

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 37755-1-II

Jefferson County Cause No. 06 2 00332 1

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

KELLY J. CARROLL, a/k/a, KELLY OLDFORD

Appellant

v.

JAMES JOHNSON

Respondent

Appellant's Reply Brief

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ORIGINAL

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Appellant, Kelly Oldford, by an through her attorney of record, Knauss & Seaman PLLC, does hereby submit the following reply brief to issues raised in Scott Johnsons's responsive brief.

A. Scott Johnson did not rely on the information in the Bankruptcy petition, judicial estoppel does not apply, therefore this information is irrelevant.

At the outset of his argument, Johnson attempts to present an issue to this court that is irrelevant; the fact that the Oldfords listed the lots together as part of a homestead in the bankruptcy petition. During trial Kelly Olford objected to the introduction of evidence, Plaintiff's Exhibit 3, which was the Chapter 7 Bankruptcy Schedules of Kelly and Gary Oldford, signed February 20, 2003. Kelly Olford objected that the bankruptcy schedules were not relevant to the specific performance claim or the damages claim because Scott Johnson did not rely on the Bankruptcy schedules during the negotiations for the home, Lot 2, or for Lot 1. Per Scott Johnson's testimony:

Q. And you said you heard about the bankruptcy, but you didn't actually see any of the paperwork or anything like that at the time?

A. Not at that time, no.

(RP I-149).

Scott Johnson took the position in trial that Kelly Oldford's declaration in the Bankruptcy Schedules hamstrings her into a position proving that that the home, Lot 2, and Lot 1 were a package deal. Kelly Oldford objected (RP II-34).

The court overruled Kelly Oldford's objection on the basis of judicial estoppel. Judicial estoppel is generally applied to debtors who failed to list a potential legal claim among their assets during bankruptcy proceedings and then later pursued the claims after the bankruptcy discharge. See generally; *McFarling v. Evaneski*, 141 Wn. App. 400 (2007); *Skinner v. Holgate*, 141 Wn. App. 840; 173 P.3d 300 (2007); *Ingram v. Thompson*, 141 Wn. App. 287 (2007) (While the doctrine of judicial estoppel serves the important purpose of preventing manipulative parties from prevailing twice on opposite theories in certain circumstances, it may not be used to hamstring a litigant from advancing a particular position when this position is not clearly inconsistent with a prior position.) *Id.* at 293.

The trial court made no specific finding regarding the bankruptcy schedules and Scott Johnson's reliance upon them. Therefore no error was assigned in the Appellant's Brief. Nonetheless, Kelly Oldford rebuts Johnson's contention about the bankruptcy schedules because he claims:

- (a) The Oldfords then believed the total property (including both lots) to be worth only \$110,000.00;
- (b) Lot 1 by itself was declared to be worth only \$8,000.00;
- and
- (c) Lot 1 was intended to be used as the septic system for the house on Lot 2.

(Respondent's Brief page 6). The Oldfords' subjective belief of value of Lots 1 and 2 contradicts the appraisal introduced by Johnson; \$170,000.00 (CP -4) (Ex. 10). This issue was raised to the trial court (RP II-36). Exhibit 10 also contradicts the various purchase prices set forth in the admitted documents, (Ex. 6, 7, 8, 9, & 12). Further, Johnson did not rely upon the bankruptcy schedules in negotiations (RP I-149), therefore they are completely irrelevant to whether or not the parties had a "meeting of the minds" to "clear and unequivocal" terms for the purchase and sale of Lot 1. The bankruptcy schedules are parol evidence that contradicts the written documents related to the transactions herein (Ex. 6, 7, 8, 9 & 12).

B. Scott Johnson fails to rebut authority regarding the legal requirement for certainty in land contracts.

Scott Johnson does not cite any cases that would permit this court to find an exception to the general rule that there must be certainty in land contracts. See generally *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653 (1999); *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994); *Kruse v. Hemp*, 121 Wn.2d 715, 722; 853 P.2d 1373 (1993); *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

Scott Johnson cites to *Coherent Holdings, LLC v. Montalvo*, 131 Wash.App 1057 (2006) (unpublished). This case does not support his position, where this Court upheld the trial court's order *denying* specific performance.

Scott Johnson cites to *Ben Holt Indus. v. Milne*, 36 Wn. App. 468, 675 P.2d 1256 (1984) (The necessary proof to invoke the doctrine of part performance requires, first, that the lease agreement be proven by **clear and unequivocal evidence**.) This case supports Kelly Oldford's position that there must be certainty in land contracts.

Scott Johnson cites to *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971) (first requirement of the doctrine that part performance of an oral contract exempts it from the provisions of the statute of frauds is that the contract **be proven by evidence**

that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract. A mere preponderance of the evidence is not sufficient), and *Stevenson v. Parker*, 25 Wn. App. 639, 608 P.2d 1263 (1980). These cases do not contradict the general rule requiring certainty in land contracts, and in fact only reinforce Kelly Oldford's position.

Scott Johnson cites *Cascade Auto Glass v. Progressive Ins.*, 135 Wn. App. 760, 145 P.3d 1253 (2006). This case is not on point, and does not contradict the controlling law contended by Kelly Oldford, requiring certainty in land contracts.

Scott Johnson cites *Knight v. Seattle First Nat'l Bank*, 22 Wn. App. 493, 496, 589 P.2d 1279 (1979); *Vehicle/Vessel LLC v. Whitman Cty.*, 122 Wn. App. 770, 95 P.3d 394 (2004) (both discussed in further detail below); and *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003). These cases do not contradict the law requiring certainty in land contracts.

The cases cited by Scott Johnson do not establish an exception to the general rule that he must first prove all terms of the contract by clear and unequivocal evidence, leaving no doubt to the terms, character, and existence of the contract. Scott Johnson attempts to circumvent this ruled by claiming its an executory

contract, an option contract, or a unilateral contract. However, he must still prove the contracts existence.

The May 11, 2004 letter is not an executory contract. If a contract includes an agreement to enter into a future contract, the contract must specify all the material and essential terms of the future contract. *Kruse v. Hemp*, 121 Wn.2d 715, 722; 853 P.2d 1373 (1993).

The May 11, 2004 letter is not an option contract. Scott Johnson was not induced to purchase the home on the promise that he could purchase the lot for septic purposes.

The trial court concluded that the May 11, 2004 contract was a unilateral contract. If it is a unilateral contract, Scott Johnson must present evidence of its terms that adequately describe what is being conveyed. If Scott Johnson overcomes this first hurdle, he then must prove that he performed those terms. If there is any doubt, specific performance cannot be granted. Upon review of the record, the Court should have doubt that a contract was formed between the parties. It was an error for the trial court to find an enforceable contract based upon the May 11, 2004 letter (Ex. 9).

C. Scott Johnson now contends the lots are inextricably intertwined; a position abandoned at trial.

Despite extensive citation to the record (RP I-151; I-163; II-15-16; III-106) regarding the testimony in court, Scott Johnson still claims that lots are “inextricably bound together because one was intended to be a septic drainfield for the other.” (Respondent’s Brief, page 14). Scott Johnson emphasizes the fact that Kelly Oldford signed the May 11, 2004 letter (Ex. 9) on the same day that she accepted Scott Johnson’s offer for the purchase of the home, Lot 2. This emphasis is without merit because it does not establish Lots 1 and 2 as being part of a package deal. It certainly does not establish the terms of the contract by clear and unequivocal evidence, leaving no doubt to the terms, character, and existence of the contract for Lot 1. As stated above, Scott Johnson relies on evidence of the bankruptcy to establish the “package deal” purportedly binding the lots together; however Scott Johnson did not rely upon this information in his negotiations.

The trial court had to resort to Scott Johnson’s subjective belief in order to fill in details needed to establish a contract, and the court was in error ordering specific performance. A review of the documents clearly demonstrates Kelly Oldford’s position. Scott

Johnson signed the offer for the purchase of the home, Lot 2, on April 30, 2004 (Ex. 7), BEFORE Kelly Oldford wrote the May 11, 2004 letter. There is no reference to Lot 1 in the purchase contract for the home, Lot 2 (Ex. 7). Pursuant to Paragraph 28 "Additional Terms and Conditions" states under section (b) "There are no agreements, promises, or understandings between the parties except as specifically set forth in this contract. No alterations or changes shall be made to this contract unless the same is in writing and signed or initialed by the parties hereto." Under section (e) Other (followed by a space to write in additional terms) the contract is blank. There are no other terms or conditions that were negotiated; there is no mention of a purported option contract or of an executory contract for the purchase of Lot 1. Looking at the four corners of the first contract (Ex 7), the presumption is that no package deal was negotiated for both Lots 1 and 2. Exhibit 7 does not establish that the lots were inextricably intertwined. The only evidence the trial court could rely upon was Scott Johnson's testimony.

Does any of the documentation at trial (Ex. 6, 7, 8, 9, & 12) indicate Lot 1 was "inextricably intertwined" with Lot 2? The second purchase agreement (Ex. 8) was not signed by Scott Johnson, it did

not specify the property to be sold, and there was no legal description written on it. Kelly Oldford never signed Exhibit 8 nor did she ever return it. Exhibit 8 does not establish that the lots were inextricably intertwined.

Scott Johnson claims that the letter by Melissa Douke (Ex 6) is evidence of the “package deal” because it was sent with Exhibit 7 and Exhibit 8. Exhibit 6 contained no legal description, and did not clearly reference Lot 1. Exhibit 6 does not establish that Lot 1 and 2 are inextricably intertwined.

Kelly Oldford’s May 11, 2004 letter (Ex. 9) did not have a legal description or address for Lot 1. Scott Johnson’s letter in September 2004 (Ex. 12) did not have a legal description or address for Lot 1. Neither of these exhibits establishes that Lot 1 and Lot 2 are inextricably intertwined.

The trial court had to resort to the oral testimony to find the terms of the agreement, including the identity of the property (missing here), the price (value of the car?), the time for closing (vague), and the identity of the parties (vague). In essence, the trial court relied upon parol evidence in the way of oral testimony to find that Lot 1 was part of a “package deal,” that was “inextricably intertwined” with Lot 2 in order to conclude that the May 11, 2004

letter was a *bargained for* unilateral contract (CP 11, Conclusions 5 and 6) that warranted an order of specific performance. Yet the oral testimony by Scott Johnson basically *denies that he believed he needed Lot 1 for septic purpose during the time the negotiations occurred.* (RP I-151; I-163; II-15-16; III-106).

The testimony of Gary Oldford and Kelly Oldford denies that Lot 1 was part of an agreed “package deal.” The oral testimony does not establish a meeting of the minds that Lot 1 and Lot 2 were “inextricably intertwined.” The admitted documents do not establish this claim. (Ex. 6, 7, 8, 9, 12).

Scott Johnson, relying on the part performance doctrine, must prove by *clear and unequivocal* evidence the *existence and all the terms of the contract* and that proof is in addition to establishing that there has been part performance. *Berg v. Ting*, 125 Wn.2d 544, 562, 886 P.2d 564 (1995).

Scott Johnson’s testimony abandoning the claim at trial that he knew he needed Lot 1 for septic purposes and then his attempt to resurrect his claim on appeal is akin to an invited error. The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. *Humbert v. Walla Walla County*, 145 Wn. App. 185 (2008). The Court should preclude any

argument that Lots 1 and 2 were inextricably intertwined when the documents and the testimony clearly contradict such claim.

D. Scott Johnson's performance cannot establish both the terms of a unilateral contract and his acceptance of those terms.

Commencing at page 26 of his Responsive Brief, Scott Johnson responds to Kelly Oldford's assignment of error that the court should not have applied part performance to remove the contract from the statute of frauds, by contending that Scott Johnson, had fully – not partially--, performed the unilateral contract. Scott Johnson further claims that the evidence showed that the terms of the parties' agreement were sufficiently clear. (Respondent's Brief, page 27). Scott Johnson basically contends that his "act" can establish the essential terms of the contract *and* the fact that he performed the terms. This argument is circular and misapplies the law.

In arguing that he could establish the fact that he had an enforceable contract by proving unequivocally the "bargained for" terms of the May 11, 2004 letter, Scott Johnson had to rely on his testimony that he "performed" the acts required of him in a "unilateral contract." This is because the documents submitted did

not show clear and unequivocal evidence of a clear purchase contract for Lot 1. The trial court erred by accepting this argument.

Scott Johnson contends that one of the required acts in Kelly's letter, when you "sell your property in Paradise Bay" was not an act that he was obliged to perform. (Respondent's Brief, page 23). Without this act, he fails in proving a purported term of the May 11, 2004 letter (Ex.9) (i.e. a time for closing) and therefore cannot show an act constituting acceptance of a professed unilateral contract. Further, he never sold his property in Paradise Bay.

Scott Johnson then wrongfully claims the only act that he had to perform was to close on the home, Lot 2. Scott Johnson goes on to contend that the act of closing thereby establishes the clear and unequivocal terms of the "bargained for" contract, the May 11, 2004 letter, (Ex. 9). He argues this one act established his unequivocal acceptance of Kelly Oldford's counteroffer and therefore additionally asserts that the same act institutes the "clear and unequivocal" terms for the conveyance of Lot 1. This is incorrect.

His "performance" or "act" of closing Lot 2 in August 2004 in response to Kelly Oldford's May 11, 2004 letter is illusory. An

illusory promise is neither enforceable nor sufficient consideration to support enforcement of a return promise. *Interchange Assocs. v. Interchange, Inc.*, 16 Wn. App. 359 (1976). Scott Johnson wrongfully contends that he acted on the promise that he close on the home, Lot 2, upon Kelly Oldford's promise that she would sell him "the lot" in her May 11, 2004 letter. This conclusion is illogical and contrary to law, when the evidence clearly showed that Scott Johnson agreed to purchase the home, Lot 2, for \$120,000.00 by signing the purchase agreement (Ex. 7) on April 30, 2004, **with no mention of Lot 1**. There was no evidence contradicting the fact that he was contractually obligated to close the deal on the home, Lot 2, upon both Gary Oldford and Kelly Oldford's acceptance of the purchase agreement, which occurred prior to the authoring of the May 11, 2004 letter (Ex. 9).

Scott Johnson denies discussing with Kelly Oldford any element of the transaction prior to his closing on the home, Lot 2, in August 2004. He further denied at trial knowing that he needed Lot 1 for septic purposes at the time the transaction for the home was negotiated. (RP I-151; I-163; II-15-16; III-106).

Clearly, the "act" to be performed in the May 11, 2004 letter (Ex. 9) was vague (*When you guys purchase the home and sell*

youre [sic] property in Paradise Bay you can buy the lot) and the trial court had to find some act by Scott Johnson to fill in very essential and unmistakably missing details regarding the terms, character, and existence of a contract for Lot 1. However, no “act” existed that established the location of the lot, the price of the lot, a time for closing, or the parties. The only evidence was oral testimony regarding Scott Johnson’s subjective belief as to the terms of the contract.

Unfortunately, the trial court then made a leap that was neither supported by fact nor law. The trial court concluded Scott Johnson “took delivery and possession” by the “act” of tendering payment and paying some of the overdue taxes and maintenance fees. (CP 11, Conclusion No 7). The court wrongfully concluded that these acts filled in missing but very essential terms to the May 11, 2004 letter (Ex. 9), the basis for granting specific performance.

Scott Johnson confirmed in testimony that he paid the 2004 taxes in approximately 2007 and a portion of the maintenance fees in approximately January 2007 (Ex. 18) (RP I-53 to I-58), acts he performed **after** Kelly Oldford returned in May of 2006 and refused to sell him Lot 1. The trial court’s conclusion that the “act” constituting possession after Kelly refused to sell Lot 1 does not

establish the terms of the contract. See *Vehicle/Vessel LLC*, 122 Wn.App at 777. (Until the offeree accepts by performance, the offer of a unilateral contract may be revoked by the offeror without adverse legal consequences.) See *Ben Holt Industries*, 36 Wn.App at 474. (More than possession alone is required to establish an estoppel or part performance).

The trial court relied upon Scott Johnson's "performance" to ascertain the terms of the vague May 11, 2004 letter, and thereby legally remove the requirement of the Statute of Frauds. But the evidence could not be clearer; no agreement had been reached in writing clearly setting forth what Scott Johnson was "unilaterally" required to perform thereby "accepting" a contract that legally bound Kelly Oldford. No evidence shows that Scott Johnson bargained for these terms. In fact, Scott Johnson denied ever contacting Kelly Oldford after she sent the May 11, 2004 letter (Ex. 9), which is precisely what she requested; "Call me so I know what you decide." His failure to respond is not an acceptance and therefore there was no meeting of the minds.

Upholding the trial court's decision renders a new and dangerous conclusion that has never been adopted by the courts. Any writing made during negotiations which is then unilaterally

“acted” upon by the other party can become the basis for an enforceable contract. Any preliminary letter that is an offer to enter into negotiations would be enforceable against the author by a party’s mere reading it and then unilaterally acting upon it. This would reject the requirements set forth in *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952).

Scott Johnson’s subjective interpretation of Kelly’s very vague letter incorrectly became the basis for the trial court to determine the “terms” of a contract to convey land. It was a misapplication of the law to find that Scott Johnson’s actions after May 11, 2004 established both the essential terms of the contract and the fact that he performed the terms, when the law clearly requires proof by *clear and unequivocal* evidence of the *existence* of the contract and *all the terms* of the contract in addition to establishing that there has been part performance of those terms.

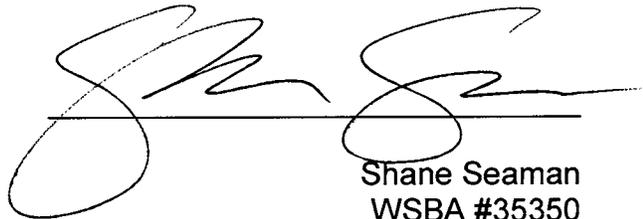
Conclusion

An executory contract, an option contract, and a unilateral contract for the conveyance of land require certain essential elements that are painfully missing from this case. All of these contractual theories advanced by Scott Johnson do not override the

well established rule requiring certainty in contracts and the court to find a meeting of the minds. The trial court erroneously concluded that the May 11, 2004 letter constituted a unilateral contract. However the admitted documents and the testimony very clearly refute any claim that the lots were “inextricably intertwined.”

This Court should not adopt a rule that permits a party to unilaterally act upon a letter written during negotiations and then come to court and claim that letter constitutes an enforceable contract. Especially when the letter states, “call me so I know what you decide” and Scott Johnson claims he never contacted Kelly Oldford.

Respectfully submitted this 14 day of January, 2009.

A handwritten signature in black ink, appearing to read 'Shane Seaman', written over a horizontal line.

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COURT OF APPEALS
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 STATE OF WASHINGTON
 BY _____

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

JAMES SCOTT JOHNSON,
 Respondent
 vs.
 KELLY J. CARROLL (a/k/a Kelly J.
 Oldford),
 Appellant.

No.: 377551-11
 Superior Court Cause No.
 06-2-00332-1
 DECLARATION OF SERVICE

On the dated stated below, I caused a copy of the following documents to be served on the parties listed below by the method(s) indicated:

1. Appellant's Reply Brief; and
2. Declaration of Service

Party/Counsel	Additional Information	Method of Service
Clerk of the Court Court of Appeals 950 Broadway, Suite 300 MS TB-06 Tacoma WA 98402-4454	Clerk of the Court Phone Number:253/593-2970	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> USPS/ overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail
Paul Bryan Beebe & Roberts, PLLC PO Box 163 Kingston WA 98346	Attorney for Gary Oldford	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> USPS/ overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail
Malcolm Harris Harris, Mericle & Wakayama, PLLC 999 Third Ave. Suite 3210 Seattle, WA 98104	Attorney for Respondent	<input checked="" type="checkbox"/> First-class U.S. mail <input type="checkbox"/> Facsimile <input type="checkbox"/> USPS/ overnight delivery <input type="checkbox"/> Personal delivery <input type="checkbox"/> E- mail

Certificate of Service

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

Signed at Port Hadlock, Washington this 14th day of January, 2009.



Kate Gamble
Paralegal to Knauss & Seaman PLLC