

63422-4

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No. 63422-4

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

FF REALTY LLC,

Appellant,

v.

KIMSCHOTT FACTORIA MALL, LLC,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

FF Realty's (Appellant) appeal must be denied and the trial court's decision affirmed because (1) its appeal bears no relation to its Complaint which it never even attempted to amend; (2) regardless it has failed to show any genuine issue of material fact that would require a trial, because it has failed to cite to any evidence that its requested relief is even possible; and (3) its own actions in demanding closing by October 31, 2008 destroy its argument that the closing date extended somehow indefinitely.

This litigation arises out of a large scale real estate transaction at the Factoria Square Mall in Bellevue, involving multiple parties and multiple agreements, and multiple parcels within the mall property as a whole, as well as millions of dollars spent/pledged by both Appellant and Kimschott in attempting to make the transaction ultimately work. Unfortunately, it did not. In essence, Appellant wanted to purchase a portion of the Factoria Square Mall footprint to build residential housing units, tearing down an old Mervyn's store and utilizing the parking lot in the process, and Kimschott wanted to sell that piece of the property to Appellant. But it was not so simple.

Because multiple other tenants and land owners on the Factoria Square Mall property held reciprocal easement rights over the property as a whole, and, more importantly, across the portion

subject to the potential sale to Appellant, in order to make the transaction work, all of the other tenants and owners needed to agree to amend their easement interests. Without such an amendment in place and recorded, Appellant would not be able to construct the residential housing units it wanted – the very purpose of buying the property from Kimschott in the first place.

This co-mingled or “reciprocal” easement issue was specifically negotiated and expressly provided for in the parties’ September 21, 2006, Purchase and Sale Agreement (the “PSA”). In other words it was an express pre-condition to closing that the Reciprocal Easement Agreement (“REA”) for the entire mall property, which at the time prohibited residential use, be amended (the “REA Amendment”) and delivered to escrow in fully executed recordable form, which would ultimately allow for Appellant’s planned residential project on the property. The PSA expressly provided that unless this REA was able to be released for recording, Kimschott had no obligation to sell and Appellant had no obligation to buy – a critical factor for Appellant.

Additionally, in August 2008 the parties specifically negotiated a contractual term for what would happen if Kimschott was unable to obtain the REA Amendment by September 30, 2008.

Namely, Appellant could elect payment of \$200,000 from Kimschott as partial reimbursement for its investment expenses incurred in pursuing the potential purchase, or elect to extend the time allowed to obtain the REA Amendment in hopes that it might get done and the PSA could be closed. Appellant did neither.

In early October 2008, instead, Appellant demanded that Kimschott close the transaction by October 31, 2008 based on Appellant's erroneous belief that the REA Amendment was ready to be recorded, that this specific condition to closing had been met, and that Kimschott was simply refusing to go forward with the sale for its own reasons. As Appellant succinctly stated in Paragraph 11 of its Complaint:

11. Upon information and belief, the Defendant delivered to escrow a fully executed amendment to the REA in the form approved by Plaintiff and Defendant in a recordable form. As a result, all PSA conditions related to the amendment to the REA were met and the Defendant was not permitted to avoid completing the transaction due to this condition to closing.

As the record shows, however, and as Kimschott pointed out in responding to Appellant's demand to close, Appellant was absolutely wrong about this. A review of the documents produced in discovery to Appellant by the escrow agent confirms that at least one of the multiple parties to the REA, Safeway, never provided its

approval for the REA Amendment to be recorded due to issues out of both Kimschott and Appellant's control – issues surrounding Target's future business plans.

Thereafter, based on the fact that Appellant's complaint was demonstrably and objectively meritless, Kimschott moved for summary judgment. In response, Appellant did not amend its complaint to allege breach of contract for failure to use commercially reasonable efforts (as it now asserts on appeal), nor did it attempt to obtain any evidence that it was even possible for Kimschott to obtain full approval of the REA Amendment had it made further efforts. Rather, Appellant simply argued that the trial court should deny summary judgment because it thought Kimschott should have tried harder, effectively abandoning its allegations clearly stated in the Complaint.

Given the evidence and pleadings before it, the trial court properly granted Kimschott's motion for summary judgment.

II. ADDRESSING ASSIGNMENTS OF ERROR

1. Appellant's first assignment of error is completely off base as its Complaint did not allege a failure to use reasonable efforts to secure a fully executed REA Amendment and Appellant failed entirely to provide any evidence that further efforts by Kimschott

would have made any difference. Further, the allegation that Kimschott “actively prevented that Amendment from being executed” is false and not supported by any of the evidence, which clearly showed that Safeway had withheld its approval to record the REA Amendment until such time as Target signed an agreement with Safeway – an event which never happened.

2. Appellant’s argument about the outside closing date of October 31, 2008 is irrelevant given that the record clearly establishes that Appellant itself demanded performance by October 31, 2008 and when it did not occur, it immediately filed this lawsuit claiming a breach by Kimschott which must pre-suppose that no further time for performance was allowed after October 31, 2008.

3. The issue about Appellant’s ability to pay the purchase price was withdrawn in Kimschott’s reply brief on summary judgment and thus cannot serve as a ground for finding error. (*See* CP 459, n.2.)

4. The Court properly granted Kimschott’s motion for summary judgment because Appellant was not entitled to the remedy of specific performance. Further, this is not a forfeiture case and Appellant’s request to conduct additional discovery did not come even close to complying with the requirements of CR 56(f).

III. STATEMENT OF THE CASE

Kimschott agrees with the first paragraph of Appellant's summary portion of the statement of the case addressing the identity of the parties to this action. Kimschott further agrees with section B of Appellant's statement of the case so it will not rehash those facts here. Otherwise, Kimschott does not agree with Appellant's statement of the case and as such will provide its own.

A. THE RELEVANT AGREEMENTS

On September 21, 2006, Appellant and Kimschott executed the original PSA for the sale of a portion of the Factoria Square Mall with an *initial* "outside closing date" of October 2, 2007. (CP 16-40) As can be seen by the complexity of the PSA, there was much to be done by both parties before the sale could close, many items of which were not within either parties' control. (CP 16-40) However, the provisions relevant to Appellant's Complaint provide as follows:

6.3 REA Amendment. Buyer and Seller acknowledge that the Property is currently subject to a reciprocal easement agreement (the "**REA Agreement**") relating to the Property and the Project. On or before the expiration of the Review Period, Seller shall use commercially reasonable efforts to cause the other owners of a portion of the Project or other property subject to the REA Agreement (and any lenders or other parties whose consent may be required) to finalize an amendment to the REA Agreement (the "**REA Amendment**") in form approved

by Buyer, such approval not to be unreasonably withheld, conditioned or delayed, releasing the Property from the REA Agreement and permitting multifamily housing on the Property. In the event the REA Amendment has not been finalized and executed prior to expiration of the Review Period, the Review Period shall be extended until ten (10) days following the finalization and execution of the REA Amendment. The parties hereto acknowledge and agree that the REA Amendment will not be recorded in the official records of the applicable county recorder except in connection with, and at the time of, the Closing of the sale of the Property.

* * *

7.4 Conditions for Closing. The obligations of Buyer and Seller under this Agreement are subject to satisfaction or waiver of the following conditions on or prior to closing.

7.4.1 REA Amendment. Seller shall have delivered the recordable REA Amendment in form and substance reasonably acceptable to Buyer and Seller to Escrow.

7.4.2 Intentionally Omitted.

7.4.3 Site Preparation Requirements. Seller shall have completed the Site Preparation Requirements applicable to the Property.

7.4.4 Land Division. Seller shall have completed the Land Division applicable to the Property.

7.4.5 Permitting Contingency. Buyer shall have satisfied or waive the Permitting Contingency applicable to the Property.

* * *

24. Time of the Essence. Time is of the essence of this Agreement.

(CP 21, 23, 30)

When the outside closing date of October 2, 2007, in the original PSA came and went with the parties not having closed the transaction, the parties agreed to keep the deal moving forward and thereafter executed the First Amendment to Purchase and Sale Agreement on August 31, 2008 for such purposes. (CP 42-93) In relevant part, the First Amendment to the PSA provided as follows:

4. Waiver or Review Period; REA Amendment.

* * *

b. . . . Seller remains obligated to complete the REA Amendment in accordance with the provisions of Section 6.3 of the Purchase Agreement. Buyer hereby approves the form of REA Amendment attached hereto as Attachment C (which REA Amendment is in the form of an "Amendment No. 7 to Reciprocal Easement Agreement"). In the event the REA Amendment has not been completed by September 30, 2008 (the "REA Amendment Date"), Buyer may at Buyer's option and upon notice to Seller given within five (5) business days after the REA Amendment Date, terminate this Agreement (in which case all rights to acquire the Property shall be terminated) and obtain a refund of the Earnest Money and reimbursement from Seller of Buyer's expenses up to an amount not to exceed Two Hundred Thousand Dollars (\$200,000), or, in the alternative, Buyer may elect to extend Closing for the Property

until fifteen (15) days following the completion of the REA Amendment.

5. Outside Closing Date. The parties hereto hereby agree that the Closing Date shall be October 31, 2008. In any event, Closing shall be subject to the satisfaction or waiver of the conditions set forth in Article 7.4 of the Purchase Agreement.

* * *

11. Continued Effect. Except as amended by this Amendment, the Purchase Agreement shall remain in full force and effect without change.

(CP 42-44)

As can be seen from these provisions, aside from extending the outside closing date to October 31, 2008, the parties specifically negotiated an option for Appellant to be reimbursed up to \$200,000 for its investment expenses in the project if, by September 30, 2008, the recordable REA Amendment had not yet been obtained. (CP 42)

B. REA AMENDMENT NEVER PROVIDED TO ESCROW IN RECORDABLE FORM

To understand the complexity of the REA Amendment, the Court needs to understand who the executing parties to the proposed REA Amendment were: Kimschott, Thrifty Payless, Inc., Safeway Inc., Washington Mutual Bank, and Factoria Properties LLC (which owned the parcel upon which the Big 5 sporting goods store operated). (CP 353) Predominantly large national companies. As

Appellant admits in its discovery responses, in order for the REA Amendment to be recordable as required by the PSA and First Amendment to PSA, signatures from each of these parties had to be delivered to escrow with “instructions that permitted the recording of the REA . . .” (CP 196-206 at 203 [emphasis added].) In other words, it was well understood that without the signatures and, importantly, the authorizations from all parties to the REA to release those signatures and record the amendment, the REA Amendment condition to closing would not be met and Chicago Title (as the escrow agent) would not have been able to close the transaction. (CP 16-40 at 21 and 23 [¶¶ 6.3 and 7.4.1.]) Without the recorded REA Amendment, Appellant would not be able to construct on the property it was wanting to buy from Kimschott.

While there may be some issues relating to Washington Mutual Bank’s and Factoria Properties LLC’s authorizations to record the REA Amendment that would have required further discovery and/or more complicated legal issues, there was no doubt at summary judgment that the instructions provided to escrow by Safeway Inc. *did not permit the recording* of the REA Amendment at any time prior to the outside closing date of October 31, 2008 – or anytime thereafter for that matter. (See CP 213-237)

In relevant part, Safeway's August 26, 2008, escrow instructions to Chicago Title provided as follows:

This will serve as Safeway's instructions in the captioned escrows.

* * *

You are authorized and directed to take the following actions, when you are in a position to comply with all the applicable conditions:

* * *

3) Provided that you can confirm [certain other conditions that are not relevant to this motion] you are authorized to record the 7th and 8th REA Amendments [the REA Amendment].

* * *

5) Provided that you can confirm ... that an instrument binding Parcel 2, the form of which will be provided by Safeway, is recorded simultaneously and is subject to no unapproved title exceptions, you are authorized to record the Parcel 2 Release.

(CP 213-215 [emphasis added].)

Thereafter, on September 10, 2008, Safeway followed up with its supplemental escrow instructions as follows:

This will serve as Safeway's supplemental instructions in the captioned escrows...

Enclosed please find

* * *

2) Agreement for Covenants between Safeway and Target Corporation (the "Safeway/Target Agreement"), executed and acknowledged by

Safeway. The Safeway/Target Agreement is the “instrument binding Parcel 2, the form of which will be provided by Safeway,” referred to in Paragraph 5 of the August 26 instructions.

Provided that you are in a position to carry out **all of the terms** of Paragraphs 1, 2, 3 and 5 of the August 26 instructions, as well as the additional applicable instructions set forth therein and herein, you are hereby authorized to carry out those instructions...

(CP 216-237.) As can be seen from the above, all of Safeway’s escrow instruction conditions had to be satisfied before Safeway would authorize the recording any of the instruments it had signed, including the REA Amendment.

Most importantly here, Safeway required that the Safeway/Target Agreement (CP 233-37) (specifically relating to conditions “5” in the first escrow instructions and “2” in the second escrow instructions) be recorded simultaneously subject to no unapproved title exceptions. (CP 214 at ¶ 5.) Aside from the title exceptions to this instrument, Safeway first required that it be executed by Target as well so that it could be recorded and binding between those two parties. (*Id.*) However, this condition was *never* satisfied because Target *never executed* or authorized the Safeway/Target Agreement. (CP 237.) In other words, because Target never signed its agreement with Safeway, as a specific result clearly stated in Safeway’s

escrow instructions regarding the REA Agreement, Safeway would not and did not authorize recording of the REA Amendment. (*Id.*)

Consistent with Safeway's clear instructions, escrow was not authorized to record any of the documents executed by Safeway, including, determinatively here, the REA Amendment. (CP 213-237) As a result, the PSA could not close.

C. APPELLANT CHOOSES TO DEMAND CLOSING BY OCTOBER 31, 2008 – DOES NOT ELECT TO EXTEND CLOSING OR EVEN ASK

Despite the REA Amendment not being ready to be recorded by September 30, 2008, on October 9, 2008, Appellant elected not to terminate the PSA and recover its \$200,000 from Kimschott in partial recompense for its investment expenses, but instead, based upon its erroneous belief that the REA Amendment was ready and able to be recorded, demanded that Kimschott close the transaction by October 31, 2008. (CP 95.) In response, on October 17, 2008 Kimschott informed Appellant that the REA Amendment had not yet been completed and that the PSA would need to be amended again if Appellant wanted to extend the outside closing date to see if a closing could ultimately occur. (CP 97-98.) Appellant then responded on October 23, 2008 erroneously rebuking Kimschott's notice that the REA Amendment had not yet been completed based

upon incomplete or erroneous information apparently received from Chicago Title (i.e., that every party to the REA Amendment had agreed that their respective signatures could be released for recording of the document). (CP 100-101.) As admitted now by Appellant, that was not the case.

D. THE COMPLAINT

Kimschott invites the Court to review the Complaint in this action as it bares little resemblance to the issues now argued in Appellant's brief. (CP 3-9.) In short, while Kimschott will allow the Complaint to speak for itself, one thing is clear from reading it: The entire Complaint is based upon the false assertion that the REA Amendment had been fully executed by all parties and delivered to escrow ready and able to be recorded by escrow. (*Id.*) Accordingly, after confirming through discovery that the entire basis for the Complaint was wrong (i.e., that Safeway had in fact not yet agreed that the REA Amendment could be recorded), Kimschott successfully moved for summary judgment dismissing Appellant's Complaint. (CP 466-467)

IV. ARGUMENT

A. APPLICABLE LEGAL STANDARDS

1. Appellate Court May Affirm On Any Ground

The Court of Appeals reviews the grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Estep v. Hamilton*, 148 Wn. App. 246, 255 (2008). In so doing, the Court “may affirm a summary judgment grant if it is supported by any grounds in the record.” *Id.* at 256, citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01 (1989). Fact issues may be decided as a matter of law where reasonable minds could reach but one conclusion. *Estep*, 148 Wn. App. at 256.

2. Summary Judgment Analysis In This Context

“The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact.” *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602 (1980). Summary judgment is appropriate if the evidence shows no issues of material fact exist and that the moving party is entitled to judgment as a matter of law. CR 56(c). “A material fact is one upon which the outcome of the litigation depends, in whole or in part.” *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 861 (2004). In responding to a motion for summary judgment, **the non-moving party has the**

burden of establishing the essential elements of its case and its failure to do so “necessarily renders all other facts immaterial.”

B.A. Van de Grift, Inc. v. Skagit County, 59 Wn. App. 545, 550 (1990) (emphasis added).

A defendant may move for summary judgment either by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. *Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 350. (2006). If the latter method is used, the defendant must “identify those portions of the record, together with the affidavits, if any, which . . . demonstrate the absence of a genuine issue of material fact.” *Id.* at 350-51 (quoting *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 22 (1993)). Once this burden has been met, the burden shifts to the plaintiff to present admissible evidence demonstrating the existence of a genuine issue of material fact. *Shooting Park Ass’n*, 158 Wn.2d at 351. “If the plaintiff cannot meet that burden, summary judgment is appropriate.” *Id.*

Appellant’s failure to provide proof as to any essential element supporting its claims alleged in its Complaint means that no genuine issue of material fact can exist and summary judgment is mandated. *Id.*; *B.A. Van de Grift, Inc.*, 59 Wn. App. at 550.

3. Pleading Requirements For Complaint Not Met

“While inept pleadings may survive a summary judgment motion, insufficient pleadings cannot.” *Shooting Park Ass’n*, 158 Wn.2d at 352 (citing *Lewis v. Bell*, 45 Wn. App. 192, 197(1986)).

“Complaints that fail to give the opposing party fair notice of the claim asserted are insufficient.” *Shooting Park Ass’n*, 158 Wn.2d at 352 (citing *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26 (1999); *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385-86 (1993) (rejecting plaintiff’s “veiled attempt” to amend his complaint by raising a theory of wrongful termination in response to defendant’s summary judgment motion); *Lundberg v. Coleman*, 115 Wn. App. 172, 180 (2002).

B. SUMMARY JUDGMENT PROPERLY GRANTED BASED ON COMPLAINT

Appellant’s lawsuit and the trial court’s order granting summary judgment were based, by definition, on the Complaint filed by Appellant. The basis of the Complaint was summed up by Appellant in Paragraph 11, thereto:

11. Upon information and belief, the Defendant delivered to escrow a fully executed amendment to the REA in the form approved by Plaintiff and Defendant in a recordable form. As a result, all PSA conditions related to the amendment to the REA were met and

the Defendant was not permitted to avoid completing the transaction due to this condition to closing.

(See CP 3-9, at 8)

Given that discovery had shown that the allegations made in the Complaint were completely false, Kimschott moved for summary judgment based on the Complaint. With no leg left to stand on, Appellant then changed its theory in response to Kimschott's summary judgment motion, asserting instead for the first time that Kimschott had failed to use commercially reasonable efforts to obtain the REA Amendment. Not only is this new theory nowhere to be seen in the Complaint, but it is actually contrary to the allegations made in the Complaint (i.e. that the REA Amendment had already been completed but Kimschott was preventing the deal from closing as a result of its own signatures).

Despite completely changing its theory, however, Appellant did not attempt to actually amend its Complaint. Instead, similarly to the plaintiff in *Malloy supra*, Appellant made a "veiled attempt" to amend its Complaint by raising its new theory only in response to Kimschott's summary judgment motion. *Molloy*, 71 Wn. App. at 385-86. And here, just as in *Malloy*, the Court should not allow Appellant to go forward with a theory not contained within the Complaint (indeed a theory that is actually contrary to the

allegations made in the Complaint).¹ This Court should affirm the trial court's grant of summary judgment based on the actual Complaint, which was shown to be meritless.

This entire inquest should really end here, but given the lack of merit in Appellant's remaining arguments, Kimschott will address those as well to provide the Court with additional grounds for affirmance. *Estep*, 148 Wn. App. at 256.

C. APPELLANT'S COMMERCIALY REASONABLE EFFORTS ARGUMENT FAILS

1. Appellant Lacks Evidence Essential To Its Claim

In support of its appeal, notwithstanding the allegations actually made in the Complaint as discussed above, Appellant wrongly asserts that Kimschott bore the burden of establishing that it used commercially reasonable efforts to obtain the REA Amendment. While there is substantial evidence in the record to establish Kimschott's use of commercially reasonable efforts in attempting to obtain the REA Amendment,² a determination of

¹ Appellant's Complaint alleged that Kimschott refused to close even though the REA Amendment was able to be recorded while its new theory in response to summary judgment and now on appeal is that Kimschott did not try hard enough to ensure that the REA Amendment might eventually be able to be recorded.

² Most obviously the fact that Kimschott was successful in getting each of the large corporations that were signatories to the REA to sign off on the REA Amendment subject to only a few important conditions.

whether Kimschott's efforts were commercially reasonable would not become necessary until there was evidence to support a finding that obtaining the REA Amendment was possible through commercially reasonable efforts. *See Egbert v. Way*, 15 Wn. App. 76, 79-80 (1976) (evidence establishing that the breaching party had the ability to perform required before specific performance can be ordered); *see also Langston v. Huffacker*, 36 Wn. App. 779 (1984) (same). Appellant did not even attempt to provide such evidence to the trial court below, nor is such evidence apparent before this Court.

If commercially reasonable efforts are analyzed as urged by Appellant, as the non-moving party plaintiff, Appellant would have the burden of putting forth evidence that further commercially reasonable efforts by Kimschott would have lead to the REA Amendment being completed before a claim for failure to use such efforts or the relief of specific performance could even be addressed. *Shooting Park Ass'n*, 158 Wn.2d at 350-51, *B.A. Van de Grift, Inc.*, 59 Wn. App. at 550. In this burden, however, Appellant completely failed. There is absolutely no evidence in the record that further efforts by Kimschott would have ever led to a completed REA Amendment. By contrast, in the cases cited by Appellant, the Courts looked at the evidence presented and found affirmatively that

performance was possible by the defendants therein. *See Egbert*, 15 Wn. App. at 79-80 (only barrier was tax obligations that could have been paid by defendant); *Langston*, 36 Wn. App. at 789 (facts established that title could have been cleared in time by defendant's efforts).

Accordingly, even if Appellant was allowed to assert its new theory of alleged failure to use commercially reasonable efforts in response to Kimschott's summary judgment motion, it failed to produce any evidence below that the use of commercially reasonable efforts (whatever it thinks those might be – again, not articulated to the trial court) would have actually born fruit in the form of a recordable REA Amendment. As is clear from the analysis in *Egbert* and *Langston*, this first step (showing that performance was possible) is an essential element in any claim for specific performance. In responding to Kimschott's motion for summary judgment, it was Appellant's burden to put forth evidence sufficient to establish each of the essential elements of its case. *Shooting Park Ass'n*, 158 Wn.2d at 350-51, *B.A. Van de Grift, Inc.*, 59 Wn. App. at 550. Its failure to do so "necessarily renders all other facts immaterial" and mandates summary judgment for Kimschott as the moving party. *Id.*

Furthermore, given that Appellant's requested relief is specific performance, it follows that it must have some evidence that such performance is still possible in order for that relief to actually be ordered by the trial court. Here, given the time that has passed, there is a complete lack of evidence that any of the parties to the REA would agree to the REA Amendment now.³

2. While Not Necessary To Its Decision, Trial Court Had Ample Evidence Of Kimschott's Efforts Determine As A Matter Of Law That Its Efforts Were Commercially Reasonable

It is true that determining whether commercially reasonable efforts were used is usually a question of fact for the jury. However, in situations like the one at hand, fact issues may be decided as a matter of law where reasonable minds could reach but one conclusion on the evidence presented. *Estep*, 148 Wn. App. at 256.

The undisputed facts before the trial court established that after years of effort Kimschott was able to get all of the REA

³ For example, while Washington Mutual originally signed off on the REA Amendment, given the Federal Government's seizure and sale of Washington Mutual to J.P. Morgan Chase on or about September 25, 2008, it is unclear whether Washington Mutual's signature on the REA Amendment would have been sufficient or if a signature from J.P. Morgan Chase would have been required. As of now, however, it is clear that an agreement from Chase would need to be obtained before any REA Amendment could be finalized.

signatories together with signatures in escrow, but unfortunately it was one last (albeit very important to Safeway) condition that blocked the REA Amendment from being completed. (CP 213-37.) Obtaining these signatures was not a simple process. The parties to the REA included very large national corporations Thrifty Payless, Inc., Safeway Inc., and Washington Mutual Bank. Additionally, while not a party to the REA, Target Corporation had land, lease and use rights that were intertwined with the planned project. Most importantly here was Safeway's relationship with Target and Safeway's requirement that Target sign off on a certain Agreement for Covenants Affecting Land before it would agree to release its signatures for the REA Amendment. (*See* CP 213-17, 233-237). As it turned out, as of September 11, 2008, all parties were waiting on Target's sign off on Safeway's document in order to have the REA Amendment in recordable form, and the evidence shows Kimschott's substantial efforts to obtain Target's sign off. (*See e.g.* CP 244-251). Unfortunately, in early October, Target stopped working towards participating in the project and informed all involved that it would not revisit the issue for at least six months.

Almost immediately thereafter, on October 9, 2008, Appellant sent its first letter erroneously asserting that the REA Amendment had

been signed of on by all parties in recordable form and demanding closing by October 31, 2008. Given the rug that had just been pulled out from under the planned transaction with Target pulling out, Kimschott was working on regrouping when it received Appellant's demanding letter. In response, Kimschott specifically pointed out the incorrect assertions put forth in Appellant's October 9, letter and suggested that a modification/extension needed to be made to the PSA before October 31, or the agreement would terminate. (*See* CP 97-98.)

In response, however, rather than believing Kimschott about the REA Amendment status and working towards amending the PSA, by letter dated October 23, 2008, Appellant again demanded closing by October 31, 2008 on the erroneous belief that the REA Amendment had been completed. When closing did not occur on October 31, Appellant filed the Complaint almost immediately confirming Appellant's own position that the October 31st cut off was the last day for performance under the PSA, as amended.

Given the above, the trial court would have been well within its bounds to determine that Kimschott had used commercially reasonable efforts to obtain the REA Amendment as a matter of law and no reasonable jury could conclude otherwise. *Estep*, 148 Wn. App. at 256. Likewise, as Appellant failed to provide any evidence

of a lack of commercially reasonable efforts, or even that such efforts, reasonable or not, might bear fruit, Appellant failed to meet its responsive burden on summary judgment.⁴

D. RELIANCE AND FORFEITURE ARGUMENTS ALSO NOT IN COMPLAINT AND BASELESS BESIDES

While not anywhere to be found in the Complaint, Appellant asserts that it relied on Kimschott's assurances which allegedly resulted in a forfeiture of \$775,000 for a non-refundable construction loan commitment and of another potentially \$4 million for its development investment. *See* Brief at 17-19. However, Appellant did not sue (nor seek the remedy) of a money judgment against Kimschott. It claims it wants specific performance of a contract that Kimschott cannot control (i.e. the several outside parties required to validate and get recorded the critical REA Amendment), but then it complains to this Court about monies it invested in trying to bring this deal to a close. However, Appellant is not allowed to assert claims in its briefing that are not contained in its complaint. *Molloy*, 71 Wn. App. at 385-86. The Court should give short shrift to these arguments for this reason alone.

⁴ Since the filing of the suit and commencement of its discovery efforts, Appellant never even attempted to obtain testimony and/or depose Safeway or Target to show that a resolution on this sticking point was even possible.

Regardless, even if the Court were to go forward with analyzing these claims, they fail on their face under the explicit negotiated terms of the Amended PSA. Specifically, these two sophisticated commercial parties negotiated in the first amendment to the PSA exactly what would happen if the REA Amendment could not be completed in a timely manner:

4. Waiver or Review Period; REA Amendment.

* * *

b. . . . Buyer may at Buyer's option and upon notice to Seller given within five (5) business days after the REA Amendment Date, terminate this Agreement (in which case all rights to acquire the Property shall be terminated) and obtain a refund of the Earnest Money and reimbursement from Seller of Buyer's expenses up to an amount not to exceed Two Hundred Thousand Dollars (\$200,000), or, in the alternative, Buyer may elect to extend Closing for the Property until fifteen (15) days following the completion of the REA Amendment.

(See CP 42)

It must be noted also that the \$200,000 to be paid in the above paragraph is not a repayment of funds that were ever received by Kimschott from Appellant. It is a payment of funds out of Kimschott's own pocket pursuant to the parties' specific agreement. In other words, Kimschott and Appellant were in the deal together, one wanting to sell the property and one wanting to buy, but both

realizing that other parties had control over whether such a purchase would be feasible for the purposes of Appellant. To that end, Kimschott agreed to cover up to \$200,000 of Appellant's costs if the deal could not be brought to fruition. This is not a forfeiture situation like those in the half century old case law cited by Appellant. *See Hyrka v. Knight*, 64 Wn.2d 733 (1964) (\$1,500 paid toward purchase that did not go through returned to purchaser due to lack of discussion of forfeiture provision), *State ex rel. Foley v. Superior Court*, 57 Wn.2d 571 (forfeiture of real estate as a result of late payments not allowed without grace period given that parties had not discussed forfeiture provision), *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777 (forfeiture provision in dairy farm sale contract found to be enforceable, but grace period employed in equity), *Dill v. Zielke*, 26 Wn.2d 246 (1946) (forfeiture of real estate as a result of late payment not allowed without grace period).

No forfeiture of money or property to Kimschott occurred here. Even if it were included in the Complaint, which it is not, this is not a forfeiture case. This case involves two sophisticated businesses that realized the PSA they entered into was not entirely in either one's control and relied on other parties that had the potential to kill the deal at any time.

Furthermore, despite Appellant's wrongful allegations regarding Kimschott's signatures on the REA Amendment, at no point did Kimschott ever delay or prevent closing by withholding its signatures. Simply because Kimschott's lawyers held its signatures to the deal versus escrow, did not prevent this matter from closing. The evidence is undeniable that closing was prevented by the conditions put on the signatures of other parties to the REA, at the very least, Safeway, but not Kimschott. Additionally, Appellant never requested a grace period. In fact, when a grace period was suggested by Kimschott by way of again amending the PSA (*See* CP 98) in response to Appellant's first demand for performance, Appellant simply re-demanded performance by October 31, 2008 or risk having Appellant claim a failure of timely performance and file suit.

**E. OUTSIDE CLOSING DATE ARGUMENT
IRRELEVANT GIVEN APPELLANT'S ACTIONS**

Appellant spends a substantial section of its brief arguing that the Outside Closing date found in the first amendment to the PSA was not actually the outside closing date because closing could be extended to 15 days after the REA Amendment was completed. Arguing in essence that since the REA Amendment was not completed (a fact which they denied wrongly to the trial court below), the contract continued indefinitely. Apparently, Appellant

is attempting to make it an issue of fact whether the parties' agreement automatically terminated on October 31, 2008 or not. This question, however, is completely irrelevant given the actions of Appellant.

Appellant's October demand letters and Complaint assert that Kimschott's failure to close by October 31, 2008 constituted a breach of contract – a timely failure to close. Thus, regardless of the Court's interpretation of the contract (i.e. whether Appellant could elect to extend closing indefinitely), the facts are clear and undisputable that Appellant did not elect to extend the time for performance, but in fact did just the opposite and demanded performance by the Outside Closing Date – October 31, 2008. Appellant's arguments in this regard in an attempt to create an issue of fact are thus meritless.

F. NO EVIDENCE OF SABOTAGE BY KIMSCHOTT

Likewise Appellant's attempt to cast aspersions on Kimschott for pulling its signatures from escrow and leaving them in its lawyers' hands is nothing but baseless innuendo. At no point did the location of Kimschott's signatures have any affect on whether the REA Amendment could be obtained and recorded or not. At no point was escrow ever waiting on Kimschott to submit its signatures to finalize the deal. If that is Appellant's argument, it failed to

produce any evidence of that fact.⁵ Appellants attempt to analogize this case to *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841 (2007) therefore fails.

In *Nishikawa*, the seller of a piece of real estate attempted to change the terms of the already completed sale to include an environmental indemnity clause and when the buyer refused to go along with the change, the seller refused to close. This is not even close to what occurred here. Unlike the seller in *Nishikawa*, Kimschott never attempted to change the terms of the PSA, and specifically, despite Appellant's unsupportable assertions, Kimschott never revoked its approval of the REA Amendment. As is discussed in detail above, given that Safeway's conditions for releasing its signatures were never met, there never came a time at which escrow was waiting for Kimschott to provide its approval on the REA Amendment and release of signatures to close. Kimschott never refused to close, but rather the transaction could not close by its own terms because the REA Amendment had not been completed with the other parties and Appellant did not (and rationally would not)

⁵ Again, despite subpoenaing the documents of the escrow agent, Appellant never even attempted to take the testimonial deposition of the escrow agent to support any of Appellant's misguided theories in this regard.

waive that condition and buy a piece of land that it could not construct on. This whole line of argument by Appellant is simply another red herring.

G. CR 56(F) CANNOT SAVE APPELLANT'S MERITLESS CLAIMS

Initially it should be pointed out that Appellant's argument with regard to why it needs additional time to conduct discovery does not make any sense. Appellant argues (albeit wrongly) that it was Kimschott's burden to show that it used commercially reasonable efforts and that Kimschott allegedly provided no evidence of any such efforts. Then, in the very next sentence it asks the Court to provide Appellant time to do discovery on Kimschott's efforts. This does not make logical sense.

Next, in support of its assertion that it should have been granted CR 56(f) relief, Appellant makes no effort to address the substantial authority provided to the trial court as to why the trial court should not have granted CR 56(f) relief, but instead relies only upon generic statements about CR 56(f) and continuances. Appellant has not shown good cause, let alone any cause for allowing CR 56(f) relief.

Appellant's Complaint has been shown to have been based completely upon the false premise that the REA Amendment was in escrow ready to be recorded, but that Kimschott simply refused to go

forward and release its signatures for the sale. That premise having been destroyed by the parties' initial discovery and the uncontroverted documentation found in the escrow file, Appellant argued to the trial court that it should be allowed to go on a fishing expedition to see if it could come up with some other theory that it might advance in the future. This is not what CR 56(f) was created for, and given the requirements to obtain CR 56(f) relief that Appellant did not meet, the trial court properly denied Appellant's request for CR 56(f) relief.

CR 56(f) requires the opposing party to file an affidavit and state the reasons why additional time is necessary. A court may deny the motion if: (1) the moving party does not offer a good reason for the delay in obtaining the evidence; (2) the moving party does not state what evidence would be established through the additional discovery; or (3) the evidence sought will not raise a genuine issue of fact.

Briggs v. Nova Servs., 135 Wn. App. 955, 961-62 (2006) (internal quotations omitted).

Here, straight off, before even looking at the three factors set out in *Briggs*, Appellant failed to file an affidavit stating the reason why additional time was necessary. This should be fatal to its request at the outset. Regardless, even if the Court were to construe the affidavits on file as somehow meeting this CR 56(f) requirement, Appellant did not meet the other three requirements set out in *Briggs*.

First, Appellant offered no good reason for its delay in obtaining the discovery it allegedly seeks. In fact, Appellant offered no reason whatsoever. This case was filed in early November 2008. Kimschott filed its summary judgment motion in February 2009, and even after it was filed, Appellant made no attempt to begin any of the discovery it alleged that it would do if the trial court allowed it a continuance. Appellant did absolutely nothing to indicate it needed discovery or why it had not taken such “necessary” discovery over the last four months preceding the summary judgment hearing. For this reason alone, Appellant’s request for CR 56(f) relief was properly denied. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App 899, 902-03 (1999) (failure to meet any of the three prongs is grounds for denying continuance request under CR 56(f)).

Second, Appellant’s request did not state the evidence that it hoped to establish through additional discovery. Rather, Appellant simply identified the discovery mechanisms it hoped to employ. Mechanisms it obviously hoped would help, but with no indication of any specific evidence that it expected to actually obtain. This failure alone is also fatal to Appellant’s CR 56(f) request. *Mannington Carpets*, 94 Wn. App at 902-03.

And third, the discovery sought by Appellant's request could not produce evidence sufficient to raise a genuine issue of material fact. Discovery has already shown the Complaint to be meritless. Further discovery will not change this or create an issue of fact in this regard. The documents provided by signers to the REA Amendment say what they say and are not ambiguous, so further discovery on any grant of authority issues will not change anything. *See, e.g., Mutual of Enumclaw v. Archer Constr.*, 123 Wn. App. 728, 744 (2004) (after reviewing a contract as a matter of law, the court denied the continuance because "the desired evidence does not raise a genuine issue of material fact."); *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369 (2007) (denying the continuance in part because the issue was "a matter of law"); *Linville v. State*, 137 Wn. App. 201, 207 and n. 3 (2007) (denying continuance because "the primary issue in [the] case [was] duty, which [was] a legal rather than a factual question and, thus, the trial court could proceed with the summary judgment hearing").

Additionally, if Appellant's argument now is that, if Kimschott had done something more (what that something is, however, is not alluded to by Appellant), then Safeway and/or Target would have changed their positions, thus allowing the release of Safeway's signature to the REA Amendment, then Appellant should have at least

attempted to obtain testimony (or depositions) from either Target or Safeway for this proposition. It attempted neither and has no excuse for its delay.

As such, Appellant failed to meet any of the requirements for CR 56(f) relief, let alone all of them and thus its CR 56(f) request was properly denied.

**H. READY WILLING AND ABLE ARGUMENT
IRRELEVANT**

Appellant's ability to pay the purchase price was an issue that was withdrawn for purposes of summary judgment in Kimschott's reply brief and thus was not relied upon by the trial court and cannot serve as a ground for finding error. (*See* CP 459, n.2.) Notably, however, Appellant has not paid the judgment entered against it by the trial court for Kimschott's attorney's fees and costs, nor has it posted a supersedeas bond. Further, Kimschott's efforts at collection have been unsuccessful to date despite the use of supplemental proceedings. Under the circumstances, this Court in good conscience should not allow Appellant to continue to prosecute this appeal given that Appellant is asking the Court to require it to enter into an over \$14,000,000.00 transaction when Appellant refuses (or is unable) to pay on a judgment of less than \$50,000.00 that it currently owes to Kimschott.

I. KIMSCHOTT SHOULD BE AWARDED COSTS AND ATTORNEYS' FEES ON APPEAL

Pursuant to RAP 18.1(b) and ¶ 17 of the PSA, Kimschott requests an award of all reasonable attorney's fees and costs incurred on appeal. "A court has power to award attorney fees when authorized by contract, statute, or recognized ground of equity." *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 35, 904 P.2d 731 (1995) (internal quotations deleted).

If the Court affirms the trial court's grant of summary judgment, then Kimschott will be entitled to an award of its attorneys' fees pursuant to ¶ 17 of the PSA which provides as follows:

17. Governing Law, Attorneys' Fees. This Agreement shall be construed according to the laws of the state of Washington. If either Buyer or Seller should find it necessary to employ an attorney to enforce a provision of the Agreement or to recover damages for the breach hereof (including proceedings in bankruptcy), the prevailing party shall be entitled to be reimbursed for its court costs and attorneys' fees, in addition to all damages, through all levels of appeal.

(CP 28).

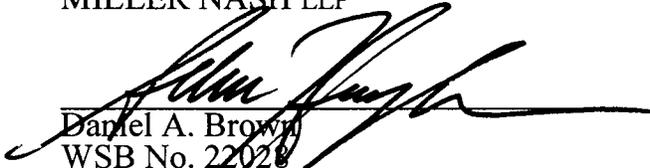
Accordingly, pursuant to paragraph 17 of the PSA and in compliance with RAP 18.1(b), Kimschott request an award of its costs and attorneys' fees incurred in defending this appeal.

V. CONCLUSION

Appellant's lawsuit was based entirely upon the premise that all conditions to closing had been met and that Kimschott simply refused to close. That premise was then undeniably refuted by discovery and Appellant refused to amend its complaint. As such summary judgment was properly granted. It should be as simple as that. For this reason and the other reasons set forth above, Kimschott respectfully requests that the Court affirm the trial court's grant of summary judgment and award Kimschott its costs and attorneys' fees incurred in defending this appeal.

DATED this 3rd day of August, 2009 at Seattle, WA.

MILLER NASH LLP



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Attorneys for Respondent

I hereby certify that I served the foregoing BRIEF OF
RESPONDENT on:

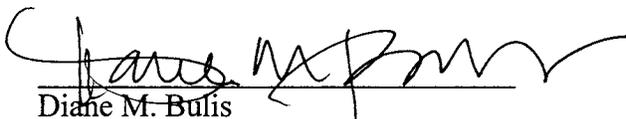
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by the following indicated method:

- by causing full, true, and correct copies thereof to be hand-delivered to the attorney at the attorney's last-known office address listed above on the date set forth below.

DATED this 13th day of August, 2009.



Diane M. Bulis

Of Attorneys for Respondent

SEADOCS:401412.2

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