

No. 45743-1-H  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION II

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PHILIP A. NELSON,

Appellant,

v.

ROBERT V. TRENT and JANE DOE TRENT, husband and wife, individual  
and their marital community composed thereof, and SDC HOMES, LLC, a  
Washington limited liability company,

Respondents.

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**BRIEF OF RESPONDENTS**

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

The trial court's ruling should be affirmed. The trial court read the plain provision in the contract and, as a matter of law, correctly determined that the Appellant, Philip Nelson, was not entitled to a stipend unless a home was sold, which is what the Agreement says. Contrary to Nelson's arguments here, there are no "issues of fact" or "ambiguities" requiring a trial and instead, Nelson is trying to enlist the Court's aid in rewriting his Agreement to change the terms under which a stipend was payable. The Court should decline the invitation to change the bargain of the parties and should affirm the trial court's decision.

Appellant, Phillip Nelson, was formerly employed as a "Land Acquisition Manager" for a homebuilder called SDC Homes. Nelson worked in that position for approximately a year before he was terminated for cause in February 2011. Now, in addition to what he was paid, Nelson contends that he is owed over \$400,000 in additional "stipends" for one year's work (plus double damages for alleged willful nonpayment of wages), even though those claimed payments are outside the terms of his Employment Agreement and even though Nelson concedes he had little or

nothing to do with the acquisitions of the properties for which those stipends are claimed.

The trial court granted summary judgment because it was unwilling to rewrite the terms of Nelson's Agreement to broaden the terms under which he would receive a stipend.

And Nelson's claim tried to do exactly that. From time to time, SDC Homes had purchased land. Mr. Nelson's contract specifies that he would be paid a stipend of "\$1,000 per home sold" if SDC built and sold homes acquired through Mr. Nelson's efforts. But SDC Homes was under no obligation to develop that land, or to build homes on it. SDC Homes had the absolute right to simply hold the land, or to trade it for other assets, to use it to satisfy wetlands or other requirements, or to sell it in bulk or individually to other parties. And Nelson had no right to tell SDC what to do with SDC's land. Nelson was employed by SDC Homes, but was not an owner, and Nelson had no contractual or other right to require SDC Homes to take any particular action with regard to land that SDC Homes acquired.

Ultimately, in 2011, SDC Homes and a number of related entities sold their assets to MDC Holdings, a national home builder. As a part of

that transaction, various parcels of land that SDC Homes purchased were sold in bulk to MDC Holdings.

Assuming all of the other conditions in the contract were met, Nelson was entitled to a stipend for homes sold. But Nelson's Agreement does not provide a stipend for any other disposition of the land. Here, Nelson concedes that when the land was transferred to MDC, there were no homes on the lots, and consequently there was not a single "home sold." Nonetheless, he claims should be paid stipends anyway.

On summary judgment, Nelson's attempt to claim stipends for the bulk transfer of the land was rejected by the trial judge, who correctly ruled that this Agreement says what it says – that Nelson's contract specified that stipends were only payable when SDC built and sold a *home* on land acquired through the efforts of Mr. Nelson. Because Nelson was not entitled to stipends for the bulk sales of land, the trial court properly dismissed those claims.

The trial court's ruling reduced Nelson's' claim from over \$400,000 (plus double damages) to only a small claim based on actual home sales (assuming Nelson were to prevail on a variety of other disputed issues). To avoid trying the case over the lesser amounts, since

Nelson planned to appeal the summary judgment ruling, Nelson proposed staying the remainder of the case so that his appeal of the summary judgment could be resolved first. Respondent is confident that the trial court reached the correct decision and does not oppose this approach leading to this interlocutory appeal challenging the trial court's summary judgment order. Nelson's arguments on appeal lack merit and the trial court's ruling should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. Factual Background**

Philip Nelson was employed by SDC Homes as a "Land Acquisition Manager" for slightly over a year during 2010 and 2011. CP 149. Nelson's employment was governed by a written Employment Agreement signed in February of 2010. CP 56-71. Under that Agreement, Nelson was paid a base salary of \$5,000 per month, "plus a stipend of \$1,000 *per home sold* if the land was purchased through Phil Nelson as the Land Acquisition Manager." CP 66 (emphasis added). At his deposition, Nelson admitted that the Agreement requires the sale of a home before any stipend is owed:

Q: (By Mr. Goldfarb) Okay. And what the contract says specifically is that there is no stipend on any lot until there is a home sold. That's what the documents says, correct?

A: Correct.

CP 230.

Nelson's job as a "Land Acquisition Manager" was to identify vacant land suitable for acquisition and development by SDC, and to manage the acquisition of that land. CP 59-60. Nelson played a role in several land acquisitions, and, to the extent that land was developed and homes were built and sold, Nelson was paid the \$1,000 stipends for those projects *when homes were sold*. See CP 50. Nelson admits that in addition to his base salary, he received \$81,000 in stipends, which corresponds with 81 homes sold on land where Nelson was supposedly involved in the acquisition. CP 38.

However, Nelson's performance while at SDC was, in the discretion of his employer, deemed to be subpar. As a few examples:

- Nelson failed to perform the core responsibilities of a Land Acquisition Manger, such as verifying the feasibility of potential acquisitions and conducting market studies. As a result, Mr. Trent and

others at SDC were required to step in and do the work that Nelson was hired and compensated to do. CP 50.

- Nelson was often out of the office and not accountable during normal business hours. CP 50.

- Nelson held a financial interest in a granite fabricating business. CP 222. Although home design was not part of Mr. Nelson's job duties, he frequently injected himself into the home design process by recommending that SDC use his company's granite projects, a misuse of his own time and a distraction to SDC's design staff. CP 50. Nelson also assisted SDC's competitors by providing them with low-cost granite products (CP 223-24), a violation of his duties of loyalty under the Employment Agreement. (CP 62) (Nelson shall not "directly or indirectly engage in or work for any business that provides substantially similar services as provided by SDC Homes, LLC...).

SDC's President, Robert Trent, informed Nelson of his concerns by an email dated January 18, 2011 (CP 73-75), and later met with Nelson to discuss these issues (CP 50). Nelson's job performance failed to improve. On March 6, 2011, Nelson received a notice of termination for cause. CP 29-30. Nelson's Agreement provided that Nelson was an at-

will employee that could be terminated at any time and for any reason. CP 64. Thus there is no dispute the termination was lawful (though there is a dispute, not presently before this Court, as to whether good cause existed).

Meanwhile, as a result of business issues not related to Nelson, Mr. Trent decided to sell the assets of SDC Homes to a national homebuilder called MDC Holdings, Inc. CP 16. Among other assets, SDC conveyed to MDC Holdings several tracts of undeveloped land that SDC had acquired. *Id.* This sale of undeveloped land is the focus of the trial court's ruling and this appeal.

Trent had no ownership or other interest in MDC Holdings, and the asset sale was an arm's length transaction arranged by a business broker. CP 50. Mr. Nelson had no ownership interest in SDC Homes. He was not consulted about the possible transaction with MDC Holdings, and it had nothing to do with him. *Id.* Crucially, Nelson has not alleged that Defendants sold the land in a bad-faith attempt to deprive Nelson of his stipends. Rather, it is undisputed the Defendants sold to MDC Holdings because MDC had made a favorable offer.

## **B. Procedural History**

Nelson filed this action on April 5, 2012. CP 1. Nelson asserts “Employment Claims” against SDC Homes for the unpaid commissions, along with exemplary damages under Chapter 49.52 RCW. CP 4-5. Nelson further seeks personal liability against Mr. Trent for the alleged nonpayment of wages. *Id.* Nelson’s claims are all based upon his reading of his Employment Agreement. *Id.* According to Nelson’s discovery responses, he seeks \$417,000 in commissions arising from SDC’s sales of homes and/or land from nine projects.<sup>1</sup>

On October 4, 2013, Defendants moved for summary judgment based on several theories, including that:

- Most of the properties in questions were not purchased “through” Mr. Nelson because he had no substantial involvement in their acquisition, he was not the procuring

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<sup>1</sup> While investigating Nelson’s accusations, SDC learned that, while still an employee, Nelson had requested, and obtained, commissions for several home sales to which he was not entitled. CP 51-52. Accordingly, SDC has counterclaimed for the return of those commissions. CP 29-30. The counterclaim is not at issue in this appeal.

cause, and SDC had used an outside broker for those properties.

- Nelson was properly terminated for cause, and under the contract's termination provision, that termination ended all rights to further stipend compensation.
- The contract only provides for a stipend upon the sale of a home by SDC, meaning that the bulk sales of land to MDC Holdings were not commissionable.

CP 36-48.

The trial court heard the summary judgment motion on November 22, 2013. CP 578-581. The trial court agreed with Defendants that, as a matter of law, Nelson could not obtain stipends based on the bulk land sales because the contract specified that stipends were payable only upon the sale of homes. *Id.*

Because the bulk land sales accounted for the lion's share of Nelson's claims, this partial summary judgment order dramatically reduced the size of Nelson's claim. The parties agreed that it was not worth trying the case for this reduced amount when Nelson would inevitably appeal the dismissal of the bulk sale claims. Therefore, the

parties stipulated to a stay of the case while Nelson sought review of that portion of the ruling, and the trial court certified the dismissal as a final order under CR 54(b). The other elements of the trial court's ruling are not presently under appeal.

### **III. ARGUMENT**

The trial court correctly dismissed Nelson's bulk sale claims. Nelson's Employment Agreement does not provide for compensation when SDC Homes sells vacant land in bulk. Rather, Nelson, who holds himself out to be a sophisticated real estate professional, entered into a contract which only provides stipends upon sales of homes by SDC. Despite receiving ample compensation for his year of work with SDC, Nelson in this lawsuit attempted to expand the contract to provide payments outside of the contract terms. But Nelson's attempt to rewrite his Agreement violates the well-established rule that a court cannot make a contract for parties which they did not make for themselves. *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279, 1284-85 (1980). The contract says what it says, and the trial court was correct in dismissing the claims for a stipend for the bulk sale of vacant land.

**A. The Agreement is Unambiguous**

Nelson attempts to claim that his Agreement with SDC is “ambiguous.” But simply because he has proffered a self-serving reading of the contract it does not create an ambiguity. *See Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323, 1326 (1995) (“A provision, however, is not ambiguous merely because the parties suggest opposing meanings.”). Rather the trial court properly concluded that the unambiguous language of the Employment Agreement required a sale of a home before Nelson was owed a stipend.

“Interpretation of an unambiguous contract is a question of law. If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.” *Mayer*, 80 Wn. App. at 420 (citations and quotation marks omitted). “If the language is clear and unambiguous, the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists.” *Lehrer v. State, Dep't of Soc. & Health Servs*, 101 Wn. App. 509, 515-16, 5 P.3d 722, 726 (2000). “An ambiguity will not be read into a contract where it can reasonably be avoided.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971, 974 (1983).

Nelson agreed that he would be paid “a stipend of \$1,000 *per home sold* if the land was purchased through Phil Nelson as the Land Acquisition Manager.” CP 66 (emphasis added). His Agreement does not address the absolute right of SDC to do something else with the bulk land it held. SDC could hold its land, sell it in bulk, trade it, leave it undeveloped (*e.g.*, for an open space tract) or develop it in some fashion. Nelson had no right to control or dictate what SDC chose to do with its property.

Nelson would receive a stipend only upon the sale of a home – essentially a profit sharing mechanism, where if SDC later decided to build and sell a home, at the time of sale, Nelson would receive the stipend. But nothing in his Agreement provided for the payment of stipends if there was a subsequent bulk sale of land to a third party. As the trial court noted, the parties were obviously capable of distinguishing between homes and land, because they did so within the very sentence at issue. CP 66 (“*per home sold* if the *land* was acquired...”) (emphasis added). Thus there can be no argument that the parties did not mean “*per home sold*” to require the sale of a home.

Nelson attempts to broaden the contract to provide that, Nelson's stipend was somehow *earned* when SDC purchased the land in question, but only *payable* when SDC sold homes. But there is simply nothing in the language of the contract to support that conclusion. The stipend provision says "\$1,000 per home sold," and if there are no homes sold, there is no compensation due. There is simply no textual basis for an "earned" versus "payable" distinction – the contract does not say anything about Nelson "earning" a stipend before the stipend is payable.

At the hearing, the trial judge raised a compelling argument against Nelson's theory that the commission was "earned" before payment was required under the contract: what if SDC Homes acquired a certain parcel, but was unable to develop some or all of it? (The trial court used the example of an unforeseen wetlands problem). The trial court cited this example when it rejected Nelson's claim that stipends for the entire property would have been "earned" upon acquisition, even if SDC could not ultimately sell homes or do anything else productive with that property.

Finally, Nelson attempts to argue that the phrasing "per home sold" is not a condition that must be satisfied before Nelson is entitled to a

stipend. But Nelson’s argument is just another attempt to ignore the specific provisions in the Agreement. A condition precedent is essentially an “on switch” that trigger’s a party’s obligation to perform some particular obligation forth in the contract. In *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 79, 96 P.3d 454, 457 (2004) (relied upon by Appellant), a real estate purchase agreement contained a condition precedent stating that the purchase was conditional to the seller obtaining plat approval. There, the Court recognized that the occurrence of the condition precedent was required to trigger the separate obligation of the buyer to pay the purchase price as set forth in the contract. *See id.* at 79. (“It is clear that NW's failure to procure final plat approval excused O'Connor from any contractual obligations.”).

Here, the “per home sold” language does not control simply *when* SDC is obligated to perform some defined obligation – rather, it controls what SDC’s underlying obligation is. Again, if SDC sold no homes, it cannot be liable for any stipends under the contract.<sup>2</sup>

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<sup>2</sup> Nelson offers a few examples of common usage of the word “per”: “miles per gallon” and a minimum wage of “\$15 per hour.” Appellant’s Brief at 10-11. A car that traveled zero miles would use zero fuel, and a worker who worked zero

Nelson also attempts to analogize to a real estate commission, arguing that a real estate commission can be earned at the time of the contract, even if a later sale is not closed. But Nelson’s argument fails for at least two reasons, addressed in further detail below. First, this is not a case involving real estate commissions. And second, even in that situation, the Court must look to the actual agreement to understand the particular circumstances under which a commission is triggered. As is well recognized, parties can make specific agreements in specific circumstances to determine what commissions are owed.<sup>3</sup> Nelson simply cannot avoid the language of his Agreement with SDC—the stipend is

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hours would receive zero wages. So too here—zero home sales mean zero stipends.

<sup>3</sup> It is commonplace for commission agreements to establish certain contingencies that must occur before the commission is owed, and the law does not disfavor such agreements. See, e.g., *Harding v. Rock*, 60 Wn.2d 292, 301, 373 P.2d 784, 789 (1962) (“Accordingly, we hold that the duty of appellants to pay a broker’s commission was conditional upon the consummation of the transaction or closing of the sale, and that appellants did not assent to pay respondent for services rendered.”); *Todiss v. Garruto*, 34 N.J. Super. 333, 338, 112 A.2d 285, 287 (App. Div. 1955) (“a broker may, by a special agreement with his principal, contract to fix definitely or to postpone the time of the payment of his commission or, indeed, conditionally make his compensation entirely dependent on a stated contingency”) (emphasis added); see also *Ekman v. United Film Serv., Inc.*, 53 Wn.2d 652, 653, 335 P.2d 813, 814 (1959) (“We know of no legal prohibition which prevents competent parties from contracting as to the terms and conditions under which unaccrued, prospective, and contingent commissions shall be paid.”). Nelson offers no authority, and we have seen none, where a court has held that the commission is “earned” and payable despite the non-occurrence of a clear contingency stated in the commission agreement.

payable upon the sale of a home. Nelson cannot read that out of his contract no matter how hard he tries.

**B. Nelson’s Economic Rationale Argument Fails**

Nelson next turns to supposed extrinsic evidence, arguing that the alleged economic rationale for Nelson’s incentive compensation – SDC’s cash flow considerations – supports the theory that Nelson “earned” his stipends when land was acquired, even if homes were never sold. As a threshold matter, the court need not and should not rely on extrinsic evidence to rewrite the unambiguous contract provision. But Nelson’s argument does not hold water anyway.

It is common for employees and employers to agree to incentive compensation or bonus compensation. Stock options in a high-tech start-up are a prototypical example, as are bonuses based on overall performance of the company. And while compensation arrangements come in all shapes and sizes, in many cases the incentive compensation is not tied directly to the employee’s individual job performance, but rather to some broader metric for the health or success of the business. To continue the example, suppose a particular employee at a high-tech start-up with a profit sharing plan does an exemplary job, but the company does

not earn any profits (because of bad market conditions, or because the employer chooses to re-invest its earnings into expansion). The employee cannot possibly say that, because he did his job well, he “earned” additional compensation, and the company must pay it even though the agreed-upon condition did not occur.

But that is the essence of Nelson’s argument – that because he allegedly fulfilled his duties as Land Acquisition Manager, he “earned” his compensation even if the agreed-upon condition of home sales did not occur. Nelson’s argument does not make logical sense, and it is certainly not a sufficient basis for the Court to overlook the unambiguous contract language requiring a home sale.

**C. Nelson’s “Excuse of Performance” Argument Fails**

Nelson’s final argument is that, because Defendants made the decision to sell the land to MDC Holdings rather than build houses on it, they are liable for the stipends because they caused the non-occurrence of the contingency.

To begin with, Nelson’s argument again defies common sense. Under Nelson’s view of the law, a company would be liable to pay every

contingent bonus as long as the employee could show that it was somehow potentially within the power of the company to meet the conditions, even if that was not in the best interest of the company. As an example, suppose a professional athlete has an incentive clause stating that he will receive an extra \$1 million bonus if he starts in 80% of the team's games. Even if the player was playing poorly and did not deserve a starting role, under Nelson's interpretation of the law, as long as the team *could* have started that player, it would have to pay the bonus regardless.

But, as discussed below, the applicable legal standard is different. The real standard is that Nelson must show the employer acted unlawfully or in bad faith to defeat the payment. Here, Nelson would have to show that SDC's decision to sell to MDC was for the explicit purpose of avoiding Nelson's stipends. Nelson knows that is not true and made no such argument below nor could he because there is no evidence that Defendants acted in bad faith when the land was sold in bulk.

1. The Applicable Standard is Bad Faith

As Nelson admits, the on-point cases hold that when a party makes a decision that causes a contingent payment event to not occur, it is only liable if acted *improperly*. As one court explained:

The principle of law is that the condition upon which the payment of the commission is contractually made to depend is rendered legally inoperative only where the vendors have indulged in some *affirmative act* to hinder or prevent the consummation of the contract of sale.... the law disables a vendor from escaping liability to the broker by invoking the contingency clause where the non-performance of the contract of sale is attributable to the *malfeasance or fraudulent, arbitrary, or capricious conduct* of the vendors...

*Todiss v. Garruto*, 34 N.J. Super. 333, 339-42, 112 A.2d 285, 288 (App. Div. 1955) (emphasis added).

The California case of *Dunne v. Combe* is illustrative of this rule. 192 Cal. 740, 221 P. 912 (1923). That case concerned a broker's contingent commission agreement, which specified the commission would not be owed until the buyer had paid for the property at issue. *Id.* at 742. The buyer and seller had entered into a purchase and sale agreement, but before money was exchanged, they mutually decided to abandon that agreement and enter into an alternate arrangement that was not subject to the commission. *Id.* The broker attempted to recover the commission from the seller, claiming (much like Nelson) that "by agreeing to abandon the first contract," the seller was "the cause of the purchaser's failure to perform the same." *Id.* But the court rejected that claim:

To render such cancellation an act of prevention entailing the consequence claimed by respondent ***it must be without legal justification***. Where the vendee is in default, there is no longer any legal obligation on the vendor to proceed with the performance of the contract. The law gives him the right to regard the contract as at an end. The law prescribes no penalty for the exercise of this right. The default of the vendee, with the consequent destruction of the right of the broker to his commission, was a ***contingency inherent in the contract, the risk of the occurrence of which was assumed by the broker***.

*Id.* at 745 (emphasis added).

The court in *Todiss* reached an identical conclusion under the same fact pattern:

The brokerage contract with which we are here concerned clearly manifests the definite intention of the parties that the commission was to be “contingent upon the transaction being consummated and in the event that said transaction is not consummated then and in that event no commission shall be payable to said brokers.”

We are not persuaded that in the circumstances of the present case the conduct of the vendors in entering into the agreement of compromise participated in the hindrance or prevention of the consummation of the contract of sale within the application of the legal principle akin to that of waiver.

*Todiss*, 34 N.J. Super. at 342.

Under Washington law, the principle described in *Dunne* and *Todiss* is best characterized as an application of the implied covenant of

good faith and fair dealing. “The covenant of good faith applies when the contract gives one party discretionary authority to determine a contract term, but it does not apply to contradict contract terms.” *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628, 632 (1997). In this case, SDC Homes had discretion as to whether, how and when houses would be built. It was therefore under a duty not to act in bad faith when exercising that discretion—that is, to not intentionally manipulate events in order to deprive Nelson of a stipend he otherwise would have earned.

But Nelson concedes that is not what happened here. SDC Homes made a legitimate business decision to sell its assets, including the bulk land rather than to build homes. SDC can hardly be criticized because it received a favorable buyout offer during a trying economic time for the housing market. Nelson has not even alleged that the sale to MDC Holdings was done in an attempt to deprive him of commissions. Absent an allegation of bad faith, as in *Dunne*, Nelson assumed the risk that he would not get paid a stipend if homes were not sold.

2. Nelson’s Analogy to Brokerage Cases is Misplaced

To rebut Defendants’ argument, Nelson heavily relies on analogy

to various real estate brokerage cases, in which courts have held that when a broker finds a buyer (or seller) but the principal decides not to close, the principal is liable for the commission anyway. *See, e.g., Bloom v. Christensen*, 18 Wn.2d 137, 142, 138 P.2d 655, 657 (1943). But those cases are inapt for the following reasons.

First, Nelson has previously argued that his job was *not* that of a real estate broker and that legal presumptions regarding compensation of brokers do *not* apply to his Agreement. Nelson has admitted that he is not the procuring cause of nearly all of the properties at issue, which would be the end of his claims if the real estate agent procuring cause standard applied.<sup>4</sup> To avoid this outcome, Nelson stated in a declaration:

First, during the negotiations leading up to the Employment Agreement, there was absolutely no discussion that the stipend would be conditioned on me being the “procuring cause” or identifying a property as a target for acquisition. Procuring cause is a basis for compensating outside agents. That ***I was not to be compensated on the same terms as an outside agent*** is clear from the fact that the original version of the Employment Agreement referred to me as the

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<sup>4</sup> “A real estate broker is entitled to a commission when he or she procures a purchaser who is accepted by the principal and with whom the principal enters into a binding, enforceable contract. The broker must set in motion the series of events culminating in the sale ‘and, in doing so, accomplish what he undertook under the agreement.’” *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 776, 875 P.2d 705, 709 (1994) (citations omitted).

“vacant land real estate agent” which was stricken out and replaced by the term “Land Acquisition Manager.”

CP 80. His attempt to now selectively apply real estate agency law is not persuasive.

Second, while the law supplies a “general rule” on when a broker’s commission is earned, the parties are free to contract by adding additional contingencies for payment. In *Bloom*, which Nelson relies upon, the court applied the general rule and found that the commission was earned upon procurement rather than closing. 18 Wn.2d 137. But in cases where the parties added additional contingencies that must be met before the broker is paid, the courts have enforced those contingencies. See *Harding v. Rock*, 60 Wn.2d 292, 301, 373 P.2d 784, 789 (1962) (“we hold that the duty of appellants to pay a broker's commission was conditional upon the consummation of the transaction or closing of the sale, and that appellants did not assent to pay respondent for services rendered”); *Todiss*, 34 N.J. Super. at 338 (“a broker may, by a special agreement with his principal, contract to fix definitely or to postpone the time of the payment of his commission or, indeed, conditionally make his compensation entirely dependent on a stated contingency”).

Here, in their Agreement SDC Homes and Nelson conditioned any stipend on the requirement that there be a *home sold*. Nelson does not argue, and no law suggests, that the parties were legally precluded from structuring Nelson's stipend as they did. *See Ekman v. United Film Serv., Inc.*, 53 Wn.2d 652, 653, 335 P.2d 813 (1959) ("We know of no legal prohibition which prevents competent parties from contracting as to the terms and conditions under which unaccrued, prospective, and contingent commissions shall be paid.").

Thus, even if the "general rule" in real estate commissions applied, that rule simply has no relevance when the parties have chosen to impose an additional contingency, as is the case here.

#### **IV. CONCLUSION**

For the reasons stated above, the trial court was correct in dismissing Nelson's claims regarding stipends for bulk land sold to MDC Holdings. That ruling should be affirmed.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of April, 2014.

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## DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury, under the laws of the State of Washington, that on April 18, 2014, I caused the service of the foregoing pleadings by electronic mail each and every attorney of records herein:

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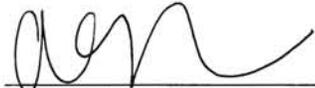
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DATED this 18<sup>th</sup> day of April, 2014 at Seattle, Washington.

  
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Angela Trinh