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No. 69927-0-1

COURT OF APPEALS, DIVISION I OF THE STATE  
OF WASHINGTON

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CHICAGO TITLE INSURANCE COMPANY,

a Washington corporation, Plaintiff,

vs.

RICHARD CAMPBELL AND REBECCA LEE MARCY, husband and  
wife and their marital community, Appellants,

ROSALIND M. GREENBERG, and individual, Respondent.

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**REPLY BRIEF OF APPELLANTS**

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FILED  
APR 22 11 1:16  
COURT OF APPEALS  
DIVISION I  
SEATTLE, WA

## TABLE OF CONTENTS

I. ARGUMENT .....	1
A. Respondent Failed to Meet Her Burden of Proof at the Summary Judgment and Mistakenly Argues to Shift the Entire Burden of Proof on Campbell/nonmoving party.....	1
B. Appellant Relied on Substantial Evidence which Raised Genuine Issues of Material Fact as to the Application of the Financing Contingency and to Greenberg's Alleged Excuse to Perform .....	4
C. Greenberg's Lack of Providing the Down payment Funds Is Further Proof of Her Bad Faith Rather Than A Futile Act .....	9
V. CONCLUSION .....	11

## TABLE OF AUTHORITIES

### i. TABLE OF CASES

<i>Atherthon Condo Ass'n v. Blume Dev. Co.</i> , 115 Wash.2d 506 (1990).....	2
<i>Demelash v. Ross Stores, Inc.</i> , 105 Wash.App. 508 (2001) .....	3
<i>Graves v. P.G. Tagagares</i> , 94 Wash.2d 298 (1980) .....	3
<i>Hash by Hash v. Children Orthopedic Hosp. and Medical Center</i> , 110 Wash. 2d 912 (1988) .....	3
<i>Marincovich v. Tarabochia</i> , 114 Wash.2d 271 (1990).....	2
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wash.2d 874 (1967) .....	4
<i>Riley v. Andres</i> , 107 Wash.App. 391 (2001) .....	4
<i>Salvo v. Thatcher</i> , 128 Wash.App. 579 (2005) .....	4,8
<i>Security State Bank v. Burk</i> , 100 Wash.App. 94 (2000).....	5
<i>Van Noy v. State Farm Mut. Ins. Co.</i> , 98 Wash.App. 487 (1999).....	5
<i>Willener v. Sweeting</i> , 107 Wash.2d 388 (1986).....	8,9,10
<i>Young v. Key Pharmaceuticals</i> , 112 Wn. 2d (1989) .....	1

ii. RULES

CR56(c).....2

## I. ARGUMENT

### A. Respondent Failed to Meet Her Burden of Proof at the Summary Judgment and Mistakenly Argues to Shift the Entire Burden of Proof on Campbell/nonmoving party

Respondent blatantly fails to recognize the well-established burden of proof standard in a summary judgment motion and does not provide any discussion at all regarding how Greenberg met that standard at the trial court level. While Greenberg briefly mentions the defendant moving for summary judgment has the initial burden to demonstrate the absence of a material question of fact (Respondent's Brief pp. 4-5, quoting *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225 (1989), the analysis is shifted upon a novice and legally flawed argument which completely ignores Greenberg's burden of proof and instead focuses only on Campbell's burden of proof to avoid summary judgment.

Because this argument was also made at the trial court and Greenberg's burden was somehow overlooked, the burden of proof requirement bears repeating for clarification.

An appellate court reviewing a summary judgment order must engage in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274 (1990). Summary judgment is appropriate “only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Marincovich*, at 274; CR 56(c). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wash.2d 506, 516, (1990). On review, [t]he court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. *Marincovich*, at 274; CR 56(c).

A motion for summary judgment argues (1) that the case presents no genuine issues of fact (thus leaving the trier of fact nothing to decide), and (2) that the moving party is entitled to a judgment as a matter of law. CR 56(c).

The burden of establishing both requirements is on the moving party, even though the overall burden of proof at trial may be on the other party. If the moving party sustains his or her burden,

a final judgment will be entered in that party's favor. If the moving party fails to establish both requirements, the motion will be denied. The motion can be denied (i.e., the court may conclude that factual issues exist) even though the nonmoving party has submitted no affidavits or other evidence. *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wash. 2d 912 (1988). See also *Graves v. P.J. Taggares Co.*, 94 Wash.2d 298, 302(1980).

Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact. *Graves*, at 302 (emphasis added).

Respondent quite mistakenly claims that “the question instead is whether Campbell has presented sufficient evidence that Greenberg breached her duty under the financing contingency.” (Respondent’s Brief p. 2) That is not the question here as the legal authority does not support such argument. Rather, Greenberg failed to meet her initial burden of proof that she was entitled to summary

judgment and Campbell raised numerous issues of material fact that should have precluded Greenberg's summary judgment order.

**B. Appellant Relied on Substantial Evidence which Raised Genuine Issues of Material Fact as to the Application of the Financing Contingency and to Greenberg's Alleged Excuse to Perform**

The court does not weigh credibility in deciding a motion for summary judgment. If the facts as presented by the parties would require the court to weigh credibility on any material issue, a genuine issue of fact exists and summary judgment will normally be denied. Conflicting affidavits present the classic example. If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied. See, e.g., *Riley v. Andres*, 107 Wash. App. 391 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wash. 2d 874 (1967).

Here there are conflicting affidavits about Greenberg's good faith attempt to obtain financing when that is a condition of her duty to close, analyzed under *Salvo v. Thatcher*, 128 Wash.App. 579, 585 (2005), should have been a strong basis to deny Greenberg's summary judgment.

Summary judgment has often been precluded because the trier of fact needed to determine whether something was reasonable, or whether a person acted reasonably. *Security State Bank v. Burk*, 100 Wash. App. 94, (2000) (whether disposition of commercial collateral was commercially reasonable); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wash. App. 487 (1999), aff'd, 142 Wash. 2d 784, 16 P.3d 574 (2001) (whether insurer acted reasonably); *Demelash v. Ross Stores, Inc.*, 105 Wash. App. 508, (2001) (in suit for conversion, whether defendant had retained plaintiff's property for an unreasonable length of time).

It was for the trier of the fact to determine whether Greenberg acted in good faith in applying for the loan, specifically determining:

- when exactly she started the process,
- whether the financing was specific for the property in question,
- whether she cooperated with Merrill Lynch and instructing them to liquidate assets to have cash available for the down payment,

- what specific steps were taken after the May 17, 2011 Pre-Approval letter in order to facilitate the obtaining of the loan,  
-whether Greenberg's attempt to obtain alternate financing two days before closing was reasonable and in good faith, and  
-the credibility of Greenberg's actions and what exactly happened between April 26<sup>th</sup> when she allegedly started the financing process until June 8<sup>th</sup>, the closing date, when the financing was not ready.

These issues were highly disputed in the summary judgment affidavits as well as the evidence introduced by both parties.

Even in Respondent's brief an example of such issue is actually discussed: Respondent claims that on June 1, 2011 Merrill Lynch said it could not close the transaction because "it required more time to make the loan," (RP at p. 3); however, the very citation referenced by Respondent (CP 164-165) references an email from the real estate agent Donna Cowles saying that Merrill Lynch needed more time to sell the stock for the down payment rather than the loan and there is no guarantee that Merrill Lynch even requested such extension since Cowles got this information from Greenberg, not

Merrill Lynch . The credibility and veracity of the source of information is further proven questionable given that Meryl Lynch supposedly could not sell stock in 8 days and that is why the extension was needed.

Further, it seems evident that testimony is needed from Merrill Lynch representative(s) who communicated with Greenberg and worked on her loan approval application. Greenberg's claims are not supported by the evidence presented: the Merrill Lynch notes do not indicate any activity of reviewing the loan application until June 3<sup>rd</sup> or after. (CP 133) However, there is nothing from May 17<sup>th</sup> through June 3<sup>rd</sup> to indicate that Merrill Lynch was working on the approval loan process under Greenberg's direction. Contrary to Greenberg's assertion in the response, lack of evidence of documents showing any acts and communication on Greenberg's behalf to facilitate the loan and follow the steps provided by Merrill Lynch in the May 17<sup>th</sup> letter, is proof of her lack of good faith.

Beside the number of issues in dispute enumerated above, the trier of the fact should have determined whether Greenberg's refusal to pay for an extension of the closing was reasonable and in good

faith. Greenberg keeps mentioning that she asked for an extension and somehow her asking is enough to postpone the closing as to her desired date. There is no legal authority presented by Greenberg to support this contention; to the contrary, the other case presented on point by Greenberg beside *Salvo*, is *Willener v. Sweeting*, 107 *Wash.2d* 388 (1986), which deals with a prospective buyer who paid twice for two extensions in hopes to close the sale transaction. Campbell offered Greenberg the extension in exchange for additional consideration and Greenberg refused. Greenberg cannot claim Campbell is at fault because he did not grant an extension and agreed to modify an existing enforceable contract for free.

Lastly, *Willener, supra*, which Respondent relies on, is inapplicable here: in *Willener* the seller failed to tender marketable title at the closing date after buyer agreed and paid for two extensions in order to give time to the seller to cure the title defect (correct legal description of the property). In *Willener* the sellers breached the contract because they could not convey the exact property described in the earnest money agreement and deliver title

free and clear, so the court returned the earnest money to the purchaser (*Willener* at 392-393).

The legal standing is quite different here as Campbell was not in breach; rather Campbell was able to tender marketable title and close the sale on June 8<sup>th</sup> as mutually agreed by the parties. His refusal to extend the closing for no additional consideration was also not a breach. The only failure to perform was Greenberg's, and as discussed above that failure was not legally excused under the financing contingency provision.

**C. Greenberg's Lack of Providing the Down  
payment Funds Is Further Proof of Her Bad  
Faith Rather Than A Futile Act**

Respondent argues that the down payment requirement was futile; however, there is no legal basis of contract language which makes the financing approval of the loan a condition precedent to tendering the down payment funds; rather those actions are concurrent as the funds to purchase the property came from two sources: Merrill Lynch loan and cash down payment. Greenberg failed again to meet her initial burden to show there was no genuine

issue of material fact regarding her ability to provide that cash down payment.

Greenberg did not have the funds required for the down payment, and failed to introduce evidence to prove that she had in fact \$170,000 required down payment in cash or equivalent liquid form ready on June 8<sup>th</sup>. In fact, the response points to the very evidence which proves that more time was needed to obtain the funds for the down payment by selling stock (RP p.3, CP 164-165).

The legal authority relied upon by Respondent is quite inapplicable because even though the law does not require a futile act, this premise is based upon the circumstances where the other party failed to perform, not the party who raises the futility claim. (*Willener* at 395) (emphasis added). Greenberg makes another legally flawed argument using *Willener* for a proposition that it does not stand for: that a party can fail to perform part of her contractual duties and then claim futility on her own failure to perform for the rest of her contractual duties.

Here Campbell was ready and willing to perform and close the transaction on June 8<sup>th</sup> so there was no futility. Further, if

Greenberg would have least deposited the down payment funds in escrow, it would have showed good faith to close the transaction. To the contrary, the evidence introduced at the trial court showed no such liquidity on these funds on June 8<sup>th</sup>. On at least four occasions Greenberg has admitted that she needed an extension of the contract closing date in order to sell stock to raise the down payment. (CP 253-255, 258).

Greenberg's willingness and ability to tender the down payment should have been a question for the trier of the fact to determine whether she acted reasonably and in good faith.

## **II. CONCLUSION**

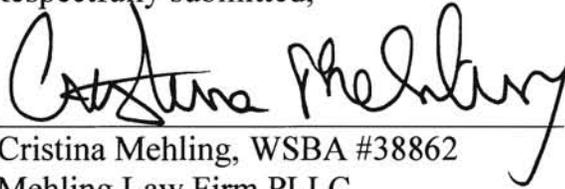
The record and the arguments in both Appellants' and Respondent's brief prove that there are quite a number of disputed material issues of fact surrounding this real estate transaction. The trial court erred in not recognizing those disputed issues and wrongfully concluded that Greenberg met her burden of proof on her summary judgment motion.

Campbell respectfully requests that the trial court decision be reversed as there was substantial evidence to show that material

issues of fact existed as to defeat the granting of Greenberg's  
summary judgment.

Dated: December 2, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Cristina Mehling". The signature is written in a cursive style with a horizontal line underneath the name.

Cristina Mehling, WSBA #38862  
Mehling Law Firm PLLC  
Attorney For Appellants Richard  
Campbell and Rebecca Lee Marcy

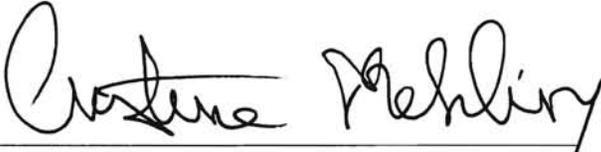
I, Cristina Mehling, state:

On December 2, 2013, I caused to be delivered via ABC  
Legal Messenger Appellant's Reply Brief to the Court of Appeals  
Division I and to

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Declarant is a resident of the State of Washington and over  
the age of eighteen (18) years. I certify under penalty of perjury  
under the laws of the State of Washington that the foregoing is true  
and correct.

DATED this 2<sup>nd</sup> day of December, 2013 at Bellevue, Washington

  
Cristina Mehling