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

FF REALTY, LLC, a Delaware limited liability company, Appellant, v. KIMSCHOTT FACTORIA MALL, LLC, a Delaware limited liability company, Respondent.	)	No. 63422-4-I UNPUBLISHED OPINION FILED: October 11, 2010

Ellington, J. — This is a suit for specific performance of a real estate sale agreement. The parties' transaction depended in part upon agreement of others, which was not, in the end, forthcoming. Absence of that agreement is fatal to specific performance, and we affirm the trial court's summary judgment of dismissal.

FACTS

This litigation arises out of a real estate transaction involving Factoria Square Mall in Bellevue, Washington. Kimschott Factoria Mall, LLC, owns a significant part of the mall. In September 2006, as part of a redevelopment of the mall, Kimschott entered into a purchase and sale agreement (PSA) with FF Realty, LLC for a parcel on the southwest corner of the mall, upon which FF Realty planned to build a multifamily

residential development. The initial purchase price was $15,750,000 plus $35,000 for each residential unit approved for development.

Factoria Square Mall owners and tenants hold reciprocal easement rights over the property as a whole, reflected in a reciprocal easement agreement (REA). Because the REA prohibits residential use, its amendment was an express condition of closing. Section 6.3 of the PSA required Kimschott to "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" to permit multifamily housing on the property.[1] The amendment was to be obtained within a review period of up to 45 days after the PSA became effective. If the amendment could not be secured during that time, the review period was extended until 10 days following the finalization and execution of the REA Amendment.

The PSA included other conditions to closing: land division, site preparation requirements, a lien release to be fulfilled by Kimschott, and a permitting contingency to be fulfilled by FF Realty. Kimschott's failure to secure the land division and the lien release before closing gave FF Realty the right to elect either to terminate the PSA and obtain the refund of earnest money and reimbursement of expenses up to $200,000, or to extend closing until 15 days following fulfillment of the condition. Each relevant provision required that FF Realty notify Kimschott of its choice within a certain time.

The PSA provided for an outside closing date of October 2, 2007 and made time

[1] Clerk's Papers at 278.

of the essence:

7.1 Time and Place of Closing. Closing as to the Property shall occur in the office of the Title Company fifteen (15) days following the satisfaction or waiver of the conditions set forth in Article 7.4 below with respect to the Property. Notwithstanding the foregoing, in no event shall Closing occur after October 12, 2007 ("Outside Closing Date") unless (i) both parties hereto agree to modify such Outside Closing Date or (ii) Buyer has elected to extend Closing pursuant to Section 6.1, Section 6.2, and/or Section 6.4. If the Closing shall not have occurred by the Outside Closing Date (or within fifteen (15) days following the satisfaction of the requirements of Section 6.1, Section 6.2, and/or 6.4, if Buyer has elected to extend Closing thereunder), then absent agreement to the contrary by the parties hereto, this Agreement shall terminate and the Earnest Money shall be returned to Buyer. . . .

. . . .

7.4 Conditions for Closing. The obligations of Buyer and Seller under this Agreement are subject to the 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.

. . . .

7.4.3. 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 Seller waived the Permitting Contingency applicable to the Property.

. . . .

24. Time of the Essence. Time is of the essence of this Agreement.[2]

[2] Clerk's Papers at 279–80, 287.

The PSA expressly provided that specific performance was available:

> 18.2 Default by Seller. If Seller fails without legal excuse to complete the sale of the Property in accordance with the terms of this Agreement, Buyer may elect one of the following remedies: (a) specific performance of this Agreement (provided an action thereon is commenced within sixty (60) days following Seller's failure to perform).[3]

The project moved more slowly than the parties anticipated. On August 31, 2008, more than nine months after the outside closing date of October 12, 2007, Kimschott and FF Realty amended the PSA (First Amendment). The purchase price was reduced to $14,315,000. The land division condition was recognized as having been fulfilled, FF Realty waived the review period, and a new outside closing date was set for October 31, 2008. In a section key to this appeal, 4.b, completion dates for the REA Amendment were also extended:

> 4. Waiver of Review Period; REA Amendment
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> . . . .
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> b. . . . 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.[4]

Signatures on the REA Amendment were to be delivered to escrow with instructions that permitted recording.

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[3] Clerk's Papers at 285.

[4] Clerk's Papers at 42.

Kimschott secured all necessary signatures, including those of Thrifty Payless, Inc., Washington Mutual Bank, and prospective tenant Safeway. But on August 26, and then on September 10, 2008, Safeway instructed the escrow agent, Chicago Title, not to record its signature until certain conditions were met. These included amendment of a separate REA concerning a different parcel in the mall, for which the prospective purchaser was Target Corporation. Another condition was the recording of an agreement for covenants between Safeway and Target. Target never executed the Safeway/Target agreement, and Safeway never authorized recording of its signature on the REA Amendment.

On September 18, Kimschott informed Chicago Title that the FF Realty closing would be delayed due to "issues on Target's side."[5] Kimschott informed the title company it fully expected to close escrow in the FF Realty deal but asked that it "hold [our] signature pages until we are ready to do so," and to regard this request as confidential and not to be disclosed to the other parties.[6]

On September 24, Kimschott informed FF Realty that Target was requesting additional time "to reconfirm its financial model":

> Over the past several weeks there has been a tremendous effort to get the Marketplace @ Factoria documentation to the start line for a redevelopment launch. As we have all previously discussed, this effort must be and has been a collective effort. . . . With respect to the overall Investment Return for Kimschott, the economics require concurrent documentation, recordation and execution of all stakeholder programs. . . . Target has conveyed its commitment to the Redevelopment, however was not prepared to execute its closing as planned.[7]

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[5] Clerk's Papers at 411.

[6] Id.

[7] Clerk's Papers at 452.

Kimschott stated it expected a resolution within two weeks, and asked that "all stakeholders maintain their documents in escrow as currently submitted in a[n] effort to close the concurrent transactions by mid-October."[8]

At that point, FF Realty contacted Target directly. In a September 30, 2008, email, FF Realty advised Kimschott that according to Target's representative, Target wanted to help get the deal closed.

On October 9, FF Realty advised Kimschott it would perform all obligations under the PSA, waived Kimschott's site preparation obligations, and demanded Kimschott close by October 31.

On October 17, Kimschott responded that the REA Amendment "appears" not to have been completed within the time frame contemplated "by Section 4b of the First Amendment to the Purchase Agreement,"[9] that it had not received notice from FF Realty under Section 4.b (i.e., within five business days after September 30) of election to extend the October 31 closing date, and that if the REA Amendment was not accomplished by the outside closing date, the PSA would terminate.

FF Realty checked with Chicago Title and was informed "that all signatures required to finalize the REA Amendment were tendered by Seller and in escrow, until recently, when Seller demanded the return of its signature pages."[10] Believing the amendment had been fully executed and was ready to record, FF Realty advised

[8] Id.

[9] Clerk's Papers at 97.

[10] Clerk's Papers at 100.

Kimschott that Section 4.b was not triggered:

> Section 4 of the First Amendment to [the PSA] has no effect on this analysis, as the final REA Amendment was in fact finalized and delivered to escrow. If you have information suggesting the REA Amendment was not, at some point in time, finalized and delivered to escrow, we would very much like any information you have on this subject.[11]

On October 31, Kimschott rejected FF Realty's request to close and claimed FF Realty was entitled only to a refund of its earnest money. Kimschott also expressed concerns about FF Realty's financial ability to close.

On November 4, FF Realty filed suit for specific performance.

On Feb. 25, 2009, Kimschott moved for summary judgment dismissing the complaint. Kimschott contended the REA Amendment was never in escrow in recordable form and that the PSA therefore terminated on October 31. FF Realty responded that Kimschott's failure to secure the REA Amendment automatically extended closing 15 days following its completion and that questions of fact existed as to whether Kimschott used commercially reasonable efforts to secure a recordable REA Amendment. FF Realty also sought a continuance under CR 56(f). In reply, Kimschott argued that because FF Realty never elected to extend closing, the PSA terminated, that the reasonable efforts argument was improper because it was not pleaded in the complaint, and that in any event, specific performance was impossible absent a recordable REA Amendment.

The trial court granted the motion and dismissed.

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[11] Clerk's Papers at 101.

FF Realty appeals. It argues that under the PSA it had an automatic right to extend closing until 15 days after completion of the REA Amendment, that specific performance is an appropriate remedy, that Kimschott failed to demonstrate the absence of an issue of fact as to whether it used commercially reasonable efforts to secure the REA Amendment, and that the court erred in denying its request for a continuance. We apply the usual standard of review on summary judgment.[12]

DISCUSSION

We must first decide what is properly before us. FF Realty sued for specific performance believing the REA Amendment was ready to record. In response to summary judgment, it shifted ground, arguing Kimschott failed to exercise commercially reasonable efforts to secure a recordable amendment. Kimschott contends this change in the factual allegations amounts to a new theory that cannot be considered on appeal because FF Realty did not amend its complaint correspondingly.

Washington is a notice pleading state. This means a simple concise statement of the claim and the relief sought is sufficient.[13] Pleadings are to be liberally construed;

[12] This court reviews summary judgment de novo. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is affirmed when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id.; CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Id.; Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). The burden is on the moving party to demonstrate that there is no genuine issue as to any material fact. Vallandigham, 154 Wn.2d at 26. Once the moving party has met its burden, the nonmoving party must present evidence that material facts are in dispute. Id. If the nonmoving cannot do so, then summary judgment is proper. Id.

[13] Pac. Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352, 144 P.3d 276 (2006).

their purpose is to facilitate a proper decision on the merits, "not to erect formal and burdensome impediments to the litigation process."[14] But a complaint must give sufficient notice of the claim asserted. Complaints that fail to give the opposing party fair notice of the claim asserted and the ground upon which it rests are insufficient.[15]

The complaint alleged that "[u]pon information and belief, [Kimschott] delivered to escrow a fully executed amendment to the REA in the form approved by [the parties] in a recordable form. As a result, all PSA conditions related to the amendment to the REA were met and [Kimschott] was not permitted to avoid completing the transaction due to this condition to closing."[16] FF Realty requested "an order of this court enforcing the PSA and compelling [Kimschott] to perform all acts necessary to complete the transfer of the Property and related Easements to [FF Realty]."[17]

Thus Kimschott had notice that FF Realty was seeking an order compelling it to perform all acts necessary to complete the transaction. Read liberally, this includes FF Realty's later contention that if the REA Amendment was not in recordable form, Kimschott should be required to exercise commercially reasonable efforts to secure it. FF Realty's theory that Kimschott failed to exercise reasonable efforts was litigated on summary judgment below, which operated to clarify the pleadings.[18] It is thus properly argued on appeal.

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[14] State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

[15] Lewis v. Bell, 45 Wn. App. 192, 197, 724 P.2d 425 (1986); Pac. Northwest Shooting Park, 158 Wn.2d at 352.

[16] Clerk's Papers at 8.

[17] Clerk's Papers at 9.

[18] Adams, 107 Wn.2d at 620 (pleadings may be clarified during the course of summary judgment proceedings.)

The next question is whether there was a contract to enforce. Kimschott argues the PSA terminated on the closing date because FF Realty did not exercise its right to extend closing under Section 4.b. FF Realty responds that under Section 4.b, it had the right to automatically extend closing until 15 days after completion of the REA Amendment. By this, FF Realty appears to mean that an extension of the closing date occurred automatically if the REA Amendment was not complete by September 30.

"In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous."[19] We may interpret contract terms as a matter of law when interpretation of the contract does not depend on the use of extrinsic evidence.[20] "'If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.'"[21]

Before the First Amendment, Section 6.3 had expressly provided for an automatic extension of the review period in the event the REA Amendment was not timely completed: "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."[22]

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[19] Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

[20] Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

[21] Mayer, 80 Wn. App. at 420 (quoting Voorde Poorte v. Evans, 66 Wn. App. 358, 362, 832 P.2d 105 (1992)).

[22] Clerk's Papers at 278 (emphasis added).

The language of Section 4.b of the First Amendment to the PSA is different:

> Buyer may at [its] option and *upon notice to Seller given within five (5) business days after the REA Amendment Date*, terminate this Agreement . . . 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.[23]

Thus, Section 4.b provides that if the REA Amendment was not completed by September 30, FF Realty could elect, upon notice to Kimschott, either to extend the closing date or to terminate the PSA.

This is consistent with other PSA provisions requiring buyer to give notice of its election either to terminate the agreement or extend the closing date should the seller fail to fulfill certain conditions.[24] The difference in the two provisions strongly supports Kimschott's interpretation that the First Amendment provision provided for an extension only upon notice. Further support is found in FF Realty's own demand that the transaction close on October 31.

FF Realty contends the language is ambiguous, and relies upon its attorney's declaration that the First Amendment provided "that closing could be extended to 15

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[23] Clerk's Papers at 299 (emphasis added).

[24] See Clerk's Papers at 278 ("In the event the Land Division has not been approved by September 28, 2007 ('Land Division Date'), Buyer may at Buyer's option and upon notice to Seller given within five (5) business days after the Land Division Date, terminate this Agreement (in which case all rights to acquire the Property will 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 Land Division . . . . If the Site Preparation Requirements have not been fulfilled with respect to the Property prior to Closing, Buyer may at its option upon notice given to Seller at least two (2) days prior to the scheduled Closing, elect to extend the Closing until fifteen (15) days following the completion of the Site Preparation Requirements."); Clerk's Papers at 279 ("If the Lender Release has not been obtained with respect to the Property at Closing, Buyer may at its option upon notice given to Seller at least two (2) days prior to the scheduled Closing, elect to (i) extend the Closing until fifteen (15) days after completion of the Lender Release or (ii) cancel this Agreement 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).").

days beyond satisfaction of the REA Amendment. . . . [T]o the extent that the REA Amendment took longer than expected, the *automatic* 15-day extension beyond closing . . . would extend closing until the REA Amendment condition was satisfied."[25]

We see no lack of clarity in the language. FF Realty was entitled to the extension, but it was not automatic. Even were the intent of the parties unclear so that extrinsic evidence could serve as an aid in ascertaining that intent,[26] a party's unilateral or subjective belief as to the meaning of a contract word or term is not admissible.[27] The quoted declaration does not state facts relating to a mutual understanding. It is therefore not admissible extrinsic evidence.

The First Amendment required FF Realty to give notice of its election to extend the closing date if the REA Amendment was not secured by September 30. No notice of election was given.

Generally, when an agreement makes time of the essence and fixes a termination date, the agreement becomes legally unenforceable upon that date if performance is not tendered.[28] The exception to this rule is when failure to meet the time limit is the result of bad faith or lack of due diligence.[29] Thus, "the time limits in the

[25] Clerk's Papers at 446–47.

[26] Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). If relevant, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of the respective interpretations. Id.

[27] Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

[28] Nadeau v. Beers, 73 Wn.2d 608, 610, 440 P.2d 164 (1968); Mid-Town Ltd. P'ship v. Preston, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993).

[29] Langston v. Huffacker, 36 Wn. App. 779, 789, 678 P.2d 1265 (1984) (quoting Local 112, I.B.E.W. Bldg. Ass'n v. Tomlinson Dari-Mart, Inc., 30 Wn. App. 139, 142–43,

contract, even though made of the essence, do not operate to excuse [the seller] from specific performance when the breach is the result of her own bad faith and lack of diligence."[30] FF Realty contends Kimschott's failure to secure the amendment was a result of lack of diligence or bad faith.

Whether a party has used commercially reasonable efforts, or acted in good faith, are usually questions of fact.[31] Factual questions may be resolved on summary judgment where reasonable minds could reach but one conclusion from the evidence presented.[32] FF Realty argues Kimschott offered no evidence that it used reasonable efforts to obtain the amendment. But this is hardly surprising, as the reasonable efforts theory was not part of FF Realty's complaint and was not raised until its response to the summary judgment motion. In response to this argument below, Kimschott pointed out that all signatures had been obtained, but that one party, Safeway, expressly instructed escrow not to record until completion of a separate transaction over which Kimschott had no control.

For its part, FF Realty emphasizes that on September 24, in notifying FF Realty that Kimschott expected a resolution within two weeks, Kimschott referenced the fact that its own investment objectives required "concurrent documentation, recordation and execution of all stakeholder programs," and that although Kimschott asked FF Realty

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632 P.2d 911 (1981)).

[30] Egbert v. Way, 15 Wn. App. 76, 82, 546 P.2d 1246 (1976).

[31] Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank, 18 Wn. App. 569, 587, 570 P.2d 702 (1977) (commercial reasonableness); Morris v. Swedish Health Servs., 148 Wn. App. 771, 778, 200 P.3d 261 (2009) (good faith).

[32] Estep v. Hamilton, 148 Wn. App. 246, 256, 201 P.3d 331 (2008), review denied, 166 Wn.2d 1027 (2009).

and other stakeholders to leave documents in escrow "as currently submitted in a[n] effort to close the concurrent transactions by mid October,"[33] Kimschott gave confidential instructions to escrow to withhold its own signatures. FF Realty argues this evidence indicates Kimschott was working against the closing to protect its own interests.

But Kimschott could not have withheld its signatures if Safeway had authorized recording. Everything was in place except for the difficulty with the Safeway/Target deal, because of which Safeway refused to authorize recording of its signature on the REA Amendment.[34] Target was not a party to the REA. Whatever the reasons for the stalemate between Target and Safeway, there is no reason to believe Safeway would have agreed to the amendment just because Target did not object.[35] Nothing in the record suggests that Kimschott added to these difficulties or could have solved them, or that recording instructions from Safeway were obtainable.

Even after learning the REA Amendment was not in recordable form, FF Realty sought one and only one remedy: specific performance. Kimschott contends this is

[33] Clerk's Papers at 452.

[34] Kimschott also observes in its brief that Washington Mutual was seized by the government and sold to J.P. Morgan Chase on or about September 25, 2008, raising other questions about the recordable nature of the signatures.

[35] The parties disagree as to whose burden it was to establish the summary judgment standard regarding Kimschott's good faith/reasonable efforts or the possibility of performance. Lack of good faith or reasonable efforts in this context serves as a defense to the argument that the agreement terminated. See Egbert, 15 Wn. App. at 81–82. Given that FF Realty failed to raise this allegation in its complaint, it was for FF Realty to raise a question of fact on the issue. Impossibility defeats a claim for specific performance, see Carpenter v. Folkerts, 29 Wn. App. 73, 77–78, 627 P.2d 559 (1981), and it was for Kimschott to show performance is not possible.

fatal because without a recordable REA Amendment, no specific performance is possible and the only available remedy under the PSA is rescission.

In general, a court has discretion to order specific performance of a real estate purchase agreement.[36] But specific performance must be possible.[37] As discussed above, Safeway never authorized recording of its signatures, so the REA Amendment was never obtained. We agree with Kimschott that summary judgment was properly granted because performance is not and never has been possible.

Finally, FF Realty contends the trial court erred in denying its motion for a CR 56(f) continuance to conduct further discovery on issues related to Kimschott's good faith and reasonable efforts. FF Realty did not, however, submit the affidavit required by the rule. The court therefore did not abuse its discretion in declining to order a continuance.

Pursuant to the PSA, Kimschott is entitled to its fees on appeal.

Affirmed.

Ellington, J.

WE CONCUR:

Spear, J.

Appelwick, J.

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[36] Paradiso v. Drake, 135 Wn. App. 329, 335, 143 P.3d 859 (2006).

[37] See 18 William Stoebuck & John Weaver, Washington Practice: Real Estate: Transactions § 16.8, at 245–46 (2d ed. 2004); see also Egbert, 15 Wn. App. at 80.