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No. 69927-0-1

COURT OF APPEALS, DIVISION I OF THE STATE
OF WASHINGTON

2017 MAR 19 PM 2:33
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellant Richard Campbell (“Campbell”), a real estate agent, was the seller of a real estate property located at 10442 NE 112th Street, Kirkland, Washington (“the Property”), and Respondent Rosalind Greenberg (“Greenberg”) was the buyer on this property. Greenberg, who was living in Green Bay, WI, was in the market for a residence for her daughter who was attending school in the Seattle area.

After signing a NMLS Residential Real Estate Purchase and Sale Agreement (RESPA- “Agreement”) and reaching mutual acceptance on May 2, 2011, the closing set for June 8, 2011 did not occur due to Greenberg’s failure to obtain the required financing and lack of providing the down payment funds. Greenberg did not act in good faith in timely applying for a loan and completing the loan process steps required by her financial provider, Merrill Lynch.

Greenberg did initiate the financing process with Merrill Lynch (although there is a dispute to the actual date when the process was started), who issued a pre-approval letter on May 17, 2011, but Greenberg did not follow up on the required steps

indicated by Merrill Lynch to actually apply for the loan for the Property and obtain final approval. There is no evidence to indicate any steps taken by Greenberg to secure the financing until June 6, 2011, two days before the closing date, and Merrill Lynch was simply not able to process the loan application and issue the loan within a two-day timeframe.

Concurrent with her failure to procure financing because lack of timely action on her part, Greenberg also failed to present the down payment money of \$170,000, which was an independent requirement from the Financing Addendum, in order to supplement the funds needed for the purchase price.

Lastly, when presented with an option by Campbell to extend the closing date for additional consideration, Greenberg refused and breached the Agreement by failing to close the transaction without legal excuse, therefore entitling Campbell to the \$7,000 earnest money. Greenberg canceled her loan process with Merrill Lynch on June 8, 2011.

Although Greenberg did not obtain financing in time for the June 8, 2011 closing on the Property, her ability to obtain financing

is demonstrated by the fact that she did she did buy three other properties in the Seattle area after June 8, 2011.

Greenberg claimed the failure to obtain financing created a legal excuse for her performance and therefore she was entitled to a refund of the earnest money; however, she failed to prove that there was no genuine issue of material fact as to her duty of good faith in securing the required financing.

The trial court wrongfully granted Greenberg's summary judgment motion by concluding that her pre-approval for a loan was equivalent to fulfilling her good faith requirement in obtaining the final approval for the financing for the June 8, 2011 closing. The court also awarded all the attorney fees requested by Greenberg because she was the prevailing party per the attorney fee provision in the Agreement.

Greenberg was represented by attorney Lars Neste of Demco Law Firm while Campbell appeared pro se.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting the summary judgment order on January 8, 2013, providing that there was no genuine issue of material fact concerning Greenberg's right to interplead into the registry and recover the earnest money.

B. Issues Pertaining to the Assignment of Error

1. Did Greenberg's actions (and inaction) in regards to obtaining financing before the closing date of June 8, 2011 amount to good faith such that she had legal excuse for her failure to comply with the financing contingency and terminate the agreement? (Assignment of Error 1)
2. Did Greenberg's arguments that she thought she took enough steps to obtain the financing entitle her to claim legal excuse for failure to close? (Assignment of Error 1)
3. Did Greenberg comply with the Earnest Money provision of the Agreement as to entitle her to a refund of the earnest money? (Assignment of Error 1)

4. Was the completion of the April 26, 2011 pre-approval application sufficient to prove a good faith effort to obtain the financing?
5. Was Greenberg entitled to \$21,853.50 award of attorney fees where the trial court erred in finding there was no genuine issue of material fact?

III. STATEMENT OF THE CASE

A. Factual Summary

On April 28, 2011, Campbell listed his property at 10442 NE 112th St, Kirkland for sale for \$370,000, acting as the listing agent.

On about April 29, 2011 Greenberg made an offer of \$370,000 for Campbell's property. (CP 89)

On or about May 1, 2011 Greenberg and Campbell reached mutual acceptance for the purchase and sale of Campbell's property at the \$370,000 price. (CP 97) The Agreement provided for a closing date of June 8, 2011, and included a financing addendum, which provided in part:

“1.a. Loan Application. This Agreement is contingent on the buyer obtaining the following loan or loans to purchase the Property:
x Conventional First [...]. Buyer agrees to pay \$170,000 down, in addition to the Loans and to make written application for the Loans

to pay the balance of the Purchase Price and pay the application fee, if required, for the subject Property within ___ days (5 if not filled in) after mutual acceptance of this Agreement. If not waived, the Financing Contingency shall survive the Closing Date.

[...]

4. EARNEST MONEY. If Buyer has not waived the Financing Contingency, **and is unable to obtain financing after a good faith effort**, on Buyer's notice, **this Agreement shall terminate**. The Earnest Money shall be refunded to the Buyer after Buyer delivers to Seller written confirmation from Buyer's lender confirming (a) **the date the Buyer's loan application for the subject property was made;** (b) **that Buyer possessed sufficient funds to close;** and (c) **the reasons Buyer's application was denied.**" (emphasis added) (CP 231)

Shortly thereafter Greenberg deposited \$7,000 into escrow as earnest money for the transaction. (CP 78:12-14)

Greenberg had from May 2, 2011 (mutual acceptance on the Agreement) until June 8, 2011 (closing) to secure the financing provided in the signed Agreement.

Prior to seeing or making the offer on the Campbell property, on April 26, 2011, Greenberg, with no knowledge of the Campbell property (because the Property was not listed until April 28, 2011), filled out a pre-approval application (Greenberg calls it a "general financing application" (CP 89:12-13) for financing containing no specific property address, as she was looking together with her daughter, and through the help of real estate agent Donna Cowles,

for a property in the Puget Sound Area for her daughter. (CP 89)

Greenberg submitted an offer to purchase a property in Redmond owned by the Bowers (Bowser property). (CP 89:16-17;210)

On May 4, 2011, Cowles emailed to Greenberg to remind her that she needed an approval letter from the lender showing an approval for \$200,000 and “another \$170,000 in the bank for down payment”. (CP 129)

On May 4, 2011, Greenberg claimed in her declaration that she spoke with Mr. Scott Mainard at Merrill Lynch and that in that conversation she informed Mainard that she had entered in to a purchase and sale agreement for the Property, after being prompted by Cowles to see whether the loan was pre-approved. (CP 89:23-26)

On May 6, 2011, Greenberg exchanged emails with lender Merrill Lynch under the subject “Approval Letter” communicating about the pre-approval process and review of tax returns, (CP 127-130) and asked Mainard if he can issue a pre-approval letter the same day (CP 129), to which Mainard responded that it would take until the following week and that the mortgage landscape has

dramatically changed and the process takes longer than before (CP 127).

On May 17, 2011, Merrill Lynch issued the Pre-approval letter stating that Greenberg was pre-approved for a mortgage loan of \$148,000 and that she will be assisted in the financing process from application to closing. With the letter Merrill Lynch provided an attached 3-page document entitled “Your Next Steps in the Financing Process” which detailed the checklist of responsibilities for Greenberg to complete. (CP 146-150)

Greenberg claims that she did make efforts after the May 17th to obtain the financing and actually get approved for the loan and this point was specifically argued at the summary judgment hearing (RP 7). However, no evidence whatsoever was presented by Greenberg to prove this.

On May 23, 2011, after the property inspection was performed by Greenberg, she negotiated the purchase price down to \$341,000. (CP 91)

On June 01, 2011, Cowles asked Campbell in an email for an extension as for Greenberg to sell the remaining stock to procure the

down payment but stating that they “will most likely be able to close sooner.” (CP 164)

On Friday, June 3, 2011, a Merrill Lynch internal email is asking for the Greenberg pre-approval to be turned into “live registration” meaning to convert the general pre-approval into a property specific loan application. (CP 196)

On June 4, 2011, an email exchange between Greenberg and Cowles shows that the loan had not been started yet by Greenberg, and Cowles didn’t know how to respond to Campbell who was asking details about the loan progress. (CP 220)

On June 5, 2011, Campbell had an email exchange with Cowles and asked for information about the financing options and told her he could not grant an extension without “a thorough understanding of the issues at hand and the resolutions going forward.” (CP 176)

On Monday, June 6, 2011, two days before the scheduled closing of June 8th, records subpoenaed from Merrill Lynch showed that Greenberg’s application for the Property was identified and registered on June 6th, and heavy activity registered with Merrill

Lynch in trying to process the application, until June 8th when Greenberg advised them that she was not going to sign an extension and the sale was not going through. (CP 132 -134)

On June 8, 2011, the scheduled closing date, Greenberg failed to tender to escrow the required \$170,000 down payment funds and failed to provide loan documentation showing an approval for the remainder of the funds necessary to close, therefore breaching the Agreement.

On the same day (June 8th) Campbell sent a letter to Cowles explaining that the earnest money was forfeited because no extension was agreed upon, and proposed a price \$3,000 higher than the previous agreed price of \$341,000 (which was negotiated and reduced from the original \$370,000) if Greenberg still wanted the sale to take place later. (CP 181)

The June 8th Merrill Lynch notes in the system, as well as an internal email, indicated that registration of the loan was made only 2 days before closing, that Greenberg decided not to purchase the Property and that a withdrawal fee letter was sent. (CP 132; 200) A note in these Merrill Lynch notes of “Lower sales price. Has

contract” indicates that this is the earliest date that Merrill Lynch is aware that Greenberg has a property under contract for purchase. (CP 133)

On June 9, 2011, Campbell wrote to Cowles demanding information in regards to the requirements of the earnest money provision in the Agreement. (CP 189) No such information was provided by Greenberg.

On June 10, 2011, Merrill Lynch issued a letter to Greenberg in which they stated their regret for her not using their financing and canceling the process for which a cancelation fee would apply. (CP*)¹

A dispute arose between Greenberg and Campbell over the \$7,000 earnest money and, on October 14, 2011, Chicago Title Insurance Company filed an interpleader action to settle the dispute.

B. Procedural Summary

On October 14, 2011, a complaint for interpleader was filed by Chicago Title Insurance Company to resolve the issue of the release of the earnest money. (CP 1-22)

¹ The letter was produced in the response to the Merrill Lynch subpoena but neither party introduced it in the summary judgment exhibits. However, the Merrill Lynch notes (CP132-:“Withdrawal Fee letter sent”) corroborate the content of this letter.

On November 18, 2011, Chicago Title was discharged and the remaining parties were Campbell and Greenberg. (CP 38-40)

On August 30, 2012, Greenberg answered to the Complaint and cross-claimed against Campbell. (CP 69-74)

On October, 2012 Campbell filed an answer and cross-complaint for breach of contract against Greenberg. (CP 54-68)

On December 11, 2012, Greenberg filed a summary judgment motion with supporting declarations from Greenberg and attorney Christina Cowin. (CP 77-87; CP 88-92; CP 93-200)

On December 28, 2012, Campbell filed an opposition with supporting declaration and a cross-motion for summary judgment. (CP 203-266)

On January 8, 2013, Honorable Laura Inveen heard the motion for summary judgment and granted Greenberg's summary judgment motion and denied Campbell's cross-summary judgment motion. (CP 274-274; RP 1-26).

On January 14, 2013 Greenberg filed its motion for award of attorney fees asking for an approximate \$23,000 in attorney fees. (CP 321-322; CP 284-320)

On January 23, 2013 Campbell filed his opposition to the attorney fee award motion. (CP 323-344)

On February 7, 2013, Campbell filed a Notice of Appeal through his attorney of record, Cristian Mehling. (CP 351-354).

On March 8, 2013, the Designation of Clerk's papers was filed by Campbell.

On March 26, 2013, the trial court granted Greenberg's motion for attorney fees in the amount of \$21, 853.50.²

On April 9, 2013, Campbell dismissed his cross-claim against Greenberg.

On April 22, 2013, a Judgment for attorney fees was entered in the amount of \$21,853.50.³

IV. ARGUMENT

A. Standard of Review

The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437,

² Although a corrected Designation of Clerk's Papers was filed on April 4, 2011, the order awarding attorney fees was inadvertently left out.

³ The Notice of Appeal filed more than two months prior includes this expected order on the attorney fees.

(1982); *Malnar v. Carlson*, 128 Wn.2d 521, 534, (1996); *Mountain Park Homeowners Assn. v. Tydings*, 125 Wn.2d 337 (1994).

Summary judgment is only appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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 one upon which the outcome of the litigation depends in whole or in part. *Zobrist v. Culp*, 18 Wn. App. 622, 637, 570 P.2d 147 (1977); *Morris v. McNichol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

The moving party bears the burden of demonstrating that there is no genuine issue as to any material fact. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349 (1979). All reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment may be granted only if a reasonable person could reach but one conclusion. *Snohomish County v. Rugg*, 115 Wn. App. 218, 224 (2002); *Malnar*, 128 Wn.2d at 535; *Morris*, 83 Wn.2d at 494-95.

B. Greenberg Failed to Make a Good Faith Effort to Obtain Financing, Thus Rendering the Financing Contingency Inapplicable Thereby Creating a Genuine Issue of Material Fact

Greenberg's failure to make a good faith effort to obtain financing was evidenced by her inaction and very last minute attempt to transform the May 17, 2011 pre-approval letter into an actual loan process. Greenberg's excuse that she thought she did enough under the circumstances of her husband's illness does not pass muster as to constitute a legal excuse. Further, her attempt to confuse the issue by claiming that a filling out a pre-approval application is the equivalent to completing all the steps involved in obtaining a final approval for a loan, thus satisfying the financing contingency, should not have led to granting the summary judgment in her favor.

1. Greenberg's actions and inaction from May 17th to June 8th do not amount to good faith effort to obtain financing

RCW 64.04.005(1) provides that

“(1) A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable, regardless of

whether the other party incurs any actual damages.” RCW 64.04.005 (1).

The parties’ principal duties in these situations are to close the agreed purchase and sale, the purchaser to take and pay for title and the vendor to convey. Both parties are under a duty to act in good faith to see to it that conditions precedent to their duty to close are carried out. *Omni Group, Inc. v. Seattle-First Nat’l Bank*, 32 Wn. App. 22 (1982) (buyer to act in good faith when agreement said feasibility report to be “satisfactory”); *Cavell v. Hughes*, 29 Wn.App. 536 (1981) (vendor could not block purchaser’s admission to subdivision community club); *Weaver v. Fairbanks*, 10 Wn.App. 688 (1974) (vendor had to make reasonable repairs that would enable purchaser to obtain FHA mortgage insurance).

A particular application of the duty of good faith concerns the purchaser’s attempt to obtain third party financing when that is a condition of the duty to close; in this common situation an agreement will contain a specific covenant to the effect that the purchaser will immediately and diligently pursue application(s) for financing. *Highlands Plaza, Inc. v. Viking Investment Corp.*, 2 Wn. App. 192 (1970) The financing contingency is a condition precedent

to the buyer's duty to perform under RESPA. A buyer has a duty to act in good faith to attempt to obtain third-party financing when that is a condition of his duty to close. *Salvo v. Thatcher*, 128 Wash.App. 579, 585 (2005)

The Agreement provided that "If Buyer has not waived the Financing Contingency, and is unable to obtain financing **after a good faith effort**, on Buyer's notice, this Agreement shall terminate.." (CP 231)

There is no substantial evidence in the case at bar to support the finding that Greenberg met her duty of good faith to obtain third party financing.

The focus of the trial court was wrongly and confusedly directed on the pre-approval application of the loan, made on April 26, 2011 (before the Property was put on the market) and therefore not intended for it, and later altered to show the Property address. (RP 15-18). Although there was sufficient evidence to question the veracity of such document, it was not the central document on which this case should have focused since the April 26th pre-approval application date was immaterial: the application (whenever made)

for pre-approval actually led to a pre-approval letter on May 17, 2011. This document is the crucial document in this case which was barely addressed. The focus was when the pre-approval process was started and for which property, but neither party nor the court actually asked what happened after the pre-approval was granted? The answer is nothing happened until the very last minute, and therein lays Greenberg's failure to make a good faith effort to obtain financing.

The May 17, 2011 Pre-Approval letter (which resulted from an application for a loan, regardless of the date the application was started) was issued to Greenberg and specifically stated:

“Dear Rosalind Greenberg,
Merrill Lynch Credit Corporation is pleased to provide your pre-approval for a mortgage loan in the amount of \$148,000. [...] we will assist you throughout the home financing process, from application to closing, [...] [I]f any of your information changes your loan pre-approval must be re-evaluated.

[...]

Please take a moment to review the enclosed checklist of items needed for your final approval before closing.” (Emphasis added; CP 146-147)

The second part of the letter was a document entitled “YOUR NEXT STEPS IN THE FINANCING PROCESS” and provided a website for checking the status of the loan application (CP 148) and

the following page, entitled “LOAN CONDITIONS AND REQUIREMENTS” listed Greenberg’s responsibilities: “Your responsibilities. These items are needed to complete your loan application.” Further, a laundry list of documents needed were listed below, followed by another section entitled “These items are needed to close your loan” with another list beneath. (CP 149) Finally, the last page contained “these items are needed to complete your loan application.” (CP150)

This pre-approval letter (CP 146-150) contains pretty detailed instructions and is very clear about Greenberg’s duty to act and provide the necessary documents and information for the final approval. Further, the letter clearly indicates that this was a pre-approval and the loan application and processing was about to follow. Moreover, a website was provided for Greenberg to check the progress of her loan application should she be interested about the status of her loan process.

The present case is quite distinguishable from *Salvo* where the court found that the financing contingency applied because the loan was obtained after the closing date and it was clear that *Salvo*

established his duty of good faith in obtaining the loan. Contrary to our case, in *Salvo* it was established that:

“Salvo timely applied for a purchase loan the day the Thatchers accepted his offer. It is undisputed that Salvo continued to pursue financing until he obtained the loan approval and that he acted in good faith in doing so.” *Salvo* at 586.

These facts are not undisputed here, in fact, they are the main argument in dispute and the evidence presented to the trial court failed to establish that Greenberg acted in good faith.

The evidence presented before the court shows the following:

- a) On May 4th Cowles emailed to Greenberg to remind her that she needs an approval letter from the lender showing an approval for \$200,000 and “another \$170,000 in the bank for down payment”(CP 129);
- b) Greenberg claims in her declaration that on the same day she spoke with Mr. Scott Mainard at Merrill Lynch and that in that conversation she informed Mainard that she had entered in to a purchase and sale agreement for the Property, after being prompted by Cowles to see whether the loan was pre-approved (CP 89:23-26);

- c) On May 6, 2011, Greenberg exchanged emails with lender Merrill Lynch under the subject “Approval Letter” communicating about the pre-approval process and review of tax returns, (CP 127-130) and asked Mainard if he can issue a pre-approval letter the same day (CP 129), to which Mainard responded that it would take until the following week and that the mortgage landscape has dramatically changed and the process takes longer than before (CP 127). This email plainly contradicts her declaration in which she was suggesting that she was asking on whether Merrill Lynch already pre-approved the loan rather than asking them for the first time to issue a pre-approval;
- d) On May 17, 2011, Merrill Lynch issued the Pre-approval letter;
- e) There is no activity from May 17th to June 3rd to evidence any effort by Greenberg to attempt to comply with the instructions set in the May 17th pre-approval letter;

- f) On Friday, June 3rd, a Merrill Lynch internal email is asking for the Greenberg pre-approval to be turned into “live registration.” (CP 196) This is the earliest evidence we have from Merrill Lynch regarding turning the pre-approval into live registration, demonstrating this is the first time this process was initiated by Greenberg;
- g) On June 4, 2011, an email exchange between Greenberg and Cowles shows that the loan had not been started yet by Greenberg and Cowles didn’t know how to respond to Campbell who was asking details about the loan progress. (CP 220);
- h) Between Monday, June 6th and the June 8th closing date the Merrill Lynch records from their system shows that the application was made live only two days prior to closing, that there was frantic activity noted in trying to process the application and that it was cancelled by Greenberg, and that a cancellation letter should go out to Greenberg.
- i) On June 10th Merrill Lynch sent out a letter to Greenberg stating that they regretted that Greenberg decided not to

use them for financing and that a fee would apply for the cancelation of the application.

There is no indication from Merrill Lynch that the loan application was denied. The loan was apparently cancelled and not approved due to time constraints. The only issue for the failure of the loan was timing and the evidence proves that Merrill Lynch did whatever they could since June 3rd to June 8th but there was simply not enough time since Greenberg instructed them or gave them the necessary information to proceed with the loan processing.

Greenberg testified in her deposition that the reason for failure of the financing given by Merrill Lynch was that “they couldn’t see the stock in time” (CP 245), proving again that there was an issue of timing and not because of other contingency or disqualification for the loan requirements.

Greenberg also admitted in her deposition that she did nothing else besides obtaining the pre-approval letter and was “assuming my Merrill Lynch people were working on the loan. I didn’t do anything else except, you know, ask how things were going” (RP 228:2-7), and when asked specifically about the action

required from the May 17th pre-approval letter, she stated that “I may have started [...] I don’t recall this. I --- I may have started.” (CP 228:4-10). She further used the excuse for not taking any action by bringing up her husband’s condition and the fact that she relied on Merrill Lynch financial advisor and her real estate agent, and that “as a matter of fact I – I didn’t know there was anything else I needed to do other than wait for papers to come to me.” (CP 229:10-25).

While Greenberg’s counsel argued at the summary judgment that Greenberg “throughout the course of this process Merrill Lynch was supplementing that loan application with additional information” (RP 8:21-23), there is no evidence to prove that assertion. Further, counsel argued that “[I]t would seem in order to lose the benefit of the financing contingency and be deemed to have been in bad faith, if, you will, that Ms. Greenberg would have some kind of notice from her lender that she needed to do something and then failed to do that, and there is no evidence before the court on that.” (RP 9:17-22; RP 22:1-9) Actually, there is quite compelling evidence to the contrary: the May 17th pre-approval letter

specifically states the steps needed for Greenberg in order to complete the loan process. What we don't have is any actual attempt at compliance by Greenberg on those steps until on June 3rd.

Greenberg's admission that she took no action after the May 17th pre-approval, coupled with the parallel lack of action at Merrill Lynch, the lack of documents or Merrill Lynch testimony submitted by Greenberg in the summary judgment to prove otherwise, establish that, indeed, Greenberg did nothing to comply with the specific requirements of the May 17th pre-approval letter. Such conduct cannot qualify as a good faith attempt which was undisputed in *Salvo*. Although Greenberg's husband was suffering from serious illness since July 2009 and he took a turn for the worse and eventually passed on June 25, 2011, that fact, although tragic, has no legal effect on Greenberg's failure to act in good faith to obtain financing.

The case at bar is similar to *Egbert v. Way*, 15 Wash.App. 76 (1976), where the court found that a buyer breached the purchase and sale agreement as a result of her own bad faith by failure to pay and clear tax liens on the property before the closing. The court held

that “each party has the affirmative good faith obligation to perform conditions precedent under a contract and cannot be excused from performance by his own misconduct.” *Egbert* at 79. Here the evidence proves that Greenberg’s failure to obtain financing the result of her wrongdoing in failing to act in a timely fashion and work with Merrill Lynch or other financial provider to obtain the loan and the down payment funds.

“When both parties accept such a condition by signing an earnest money agreement, good faith obligations and not mere privileges are imposed upon them to see that the condition is fulfilled.” *Weaver, supra* at 691. The purchaser is required to exercise good faith and diligence in his/her attempts to obtain satisfactory financing. *Id; see also Highlands Plaza, Inc., supra*.

Here the evidence was quite abundant and disputed to create material issues of fact as to Greenberg’s fulfillment of her good faith duty.

Lastly, relying on the fact that the loan was processed from Wisconsin and it would take longer to process than would supposedly take with a Washington lender, is not a valid legal

excuse for the breach. Again, two days is most likely not enough time to process of residential real estate purchase loan in any state, and it was Greenberg's duty (who was specifically looking at quite a few properties in the Puget Sound with the intention to buy) to comply with her lender's requirements. There is no evidence presented by Greenberg that she even asked Merrill Lynch how long the process would take until she had the necessary funds, or that she sent any reminder or statement to Merrill Lynch that she needed the funds by June 8th. Again, as a buyer residing in Wisconsin, Greenberg's duty to provide the necessary funds to close as well as the required financing rested solely on her shoulders, as she knowingly and voluntarily entered into the Agreement in Washington, purchasing a Washington property and having Donna Cowles as a Washington real estate agent.

2. Greenberg's claim that she thought she did enough of what was required from her in light of her husband's illness does not amount to good faith or constitute legal excuse

Greenberg's deposition and declaration statements as well as her counsel's argument that she thought she did enough by filling

out the pre-approval application and obtaining pre-approval (see B.1. supra) are suggesting a substantial compliance standard which was clearly rejected in *Chrisp v. Goli*, 126 Wash.App. 18 (2005).

Ironically the seller in that case was represented by Greenberg's counsel, Mr. Lars Neste, and the issue decided by the court was whether the substantial compliance doctrine applies to the earnest money forfeiture statute.

There the buyer backed out of the transaction the day before taking possession under the reasoning that he failed to obtain financing, but his daughter testified that the seller actually decided not to buy the property because he realized he could not legally install a kitchen in the cottage. *Chrisp* at 21.

The court held that "we could not see how a plain reading of this statute [referring to RCW 64.04.005] allows application of the substantial compliance doctrine. The statute itself clearly states the consequences of failure to comply: the seller retains all remedies." The court further found that the seller and her realtor testified that buyer intentionally avoided compliance, that she had no wish to be bound by the forfeiture clause and she ensured she would not be

bound by declining to meet the statutory conditions for the clause to be effective. *Id* at 25.

Here the evidence suggests that on June 8th Greenberg changed her mind about wanting to purchase the Property because, as stated in her deposition and to Merrill Lynch, Campbell was somehow trying to extort her by asking for additional consideration for an extension or renewing the agreement for a later closing date (CP 181), and she cancelled the Merrill Lynch financing process stating that Campbell was trying to extort her (CP 132-134). There is also evidence that Greenberg was unsatisfied with the repairs needed after the result of the inspection and as a result she negotiated a price decrease from \$370,000 to \$341,000. The fact that Greenberg saw other properties and eventually qualified for a loan and bought three properties in the area also make her intent in the failure of the financing approval very questionable.

3. Confusion as to the role of the April 26th application and its authenticity should not have been a basis for granting summary judgment

The Agreement provides that “The Earnest Money shall be refunded to the Buyer after Buyer delivers to Seller written

confirmation from Buyer's lender confirming (a) the date the Buyer's loan application for the subject property was made."

The language is very clear that the lender has to provide such written confirmation of the date of the loan application. Instead of complying with this requirement, Greenberg herself provided a document dated April 26, 2011 purported to be a "general pre-application" that would suffice for all properties she made an offer on. (CP 79:5-8) Greenberg also admitted in her deposition that the initial application on April 26th was for pre-approval. (CP 223: 17-21)

The April 26th application presented a number of issues which were indicative of Greenberg altering that document in order to prove that she started her application process timely and fulfill the requirement for return of the earnest money. As pointed out to the trial court, the authenticity of this document posed several issues: the application was made on April 26th, two days prior to the Property being on the market; the application was presented in different versions with and without the property address listed in its content; Mainard's signature was on all the documents but no declaration or

any corroborating documents exists from Merrill Lynch to attest to Mainard's signature, and an original of that signature was not provided; the price changes on that document also suggest there were versions of the same document. While Greenberg claims she filled out an application with no property address and that address was later filled in by Merrill Lynch, but we have no evidence of that from the Merrill Lynch records, nor do we have anyone's testimony from Merrill Lynch confirming in fact that property addresses can be filled in in prior dated and signed applications.

The trial court erred in allowing admission of the alleged May 4th application since it is considered a "lost instrument" and as such "the one proposing its validity must show its execution, its delivery, and its contents." *Deglow v. Smith*, 77 Wash. 2d 128, 129 (1969)

Because of this extensive focus on the April 26th document, the trial court was confused as to the wording of the May 17th pre-approval letter in referring to an enclosed checklist of things Greenberg needed to do in order to obtain final loan approval. (RP 20:4-8) Unfortunately, Campbell was not able to make clear the difference between a mere pre-approval for a potential loan for any

property, as opposed to final approval of an actual loan figure for a specific property, and Mr. Neste shifted the argument back to the fraudulent pre-approval application of April 26th . (RP 20)

It is irrelevant when and if indeed such application for pre-approval was altered, for it resulted in Greenberg's pre-approval for a loan on May 17th and further action, as listed above, was needed in order to obtain the final approval. It was in this period, from May 17th to June 3rd or 6th when Greenberg failed to make a good faith effort to abide by the requirements of her pre-approval and act in time to give Merrill Lynch enough time to approve and provide the loan funds (as discussed supra).

C. Greenberg's Failure to Tender the Down payment Funds Was Also Lack of Good Faith and Constituted Breach of the Agreement

The argument on this issue from the summary judgment hearing contradicts again the evidence and implies the Greenberg had no duty to tender such funds into escrow and that she had in fact those funds ready in her account, but somehow had no duty to prove that. Taking advantage again of Campbell's lack of legal knowledge, Mr. Neste placed the burden of proof on Campbell to prove that

Greenberg did not have the funds required for the down payment, ignoring the mere fact that Greenberg did not tender any funds for the down payment to Chicago Title escrow, and that it was plainly her duty under the terms of the Agreement to do so. It was error for the trial court to agree with the shift in burden of proof. Further, Greenberg 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 8th. No such document was introduced into evidence by Greenberg to prove that liquidity on June 8th, and to shift the burden to Campbell to refute that fact is quite preposterous given the clear language of the Agreement, paragraph 4. Earnest Money (*see supra III. A*). (RP 21:4-16)

Campbell was at complete disadvantage by his pro se representation and because of his frustration around the sham April 26th document and its different versions, the focus was shifted mainly to this issue, and the other evidence discussed above which presented several genuine issues of material fact, was not properly and fully addressed by the trial court.

D. The Trial Court Erred in Awarding Attorney Fees to Greenberg Because there Were Various Issues of Material Fact Which Should Have Denied Her Motion for Summary Judgment

Given the discussion above, there is substantial evidence to prove that in fact Greenberg did not meet her burden to prove that there was no genuine issue of material fact and that she was entitled to summary judgment and therefore being claimed the prevailing party and awarded attorney fees.

V. CONCLUSION

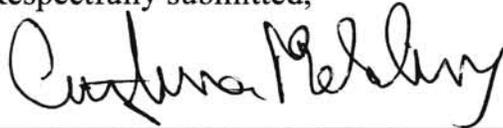
The reasoning for earnest money clause is to provide for remedy in these types of situations and deter buyers from backing out of agreement, if they wish to, with no legal excuse. Greenberg did not have a legal excuse for her very last minute action in trying to obtain financing and the evidence before the trial court proved that she did not act in good faith to fulfill the financing requirement. Further, her lack of good faith is proven by her refusal to provide additional consideration for an extension while actually purchasing three other properties in the area.

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: August 19, 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 it.

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