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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 294218

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION NO. III

JOHN K. EACHO

Respondent/Plaintiff

vs.

GUSTAFSON & HOGAN, P.S., INC.,

Appellant/Defendant

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The Appellant, Gustafson & Hogan, P.S. ("GH") did not breach its contract with the Respondent ("Mr. Eacho"). To avoid this conclusion, Mr. Eacho relies on flawed reasoning, which was adopted by the trial court.

As his first premise, Mr. Eacho relies on one provision in the Closing Agreement: that GH was to "receive" and "hold" documents "as necessary to close the transaction." (CP 98.) *Resp't Br.* at 9, 13.

As his second premise, Mr. Eacho references the "Addendum to Purchase and Sale Agreement," which states in pertinent part:

2. Insurance Contingency. This Agreement is contingent upon Buyer obtaining "Acceptable Insurance."

(CP 67.) *Resp't Br.* at 8-10 (citing trial court's findings of fact). The Addendum contains a specific definition of "Acceptable Insurance":

For purposes of this provision, Acceptable Insurance means a preferred replacement type insurance policy issued by an admitted insurer in the State of Washington that either:

- a. Is a preferred insurance policy with an initial annual premium rate not exceeding \$_____ (1/2 of one percent of the purchase price for the Property if not filled in); or

b. Is issued at the carrier's preferred insurance rates filed with the Washington State Insurance Commissioner.

(CP 67.)

As his third premise, Mr. Eacho references certain covenants and agreements made by *Grantor Barbara Uribe* in the Deed of Trust to procure an insurance policy designating Mr. Eacho as the loss payee. (CP 93-94.) *Resp't Br.* at 11 (quoting trial court's findings of fact).

As his fourth premise, Mr. Eacho references an obligation of the buyer, Ms. Uribe, to procure insurance and provide evidence of the insurance coverage to GH if a new policy of fire insurance was necessary to close the transaction. (CP 101.) *Resp't Br.* at 11-12 (quoting trial court's findings of fact.)¹

From these premises, Mr. Eacho concludes that **GH** breached its contract with Mr. Eacho. This non-sequitur establishes nothing. Because Mr. Eacho's "receive-and-hold-documents-of-acceptable insurance" theory is untenable, reversal of the trial court's decision that GH breached its contract with Mr. Eacho is warranted.

Mr. Eacho asserts his "receive" and "hold" theory throughout the breach of contract portion of his response brief. *See Resp't Br.* at pp. 4, 9,

¹ An unstated premise is that GH did not have proof of an insurance policy listing Mr. Eacho as loss payee before closing the real estate transaction.

10, 13, 16, 17, 18, 19, and 20. In particular, Mr. Eacho claims that the above-referenced insurance contingency was not "waived" through his or Ms. Uribe's actions, but was actually "satisfied." *Resp't Br.* at 13-16. The Addendum to Purchase and Sale Agreement specifically states that the insurance contingency may be –

Waived – if the buyer (Ms. Uribe) fails to make complete application for acceptable insurance no later than five days after January 27, 2007; or

Deemed Satisfied – unless within 14 days after January 27, 2007, the buyer (Ms. Uribe) gives notice of an inability to obtain acceptable insurance to the seller.

(See CP 67 at ¶¶3, 4.)

Regardless of whether the contingency of Ms. Uribe obtaining "acceptable insurance" was waived or satisfied, the same result follows. If it was waived, "acceptable insurance" was no longer a condition precedent to the Purchase and Sale Agreement. If it was deemed satisfied, then GH "receiving" or "holding" documentation indicating the existence of "acceptable insurance" would be unnecessary to close the transaction. Any ostensible duty to "hold" and "receive" such insurance documentation therefore evaporates. The law never requires performance of a vain and useless act. *State v. National Mercantile Co.*, 87 Wash. 108, 151 P. 244

(1915). Mr. Eacho's argument that satisfaction of the insurance contingency establishes GH's liability for breach is misplaced.

The Addendum to Purchase and Sale Agreement clearly addresses the rights and obligations of Mr. Eacho and Ms. Uribe regarding the procurement of "acceptable insurance." No ambiguity infects the Addendum or any related closing document. Nor was it permissible for the trial court to inject into the contracts obligations between the parties that never existed. *King v. Bilsland*, 45 Wn. App. 797, 800, 727 P.2d 694 (1986). Substantial evidence does not support the trial court's finding that GH somehow breached its contract with Mr. Eacho.

II. CONCLUSION

Based on the foregoing argument and authorities and that set forth in GH's Opening Brief, GH respectfully requests that the trial court's findings and conclusions be REVERSED, and that the matter be remanded for a new trial.

In the alternative, if a new trial is not ordered, GH respectfully requests that the trial court's award of attorney fees, costs and pre-judgment interest be VACATED. If the Court determines that some award of attorney fees/cost is appropriate, GH asks that the matter be remanded to the trial court for segregation of fees/costs between the contract claim and the negligence claim.

RESPECTFULLY SUBMITTED this 19th day of September, 2011.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 19 day of September, 2011, I caused to be delivered a copy of the foregoing to the undersigned:

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VIA REGULAR MAIL []
VIA CERTIFIED MAIL []
VIA FACSIMILE []
HAND DELIVERED

Dated at Spokane, Washington this 19th day of September, 2011.

J. Schausch, 39393
for: CHRISTOPHER J. KERLEY, WSBA #16489