IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KENNETH R. SEILER and PHYLLIS I. SEILER, husband and wife,	)	**No. 27744-5-III**
Appellants,	)	**Division Three**
v.	)	
	)	**UNPUBLISHED OPINION**
DAVID R. BLACK and JANE DOE BLACK, husband and wife,	)	
Respondents.	)	

Brown, J. — On cross-motions for summary judgment, the Spokane County Superior Court granted purchaser David R. Black's motion and declared enforceable a Real Estate Purchase and Sales Agreement (REPSA) against the seller, Kenneth Seiler. Mr. Seiler appeals, contending the trial court erred because (1) the REPSA was an unenforceable illusory contract lacking in consideration, and (2) disputed material factual issues remain in dispute regarding whether the REPSA effectively terminated before Mr. Black elected to complete the purchase. We reject Mr. Seiler's contentions, affirm, and award attorney fees under the REPSA to Mr. Black.

FACTS

In 1975, Kenneth Seiler inherited the subject property zoned single family rural and located on South Regal in Spokane. Mr. Seiler wanted to sell the property for commercial development in the 1990s, but rezoning was problematic. By 2004, development and rezoning conditions improved. Then, Mr. Seiler and developer David Black, who had rezoning and development expertise, began negotiations. Mr. Seiler wanted to begin rezoning efforts immediately.

On September 13, 2004, Mr. Seiler and Mr. Black signed an initial REPSA, under which Mr. Black agreed at Mr. Seiler's behest to diligently pursue required approvals and apply for rezoning within 30 days of acceptance of the agreement. Mr. Black agreed to pay all costs for rezoning and development approval. The parties agreed the costs for rezoning would be additional earnest money, but not applied to the purchase price. Mr. Seiler wanted to simplify the REPSA, so he created a sales agreement addendum with proposed changes.

On September 27, 2004, the parties entered into a final REPSA with a sale price for the property of $4.50 per foot, or $1,980,928. Mr. Black tendered a signed promissory note for $25,620 as earnest money toward the purchase price, payable at closing. The REPSA provided that Mr. Black could send to Mr. Seiler at any time a

cancellation notice making the REPSA null and void with no further obligations to either party. But all costs of rezoning and development would still be borne by Mr. Black.

The REPSA partly stated:

> This offer is contingent upon Purchaser obtaining zoning approvals for his intended use. The Purchaser will provide a site plan and proposed progress schedule to the Seller. The Purchaser will diligently pursue all required approvals and site planning, including applying for re-zoning within 30 days of acceptance of this offer.
> The intended use is retail, and may take up to 3 years to complete, including appeals.
> . . . .
> FINAL SALE to close on or before 120-days following Government Agency Zoning Approvals, and expiration of any appeals period following zoning approvals.

Clerk's Papers (CP) at 60. Paragraph 8 of the REPSA—a boilerplate provision pertaining to closing ("Termination Date")—was then left blank. CP at 61.

Mr. Black's $25,620 promissory note contained the following typewritten notation: "The expense of rezoning will be additional consideration for this transaction, but will not apply to the purchase price." CP at 62. Mr. Seiler accepted the promissory note from Mr. Black as written.

Mr. Black timely commenced rezoning efforts, which the City of Spokane requested occur as an amendment to its comprehensive plan. Mr. Black worked continuously on the project beginning in October 2004, but rezoning had not been approved by October 2007. Mr. Seiler then proposed an addendum to the agreement setting a termination date of November 30, 2007. Mr. Black refused.

On December 4, 2007, Mr. Seiler sued Mr. Black for declaratory relief and quiet title, claiming the REPSA was unenforceable for lack of consideration; and, the agreement had expired because three years had passed without zoning approval. Alternatively, Mr. Seiler requested the court to set a reasonable termination date for the agreement. Mr. Seiler then offered to sell Mr. Black the property for an increased price of $7.00 per foot. In March 2008, with rezoning approval still pending, Mr. Black responded that he intended to close on the property under the REPSA. Mr. Seiler declined; Mr. Black counterclaimed, seeking specific performance against Mr. Seiler.

In June 2008, the Spokane City Council approved the requested amendment to the comprehensive plan and rezoned the property commercial. Mr. Black spent over $100,000 in consulting, engineering and legal fees for the successful rezoning efforts.

Both parties moved for summary judgment on the issue of REPSA enforceability. The trial court denied Mr. Seiler's motion and granted Mr. Black's cross-motion. Mr. Seiler appeals.

ANALYSIS

A. Contract Supported by Consideration

The issue is whether the trial court erred in concluding the REPSA was enforceable and supported by consideration when granting summary judgment to Mr. Black. Mr. Seiler contends the REPSA was as an illusory contract lacking consideration.

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Trimble v. Wash. State Univ*., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 93; CR 56(c).

The essential elements of a valid executory contract will ordinarily include "competent parties, a legal subject matter and valuable consideration." *Lager v. Berggren*, 187 Wash. 462, 467, 60 P.2d 99 (1936) (quoting 58 C.J. 929). A binding contract requires mutuality of obligation, with all material contract terms complete and reasonably certain. *Id.* Deciding contract enforceability is a question of law. *See Underwood v. Sterner*, 63 Wn.2d 360, 364, 387 P.2d 366 (1963).

A promise for a promise is sufficient consideration to support a contract. *See Omni Group, Inc. v. Seattle First Nat'l Bank,* 32 Wn. App. 22, 24, 645 P.2d 727 (1982) (citing *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950)). A promise is "illusory," however, when it "actually promises nothing because it leaves to the speaker the choice of performance or nonperformance." *Interchange Assocs. v. Interchange Inc.*, 16 Wn. App. 359, 360, 557 P.2d 357 (1976). Thus, a promise is "illusory" when it leaves "the promisor's performance optional or entirely within the discretion, pleasure, and control of the promisor." *Id*. at 360-61. "An 'illusory promise' is neither enforceable nor sufficient consideration to support the enforcement of a return promise." *Id*. at 361. The same principle renders invalid a contract that reserves to one of the parties an

unconditional right to terminate the contract. *Id.*

Mr. Seiler relies on *Interchange Associates.* There, the plaintiffs promised to serve on the board of directors for 10 years or "until their sooner resignation." *Id.* at 362. The plaintiffs expressly reserved the right to terminate the agreement unilaterally. They served four years as directors before the defendants removed them. The plaintiffs then sued for specific performance seeking to be retained as directors for the remainder of the 10 years. *Id*. The court held the contract was illusory, notwithstanding that plaintiffs had already performed under the agreement for four years. The court reasoned:

> Here, the plaintiffs "promised" to serve as directors for 10 years or "until their sooner resignation." The plaintiffs expressly reserved the right to resign at any time. The resignation clause is indistinguishable from a contractual provision permitting one party to arbitrarily, unilaterally, and unconditionally cancel the contract. It follows that the plaintiffs' "promise" is insufficient consideration to support enforcement of the executory portion of the defendants' counter promise. The contract is invalid and the judgment decreeing specific performance of the contract must be reversed.

Interchange Assocs., 16 Wn. App. at 362.

Interchange Associates is distinguishable. There, the contract was illusory because the directors had no binding obligation even at inception, and their right to resign remained unconditional. Our case is more like *Omni Group Inc*. Mr. Black's ability to purchase was subject to conditions to commence rezoning efforts at his own expense within 30 days. *Omni Group, Inc.*, 32 Wn. App. at 25. Mr. Seiler insisted upon getting rezoning efforts underway immediately. Mr. Black incurred an immediate legal

detriment, the obligation to act at his own expense conferring a benefit upon Mr. Seiler by advancing Mr. Seiler's rezone plans. Mr. Seiler agreed that Mr. Black's rezoning expenses were to be considered as additional consideration for the REPSA transaction.

Considering all, we conclude consideration supports the REPSA. Having so reasoned, we do not reach Mr. Black's alternative arguments to uphold the summary judgment. We hold the REPSA is not an illusory contract.

B. No Material Facts Remain

The issue is whether the trial court erred in deciding no disputed material facts remain regarding lack of a termination date in the REPSA.

"When a contract is silent as to duration or states [a] time for performance in general or indefinite terms, the court is to impose a reasonable time." *Pepper & Tanner, Inc. v. Kedo*, *Inc.*, 13 Wn. App. 433, 435, 535 P.2d 857 (1975). "A reasonable time is to be determined by the nature of the contract, the position of the parties, their intent, and the circumstances surrounding performance." *Id*.

Here, the REPSA does state a definite time to the extent that closing must occur "on or before 120-days following Government Agency Zoning Approvals, and expiration of any appeals period following zoning approvals." CP at 60. The language that zoning approval may take up to three years to complete does not appear as a deadline term, but instead reflects a time estimate—one that these parties well versed in the

uncertainties of the zoning application process chose not to use for setting a *termination* date in Paragraph 8. The parties did not tie any closing deadline to potential changes in market value of the property. The closing date was tied to final zoning approval (which has in fact now occurred) and no evidence shows Mr. Black failed to make good on his promise to actively pursue the rezoning application as of the time of the summary judgment hearing. In sum, the lack of a termination date in the REPSA does not present a factual issue that precludes summary judgment for Mr. Black on the issue of contract enforceability.

C. Attorney Fees

Both parties seek attorney fees for this appeal. In Washington, attorney fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. *See Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). The REPSA partly provides the prevailing party in "any dispute relating to any aspect of this transaction or this Agreement" shall recover their reasonable attorney fees and costs. CP at 61. Mr. Black has prevailed on appeal, has complied with the briefing requirements of RAP 18.1(b), and is entitled to his attorney fees.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

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Sweeney, J.

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Korsmo, J.