a later date “Provided [the] Septic System is properly repaired/replaced as necessary by County approvals.” CP 14, Exhibit H. The Appellants responded by crossing out the statement “properly repaired/replaced as necessary by County approvals” and replacing it with “designed [and] approved by 3/21/05.” *Id.* In addition, the real estate agent sent a letter stating outright that they had no obligation to repair the septic nor liability for its condition. CP 14, Exhibit I. The Appellants, even though they contend that the contract was defunct, also apparently felt the need to formally and unilaterally rescind the Agreement. *Id.* at Exhibit J.

III. ARGUMENT

A. THE PHRASE “TO THE BEST OF SELLER’S KNOWLEDGE” REFERS ONLY TO REPRESENTATIONS MADE

The Appellants assert that they were not liable for the warranty because they were not aware that the property was in a condition that would make them liable under the warranty. *See* Appellants’ Brief, pages 19-20. The basis for their assertion appears to be the language of the warranty Contract where it states “Seller represents and warrants to Buyer that, to the best of Seller’s knowledge,” the property is and will be in compliance with the laws. CP 14, Exhibit “B”; *see* Appellants’ Brief, pages 19-20. The Appellants apparently feel that the phrase “to the best of Seller’s knowledge” makes any obligation to fulfill the warranty contingent upon their knowledge. *Id.* They therefore assert that they were not liable to fulfill their warranty obligation because they allege that they were not aware of the condition of the drainfield. *Id.*

There are several flaws with the Appellants argument. A warranty is a guarantee that something will be in a specified condition. One does not warrant something to the best of their knowledge. Either it meets the condition or it does not and if it does not, the warrantor is liable. Even were the court to adopt the odd sounding proposition that the Appellants made a warranty to the best of their knowledge, it still does not affect the

fact that a warranty was made. It would certainly be a stretch to imply that the warranty that was given was not only based on their knowledge but contingent upon it as well. In essence, the Appellants are desperately seeking to add non-existent conditions to the warranty.

The Appellants also fail to consider the fact that they were both making representations *and* warranties. The phrase “to best of Seller’s knowledge” was clearly meant to apply to Appellants’ representations and not to the warranty. This is because when one gives a representation, he or she describes the condition of something based on his or her observation. By stating that they are representing something to the best of their knowledge, the Appellants are attempting to limit their liability for the Buyer’s reliance on those representations and observations. Hence, if Rauth had asserted that the Appellants breached the contract solely due to misrepresentations, the Appellants may have a valid argument, provided that they did not purposely misrepresent the condition of the septic system. However, here the Appellants are incorrectly attempting to apply this to the warranty.

**B. THE CONTRACT WAS ANTICIPATORILY BREACHED
BY THE APPELLANT’S MAKING CLOSING UNNECESSARY**

In *Wallace Real Estate Investment, Inc. v. Groves*, the court stated that an anticipatory breach “occurs when one of the parties to a bilateral

contract either expressly or impliedly repudiates the contract prior to the time of performance.” *Wallace Real Estate Investment, Inc. v. Groves*, 124 Wash.2d 881, 898, 881 P.2d 1010 (1994). The court went on to say that an anticipatory breach is a “positive statement or action by the promissor indicating distinctly and unequivocally that he either will not or *cannot* substantially perform any of his contractual obligations[.]” *Id.* (citations omitted and italics added).

In *Wallace Real Estate Investment* the buyer of real property sent a letter to the Seller stating that he had run into problems regarding the transaction. *Id.* at 897-98. Specifically, the buyer stated that unexpected events occurred and he requested a new agreement with a different closing date. *Id.* The Sellers subsequently retained the buyer’s earnest money after showing up to closing. However, the trial court held in its oral decision that “the sellers would have been perfectly entitled in not even showing up [to closing]. They were not required to do a useless act.” *Id.* at 898. The decision of trial court was affirmed by both the Washington State Court of Appeals and the Supreme Court and the letter of the buyer was held to be an anticipatory breach. *Id.* at 899.

Like the buyer in *Wallace Real Estate Investment*, the Appellants indicated in their email that they could not complete and install a new septic system by the agreed upon closing date. *See* CP 14, Exhibit “G”.

Since the septic system could not be brought into compliance with the law by closing, the Appellants were clearly and distinctly stating that the property would not be in compliance with the law upon closing as they had warranted. This was an anticipatory breach. At that point, Rauth could exercise all remedies available to them just as the defendants did in *Wallace Real Estate Investment*. Rauth could have filed an action for damages and specific performance or they could have just filed an action for damages alone right after they got the email from the real estate agent.

Contrary to what the Appellants assert in their pleadings, after the Appellants' anticipatory breach, Rauth, much like the Sellers in *Wallace Real Estate*, were not obligated to close the transaction and accept the property in a condition that was not as the Appellants had warranted. *See* CP 28; *See also* Defendants' Brief.

Unlike the non breaching party in *Wallace Real Estate Investment* who exercised remedies available to them after closing by retaining the earnest money of the breaching party after his anticipatory breach, Rauth first tried to work with the Appellants to allow them to cure the breach by amending the original agreement. Despite the Appellants' original email indicating that they were going to repair and install the new septic system but needed more time, the Appellants ultimately manifested their mistaken belief that they did not nor ever had to fulfill the original contract by

repairing the septic system prior to closing. See CP 14, Exhibit “H” (where the Appellants countered the offer for a new closing date by conspicuously leaving out the obligation to repair the septic but keeping the same closing date); *see also* CP 14, Exhibits “I”, “J” and “L”. In any event, no agreement was made as to the terms to cure the Appellants’ anticipatory breach. The fact that plaintiffs attempted to work with the Appellants to allow them to cure their breach certainly does not void the original contract nor does it limit their remedies for the Appellants’ breach.

C. IMPOSSIBILITY IS NOT A DEFENSE

The Appellants also seek to exculpate themselves from liability under the theory of impossibility because the discovery of the septic system was an unexpected occurrence and that they would be unable to deliver the property in a lawful state prior to closing. *See* Appellants’ Brief. Unfortunately for the Appellants, this theory only applies the party seeking relief if that party did not bear the risk of the unexpected occurrence. *Tacoma Northpark, llc. v. NW LLC*, 123 Wash.App. 73, 96 P.3d 452 (2004). In the case at bar, the Appellants warranted that the property would be in compliance with all applicable laws, regulations and ordinances. CP 14. By making that warranty, the Appellants bore the risk of having to bring or pay to bring the property in compliance with that

warranty prior to closing the transaction and they bore the risk of being liable for having to fulfill their warranty obligations. Any time somebody has to fulfill a warranty, it is fairly safe to say it is an unexpected occurrence. Obviously, if it was an expected occurrence, nobody would make warranties because it would mean they would always have to pay. The defense of impossibility does not apply to Appellants.

D. SPECIFIC PERFORMANCE AND DAMAGES ARE AVAILABLE REMEDIES TO RAUTH

Rules of Appellate Procedure 2.5(a) states “The appellate court may refuse to review any claim of error which was not raised in the trial court.” In addition, the court has stated that it “will not review an issue, theory, argument, or claim of error not presented at the trial court level.” *Lindblad v. Boeing Co.*, 108 Wash.App. 198, 207, 31 P.3d 1 (2001). The issue of specific performance was raised in the Plaintiffs’ Motion for Partial Summary Judgment, CP 15, Plaintiffs’ Memorandum of Law in Support of Plaintiffs Motion for Summary Judgment, CP 16, and the Order Granting Partial Summary Judgment and Authorizing Specific Performance, CP 37.

It appears, however, that the first time the Appellant ever addressed the issue was in its Brief. *See* Appellants Brief, pages 17-19. The Appellants had ample opportunity to address that issue in the court

below and they should not be allowed to now address that issue for the first time in this court simply because they did not prevail in their argument below. In fact, the Appellants probably chose not to address the issue of specific performance below because they wanted to use the issue of specific performance to force an interlocutory appeal as a matter of right.

The Appellants try to rely on *Local 112 IBEW Bldg. Ass'n v. Tomlinson Dari-Mart* as a justification to deny Rauth the remedy of specific performance. *Id.* The basis for their assertion is that the closing date had come and gone making the Agreement defunct. *Id.* This would have been a valid argument had the Appellants breach been discovered after the closing date had come and gone and the parties had not closed. The problem with their argument is that they fail to take into consideration that the Agreement was anticipatorily breached about ten days prior to the closing date when they sent Rauth an email indicating that they would not be able to deliver the property as warranted. That is a major difference between this case and *Tomlinson Dari-Mart*. Once the Appellants anticipatorily breached the agreement, Rauth could exercise all remedies available to him, including bringing a suit for specific performance and damages for breach of the Appellants' warranty.

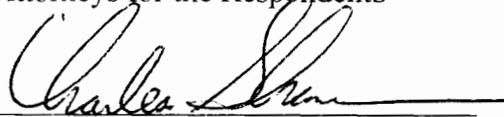
IV. CONCLUSION

This is really a very simple and clear case. The Appellants made a warranty to Rauth. They warranted that the property would be in a lawful condition before closing. CP 14, Exhibits "A" and "B". Prior to closing, the Appellants through their agent clearly and unequivocally stated that they would not be able to fulfill the warranty prior to closing. CP 14, Exhibit "G". They anticipatorily breached the Agreement. At that point Rauth could exercise any remedy available to him. He did not have to close the transaction nor was he precluded from exercising his remedy at any point after the breach of the Agreement by the Appellants. Rauth tried to work with the Appellants to allow them to cure their breach and they refused to do so. *See* CP 14, Exhibit "H". Therefore, Rauth then appropriately brought this action for Specific Performance and for a court to determine the damages for the Appellants' breach. The Court correctly granted summary judgment in favor of Rauth. The Respondents respectfully request that the Court affirms that decision.

Dated this 5th day of October, 2006

Respectfully Submitted:

MICHEAU AND ASSOCIATES, PS
Attorneys for the Respondents

A handwritten signature in cursive script, appearing to read "Charles P. Shane", written over a horizontal line.

Charles P. Shane, WSBA 33250

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Nadine Salo
NADINE SALO

SUBSCRIBED AND SWORN to before me this 5th day of October, 2006.

Sherry Carlson
NOTARY PUBLIC in and for the
State of Washington
Residing at Raymond
My Commission Expires: 12-10-07

SHERRY CARLSON
NOTARY PUBLIC
STATE OF WASHINGTON
My Commission Expires Dec. 10, 2007