



## Cort v. Kehres

133 Wash.App. 1040 (2006) | Cited 0 times | Court of Appeals of Washington | July 3, 2006

JUDGES: Concurring: Stephen J Dwyer, Mary Kay Becker.

### UNPUBLISHED OPINION

Douglas Kehres appeals the court's order of contempt for failing to comply with an order of specific performance. Because Kehres was in plain violation of the specific performance order, we affirm.

I.

Kehres entered into a Vacant Land Purchase and Sale Agreement (VLPSA) with Joseph Cort and Warren Anderson in September 2002. Cort and Anderson agreed to pay Kehres \$400,000 for all of one parcel of land and part of a second parcel, for the purpose of developing a 10-lot residential subdivision. The parties were to close the transaction by September 30, 2003, unless an extension was granted. Cort and Anderson were entitled to two six-month extensions upon transferring \$4,000 to Kehres for each extension.

The VLPSA referenced Kehres's parcels of land by lot numbers, block number, addition, city, county, and state, but provided that the exact legal description of the sale property was 'to be determined by Property Line Adjustment.' The contract included Exhibit A, which was a hand drawn map of the two parcels of land, indicating the intended boundary line adjustment (BLA).

Cort and Anderson discovered that the property delineated for sale could only be developed into nine lots. The parties modified the VLPSA in June 2003 by Addendum II, to provide for a tenth lot, 'as set forth in Exhibit 'B.' Exhibit B is a preliminary plat map, which depicts the intended BLA and sale property, as modified by Addendum II.

The buyers exercised their right to a six-month extension in September 2003 by paying Kehres \$4,000. Kehres attempted to have Cort and Anderson sign several modifications to the contract in the form of 'extension agreements,' which they rejected. Kehres refused to cooperate by signing the BLA application unless Cort and Anderson signed his proposed 'extension agreement.'

In March 2004, Cort and Anderson filed a lawsuit against Kehres for specific performance of the VLPSA and for damages. Kehres filed an answer and counterclaim.

The parties cross-moved for partial summary judgment regarding specific performance. The court



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ruled in Cort's and Anderson's favor, ordering Kehres to 'sell the real property described in the Complaint for Specific Performance,' and take any and all necessary action to perform the Vacant Land Purchase and Sale Agreement, including but not limited to, signing the boundary line adjustment prepared on Plaintiffs' behalf and otherwise cooperating and performing the Agreement and proceeding to close the purchase and sale of the real property . . . .

At that time, there was no prepared BLA, but rather an application for a BLA, which was submitted to the court with the plaintiffs' motion for summary judgment. The application included both a written description of the sale property and Exhibit B, which was a plat map of the sale property. Kehres signed the application at the summary judgment hearing and did not object to the property lines as depicted in the application.

Subsequently, the court granted Cort's and Anderson's motion for interim attorney fees and costs pursuant to their cause of action for specific performance, awarding \$12,632.50. It certified its judgment as final under CR 54(b). Kehres did not appeal.

The city of Kenmore approved the BLA and a final BLA map was ready for Kehres to sign in January 2005.<sup>1</sup> Kehres's signature was needed on the map before the parties could close the transaction.<sup>2</sup> Kehres refused to sign the map, maintaining that the BLA was not consistent with the VLPSA because the boundary lines were incorrect. The January BLA map was identical to Exhibit B of the BLA application, except for an added drain field.

The parties' attorneys negotiated to resolve the conflict. At Kehres's request, Cort and Anderson made changes to the BLA map. They presented Kehres with a modified BLA map in March 2005. But Kehres refused to sign the March map, claiming that there were additional problems with the boundary lines.

Cort and Anderson moved to have Kehres held in contempt of the July 2004 specific performance order because he refused to sign the final BLA map. The court held a show cause hearing on May 13, 2005 and found Kehres in contempt. The court ordered Kehres to sign the March BLA map within 10 days of the hearing. It imposed sanctions of \$500 a day in the event Kehres did not comply with its order.

Kehres moved for reconsideration. The court requested further pleadings concerning the adequacy of its findings and sanctions. After a hearing, the court entered findings of fact and conclusions of law and again ordered Kehres to sign the March BLA map. The court purged its May 13 contempt sanctions, but ordered that a commissioner be assigned to sign the March map in the event Kehres did not comply with its order.

II.



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Kehres argues that he is not in contempt of the court's specific performance order because the order simply required him to perform his obligations under the VLPSA. He maintains that the boundary lines of the sale property were not at issue in the specific performance proceeding. He claims that the March BLA map does not portray the sale property as it is described in the VLPSA; therefore he is not required to sign it. Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court.<sup>3</sup> We review a contempt order for an abuse of discretion, which occurs when the trial court's decision is manifestly unreasonable or based on untenable grounds.<sup>4</sup> We will uphold a contempt order if there is any proper basis.<sup>5</sup>

In contempt proceedings, an order must be read in light of the issues and the purposes for which the suit was brought and its meaning will not be expanded by implication.<sup>6</sup> 'The facts found must constitute a plain violation of the order.'<sup>7</sup> This is to protect people from being held in contempt of judicial decrees that are unclear or ambiguous.<sup>8</sup> Kehres was ordered to 'sell the real property described in the Complaint for Specific Performance,' and to 'take any and all necessary action to perform' the VLPSA, including 'signing the boundary line adjustment . . . and otherwise cooperating and performing the Agreement and proceeding to close the purchase and sale of the real property.'

Kehres's assertion that the boundary lines were not at issue in the specific performance order is inaccurate. The court ordered Kehres to sell the property described in the plaintiffs' complaint. The VLPSA was attached to the complaint. Exhibit B to Addendum II shows the boundary lines of the intended sale property. Additionally, the BLA application was attached to Cort's declaration in support of the plaintiffs' motion for summary judgment. It included Exhibit A, which is a written description of the proposed boundary lines, and Exhibit B, which is a surveyor map that depicts the boundaries between the sale property and the property to be retained by Kehres. At the conclusion of the summary judgment proceeding, Kehres signed this application in front of the court. He did not object to the boundary lines as depicted in the application.

In order to proceed toward closing, Kehres had to sign a final BLA map. The January BLA map shows the sale property as it is depicted in Exhibit B to Addendum II and in the BLA application. Thus, when Kehres refused to sign the BLA map, he did so in plain violation of the court's specific performance order.

The trial court's findings also reflect Kehres's failure to cooperate in general, in violation of the specific performance order. The court found that 'the Defendant has made and continues to make different requests and demands regarding the {BLA} map and other matters,' and 'continually changes his demands about which property lines need adjustment.' The court stated that 'Mr. Kehres has made it very clear that if he believes that the map is not accurate, and regardless of any ruling of the Court against his stated positions, he will not sign the March map.' The court did not abuse its discretion by holding Kehres in contempt of the specific performance order because he refused to cooperate, sign the final BLA, and proceed toward closing.<sup>9</sup>



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Kehres next argues that the real estate statute of frauds<sup>10</sup> voids any obligation to convey real property as depicted in Exhibit B or the BLA because a contract must contain words of conveyance sufficiently definite to locate the property without recourse to oral testimony.

We note that Kehres should have raised the statute of frauds as a defense in his pleadings on the action for specific performance. His claim concerns whether there is an enforceable contract, which is precisely what was at issue in the summary judgment proceeding. Generally, the doctrine of res judicata bars relitigation of 'matters that were actually litigated and those that 'could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.'"<sup>11</sup>

Regardless, assuming the VLPSA does not accurately describe the sale property, Cort's and Anderson's part performance removes the VLPSA from the statute's requirements. If an agreement for the sale of real property contains an inadequate legal description of the property, a court will enforce the agreement if there is sufficient part performance to leave no doubt as to the existence of a contract.<sup>12</sup> Such a showing will exempt a contract from the statute of frauds.<sup>13</sup>

We consider three factors to determine whether there has been part performance of the VLPSA: (1) delivery and assumption of actual and exclusive possession, (2) payment or tender of consideration, and (3) the making of permanent, substantial and valuable improvements referable to the contract.<sup>14</sup> Consideration alone is insufficient evidence of part performance, but there is no absolute rule that two of the three factors must be present before we will find part performance.<sup>15</sup> Ultimately, our goal is to identify clear and unequivocal evidence which leaves no doubt as to the terms, character, and existence of the contract.<sup>16</sup>

Cort and Anderson have provided consideration in the form of \$10,000 in earnest money and a \$4,000 extension fee. They have also spent time and money obtaining preliminary approval of the BLA. With BLA approval, Kehres can sell the property to another buyer without the expense of surveying the land and obtaining approval. Thus, Cort and Anderson have made permanent, substantial, and valuable improvements to Kehres's land by obtaining preliminary BLA approval. The buyers' payment of consideration, the signed BLA application, and preliminary approval of a final BLA provide clear and unequivocal evidence of the parties' agreement and the terms of the VLPSA.

Cort and Anderson are entitled to reasonable attorney fees and costs on appeal under RAP 18.1 and the terms of the VLPSA.

**AFFIRMED.**

1. The city approved the BLA under chapter 17.40 of the Kenmore Municipal Code.

2. See Kenmore Municipal Code sec. 17.40.030(A) (providing that '{a}ll persons having an ownership interest within the boundary line adjustment shall sign the final recording document').



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3. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).
4. *Moreman*, 126 Wn.2d at 40; *In re Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995).
5. *Graves v. Duerden*, 51 Wn. App. 642, 647, 754 P.2d 1027 (1988) (citing *State v. Boatman*, 104 Wn.2d 44, 46, 700 P.2d 1152 (1985)).
6. *State v. Int'l Typographical Union*, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); *Graves*, 51 Wn. App. at 647.
7. *Johnston v. Beneficial Mgt. Corp.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982) (citing *Int'l Typographical Union*, 57 Wn.2d at 158).
8. *Graves*, 51 Wn. App. at 647-48 (citing *Int'l Longshoremen's, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed. 2d 236 (1967); *Int'l Typographical Union*, 57 Wn.2d at 158).
9. Kehres argues that the trial court exceeded its authority in the contempt proceeding by making findings of fact and conclusions of law regarding the correct boundary lines, and by ordering him to sign the March BLA map. But the court's findings and conclusions regarding the boundary line are superfluous. It accurately found that Kehres refused to sign the January BLA map or otherwise cooperate with the specific performance order. This is enough to sustain the order of contempt. And the court could properly order Kehres to sign the March BLA map even though it differed from the property description approved of by the court in its specific performance order because the changes were made at Kehres's request and are in his favor.
10. Ch. 64.04 RCW.
11. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891-92, 1 P.3d 587 (2000) (quoting *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997)). Res judicata applies to issues decided by a final judgment on the merits. In *re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). After the court granted Cort and Anderson interim attorney fees pursuant to the specific performance order, it certified as final under CR 54(b) both its judgment in favor of the plaintiffs on their cause of action for specific performance and its judgment awarding interim attorney fees and costs.
12. *Firth v. Lu*, 103 Wn. App 267, 277, 12 P.3d 618 (2000).
13. *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995).
14. *Berg*, 125 Wn.2d at 556; *Firth*, 103 Wn. App at 277.
15. *Berg*, 125 Wn.2d at 557-58.
16. *Berg*, 125 Wn.2d at 556.

