IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WEDGEWOOD AT RENTON, INC., a Washington corporation; KOLIN TAYLOR and JANE DOE TAYLOR, husband and wife and their marital community; and KBS DEVELOPMENT CORPORATION, a Washington corporation, Respondents, v. WESTCOTT HOLDINGS, INC., a Washington corporation; and VERCELLO, LLC, a Washington limited liability company, Appellants.	)	No. 66571-5-I DIVISION ONE UNPUBLISHED OPINION FILED: June 11, 2012

Schindler, J. — Vercello LLC, a wholly-owned subsidiary of Westcott Holdings Inc., entered into an agreement with Wedgewood at Renton Inc. and KBS Development Corp. to purchase vacant finished lots in a subdivision in Renton. After the real estate purchase and sale agreement (REPSA) expired, the parties entered into an addendum amending the terms of the REPSA, "Addendum G." Vercello appeals summary judgment dismissal of its claims against Wedgewood, KBS, and KBS president Kolin Taylor for breach of contract, specific performance, and damages on the grounds that

Addendum G was unenforceable. We reverse and remand.

FACTS

Wedgewood and KBS owned vacant finished lots in the proposed plat of Wedgewood and Wedgewood Lane in Renton. Wedgewood owned Divisions 1, 2, 3, and 5; and KBS owned Division 4.

On January 30, 2007, home builder Westcott Holdings Inc. entered into a REPSA with Wedgewood and KBS. Subject to financing and a feasibility study, Westcott agreed to purchase 126 lots from Wedgewood and KBS for $245,520 per lot. The total purchase price of $30,935,520 included a nonrefundable earnest money deposit of $630,000. Exhibit A to the REPSA sets forth a legal description of the property, Exhibit B addresses the "Construction Site Maintenance Damage Deposit," and Exhibit C sets forth the "Takedown Price Schedule."

According to the terms agreed to in the REPSA, three separate closings for 42 lots were scheduled to occur over the course of a year. The REPSA also contains a "[t]ime is of the essence" provision. The REPSA provides, in pertinent part:

> Scheduled Closing Date
>
> Closing shall occur according to the following schedule:
>
> i. Closing of first 42 lots on or before the later of either Sixty (60) days from mutual acceptance of this Agreement OR within Seven (7) days following Sellers written notice to Purchaser that the lots have been recorded with the County of King and "finished" per the definition in Paragraph 8 of the Purchase and Sale Agreement dated January 30, 2007.
> ii. Closing of the Second 42 lots shall be no later than 6 months from the date of the first closing, or earlier at Purchaser's discretion.
> iii. Closing of the Final 42 lots shall be no later than 12 months from the date of the first closing, or earlier at

Purchaser's discretion. The Final 42 lots shall bear interest from the date of the second closing to the date of the final closing at a rate of 4% per annum, added to the purchase price and payable at the final closing.

iv. Purchaser shall identify specific lots for each closing during feasibility study.

With the approval of Wedgewood and KBS, Westcott assigned its interest in the REPSA to its wholly-owned subsidiary, Vercello.

Based on the results of the feasibility study, on March 6, 2007, the parties amended the terms of the REPSA before the first scheduled closing date. The parties reduced the number of lots from 126 to 113, reduced the purchase price to $27,687,303, reduced the amount of the nonrefundable earnest money to $565,000, and changed the closing dates. "Addendum B" provides, in pertinent part:

> The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30, 2007, by and between Westcott Holdings, Inc. ("Purchaser") and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase and Sale Agreement, the terms of this Addendum shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "this Agreement."
>
> Pursuant to the Agreement, Purchaser and Seller hereby agree to the following:
>
> . . . .
>
> 5) Allocation of Purchase Price, Payment of Purchase Price and Scheduling Closing Date (Paragraph 3 and 5a of the Agreement, respectively) shall be amended to read as follows:
>
> a) The purchase of the first 37 lots (the "First Closing"), shall be comprised of Lots 43 and 44 of Division 2 and Lots 1 through 35 of Division 3. The Purchase Price for each lot shall be consistent with those prices called out in the revised Exhibit C (attached) to the Agreement, titled "VerCello Takedown Price Schedule." The

First Closing shall occur on or before the latter to occur of: a) 55 days following the Removal of Feasibility Study Contingency pursuant to Paragraph 22 of the Agreement, or b) 5 days following the completion of the lots pursuant to Paragraph 8 of the Agreement.

b) The Second Closing shall be 38 lots, comprised of lots 36 through 40 of Division 3, lots 1 through 10 of Division 4, lots 1 through 18 of Division 1, and lots 1 through 4 and lot 45 of Division 2. The Purchase Price for each lot in the Second Closing shall be consistent with those prices called out in the revised Exhibit C (attached) to the Agreement, titled "VerCello Takedown Price Schedule." The Second Closing shall occur no later than 170 days from the date of the first closing.

c) The Third Closing shall be the remaining 38 lots not included in any of the previous closings. The Purchase Price for each lot in the Third Closing shall be consistent with those prices called out in the revised Exhibit C (attached) to the Agreement, titled "VerCello Takedown Price Schedule," plus interest as specified in paragraph 5a(iii) of the Agreement. The Third Closing shall occur no later than 365 days from the date of the first closing.[1]

As agreed, the closing for the first set of lots occurred in July 2007. At closing, Vercello paid Wedgewood and KBS $9.3 million for 37 lots and committed $10 million for construction. The closing for the second set of lots was scheduled for January 17, 2008.

Because "the market had slowed considerably and the market value of the lots had significantly declined," Vercello was concerned about going ahead with the second closing and "was reluctant to pay another $9 million and commit to another $10 million in construction costs under the then present market conditions." But according to Vercello, "Wedgewood was desperate to go forward with a second closing, as they were obligated to pay the final $6 million on their underlying loan." Accordingly, before

[1] "Addendum C" addresses the lots to be sold in each closing, adjusting boundary lines; "Addendum D" is a walkthrough checklist; "Addendum E" is an assignment to Vercello; "Addendum F" changes the amount of the damage deposit.

the second closing scheduled for January 17, 2008, the parties agreed to restructure and negotiate new terms for closing on the second and the third sets of lots.

On January 29, 2008, the parties entered into Addendum G. Addendum G expressly incorporates the REPSA by reference but states that the terms of the Addendum shall control. Addendum G states, in pertinent part:

> The following is an Addendum to the Real Estate Purchase and Sale Agreement dated January 30th 2007 together with all related addendums and exhibits, by and between Vercello, LLC ("Purchaser" via Assignment) and Wedgewood at Renton, Inc. and KBS Development Corporation ("Sellers"). In the event of any inconsistencies between this Addendum and the Real Estate Purchase and Sale Agreement, the terms of this Addendum shall control. The Real Estate Purchase and Sale Agreement and all addenda thereto are collectively referred to as "this Agreement".

Addendum G changes a number of the terms of the REPSA. The parties reduced the sales price per lot to $216,780, or a total of approximately $8.8 million, and allowed Vercello to apply the earnest money to closing on the second set of lots. The parties agreed that the second closing would occur "on or before Thirty Five (35) days from Mutual Acceptance of this Addendum G," and that the closing on the remaining 35 lots would occur "on or before January 6, 2009."

Vercello agreed that Wedgewood and KBS could "market and sell any of the remaining 35 lots included in the Third Closing to a third party, provided that Purchaser does NOT exercise their Right of First Refusal as provided below." However, Wedgewood and KBS agreed that Vercello has a right of first refusal upon receipt of a bona fide offer to purchase the remaining 35 lots scheduled for the third closing. Under the terms of the right of first refusal, Wedgewood and KBS had to notify Vercello in

writing of any bona fide offers to purchase the 35 lots. Vercello then had two days to

exercise the right of first refusal and purchase the lots based on the terms of the offer. The right of first refusal in Addendum G states:

> First Right of Refusal. Purchaser retains the right of first refusal to match any bona fide offer to purchase any of the remaining lots. Seller shall provide written notice and copy of signed bona fide offer, from third party to Purchaser and Purchaser shall have Two (2) business days to accept or decline terms of such offer and deliver notice to Seller in writing. If accepted, Purchaser shall deposit an equal amount of Earnest money and proceed to closing per agreed upon price and terms of said bona fide offer. If not so accepted in 2 day period than it shall be assumed declined by Purchaser and Seller may proceed to closing with third party AND the subject lots of said bona fide offer shall be removed from this Agreement. If terms of said offer are materially revised any time after Purchaser's declination, Purchaser shall have the right to exercise this right of first refusal according to the terms herein each time the terms are materially changed.

As agreed to in Addendum G, the closing on the second set of lots took place, and Vercello paid Wedgewood and KBS approximately $8.8 million.

Unbeknownst to Vercello, in the fall of 2008, Wedgewood and KBS approached American Classic Homes (ACH) about purchasing the remaining 35 lots. In an e-mail dated October 31 from KBS president Kolin Taylor to ACH, Wedgewood and KBS agreed to sell the remaining 35 lots to ACH for approximately $175,000 per lot. Wedgewood and KBS also agreed that ACH could pay for the lots from the proceeds of sales, and could begin construction on the lots with no money down and no interest. In addition, Wedgewood and KBS agreed to guarantee ACH at least $17,500 in profits with any profit over $35,000 to be divided between the three parties, ACH, Wedgewood, and KBS. The e-mail states that the parties agree to execute the purchase and sale agreement in early 2009.

Vercello did not close on the remaining 35 lots on January 6, 2009. According to

Vercello, "[t]he primary reason [it] did not close on the remaining lots was the price of $245,000 per lot, all cash, required by Addendum G."

Three days later, on January 9, 2009, Taylor instructed his attorney to draft a purchase and sale agreement with ACH according to the terms set forth in the October 31 e-mail. On February 6, Wedgewood, KBS, and ACH entered into a REPSA for the remaining 35 lots.

In a letter dated February 9, Vercello informed Wedgewood and KBS that under the terms of Addendum G, it was entitled to notice of the offer with ACH and the right of first refusal. Vercello told Wedgewood and KBS that failure to comply with the terms of Addendum G and execute an agreement with ACH would result in a breach of contract. Wedgewood and KBS took the position that because the REPSA expired on the date of the third closing agreed to in Addendum G, January 6, 2009, the right of first refusal was not triggered.

On March 3, Wedgewood filed a declaratory judgment action on the grounds that Vercello's right of first refusal in Addendum G terminated on January 6, 2009. In the "Complaint for Declaratory Judgment," Wedgewood admits that the parties entered into Addendum G on January 29, 2008 after closing on the first set of lots, and the January 29, 2008 agreement "materially modified the business deal," including the right to sell the remaining 35 lots scheduled as part of the third closing subject to Vercello's right of first refusal. The Complaint for Declaratory Judgment states, in pertinent part:

> 2.5 An addendum dated January 29, 2008 ("Addendum G") was entered into between the parties after the closing of the first set of lots and prior to the closing of the second set. The Addendum materially modified the business deal, and the relevant modifications are as follows:
>
> 2.5.1 The entire earnest money was applied to the closing

of the second set of lots, which closing did subsequently occur;

2.5.2 Wedgewood regained the right to sell any of the lots which were to be in the third closing subject to a first right of refusal of Vercello; and

2.5.3 The closing date for the third set of lots was changed to no later than January 6, 2009.

Wedgewood alleged that because Vercello breached the terms of Addendum G by failing to close on the third set of lots on January 6, 2009, the sellers "sought other means to market the lots which were to be sold to Vercello in the third closing," and in February 2009, entered into the agreement with ACH.

Vercello filed a counterclaim for specific performance, breach of contract, breach of the implied covenant of good faith and fair dealing, and damages. Vercello alleged Wedgewood breached the terms of Addendum G by failing to give notice of the offer to ACH and not allowing it to exercise its right of first refusal.

Wedgewood filed a motion for partial summary judgment. Wedgewood argued that the right of first refusal expired on January 6, 2009. Wedgewood conceded the parties "entered into Addendum G to the REPSA . . . which amended the REPSA." Citing the provision in the REPSA stating that "[t]ime is of the essence," Wedgewood claimed Vercello's right of first refusal expired when it failed to close on January 6, 2009. Wedgewood also argued that the negotiations with ACH did not trigger the right of first refusal in Addendum G. The court denied the motion for partial summary judgment without prejudice to allow the parties to conduct additional discovery. Several months later, Wedgewood filed a second motion for partial summary judgment on the same grounds. The court denied the motion on the grounds that there were material issues of fact.

In October 2009, Vercello asserted cross claims against KBS and Taylor for breach of Addendum G and the implied duty of good faith and fair dealing, breach of fiduciary duty, and tortious interference. In answer to the cross claims, KBS admitted "the parties agreed to Addendum G which was . . . an addendum to the existing agreement."

After the case was transferred to another judge, KBS and Taylor filed a motion for summary judgment dismissal of Vercello's claims. KBS and Taylor argued that because the REPSA expired before the parties executed Addendum G, as a matter of law Addendum G was not legally enforceable.

The trial court granted summary judgment dismissal of Vercello's claims on the ground that "the revival effort took place after January 17, 2008 when the agreement had already basically expired." The court also ruled that Addendum G violated the statute of frauds[2] and did not "constitute a legally binding contract" because there was no "legal description of the property."

Wedgewood then filed a motion for summary judgment arguing for the first time that Addendum G was unenforceable on the same grounds asserted by KBS and Taylor. The court granted the motion.

Vercello appeals the trial court orders granting summary judgment dismissal of its claims against KBS, Taylor, and Wedgewood.

ANALYSIS

Vercello contends the trial court erred in ruling that as a matter of law the parties could not mutually agree to enter into a new agreement amending and incorporating

[2] Chapter 64.04 RCW.

the terms of the REPSA after it expired. Wedgewood, KBS, and Taylor concede that the parties agreed to amend the terms of the REPSA in Addendum G, but assert that as a matter of law it is unenforceable because the REPSA expired before the parties executed Addendum G.[3]

We review summary judgment de novo and engage in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the declarations, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Our primary goal in interpreting a contract is to ascertain the parties' intent. Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). In determining the parties' intent,

> we will consider "the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties."

Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 516, 94 P.3d 372 (2004)[4] (quoting Berg, 115 Wn.2d at 667).

In addressing the question of whether Addendum G is a legally enforceable agreement, the parties primarily rely on Pavey v. Collins, 31 Wn.2d 864, 199 P.2d 571 (1948), and Mid-Town Ltd. P'ship v. Preston, 69 Wn. App. 227, 848 P.2d 1268 (1993).

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[3] Wedgewood also argues that Addendum G is void because it is illusory, the right of first refusal expired on January 6, 2009, and the deal with ACH did not trigger the right of first refusal. These arguments were the subject of the first two summary judgment motions denied by the trial court. Wedgewood has not filed a cross-appeal on these issues and we will not consider them. RAP 2.4(a); Robinson v. Khan, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998).

[4] (Internal quotation marks and citation omitted.)

Vercello asserts that whether Addendum G is characterized as a new contract that incorporates the terms of the expired REPSA, or as an addendum that revives the expired REPSA, the parties can mutually agree to revive an expired contract. Wedgewood and KBS argue that as a matter of law, Addendum G cannot revive the expired REPSA. Neither Pavey nor Mid-Town supports the argument that the parties could not enter into an agreement to amend and incorporate the terms of the expired REPSA.

In Pavey, a real estate broker sued to recover his commission for a sale that occurred after the exclusive brokerage agreement expired. Pavey, 31 Wn.2d at 869-70. The broker argued that in the letter sent by the seller terminating the agreement with the broker, the seller authorized him to continue his efforts to sell the property. Pavey, 31 Wn.2d at 866. The letter from the seller to the broker states, in pertinent part:

> "[Y]our exclusive on my two ranches at Enumclaw no longer exists, nevertheless should you have a buyer for either one $13,500 for 19 Acres and $11000 on the 40 with commission deducted from these amounts, I will let you know if these are sold by anyone else."

Pavey, 31 Wn.2d at 866.[5]

The trial court concluded the letter showed the seller agreed to an extension of the original brokerage agreement. Pavey, 31 Wn.2d at 870. The supreme court reversed on two grounds. First, the court concluded that the letter expressly states that the prior agreement "no longer exists." Pavey, 31 Wn.2d at 870.

> Whatever authority to sell and whatever right to a commission the respondents may have had under the original agreement came to an absolute end on December 31, 1946, and were not resuscitated by the

[5] (Emphasis omitted.)

letter of January 12, 1947.

Pavey, 31 Wn.2d at 872. The court also states that "the letter of January 12, 1947, on

its face negatives any 'extension' of a prior agreement, and categorically declares that the prior agreement has expired and no longer exists." Pavey, 31 Wn.2d at 870.

Second, the court concluded that the parties did not mutually agree to "bring the terms of an extinguished contract into renewed existence." Pavey, 31 Wn.2d at 870. The court notes that the letter did not authorize the broker to sell the property, limit the seller's ability to sell the property, set a commission or a time period for the broker to procure a buyer, or obligate either party in any way. Pavey, 31 Wn.2d at 869.

> The second reason is that a contract which by its terms has expired is legally defunct, and, since the vitality which it once had has ceased, there is nothing upon which an extension may legally operate. So long as a contract remains executory, the parties thereto, acting upon sufficient consideration, may by agreement rescind, alter, modify, supplement, or replace it; but, when the contract has terminated or been extinguished, it is no longer subject to extension, for extension implies an existing agreement. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms.

Pavey, 31 Wn.2d at 870.[6]

Accordingly, under Pavey, when an agreement expires it is "legally defunct" and "no longer subject to extension," unless the parties mutually agree to enter into a new agreement that incorporates the terms of the expired contract. Pavey, 31 Wn.2d at 870.

Here, the undisputed record shows that the parties mutually agreed to enter into a new agreement that amended and incorporated the terms of the expired REPSA. Before the second closing date in the REPSA of January 17, 2008, the parties negotiated an agreement to change the purchase price and closing dates for the second and third closings. Executed on January 29, 2008, Addendum G expressly

[6] (Emphasis omitted.)

incorporates the terms of the expired REPSA and states that "[i]n the event of any inconsistencies between this Addendum and the [REPSA], the terms of this Addendum shall control." Addendum G unambiguously amended the terms of the REPSA, setting new deadlines, a new price, and adding the right of Wedgewood and KBS to market the remaining lots scheduled for the third closing as well as a right of first refusal. There is also no dispute that after entering into Addendum G, the parties performed according to its terms and closed on the second set of lots. See Puget Sound Fin., L.L.C. v. Unisearch, Inc., 146 Wn.2d 428, 434, 47 P.3d 940 (2002). When examined in light of the subsequent conduct of the parties, "it is apparent that [the parties] proceeded in a manner" consistent with the intent to revive the expired REPSA. Carpenters Trust of W. Wash. v. Algene Constr. Co., Inc., 11 Wn. App. 838, 840, 525 P.2d 834 (1974). The plain and unambiguous language of Addendum G states that the REPSA "and all addenda thereto are collectively referred to as 'this Agreement.' "

In Mid-Town, the parties entered into an addendum to the REPSA after the agreement expired. The addendum amended a number of terms, including changing the closing day from October 31, 1988 to June 1, 1989. Mid-Town, 69 Wn. App. at 230. Neither party had sufficient funds to close on June 1 and the date "passed without a tender of performance by either party," but the parties continued to work on the deal. Mid-Town, 69 Wn. App. at 230. When the purchaser was ready to close more than two months later, the seller refused to close. Mid-Town, 69 Wn. App. at 231. The purchaser, Mid-Town, sued for specific performance and damages. The trial court concluded that the conduct of the parties established that the parties mutually agreed

to the extension of the June 1, 1989 closing date and a waiver of the time is of the essence provision in the agreement. Mid-Town, 69 Wn. App. at 231. The trial court also found that the conduct of the seller "gave rise to equitable estoppel and/or waiver of the closing date." Mid-Town, 69 Wn. App. at 231.

On appeal, there was no dispute that the addendum the parties entered into after the REPSA expired was enforceable. We reversed on the grounds that the seller "did nothing that could be interpreted as a waiver of the June 1 closing date, nor of the time is of the essence clause." Mid-Town, 69 Wn. App. at 236. The opinion expressly notes that "except for the changes specifically set forth in the addendum, all other terms and provisions of the sale agreement remained in effect. The addendum expressly so provides." Mid-Town, 69 Wn. App. at 232. Accordingly, we concluded that "the provision making time of the essence remained in full force and effect and that the extension of the closing date was expressly limited to June 1, 1989." Mid-Town, 69 Wn. App. at 232-33.

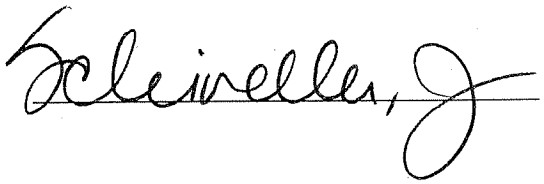
Because the agreement contained a time is of the essence provision, we held "there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered." Mid-Town, 69 Wn. App. at 233.

Here, as in Mid-Town, the parties could have walked away from the original agreement after it expired, but instead mutually agreed to enter into Addendum G, amending but otherwise incorporating the terms of the REPSA.

Alternatively, Wedgewood and KBS argue that Addendum G is not enforceable

because it does not meet the requirements of the statute of frauds. We disagree. Compliance with the statute of frauds is not limited to a single, signed piece of paper but may be evidenced by several clearly related documents. Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). There is no question that the REPSA includes property descriptions that meet the requirements of the statute of frauds, and that Addendum G expressly incorporates the terms of the REPSA by reference.

We reverse and remand for trial.



WE CONCUR: