

CASE NO. 34988-4-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

TINA EPHREM,
Appellant/Cross-Respondent,

v.

CARY FALK,
Respondent/Cross-Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
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BY DEPUTY

**RESPONDENT / CROSS-APPELLANT FALK'S
REPLY**

LAW OFFICE OF NATHAN JAMES NEIMAN

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A. REPLY ARGUMENT

Interestingly, the Ephrems do not dispute their deceitfulness when they failed to record the Real Estate Contract to avoid execution by creditors. The Ephrems do not dispute that they lied about having a Lease Purchase Option. The Ephrems make no excuses for their scheme to induce Respondent/Cross Appellant Falk's forbearance from collection by assigning their interest in the real estate.

Rather, the Ephrems stand before this Court seeking to take advantage of their misdeeds, claiming equity as a basis.

I. The Ephrems Concede That The Trial Court Erred In Concluding As A Matter Of Law That The Contract Was Not Assignable

Falk in his opening brief starting at page 13, provided a complete detailed analysis of the contract language regarding assignability and the law favoring the free alienation of property. The Ephrems have not countered Falk's arguments; thereby conceding that the contract was/is assignable and conceding that the Trial Court's conclusion of law was erroneous.

II. The Ephrems Argue Form Over Substance While The Characterization As Either A Real Estate Contract Or A Lease Purchase Option Was Irrelevant To The Trial Court

In the Ephrems' response, they continue to argue form over

substance. A lease purchase option allows the tenant to makes payments while in possession and establishes an agreed upon amount for purchasing that property. A real estate contract establishes the method for payment of an agreed upon amount for purchasing that property. In substance, both provide the method for purchasing a specific property. The Ephrems ignore the substance of the transaction, and instead hide behind how transactional document is titled.

This is no safe harbor for the Ephrems, in fact, the characterization of the document, as either a Real Estate Contract or a Lease Purchase Option, was irrelevant to the Trial Court. The Trial Court did not deny the Falk's motion for judicial assignment based on the characterization of the Ephrems' interest as a Real Estate Contract instead of a Lease Purchase Option. Rather, the Trial Court erroneously ruled that Ephrems' interest was not assignable as a matter of law. CP 359-362. Specifically, the Trial Court found as a matter of law:

The contract clearly or the document, whether you want to call it a real estate contract or a lease option, clearly indicates that there was no ability to assign . . . [Defendants] have satisfied the obligation in that Tina does not have the ability or right to assign.¹

But we clearly know now after the fact that - - I don't see how we can legitimately say that he [Falk] is entitled to the property when now some additional information has been

¹ RP November 3, 2006 page 52.

brought to the attention of all counsel of record clearly showing the she, being Tina [Ephrem], did not have the authority or the right to assign.²

Presumably, if in the mind of the Trial Court the Ephrems' interest was assignable, then Falk's motion should have been granted. It is the erroneous conclusion of law that the interest was not assignable that is being appealed. The Ephrems have not disputed the Trial Court's conclusion of law was erroneous.

III. Relief Granted May Exceed Relief Requested Where Ephrems Were Provided Notice

Tina Ephrem's arguments regarding the relief granted in this matter are based on a deliberate disregard of the facts of this case. Tina ignores her admissions of record and the abundant notice provided prior to entry of judgment. Specifically, Falk gave the Ephrems full notice and provided an undeserved opportunity to be heard at a hearing prior to the entry of the Findings of Fact, Conclusions of Law and Judgment. In fact, the Ephrems were served, both personally and by Express mail, with the proposed Findings, Conclusions and Judgment.³ Despite this formal notice and opportunity to appear and be heard, no one appeared for the Ephrems at the time the Findings, Conclusions and Judgment were presented for entry. While Falk disagrees with Ephrems' argument that

² RP November 3, 2006 page 26.

³ CP 63-66

the judgment is in excess of the relief sought in the complaint or the relief supported by the Ephrems' own admissions of fact, the point is this: the Ephrems' argument is moot under Fonseca v. Hobbs, 7 Wn.App. 235, 498 P.2d 894 (1972).

In Fonseca, the plaintiffs obtained an order adjudging defendants to be in default. Plaintiffs served on defendants' attorneys a copy of proposed findings of fact, conclusions of law and judgment together with written notice of the hearing regarding the entry thereof. At the time and date of the scheduled hearing, no one appeared for the defendants. Plaintiffs presented their evidence and the court granted their request. The court held that since the defendants had been given notice and copies of the proposed findings, conclusions, and judgment well in advance of the hearing date, and since they did not appear at the hearing to raise any objections they may have had:

“[u]nder these circumstances, if it be assumed that the judgment entered is substantially in excess of or different from that sought in the complaint, the judgment is nevertheless a valid one.”

Fonseca at 240.

Like the defendants in Fonseca, the Ephrems have been accorded due process throughout the entry of judgment procedure. The Ephrems have ignored each notice and willfully waived every opportunity to object.

This Court should follow **Fonseca** and rule that the judgment, whether or not in excess of the relief sought in the complaint, is valid as presented.

IV. The Ephrems Continue To Ignore The Admissions Of Record They Have Made.

The Ephrems once again ignore their admissions of record and the fact that Tina Ephrem is precluded from challenging the admissions of Tim Ephrem based on the law of partnership. Those admissions, which are verities in this case, conclusively establish Tim Ephrem's pledge of the partnership property as consideration for a forbearance from collection. Tim Ephrem has chosen not to appeal those admissions. Under partnership law, each partner acts as an agent for the partnership. A partner's acts bind the partnership and the other partners. See RCW 25.04.090 and **Barnes v. McLendon**, 128 Wn.2d 563, 910 P.2d 469 (1996).

In addition, a contract does not need to be signed by all partners or even mention the name of the partnership in order to bind the partners. **Id.**, at 573. Admissions or representations made by any partner regarding partnership affairs within the scope of his or her authority are "evidence against the partnership." See RCW 25.04.110 and **Id.**, at 574.

V. The Ephrems Continue To Misrepresent The Relief Requested In This Case.

The assignment of the interest in the real estate WAS NOT in satisfaction of a debt. The admissions on record conclusively establish that the assignment of the interest in real estate was the consideration for the forbearance. All of the following admissions by the Ephrems' own averities that the pledge was independent of the debt:

- **REQUEST FOR ADMISSION NO. 7:** Admit that at the time you requested the forbearance of Cary Falk, you represented that the option had significant value in order to support your request for a forbearance.
- **REQUEST FOR ADMISSION NO. 15:** Admit that the option was to provide additional consideration to support the agreement to forbear.
- **REQUEST FOR ADMISSION NO. 16:** Admit that your agreement to assign the option to purchase the residence was not intended to satisfy the underlying obligation on the loan, but rather to obtain the forbearance.⁴

Although the Ephrems try, they cannot ignore their own admissions that the assignment of the interest in real estate was independent from the obligation on the loan.

Moreover, the value of the interest pledged by the Ephrems is immaterial. While the Ephrems certainly did not pledge \$800,000.00,⁵ Courts will not inquire as to the adequacy of consideration. See **Browning**

⁴ CP 50, 52 and 69-70

⁵ Upon information and belief, the Ephrems still owe a substantial amount of money under their agreement with the Brinkmans.

v. Johnson, 70 Wash.2d 145, 147, 422 P.2d 314 (1967). (holding that Courts will not compare the value of the promises and acts exchanged).

VI. Attorney Fees And Costs

In accordance with RAP 18.1, Falk respectfully requests that this court award him attorney fees and costs that he has incurred in this consolidated appeal. In Washington, an award of reasonable attorney's fees is mandatory where the contract between the parties includes an attorney's fees clause. Specifically, RCW 4.84.330 requires that fees be paid to the prevailing party and the "language of the statute is mandatory with no discretion except as to the amount." Kofmehl v. Steelman, 80 Wn.App. 279, 908 P.2d 391 (1996).

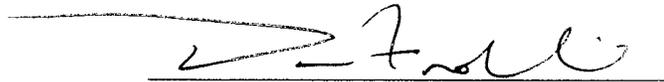
B. CONCLUSION

For all of these reasons, Respondent/Cross Appellant Falk respectfully requests an Order (1) vacating the decision of the Pierce County Superior Court dated November 3, 2006 entitled *Order Confirming that the Judgments Have Been Fully Satisfied* (CP 363-364), (2) granting of Respondent/Cross Appellant Falk's Motion for Order assigning the Defendants' interest in the property to Respondent/Cross Appellant Falk (CP 352-358), (3) holding, as a matter of law, the contract (CP 416-422) can be assigned and/or judicial assigned, (4) an award of

attorney fees and costs to Falk; alternatively (5) remanding this matter to the Trial Court for the entry of orders consistent with these rulings.

RESPECTFULLY SUBMITTED this 18th day of June, 2007.

LAW OFFICE OF NATHAN JAMES NEIMAN

A handwritten signature in black ink, appearing to read "Nathan J. Neiman", is written over a horizontal line.

Nathan J. Neiman, WSBA #8165

Daniel J. Frohlich, WSBA #31437

Attorneys for Respondent/ Cross Appellant Falk

CERTIFICATE OF SERVICE

I, Daniel J. Frohlich, declare under penalty of perjury under the law of the state of Washington that on this date I have served or will serve a copy of this document upon the following parties as indicated:

George Scott Kelley 535 Dock Street, Suite 100 Tacoma, WA 98402-4629 Attorney for Defendant Tim Ephrem	Delivered Via: <input type="checkbox"/> First Class Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger/Same Day Service <input type="checkbox"/> Hand Delivered
Gary Johnson Mann Johnson Wooster & McLaughlin 820 A Street, Suite 550 Tacoma, WA 98402-5220 Attorney for Defendant Tina Ephrem	Delivered Via: <input type="checkbox"/> First Class Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger/Same Day Service <input type="checkbox"/> Hand Delivered

DATED this 18th day of June 2007, at Bellevue, Washington.



Daniel J. Frohlich

STATE OF WASHINGTON
BY: [Signature]
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DIVISION II