LAS

63153-5

63153-5

No. 63153-5

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2009 JUL 14 AM 11:12

JAY and CINDY BOWEN,

Appellant,

v.

JOEL and CHERAE ALMANZA

Respondents.

RESPONDENTS' BRIEF

Gregory L. Gilday, WSBA #36608
Law Office of Cole & Cole, P.C.
9029 271st St. NW / PO Box 249
Stanwood, WA 98292
Phone: (360) 629-2900

Attorneys for Respondents
Karl and Heather Smale

ORIGINAL

TABLE OF CONTENTS

I. Introduction.....1

II. Issue Statement.....1

III. Statement of the Case.....1

IV. Argument

1. The Almanzas properly exercised their statutory right to rescind the purchase and sale agreement and are therefore entitled to the return of their earnest money deposit.....2-3

2. Addressing Appellants' Arguments

a. RCW 64.06.030 is a derogation of common law and must be strictly construed.....3-4

b. RCW 64.06.030 does not extend an open-ended right for purchasers to rescind all purchase and sale agreements for real estate.....4-8

c. The Almanzas complied with RCW 64.06.030 and may thus invoke its relief.....8-9

d. The Almanzas did not expressly waive their right to a Form 17 Disclosure statement.....9-14

V. Conclusion.....14

TABLE OF AUTHORITIES

CASES

State v. Watson
146 Wash.2d 947, 954, 51 P.3d 66 (2002).....3

Alejandro v. Bull
123 Wn.App. 611, 616 (Div.III 2004).....4, 7, 11

Ferguson v. Jeanes
27 Wn. App. 558,561, 619P.2d 369 (1980).....11

Berg v. Hudesman
115 Wn.2d 657, 801 P.2d 222 (1990).....11

Seven Gables Corp. v. MGM/UA Entm't Co.
106 Wn.2d 1, 721 P.2d 1 (1986).....12

STATUTES

RCW 64.06.015.....10

RCW 64.06.020.....2, 4, 6, 13, 14

RCW 64.06.030.....2, 4, 6, 13, 14

RCW 64.06.040.....6

RCW 64.06.070.....5

I. INTRODUCTION

The Skagit County Superior Court ("Superior Court") properly entered an Order Granting Summary Judgment in favor of the Almanzas on February 20, 2009, upholding their rescission of a real property purchase and sale agreement. As a matter of law, the Almanzas had, and properly utilized, a statutory right of rescission. The Almanzas urge the Court to uphold the February 20, 2009 Order of the Superior Court.

II. ISSUE STATEMENT

Whether the Almanzas properly exercised their statutory right to rescind the purchase and sale agreement under RCW 64.06.040 and are therefore entitled to the return of their earnest money deposit?

III. STATEMENT OF THE CASE

The Almanzas and the Bowens signed a document entitled Residential Real Estate Purchase and Sale Agreement, Specific Terms together with the listed addendums (collectively "the Agreement"). CP 4-19. The Almanzas then deposited earnest money in the amount of $6000 into an escrow account at Chicago Title. CP 28. On August 22, 2007, the Almanzas signed a Rescission of Purchase & Sale Agreement requesting that they be refunded their earnest money deposit and faxed it to the Bowens' real estate agent. CP 29. The Almanzas filed this action when their request for a return of their earnest money was rebuffed by the

sellers, Mr. and Mrs. Bowen[1]. CP 2. On February 20, 2009, Judge Mura, sitting for the Skagit County Superior Court, entered an Order Granting Summary Judgment in favor of the Almanzas. CP 87-88.

IV. ARGUMENT

1. *The Almanzas properly exercised their statutory right to rescind the purchase and sale agreement and are therefore entitled to the return of their earnest money deposit.*

RCW 64.06.020 and .030 specifically require the Seller to provide to the Buyers a disclosure statement commonly known as Form 17. RCW 64.06.020 specifically includes this situation herein – new construction that has never been occupied – as requiring a Form 17. This is true for all cases in which the disclosure has not been "expressly waived."

Next, RCW 64.06.040(3) states:

> If the seller in a residential real property transfer fails or refuses to provide to the prospective buyer a real property transfer disclosure statement as required under this chapter, *the prospective buyer's right of rescission under this section shall apply* until the earlier of three business days after receipt of the real property transfer disclosure statement or the date the transfer has closed, unless the buyer has otherwise waived the right of rescission in writing. Closing is deemed to occur when the buyer has paid the purchase price, or down payment, and the conveyance document, including a deed or real estate contract, from the seller has been delivered and recorded. (Emphasis added.)

[1] The suit was also brought against Kenneth and Dana Cuthbert, husband and wife, and Kenneth Cuthbert and Jay Bowen, LLC, a Washington LLC, but these parties have not appealed the lower Court's order.

The Washington Supreme Court has consistently held that when a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. It has also consistently declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous, or subtract from the clear language of a statute even if it believes the Legislature intended something else but did not adequately express it. See State v. Watson, 146 Wash.2d 947, 954, 51 P.3d 66 (2002).

The statutes discussed above, under their plain meanings, clearly give the Buyers the clear and unambiguous right to rescind the agreement when the required disclosure form has not been given by the Sellers. Even if it may seem unfair, the Court is required to follow the letter of the law.

In the case at hand there are a number of items that are not in dispute: (1) The purchase contemplated was for a residential property with new construction that had never been occupied; 2) The Bowens were required by statute to give the Almanzas a property disclosure statement; 3) The Almanzas have never expressly waived their right to receive the property disclosure statement; 4) The Bowens failed to provide the Almanzas with the property transfer disclosure statement (Appellants' Brief, page 6); and, 5) The Almanzas properly exercised their right to rescind the purchase and sale agreement by transmitting their intent to rescind in writing prior to being given the property transfer disclosure form and before closing.

2. *Addressing Appellants' Arguments:*

   a. *RCW 64.06.030 is a derogation of common law and must be strictly construed.*

In their brief, the Bowens make a number of points that the Almanzas have no argument with. First, it is agreed that RCW 64.06.030 must be strictly construed. Appellants' Brief at 11. It is further agreed that RCW 64.06.030 "extends to a Buyer a far more flexible right to rescind," that with certain limitations, "grants buyer sole discretion to rescind," and that under the statute, there is no waiver of the right to rescind for accepting part performance. Appellants' Brief at 10.

b. *RCW 64.06.030 does not extend an open-ended right for purchasers to rescind all purchase and sale agreements for real estate.*

The Bowens next assert that RCW 64.06.030 extends an open-ended right to rescind to all purchasers of real estate, but this is not the case. The Bowen's cite Alejandro v. Bull, 123 Wn.App. 611, 616 (Div.III 2004) as supporting the statement that "the effect of this statute is to give the buyer a three-day option to change his or her mind about the sale." However, in Alejandro, the Court was talking about the Buyers' rights *after* the disclosure statement required under RCW 64.06.020 had been delivered. Alejandro is clearly inapplicable to the case at hand since it is not disputed that the Bowens never gave the required disclosure statement to the Almanzas.

The Bowens next point out that RCW 64.06.070 "limits itself by stating that 'nothing in this chapter extinguishes or impairs any rights or remedies of a buyer of real estate against the seller' and it further provides that 'nothing in this chapter creates a new right or remedy for the buyer of residential real property." Appellants' Brief at 12. While this is technically true, the Bowens are misleading the Court. The statute does not end as cited by the Bowens. The full text of RCW 64.06.070 states:

> Except as provided in RCW 64.06.050, nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate against the seller or against any agent acting for the seller otherwise existing pursuant to common law, statute, or contract; nor shall anything in this chapter create any new right or remedy for a buyer of residential real property *other than the right of recision exercised on the basis and within the time limits provided in this chapter*. (Emphasis added)

It is clear from this language that the Legislature was giving the Buyer a statutory right to rescind, but was careful to not abrogate any previously existing right – leaving it up to the Buyer to decide which avenue to pursue. The Bowens' selective quote of the statute attempts to make it state the opposite of what it actually states.

The Bowens next assert that the three day limit is meaningless and that the "unlimited" and "very new remedy" asserted by the Almanzas requires the Court to read language into the statute, specifically "where the seller has failed to provide a disclosure statement for any reason, Buyer

may rescind at any time thereafter, Seller's demonstrable reliance upon the real estate purchase and sale agreement and Buyer's acceptance of performance notwithstanding." Appellants' Brief at 12-13. However, the Almanzas do not have to ask the Court to read anything into the statutes, as the remedy is already contained therein. It is the appellants that want to add conditions to an absolute right.

RCW 64.06.040(3) clearly states that when a Seller fails or refuses to give the Buyer a required disclosure statement, "*the prospective buyer's right of rescission under this section* ***shall*** *apply* until the earlier of three business days after receipt of the real property transfer disclosure statement or the date the transfer has closed, unless the buyer has otherwise waived the right of rescission in writing." RCW 64.06.030 requires that this written waiver be an express waiver.

There is no dispute that the Bowens did not deliver the Form 17 as required – they even state in their brief that they didn't give this disclosure. Appellants' Brief at 6. Further, the deal had not closed, and the Almanzas had not expressly waived their right to receive the disclosure statement. It is interesting to note that the Bowens have never asserted that there was any express waiver signed by the Almanzas as to their right to receive the required disclosure form. Therefore, the Almanzas never lost their right to rescind the Agreement.

This is not "fashioning a sword with which to escape a bargain" as the Bowens contend, and it does not afford the Buyer an unfair advantage of extending their right to rescind indefinitely. Appellants' Brief at 13. Under RCW 64.06.020, the right to rescind exists until one of three things happen: 1) the buyer expressly waives their right to the disclosure, 2) three days after the seller delivers the disclosure to the buyer; or, 3) closing. The Bowens could have cut off the Almanzas' right to rescind simply by delivering the disclosure statement, an act that was fully within their control.

The Bowen's attempt to use Alejandro in support of their argument that somehow the Almanzas misused their right to rescind is nonsensical. As shown above, Alejandro is not applicable to this case since that Court was talking about the Buyers' rights *after* the disclosure statement required under RCW 64.06.020 had been delivered and the purchaser had signed the section entitled "BUYERS WAIVER OF RIGHT TO REVOKE OFFER." Id. at 616.

The Bowen's final assertion under this section was that it is somehow an "absurd consequence" that the Almanzas can exercise their right of rescission "when the evidence plainly shows this had nothing to do with their decisions to quit the deal." Appellants' Brief at 13. The reasons for rescission are immaterial under the strictly construed language

of RCW 64.06. Further, it would it not make any sense to have such a requirement since there is no opportunity for the Seller to cure – even if the Seller did turn around and give the required disclosure, the Buyers would still have three days to rescind the deal in their sole discretion. Lastly, as the Bowens have argued, the statute is to be strictly construed, and as such, no such requirement can be read into it.

c. *The Almanzas complied with RCW 64.06.030 and may thus invoke its relief.*

The Almanzas did everything required of them under the statute to rescind the Agreement. The Almanzas agree with the Bowens assertion that "the buyer must deliver written notice of intent to rescind to the seller within three days *after receipt of the disclosure statement.*" (Emphasis added) Appellants' Brief at 14. As the disclosure was never delivered to the Buyers, the three day limitation was never commenced, and the right to rescind was never lost. A written notice of rescission was delivered to the Bowens on August 23, 2007. CP 29. Since the disclosure statement was never delivered and the three day rescission period had not commenced, there could be no "deemed acceptance" of the disclosure statement by the Almanzas.

It is also inconsequential that the "record demonstrates that Almanzas [Almanzas] failed to make demand for rescission for some 6

weeks following contract execution," as alleged by the Bowens. Appellants' Brief at 14. The only time constraints within RCW 64.06 concerning the rescission is that it must be given prior to one of the following occurrences: 1) the buyer expressly waives their right to the disclosure, 2) three days after the seller delivers the disclosure to the buyer; or, 3) closing. As none of these occurrences had happened, the rescission was properly given by the Almanzas. Again, since the statute is to be strictly construed, no such time requirement should be read into it.

d. *The Almanzas did not expressly waive their right to a Form 17 Disclosure statement.*

RCW 64.06.020 requires the Seller to provide to the Buyers a disclosure statement unless the buyer has *expressly waived* the right to receive the disclosure statement. At no point did the Almanzas expressly waive their right to receive the disclosure statement. It is also notable that at no time have the Bowens asserted that the Almanzas have expressly waived their right to the disclosure statement.

The question raised by the Bowens, "Why did the Almanzas permit the disclosure statement deadline to pass without mention," is a straw man argument. Appellants' Brief at 14. Nothing in the statutes places any duty on the shoulders of the Buyer to request the disclosure statement from the Seller. In fact, in multiple places in RCW 64.06 it

states that the "seller shall deliver." The onus to deliver the property disclosure statement is placed wholly on the seller.

The Bowens also assert that "there was no reason to make disclosure on a dwelling which did not exist." Appellants' Brief at 15. However, the Washington State Legislature felt otherwise, and under RCW 64.06.015 and .020, it required the Seller of both unimproved and improved (specifically including new construction which has never been lived in) residential real property to deliver a disclosure statement to the prospective buyers.

The next assertion brought by the Bowens is that the Almanzas somehow waived their statutory right to a rescission since the Agreement contained a full inspection contingency and a walk-thru provision. Appellants' Brief, page 14-15. This argument is ridiculous on its face. With the exception of financing contingencies, inspection contingencies are probably the most common contingency in residential real property transactions. It would be absurd to find that a Buyer's insistence on a final inspection would act as an express waiver which would relieve the Seller from his duty to deliver a disclosure statement as required by statute.

Overall, this argument misses the point since a Buyer's inspections and a Seller's disclosures are not mutually exclusive. They cover different aspects and are commonly used in conjunction with one

another. The Bowens cite three cases to support of this assertion, but again, they mislead the Court.

The first case cited is Alejandro, *supra* at 123 Wn.App. 616. As shown above the Buyer in Alejandro had been given the required disclosure statement and signed the section of the disclosure entitled "BUYER'S WAIVER OF RIGHT TO REVOKE OFFER." In the case at hand, the Almanzas were never given the required disclosure statement, and never signed any waiver of their right to rescind the agreement.

The second case cited by the Bowens, Ferguson v. Jeanes, 27 Wn. App. 558,561, 619P.2d 369 (1980), deals with common law rescission. As we can see from the Bowens' brief (pages 8-11), there is a significant difference between common law rescission and the statutory right of rescission under RCW 64.06, and therefore, this case is wholly inapplicable.

The final case cited by the Bowens, Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), deals with contract interpretation, and is inapplicable to determining whether the Almanzas expressly waived their statutory right to receive the disclosure.

Assuming *arguendo* that the inspection contingency did somehow expressly waive the Buyers' statutory right to rescind, Form 35 allows the Buyers to disapprove of the inspection and terminate the deal. *See* CP 76-

77. Since the Almanzas would still have had the right to rescind the agreement, it is a moot point.

While it is true that the Bowens were entitled to all reasonable inferences and favorable constructions during the Almanzas summary judgment motion, they "may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). RCW 64.06 requires that the prospective buyer expressly waive the right to the disclosure statement. Trying to determine what the Almanzas intended under the Agreement, or what was implied between the parties does not rise to the level of an "express waiver." The Almanzas did not expressly waive their right to the property disclosure in writing, and the Bowens have failed to even assert any express written waiver, and instead rely on wholly on implications and speculation.

Neither of the "factual issues" raised by the Bowens in their brief (page 16) are genuine issues of fact. First, did the Almanzas waive their right to a Form 17? As seen above, the statutes require a written express waiver, and at no time did the Almanzas expressly waive this right in writing. Nor have the Bowens ever asserted that the Almanzas had ever expressly waived this right in writing or otherwise.

Second, did the parties otherwise agree to defer disclosure as contemplated by RCW 64.06.030? This "issue" is another red herring. RCW 64.06.030 uses "otherwise" agreed to in four places: 1) not later than five days, or as otherwise agreed to, after mutual acceptance of the deal, the seller shall deliver the disclosure to the buyer; 2) within three days, or as otherwise agreed to, of receipt of the disclosure, the Buyer can approve or rescind the agreement; 3) if the buyer elects to rescind the deal, he must do so in writing within three days, or as otherwise agreed to; and, 4) if the buyer does not send written notice of rescission within three days, or as otherwise agreed to, then the disclosure is deemed to have been accepted by the buyer.

None of the "otherwise agreed" portions of RCW 64.06.030 would have the effect of waiving or eliminating the Almanzas' right to rescind the Agreement. Assuming *arguendo*, that the parties had agreed to postpone the time in which the Bowens had to deliver the disclosure statement, the Almanzas would still retain the right under the statute to rescind the deal until three days after receipt of the disclosure or the closing of the deal, neither of which happened. The last three "otherwise agreed to" mentions in the statute do not even come into effect since the disclosure statement was never delivered by the Bowens. Therefore, even if the parties had "otherwise agreed" as contemplated under RCW

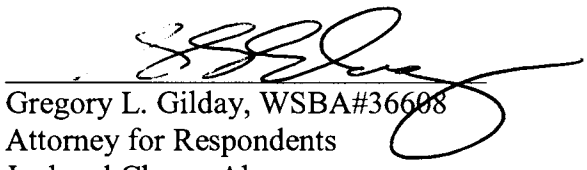
64.06.030, this does not equate to an express waiver of their right to rescind, and therefore, the Almanzas still had their statutory right to rescind.

V. CONCLUSION

This case was clearly predisposed for a summary judgment motion. There is no material issue concerning intent, modification and/or waiver as asserted by the Bowens. There is no contractual interpretation to be done, and there is nothing for a fact-finder to determine. Bowens do not put forth any argument apart from their speculations and argumentative assertions. For the foregoing reasons, Respondents Almanzas respectfully request that the Court uphold the Superior Court's February 20, 2009 Order Granting Summary Judgment, which upheld the Almanzas' statutory right to rescind the Agreement and be refunded their earnest money deposit.

Dated: July 13, 2009.

Law Office of Cole & Cole, P.C.



Gregory L. Gilday, WSBA#36608
Attorney for Respondents
Joel and Cherae Almanza