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Division III
State of Washington
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No. 97690-2

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

BORTON & SONS, INC.,
a Washington state corporation

Plaintiff / Appellant

v.

BURBANK PROPERTIES, LLC,
a Washington state limited liability company

Defendant / Respondent

REPLY BRIEF OF APPELLANT
BORTON & SONS, INC.

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I. INTRODUCTION

In this appeal, this Court has the opportunity to clarify when and under what circumstances courts can use their equitable jurisdiction to excuse missed deadlines in clear, unambiguous real estate contracts. Respondent, Burbank Properties, LLC (“Burbank”) argues that this can be done any time based on the facts and circumstances with no clear legal threshold. The Appellant, Borton & Sons, Inc.’s (“Borton”) position based on this record and appellate court case law is Burbank can’t meet clear, legal thresholds to allow equitable relief which include (1) proving it was ready and able to buy the property in accordance with the written option contract at issue; (2) being authorized to make and actually making permanent improvements to the property that amount to an inequitable forfeiture; and (3) pointing to undisputed facts in the record to excuse its admitted failure to comply with clear, unambiguous contractual deadlines. This is a case where the Court can and should stick to the long-accepted general rule outlined and cited in Borton’s principal brief, that options must be unconditionally exercised in strict accordance with their terms, or the right to buy or lease real estate is lost.

Here, it is undisputed that Burbank failed to exercise the option to purchase the property by December 31, 2017 as set forth in the

contract at issue. Burbank asked for a grace period to remedy its mistake and the trial court granted one. On this record, this was error.

Both courts in this state and elsewhere recognize the “very limited” situation where an equitable grace period can be considered requires that the party requesting one to prove it will suffer an “inequitable forfeiture.” This record is totally void of any forfeiture that Burbank will suffer, let alone an inequitable forfeiture. As a matter of law, there is insufficient evidence for equitable relief to be granted because there is no evidence of substantial improvements by Burbank so there can be no inequitable forfeiture.

This Court should reverse the trial court and further hold that Borton is entitled to a summary judgment declaration that Burbank has not validly exercised the option to purchase the property. Alternatively, at the very least, issues of fact are present that would require a reversal of the trial court decision and a remand for the trial court to resolve those issues of fact at trial.

II. STATEMENT OF THE CASE

Burbank’s “Counterstatement of the Case” largely cites to incorrect references to the record. A large amount of the citations are

simply wrong. A number of others do not support the proposition that they are cited for.

The first example is that for the first four paragraphs of the facts section, Burbank cites largely to CP 107 and 108 for the historical background on this property. These citations do not even remotely support the propositions for which they are referenced. The citations are to the Declaration of Darren Harman who performed an appraisal on the property. (CP 107-08). The Declaration does not, in any manner, support the factual propositions for which it is cited. Burbank also cites CP 109 for propositions. CP 109 is the certificate of service for the Declaration of Mr. Harman. Needless to say, it only stands for the fact that the Declaration was served.

III. ARGUMENT

A. Contrary to Burbank's Argument, The Proper Review Standard of the Trial Court's Summary Judgment Ruling is the Standard "De Novo" Review.

Burbank argues that the applicable standard of review in this case should be abuse of discretion as opposed to the normal standard of review following summary judgment that is de novo. While this could be the correct standard of review if this was an appeal from the decision

of a trial court, **after an actual trial**, on decisions related to the exercise of equitable determinations on summary judgment, such is not the case.

As is outlined below, there are six cases in Washington that specifically deal with the issue of granting a party an equitable grace period. Five of the cases were decided after a trial on the merits. The remaining, sixth case, decided the issue of whether to grant an equitable grace period at the summary judgment stage. On appeal, the Court was crystal clear to set forth the standard of review as being the usual, de novo, review standard:

“The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.” *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). In reviewing an order for summary judgment, we engage in the same inquiry as the trial court. *Folsom*, 135 Wash.2d at 663, 958 P.2d 301. Summary judgment is properly granted where the pleadings, affidavits, depositions, and admissions on file demonstrate “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.” CR 56(c). A material fact “‘is a fact upon which the outcome of the litigation depends, in whole or in part.’ ” *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 349, 588 P.2d 1346 (1979) (quoting *Morris v. McNicol*, 83 Wash.2d 491, 494–95, 519 P.2d 7 (1974)). All evidence must be considered in the light most favorable to the nonmoving party, and summary judgment may be granted only where there is but one conclusion that could be reached by a reasonable person. *Lamon*, 91 Wash.2d at 349–50, 588

P.2d 1346 (quoting *Morris*, 83 Wash.2d at 494–95, 519 P.2d 7).

Cornish College of the Arts v. 1000 v. Virginia Ltd. Partnership, 158 Wn. App. 203, 242 P.3d 215-16 (2010).

Cornish is directly on point for this proposition. Even though there was the potential for equitable relief, the *Cornish* court was clear that the standard of review is the usual standard employed after summary judgment, and it is de novo when considering the equitable grace period issue following a summary judgment motion. The Court even went on further to address whether the trial court could grant such relief on summary judgment and held, that such relief could be appropriate if the trial court could rule as such as a matter of law under normal summary judgment rules. *Cornish*, 158 Wn. App. at 220-21.

Burbank only cites general cases dealing with the granting of equitable relief in other contexts. There is one case directly on point on the standard of review when considering whether to grant an equitable grace period at the summary judgment stage. *Cornish* is unambiguous that the standard of review is de novo and not an abuse of discretion standard.

Even if the Court was to erroneously apply an abuse of discretion standard, Borton would still prevail since there is no evidence that

Burbank has suffered any conceivable forfeiture in this case or made any substantial improvements to the property. Accordingly, as more fully set forth below, the failure to do so is a fatal flaw irrespective of the review standard. Here, the correct standard of review is de novo. This Court can and should review the same record the trial court did and make its own ruling.

B. Courts Cannot Grant Equitable Grace Periods Without Proof of an Inequitable Forfeiture Supported by Permanent Improvements to the Property.

The essential facts to this case are undisputed. Burbank sold the property to Borton and Borton paid Burbank \$1,550,000. Borton leased the property to Burbank for three years and granted Burbank an option to re-purchase the property \$1,800,000 but the option had to be exercised, in writing, no later than December 31, 2017. Burbank missed the deadline and Borton received the late notice on January 8, 2018.

Under the “normal” rule of law, the failure of a party to provide the notice as required in the contract to exercise an option terminates the option since the giving of such notice is a condition precedent to availing itself of the option. *See Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 610, 605 P.2d 334 (1979).

However, in 1979, Division I of the Washington Court of Appeals set forth a limited exception to this general rule that permitted a court to consider the granting of an “equitable grace period” if certain conditions were met. *Wharf*, 24 Wn. App. at 610-11. Since then, there have been three other Division I cases to discuss the issue: *Lenci v. Owner*, 30 Wn. App. 800, 638 P.2d 598 (1981); *Cornish College of the Arts v. 1000 v. Virginia Ltd. Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010); *Recreational Equipment, Inc. v. World Wrapps Northwest, Inc.*, 165 Wn. App. 553, 266 P.3d 924 (2011). Division II of the Court of Appeals addressed the issue in *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 867 P.2d 683 (1994). The Washington Supreme Court addressed the issue in *Pardee v. Jolly*, 163 Wn.2d 558, 577, 182 P.3d 967 (2008)(review of a Division II case, 136 Wn. App. 1055 (2007)), but after noting the limited exception, remanded the case back to the trial court for further proceedings. There has never been a Division III decision addressing this issue.

Only three of the cases cited above affirmed the granting of an equitable grace period based on the facts and the special circumstances presented in each case: *See Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 219-21; *Recreational Equipment*, 165 Wn. App. at 562-64.

However, in granting this relief, every single one of those courts acknowledged the fact that the relief was only appropriate because the party had demonstrated that permanent improvements had been made on the property that would be lost to the owner creating an inequitable forfeiture. See *Wharf*, 24 Wn. App. at 612; *Cornish* 158 Wn. App. at 219; *Recreational Equipment*, 165 Wn. App. at 563. In contrast, the courts in *Lenci*, 30 Wn. App. at 803, and *Heckman*, 73 Wn. App. at 88, both held that because no substantial nor permanent improvements were made, no grace period would be granted.

The common denominator in all of these opinions, whether relief is granted or denied, is that there must be a permanent or substantial improvement done with respect to the property that would be forfeited to the property owner in order to justify the imposition of the grace period. This is consistent with the original declaration in *Wharf* as to the rationale for the limited exception to the rule in the first place: “equity’s abhorrence of a forfeiture.” *Wharf*, 24 Wn. App. at 610.

When Washington first considered an equitable grace period in *Wharf*, the Court was clear that the basis of such a doctrine was the avoidance of an inequitable forfeiture of valuable, permanent improvements made by the option holder.

Professor Corbin in his treatise on the law of contracts in our opinion best expresses this rule and its limitations:

There is one sort of case in which it has been held that the power of acceptance continues to exist for a short time after the expiration of a time limit expressly set by the offeror and known to the offeree. **The only cases known to the writer, in which it has been so held, were cases of option contracts creating an irrevocable power, and in which the holder of the option neglected to give notice of acceptance within the time fixed although he had made valuable permanent improvements with intention to give the notice.**

Thus, it was held that the power of the holder of an option to buy or renew, contained in a lease, is not necessarily terminated by failure to give notice within the specified time. **If, in expectation of exercising the power, the lessee has made valuable improvements,** and the delay is short without any change of position by the lessor, the lessee will be given specific performance of the contract to sell or to renew. **This is for the purpose of avoiding an inequitable forfeiture. Where no inequitable forfeiture will occur, the same rule is applicable to an option contract as to a revocable offer; a time limit, expressly stated, is controlling. The mere fact that a price was paid for the option does not result in forfeiture.** If one pays five hundred dollars for a thirty day option to buy land for twenty thousand dollars, the power to accept for thirty days is the exact agreed equivalent of five

hundred dollars. An extension of the power, even for a moment of time, by action of a court, is compelling the offeror to give something for nothing. (Footnotes omitted.) 1 A. Corbin, Corbin on Contracts s 35, at 146-47 (1963).

Wharf, 24 Wn. App. at 611–12 (emphasis added).

No Washington court has specifically set forth a legal “test” for when equitable grace periods should be considered. In *Wharf*, the Court simply listed five “special circumstances” that existed **in that case** that justified the granting of an equitable grace period in that case. It is further true that in *Cornish* the same Division I held that not all five factors listed in *Wharf* need be present. This is because each case must be decided on its own facts. However, as a factual matter the *Cornish* court found that substantive, valuable permanent improvements were in fact made.

Burbank in its Response Brief ignores the elements (or threshold) showings that must be made in order to even attempt to invoke equity to avoid clear deadlines in contracts. A fair reading and review of the case law cited above requires, at a minimum, a showing of substantial, permanent improvements in the property, so that there is an “inequitable forfeiture,” one not contemplated by the contract itself. Burbank has failed to make such a showing.

When *Wharf* first addressed the concept, it noted the two competing ideas at work:

The courts which have considered this problem have not found the solution simple. On the one hand is equity's abhorrence of a forfeiture. On the other hand is the general reluctance of courts to relieve a party from its own negligent failure to timely exercise an option, when to do so might tend to introduce instability into business transactions and disregard commercial realities.

Wharf, 24 Wn. App. at 610.

This issue is not unique to Washington. Rather, courts around the nation have grappled with this concept. There is no “majority rule” or a “modern rule” requiring or precluding grace periods. On one end of the argument are those courts that hold that equity will not relieve a party of its own failure to timely exercise the option agreement. A contract is a contract and it will be enforced as such. On the other side of the argument are those courts, such as Washington, where courts are willing to examine whether to allow an equitable grace period but only if an inequitable forfeiture may occur. *See United Properties Ltd. Co. v. Walgreen Properties, Inc.*, 134 N.M. 725, 82 P.3d 535, 538 (2003).

The reason for providing this background is to let this Court know that this is not a case of first impression and that there is a split of authority around the nation. *See* W. Johnson, Annotation,

Circumstances Excusing Lessee's Failure to Give Timely Notice of Exercise of Option to Renew or Extend Lease, 24 A.L.R. 4th 266 (1984). However, even if such an equitable examination is undertaken, "Equity jurisdiction has never given the judiciary a roving commission to do whatever it wishes in the name of fairness or public welfare." *United Properties*, 82 P.3d at 541.

In Borton's opening brief it addressed this forfeiture issue as a legal threshold to show that a substantial, permanent improvement had been made and would be lost if equity didn't intervene. The rule has been expressed in other jurisdictions adopting the equitable grace period concept as having to demonstrate:

(1) Such failure was the result of "inadvertence," "negligence" or "honest mistake;" (2) the nonrenewal would result in a "forfeiture" by the tenant due to his substantial improvements on the property; and (3) the landlord would not be prejudiced by the tenant's failure to send, or its delay in sending, the renewal notice.

25-35 Bridge St. LLC v. Excel Automotive Tech Center, Inc., ___ N.Y.S.3d ___, 2018 WL 5579134 at * 10 (2018).

At a minimum, other jurisdictions who have considered equitable grace periods have, as one of the elements, that parties prove that substantial improvements to the property that have been made. This is consistent with the Washington court's first pronouncements in *Wharf*

and have continued in the five subsequent cases. As outlined below, on this record Burbank has failed to make such a showing so Borton is entitled to the granting of its summary judgment motion that the option lapsed. At the very least, issues of fact exist that would preclude the granting of Burbank's motion.

C. **Burbank's Failure to Timely Exercise the Option Should Not be Excused as a Matter of Law. Alternatively, at the very Least, Issues of Fact Exist Precluding the Granting of Burbank's Summary Judgment Motion.**

1. *There was no "mistake" justifying the granting of an equitable grace period in this case.*

The record is undisputed in this case. Mr. Rogers of Burbank knew of the option deadline. Borton did nothing to prevent or mislead him from timely exercising the option. Burbank had an almost two year period to exercise that option. Mr. Rogers admitted that he actually timely drafted the letter but then just forgot to send it. These facts do not meet any test for a mistake to justify the imposition of a grace period. They amount to gross negligence, pure and simple.

The court, in *United Properties*, addressed the type of mistake that could be used to justify the imposition of equity:

Instead, we believe that the mistake that constitutes the threshold showing allowing equity to intervene is the type of mistake that is defined in the cases specifically

addressing whether to hold parties to their freely negotiated bargains:

A mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character being intended or known at the time.

[Tenant] does not argue it misunderstood the terms of the contract. It does not contend it was unaware of the notice provision. Rather, the facts before us show [Tenant] failed to exercise its option because of simple forgetfulness. Forgetfulness is not the equivalent of a mistake.

No one can predicate a mistake on his own negligent omission to perform a legal duty.... When one is charged with a duty, and forgets to do it, it may under certain circumstances constitute excusable negligence, but it cannot be held to be a mistake.... Negligently and inadvertently omitting to perform a duty is far different than to omit it through mistake or accident. *SDG Macerich Props.*, 648 N.W.2d at 587 (internal quotation marks and citations omitted).

United Properties, 82 P.3d at 543–44.

These observations are directly on point with the facts of this case. Burbank is simply using the “Oops, I forgot” defense. That is not

sufficient to cross the threshold in order to invoke equitable relief. Borton is entitled to summary judgment or, at the very least issues of fact are presented making the granting of Burbank's motion error.

2. *Burbank produced no evidence of any improvements to the property, let alone substantial or permanent improvements.*

As outlined above, the hallmark of any consideration of granting an equitable grace period is to avoid a forfeiture. In Washington, under the cases cited above, it is clear that that forfeiture is tied to the substantial, permanent improvements that a tenant has made and would be lost to the landlord.

Burbank points to only two things in this case to support a forfeiture argument, but one is not an improvement (alleged loss of equity) and the other (loss of a temporary hay crop) also is not and/or is not supported by the record.

Burbank argues it "lost equity" in the property by not being able to exercise the option. The first thing to note is that Burbank uses the wrong figures. It agreed to pay Borton \$1,800,000 to purchase the property, even if it timely exercised the option. The appraisal for the property in the record shows that, as of February 3, 2014, the value of the property was \$1,875,000. (CP 108). Thus, assuming an almost 5

year old appraisal is still valid, the “loss of equity” would only be \$75,000 on a \$1,800,000 purchase (4%).

The more fatal flaw to Burbank’s argument is that loss of equity in the property itself cannot in any manner be considered an “improvement” to the property. *Wharf* was clear that the failure to be able to complete the transaction itself could not be the “forfeiture” that equity was trying to address. *See Wharf*, 24 Wn. App. at 611-12. To hold otherwise would allow any party negligently missing contractual deadlines to argue economic loss.

Heckman directly supports the proposition that economic loss from property itself cannot support an equitable grace period. In *Heckman*, Heckman rented property from Gunn for \$550 per month. There was a five-year extension of the lease that could be made but notice had to be given at least 90 days before the end of the first lease term. *Heckman*, 73 Wn. App. at 85.

During the term of the lease, Heckman sold his business and subleased the same space to the new business owner for \$2,000 per month. Thus, Heckman was paying Gunn \$550 per month and receiving \$2,000 per month in rent from the “subtenant”. *Heckman*, 73 Wn. App. at 86. Heckman read the renewal provision incorrectly and failed to

timely exercise the 5 year extension. It then sued to be allowed an “equitable grace period” to be able to exercise the option. *Heckman*, 73 Wn. App. at 86-87.

The court first noted that:

Turning to this case, **we agree with the trial court that Heckman Motors had not made, and would not forfeit, substantial valuable improvements of the sort present in Wharf.** According to Heckman Motors' brief on appeal, it spent about \$18,000 to find the lot and improve it with paving, landscaping and a sales building. According to the trial court, Gunn spent about \$23,000 for materials. According to James Heckman's testimony and the trial court's findings, Heckman Motors “had basically amortized out all ... expenses in the improvement of that lot” during the initial 5–year term of the lease.

Heckman, 73 Wn. App. at 88 (emphasis added)(footnotes omitted).

The more telling pronouncement from the Court was that Heckman’s loss of the ability to collect the excess rent of \$1,500 per month for five years was not a “substantial improvement” that would justify the equitable grace period.

When all the circumstances of this case are viewed in combination, it appears that **the real economic issue was not the possibility that Heckman Motors would forfeit valuable improvements previously made, or that Gunn would or would not be prejudiced by Heckman Motors' delay in exercising its option to renew. Rather, the real issue was whether Heckman Motors would be**

able to continue collecting rent from Ruddell in an amount greater than the rent it was paying Gunn.

Heckman, 73 Wn. App. at 89 (emphasis added).

Burbank's potential or unsupported "loss of equity" is not an improvement to the property. Just as in *Heckman*, it may be an economic loss arising out of Burbank's own negligence. However, it is not a substantial improvement to the property that would justify the imposition of an equitable grace period.

Burbank's only other argument that it made improvements on the property is an assertion that it planted timothy hay on the property in 2017, with no evidence on how long it would last or what it was worth. Just so this record is clear and not an interpretation of the facts, here is the quote from CP 128 (Deposition of Eric Rogers) dealing with the use of the property at issue in this case:

Q: And the current property, I'm just going to refer to it as the subject property; is that all right?

A: Okay.

Q: What is it currently being used for?

A: Row crops.

Q: What kind of crops?

A: Potatoes, timothy hay, we've had grass seed in there.

Q: And prior to selling it to Borton in 2016, what was it used for?

A: The same.

Q: Are potatoes, are those annual, perennial, how often do you—

A: Potatoes, we do them every third year we grow potatoes.

Q: Okay.

A: Typically. It can be every other year.

Q: What about hay?

A: Hay is usually kept in for two to three years.

Q: So properties have been the same use the entire time before and after the sale and when you entered into the lease?

A: For row crops, yes. Rotation has changed over the years.

Q: Okay. And what does that mean?

A: We, we've changed the—we grew grass seed in it prior, and potatoes, and now we transitioned it to potatoes, three years of hay, and then back to potatoes.

Q: Okay. So—

A: We had problems with some potatoes in there so we've tried to lengthen our rotation out on that property.

Q: Is that a soil thing?

A: Potatoes, disease gets in there so we have to lengthen our rotation to break the disease cycle.

(CP 128).

Burbank's legal argument based solely on this deposition testimony (that hay planted was a valuable, permanent improvement) is not even remotely supported. The lease agreement between the parties began in February 2016 and was to end on December 31, 2018 and encompassed three crop years. (CP 10 & 16). Mr. Rogers's deposition which is the basis for CP 128 was taken on April 18, 2018. (CP 126).

First, Burbank cites this quoted material for the proposition that the property was planted to potatoes in 2017. The Court can read for itself. There is nothing in CP 128 that even remotely says that the property was planted to potatoes in 2017. In fairness, there is a citation to the record that does say that potatoes were planted to the property in 2017 and Borton cited that testimony to this court in its opening brief. (CP 159).

The more problematic factual citation is Burbank's assertion that:

After the potatoes were harvested in 2017, Rogers planted timothy hay, which is a two to three year crop, meaning that the crop is harvested over a two to three year period.
CP 128.

Respondent's Brief at 4.

Again, this citation does not even come close to supporting these assertions in Burbank's Response Brief. It does not say that potatoes were harvested in 2017. CP 128 does not say that after the potato harvest that Rogers then planted timothy hay. CP 128 does not say that the same hay crop is harvested for two to three years. The record does not support any of the propositions set forth by Burbank.

Presumably, Burbank harvested the hay crop in 2018 and made money on it. However, the Court does not know this since that information is not in the record. There is no record as to the cost of planting the hay. There is no record as to whether the revenue generated would cover the expense of planting and growing.

More importantly, the planting of timothy hay is not a permanent improvement to the property. The record does show, at CP 128 that Burbank would rotate crops so that it would get back to growing potatoes in 2-3 years. This is not a situation where Burbank installed a new irrigation system at a cost of \$200,000, built a new storage barn at a cost of \$200,000, or even planted a permanent orchard like Borton intends to do. Accordingly, Borton was entitled to judgment as a matter of law. At the very least, Burbank should not have been granted summary

judgment. Issues of fact would be present precluding the granting of Burbank's motion.

D. Borton's Motion Should be Granted Since Burbank was not "Ready, Willing and Able" to Exercise the Option.

As was set forth in the initial briefing, Burbank admitted it did not have the ability to purchase the property at the time it sent its notice. Burbank did not have the cash to do so and had not even attempted to find financing. These facts are undisputed.

Burbank attempts to find fault with Borton's citation to and reliance on *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn. App. 296, 628 P.2d 838 (1981). *Kaufman* directly supports Borton's claims.

One of arguments in *Kaufman* was that the option agreement was unenforceable because the optionee, Southards, didn't have the funds to purchase the property when it exercised the option. *Kaufman*, 29 Wn. App. at 301. The Court disagreed:

In the instant case, the lease required closing within 30 days after exercise of the option. The record indicates the Southards were ready, willing and able⁵ to close the transaction.

5 Testimony indicated the Southards could have received third party financing.

Kaufman, 29 Wn. App. at 301 (emphasis added)

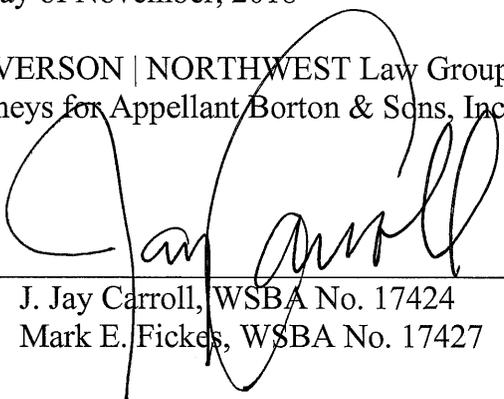
Thus, unlike in this case, in *Kaufman*, there was evidence that the buyer was ready willing and able because he could have obtained financing. No such record exists in this case. Burbank essentially admits its untimely exercise of the option was contingent on financing, which precludes a decree of specific performance in its favor. Without the money, or an ability to get it, this case is moot. Because Burbank was not ready, willing and able at the time it sent notice to Borton, it was error for the Court to not grant Borton's motion.

IV. CONCLUSION

This Court should reverse the trial court and also grant Borton's motion to declare that the option was not timely exercised. Burbank has not demonstrated any substantial improvements to the property to justify equity to grant an equitable grace period. At the very least, this Court should reverse and remand the case back to the trial court since issues of fact precluded Burbank's motion.

DATED this 14 day of November, 2018

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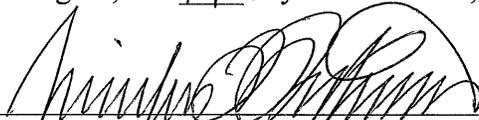
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CERTIFICATE OF SERVICE

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