IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL KERSCHNER INC., a Wyoming Corporation; and DONALD GARDNER INC., a Washington Corporation d/b/a MALONE ADDITION INVESTORS, LLC, a Washington Limited Liability Company, Appellants/Cross Respondents, v. MORRIS MALONE and VIOLA MALONE, husband and wife, and the marital community comprised thereof, Respondents/Cross Appellants.	No. 40943-7-II ORDER AMENDING UNPUBLISHED OPINION

The unpublished opinion in this matter was filed on October 25, 2011. The court gave permission for the parties to file additional authority in response to the attorney fee award in superior court. After review, it is hereby

ORDERED that page 7, section III, Attorney Fees, beginning at line 14, shall be deleted. It is further

ORDERED that the following shall be inserted under section III, Attorney Fees:

> We affirm the award from superior court to the Malones of attorney fees and costs. Additionally, we award the Malones attorney fees and costs on appeal.

DATED this _______ day of January, 2012.

____
Armstrong, J.

We concur:

____
Quinn-Brintnall, J.

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Worswick, A.C.J.

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Armstrong, J. — Michael Kerschner and Donald Gardner (Kerschner)[1] agreed to purchase real property from Morris and Viola Malone to develop a short plat. The parties signed a Real Estate Purchase And Sale Agreement (REPSA), which obligated Kerschner to make the Malones' loan payments on the property during the development phase between signing the REPSA and closing the sale. During this time, the parties signed several addendums to the REPSA, but when Kerschner proposed an addendum that could have reduced the property's purchase price, the Malones refused to sign it. Kerschner then stopped making the monthly loan payments, the Malones terminated the REPSA, and Kerschner sued for breach of contract. After a bench trial, the trial court dismissed Kerschner's claim and ruled that the Malones were entitled to keep the monthly loan payments that Kerschner had made. On appeal, Kerschner argues that the Malones

[1] Kerschner and Gardner signed the purchase and sale agreement as Michael Kerschner, Inc., Donald Gardner, Inc., dba Malone Addition Investors, LLC.

failed to comply with the default notice provisions of the REPSA. Because unchallenged findings of fact demonstrate that Kershner anticipatorily repudiated the REPSA, we affirm.

FACTS

The parties executed the REPSA on September 19, 2007. Kerschner agreed to pay $4,256,000 for the property and to make the Malones' loan payments on the property during the 18-month development period. The REPSA required the Malones to give Kerschner written notice if he failed to make any monthly payment and to allow Kerschner 10 days to make the payment.

The REPSA provided that "[a]ll notices provided for herein may be telecopied, sent by recognized overnight courier, personally delivered, or mailed by U.S. registered or certified mail, return receipt requested." Ex. 1, at 9. The parties agreed to use "telecopied or electronic signatures in order to expedite the transaction." Ex. 1, at 11.

The parties proposed and executed several addenda to the REPSA during the development stage. But when Kerschner proposed addendum 5, which the trial court found effectively lowered Kerschner's purchase price, the Malones refused to sign it. The trial court found that the Malones had no obligation to execute addendum 5.

Kerschner timely paid the loan payments until February 2008. He made the February payment on March 5, 2008, following an e-mail from the Malones requesting payment. By then, Kerschner had paid $65,806.05 in supplemental loan payments. Kershner failed to make the loan payment due on March 21, 2008, or any payments thereafter.

The parties exchanged e-mails and telephone calls regarding the March payment and

addendum 5. On March 20, 2008, the Malones e-mailed Kerschner, reminding him that the March payment was due the next day. Kerschner responded that the Malones should contact Don Gardner about the payment and that he and Gardner were expecting a response to their proposed addendum. The Malones e-mailed back that addendum 5 had no bearing on Kerschner's obligation to make the March payment due that day, March 21, 2008. The Malones' final e-mail on March 21, 2008, confirmed a phone conversation in which Kershner stated that he would not proceed with the contract unless the Malones signed addendum 5. Although the parties continued to discuss addendum 5, on May 1, 2008, the Malones sent Kerschner a letter terminating the REPSA.

The trial court concluded that Kerschner materially breached the REPSA by failing to pay the March 21, 2008 payment and any additional payments. The trial court concluded that because of Kerschner's material breach, the Malones had no obligation to perform their contractual obligations.

After denying Kershner's motion for reconsideration, the trial court entered supplemental findings of fact and conclusions of law. The trial court found that the REPSA allowed for e-mail transmission of notice and it concluded that the e-mail transmissions on March 20 and 21, 2008, were sufficient notice under the agreement. In the alternative, the trial court found that the REPSA allowed either party to waive its rights, and it concluded that Kershner had done so as to the method of notice; thus, the e-mails were sufficient.

ANALYSIS

I. Standard of Review

We review conclusions of law de novo. *Clayton v. Wilson*, 168 Wn.2d 57, 62, 227 P.3d 278 (2010). We review findings of fact for substantial supporting evidence. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Kerschner has not assigned error to any finding of fact. Accordingly, we treat the court's findings as verities. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The parties dispute whether the Malones were required to give Kerschner notice of his failure to make the March payment with the opportunity to cure the default. Kerschner argues that the Malones were required to give such notice and that the Malones' March e-mails were insufficient written notice under the REPSA. The Malones counter that because Kerschner breached the REPSA by failing to pay and declaring his intent not to pay unless the Malones agreed to addendum 5, they were not required to give further notice and opportunity to cure. Moreover, according to the Malones, their e-mails on March 20 and March 21 constituted adequate notice because the parties had routinely e-mailed documents to each other. Because the unchallenged findings of fact demonstrate that Kerschner anticipatorily repudiated the REPSA, we need not address the notice issues.

The Malones argue that Kerschner's anticipatory repudiation excused their duty to give notice of Kerschner's default in making payments. Kerschner responds that we should not consider this issue because the Malones did not argue anticipatory repudiation below.

"The appellate court *may* refuse to review any claim of error which was not raised in the trial court. . . ." RAP 2.5(a) (emphasis added). Here, the Malones did not argue anticipatory repudiation below. But RAP 2.5(a) is permissive. And the parties fully developed the facts

necessary to resolve the repudiation issue—the March e-mails. Moreover, the repudiation doctrine is simply a restatement of the Malones' argument that Kerschner's failure to make payments excused them from performing the default notice provisions of the REPSA. Thus, we can fairly resolve the case on this fully developed issue.

A party's anticipatory repudiation of a contract excuses the other party's performance. *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991). Such repudiation must occur *before* the other party's performance is due. *Wallace v. Kuehner*, 111 Wn. App. 809, 816, 46 P.3d 823 (2002). And the repudiation must consist of a "'positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.'" *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994) (en banc) (quoting *Olsen Media v. Energy Scis., Inc.*, 32 Wn. App. 579, 585, 648 P.2d 493 (1982)). A party's "doubtful and indefinite statements" suggesting only that it *may* not perform do not demonstrate repudiation. *Groves*, 124 Wn.2d at 898. A party's letter stating that it could not perform on the date due "was clearly an anticipatory breach." *Groves*, 124 Wn.2d at 898. A party's threat to withhold a payment due under the contract until the parties modified the contract was also an anticipatory repudiation of the contract. *CKP, Inc.*, 63 Wn. App. at 620.

Here, the trial court found that Kerschner drafted addendum 5, which would effectively reduce Kerschner's purchase price. The trial court also found that after the Malones requested the March payments, Kerschner responded that they would not make the payments until the Malones signed addendum 5. The trial court found that the Malones were not obligated to sign

addendum 5. And although the parties continued to discuss addendum 5, the Malones told Kerschner that the March payment was due regardless of whether the parties continued to discuss addendum 5. Nothing in the REPSA excused Kerschner from making all payments due while the parties discussed a possible modification. As in *CKP, Inc.*, Kerschner's demand for modification before he would perform clearly evidenced his intent to repudiate the contract. This anticipatory repudiation excused the Malones from having to comply with the notice and opportunity to cure provisions of the REPSA.

II. Specific Performance

The Malones cross-appeal the trial court's decision not to grant them specific performance of the contract. The Malones reason that (1) Kerschner asked for specific performance in the complaint; (2) Malone admitted the same in the answer; (3) Kerschner never dismissed the specific performance claim; and (4) the circumstances of the case call for a specific performance remedy in favor of the Malones. Kerschner responds that the REPSA limits the Malones to liquidated damages for his breach.

RCW 64.04.005(1) provides:

> (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. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.

The statute defines earnest money deposits as any deposits or payments toward the "purchase price for the property." RCW 64.04.005(2)(a).

Generally, liquidated damages provisions do not deprive the nonbreaching party of other remedies available under common law unless the parties intended liquidated damages to be the exclusive remedy. *Asia Inv. Co. v. Levin*, 118 Wash. 620, 625-26, 204 P. 808 (1922). In interpreting a contract, we look for the parties' intent. *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 516, 94 P.3d 372 (2004) (citing *Anderson Hay & Grain Co. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 254, 76 P.3d 1205 (2003)). If the contract is unambiguous, we can find the parties' intent as a matter of law. *Paradise Orchards*, 122 Wn. App. at 517 (citing *Stranberg v. Lasz*, 115 Wn. App. 396, 402, 63 P.3d 809 (2003)).

Here, the REPSA provides, "In the event of Buyer's Material Breach of this Agreement, any Deposit paid to Seller shall be forfeited to the Seller as their *exclusive remedy*." Ex. 1 at 9 (emphasis added). Thus, the parties clearly intended that the Malones' exclusive remedy for Kerschner's default would be forfeiture of the payments made as of the date of the default.

The Malones cite *Dean v. Gregg*, 34 Wn. App. 684, 686, 663 P.2d 502 (1983), to support their claim for specific performance. *Dean* does not help the Malones; the contract there explicitly allowed the nonbreaching party to seek specific performance. *Dean*, 34 Wn. App. at 685. The trial court did not err in denying the Malones specific performance.

III. Attorney Fees

Kershner challenges the trial court's award of attorney fees to the Malones. The Malones ask us to affirm the lower court's award of attorney fees and to grant them further fees on appeal. The REPSA grants attorney fees and court costs to the prevailing party in any action arising out of the REPSA. We will enforce a contract provision awarding attorney fees to a prevailing party.

RCW 4.84.330.

Although the Malones prevailed in the trial court and on appeal, we decline to award attorney fees because of the pending bankruptcy action filed by Michael Kerschner and his wife, and David Gardner and his wife. The parties may submit authority to us on the issue of whether we can award attorney fees to the Malones despite the pending bankruptcy action. We grant the parties 30 days to file authority with this court on this limited issue.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.