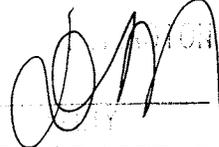


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NO. 34589-7-II

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

LLOYD and MONICA NISHIKAWA,
husband and wife,

Appellants

vs.

U.S. EAGLE HIGH,
a Washington limited liability company,

Respondent.

APPELLANTS' BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order of March 10, 2006 granting the defendant's motion for summary judgment and denying the plaintiff's motion for summary judgment.

ISSUES

1. Is an earnest money agreement complete and a valid instrument under the statute of frauds, where the property was identified by address although the legal description of the property involved was not filled in at the time the agreement was executed by the parties, but the agreement expressly provided that the description was to be inserted by the listing agent or the selling licensee to sell the property, and the listing agent did so in compliance with this authority?
2. May one party to an earnest money agreement unilaterally modify the contract to revoke the authority of the listing agent and the selling licensee to insert the legal description of the property without the agreement of the other party?
3. Assuming, arguendo, that a party could revoke the authority of his or her agent to act further as that party's agent, but the agent is a dual agent, can that party unilaterally terminate the authority of that agent to act on behalf of the other contracting party to insert or correct the legal description?

STATEMENT OF THE CASE

Respondent U.S. Eagle High, LLC owns real property located at 13415 Pacific Avenue South, Tacoma, WA 98444, Pierce County Tax Parcel #2695002822, legally described as:

Lots 2 and 3, Pierce County Short Plat, Recorded February 7, 1995, under Recording Number 9502070438, Records of Pierce County, Washington.
Situating in the County of Pierce, State of Washington.

(hereinafter the "Property"). On August 1, 2005, the Appellant Nishikawa and Respondent executed a Commercial and Investment Real Estate Purchase and Sale Agreement (the "Agreement") wherein Respondent contracted to sell the Property to the Nishikawas. (CP 13-19) Pursuant to the Agreement, the sale was to have closed on or before September 22, 2005. The Agreement contained no contingencies that were not timely satisfied.

The Nishikawas, after executing the Agreement, and within the time allotted by the Agreement, deposited Five Thousand Dollars (\$5,000.00) in earnest money to the real estate agent involved in the transaction. The Agent is a dual agent acting as both the Listing Agent and Selling Licensee for this transaction. An escrow was opened to close the transaction. At all material times, the Nishikawas were ready, willing and able to close the sale of the Property.

At the time the parties signed the Agreement, the property was identified by address, but the legal description of the Property was not attached

to the Agreement. The Agreement stated, however, that “Buyer and Seller authorize the Listing Agent or Selling Licensee to insert and/or correct, over their signatures, the legal description of the Property”. (CP 13) On September 19, 2005, the Respondent, through counsel, unilaterally sent a letter to the managing broker of the Listing and Selling Agent purporting to instruct the dual agent not to attach the legal description to the Agreement. (CP 24-25) The Nishikawas did not concur in those instructions or agree to any modification of the Agreement with respect to the authority of the dual agent to insert the legal description. On September 20, 2005, the dual agent inserted the legal description of the Property into the Agreement over the signatures of the Nishikawas and Respondent. (CP 106-107) The legal description which was inserted was the legal description provided by the title company. (CP 106) The Respondent was obligated by the Agreement to provide the title commitment to the Nishikawas. (CP 106, 89) The Respondent was also obligated by the Agreement to provide the legal description. (CP 93) On August 20, 2005, respondent gave to the dual agent, Sung Lee, a proposed contract modification which contained the corrected addresses and parcel numbers of the property which was the subject of the agreement. (CP 102) Even though that modification was not accepted, it provided to the Nishikawas and the agent sufficient information for the dual agent to obtain a title commitment with the full legal description and to provide it to the Nishikawas.

When Respondent refused to close the purchase and sale transaction, the Nishikawas brought suit for specific performance and/or damages. Both

parties moved for summary judgment. The trial court granted the Respondent's motion, denied the Nishikawas' motion, and dismissed the action.

ARGUMENT

1. Is an earnest money agreement complete and a valid instrument under the statute of frauds, where the property was identified by address although the legal description of the property involved was not filled in at the time the agreement was executed by the parties, but the agreement expressly provided that the description was to be inserted by the listing agent or the selling licensee to sell the property, and the listing agent did so in compliance with this authority?

RCW 64.04.010 requires that every conveyance of real estate, or any interest therein, must be by deed. A valid deed conveying property must be in writing, signed by the party bound thereby and acknowledged. RCW 64.04.020. However, the Washington courts have held that executory contracts for the conveyance of real property, while required to be in writing, are not specialties, but are simple contracts, valid when signed by the parties to be charged, whether or not they are executed with the formalities required for the execution of deeds. First National Bank of Kennewick, v. Conway, 87 Wash. 506, 151 P. 1129 (1915), Fallers v. Pring, 144 Wash. 224, 257 P. 627 (1927). In order to satisfy the statute of frauds, a contract for the sale of real property must embody all essential and material parts of the contemplated

agreement with sufficient clarity and certainty to indicate the parties' meeting of the minds on all material terms with no material matter left for future agreement or negotiation. Saunders v. Callaway, 42 Wn. App. 29, 36, 708 P.2d 652 (1985).

No issue has been raised in this litigation as to the actual property to be conveyed. The description which was attached is the legal description of the property which the parties intended to sell and buy. The material terms required to be included in the memorandum are the subject matter of the contract, the parties thereto, the promise or undertaking, the terms and conditions, and the purchase price or consideration. *Id.* Further, every contract or agreement involving a sale or conveyance of real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county and state. Martin v. Siegel, 35 Wn.2d 223, 229, 212 P.2d 107 (1950).

However, the Washington courts have created a specific, limited exception to this rule with regard to real estate purchase and sale agreements, recognizing that the legal description may not be available when the agreement is drafted, or it may be corrected by the title company when the preliminary commitment is issued. Where a real estate agent or other person is authorized in the contract or agreement to insert the description of the property therein

and does so, the *contract is complete* and constitutes a valid binding agreement under the statute of frauds. *Edwards v. Meader*, 34 Wn.2d 921, 925, 210 P.2d 1019 (1949). (emphasis added)

This rule has been followed consistently by several cases, including *Noah v. Montford*, 77 Wn2d 459 (1969), where the court held that the earnest money agreement was enforceable because the real estate agent was specifically authorized to insert the legal description of the properties over their signature. In *McCarthy v. Rogstad*, 6 Wn.App 699, the court similarly held that:

If the description was insufficient, it could have been corrected by Benton-McCarthy Realty, because the agreement provided that "purchaser and seller authorize agent to insert legal description over signatures." *Noah v. Montford*, 77 Wn.2d 459, 463 P.2d 129 (1969). The earnest money agreement was subject to reformation and specific performance. *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 368 P.2d 372 (1962).

This line of cases was specifically followed in *McKoin v. Kunes*, 5 Wn.App 731, 490 P.2d 735 (1971), wherein the court not only followed the precedent of *Edwards v. Meader, supra*, but rejected an argument to limit that rule to residential property.

The courts have also been careful to distinguish this line of cases, and not apply it to actions for the enforcement of a purchase and sale agreement wherein the legal description is inadequate and there is no

specific authority for the real estate agent or any other person to insert the legal description of the property to be conveyed. Martin v. Seigel, 35 Wn2d 223, 212 P.2d 107 (1949), Leo v. Casselman, 29 Wn2d 47, 185 P.2d 107 (1947), Fosburgh v. Sando, 24 Wn2d 586, 166 P.2d 850 (1946), Martinson v. Cruikshank, 2 Wn2d 565, 101 P.2d 604 (1940), Schweither v. Halsey, 57 Wn2d 707, 359 P.2d 821 (1961).

The agreement in this case contained explicit authority for the listing agent or the selling licensee to insert or correct the legal description. The legal description was inserted by the broker for the listing agent and selling licensee, who was the same person acting as a dual agent. This having been done, the earnest money agreement was complete and constituted a valid instrument under the statute of frauds.

2. May one party to an earnest money agreement unilaterally modify the contract to revoke the authority of the listing agent and the selling licensee to insert the legal description of the property without the agreement of the other party?

Pursuant to contract law principles, the contractual authority of the listing agent and the selling licensee to insert the legal description is not subject to unilateral revocation by Respondent. Modification of a contract by subsequent agreement requires a meeting of the minds. Jones v. Best, 134 Wn.2d 232,

240, 950 P.2d 1 (1998). Mutual assent is required and one party may not unilaterally modify a contract. *Id.* Mutual modification of a contract by the subsequent agreement of the parties arises out of the parties' intentions and requires a meeting of the minds. *Wagner v. Wagner*, 95 Wash.2d 94, 103, 621 P.2d 1279 (1980); *Hanson v. Puget Sound Navigation Co.*, 52 Wash.2d 124, 127, 323 P.2d 655 (1958). Here, the listing agent and the selling licensee were given the authority to insert the legal description by a provision in the Agreement. The Respondent cannot unilaterally revoke that authority. There is no suggestion or evidence that the Nishikawas concurred in the modification of the Agreement to eliminate the authority of the listing agent and selling licensee to insert the legal description. The letter from Mr. Burns could not unilaterally revoke the Agent's contractual authority. When the broker for the listing agent inserted the legal description into the Agreement, the broker was acting pursuant to his or her contractual authority. The Agreement is binding and enforceable against Respondent.

3. Assuming, arguendo, that a party could revoke the authority of his or her agent to act further as that party's agent, but the agent is a dual agent, can that party unilaterally terminate the authority of that agent to act on behalf of the other contracting party to insert or correct the legal description?

The general rule is that an agent's authority to act *on behalf of the principal* may be revoked by the principal, and thereafter the agent has no authority to bind the principal as his or her agent. As stated in *DeBenedictus v. Hagen*, 77 Wash.App. 284, 890 P.2d 529 (1995), :

Subject to exceptions not pertinent here, the principal can revoke the agent's authority at any time; if the revocation is a breach of contract, the agent can claim damages, but in no event may the agent continue to act on behalf of the principal. *State ex rel. Everett Trust & Sav. Bank v. Pacific Waxed Paper Co.*, 22 Wash.2d 844, 855, 157 P.2d 707 (1945); *Arcweld Mfg. Co. v. Burney*, 12 Wash.2d 212, 221-222, 121 P.2d 350 (1942); 1 Restatement (Second) of Agency pp. 274-75, ch. 5, Topic 1, Introductory Note.

There is a dearth of authority with regard to the effect of a termination of an agent's authority to act on behalf of one principal when that agent is acting as a dual agent, and is therefore the agent of the other party to the transaction as well. In those circumstances, it appears clear that the one party may terminate the authority of the agent to act *on his behalf as his agent*, under general agency principles. However, there is no basis under either agency law or contract law for the proposition that one principal can act to terminate the authority of the agent to act as agent for another principal simply because the agent is a dual agent. Clearly, if there had been two real estate agents involved in this transaction, one representing the seller and the other representing the buyer, any revocation by the respondent of the agent's authority would only apply to the authority of the agent representing the respondent. The authority

of the agent representing the Nishikawas in such a transaction would not be affected. That result should not be affected by the fact that the same person is acting as the agent for both of the parties. Even if there were no contract term authorizing specific persons to insert or correct the legal description, a revocation by the respondent of the agent's authority only revokes the agent's authority to act on behalf of the respondent. It does not revoke the authority of the agent to act on behalf of the Nishikawas.

The Nishikawas do not concede that this is an agency case. This is a contract case. However, if the court analyzes this as an agency case, it should be analogized to either an agency coupled with an interest or a trust.

Our Supreme Court has discussed the concept of a power or authority coupled with an interest in the context of an irrevocable proxy given to a party to protect its security interest. In those circumstances, the court stated:

The general rule is that a proxy given by a stockholder to vote his corporate stock at a meeting of stockholders of a corporation is revocable by him even though the proxy by its terms is expressly made irrevocable.

Exceptions to this rule, as well as the general rule, are set forth in *Arcweld Mfg. Co. v. Burney*, 12 Wash.2d 212, 121 P.2d 350, 355; 2 Am.Jur. 61; 5 Fletcher Cyc. Corp., Perm. Ed., 187; 2 Thompson on Corp., 3rd Ed., 356; 2 C.J.S., Agency, §§ 73 and 75, pp. 1153 and 1159.

The exceptions are: (1) Where the authority or power is coupled within an interest. (2) Where the authority is given as part of a security or is necessary to effectuate such a security.

In the *Arcweld* case, in defining 'power coupled with an interest', we said: 'A 'power coupled with an interest' is a power or authority to do

an act, accompanied by or connected with an interest in the subject or thing itself upon which the power is to be exercised, the power and interest being united in the same person.'

With reference to the second exception we said: 'The second exception to the general rule that a principal may revoke the power at will arises where the authority is given as part of a security or is necessary to effectuate such security. In such cases the 'interest' of the agent is something more than an interest in being permitted to exercise the power, yet something less than an estate in the subject matter or thing upon which the power is to be exercised. The purpose of the power of attorney in such cases is ordinarily to afford to the agent protection for money advanced or obligations incurred by him.'

It will be observed that as to the first exception we did not limit the 'interest' to the thing itself upon which the power is to be exercised, but we also included the subject upon which the power is to be exercised. In many cases they are the same, but in other instances they may be different. Many of the cases under the facts before the court lay down the broad rule that the 'interest' referred to must be in the thing itself, and if applied literally to the case before us it would mean that in order to come within the exception it would be necessary that Engle have some kind of a title to or estate in the shares or certificates of stock, but according to the interpretation we have given the exception it is sufficient that the proxy holder have an 'interest' in the subject matter upon which the power is to be exercised. The 'thing itself' may refer to the tangible shares or certificates of stock, but the 'subject' or 'subject matters' may refer to the intangible voting right and the incidental control of the corporation. Ordinarily the purpose of a power of attorney under the second exception is to afford the agent protection for money advanced or obligations incurred by him for his principal, but the term 'security' has not always been so limited by the courts. The word 'security' as used in this connection is somewhat elastic and cases we later cite disclose that whenever the purpose to be served by the exercise of the power is to protect or further the interest of the proxy holder the authority given is regarded as a part of a security or something necessary to effectuate such a security. State Ex Rel. Everett Trust & Savings Bank V. Pacific Waxed Paper Co. et al., 22 Wash.2d 844, 157 P.2d 707, 159 A.L.R. 297 (1945).

In that case, the purpose of the appointment of the agent was not merely to vote the stock, but also to enable the agent to cooperate with another holder of stock in the corporation to maintain control. The court found that the voting of the stock for these purposes was the subject of the agency. The court found that the mutual arrangement created something like a community of interest in the stockholdings of the parties having for its purpose the use of their stock as a unit, the effect of which was to give both parties an interest in the voting of the stock. The power was therefore coupled with an interest and by the entire arrangement between the parties the power was intended to be and became a security to effectuate the main purpose of the agency. *Id. at 852.* Therefore, the proxy was irrevocable.

If this case is analyzed as an agency case, the court should apply a similar analysis to the agency relationship involved here. The purpose of appointment of the agent by both of the parties was to create a mutual arrangement which as a whole protected the interests of both of the parties and assured the completion of the transaction contemplated by both parties. Clearly, the authority granted to the listing agent and the selling licensee under the Agreement was intended to protect the interests of both of the parties. The power was therefore coupled with an interest intended to be a security to effectuate the main purpose of the agency.

Similarly, the court could analyze the authority given by the respondent to the agent as a quasi trust, if any sort of agency law is to be applied. It is the general rule that, in the absence of an express reservation, a trustor cannot revoke a trust without the consent of the trustee and all beneficiaries. An exception exists where the trustor is the sole beneficiary. Bogert on Trusts, 4th ed. ss 148, 152 (1963); Restatement (Second) Trusts s 330 et seq.; 62 A.L.R.2d 1412 (1958); 54 Am.Jur. Trusts s 84. Lucas v. Velikanje, 2 Wash.App. 888, 471 P.2d 103 (1970). The document here was voluntarily executed by the respondent, in the authority of the agent to act should not be set aside in the absence of fraud, mistake, duress, undue influence, or other matters cognizable in equity.

CONCLUSIONS

The earnest money agreement executed by the parties is a complete and valid instrument under the statute of frauds, although the legal description of the property involved was not filled in at the time the agreement was executed, because the agreement expressly provided that the description was to be inserted by the listing agent or the selling licensee, and the broker for the listing agent in selling licensee did so in compliance with this authority. The respondent provided the correct address for the property pursuant to the requirements of the agreement, and the broker for the listing agent attached the legal description to the agreement from the preliminary commitment for title insurance which the respondent was also required by contract to provide.

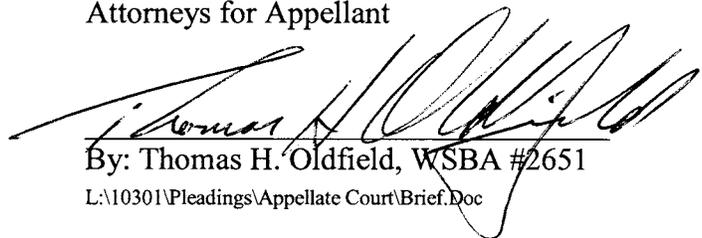
The attempt by the respondent to unilaterally amend the contract to revoke the authority of the listing agent and the selling licensee to insert the legal description of the property without the agreement of the Nishikawas was completely ineffective, and did not reduce or eliminate the contractual authority of the dual agent.

Even if the respondent effectively terminated the authority of the listing agent and the selling licensee to act further as that party's agent, the listing and selling agent was a dual agent and was therefore separately the agent of the Nishikawas. The respondent had no authority to revoke the authority of that agent to act on behalf of the Nishikawas to insert or correct the legal description.

If this case is to be analyzed as an agency case, the court should find that the agency is an agency coupled with an interest or a quasi trust, and therefore not susceptible to unilateral revocation by one of the principals.

The summary judgment granted in favor of the respondent should be reversed, and an order should be entered granting summary judgment to the Nishikawas for specific performance of the agreement.

Respectfully submitted,
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Attorneys for Appellant

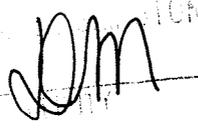


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STATE OF WASHINGTON

BY: 

NO. 34589-7-II

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CERTIFICATE OF SERVICE

The undersigned declares that on July 17th, 2006, she hand-delivered a copy of Appellants' Brief to the office of Respondent's counsel at the following address:

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DATED this 17th day of July, 2006, at University Place, Washington.



Erica Johnson