

COURT OF APPEALS
DIVISION II

No. 37921-0-II

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STATE OF WASHINGTON
BY SW

DEPUTY

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

WALTER JAMES GOLDSMITH
Appellant

v.

CRYSTAL HAUNG SOON KWAK-GOLDSMITH.,
Respondent

REPLY BRIEF OF APPELLANT

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ARGUMENT

A. No Contact Provision Was Material

Appellant, in his brief, sets forth the background for the “no unilateral contact” provisions in the CR2A Agreement as well as the letter to the appraiser.

Appellant, in his brief, claims that said “no unilateral contact” provisions were material to him in entering into the CR2A Agreement.

Respondent fails to produce any evidence that refutes Appellant’s position that said provisions were material to him in entering into the agreement.

B. Evidence Supports Breach

It is undisputed that the Respondent had unilateral contact with the appraiser. The appraiser’s report, Exhibit 2, Page 39, as well as the trial testimony confirmed that the Respondent and the appraiser, Mr. Westman, had unilateral contact. (RP V. 1-55). It is further undisputed that at the time of the filling station appraisal that the Respondent contacted her attorney while the appraiser was present to determine whether or not the appraisal should be put on hold pending the Department of Ecology inspection. (RP V. 1-62).

WPI 302.01 defines breach of contract by stating: “The failure to perform fully a contractual duty when it is due is a breach of contract.”

The Restatement (2d) of Contracts, paragraph 235(2), at 211 (1981) defines breach of contract by stating:

A party's failure to perform fully a contractual duty when it is due constitutes a breach of contract.

C. Breach is Material

It is obvious that the parties wanted the filling station appraised in order to value same for their divorce proceeding.

In Jacks v. Blazer, 39 Wn.2d 277 at 285-6 the Court stated:

The materiality of the breach is the important question. 2 Williston, Sales (Rev. Ed.) 770, P 467b. This is dependent upon the circumstances of each particular case.

WPI 302.03 defines material breach as:

A "material breach" is a breach that is serious enough to justify the other party in abandoning the contract. A "material breach" is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.

A material breach of contract is often defined as one that substantially defeats the purpose of the contract. 17 Am. Jur.2d Contracts (504).

In this case it is undisputed that respondent Crystal Goldsmith had unilateral contact with the property appraiser in violation of the CR2A agreement.

In Bailie Comm., LTD v. Trend Business Systems, 53 Wn. App. 77 (1988) the court set forth at page 83 the five factors to be considered to determine whether or not a breach of contract is material.

Those five factors are:

1. The extent to which the injured party was deprived of its expected benefit;
2. The extent to which the injured party can be adequately compensated for the lost benefit;
3. The extent to which the breaching party will suffer forfeiture;
4. The likelihood that the breaching party will cure her failure;
and
5. The extent to which the breaching party comported with standards of good faith and fair dealing in carrying out her duties.

Factor #1 Deprivation of Expected Benefit

Walter Goldsmith expected that there would be no contact between his wife and the appraiser. That expectation was motivated solely by Walter Goldsmith's concern that his wife would do whatever she could to undermine or influence the appraisal. The unrefuted contact that occurred deprived Walter Goldsmith of this component of the agreement.

Factor #2: The Extent to Which the Injured Party Can be
Compensated

The injured party can be compensated only in one of two ways.

The first way is if the court was to be able to determine the extent of Walter Goldsmith's damages resulting from the unilateral contact between his then wife and the appraiser. In this case the court could have considered the valuation established by appraiser Greer that the property was worth in excess of \$1,000,000 together with the two independent offers to purchase made during the period of the CR2A appraisal, one being in the amount of \$1,100,000 and the other being in the amount of \$1,000,000. Had the court used any one of these values the injured party would have been adequately compensated.

The other means of compensation is for the court not to consider the CR2A appraisal and to order a new appraisal at the respondent's expense.

Factor #3: Extent Breaching Party Will Suffer Forfeiture

The breaching party will not suffer forfeiture even if the CR2A appraisal is excluded. There was other testimony presented

as to value or the court could have directed a new appraisal, neither of which would have resulted in forfeiture to the respondent.

Factor #4: Likelihood Breaching Party Will Cure Her Failure

The condition has been breached. There is no cure other than for exclusion of the appraisal or requiring new appraisal.

Factor #5: Extent Breaching Party Comported With Good Faith and Fair Dealing

The trial testimony is clear that the breaching party was well aware of the provision of no unilateral contact with the appraiser when she had unilateral contact with the appraiser. In fact, it is clear that the appraiser was informed by the breaching party of the no unilateral contact provision at the time the unilateral contact occurred. This contact does not comport with good faith and fair dealing in carrying out the respondent's duties under the contract.

In every contract there is an implied duty of good faith and fair dealing. In fact, WPI 302.11 provides as follows:

A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change of the terms of his contract.

Not only are the provisions of fair dealing implicit in contracts there is also a fiduciary obligation between the parties hereto to be involved in fair dealing with each other.

In Williams v. Queen Fisheries, 2Wn. App. 691 the court stated at 694:

A willful violation of the duty of loyalty may constitute a material breach of contract, even though the harm likely to arise from such breach is very small.
Restatement (2nd) of Agency paragraph 409 (1958).

The Goldsmith trial court judge, Judge Pro Tem John Purbaugh, held that the unilateral contact by Ms. Goldsmith with the appraiser was not a material breach since it did not affect the methodology of the appraisal or the outcome of the designated appraisal. However, there is no evidence supporting this finding and, to the contrary, there is substantial evidence that the breach was material. That evidence includes: (1) the petitioner's appraiser's (Edward Greer) appraisal finding that the property was worth in excess of \$1,000,000 (RP Vol. 1-99) compared to the finding of the CR2A appraiser Westman in the amount of \$780,000 (Exhibit 2); (2) that unilateral contact in violation of the CR2A agreement occurred between Ms. Goldsmith and the appraiser; (3) the delay by appraiser Westman in issuing the CR2A appraisal until such time as the Department of Ecology test results had been received (RP Vol. 1-

62); (4) the two independent offers to purchase the property during the course of the CR2A appraisal, one being in the amount of \$1,100,000 and the other being in the amount of \$1,000,000 (CP 198-235).

The purpose of the CR2A agreement was to determine the fair market value of the property to assist the parties in dividing the community assets. Regardless of the methodologies used the end result that the parties wanted was to determine what their property was worth if they had to sell it to split up their marital assets. Fair market value is simply what a willing buyer and a willing seller would come to an agreement to as the property's fair value. In this case, we know the following information with regard to the property's valuation:

Westman's appraisal evaluation (2004)	\$1,160,000
Purchase price paid by Goldsmiths (2004)	\$1,260,000
Offers to purchase received during	(1) 1,100,000
2007 Westman appraisal	(2) 1,000,000
Westman's 2007 appraisal	\$780,000

CONCLUSION

There is no doubt that there was a breach of the CR2A agreement by the respondent.

It is impossible to know what was communicated between the CR2A appraiser and Mr. Goldsmith. However, we do know that the no

unilateral contact provision of the CR2A agreement was the only part of said agreement, other than the payment provisions, that addressed the parties' relationship to the appraiser during the appraisal. It was included due to the husband's unrefuted concerns that his wife would manipulate or otherwise influence the CR2A appraisal results.

Whether or not the breach is material is based upon the factors and law set forth in appellant's brief and reply. Although we are not certain exactly what was discussed between the parties we do know that discussions occurred, that a telephone call was made to respondent's attorney while the appraiser was present with the respondent, and that it was agreed upon by the respondent, her counsel, and the appraiser that the CR2A appraisal results would be withheld pending resolution of the Department of Ecology inspection. We also know that, using same the same appraisal methodology that Mr. Westman used in 2004, the appraisal value from 2004 to 2007 dropped by approximately 50% (from \$1,160,000 to \$780,000) ostensibly due to a Safeway gas station located in the area. Notwithstanding the Safeway gas station we know that there were two bona fide offers to purchase the property during the time of Mr. Westman's 2007 CR2A appraisal, one for \$1,000,000 and one for \$1,100,000.

Appellant believes that there is not substantial evidence supporting the court's findings in this matter that a material breach has not occurred and, in fact, appellant believes that there is substantial evidence supporting that the unilateral contact constituted a substantial breach of the contract and that appellant's expert testimony as well as the two offers made on the property, should have been taken into consideration by the court in establishing the value of the property.

ATTORNEY'S FEES

Appellant reiterates his request for attorney's fees as set forth in his brief.

SEP 18 2009

Respectfully submitted on: _____



Robert Helland, WSBA #9559
Attorney for Appellant

Certificate of Service

UNDER PENALTY OF perjury under the laws of the State of Washington,
I affirm the following to be true:

That on **SEP 18 2009** I transmitted a true and
correct copy of the Brief of Appellant attached hereto, by United States Mail,
ABC Legal Services or by personal delivery to the following:

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BY _____
DEPUTY
COURT OF APPEALS
DIVISION II

SIGNED at Tacoma, Washington on: **SEP 18 2009** _____.

Heath Doyal