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SUPREME COURT OF THE STATE OF WASHINGTON

PATRICK H. KOFMEHL, an individual,

Petitioner/Plaintiff,

vs.

BASELINE LAKE, LLC, a Washington limited liability company,

Respondent/Defendant.

SUPPLEMENTAL BRIEF OF BASELINE LAKE, LLC

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I. INTRODUCTION

When real estate developer Patrick H. Kofmehl (Kofmehl) became concerned about the economic viability of one of his proposed developments, he filed a lawsuit to enforce, or in the alternative avoid, a commercial real estate purchase and sale agreement that he entered into with Baseline Lake, LLC (Baseline). When it became apparent that Kofmehl's own broker would not support his interpretation of the agreement, and that he could not improve upon his bargain by means of litigation, Kofmehl avoided the bargain altogether on grounds that the description of the property conveyed by the parties' agreement did not comply with the statute of frauds, thereafter asking for rescission and restitution.

Under this Court's decisions in *Schweiter v. Halsey*, 146 Wn.2d 707, 710-11, 359 P.2d 821 (1961); *Browne v. Anderson*, 36 Wn.2d 321, 323-24, 217 P.2d 797 (1950); *Dubke v. Kassa*, 29 Wn.2d 486, 487, 187 P.2d 611 (1947); and *Johnson v. Puget Mill Co.*, 28 Wash. 515, 520-21, 68 Pac. 867 (1902); and the Court of Appeals' decision in *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 240, 189 P.3d 253 (2008), a buyer who avoids enforcement of a real estate purchase and sale agreement on grounds of the statute of frauds cannot obtain rescission or

restitution from a seller who is ready, willing and able to perform as agreed.

The superior court declined to apply this rule on grounds that Kofmehl and Baseline disputed the extent of the property conveyed by the parties' agreement and the accessibility of sewer, and granted rescission and restitution to Kofmehl on summary judgment. *See* RP Oct. 12, 2010, at 26:14-25. The Court of Appeals reversed in a partially published opinion, holding that the rule applies and placing the burden of proof on Kofmehl as the party seeking rescission and restitution. *See Kofmehl v. Baseline Lake, LLC*, 167 Wn. App. 677, 694, 275 P.3d 328, *rev. granted*, 285 P.3d 885 (2012). In the unpublished portion of its opinion, the court held that questions of fact precluded summary judgment in Baseline's favor, notwithstanding admissions of Kofmehl's broker regarding the property conveyed and the undisputed language of the agreement and other evidence regarding the accessibility of sewer. *See Kofmehl Pet. for Rev.*, at A24-A26.

The issues raised by the petition for review are: Does the mere existence of a dispute regarding the property conveyed, no matter how colorable, avoid application of the foregoing rule and automatically confer a right of rescission and restitution on the buyer? Or, does the buyer have the burden of proving that the seller is not ready, willing and able to

perform as agreed in order to obtain rescission and restitution? *See* Baseline Ans. to Pet. for Rev., at 2; Kofmehl Pet. for Rev., at 1.

On de novo review, this Court should affirm the Court of Appeals' holdings that a buyer is not entitled to rescission and restitution if the seller is ready, willing and able to perform (regardless of whether there is a dispute), and that the buyer seeking rescission and restitution has the burden of proof on this issue. However, the Court should grant summary judgment in Baseline's favor because there are no genuine disputes of material fact regarding the extent of the property conveyed or the accessibility of sewer.

II. STATEMENT OF THE CASE

Baseline incorporates the "Facts and Procedural Background" summarized by the Court of Appeals below, *see Kofmehl*, 167 Wn. App. at 679-89; and the statement of the case in its opening brief in the Court of Appeals, *see* Baseline App. Br., at 3-14.

III. ARGUMENT

- A. The Court of Appeals correctly stated the rule applicable to this case, that Kofmehl is not entitled to rescission and restitution if Baseline was ready, willing and able to perform as agreed, and the mere existence of a dispute does not preclude application of the rule.**

The Court of Appeals described the governing rule of law as follows:

Washington law is well settled that “a vendee under an agreement for the sale and purchase of property which does not satisfy the statute of frauds, cannot recover payments made upon the purchase price if the vendor has not repudiated the contract but is ready, willing, and able to perform in accordance therewith, even though the contract is not enforceable against the vendee either at law or in equity.” *Schweiter v. Halsey*, 57 Wash.2d 707, 711, 359 P.2d 821 (1961) (quoting *Dubke v. Kassa*, 29 Wash.2d 486, 487, 187 P.2d 611 (1947)). Washington courts have “consistently denied” recovery of earnest money paid under such circumstances, “in accord with the great weight of authority.” *Id.* at 712, 359 P.2d 821; *Home Realty*, 146 Wash.App. 231, 189 P.3d 253.

Kofmehl, 167 Wn. App. at 690 (quotations & citations in original); *accord id.* at 692 (noting “the 106-year-old line of Washington cases beginning with *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867 (1902) and most recently expressed in *Home Realty*: that a vendor is entitled to retain the [earnest money] deposit if it is ready, willing, and able to perform as agreed and it is the purchaser who refuses to perform by setting up the statute [of frauds] against the vendor”; brackets added).

Although *Kofmehl* characterizes this statement of the law as an “exception” rather than a rule, he does not quarrel with the rule, its longstanding history, or Court of Appeals’ formulation of the rule. *See Kofmehl Pet. for Rev.* at 2-3 (referring to “the long-recognized ‘ready, willing, and able’ exception and quoting *Kofmehl*, 167 Wn.App. at 692; emphasis & quotation marks in original); *id.* at 12 (recognizing court

adoption of rule and quoting *Home Realty*, 146 Wn. App. at 240). Although the significance of Kofmehl's characterization as an "exception" is not clear, the case law describes it as "the general rule followed by a great majority of other jurisdictions." *Home Realty*, at 240.

Kofmehl argues that the rule "applies only if the underlying terms of the contract are undisputed," and not where "a dispute exists regarding material terms of the contract[.]" Kofmehl Pet. for Rev., at 3 (brackets added); *accord id.* at 4, 12-16. Kofmehl does not elaborate on whether he believes the dispute must be colorable in order to avoid application of the rule. To the extent a party could avoid application of the rule simply by alleging the existence of a dispute after the fact, the rule would be meaningless. To the extent more is required, it would seem to be necessary for the court to address the dispute in some fashion. The very existence of the rule barring rescission and restitution seems to contemplate the possibility of a dispute regarding whether the seller is, in fact, ready, willing and able to perform as agreed.

In any event, Kofmehl does not cite any authority for the only-in-cases-of-no-dispute limitation that he seeks to impose on the rule. He attempts to distinguish prior cases applying the rule as not involving disputes. *See* Kofmehl Pet. for Rev., at 14-15 & n.4 (stating "none of the cases cited by Baseline ... involve[s] genuine disputes"; ellipses &

brackets added). However, none of the cases limit the rule to cases of no dispute, and several of them expressly contemplate the existence of disputes. For example, in *Johnson*, 28 Wash. at 521, this Court referred to “proof” regarding whether the seller was ready, willing and able to perform. Similarly, in *Browne*, 36 Wn.2d at 323-24, the Court construed a trial court finding that the seller was “without fault,” as inferentially recognizing that the seller was ready, willing and able to perform. Finally, in *Home Realty*, 146 Wn.App. at 241-42, the Court of Appeals remanded the case before it to the trial court for further proceedings to determine whether the sellers remained ready, willing and able to perform. All of these authorities support application of the rule to cases involving disputes regarding the property conveyed.

In the absence of authority to support his position, Kofmehl argues that resolving disputes regarding the seller’s readiness, willingness and ability to perform would render the statute of frauds “moot.” *See* Kofmehl Pet. for Rev., at 13. He reasons that resolving such disputes would require proof of the parties’ contract, even though a breach of contract claim is eliminated by application of the statute of frauds. *See id.* at 4, 13. This reasoning is incorrect. The statute of frauds is not “moot,” because it allowed Kofmehl to avoid specific enforcement of his agreement with Baseline.

The claim that remains after invocation of the statute of frauds is an equitable one for rescission and restitution, not breach of contract, even if the equitable claim does involve evidence of the parties' agreement. "[S]ince a contract within the statute [of frauds] is only voidable upon the motion of a party, it would violate the equitable principle of clean hands to allow a purchaser who seeks equitable restitution to assert the statute against his own contract" and then obtain rescission and restitution under circumstances where the seller is ready, willing and able to perform. 18 William B. Stoebuck & John W. Weaver, Wash. Prac., Real Estate § 16.9 (2d ed. 2012). The equitable nature of the claim requires consideration of whether the seller was ready, willing and able to perform before rescission and restitution can be awarded.¹

To the extent Kofnehl appears to be relying on the purpose of the statute of frauds to support his argument, he overstates its purpose. The authorities on which Baseline relies address the consequences of voiding a contract based on the statute of frauds. In this sense, the statute of frauds has already served its purpose. Moreover, the purpose of the statute of

¹ The equitable clean hands principle is evident in *Johnson*, at 520 (stating "[i]t would be an *alarming doctrine*, to hold, that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received"; emphasis added; quotation omitted); *Schweitzer*, at 711-12 (quoting this passage from *Johnson*); *Browne*, at 324 (same); *Home Realty*, at 240 (stating "[t]he rationale is that 'a purchaser should not be allowed to use his own breach to escape his contractual obligations—in effect, to have an election not to perform what he has agreed to do'"; quotation omitted).

frauds is to protect the seller and to prevent fraud, rather than perpetrate it. See *Key Design Inc. v. Moser*, 138 Wn.2d 875, 885-86, 983 P.2d 653 (1999) (prevention of fraud); *Home Realty*, 146 Wn. App. at 240 (protection of seller). Thus, rescission and restitution are properly denied when the seller remains ready, willing and able to perform as agreed, even if the issue is subject to dispute.

B. The Court of Appeals properly placed the burden of proof on Kofmehl as the party seeking rescission and restitution, after he avoided his contract based on the statute of frauds.

With respect to placement of the burden of proof, the Court of Appeals stated:

The allocation of the burden of proof follows naturally from the fact that Mr. Kofmehl is the party seeking restitution and must therefore prove that Baseline is unjustly enriched by retaining the earnest money. Establishing that Baseline was not ready, willing, and able to perform as agreed is a necessary element of Mr. Kofmehl's claim.

Kofmehl, 167 Wn. App. at 694. This is consistent with the placement of the burden of proof implicit in *Johnson*, 28 Wash. at 521, and *Browne*, 36 Wn.2d 323-24, as well as the placement of the burden of proof outside of the statute of frauds context, see *Gillmore v. Green*, 39 Wn.2d 431, 437, 235 P.2d 998 (1951) (stating “[t]he burden is upon plaintiff (vendee) to allege and prove that the vendor cannot perform when the time for performance arrives”; brackets added); see generally 18 Stoebuck, *supra*

§ 16.9 (discussing *Gillmore*).² It is further consistent with and supported by the rationales for the rule barring rescission and restitution when the seller is ready, willing and able to perform. *See Key Design*, 138 Wn.2d at 885-86 (prevention of fraud); *Home Realty*, 146 Wn. App. at 240 (protection of the seller); 18 Stoebuck, *supra* § 16.9 (unclean hands).

Kofmehl argues that the burden of proof should be placed on Baseline, relying solely on *Home Realty*, 146 Wn. App. at 241-42. *See* Kofmehl Pet. for Rev., at 17-18. *Home Realty* clearly contemplates the possibility of dispute regarding whether the seller was ready, willing and able to perform, as noted above, but the case does not explicitly address placement of the burden of proof. While the phrasing of *Home Realty* can be read as implying that the burden of proof is on the seller, rather than the buyer, this Court is not bound by *Home Realty* and any such implication should be rejected. *See* Baseline App. Br., at 22-23 (discussing *Home*

² In *Johnson*, 28 Wash. at 521, the Court denied recovery of down payments under a real estate contract that did not satisfy the statute of frauds because “[t]here is no proof whatever that the respondent [seller] was not at all times ... able, ready, and willing to fully perform[.]” (Brackets & ellipses added.) The only reasonable inference from this language is that the buyer failed to meet its burden of proof. In *Browne*, 36 Wn.2d at 323-24, the Court denied recovery of earnest money under a lease that did not satisfy the statute of frauds, construing the trial court’s finding that the lessor was “without fault” as “inferentially recognizing” that the lessor was ready, willing and able to perform. The absence of a finding that the less was *not* ready, etc., was apparently construed against the lessee, suggesting that the lessee had the burden of proof. *See* Baseline App. Br., at 20-21, for more discussion.

Realty). There is no authority and no reason to place the burden of proof on a seller who is defending against a claim of rescission and restitution.³

C. There are no genuine disputes of material fact regarding whether Baseline was ready, willing and able to perform as agreed, and the Court of Appeals should have granted summary judgment in Baseline's favor.

There are only two factual issues that remain in this case: (1) the extent of the property conveyed by the parties' agreement, and (2) the accessibility of sewer to the property. Neither issue presents genuine disputes of material fact, and summary judgment should have been entered in Baseline's favor, dismissing Kofmehl's rescission and restitution claim.

With respect to the extent of the property conveyed, the Court of Appeals correctly noted that Kofmehl's testimony was contradicted by his own broker, who agreed with Baseline and Baseline's broker. *See Kofmehl*, 167 Wn.App. at 696. The admissions of Kofmehl's broker are imputed to and binding upon Kofmehl himself, and they should be dispositive of this factual issue. The Court of Appeals did not address Baseline's argument in this regard. *See Baseline App. Br.*, at 27-28.⁴

³ The parties agree regarding the clear and convincing standard of proof, even though they disagree regarding placement of the burden of proof. *See Kofmehl*, 167 Wn.2d at 694 n.3.

⁴ Kofmehl's broker also testified that he specifically told Kofmehl the legal description of the property and highlighted it on a map. CP 627, 630. The testimony of Kofmehl's broker is reproduced at some length in the briefing because of disputes over what the Court of Appeals found to be a subsequent sham affidavit by the broker. *See Baseline App. Br.*, at 36-40; *see also Kofmehl*, 167 Wn. App. at 696-97.

With respect to the accessibility of sewer, the Court of Appeals denied summary judgment in Baseline's favor on grounds that:

Mr. Kofmehl presented the testimony of his project manager, Robert West, who testified to Mr. Kofmehl's contemporaneous statements in April 2007 that the Agreement required Baseline to construct a sewer connection to the property line."

Kofmehl Pet. for Rev., at A-25 (unpublished portion of Court of Appeals opinion, presumably referring to CP 574). This evidence is insufficient to deny summary judgment in favor of Baseline because it contradicts the plain language of the purchase and sale agreement, referring only to "accessibility of sewer," CP 75; as well as the first addendum, which provides for an extension of the closing date to "complete the negotiations regarding water & sewer cost sharing," among other things, CP 78. If the parties had agreed that Baseline would bring sewer to the property, then such negotiations would have been unnecessary and never would have occurred. *See Hearst Comm. Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (indicating extrinsic evidence may not vary, contradict or modify written contract). The unambiguous language of the agreement and the evidence in the record confirm that sewer was accessible. *See Baseline App. Br.*, at 30-32; *Baseline Reply Br.*, at 21-22. There is no other reasonable inference from the record.

D. The Court should award attorney fees and costs to Baseline.

As argued in the Court of Appeals and in answer to Kofmehl's Petition for Review, *see* Baseline App. Br., at 43; Baseline Ans. to Pet. for Rev., at 15, Baseline is entitled to attorney fees and costs incurred in this matter pursuant to RAP 18.1(b) and the parties' agreement, CP 77.

IV. CONCLUSION

Based on the foregoing, Baseline asks the Court for the following relief:

1. Affirm the decision of the Court of Appeals in part, and reverse it in part, as requested herein;
2. Vacate the superior court orders granting summary judgment to Kofmehl, and awarding him restitution and attorney fees and costs, and the judgment in his favor;
3. Enter or direct entry of summary judgment in favor of Baseline, dismissing Kofmehl's claims for rescission and restitution; and

4. Award attorney fees and costs to Baseline pursuant to RAP 18.1(b) and contract as the prevailing party.

Dated this 8th day of October, 2012.

AHREND ALBRECHT PLLC


By: George M. Ahrend
WSBA #25160

Attorneys for Respondent

CERTIFICATE OF SERVICE

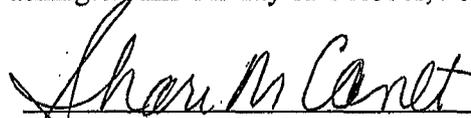
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Robert A. Dunn
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Signed at Ephrata, Washington this 8th day of October, 2012.



Shari M. Canet, Paralegal

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Dear Mr. Carpenter:

Attached for filing is the Supplemental Brief of Baseline Lake, LLC.

Thank you.

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