

No. 307921

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

FILED

KATHLEEN G. KILCULLEN, RESPONDENT,

FEB 25 2013

v.

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CALBOM & SCHWAB, P.S.C., APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT OF DOUGLAS
COUNTY, STATE OF WASHINGTON
Superior Court Case No. 10-2-00359-0
The Honorable John Hotchkiss, Judge of the Superior Court

APPELLANT'S REPLY BRIEF

Robert L. Carey, WSBA No. 32261
Kristin L. Bremer, WSBA No. 43899
Attorneys for Appellant Calbom & Schwab, P.S.C.
TONKON TORP LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204
Carey d.d.: 503.802.2032
Carey fax: 503.972.3732
Bremer d.d.: 503.802.2154
Bremer fax: 503.972.3854

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. LEGAL ARGUMENTS IN REPLY	2
A. The Trial Court Erred By Resolving Disputed Facts Related to the Loan Agreement In Favor of the Moving Party	2
1. The loan agreement is conditioned on financial benchmarks, not on employment status.	2
2. The loan agreement does not require payment in four months.....	4
B. "Reasonable Time" is a Question of Fact to be Resolved by a Jury	5
C. "Loss of Consideration" Has No Basis in Law or Fact. ...	6
D. The Loan Agreement is Not "Illusory"	8
E. Equitable Remedies Not Allowed if Contract is Valid.....	12
III. CONCLUSION.....	13

TABLE OF AUTHORITIES

CASES

<i>Automotive United Trades Organization v. State</i> , ___ Wash.2d ___, 286 P.3d 377 (October 4, 2012).....	4
<i>Hamlin v. Steward</i> , 622 N.E.2d 535 (Ind. App. 1993).....	10, 11, 12
<i>King County v. Taxpayers of King County</i> , 133 Wash.2d 584, 949 P.2d 1260 (1997) (en banc).....	9, 10
<i>Merchants' Bank of Canada v. Sims</i> , 122 Wash. 106, 209 P. 1113 (1922).....	3, 7
<i>Omni Group, Inc. v. Seattle- First National Bank</i> , 32 Wash.App. 22, 645 P.2d 727 (1982).....	10
<i>Pepper & Tanner, Inc. v. KEDO, Inc.</i> , 13 Wn.App. 433, 535 P.2d 857 (1975).....	5
<i>Peterson v. Kitsap Community Federal Credit Union</i> , ___ Wn. App. ___, 278 P.3d 27 (October 23, 2012).....	13
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960).....	14
<i>Robertson v. Wilson</i> , 121 Wash. 358, 209 P. 841 (1922).....	6
<i>United Iron Works v. Wagner</i> , 89 Wash. 293, 154 P. 430 (1916).....	6

I. INTRODUCTION

It is undisputed that the shareholders of Calbom & Schwab ("C&S") – including Kathleen Kilcullen ("Kilcullen" or "Plaintiff") – have loaned the firm money over the years and all parties agreed that the loans would be repaid when the firm achieved certain financial benchmarks. Despite the undisputed contract terms, Kilcullen contends that C&S should have repaid her loans when she was terminated. Kilcullen's attempt to change the terms and conditions of the loan agreement, at a minimum, constitute a dispute of material facts, which must be resolved in favor of C&S, the non-moving party, on summary judgment.

The trial court erred when it held that C&S breached the loan agreement when it did not repay Kilcullen's portion of the loans upon her termination – thereby improperly adopting the moving party's version of the disputed facts. In addition to misapplying the standard for summary judgment, the trial court also misapplied several basic principles of contract law. First, the trial court erred by adding a new condition to the contract to which the parties did not agree (that the loan would be repaid at termination). Second, the trial court erred when it inserted a time in which C&S was required to repay the loan (four months from the date of the Revised Order (CP 92-94)) because (1) it was not a term agreed to by the parties and (2) to the extent the contract is indefinite as to duration of time,

there is a dispute of facts as to what constitutes a "reasonable time," which must be viewed in the light most favorable to C&S, the non-moving party. Third, the trial court erred by applying the principles of "illusory promise" and "unjust enrichment" to a valid, enforceable contract. The trial court's ruling is inconsistent with Washington law and should be overturned.

II. LEGAL ARGUMENTS IN REPLY

A. The Trial Court Erred By Resolving Disputed Facts Related to the Loan Agreement In Favor of the Moving Party.

The trial court erred when it determined that Kilcullen was entitled to repayment under the loan agreement because her employment ended. The trial court erred in two ways. First, the trial court erred by adding a term to the loan agreement that was not agreed to by the parties – that termination of employment would trigger payment. Second, the trial court erred by inserting a "reasonable time" for C&S to pay. Both of these findings are disputed questions of fact, and must be viewed in the light most favorable to C&S, the non-moving party.

1. **The loan agreement is conditioned on financial benchmarks, not on employment status.**

The record before the Court is undisputed that the loan repayment was conditioned on C&S reaching certain financial benchmarks. (CP 25, 28-30, 31-35). Further, the record contains no evidence of any intent to condition the loan repayment on continued employment. Because the

record is undisputed that the contract requires repayment of the loans only when financial benchmarks are met, the contract must be enforced according to its terms. *Merchants' Bank of Canada v. Sims*, 122 Wash. 106, 113, 209 P. 1113 (1922). The Washington Supreme Court has said,

Parties are at liberty to refer to and adopt any lawful [terms] as part of their contract; and where the language of the contract stipulates for performance according to a specified [term], the courts will enforce the contract in accordance with the [term] so incorporated. *Merchants' Bank of Canada v. Sims*, 122 Wash. 106, 209 P. 1113 (1922).

Here, there is no dispute about the financial benchmark provision, and Kilcullen has never denied that the repayment was conditioned on attaining the financial benchmarks. (CP 25). Yet, Kilcullen attempts to insert a new term into the loan agreement that a condition of performance is based on employment status. (CP 15-18). Kilcullen's position is belied by the uncontroverted evidence and her own admissions. At a minimum, Kilcullen's contradictory positions about the terms of the contract create an issue of fact to be resolved by a jury.

Based on the record, the trial court did not have the authority to disregard an undisputed term of the contract, nor did the trial court have the authority to insert a new condition that loans must be repaid at the end of employment. Therefore, the trial court erred when it resolved the

disputed facts in favor of Kilcullen, the party seeking summary judgment. *Automotive United Trades Organization v. State*, ___ Wash.2d ___, 286 P.3d 377, 379 (October 4, 2012), *en banc.*; CR 56(c) (summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”).

2. The loan agreement does not require payment in four months.

The trial court erred by ordering that C&S repay the loan to Kilcullen within four months of the Revised Order. The trial court lacked authority to insert a "reasonable time" for performance into the contract because it was sufficiently definite as to timing of performance.

Kilcullen argues that the trial court was justified in reaching its decision because a long time had passed since Kilcullen loaned money to C&S. Specifically, she argues that "[b]y the time that the trial court issued its Order, thirty-nine (39) months had passed since Kilcullen's last loan to Calbom & Schwab. The record shows Kilcullen loaning her money back to Calbom & Schwab since 2002. With the Order, Calbom & Schwab was given an additional four (4) months to perform." (Response 9-10.) What Kilcullen fails to acknowledge is that she is similarly situated to all of the shareholders who also have loaned money to the firm since 2002 and who

also have not received repayment of the loan because the financial benchmarks have not been met. To determine a "reasonable time," the trial court made no consideration as to the other shareholders that are bound by the same agreement. It is clear that the trial court inappropriately inserted a "reasonable time" provision into the loan agreement that only applied to Kilcullen, but does not apply to the other similarly situated shareholders. Apparently, Kilcullen – and the trial court – believe that the contract can be interpreted one way as applied to Kilcullen and a different way as applied to the other shareholders. There is no legal basis for this confounding approach to contract interpretation.

B. "Reasonable Time" is a Question of Fact to be Resolved by a Jury.

To the extent the loan agreement was indefinite as to the time of performance, the only conceivable time in which the trial court could have properly inserted a reasonable time (four months or otherwise), was after all conditions had been satisfied (the financial benchmarks met).

Assuming that the oral contract at issue was ambiguous for lack of definite duration of time, a reasonable time is to be determined by the nature of the contract, the propositions of the parties, their intent, and the circumstances surrounding performance. *Pepper & Tanner, Inc. v. KEDO, Inc.*, 13 Wn.App. 433, 435, 535 P.2d 857 (1975). "[I]n as much as the contract [is] silent as to the time of performance, the law implies a

reasonable time to perform the contract, and what was or is a reasonable time under the circumstances and within the contemplation of the parties was a question of fact to submit to the jury upon competent evidence, and not a question of law." *United Iron Works v. Wagner*, 89 Wash. 293, 300, 154 P. 430 (1916) (emphasis added). "[T]he question of what is a reasonable time is one of fact and to be determined as such." *Id.*

Here, the trial court made no factual findings on the issue of a reasonable time for performance – which is essential to any determination. Instead, the trial court merely adopted Kilcullen's version of "facts" as to what constituted a reasonable time to repay the loans. At a minimum, there is a dispute of material fact as to the reasonable time issue, making summary judgment inappropriate. *See also Robertson v. Wilson*, 121 Wash. 358, 361, 209 P. 841 (1922) ("It is a matter of law for the court when it depends on the construction of a contract in writing or upon the undisputed extrinsic facts, *and a question of fact for the jury when it depends on facts extrinsic to the contract, and which are matters in dispute.*" (emphasis added)).

C. "Loss of Consideration" Has No Basis in Law or Fact.

The trial court erred when it granted summary judgment to Kilcullen based on a "loss of consideration" theory. As C&S stated in its Opening Brief, Kilcullen has not provided any authority to support her

argument that the *valid* loan agreement is rendered *invalid* for "loss of consideration" when her employment ended. In her Response Brief, Kilcullen does not dispute this statement – and she does not provide any cogent authority for either her position or the trial court's ruling. Thus, the trial court erred when it adopted Kilcullen's "loss of consideration" theory that has no basis in law.

Moreover, the trial court erred by adopting Kilcullen's version of the facts – loss of employment constituted "loss of consideration" – that were unsupported by the record. In her Response Brief, Kilcullen does not dispute that the loan agreement was supported by consideration, in that she gave up the right to use her money by loaning it to C&S in exchange for the right to earn interest on the loan (i.e., a benefit to the Promisor), and C&S promised to pay interest on the money borrowed (i.e., a detriment to the Promisee). Nor does Kilcullen dispute that the exchanged promises described above are adequate consideration to form a valid contract. *See, e.g., Merchants' Bank of Canada v. Sims*, 122 Wash. 106, 114, 209 P.1113 (1922) ("Courts will not ask whether the thing that forms the consideration does, in fact, benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him.") (internal quotes and cites omitted)).

Nevertheless, Kilcullen attempts to modify the loan agreement to accommodate her changed circumstances. Now, Kilcullen wishes that continued employment had been an expressed part of the consideration, but it was not. The record is undisputed that, at the time the contract was bargained for, employment status was not the basis of the consideration.

Regardless, before the trial court could determine whether Kilcullen's loss of employment constituted the "loss of consideration" – assuming that such a legal fallacy were valid – the trial court was required, as a preliminary matter, to acknowledge the dispute of material facts as to whether employment was consideration for the loan agreement and to view the disputed facts in the light most favorable to C&S. This the trial court failed to do. Instead, the trial court erred by misapplying contract law under a fictitious "loss of consideration" theory, and further erred by misapplying the summary judgment standard by resolving the conflicting facts in favor of the moving party.

D. The Loan Agreement is Not "Illusory."

The trial court also erred in ruling that the loan agreement was an "illusory promise" and, therefore, not enforceable. First, this finding contradicts the trial court's initial ruling that the contract was valid and enforceable. Second, the concept of "illusory promise" was misapplied.

Kilcullen argues that the loan agreement was an "illusory promise" because C&S has control over its reserve account and discretion to determine whether the financial benchmarks are achieved. Kilcullen's illusory promise argument is premised on her unsupported speculation that C&S will act in bad faith to prevent the financial benchmarks from being met.

None of the authorities cited by Kilcullen support her position or the trial court's ruling. To the contrary, they support C&S's position that the loan agreement, conditioned on financial benchmarks, was valid and enforceable. In *King County v. Taxpayers of King County*, 133 Wash.2d 584, 599-600, 949 P.2d 1260 (1997) (en banc), the plaintiff taxpayers alleged that a profit sharing agreement between the Mariners and King County was illusory based on the speculation that "the Mariners can doctor their books to pump up expenses as offsets to revenues in a way that will never show a profit." The Washington Supreme Court rejected the argument, stating that the mere possibility that the Mariners may breach the agreement by cooking their books in bad faith does not make the profit sharing illusory. *Id.* at 600.

Similarly, *Omni Group, Inc. v. Seattle-First National Bank*, 32 Wash.App. 22, 25, 645 P.2d 727 (1982), the plaintiff brought an action to enforce an earnest money agreement for the purchase of realty. The

defendants argued, and the trial court agreed, that by plaintiff making its obligation to purchase the property subject to receipt of a "satisfactory" feasibility report, the agreement was rendered illusory. *Id.* The defendants speculated that the plaintiff could act in bad faith and purposefully avoid receiving a satisfactory feasibility report to avoid the purchase of the property. *Id.* The Court of Appeals disagreed and reversed, holding that the agreement was valid and enforceable because the purchaser plaintiff has a duty to make a good faith effort to obtain a feasibility report of a type recognized in the real estate trade. *Id.* In both cases cited by Kilcullen, *King County* and *Omni Group*, the courts rejected the arguments that Kilcullen makes here – that a promise is illusory based on abject speculation that the other party will act in bad faith to thwart the condition precedent in order to avoid performance. As the *King County* and *Omni Group* courts explained, whether a party acts in bad faith to avoid performance is an issue of contract breach, but does not render the contract illusory.

The case of *Hamlin v. Steward*, 622 N.E.2d 535 (Ind. App. 1993) is similarly instructive. In that case, the Hamlins loaned their granddaughter and her husband, the Stewards, money to fix up their motel. *Id.* at 539-39. The Hamlins and Stewards made several oral modifications about the timing of the loan repayment, ultimately agreeing that the loan

would be paid when the Stewards sold the motel. *Id.* at 539. The Hamlins became impatient after several years, and filed a lawsuit to recover the loan amount. The Hamlins asserted that the promise to repay the loans conditioned on the sale of the motel was an illusory promise because the Stewards retained exclusive control over when the condition will be fulfilled. *Id.* at 540. The Court of Appeals disagreed. It held, that while the borrowers had exclusive control of when motel would be sold,

they do not have an unlimited time within which to satisfy the condition before the Note becomes due.

The Stewards also have an implied obligation to make a reasonable and good faith effort to satisfy the condition. A good faith effort is defined as what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances.

What constitutes a reasonable time under the circumstances is a question of fact. Likewise, what constitutes a reasonable and good faith effort is a question of fact. We do not decide questions of fact on appeal.

* * *

[W]e must infer good faith in the performance of the condition in order to give meaning to the intention of the parties. The underlying debt is owed, and the only issue is when the Note is due. Thus, good faith is implied because fulfillment of the condition rests with the promissor, and without good faith, the mere promise to pay the Note subject to a condition precedent to be performed by the promisor would be an

illusory promise. *Id.* at 540-41 (internal cites omitted).

Thus, the Indiana Court of Appeals reversed and remanded the case to the trial court for a determination of whether the Stewards had made a reasonable and good faith effort to sell the motel, and had a reasonable time under the circumstances, to fulfill the condition. *Id.* at 541.

Applying the Washington cases discussed above and *Hamlin* to the case at bar, the trial court should have evaluated whether C&S made a reasonable and good effort to meet the financial benchmarks, and whether it had a reasonable time, under the circumstances, to fulfill the condition. The trial court erred by failing to make any factual findings or engage in any of the foregoing analysis.

Instead, the trial court wholly adopted Kilcullen's version(s) of the disputed facts that the loan repayments become due at the end of employment or, alternatively, the loan agreement was illusory because it was tied to financial benchmarks that were in the exclusive control of C&S. Because Kilcullen's "facts" are disputed, the trial court erred by granting summary judgment in her favor.

E. Equitable Remedies Not Allowed if Contract is Valid.

The trial court erred by fashioning an equitable remedy based on unjust enrichment for two reasons. First, unjust enrichment is an equitable

remedy for quasi-contracts – where no valid contract exists. Thus, before unjust enrichment can be applied, there must first be a determination of whether a valid and enforceable contract exists. To the extent that the trial court held that the loan agreement was valid, equity principles under quasi-contract theory are inapposite. "A party to a valid express contract is bound by the provisions of that contract; she cannot bring an action on an implied contract relating to the same subject matter, in contravention of the express contract." *Peterson v. Kitsap Community Federal Credit Union*, ___ Wn. App. ___, 278 P.3d 27 (October 23, 2012).

On the other hand, to the extent the trial court's unjust enrichment ruling is premised on its findings that the loan agreement was illusory, for the reasons stated in Section D above, the trial court committed reversible error in its ruling. Because the loan agreement was not illusory, it is premature to determine whether Kilcullen is entitled to repayment of her loans based on unjust enrichment.

Based on either scenario, summary judgment was inappropriate, and Kilcullen is not entitled to relief under an unjust enrichment theory until the disputed facts are resolved by a jury.

III. CONCLUSION

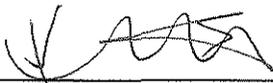
The purpose of summary judgment is to avoid a useless trial; however, trial is not useless, but absolutely necessary, where there is

genuine issue as to any material fact. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Here, a trial absolutely is necessary to resolve the disputed material facts as to the terms of the loan and repayment, whether Kilcullen received the benefit of the bargain, and whether C&S has been unjustly enriched. The trial court's Revised Order (CP 92-94) and judgment should be reversed accordingly.

DATED this 21st day of February, 2013.

Respectfully Submitted,

TONKON TORP LLP

By: 
Robert L. Carey, WSBA No. 32261
Kristin L. Bremer, WSBA No. 43899
Attorneys for Appellant Calbom &
Schwab, P.S.C.