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No. 409437

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

MICHAEL KERSCHNER INC. a Wyoming corporation, AND
DONALD GARDNER, INC., a Washington corporation, dba
MALONE ADDITION INVESTORS, LLC, a Washington limited
liability company,

Appellants

v.

MORRIS MALONE AND VIOLA MALONE, individuals and a martial
community,

Respondents.

APPELLANTS' REPLY BRIEF AND RESPONSE TO
RESPONDENT'S OPENING BRIEF

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY
COURT OF APPEALS
DIVISION II

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INTRODUCTION

Mr. and Mrs. Malone's response contains numerous statements that are not supported by the record. For example:

- Mr. and Mrs. Malone repeatedly claim that MAI orally terminated the REPSA. There is, of course, no such finding of fact or conclusion of law to support that claim. The findings, conclusions, and exhibits prove that it was in fact Mr. and Mrs. Malone who terminated the REPSA.
- Mr. and Mrs. Malone repeatedly claim that notice would be "futile." There is, again, no finding of fact to support that new claim.
- Mr. and Mrs. Malone repeatedly claim that MAI did "not assign error to ... Supplemental Conclusion of Law No.2." But MAI's Opening Brief assigned error to the waiver conclusion in COL 2 (Assignment No. 4), and in Issue No. 8, wrote: "Did the trial court err in Supplemental Conclusion of Law No. 2 by holding that "the plaintiffs waived any right to enforce any requirement of the REPSA that required Defendants to provide notice in a manner other than the notice that was provided by Defendants in this case?"

APPELLANTS' REPLY BRIEF - 1

- Mr. and Mrs. Malone repeatedly claim that section 14(b) of the REPSA "does not state that the Seller has to give any notice whatsoever to the Buyer of its material breach." But section 14(b) actually says: "In the event Seller fails to receive any payment or notice required herein, Seller shall so notify Buyer and Buyer shall then have ten (10) days to cure." As shown in MAI's Opening Brief, MAI failed to make a payment, and Malone terminated the REPSA without ever providing that notice and 10-day cure period.
- Mr. and Mrs. Malone repeatedly claim that MAI has "gone back on its word" and has challenged findings of fact. Again, the statement is untrue. MAI admitted in its Opening Brief that it is not challenging any findings of fact that are actually findings of fact. MAI has only challenged conclusions of law, though some of those conclusions are wrongly titled "findings of fact." It is up to this Court to decide whether the challenged "findings" are actually "findings of fact," and, if they are, then MAI admits they are verities on appeal. However, MAI has

every right to challenge conclusions of law that are mislabeled as findings.

This appeal boils down to this:

The trial court found that: (1) MAI said it would not make the requirement payment until Addendum No. 5 was signed; (2) MAI missed the March 21 payment; (3) the parties continued to negotiate Addendum No. 5 after March 21; (4) Malone sent a letter stating they were terminating the REPSA and retaining all deposits; and (5) Section 14(b) of the REPSA requires written notice of a missed payment and a 10-day cure period.

Mr. and Mrs. Malone claim, and the trial court concluded, that Exhibit 63, an email sent before the deadline for the payment and which does not mention any missed payments (how could it when no payment had yet been missed?), was the only notice required by the contract – even though the parties were continuing to discuss an amendment.

If this Court agrees that Exhibit 63 was sufficient notice under the contract and the law, it should affirm. If it doesn't agree, it must reverse and remand for entry of a judgment in favor of MAI for the return of its deposits.

APPELLANTS' REPLY BRIEF - 3

ARGUMENT

Mr. and Mrs. Malone's response brief mainly relies on two related and unsupported claims: that notice was excused because, first, MAI orally terminated the REPSA, and second, because MAI verbally informed Malone that it would not make any payments on the REPSA until Mr. and Mrs. Malone signed Addendum No. 5 and thus the notice required by the REPSA would have been "futile" and was not required.

A. THE TRIAL COURT DID NOT FIND THAT MAI TERMINATED THE REPSA.

There is nothing in the trial court's findings or conclusions to support Malone's newly devised theory that MAI terminated the REPSA. That Malone was not required to provide notice under section 14(b) because MAI had already terminated the contract is a material fact on which the Malone's had the burden of proof. MAI sued Malone for breach of contract claiming, in part, that Malone's termination was a breach because Mr. and Mrs. Malone never provided the required written notice. Mr. and Mrs. Malone now claim that notice was not required because MAI had previously terminated the REPSA. The burden of proving a prior termination by MAI was on Malone. If there is no express finding upon a

material fact, the fact is deemed to have been found against the party having the burden of proof.”¹ Since there is no finding to support Malone’s new theory attempting to excuse the lack of written notice, this Court must find that MAI did not orally terminate the REPSA.

Moreover, Mr. and Mrs. Malone’s belated attempt to offer a new theory to excuse their lack of written notice is belied by the very findings and conclusions they asked the trial court to sign. FOF No. 28 and Ex. 20 show that it was in fact Mr. and Mrs. Malone who terminated the REPSA. Mr. and Mrs. Malone wrote to MAI and terminated the REPSA. [Ex. 20]

In sum, Mr. and Mrs. Malone cannot now excuse their breach - termination of the REPSA without written notice - by relying on a finding or conclusion that does not exist.

B. THERE IS ALSO NO FINDING TO SUPPORT MALONE’S NEW THEORY THAT NOTICE WOULD HAVE BEEN FUTILE

Mr. and Mrs. Malone, again for the first time, claim that written notice was not required because it would have been futile. But again, the burden of proof was on Malone to prove that fact, and there is no finding of fact that notice would have been futile. As

¹ *Ingle v. Ingle*, 183 Wash. 234, 48 P.2d 576 (1935)

such, the fact is deemed to have been found against Malone as the party having the burden of proof on that fact.²

Moreover, Malone ignores the finding of fact by the trial court that, after March 21, 2008, Mr. and Mrs. Malone and MAI continued to negotiate Addendum No. 5. In other words, (1) MAI said it would not pay until Addendum No. 5 was signed; (2) MAI missed the March 21 payment; (3) the parties continued to negotiate Addendum No. 5; and (4) Malone terminated the REPSA without providing written notice as required by section 14(b). The proposed finding on futility is not only improper and too late, but is not supported by the record. When the parties were negotiating Addendum No. 5, how could notice have been futile?

C. THE REPSA DOES IN FACT REQUIRE WRITTEN NOTICE.

Mr. and Mrs. Malone also want to read section 14(b) out of the REPSA by claiming that the notice requirement is meaningless. They even go so far as to pretend that it doesn't exist, asserting that "section 14(b) does not state that the Seller has to give any notice whatsoever to the Buyer of its material breach." The REPSA, section 14(b) reads: "In the event Seller fails to receive

² See *id.*

any payment or notice required herein, Seller shall so notify Buyer and Buyer shall then have ten (10) days to cure." [Ex. 1]

First, Mr. and Mrs. Malone's position is contrary to how they acted when performing and then breaching the REPSA. Mr. and Mrs. Malone, when they terminated the REPSA, claimed that they had provided written notice and a 10 day cure period, writing "Since more than ten (10) days have passed since that notification of default and your failure to cure this material breach of the Agreement on that date or since, we are retaining all your deposits and declaring the Agreement terminated." [Ex. 20].

Mr. and Mrs. Malone obviously believed that they had to provide written notice and a 10-day cure period. The parties' own interpretation of the contract is the best evidence of what it means.³ That Mr. and Mrs. Malone's termination letter was incorrect in claiming that they had provided notice when in fact they had not does not change the result. The fact is that even Malone understood they had to provide written notice and a 10-day cure period, and there is no written notice of any missed payment in the record.

³ See *Mall Tool v. Far West*, 45 Wn.2d 158, 166, 273 P.2d 652 (1954) ("where there is doubt as to the meaning of a term in a contract, courts generally will give it the construction placed upon it by the parties thereto").

In interpreting contracts, “courts may not adopt a contract interpretation that renders a term absurd or meaningless.”⁴ Courts “impute an intention corresponding to the reasonable meaning of the words used” and give the words used “their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.”⁵

Here, the “Default” section of the contract provides, in mandatory language, that the seller “shall” give notice of any missed payment and the buyer “shall then have ten (10) days to cure.” The only reasonable meaning of the words used is that if there is a missed payment, the seller cannot terminate the contract without first providing notice and the 10 day cure period. In this case, Malone continued to negotiate an amendment to the REPSA, and then terminated it without ever providing that notice. That termination [Ex. 20] was a breach – a violation of section 14 - entitling MAI to the return of its deposit.

CONCLUSION

The following facts require reversal of the trial court:

⁴ *Spectrum Glass v. PUD of Snohomish*, 129 Wn. App. 303, 313, 119 P.3d 854 (2005); *See also Fardig v. Reynolds*, 55 Wn.2d 540, 544, 348 P.2d 661 (1960) (Courts must give effect to words used and not render them “redundant and meaningless”).

⁵ *Hearst v. Seattle Times Co.*, 154 Wn.2d 493, 503 - 504, 115 P.3d 262 (2005).

- Section 14(b) reads: "In the event Seller fails to receive any payment or notice required herein, Seller shall so notify Buyer and Buyer shall then have ten (10) days to cure."

- Section 15(b) provides that "All notices required hereunder and by the terms of this Agreement shall be in writing and shall be sent or delivered to the parties hereto at their respective addresses."

- MAI did not make a payment that was due on March 21, 2008.

- The parties continued to negotiate an addendum to the REPSA after March 21.

- There is no written notice from Malone to MAI of the missed March 21, 2008 payment.

- There is no finding that the notice would have been futile, so this Court must find that notice would not have been futile.

- There is no finding that MAI terminated the REPSA, and in fact the findings and exhibits show that Malone terminated the REPSA.

- There is no finding or conclusion that MAI waived the right to receive notice. As shown in MAI's opening brief, the trial court only found a waiver of the "manner" in which the notice was to

be sent, an irrelevant conclusion not supported by the findings of fact. See Opening Brief § V(F).

- The parties were continuing to negotiate Addendum No. 5 when Malone terminated the REPSA without providing any written notice. That termination was a breach of the REPSA and entitles MAI to the return of its deposits.

MALONE'S CROSS APPEAL MUST BE DENIED

Mr. and Mrs. Malone's cross appeal must be denied. First, the trial Court must be reversed, as explained in MAI's Opening Brief and above, and judgment entered for MAI.

Second, the trial Court did not err in refusing specific performance where the REPSA, section 14(b), limited Malone's remedies to retention of the deposits paid by MAI.

Section 14(b) provides: "In the event of Buyer's Material Breach of this Agreement, any Deposit paid to Seller shall be forfeited to the Seller as their exclusive Remedy." [Ex. 1] And when Malone terminated the REPSA [Ex. 20], he wrote that he was "retaining all your deposits and declaring the Agreement terminated." Malone did retain the \$65,806 paid by MAI.

Malone has previously attempted to get around this clause by arguing it is meaningless since the REPSA does not refer to the

payments made to, and retained by, Malone as "deposits." But as noted, Malone considered them "deposits" when he terminated the REPSA and stated he was "retaining all your deposits." [Ex. 20] And, in any event, even if there was no "deposit" actually paid, the remedies limitation is still binding and enforceable.⁶

In light of the plain language of section 14(b) limiting Malone's remedies, Malone's Cross-Appeal is frivolous and must be denied.

DATED this 29th day of December, 2010

JAMESON BABBITT STITES
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By 
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Attorneys for Appellants

⁶ See *Newcastle Properties v. Shalowitz*, 221 Ill.App.3d 716; 582 N.E.2d 1165 (1991) (holding that were clause limited remedy to "deposits paid by the Buyer," seller was not entitled to amounts not actually paid); See also *Makris v. Williams*, 426 So.2d 1186 (1982).

COURT OF APPEALS
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STATE OF WASHINGTON

BY C
DEPUTY

CERTIFICATE OF SERVICE

I, Patty Schultz, declare as follows:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.
2. On December 29, 2010, I deposited with U.S. Mail a copy of the foregoing Appellants' Reply Brief to be served upon all counsel of record at the following address:

Mr. Stuart C. Morgan
Eisenhower & Carlson, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402

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

DATED: December 29, 2010, at Seattle, Washington.

 Patty Schultz
Patty Schultz