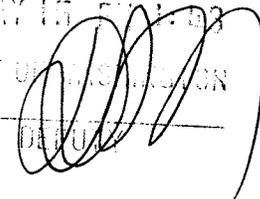


No. 38832-4-II

APPELLANTS
FILED

COURT OF APPEALS
MAY 15 2013

STATE OF WASHINGTON
BY _____



COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

RANDY GOULD and "JANE DOE" GOULD, husband and wife; BRET DRAGER
and "JANE DOE" DRAGER, husband and wife; and GREG JOHNSON and
"JANE DOE" JOHNSON, husband and wife,

Appellants,

v.

LEDAURA LLC, a Washington limited liability company,

Respondent,

APPELLANTS' OPENING BRIEF

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ORIGINAL

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I.

ASSIGNMENT OF ERROR

Appellants Randy Gould, Bret Drager and Greg Johnson (collectively referred to herein as "Gould") assign error to the Trial Court's letter dated December 10, 2008 (CP 398) and the Order on Cross Motions for Summary Judgment entered January 16, 2009 (CP 402-404), copies of which are attached as Appendix A and Appendix B respectively.

II.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court err in determining that the parties' Lease Agreement dated January 24, 2006 (hereinafter referred to as the "Lease"), the parties' Addendum dated January 25, 2006 (hereinafter referred to as the "Addendum"), and the parties' Option to Buy Real Estate dated January 25, 2006 with an attached, fully executed Commercial & Investment Real Estate Purchase & Sale Agreement dated January 25, 2006 (hereinafter collectively referred to as the "Option") all constitute one Agreement, and further that a breach under one of the above referenced documents constitutes a breach under all?

2. Does the Option satisfy the Statute of Frauds where it references Exhibit A and Exhibit A exists, and even if the legal description was not attached, the Purchase and Sale Agreement specifically authorizes the agent to insert or correct the legal description?

III.

STATEMENT OF THE CASE

1. **Procedural History.**

This case relates to the enforcement of an Option Agreement to purchase real property between Respondent Ledaura LLC (hereinafter referred to as "Ledaura") as seller and Gould as buyers. Both parties made motions for summary judgment requesting that the Trial Court grant a declaratory judgment determining whether or not the Option is enforceable. The Trial Court granted Ledaura's motion for summary judgment and declared that the Option was not enforceable. CP 402-404. This appeal followed. CP 405-410.

2. **Statement of Facts.**

Beginning in November 2005, Gould began negotiating with Leah Caruthers, co-trustee of the David W. Smith Revocable Living

Trust¹, relating to certain real estate and commercial building located at 601 St. Helens in Tacoma, Washington (the "Property"). CP 300-301. Between November 2005 to January 25, 2006, the parties prepared and signed several agreements relating to the Property. CP 308-338.

Ultimately, on January 24, 2006, the parties executed what became the final agreements, which were as follows:

- 1) A Lease Agreement dated January 24, 2006 (CP 160-174)²;
- 2) An Option to Buy Real Estate dated January 25, 2006 (CP 186-188)³ with an attached, fully executed Commercial & Investment Real Estate Purchase & Sale Agreement dated January 25, 2006 (CP 176-184)⁴; and
- 3) An Addendum dated January 25, 2006 (CP 190-191)⁵.

During the two months of negotiations, all of the agreements were considered separate and divisible from the other agreements and at no time were terms considered to make each agreement dependent upon the other. CP 304-305. In fact, each agreement

¹ In March 2006 the Living Trust conveyed the property to Ledaura. See Ledaura's Complaint paragraph 2.8. CP 6.

² A fully executed copy of the Lease is at CP 10-23. The above citation is used because it refers to a clearer copy of the document.

³ A fully executed copy of the Option is at CP 28-29. The above citation is used because it refers to a clearer copy of the document.

⁴ A fully executed copy of the Purchase and Sale Agreement is at CP 30-38. The above citation is used because it refers to a clearer copy of the document.

⁵ A fully executed copy of the Addendum is at CP 26-27. The above citation is used because it refers to a clearer copy of the document.

had different terms and each agreement was supported by separate consideration.

For example, the term of the Lease was for three (3) years, expiring in 2009. CP 160. In contrast, the Option provides that “In consideration of \$35,000 paid by [Gould] to [Ledaura], [Ledaura] grants to [Gould], and [Gould’s] successors and assigns, the right to buy the Property on or before the 25th day of January, 2014.” CP 186. Gould’s payment of \$35,000 as separate consideration for the Option, and the parties’ decision to create the Option as an agreement separate from the Lease, was intentional. CP 74, 83. Gould explained that they would not have entered into a lease for the building if they did not also have an option to purchase it due to the significant and expensive improvements they expected to make and subsequently did make, costing more than \$100,000. CP 74, 83, 304-305. The improvements included the demolition and removal of old walls, abatement of asbestos, construction of an office, painting the exterior of the building, repairing glass panels, the water line and the garage doors. CP 74, 83.

In 2007, the parties had a dispute over the interpretation of certain provisions of the Lease. CP 74, 83. As part of the parties’ negotiations to resolve the lease dispute, Ledaura prepared and

proposed an addendum to the Lease Agreement that for the first time sought to tie performance under one of the parties' agreements to enforcement of any of the others. Ledaura's proposed provision stated as follows:

Tenants have the option to purchase the property on the terms set forth in the Commercial & Investment Real Estate Purchase and Sale Agreement **so long as there has been no default at any time in their obligations under the lease, option, or any addenda thereto.**" Emphasis added.

CP 77-81, 86-90.

Gould rejected this proposed addendum for a number of reasons, but the most significant reason was because this provision would change completely the relationship between the agreements that the parties had so painstakingly negotiated, so that a breach under the Lease would jeopardize the enforceability of the Option for which Gould had paid \$35,000.00. CP 74, 83.

When the parties could not resolve their Lease dispute, Ledaura commenced an unlawful detainer action. See Pierce County Cause No. 07-2-10979-5. The Trial Court in that action determined that Gould had breached the Lease Agreement and terminated the Lease. *Id.* Gould thus vacated the building, and the Trial Court's decision regarding the Lease was ultimately affirmed by the Court of Appeals. See Division II Court of Appeals Cause No.

37379-3-II.

Even though the Lease had been terminated, but prior to the resolution of the Appeal, Gould exercised their right to purchase the building pursuant to the Option in order to protect their investment. CP 45. Ledaura refused to honor the Option and filed this action requesting the Court declare the Option terminated and unenforceable. CP 3-46. Gould counterclaimed, requesting that the Court declare the Option to be enforceable and order Ledaura to specifically perform its obligations pursuant to the Option. CP 47-52.

After considering the parties' cross motions for summary judgment, the Trial Court determined as follows:

This is a challenging case, and will likely be resolved by the appellate court. **The language that would have made it an easy case to resolve is missing from the agreements, namely language requiring the lessee to be in compliance with all lease terms in order to exercise the purchase option.** However, I believe that the option and lease are so intertwined to find that the intent of the parties was to require that the lease be in full force and effect in order for the option to be exercised in the future. Emphasis added.

CP 398.

The Trial Court then entered summary judgment in favor of

Ledaura. CP 402-404.

IV.

ARGUMENT

The Trial Court accepted Ledaura's argument that a breach of the Lease rendered the Option unenforceable, despite specifically noting that absolutely no language in either document supported such a determination. CP 398. Ledaura has previously supported its position that breach of a lease terminates the option exclusively on *Rademacher v. Rademacher*, 27 Wn.2d 482, 178 P.2d 973 (1947), *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn.App. 296, 628 P.2d 838 (1981) and *Esmieu v. Hsieh*, 20 Wn.App. 455, 580 P.2d 1105 (1978). None of these cases apply.

In *Rademacher*, the Court stated "it is an established principle of law which needs no citation of authority that before appellants would be entitled to claim or exercise the right to purchase under the option, they must establish that the lease containing the option was in full force and effect at the time they attempted to exercise the option." *Id.* at 499. What Ledaura ignores is the fact that in *Rademacher*, the Court's statement was predicated on the fact that there, the option was contained in the lease and the lease was never fully executed and thus held

unenforceable. *Id.*

Ledaura relied on *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn.App. 296, 628 P.2d 838 (1981) for the proposition that nonpayment of rent, coupled with a declaration of forfeiture, is sufficient to terminate a lease-option agreement. However, the lease in *Kaufman Bros.* contained the specific language Ledaura seeks here, which was as follows:

On the condition that the Lessees shall faithfully perform and observe the terms, agreements, and conditions on their part to be kept and performed, the Lessors give and grant to the Lessees the exclusive option to be exercised by the Lessees at any time during the term of the lease.

Id. at 299.

The present Lease, as acknowledged by the Trial Court, contained no such provision. Therefore, the terms of the option stand alone such that “[t]he time at which the option may be exercised is determined by the language of the option clause”. Stoebuck and Weaver, 17 Washington Practice: Real Estate: Property Law and Transactions, Ch. 6 (2d ed.)

Lastly, Ledaura relied on *Esmieu v. Hsieh*, 20 Wn.App. 455, 580 P.2d 1105 (1978) for the argument that non-payment of rent is sufficient to terminate an option. In *Esmieu*, the landlord and tenant executed a lease that included an option. *Id.* at 457. The landlord

breached the lease by not removing a pre-existing tenant from the property. *Id.* at 458. When the tenant refused to pay rent, the landlord sued to quiet title to the property. *Id.* at 459. The Court concluded that the landlord prevented the tenant “from gaining possession of the land, to which he was entitled under the Agreement, and this breached the implied covenant. [citations omitted] Breach of this covenant not only excuses Hsieh’s performance of his obligations with respect to irrigation water, but it also excuses any further obligation on his part to pay rent.” *Id.* at 460-461. The Court then ordered the landlord to specifically perform. *Id.* at 461-462. Nothing in that case refers to the termination of an option.

Where the parties have entered into both a lease and an option, the enforceability of the option after the termination of the lease depends on whether or not the lease and option covenants are entire and indivisible, and so interdependent, the lease is then essential to enforcement of the option.⁶ If the covenants are divisible and thus independent, and separate consideration is paid, the option is enforceable even if the lease has been terminated.

⁶ An extensive discussion regarding the enforcement of an option if the lease is terminated can be found at 10 ALR 2d 884. Pertinent portions of the discussion are attached as Appendix C for easy reference.

See eg. *Harting v. Barton*, 101 Wn.App. 954, 965 (2000). 49 Am.

Jur. 2d Landlord and Tenant § 296 states as follows:

The majority view is that an option contained in a lease is inseparable from and an integral part of the whole contract. However, it has also been held that although an option may be treated as part of the lease for reference to the persons and property covered, it is not part of the lease otherwise and is separate and distinct. The principle that an option to purchase is separate from the lease may be established with even greater strength where, for example, the option is embodied in a separate agreement, has separate, additional consideration, and, further, specifically states that the optionee has an unrestricted right to transfer and assign all its rights under the option without the consent of the optionor if the lease cannot be assigned or sublet without written consent of the lessor. (Footnotes omitted.)

A copy of 49 Am. Jur. 2d Landlord and Tenant § 296 is attached as Appendix D for easy reference.

The Option here is contained in a document entirely separate from the Lease. CP 186-188. Gould paid \$35,000.00 as separate consideration for the Option, both the Option and the Purchase and Sale Agreement specify that Gould has the unrestricted right to transfer and assign the Option and Purchase and Sale Agreement without Ledaura's consent (CP 182, 186) and there is absolutely no term in either the Option or the Lease providing that a breach under - or even the termination of - the Lease has any effect on the Option, let alone renders the Option unenforceable.

1. **The Lease and the Option are Divisible and Independent.**

The Washington Supreme Court defines an option as follows:

An option to purchase property is a contract wherein the owner, in return for a valuable consideration, agrees with another person that the latter shall have the privilege of buying the property within a specified time upon the terms and conditions expressed in the option. * * * **when supported by a consideration, as in the case at bar, the execution of the agreement results in a contract binding upon the optionor which may not be withdrawn by him during the time set forth therein.** (Emphasis added).

Whitworth v. Enitai Lumber Co., 36 Wn.2d 767, 770, 220 P.2d 328, 330 (1950); *See also McFerran v. Heroux*, 44 Wn.2d 631, 638, 269 P.2d 815 (1954).

A. Separate Consideration.

Two agreements are divisible and independent when there is separate consideration for each agreement even if the option is contained in the lease. *Harting v. Barton*, 101 Wn.App. 954, 965 (2000). Thus, even if the Lease and the Option had both been part of one document, the fact that there was separate consideration for the Option makes it divisible and independent of the lease, and therefore enforceable even if the Lease is breached or otherwise terminated. Of course in this case the Lease and the Option are

physically two separate agreements, further demonstrating each agreement is divisible and independent,

Gould paid \$35,000 as consideration for the Option. CP 28. Consequently, Ledaura cannot terminate Gould's right to purchase the property because of the termination of the Lease.

B. The Lease and the Option Necessarily are Divisible and Independent Based on the Terms of Each Agreement.

The only commonality between the Lease and the Option is that they were executed within 48 hours of each other. Otherwise, the material terms in each agreement are different from, and incompatible with, those of the other. Those differences are illustrated in the following table:

	Term	Consideration	Assignability
Lease Agreement	2006 to 2009	Rent	NO
Option Agreement	2006 to 2014	\$35,000	YES

Unlike most options contained in leases where the option must be exercised during the term of the lease, the Option negotiated and agreed to by these parties specifies that it can be exercised at any time up to 2014, five years after the expiration of the term of the Lease. Consequently, the Option cannot be construed to be in any way dependent upon the Lease. This is

further illustrated by the fact that under Ledaura's argument, if Gould failed to renew the Lease after 2009, the Option would terminate. Effectively, Goulds' right to allow the Lease to terminate in 2009 would be meaningless, which clearly was not the intent of the parties.

At Paragraph 12 of the Option (CP 187), the parties were given the opportunity to identify any other agreements that might be related to the Option. The parties listed the Purchase and Sale Agreement attached to the Option, and the January 25, 2006 Addendum, but did not list the Lease. *Id.* This further demonstrates that the parties' had no intention of tying the parties' performance under the Lease in any way to the parties' rights under the Option and even greater evidence that the Lease and the Option are separate and divisible agreements.

Lastly, unlike the Lease, the Option at paragraph 4 expressly states that Gould's rights under the Option are assignable. CP 186. Similarly, Goulds' rights under the Purchase and Sale Agreement attached to the Option are assignable. CP 184. In contrast, paragraph 17 of the Lease provides that the parties' rights under the Lease are not assignable without the prior written consent of the other party. CP 166. Gould thus had an unrestricted right to

transfer and assign all their rights under both the Option and the Purchase and Sale Agreement without the consent of Ledaura, but could not assign its rights under the Lease or sublet its space without Ledaura's written consent. CP 16.

The express assignability of the Option and Purchase and Sale Agreement clearly contemplated that those agreements could be transferred to another party, who in turn would have the right to enforce both the Option and Purchase and Sale Agreement, wholly independent from the Lease. This is further evidence that the agreements are separate and divisible and therefore not dependent upon each other.

Since the principle terms of the Lease and the option differ, each agreement must necessarily be divisible and independent from the other agreement.

2. Any Interpretation Of The Documents Results In Each Agreement Being Divisible and Independent.

A. The Agreements Do Not Specify That a Breach of the Lease Constitutes a Breach of the Option.

Nothing in any of the Agreements states or suggests that a breach of the Lease terminates the Option. In the absence of express language in any Agreement that termination of the Lease shall prevent enforcement of the Option, termination of the Lease

cannot terminate the Option. See *Atlantic LB, Inc. v. Vrbicek*, 905 A.2d 552, 560 (Pa.Sup. 2006). Since there is no language in any of the parties' agreements to support such an argument, each agreement must necessarily be divisible and independent from the other agreement. This is all the more clear in that the term of the Option extended far beyond the term of the Lease, and the Option could be assigned to and exercised by a third party who was not a party to the lease. The Trial Court thus erred in using extrinsic evidence to determine the parties' "intent" so as to add a requirement that "the lease be in full force and effect in order for the option to be exercised in the future."

B. Extrinsic Evidence Cannot Create New Terms Not Contained in the Parties' Agreements.

Washington law prohibits courts from accepting extrinsic evidence to defeat or alter the express terms of contracts. In In re Marriage of Schweitzer, 132 Wn.2d 318, 326-327, 937 P.2d 1062 (1997), the Washington Supreme Court stated that

In Berg v. Hudesman, 115 Wash. 2d 657, 667, 801 P.2d 222 (1990), this court held extrinsic evidence is generally admissible to ascertain the intent of the parties to a contract. **However, we made it clear in Berg that this rule, known as the "context rule," authorizes the use of extrinsic evidence only to elucidate the meaning of the words of a contract, and "not for the purpose of showing intention independent of the instrument."** Berg, 115

Wash. 2d at 669 (quoting J.W.. Seavey Hop Corp. v. Pollick, 20 Wash. 2d 337, 348-49, 147 P.2d 310 (1944)). **We emphasized, "it is the duty of the court to declare the meaning of what is written, and not what was intended to be written."** Berg, 115 Wash. 2d at 669 (quoting Pollick, 20 Wash. 2d at 348-49). **We accordingly held in Berg that parol evidence cannot be used to "add[], to modify[], or contradict[] the terms of a written contract, in the absence of fraud, accident, or mistake."** Berg, 115 Wash. 2d at 669 (quoting Pollick, 20 Wash. 2d at 348-49); see also U.S. Life Credit Life Ins. Co. v. Williams, 129 Wash. 2d 565, 570, 919 P.2d 594 (1996) ("unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions'.") (quoting Lynott v. National Union Fire Ins. Co., 123 Wash. 2d 678, 684, 871 P.2d 146 (1994)). **The Court of Appeals therefore correctly applied the Berg doctrine when it held extrinsic evidence of the parties' intent is generally not admissible to contradict the terms of a written agreement.** Emphasis added.

In Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999), the Supreme Court further clarified the limitations of extrinsic evidence.

Under Berg and cases interpreting Berg, extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wash. 2d 178, 189, 840 P.2d 851 (1992) (extrinsic evidence illuminates what was written, not what was intended to be written). **However, admissible extrinsic evidence does not include: Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; Evidence that would show an intention independent of the instrument; or Evidence that would vary, contradict or modify the written word.** Emphasis added.

Here, the language necessary to support Ledaura's interpretation is completely absent. As the Trial Court noted in its December 10, 2008 letter decision, there are absolutely no terms in any of the parties' Agreements providing that termination of the Lease has any effect whatsoever on the validity or enforceability of the Option.

Consequently, Ledaura asked the Court to "add to, modify, or contradict the terms of [the] written contract" to achieve its desired result, which is prohibited by law. *Berg*, 115 Wash. 2d at 669. The Trial Court clearly erred in granting Ledaura's request by using extrinsic evidence to determine the parties' "intent" so as to add a requirement that "the lease be in full force and effect in order for the option to be exercised in the future."

C. The Context of the Agreements Demonstrates Each was Separate and Divisible.

Even if the plain meaning of the agreements is unclear, which it is not, and further if extrinsic evidence could somehow be used to add terms to the parties' agreements, which it cannot, the context surrounding the transaction demonstrates that the Agreements are separate and divisible. In *Hearst Communications*,

Inc. v. Seattle Times Co., 154 Wn.2d 493, 502, 115 P.3d 262

(2005), the Court explained the context rule as follows:

In *Berg*, we recognized the difficulties associated with interpreting contracts solely on the basis of the "plain meaning" of the words in the document. We said that the process of interpretation involves " 'one person giv[ing] a meaning to the symbols of expression used by another person.' " . . . We recognized that the meaning of a writing " 'can almost never be plain except in a context.' " . . . We adopted the "context rule" and recognized that intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution. If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties. (Citations omitted.)

The application of the relevant standards to the context rule are as follows:

(i) Subject Matter and Objective of the Agreements.

The subject matter of the Lease and of the Option are directed at two different purposes: lease of the property and purchase of the property. The term of the Lease expired in 2009,⁷ while the Option did not expire until 2014. The different terms for each agreement can only mean that the objective of the parties was

⁷ In fact, either party could have terminated the lease after one year because the Lease was never notarized. See RCW 59.04.010. Under Ledaura's argument, it could have terminated the Lease after one year, thus terminating the Option.

to allow enforcement of the Option even if the Lease had expired or terminated. Under Ledaura's interpretation, if Gould did not exercise their right under the Lease for an additional term, which is solely within the discretion of Gould, the Option would terminate. Clearly, the parties did not agree to that result.

Likewise, property owners frequently provide an option to a third party who is not a party to any lease. This is a common mechanism by which a party can establish the future price of the property and to ensure that the property is available should the option holder decide purchasing the property is appropriate. This clear purpose would be frustrated unless the two agreements were entirely separate.

(ii) Circumstance Surrounding the Making of the Agreements.

The circumstances surrounding the making of the parties' agreements demonstrate that the parties clearly intended the Option to be separate from the Lease. Not only did the parties create two separate documents to govern each transaction, but they included absolutely no provision tying performance under one agreement to the enforceability of the other.

(iii) Subsequent Acts and Conduct.

More than a year after the Agreements were signed, Ledaura proposed an addendum that stated:

“Tenants have the option to purchase the property on the terms set forth in the Commercial & Investment Real Estate Purchase and Sale Agreement so long as there has been no default at any time in their obligations under the lease, option, or any addenda thereto.” Emphasis added.

CP 77-81, 86-90.

Ledaura only proposed this language because it obviously recognized that it had previously neither negotiated nor bargained for such a provision, and further because there was nothing in the parties' existing agreements suggesting that the parties' performance under one agreement, such as the Lease, might have the slightest impact on the parties' rights under the other agreements, such as the Option. This subsequent act provides conclusive evidence that the parties intended the Agreements to be divisible and independent. See *Santos v. Dean*, 96 Wn.App. 849, 854, 982 P.2d 632 (1999).

Goulds' subsequent act of improving the building further supports this. 1 Corbin on Contracts 907, § 272, contains the following pertinent passage:

[T]he holder of an option to buy land has a conditional right to a conveyance, a power to turn that right into an unconditional right to immediate conveyance by performing the conditions, an immunity from revocation by the option giver, and the legal privilege of performing or not performing the conditions at his option. During the agreed term of his option, he has a right that the option giver shall not repudiate or make performance impossible or more difficult by conveying the land to a third person. These rights are enforceable by all the usual judicial remedies, including judgment for damages, injunction, and decree for specific performance. **It is beyond question that those who have bought and paid for an option on the land believe that they have something on which they can rely; they make contracts for the resale of the land, often make valuable improvements on it, and make other important changes of position, as evidence of such reliance.** (Emphasis added.)

See McFerran v. Heroux, 44 Wn.2d 631, 638, 269 P.2d 815 (1954).

In reliance upon the Option, Gould did make significant and expensive improvements to the building and important changes in their position with the expectation that they could purchase it. CP 74, 83, 304-5. Consequently, this subsequent act provides further conclusive evidence that the parties intended the Agreements to be divisible and independent.

(iv) The reasonableness of the respective interpretations urged by the parties.

Ledaura urged the Trial Court to conclude that the

Agreements are indivisible and interdependent. However, in making this argument Ledaura failed to explain (1) the lack of any language to support that position, (2) why Ledaura sought to add the very language it seeks to enforce more than a year after the parties' execution of the Option, (3) why there are different terms and conditions and expiration dates in the Lease opposed to the Option, or (4) how Gould's payment of \$35,000 as consideration exclusively for the Option could be consistent with its position that the Option is dependent on the Lease.

Ledaura's failure to explain any of these objective facts and circumstances leaves but one conclusion: Ledaura's interpretation is unreasonable. In effect, Ledaura seeks to impermissibly add to, modify, or contradict the terms of the written contracts. These "unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions". *Berg*, 115 Wash. 2d at 669 (quoting *Pollick*, 20 Wash. 2d at 348-49); see also *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wash. 2d 565, 570, 919 P.2d 594 (1996).

On the other hand, Gould has explained how each material fact supports their interpretation of the parties' agreements. Moreover, Goulds' subsequent act of making significant

improvements to the building demonstrates their reliance upon the right to independently exercise the Option.

3. This Court Should Not Terminate The Option For Equitable Reasons.

Washington Courts have repeatedly approved the general doctrine that forfeitures are not favored in the law and are never enforced in equity unless the right is so clear that a Court cannot deny that relief. *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn.App. 296, 300, 628 P.2d 838 (1981). Here, all of the equities favor Gould. Gould made significant and expensive improvements to the building, all of which would be lost if the Option were terminated. Gould timely exercised the Option, doing so well in advance of its actual expiration date. Lastly, enforcing the Option now will cause no harm to Ledaura, who will be paid for the property at the price it specifically negotiated.

For these reasons, this Court should reverse the Trial Court and order that the Option is valid and enforceable.

4. The Option Satisfies The Statute Of Frauds.

Ledaura had previously argued that even if the Option is not terminated, the Option is still unenforceable because it does not include a legal description as required by the Statute of Frauds,

RCW 59.04.010. This argument ignored the plain language of the Option.

Gould believed that Exhibit A (CP 174, 340), which undisputedly existed and did specify the correct legal description, was attached to the Option. CP 302. But even if it was not, the Statute of Frauds is still satisfied.

The Purchase and Sale Agreement states in pertinent part as follows:

The undersigned buyer, Randy Gould, Bret Drager, Greg Johnson or assignee agrees to buy and Seller agrees to sell, on the following terms, the commercial real estate and all improvements thereon (collectively, the "Property") commonly known as 601 Saint Helens in the City of Tacoma, Pierce County, Washington legally described on attached Exhibit A. **(Buyer and Seller authorize Listing Agent or Selling Licensee to insert and/or correct, over their signatures the legal description of the Property.)** (Emphasis added).

CP 176.

So long as the agreement permits the agent to insert the legal description, the agreement satisfies the Statute of Frauds. In *Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn.App. 459, 468, 191 P.3d 76 (2008) the Court of Appeals stated in pertinent part as follows:

To comply with the statute of frauds, Washington strictly requires a legal description of the property that an agreement purports to convey. See *Martin*, 35 Wash.2d at 228, 212 P.2d 107. But there is an exception to this rule where, although a purchase and sale agreement itself includes no legal

description, the agreement authorizes an agent to “**insert the legal description of the properties over their signatures**” at a later time. *Noah v. Montford*, 77 Wash.2d 459, 463, 463 P.2d 129 (1969) (citing *Edwards v. Meader*, 34 Wash.2d 921, 210 P.2d 1019 (1949)). (Emphasis in the original.)

See also Nishikawa v. U.S. Eagle High, LLC, 138 Wn.App. 841, 848-9, 158 P.3d 1265 (2007).

Consequently, even if the legal description which existed as Exhibit A was not attached, the parties specifically authorized the agents to insert the legal description and expected the agents to do so if necessary, therefore complying with the Statute of Frauds.

5. Gould Is Entitled To An Award of Their Attorney's Fees and Costs Incurred On Appeal.

Pursuant to RAP 18.1, Gould requests their attorney's fees and costs be awarded pursuant to paragraph 21 of the Commercial & Investment Real Estate Purchase & Sale Agreement, which provides for an award of attorney's fees and costs to the prevailing party in any litigation regarding the purchase of the property.

V.

CONCLUSION

There is nothing in any of the agreements to suggest that the termination of the Lease constitutes a termination of the Option. Ledaura demonstrated it did not believe termination of the Lease terminates the Option by later proposing specific language to do so.

Gould paid \$35,000 for the Option, thereby providing consideration for the Option wholly separate from the Lease. The term, consideration and assignability of the documents are all different, demonstrating that neither agreement was dependent upon the other. Even if there was any doubt regarding any of the above, equity would demand that the Option not be forfeited.

To the extent Ledaura argues that the Option violates the Statute of Frauds, that argument must also fail because the Option references Exhibit A, which is the correct legal description and Gould believes Exhibit A was attached to the Option. But even if the legal description was not properly attached, the parties specifically authorized the agent to insert or correct the legal description if necessary.

Consequently, this Court should reverse the decision of the Trial Court and declare the Option to be enforceable and order that Ledaura comply with its terms.

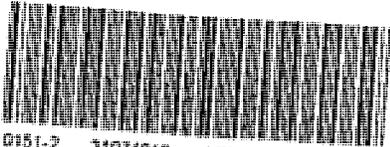
Respectfully submitted this 14th day May, 2009.

DAVIS ROBERTS & JOHNS, PLLC



MARK R. ROBERTS, WSBA #18811
Attorneys for Appellants Drager, Gould,
and Johnson

APPENDIX A

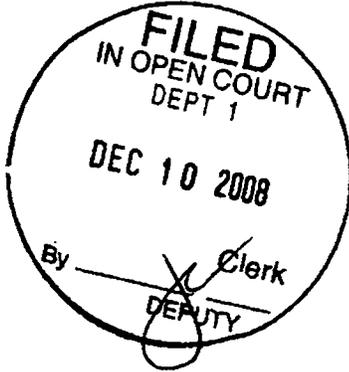


08-2-10151-2 31074010 LTR1 12-10-08

**SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY**

JAMES R. ORLANDO, JUDGE
L. Janet Costanti, *Judicial Assistant*
DEPARTMENT 1
(253)798-7578

334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402-2108



December 10, 2008

Mr. Douglas Kiger
Attorney at Law
3408 South 23rd St
Tacoma, WA 98405-1609

Mr. Mark Roberts
Attorney at Law
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335-1166

Re: Ledaura LLC v. Gould et.al.
Pierce County No. 08-2-10151-2

Dear Counsel:

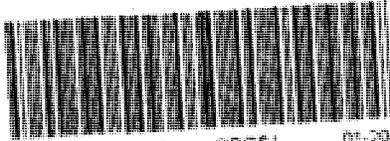
This is a challenging case, and will likely be resolved by the appellate court. The language that would have made it an easy case to resolve is missing from the agreements, namely language requiring the lessee to be in compliance with all lease terms in order to exercise the purchase option. However, I believe that the option and lease are so intertwined to find that the intent of the parties was to require that the lease be in full force and effect in order for the option to be exercised in the future. The addendum to the option agreement is replete with references to the lease and supports the plaintiff's position.

I believe that the breach of the lease, as found by Judge Lee, terminates the option to purchase the real property and will grant the plaintiff's motion for summary judgment. If the appellate court finds that the lease was not breached, then the option to purchase would still be in effect.

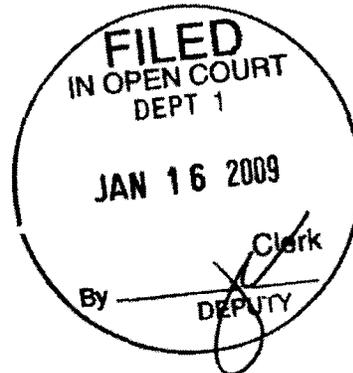
Sincerely,

James R. Orlando

APPENDIX B



08-2-10151-2 31318354 ORGSJ 01-20-09



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

LEDAURA, LLC, a Washington limited liability company,

Plaintiff,

vs.

RANDY GOULD and 'JANE DOE' GOULD, husband and wife; BRET DRAGER and 'JANE DOE' DRAGER, husband and wife; and GREG JOHNSON and 'JANE DOE' JOHNSON, husband and wife,

Defendants.

No. 08-2-10151-2

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

ORIGINAL

This matter came before the Court upon cross motions for summary judgment. The Plaintiff, Ledaura LLC, appeared by and through its attorney of record, Douglas N. Kiger of Blado Kiger, P.S., and the Defendants Gould, Drager and Johnson appeared by and through their attorney of record, Mark R. Roberts of Davis Roberts & Johns, PLLC. The court heard the oral argument of counsel, considered the pleadings filed in the action and considered the following documents and evidence that were brought to the Court's attention before the Order on Summary Judgment was entered:

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT - 1 OF 3

BLADO KIGER, P.S.
ATTORNEYS AT LAW
Bank of America Building, 2nd Floor
3408 South 23rd Street
Tacoma, WA 98405-1609
Tel (253) 272-2997 Fax (253) 627-6252

1. Defendant's Motion for Summary Judgment
2. Declaration of Randall Gould dated November 6, 2008
3. Declaration of Bret Drager dated November 6, 2008
4. Declaration of Mark R. Roberts dated November 6, 2008
5. Defendants' Memorandum in Support of Summary Judgment
6. Declaration of Douglas N. Kiger dated November 11, 2008
7. Ledaura's Motion for Summary Judgment
8. Stipulation and Order Shortening Time re: Summary Judgment
9. Ledaura's Memorandum of Law in Response
10. Declaration of Douglas N. Kiger in Response dated November 21, 2008
11. Declaration of Leah K. Caruthers dated November 21, 2008
12. Declaration of Mark R. Roberts dated December 1, 2008
13. Supplemental Declaration of Randall Gould dated December 1, 2008
14. Declaration of Greg Johnson dated December 1, 2008
15. Defendants' Response to Plaintiff's Motion for Summary Judgment
16. Declaration of Aleta Benedicto dated December 3, 2008
17. Declaration of Leah Caruthers dated December 4, 2008
18. Ledaura's Brief in Support of Summary Judgment

The Court issued a letter decision on December 10, 2008, which is incorporated herein

by reference. Based upon the foregoing, it is now hereby ORDERED ADJUDGED and

DECREED:

1. Defendants' motion for summary judgment is denied.
2. Ledaura's motion for partial summary judgment is granted; to wit: if the

Appellate Court in the unlawful detainer case of *Ledaura v. Gould*, Pierce County Superior Court Cause No. 07-2-10979-5 and Court of Appeals Cause No. 37379-3-II determine the

Defendants breached the Lease, the Option is terminated. If the Appellate Court determines the

Defendants did not breach the Lease, then the Option is enforceable. *If less than all defendants prevail on appeal the court will revisit this issue and defendants*

3. This Court finds that the order granting Plaintiff's motion is dispositive of the *are not barred on this issue.* Plaintiff's claims against the Defendants in this matter. This Court's decision will necessarily

require the parties to wait for a decision from the Court of Appeals in the unlawful detainer case

and if the Appellate Court determines that the Defendants are in breach of the Lease, it is highly

probable that the Defendants will appeal this decision. There is no reason to delay resolution of

ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT - 2 OF 3

BLADO KIGER, P.S.
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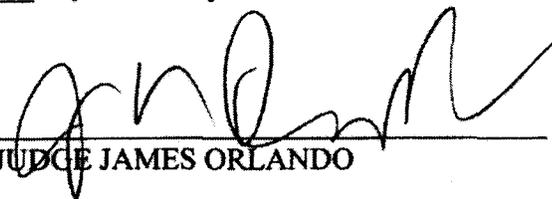
1 this matter in the meantime and waiting will impose a substantial hardship on the parties.

2 Therefore there is no just reason for delay.

3 4. This order is a final judgment pursuant to CR 54(b).

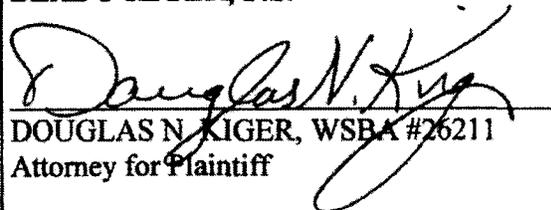
4 5. This Court certifies that this order involves a controlling issue of law as to which
5 there is substantial grounds for a difference of opinion and that immediate review of the order
6 may materially advance the ultimate termination of this litigation.

7 ENTERED IN OPEN COURT this 16 day of January, 2009.

8
9 
10 JUDGE JAMES ORLANDO

11 Presented by:

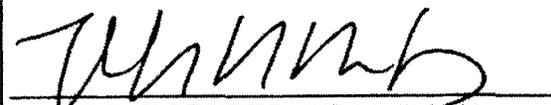
12 **BLADO KIGER, P.S.**

13 
14 DOUGLAS N. KIGER, WSBA #26211
15 Attorney for Plaintiff

11 FILED
12 IN OPEN COURT
13 DEPT 1
14 JAN 16 2009
15 BY  Clerk
16 DEPUTY

16 Approved as to form and
17 Notice of Presentation waived by:

18 **DAVIS ROBERTS & JOHNS, PLLC**

19 
20 MARK R. ROBERTS, WSBA #18811
21 Attorney for Defendants

22
23
24 **ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT - 3 OF 3**

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APPENDIX C

American Law Reports ALR3d

The ALR databases are made current by the weekly addition of relevant new cases.

Lessee's breach of or default under lease agreement as affecting his right in respect of option to purchase under the lease

Wade R. Habeeb, LL.B.

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I. Introduction

§ 1[a] Prefatory matters—Scope

This annotation[FN1] collects the cases discussing the question whether a lessee's breach of or default[FN2] under a lease agreement precluded his right to enforce an option to purchase under the lease.

Cases involving an actual or purported termination of the lease by forfeiture or otherwise before the offer to exercise the option to purchase was made are not within the scope of this annotation.[FN3]

For the purposes of this annotation it is assumed that the lessee complied with the terms of the contract in the exercise of the option to purchase. Thus, cases of failure to exercise the option or failure to comply with the terms of the contract to purchase are not within its scope, which is limited to the lessee's breach of or default in the terms of the lease.

Cases in which there was a failure to perform some provision in the lease, but where such failure was considered by the court not to be a default, since the failure to perform was merely for the benefit of the property, are excluded herefrom, as are cases involving an alleged default but holding that there was actually no default, and cases involving the forfeiture provision under a lease-sale contract which provided that the agreement of the lessor to treat the rents paid as payment for the property should become a nullity if the lessees became in arrears for stated periods, or should fail to pay the taxes or to comply with any other condition of the contract.

§ 1[b] Prefatory matters—Related matters

Related Annotations are located under the Research
References heading of this Annotation.

§ 2[a] Summary and comment—Generally

Leases frequently contain provisions conferring upon the lessee the option to purchase the demised premises. Such an option is supported, so far as consideration is concerned, by the payment of, or promise to pay, the stipulated rent reserved, so that it cannot be withdrawn by the lessor during the period specified for its continuance, and it may be specifically enforced, provided it is sufficiently definite and certain in its terms and provisions.[FN4]

However, where the lessee is in default under the lease, an interesting question arises as to whether he may still be entitled to enforce the option to purchase.

In determining whether the option to purchase was dependent on performance of the terms of the lease or was independent thereof, the courts have said that the question was one of construction of the instrument and of determining the intent of the parties.[FN5] So it has been held that where the option to purchase is conditioned on the performance of the terms of the lease, a breach or default under the lease agreement precludes the lessee's right to enforce the option,[FN6] although some cases, upon reaching the conclusion that the option to purchase and the lease were independent, have held that a breach of the latter did not preclude the lessee's right to enforce the option.[FN7]

It has been held or recognized that the option to purchase under the lease agreement was lost by default of the lessee in the performance of the covenants within the time prescribed in the lease, where the lease expressly, or in effect, provided that time should be of the essence of the contract.[FN8] But where the lease agreement does not state that time is of the essence of the contract, it has been held that the failure of the lessee to perform the covenants strictly at the time they may or should be performed will not cause him to lose his right to enforce the option.[FN9]

The right of a lessee to obtain specific performance of an option to purchase under the lease, notwithstanding a breach or default in the terms of the lease by the lessee, has been recognized by the courts where the lessor's acts precluded him from relying on the breach.[FN10] So, although there is some authority to the contrary, the courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constituted a waiver of the default so as to entitle the lessee to enforce the option to purchase.[FN11]

In some cases, the courts have taken the view that the lessee is not precluded from enforcing an option to purchase under the lease by reason of his default in the terms of the lease, where the lessor did not manifest his intention to terminate the lease by some clear and unequivocal act.[FN12] But in other cases, the courts have held that where the lessee was in default under the lease, there was no necessity for the lessor to terminate the lease or to give notice of his intention to rely on the default, in order to preclude the lessee's enforcement of the option to purchase.[FN13]

§ 2[b] Summary and comment—Practice pointers

An attorney drafting a lease containing an option to purchase by the lessee should keep in mind that if the general conditions imposed upon the lessee under the lease are to be kept separate from the option agreement, so that his default under, or violation of, the general terms will not defeat his option rights, special care must be taken to provide adequate separate consideration for the option agreement.[FN14] The terms of the lease and the option should be clear and unambiguous generally, since evidence is not admissible to vary the written terms of the option. Upon the exercise of the option, it becomes a contract of sale.[FN15] The option itself should be carefully drafted to make it clear whether the right is absolute or may be exercised only if the lessor elects to sell.[FN16] Similarly, provisions respecting whether, and the conditions under which, rental payments are or may be applied to the purchase price of the property should be drafted with the utmost care in order to avoid future disputes.

The kinds of issues that may arise with respect to the payment and application of rental amounts, and the failure to observe other conditions of the lease, as well as possible argumentative postures to be taken on the respective sides of such issues, are well suggested by the conclusions and reasoning of the courts in cases throughout the present annotation. Particular attention should be accorded to the question whether the basic legal situation projected by the terms of the agreement and the particular default thereunder may be modified by acts or omissions of the lessor in the circumstances.[FN17] General equitable considerations of varied nature are frequently of importance in cases of lessees' option rights.[FN18]

II. General considerations

A. In general

§ 3. Question as dependent on construction of instrument or intention of parties

[Cumulative Supplement]

The question whether the option and lease are one agreement so that the breach of the lease renders the option to purchase nugatory, or are independent so that the breach of the lease has no effect on the option, has been said, in a few cases, to resolve itself into a problem of construction of the instrument and of determining the intent of the parties.[FN19]

Accordingly, in *Thompson v Coe* (1921) 96 Conn 644, 115 A 219, 17 ALR 1233, the court stated that whether the option to purchase contained in a lease was an independent agreement, or in connection with the lease formed one entire agreement, depended upon the intention of the parties, and that this was to be resolved by the construction of the instrument read in the light of its circumstances.

And in *Ober v Brooks* (1894) 162 Mass 102, 38 NE 429, the court stated that a contract to purchase inserted in the same instrument with a demise might be independent, or might fall with the estate demised, and that the usual rules of construction were to be applied in ascertaining the meaning of the whole instrument.

Again, in *Mitchell v Wayave* (1946) 185 Va 679, 40 SE2d 284, the court stated that the question whether a lessee's breach of his lease agreement causes a forfeiture of his right to exercise an accompanying option to purchase the property depends largely upon the intent of the parties in entering into the agreement—whether they intended that the option should form a part of the lease contract and whether the fulfilment of the covenants of the lease by the lessee was intended to constitute at least a part of the consideration for the option.

CUMULATIVE SUPPLEMENT

Cases:

Lessee's violation of lease term by failing to pay rent directly to lessor did not invalidate lessee's option to purchase property, given that failure to pay rent was not, in itself, a default as defined in the lease and lessee paid the accumulated rent to lessor within ten days of receiving lessor's written notice of the potential default. *Chase Lumber and Fuel Co., Inc. v. Chase*, 228 Wis. 2d 179, 596 N.W.2d 840 (Ct. App. 1999).

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[END OF SUPPLEMENT]

§ 4. Option conditioned on performance of terms of lease

[Cumulative Supplement]

The option to purchase under a lease may be conditioned on the lessee's performance of the terms of the lease, so that his breach or default under the lease agreement will preclude his right to enforce the option to purchase. The following cases hold or recognize that a lessee may be precluded from exercising an option to purchase by a substantial breach of, or default under, a lease which clearly conditions the option right upon his performance of the terms of the lease.

- Ala
Brown v Larry (1907) 153 Ala 452, 44 So 841
Coley v English (1923) 209 Ala 688, 96 So 909
Long v Hirs (1959) 270 Ala 131, 116 So 2d 605
- Ariz
United Farmers' City Market, Inc. v Donofrio (1934) 43 Ariz 35, 29 P2d 144 (recognizing rule)
- Ark
Carpenter v Thornburn (1905) 76 Ark 578, 89 SW 1047
Thomas v Johnson (1906) 78 Ark 574, 95 SW 468
Bishop v Melton (1941) 202 Ark 732, 152 SW2d 299
Lawson v Taylor Hotels, Inc. (1967) 242 Ark 6, 411 SW2d 669
- Cal
Wallace v Imbertson (1961) 197 Cal App 2d 392, 17 Cal Rptr 117
- Colo
Strauss v Boatright (1966) 160 Colo 581, 418 P2d 878 (recognizing rule)
- Conn
Brauer v Freccia (1970) 159 Conn 289, 268 A2d 645, 53 ALR3d 427
- Ga
Clyde v Ware (1927) 163 Ga 917, 137 SE 396
Spooner v Dykes (1932) 174 Ga 767, 163 SE 889
- Hawaii
Flint v MacKenzie (1972, Hawaii) 500 P2d 556, reh den 501 P2d 357
- Ill
Lakeshore County Club v Brand (1930) 339 Ill 504, 171 NE 494
- La
Kizer v Burk (1980, La) 439 So 2d 1051
- Md
Messall v Merlands Club, Inc. (1966) 244 Md 18, 222 A2d 627, cert den 386 US 1009, 18 L Ed 2d 435, 87 S Ct 1349
- Mass

- Ober v Brooks (1894) 162 Mass 102, 38 NE 429
- Shayeb v Holland (1947) 321 Mass 429, 73 NE2d 731 (apparently recognizing rule)
- Mullett v Peltier (1991) 31 Mass App 445, 579 NE2d 174, review den 411 Mass 1104, 583 NE2d 250
- Mullett v Peltier (1991) 31 Mass App 445, 579 NE2d 174, review den 411 Mass 1104, 583 Ne2d 250
- Neb
Freeman v Rose (1971) 187 Neb 176, 188 NW2d 682
- NJ
Polish-American Volunteer Defenders v Roman Catholic Church, etc., Inc. (1927) 102 NJ Eq 73, 139 A 709 (recognizing rule)
- Or
Gwaltney v Pioneer Trust Co. (1948) 184 Or 459, 199 P2d 250
- Pa
Gateway Trading Co. v Childrens' Hospital of Pittsburgh (1970) 438 Pa 329, 265 A2d 115 (right of first refusal)
- Wash
Corbray v Stevenson (1982) 98 Wash 2d 410, 656 P2d 473
- Wis
Helbig v Bonsness (1938) 227 Wis 52, 277 NW 634, 115 ALR 373 (independent instrument given at same time as lease)
- Hafemann v Korinek (1954) 266 Wis 450, 63 NW2d 835
- Wyo
Frank v Stratford-Hancock (1904) 13 Wyo 37, 77 P 134 (lease inoperative)
- Can
Hunt v Spencer (1867) 13 Grant Ch 225

Although not within the scope of this annotation on its facts, since it involved an alleged default after the exercise of the option, attention is directed to *United Farmers' City Market, Inc. v Donofrio* (1934) 43 Ariz 35, 29 P2d 144, wherein the court, after pointing out that the defendant went into possession of the premises under a lease, with 30 months to determine whether it would exercise an option to purchase the property for a stated price, and on definite terms, and with the further provision that its option would be void if it did not carry out all of the conditions of the lease which it had agreed to perform, stated that at that time the only thing which it had agreed to do was to pay the rental of \$38,000, together with taxes and certain insurance; that if it did this, its option lasted for 30 months; and that if it failed to do this for even 1 month, although the 30-month period had by no means expired, it lost its option to purchase the premises without further ado.

So, in *Thomas v Johnson* (1906) 78 Ark 574, 95 SW 468, the court stated that if an agreement was in effect a lease of land with an option to the lessee to purchase and to treat the rent money as a first instalment of the purchase price, dependent upon the prompt payment of the amount when due, the failure to pay at the time fixed by the parties terminated the right to

purchase, and the relation of landlord and tenant remained.

And in *Bishop v Melton* (1941) 202 Ark 732, 152 SW2d 299, where a lease gave the lessee an option to purchase on condition that the lessee pay the rent and taxes and build a filling station and insure it, and the lessee failed to pay the rentals as agreed and failed to erect a filling station, it was held that the lessee was not entitled to maintain a suit for specific performance of the option to purchase.

Again, in *Lawson v Taylor Hotels, Inc.* (1967) 242 Ark 6, 411 SW2d 669, where a hotel building was destroyed by fire, and the lessees of the hotel failed to pay rent for 2 months after the building was destroyed, it was held that the lessees were not entitled to enforce an option to purchase contained in the lease. Holding that the chancellor did not err in refusing to order specific performance on the ground that the lessees' failure to pay or even to tender the two delinquent monthly instalments of rent precluded them from exercising the option to purchase, the court stated that there was no contention that the destruction of the hotel building relieved the lessees of their duty to pay rent; that the obligation to pay rent, absent any agreement to the contrary, was not affected by the fire loss; that, therefore, the lessees were seeking specific performance when they were themselves in default; and that such a position was not tenable.

In *Brauer v Freccia* (1970) 159 Conn 289, 268 A2d 645, 53 ALR3d 427, where a lease gave the lessees an option to purchase if they had duly and punctually fulfilled all of the provisions, agreements, covenants, and conditions of the lease, and where, on the date the lessees attempted to exercise this option to purchase, they were behind 7 monthly rental payments totaling \$2,450 and an eighth payment on the day of trial, it was held that the lessees were not entitled to specific performance of the option to purchase. The court stated that the language giving the option clearly indicated that the lessors' duty to comply with the terms of the option was conditioned upon the lessees' punctual performance of their obligations under the lease; that a tenant who failed to meet the main conditions of his lease defeated his right to rely on it when he made an effort to purchase the property pursuant to the option in the lease; and that the trial court was correct in concluding that since the lessees had failed to perform their obligations under the lease, the right to enforce the option to purchase was not in existence and the lessors were under no obligation to convey the property.

In *Messall v Merlands Club, Inc.* (1966) 244 Md 18, 222 A2d 627, cert den 386 US 1009, 18 L Ed 2d 435, 87 S Ct 1349, it was held that the forfeiture of the lessee's charter was a devolution of the ownership of the lease and a default within the meaning of a lease provision providing that a devolution of the lease, by operation of law, upon any person other than the tenant would constitute a default, and therefore precluded specific enforcement by the lessee of the option to purchase in the lease. The court also held that the revival of the charter after the attempt to exercise the option while the lessee was in default did not validate the option to purchase.

In *Ober v Brooks* (1894) 162 Mass 102, 38 NE 429, the court stated that the present indenture was a lease with an incidental right to purchase during a portion of the term, and that it was not in the mind of either party that the right should be exercised except by a tenant; that the right to purchase and the estate for years were both to commence on the same day; that if they were independent, the defendant might assign the estate for years and retain the right to purchase, or might assign the estate to one person and the right to another; that the fact that the parties did not so intend was clear from the language of the clause in which the right was

first mentioned, and in which it was agreed that if the lessee should terminate the lease, the right to purchase should also be ended; that although the agreement was to sell to the lessee or his assigns, that part of it which dealt with the betterment and damages assessed or awarded before the making of a conveyance was upon the theory that the right to purchase would be exercised by a tenant; that if the right were independent the defendant might refuse to enter, and might neglect to perform every portion of his agreement, except to pay the price, and yet have during several years the right to acquire the property; that such a state of things would greatly reduce its value to the lessors; and that the court did not think that such was the bargain and was of the opinion that the justice who reported the case was right in finding that the right to purchase would fall with the lease.

Although not within the scope of this annotation, since it apparently did not involve a breach or default by the lessee, attention is directed to *Shayeb v Holland* (1947) 321 Mass 429, 73 NE2d 731, wherein the court stated that the option to purchase was for the exclusive benefit of the lessee, that it could not be continued as a binding obligation of the lessor, except by the performance of the terms of the lease by the lessee, and that it was supported by the underlying consideration of the lease.

In *Polish-American Volunteer Defenders v Roman Catholic Church, etc., Inc.* (1927) 102 NJ Eq 73, 139 A 709, where there was no express consideration for the option to purchase contained in a lease, the court stated that the true consideration was the execution of the lease and, necessarily, the continuance thereof and an abiding by its terms on the part of the complainant. The court distinguished *Mathews Slate Co. v New Empire Co.* (1903, CC NY) 122 F 972, *infra* § 5, (holding that the option to purchase was an entirely separate instrument from the lease proper and the covenant accompanying it) on the ground that the option itself contained a recital of the consideration upon which it was based.

In *Gateway Trading Co. v Childrens' Hospital of Pittsburgh* (1970) 438 Pa 329, 265 A2d 115, where a lease rider gave the lessee an enforceable right of first refusal subject to the condition that the lessee not be in default under the lease, it was held that the failure to pay the rent was a default precluding the enforcement of the right of first refusal.

In *Helbig v Bonsness* (1938) 227 Wis 52, 277 NW 634, 115 ALR 373, it was held that an option to purchase realty, given to a lessee concurrently with the lease of the premises without independent consideration, must be regarded as being in consideration of performance by the lessee of the covenant to pay rent, and could not be exercised by the lessee, who never paid any of the rent and abandoned the premises. The court stated that although the option was under seal and recited the receipt of one dollar and other valuable consideration, the seal thereon afforded only presumptive evidence of consideration by virtue of a statute; that where the contract was under seal, the true consideration might be shown, but not for the purpose of defeating the contract; that under the transaction in question the lessee's obligation to pay the rent required under the lease constituted virtually the only true consideration for the option, as well as the lease, which, as clearly part of one and the same transaction, should be construed and regarded as one agreement; that, consequently, the lessee's failure to pay any rent constituted such a complete failure of consideration for the option in the lease as to defeat his rights thereunder; and that in view of that failure and the involuntary abandonment of the farm, it would clearly be unreasonable and inequitable to compel specific performance of the option by the lessor or his grantee for an adequate consideration.

In the following case involving a mining lease, the breach by the lessee was the failure to

explore and develop the property.

In *Wallace v Imbertson* (1961) 197 Cal App 2d 392, 17 Cal Rptr 117, the court stated that mining leases usually rested on the primary condition of reasonable diligence by the lessee in exploration and development, and where there was a complete lack of any effort whatever to fulfil this primary condition, the lessee could not have specific performance of an option that was an integral part of the lease.

In the following case where the lease was inoperative because of the lessee's failure to comply with a condition precedent, the court refused to enforce the option to purchase contained in the lease.

In *Frank v Stratford-Handcock* (1904) 13 Wyo 37, 77 P 134, where a lessee had failed to comply with a clause in his lease requiring him to deposit a sum of money with the lessor to secure faithful performance of the agreement, it was held that such clause was a condition precedent and not a covenant of the lease, and that the option to purchase contained in the lease could not be enforced by the lessee. The court stated that the condition precedent not having been performed, the lease did not become effective or binding upon the owner of the premises and could not be regarded as constituting a consideration for the option agreement to convey.

CUMULATIVE SUPPLEMENT

Cases:

Where addendum to lease stated that in consideration of keeping in performance of covenants in agreements set forth in lease, lessees would have option to renew for additional period, lessees had no right to renew lease after their failure to pay increase in taxes as additional rent, even though they may have believed in good faith that they owed less of the increase than lessor demanded; lessees' right to renew lease was dependent by implication upon faithful performance of covenant to pay rent. *Brown v Hoffman* (1981, Colo) 628 P2d 617.

In suit for specific performance, lessee was not precluded from enforcing option to purchase leased property where acceptance was timely given, despite its failure to timely pay rent thereafter, because after option to purchase had been exercised, relationship of landlord and tenant ceased and that of vendor and purchaser arose. Furthermore, lessee was entitled to specific performance, despite its breach of lease covenant requiring it to include lessor as additional insured on insurance policy and to deliver copy of policy to lessor, where lessee had substantially performed its obligations under lease, including payment of all rentals, lessee had made substantial improvements to premises, option was exercised in time and manner specified, lessor had repudiated lease and lessee had no adequate remedy at law, lessor would suffer no hardship, and parties would get their bargain under lease and option. *Panhandle Rehabilitation Center, Inc. v Larson* (1980) 205 Neb 605, 288 NW2d 743.

Commercial tenant's repeated breaches of covenant to timely pay rent contained in lease were not de minimis, and thus tenant was not entitled to specific performance of lease agreement's right of first refusal to purchase premises, even though landlord did not give tenant notice of default, where right of first refusal was conditioned on tenant not being in default during lease term, and tenant frequently paid its rent late and had failed to pay full rent that was due. *Cyber Land, Inc. v. Chon Property Corp.*, 36 A.D.3d 748, 830 N.Y.S.2d 198 (2d Dep't 2007).

Option to purchase real property, which granted tenant-optionees option to purchase de-

mised premises if "not then in default under the Lease," was null and void when optionees were in default at the time they attempted to exercise option, and therefore optionors were entitled to possession of premises. *Singh v. Atakhanian*, 818 N.Y.S.2d 524 (App. Div. 2d Dep't 2006).

Tenant was entitled to specific performance of option to purchase premises provided that it had complied with all terms and conditions set forth in lease, where failure to give notice of any alleged default precluded landlords from relying on default to defeat exercise of option, since notice provision of lease was condition precedent to landlords' ability to use default as reason to deny tenant's rights under lease. *Cinema Dev. Corp. v Two Thirty Eight Realty Corp* (1989, 2d Dept) 149 App Div 2d 648, 540 NYS2d 305.

Though tenant's failure to pay tax assessments on property as required by lease were not so material as to authorize forfeiture of lease where such failure was predicated on landlords' erroneous assurances to tenant over period of years that he owed them nothing for taxes, nevertheless, inasmuch as tenant's failure technically constituted breach of lease, tenant was not entitled to specific performance of option to purchase that was exercisable only so long as tenant performed all of his obligations under lease. *Cimina v Bronich* (1985) 349 Pa Super 399, 503 A2d 427, app gr (Pa) 521 A2d 930 and app gr (Pa) 513 Pa 638, 521 A2d 930, and revd 537 A2d 1355.

Purchaser cured default for unpaid rent prior to exercising option to purchase property contained in lease, where lease provided for right to cure and purchaser paid rent due upon notice of default. *Ingram v. Kasey's Associates*, 328 S.C. 399, 493 S.E.2d 856 (Ct. App. 1997), reh'g denied, (Dec. 22, 1997).

Commercial lessee's failure to pay portion of rent on lease was a breach of lease that prevented its automatic renewal upon expiration, and lessee was thus unable to exercise purchase option in lease after such expiration, where the lease expressly indicated that it could not be renewed if it was in default and that any holding over by lessee upon expiration of the lease was not to be construed as a renewal. *Towe Iron Works, Inc. v. Towe*, 243 S.W.3d 562 (Tenn. Ct. App. 2007), appeal denied, (Jan. 28, 2008).

In action by lessor against assignee of lessee seeking title and possession to leased property, trial court properly determined that assignee was precluded from exercising option to purchase under lease where evidence indicated that assignee breached lease by his failure to make monthly rental payments. *Baugh v Myers* (1981, Tex Civ App 13th Dist) 620 SW2d 909.

Lessee was entitled to specific performance of contract to convey real estate based upon exercise of option to purchase contained in lease where, although there was not strict compliance with terms of contract by plaintiff in that plaintiff arranged to pay off outstanding note rather than to assume it, such departure from contract terms was not material breach of contract. *Advance Components, Inc. v Goodstein* (1980, Tex Civ App 5th Dist) 608 SW2d 737, writ ref n r e.

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[END OF SUPPLEMENT]

§ 5. Option independent of lease

[Cumulative Supplement]

In some cases the courts, having reached the conclusion that the option to purchase and the lease were independent, took the position that a breach of the latter did not preclude the lessee's right to specific performance of the option to purchase.^{NY}

Curry Rd., Ltd. v Rotterdam Realities, Inc. (1993, App Div, 3d Dept) 600 NYS2d 339

So, in *Mathews Slate Co. v New Empire Slate Co.* (1903, CC NY) 122 F 972, an instrument under seal, containing a lease, with power of termination by the lessor in the event of breach of the contract by the lessee, and containing an agreement by the lessor to sell and convey the premises to the lessee on or before a certain date upon the payment of a stated sum, was held to be divided into two parts, each complete in itself and independent of the other. The court stated that by the terms of the agreement the complainant or his assignor at any time after the agreement was signed, on tendering the \$20,000, was entitled to a conveyance of the premises; that the complainant's right to this conveyance was in no way dependent upon the performance or nonperformance of the terms and conditions that the lease contained in the same instrument; that this instrument was under seal and recited a consideration of \$1 and other good and valuable considerations to it in hand paid by the party of the second part as the consideration of the option; that it was probable that the parties to the agreement had in mind the leasing as a part of the consideration, but that this was by no means certain; and that the complainant's right to a conveyance under the terms of the option could not be made to depend upon a performance or nonperformance of the agreement contained in the lease.

In *Cook v Young* (1954, Tex Civ App) 269 SW2d 457, where a lease, containing an option to purchase, provided that the lessees were to pay all water, gas, and other utility bills accruing on the leased property, but there was no such provision in that part of the instrument containing the option to purchase, it was held that the assignees of the lessee were entitled to specific performance of the option. Rejecting the contention that there was a question of fact as to whether the utility bills had been paid, the court stated that the option was unconditionally granted and there was no requirement creating any condition precedent or otherwise limiting the right to exercise the option.

And in *Giblin v Sudduth* (1957, Tex Civ App) 300 SW2d 330, error ref n r e, where a lease gave the lessees an option to purchase at any time within 5 years by the payment of a certain sum in cash, and although the lessees agreed to pay a yearly rental of a stated sum, they failed to pay such sum for the 5 years, it was held that the lessees were entitled to specific performance of the option contract, the court being of the opinion that the option was not conditioned upon the payment of the annual rental, but that the option was for 5 years and the lessees were allowed to take it up at any time within those 5 years by paying the stated sum in cash.

In *Green v Low* (1856) 22 Beav 625, 52 Eng Reprint 1249, where the owner of a plot of ground had agreed to lease the plot to another for 99 years, giving him an option to purchase as soon as he should have erected a villa on the land, the agreement for the lease to be void if the lessee should fail to perform the various terms of the agreement on his part, and where the prospective lessee had erected the villa but insured it in an office and in a name contrary to the provisions of the agreement, it was held that the contract for a lease was independent of the option to purchase and that, notwithstanding the forfeiture of the lease, the option was still in effect, entitling the lessee to specific performance of the contract for sale.

CUMULATIVE SUPPLEMENT

Cases:

Lessees were properly granted specific performance on option to purchase where, although lessees had occasionally breached their lease and violated local landlord-tenant act by failure to pay rent on time and failure to keep premises clean, these were not factors which would prevent tenants' exercise of their purchase option. *Vozar v Francis* (1978, Alaska) 579 P2d 1056.

Lessee had right to exercise option to purchase under lease agreement where assuming, without deciding, that lessee, who had filed petition in bankruptcy, was in breach at time option was exercised because notes, constituting rent, had been discharged by petition, there was no express condition in lease that lessee could not be in default in order to exercise option. *Leisure Sports Invest. Corp. v Riverside Enterprises, Inc.* (1979) 7 Mass App 489, 388 NE2d 719.

Although pasturing of cattle and horses by lessee upon premises best suited for harvesting of hay may have constituted waste of leasehold, lessee was entitled to exercise his option to purchase property where he was ready, willing, and able to pay entire purchase price as specified in option and all rentals at any time most advantageous to lessors. *Phillips v Hill* (Okla) 555 P2d 1043.

Option to purchase in lease will be treated as entirely separate agreement, and unless lease contains express provision to contrary, default under terms of lease will be no defense to action for specific performance of option. *Owens Illinois, Inc. v Lake Shore Land Co.* (1978, WD Pa) 457 F Supp 896 (applying Pa law).

Mere technical breach of lease existed and specific performance of option to purchase was properly granted where breaching party defaulted on payment of one month's rent but had made vigorous attempts to fulfill his obligations under the agreement and had taken steps toward completion of an overall development plan. *Esmieu v Hsieh* (1978) 20 Wash App 455, 580 P2d 1105.

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[END OF SUPPLEMENT]

B. Particular factors or circumstances

§ 6. Time as of essence of contract

[Cumulative Supplement]

In a number of cases the courts have held or recognized that where the lease expressly, or in effect, provided that time should be of the essence of the contract, the option to purchase under the lease agreement was lost by default of the lessee in the performance of the covenants within the time prescribed in the lease.

And in *Brown v Larry* (1907) 153 Ala 452, 44 So 841, where a lease agreement contained an option giving the complainant lessee the right to purchase the land at any time during the term of 5 years, provided he paid the rent "at maturity," and stating that if he failed to do so in any year, he thereby forfeited the right to purchase, it was held that the parties had thus made

Who may enforce option contained in lease for purchase of property, 38 A.L.R. 1162

Legal Encyclopedias

Am. Jur. 2d, Landlord and Tenant §§ 385-387

Forms

11 Am. Jur. Legal Forms 2d, Leases of Real Property §§ 161.15, 161:761- 161:772, 161:1221- 161:1226

16 Am. Jur. Pleading and Practice Forms, Landlord and Tenant, Forms 311-315

Section 1[a] Footnotes:

[FN1] The annotation supersedes that at 115 ALR 376.

[FN2] In order to bring a case within the scope of this annotation, the breach or default of the lessee must have occurred before the attempt to exercise the option to purchase. Thus, for example, cases in which there was an attempt to exercise the option and the lessee subsequently failed to pay the rent are excluded herefrom.

[FN3] For an annotation on the termination of a lease as termination of the option to purchase therein contained, see 10 A.L.R.2d 884.

Section 2[a] Footnotes:

[FN4] See Am. Jur. 2d, Landlord and Tenant § 367.

[FN5] § 3, *infra*.

[FN6] § 4, *infra*.

[FN7] § 5, *infra*.

[FN8] § 6, *infra*.

[FN9] § 6, *infra*.

[FN10] § 8[a], *infra*. For cases reaching a contrary result where the acts of the lessor were held not to be sufficient to constitute such a waiver, see §§ 7 and 8[b] *infra*.

[FN11] § 8[a], 8[b], *infra*. For cases involving acceptance of reduced rent, see § 8[c], *infra*.

[FN12] § 9, *infra*.

[FN13] § 9, *infra*.

Section 2[b] Footnotes:

[FN14] If the lease and the option rest on a common and indivisible consideration, then when the lease falls, the option expires with it. See Am. Jur. 2d, Landlord and Tenant § 367.

On the general question of termination of the lease (especially by forfeiture) as termination of the option, see the annotation at 10 A.L.R.2d 884.

[FN15] Generally, as to requirements of an option to purchase in a lease agreement, see Am. Jur. 2d, Landlord and Tenant § 367.

[FN16] For forms of notice relating to the exercise of an option to purchase in a lease agreement, see 11 Am Jur Legal Forms 2d, Leases of Real Property §§ 161:1222 et seq.

[FN17] See §§ 7- 9, *infra*.

[FN18] See especially the annotation at 10 A.L.R.2d 884.

Section 3 Footnotes:

[FN19] A proposition which few courts, no doubt, would deny.

Section 8[b] Footnotes:

[FN20] Although in this case there was an indication that the acceptance of past-due rent instalments was a waiver of a default as to such rent, the case is apparently not within the scope of this annotation, since the discussion by the court was apparently in regard to the acceptance of past-due rent after the option to purchase was exercised. See *Hafemann v Korinek* (1954) 266 Wis 450, 63 NW2d 835, *supra*.

Section 9 Footnotes:

[FN21] In this connection, see also the cases in §§ 8[a] and 8[c] *supra*, recognizing a waiver of the lessee's default where, rather than taking some action to manifest an intention to terminate the lease, the lessor accepted the agreed upon rent or a reduced rent.

[FN22] Specific performance of an option to purchase under a lease was denied by the Minnesota court in *Wurdemann v Hjelm* (1960) 257 Minn 450, 102 NW2d 811, cert den 364 US 894, 5 L Ed 187, 81 S Ct 222, wherein the court stated that the agreement to abide by the provisions of the lease was made a condition precedent to the option to purchase; that the right of the lessees to purchase the property depended upon the fulfilment of all the covenants and provisions of the lease; and that until they had paid the rent and complied with the other covenants of the lease they had under the contract no right to purchase. However, it is to be noted that the court made the statement in regard to the contention of the plaintiffs that a judgment granting a writ of restitution in a

justice court proceeding was not effective to destroy its rights under the option to purchase. So, although the court did not make any reference to the necessity for some clear and unequivocal act to forfeit the lease, it was not apparently taking a contrary view, since it seems clear that there was a clear and unequivocal act in bringing an action in the justice court.

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APPENDIX D

American Jurisprudence, Second Edition

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Landlord and Tenant

Laura Hunter Dietz, J.D.; Tracy Bateman Farrell, J.D.; Eleanor L. Grossman, J.D., of the National Legal Research Group, Inc.; Alan J. Jacobs, J.D.; Rachel M. Kane, J.D.; Jack Levin, J.D.; Lucas Martin, J.D.; Jeffrey J. Shampo, J.D.; Eric C. Surette, J.D.; and Barb VanArsdale, J.D.

IV. Rights, Duties, and Liabilities of Parties

A. Overview of Particular Powers and Obligations of Landlord and Tenant

1. Obligations When Lease Contains Option to Purchase or Right of First Refusal

a. Leases Containing Option to Purchase, in General

(1) General Considerations

Topic Summary Correlation Table References

§ 296. Whether option is separate from lease**West's Key Number Digest**

West's Key Number Digest, Landlord and Tenant ☞92(1)

The majority view is that an option contained in a lease is inseparable from and an integral part of the whole contract.[1] However, it has also been held that although an option may be treated as part of the lease for reference to the persons and property covered, it is not part of the lease otherwise[2] and is separate and distinct.[3] The principle that an option to purchase is separate from the lease may be established with even greater strength where, for example, the option is embodied in a separate agreement, has separate, additional consideration, and, further, specifically states that the optionee has an unrestricted right to transfer and assign all its rights under the option without the consent of the optionor if the lease cannot be assigned or sublet without written consent of the lessor.[4]

[FN1] Schacht v. First Wyoming Bank, N. A.-Rawlins, 620 P.2d 561 (Wyo. 1980).

[FN2] Owens Illinois, Inc. v. Lake Shore Land Co., Inc., 457 F. Supp. 896 (W.D. Pa. 1978), judgment aff'd, 610 F.2d 1185, 28 Fed. R. Serv. 2d 845 (3d Cir. 1979).

[FN3] Corbray v. Stevenson, 98 Wash. 2d 410, 656 P.2d 473 (1982); Harmann v. French, 74 Wis. 2d 668, 247 N.W.2d 707 (1976).

[FN4] Owens Illinois, Inc. v. Lake Shore Land Co., Inc., 457 F. Supp. 896 (W.D. Pa. 1978), judgment aff'd, 610 F.2d 1185, 28 Fed. R. Serv. 2d 845 (3d Cir. 1979).

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AMJUR LANDLORD § 296

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2009, I caused to be served the foregoing OPENING BRIEF OF APPELLANTS on the following individual in the manner indicated:

Douglas N. Kiger
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3408 South 23rd Street
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(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 15th day of May, 2009, at Gig Harbor, Washington.


KRISTINE R. PYLE