

**NO.: A10-1945**

STATE OF MINNESOTA  
IN COURT OF APPEALS

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BOB ACRES, LLC, a Minnesota limited liability company,

*Appellant,*

vs.

Schumacher Farms, LLC, a Minnesota limited liability company,

*Respondent.*

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APPELLANT'S BRIEF

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- A. The Trial Court granted Respondent's cross motion for summary judgment, dismissing Appellant's claim, because Appellant did not tender the earnest money payment referred to in the Purchase Agreement thus depriving Respondent of consideration.
- B. The Trial Court granted Respondent's cross motion for summary judgment, dismissing Appellant's claim, holding that there was no contract formed for the sale and purchase of the Subject Property.

2. THE TRIAL COURT ERRED BY CONCLUDING THAT RESPONDENT DID NOT WAIVE STRICT PERFORMANCE OF THE PURCHASE AGREEMENT.

3. THE TRIAL COURT ERRED BY DENYING APPELLANT SPECIFIC PERFORMANCE OF THE PURCHASE AGREEMENT.

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## STATEMENT OF THE LEGAL ISSUES

### 1. THE TRIAL COURT ERRED BY CONCLUDING THAT NO CONTRACT WAS FORMED FOR THE SALE AND PURCHASE OF THE SUBJECT PROPERTY.

In its motion for summary judgment, Appellant argued that the Purchase Agreement was a binding contract that should be specifically enforced. On its cross motion for summary judgment, Respondent argued that there was no contract formed because the \$500 in earnest money referred to in the Purchase Agreement was not paid at the time the Purchase Agreement was signed.

#### Trial Court's Ruling:

- A. The Trial Court granted Respondent's cross motion for summary judgment, dismissing Appellant's claim, because Appellant did not tender the earnest money payment referred to in the Purchase Agreement thus depriving Respondent of consideration.

Appellant has properly preserved this issue for appeal by timely perfecting an appeal of the Trial Court's Order for Judgment pursuant to Minn. R. App. P. 103.03(a).

#### Most Apposite Cases:

Craigmile v. Sorenson, 58 N.W.2d 865 (Minn. 1953).

Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co., 173 N.W. 703 (Minn. 1919).

Kielley v. Kielley, 674 N.W.2d 770 (Minn. Ct. App. 2004).

- B. The Trial Court granted Respondent's cross motion for summary judgment, dismissing Appellant's claim, holding that there was no contract formed for the sale and purchase of the Subject Property.

Appellant has properly preserved this issue for appeal by timely perfecting an appeal of the Trial Court's Order for Judgment pursuant to Minn. R. App. P. 103.03(a).

Most Apposite Cases:

Bergstedt, Wahlberg, Berquist Assoc., Inc. v. Rothschild, 225 N.W.2d 261 (Minn. 1975).

Cederstrand v. Lutheran Brotherhood, 117 N.W.2d 213, 221 (Minn. 1962).

Benedict v. Pfunder, 237 N.W. 2 (Minn. 1931).

2. THE TRIAL COURT ERRED BY CONCLUDING THAT RESPONDENT DID NOT WAIVE STRICT PERFORMANCE OF THE PURCHASE AGREEMENT.

In its motion for summary judgment, Appellant argued that the Purchase Agreement was a binding contract that should be specifically enforced. On its cross motion for summary judgment, Respondent argued that Appellant could not specifically enforce the Purchase Agreement because there was no express waiver by Respondent of the closing date specified in the Purchase Agreement.

Trial Court's Ruling:

Because the Purchase Agreement contained a nonwaiver clause, and because the parties did not execute an amendment to modify or waive strict compliance with the closing date, Respondent did not waive its right to require strict compliance with the August 14, 2006, closing date/deadline.

Appellant has properly preserved this issue for appeal by timely perfecting an appeal of the Trial Court's Order for Judgment pursuant to Minn. R. App. P. 103.03(a).

Most Apposite Cases:

Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc., 441 N.W.2d 483 (Minn. 1989).

Patterson v. Stover, 400 N.W.2d 398 (Minn. Ct. App. 1987).

Wolff v. McCrossan, 210 N.W.2d 41 (Minn. 1973).

Pollard v. Southdale Gardens of Edina Condominium Ass'n., Inc., 698 N.W.2d 449 (Minn. Ct. App. 2005).

3. THE TRIAL COURT ERRED BY DENYING APPELLANT SPECIFIC PERFORMANCE OF THE PURCHASE AGREEMENT.

Trial Court's Ruling:

In its motion for summary judgment, Appellant argued that the Purchase Agreement was a binding contract that should be specifically enforced. Because the Trial Court granted Respondent's cross motion for summary judgment and held that there was no contract formed to enforce, the Trial Court did not address this remedy in detail.

Appellant has properly preserved this issue for appeal by timely perfecting an appeal of the Trial Court's Order for Judgment pursuant to Minn. R. App. P. 103.03(a).

Most Apposite Cases:

Schumacher v. Ihrke, 469 N.W.2d 329, 335 (Minn. Ct. App. 1991).

## STATEMENT OF THE CASE

Appellant is a Minnesota limited liability company that owns certain real property in Wabasha County, Minnesota. Respondent is a Minnesota limited liability company that also owns real property in Wabasha County, including the property that is the subject of this action. In June 2006, Appellant and Respondent entered into a written agreement regarding the sale and purchase of the disputed property. Respondent refused to complete the transaction contemplated by the June 2006 agreement. Appellant initiated suit, filed in Olmsted County, Minnesota, seeking relief that included specific performance.

Once discovery was complete, the Appellant and Respondent stipulated to the facts that appeared to be material to the dispute at that time. This stipulation is included in its entirety at Appendix pages 1 to 17. Having so stipulated to the material facts in this matter, in October 2008, the parties brought cross motions for summary judgment. On December 8, 2008, the Trial Court heard arguments on the parties' cross motions. On March 9, 2009, the Trial Court issued an Order, Order for Judgment, and Memorandum (hereinafter the "Order"). By its Order, the Trial Court (i) denied Appellant's motion for summary judgment requesting specific performance, and (ii) granted Respondent's motion for summary judgment dismissing Appellant's claims. An appeal was initiated in 2009, but voluntarily dismissed because there remained one counter-claim that had not yet been resolved

at the Trial Court level. See Appellate Court Case No. A09-821. In September 2010, the parties entered into a Stipulation with respect to that one counter-claim and final judgment on all claims was accordingly entered by the Trial Court by its Order dated September 9, 2010. This appeal followed.

### **STATEMENT OF THE FACTS**

The facts in this case were established by stipulation of the parties and a complete copy of the Stipulation of Facts Not in Dispute (“Stipulation”) is included in the Appendix at 1 to 17. The key facts from the Stipulation, and supplemental facts from an additional affidavit, are as follows:

On or about June 12, 2006, Respondent, as seller, and Appellant, as buyer, entered into a Commercial Industrial Purchase Agreement and Addendum thereto for the purchase and sale of approximately twenty-five acres of bare land (“Subject Property”) located in rural Wabasha County, Minnesota (said Commercial Industrial Purchase Agreement and the Addendum are referred to collectively herein as the “Purchase Agreement”).

In May, 2006, the Subject Property was owned by one Arnie Bomgaars, however, the northerly boundary line of this tract was disputed by SBRA, LLC, a Minnesota limited liability company (“SBRA”). SBRA is owned by one or more individuals who are also principals of Appellant. Appellant had approached Bomgaars and asked him if he was willing to sell sixty-seven acres of land to the

Appellant, land that included the Subject Property. Bomgaars was not interested in selling that land to Appellant.

In May, 2006, Respondent negotiated with Bomgaars to buy a tract of land that included the Subject Property ("Bomgaars Tract"). Appellant became aware of these negotiations and, on May 20, 2006, Dennis Oeltjen, a principal of Appellant, met with a principal of the Respondent, Gary Schumacher, and discussed the purchase of the Subject Property by Appellant once Respondent had purchased it from Bomgaars. Schumacher told Oeltjen that Respondent would sell the Subject Property for \$2,800 per acre.

One week later, on May 27, 2006, Oeltjen and Jack Briggs, another principal of the Appellant, visited the Schumacher home to confirm their interest in selling the Subject Property. At that meeting, Briggs brought up the SBRA/Bomgaars boundary dispute. Briggs told the Schumachers that if Respondent sold the Subject Property to Appellant, SBRA would relinquish its boundary claim on the contiguous property that Respondent was negotiating to purchase from Bomgaars. After these discussions, the parties verbally agreed to the sale of the Subject Property and agreed to reduce said agreement to a formal purchase agreement.

Appellant had several goals in purchasing the Subject Property. First, the Subject Property would make other property owned by the Appellant easier to access. Second, the Subject Property would also enhance the value of the that

other property. Third, the purchase of the Subject Property would assist the Appellant with controlling its pastured animals.

The sale of the Subject Property was to occur on or before sixty (60) days after the Respondent closed on the Bomgaars Tract. That transaction was completed on June 13, 2006. Accordingly, Appellant and Respondent were to close on the sale and purchase of the Subject Property on or before August 14, 2006 (the "Closing Deadline").

According to the terms of the Purchase Agreement, several items had to be undertaken and completed prior to closing. These included (i) Appellant obtaining approval of an administrative split of the Subject Property (the "Split Approval Requirement") and (ii) Appellant obtaining a survey of the Subject Property (the "Survey Requirement"). Both of these undertakings were completed prior to the Closing Deadline. Significantly, at the request of the Appellant, a principal of the Respondent attended a township meeting and applied for and received approval from Wabasha County to meet the Split Approval Requirement. Additionally Appellant and Respondent cooperated in obtaining the survey by allowing the surveyor on the Subject Property. The survey was completed, at Appellant's expense, satisfying the Survey Requirement.

Additionally, and in furtherance of the closing, the Respondent also prepared and delivered to Appellant's real estate counsel an Abstract of Title for the Subject

Property, at Respondent's own expense. *See* Appendix at 35. This enabled Appellant's counsel to review the title to the Subject Property and identify any title defects or objections to be resolved by the Respondent by or before closing. This title review was completed in early August 2006 and a Commitment for Title Insurance was prepared by Appellant's real estate counsel (the "Title Commitment"). *See* Appendix at 37-43.

On August 2, 2006, Appellant's real estate counsel contacted counsel for Respondent, forwarding to Respondent's counsel the Title Commitment and asking about the arrangements for closing. *See* Appendix at 37. Counsel for Respondent did not immediately reply. So on August 14, 2006, Appellant, Oeltjen, and Respondent, through Barb Schumacher, made inquiries with each other about the status of the closing. Barb Schumacher indicated that she would contact her attorney, Karen Fetterly of Dunlap & Seeger, to ascertain the arrangements for the closing. *See* Appendix at 45. However, no contact or closing arrangements were forthcoming from attorney Fetterly and both Appellant and Respondent allowed the August 14, 2006, date to pass without closing the transaction. Nevertheless, the parties remained in contact with one another regarding the land sale, and their emails indicate an expectation that the transaction would be completed. *See* Appendix at 47, 49.

Consistent with this, on August 29, 2006, counsel for the Respondent finally responded to the August 2, 2006, inquiry from Appellant's counsel, Ray Marshall:

Ray,

*Sorry for the delay in getting back to you.* The update on the transaction is as follows: Schumachers and Dennis have been talking about access that the Schumachers will need on the [Subject Property] to access another portion of their retained property during certain times of the year. *The Schumachers have decided* to go ahead and get the access surveyed so that we can record an easement as part of the closing.

The surveyor said that they can get out to the property either yet this week or next week to get a legal description for the access. Once I have the legal description I will email you a draft of the easement agreement. I believe this easement is the last issue to be resolved and that *we will be ready to close once we agree on the easement.*"

See Appendix at 51 (emphasis added).

### STANDARD OF REVIEW

Appellant is appealing the Trial Court's Order granting summary judgment for Respondent. On an appeal from summary judgment, the reviewing court considers two questions "(1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). The court must view the evidence in the light most favorable to the nonmoving party. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). Because the Trial Court's determinations were based entirely on documentary evidence, this Court reviews the trial court's

determinations de novo. Merriman v. Sandeen, 267 N.W.2d 714, 717 (Minn. 1978).

## LEGAL ARGUMENT

1. *The Trial Court Erred by Concluding That No Contract was Formed.*

The first aspect of the Trial Court's decision to which Appellant assigns error is the Trial Court's conclusion that there was no binding contract formed between the Appellant and the Respondent. The sole basis for the Trial Court's holding in this regard was the undisputed fact that Appellant did not pay the \$500 earnest money referred to in the Purchase Agreement.

A. The Trial Court's ruling that the Purchase Agreement lacked consideration is wrong as a matter of law.

In arriving at its decision, the Trial Court first briefly noted that the elements for specific performance of a contract included the existence of a contract and adequate consideration. Order at 3 (*citing Johnson v. Johnson*, 137 N.W.2d 840, 847 (Minn. 1965)). The Trial Court then addressed how consideration might be found, quoting the following from the Restatement (Second) of Contracts:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

- (3) The performance may consist of
  - (a) an act other than a promise, or
  - (b) a forbearance, or
  - (c) the creation, modification, or destruction of a legal relation.

Restatement (Second) of Contracts, § 71 (1981). This authority would appear to provide support for the Appellant's position, expressing as it plainly does the long-recognized principle that a bargained-for return promise otherwise meeting the requirements set forth in Section 71 constitutes consideration for the prime or initial promise. *See also* 1 A. Corbin, Contracts § 142, at 611 (1963) (“[a] promise is a sufficient consideration for a return promise. This has been true for at least four centuries, ever since bilateral contracts were recognized.”).

Next, the Trial Court acknowledged that in the Purchase Agreement “there was an exchange of promises to buy and sell land by Buyer and Seller . . . .” Order at 3. On the basis of the authorities cited above, the supporting principles for which have been extant for “at least four centuries”, this *should* have prompted the Trial Court to conclude that there was consideration for a contract to exist based upon the mutual promises of the parties.

Instead, the Trial Court's reasoning at this point in its analysis strayed along a path that the Trial Court did not support with either case law or secondary authority. Specifically, the Trial Court went on to hold:

[B]ut there was no consideration for the contract because the Buyer failed to tender payment of the earnest money. When the Buyer failed to tender the earnest money there was nothing bargained for and given

in exchange for Buyer's promise to purchase the land. Because Buyer failed to tender earnest money and Seller never received consideration, there is no contract between the parties to enforce.

Order at 3-4. This conclusion is inconsistent with the Trial Court's immediately preceding holding that the parties exchanged promises, is inconsistent with the legacy of four centuries of accepted contractual principles, and is inconsistent with Minnesota case law and the case law of other states.

As matter of law, consideration for an executory contract may be found in the mutual promises set forth in the contract: "Of course a consideration is essential to the validity of an executory contract. Where one promise is exchanged for another as the consideration for a bilateral contract, it is said that there must be mutuality. That means that there must be reciprocity of obligation; that is, that each party should receive from the other an enforceable promise for the one he gave in exchange." Welsh v. Barnes-Duluth Shipbuilding Co., 21 N.W.2d 43, 47 (Minn. 1945) *citing* Weisman Realty Co. v. Cohen, 195 N.W. 898 (Minn. 1923). The Trial Court specifically determined that "there was an exchange of promises to buy and sell land by Buyer and Seller . . . ." Order at 3. Moreover, Respondent has never asserted that the promises made by the Appellant in the Purchase Agreement were unenforceable. Each party to the Purchase Agreement thus made one or more enforceable promises. These exchanged promises, under the principle illustrated in Welsh, are consideration for the formation of the bilateral Purchase Agreement.

The principle was earlier applied in Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co., 173 N.W. 703 (Minn. 1919). There the Minnesota Supreme Court considered a contract that set forth on the part of one party a promise to sell certain goods and set forth on the part of the second party a promise to purchase those goods. *Id.* at 704. The contract was specific with respect to the type of goods, the price and the date for delivery. *Id.* The Supreme Court found that “there is an express agreement on the one hand to sell and on the other to buy. Each party could hold the other to the performance of its agreement. The promises were mutual, were made at the same time, and are incorporated in a bilateral contract. Such promises so made are a sufficient consideration for each other.” *Id.*

Relying on the principle set forth in Koehler & Hinrichs Mercantile Co and Welch, the Minnesota Court of Appeals reversed a trial court that had erroneously concluded that a stipulation regarding the dissolution of a marriage, setting forth mutual promises by the parties to the stipulation, lacked consideration. *See Kielley v. Kielley*, 674 N.W.2d 770 (Minn. Ct. App. 2004). As in the earlier Supreme Court case, the Court of Appeals wrote that “[w]here promises are mutual, made concurrently, and incorporated into a bilateral contract, ***such promises are sufficient consideration for each other.*** . . . We, therefore, conclude that the district court erred in ruling that the parties’ stipulation was contractually defective

for lack of consideration.” Kielly, 674 N.W.2d at 777-778 (emphasis added) (citation omitted).

The inaccurate recitation of the payment of earnest money is not sufficient, on its own, to allow the Respondent to avoid the Purchase Agreement, as illustrated by Craigmile v. Sorenson, 58 N.W.2d 865 (Minn. 1953). There the parties executed a contract for deed for the sale of a quarter section of land. The contract provided for a down payment of \$2,500, and further provided “the receipt of which is hereby acknowledged.” *Id.* at 871. However, no down payment was made at the time the parties signed the contract and the seller later rejected the down payment twice; once when tendered in the form of a check and once when tendered in cash. *Id.* at 868.

The Supreme Court affirmed a lower court ruling in the purchasers’ favor upholding the contract and the purchasers’ right to complete the sale. The court held that “[t]he false recital of acknowledgement of receipt of the initial payment cannot be used by defendants to avoid the contract.” *Id.* at 872. The court went on to rely on two excerpts from the Restatement of Contracts, § 243, one of which included the following illustration:

In an integrated agreement A promises to sell Blackacre for \$10,000, and B promises to pay that sum for it. It is further provided that the agreement shall have no effect until B pays \$1000. There is a false recital that \$1000 has been paid by B. A contract exists, but A’s duty to transfer is conditional on the full payment by B of \$10,000.

*Id.* at 872, n.1.

The decision from Craigmile has similarities that are helpful and instructive in this appeal. Both cases involve contracts for the sale and purchase of land; that one is a contract for deed and one an earnest money contract is a distinction without a difference. A contract for deed is simply a real estate purchase agreement that has the seller also serving as financier, whereas the earnest money contract anticipates that the buyer will pay the seller in full at the closing. Indeed, the Craigmile court obviously saw no distinction either and relied on the Restatement of Contracts, § 243 illustration (quoted immediately above), which appears to be a simple purchase agreement and not a contract for deed.

Both the contract at issue in this appeal and in Craigmile contained a “false recital” involving the initial payment of money. In Craigmile it is a down payment of \$2,500 “receipt of which is hereby acknowledged.” 58 N.W.2d at 871. In the Purchase Agreement in this case it is \$500 “Earnest money herein paid . . . .” Appendix at 10.

Significantly, in both cases the sellers and the buyers *acted* as though the contract was valid. In Craigmile, after the contract for deed was signed, the seller moved his possessions out of the homestead and allowed the buyers to move their personal belongs into the residence – he even helpfully showed the buyers how to operate the stove. Craigmile, 58 N.W.2d at 869-70. In the instant case, after the

Purchase Agreement was signed, Respondent (or its agents) helpfully attending a township meeting to obtain approval for the split and sale of the Subject Property, allowed the Appellant to have the Subject Property surveyed, updated the abstract of title for the Subject Property and hired an attorney to assist with the closing of the transaction. *See* Appendix at 4, 5 and 35. As explained in the next section of this brief, these objective manifestations of assent bolster Appellant's argument that an enforceable contract for the sale and purchase of the Subject Property was indeed formed.

Finally, in Craigmile as in this appeal, the issue was whether there was consideration to support contract formation. In its summation of the basis of the dispute, the Craigmile court wrote: "The consideration essential to the validity of an agreement for the purchase or sale of land need not be paid at the time of making the agreement. The agreement of the vendee to pay in the future is sufficient consideration for the promise of the vendor to convey." 58 N.W.2d at 872. In other words, and consistent with the then-extant Restatement, Contracts § 243, the promise to pay in the future was sufficient consideration for the return promise to convey in the future. *Id.* n.1. The same principle applies to this appeal, where Appellant's promise to pay in the future is sufficient consideration for the Respondent's promise to convey in the future, upon full payment by Appellant. However, the Trial Court completely failed to consider this basic principle. It

wrote that “[w]hen Buyer failed to tender the earnest money there was nothing bargained for and given in exchange for Buyer’s promise to purchase the land.” Appendix at 21-22. The Trial Court does not understand that the “Buyer’s promise to purchase the land” is the consideration given here exchanged as it is for Respondent’s promise to sell that land.

The Trial Court’s insistence that the payment of earnest money was necessary for contract formation here is at odds with cases from beyond Minnesota as well. In a well-reasoned decision from the District of Columbia Court of Appeals, 3511 13th Street Tenants’ Ass’n v. 3511 13th Street, N.W. Residences, LLC, 922 A.2d 439 (D.C. 2007), the court reversed a lower court grant of summary judgment where that lower court based its holding, in part, upon the failure of a purchaser under a real estate contract to pay a \$25,000 earnest money payment. The D.C. appellate court wrote:

“[t]here is *no legal requirement* that there be a [deposit or] down payment-the mutual promises supply the consideration,” *and even where “the recital of a down payment is untrue” because “the buyer had not yet paid[, s]uch a contract is nevertheless enforceable.”*

3511 13th Street Tenants’ Ass’n, 922 A.2d at 443 (*quoting* Friedman on Contracts and Conveyances of Real Property § 1.4.4, at 1-27 (7th ed. 2006)) (emphasis added).

In a case very similar to the instant one, the Florida Court of Appeals reversed a trial court’s summary dismissal of a seller’s specific performance claim.

In Peterson Homes, Inc. v. Johnson, 691 So.2d 563 (Fla. Ct. App. 1997), the trial court determined that the purchaser's failure to pay an earnest money deposit of \$600,000 meant that the contract to purchase the subject property, for a total of \$1.1 million, "lacked the consideration necessary to create a binding contract." *Id.* at 564. The Florida appellate court disagreed, succinctly writing:

The consideration which creates a valid contract for the sale of real property is the purchaser's promise to pay. In the instant case, Johnson's promise to purchase the property on the date of closing created a binding executory contract which provided for the recovery of deposits paid or agreed to be paid. No portion of the earnest money deposit had to be paid at the time the agreement was signed. Therefore, the trial court erred in concluding that no binding contract existed.

*Id.* (citations omitted)

As in Kielly, the Trial Court here erred in ruling that the Purchase Agreement was contractually defective for lack of consideration. As in 3511 13th Street Tenants' Ass'n, the Trial Court here erred in ruling that the payment of the nominal earnest money recited in the Purchase Agreement amounted to a failure of consideration. The Purchase Agreement set forth specific, mutual promises that were concurrently made and incorporated into a written, bilateral contract. The Trial Court even acknowledged in its decision that those mutual promises were made and memorialized in the Purchase Agreement. Those mutual and mutually dependent promises form the consideration for the Purchase Agreement and not, as the Trial Court erroneously held, the \$500 earnest money. The Trial Court, by

invalidating the Purchase Agreement on the sole basis of a false recital regarding the payment of earnest money, has allowed Respondent to use that false recital to avoid the Purchase Agreement. This is contrary to the Minnesota Supreme Court's ruling in Craigmile. As in Kielly and 3511 13th Street Tenants' Ass'n, therefore, the Court of Appeals must reverse the erroneous legal conclusion of the Trial Court.

**B. The conduct of the parties evidenced the formation of a contract.**

That the Trial Court erred by concluding no contract was formed for the sale and purchase of the Subject Property is also evident when the conduct of the parties after the Purchase Agreement was signed is objectively examined. It is well settled that Minnesota courts rely on an objective theory of contract formation; one that does not rely on subjective thoughts or feelings: "It is not the subjective thing known as meeting of the minds, but the objective thing, manifestation of mutual assent, which is essential to the making of a contract. 'Not mutual assent but a manifestation indicating such assent is what the law requires.'" Benedict v. Pfunder, 237 N.W. 2, 4 (Minn. 1931), *quoting* Restatement of Contracts § 20; *see also* Zieve v. Holstad Coffee Co., 270 N.W. 581, 583 (Minn. 1936). In North Star Center, Inc. v. Sibley Bowl, Inc., 205 N.W.2d 331, 332 (Minn. 1973), the Minnesota Supreme Court wrote: "In determining [whether a meeting of the minds had occurred], the standard to be followed is objective and

not subjective, and it is the *expressed mutual assent rather than the actual mutual assent* which is the essential element in the formation of a contract.” (emphasis added) What does the Court mean by the distinction between “*expressed mutual assent rather than the actual mutual assent*”? The Court has held that “[e]xpressions of mutual assent” can exist in either the words or the conduct of the parties. See Cederstrand v. Lutheran Brotherhood, 117 N.W.2d 213, 221 (Minn. 1962). Consequently, “actual mutual assent” must refer to that subjective, agreeable state of mind that has not yet found expression in either clear words of assent or other conduct consistent with and objectively manifesting that assent. That subjective, agreeable state of mind is what characterized the discussions and negotiations leading up to the signing of the Purchase Agreement by the Appellant and Respondent. Thereafter, the objective manifestations of that mutual assent are evident, including in the objective act of signing the Purchase Agreement itself and in the actions that each of the parties undertook to complete the transaction after the Purchase Agreement was signed. The Appellant went about securing a survey of the Subject Property and the Respondent worked towards obtaining the governmental approvals necessary for the conveyance to occur. These matters are not disputed and are established by stipulation of the parties. See Appendix at 4-5. These matters were attended to and completed within the sixty (60) days following the execution of the Purchase Agreement. *Id.*

In addition to these undertakings, the Appellant also submitted evidence showing that legal counsel for the Appellant (i) received an updated abstract of title from counsel for the Respondent so that Appellant's counsel could review title, (ii) completed that review and prepared a title insurance commitment, which counsel forwarded to Respondent's counsel, and (iii) contacted counsel for the Respondent in order to make the arrangements for the closing. *See* Appendix at 35, 37, 39-43. This last action was necessary inasmuch as the Purchase Agreement, while identifying the date for the closing, was silent on details such as time and place for the closing. In short, after the Purchase Agreement was signed by the parties, they or their representative (including legal counsel) engaged in conduct that was consistent with a normal real estate transaction.

This case is similar to Bergstedt, Wahlberg, Berquist Assoc., Inc. v. Rothschild, 225 N.W.2d 261 (Minn. 1975), where contract formation was also the issue. The Plaintiff was a St. Paul architectural firm and defendant a principal in a partnership that owned a St. Paul parking ramp. Rothchild met with the architectural firm in order to discuss the feasibility of expanding the ramp to add office space above it. There were no discussions about the fee that the architectural firm would earn for its design work, but following the meeting, the architectural firm sent a letter to Rothchild that detailed the fee arrangement for its work on the ramp design. The letter was meant to be signed and returned by

Rothchild, but this never occurred. *See* 225 N.W.2d at 262. However, over a two year period leading up to the actual construction project, the parties engaged in what the trial court described as “a normal architect-client relationship” where the architectural firm and Rothchild were in frequent contact, where the architectural firm gave frequent updates on its progress and provided sketches, suggestions and plans to Rothchild. *See id.* at 263. Under these circumstances that court found that the record in the case was “replete with evidence that clearly supports the existence of a contract implied in fact between the parties.” *Id.*

The upshot of Bergstedt, Wahlberg, Berquist Assoc., Inc. v. Rothschild is that after the architectural firm clearly described how it expected to be paid for its services, Rothchild (and his partnership) expressed their assent to those terms by engaging in a “a normal architect-client relationship” after receipt of the fee letter. This same interplay occurred between Appellant and Respondent in this case, where both parties engaged in conduct that, when viewed objectively, evidenced an objective expression of mutual assent to the Purchase Agreement, such that, even in the absence of the earnest money, a contract implied in fact, if not an express contract, was formed. On that final point, moreover, it should be noted that whether an express contract or one implied in fact, there is no legal difference in enforceability: “The distinction between an express contract and one implied as of fact involves ‘no difference in the legal effect, but lies merely in the mode of

manifesting assent.” McArdle v. Williams, 258 N.W. 818, 820 (Minn. 1935) (quoting Restatement of Contracts, § 5). Once again, the Trial Court has invalidated a contract that, based on all of the objective evidence, the parties themselves considered valid. This error should be reversed and the matter remanded to the Trial Court for further proceedings on Respondent’s demand for specific performance.

**2. *The Trial Court Erred by Concluding that Respondent did not Waive Strict Performance of the Purchase Agreement.***

The next aspect of the Trial Court’s decision to which the Appellant assigns error is the Trial Court’s conclusion that Respondent did not waive the due date for the payment of the purchase price. Order at 4. The difficulty the Trial Court had with this issue is evident from the awkward way in which the Trial Court summed up its conclusion: “After the closing never occurred, [Respondent] did not continue to perform according to the agreement.” *Id.* Interestingly, and in further support of the arguments set forth in the immediately preceding section of this brief, the Trial Court’s statement here implies that the Respondent *was* performing under the Purchase Agreement for a time; an odd thing if no contract was ever formed. In any event, what the Trial Court seems to be saying in its opaque statement is essentially this: because the Appellant did not pay the purchase price required under the Purchase Agreement on the date required by the Purchase

Agreement, Respondent had no further obligation to sell the Subject Property under the Purchase Agreement. Appellant assigns two specific and alternative errors to the Trial Court Order in this regard. First, the conduct of the parties, as presented to the Trial Court, reflected a waiver of strict performance with the closing date and “time of the essence” requirements. Second and alternatively, the pleadings presented to the court reflected a fact issue with respect to waiver, making summary judgment inappropriate.

A. **The Post-Agreement Conduct of the Respondent Evinces an Intent to Waive Strict Performance of the Purchase Agreement.**

As has already been noted, once the Purchase Agreement was signed, the parties undertook certain actions to further the transaction; the property was surveyed and the necessary governmental approvals were sought and obtained. *See* Appendix at 4-5. These matters were attended to and completed within the sixty (60) days following the execution of the Purchase Agreement. *Id.* Additionally, other actions common to any real estate transaction proceeded, such as reviewing title for the Subject Property and contacts between counsel to arrange the closing. *See* Appendix at 35, 37, 39-43.

There is no dispute that the date specified for closing in the Purchase Agreement passed without that event occurring. The Trial Court concluded that this was primarily the Appellant’s fault, reasoning that Appellant failed to “tender .

. . . purchase money by the time appointed”. The Trial Court put an even finer point on it, noting the absence of (i) a written waiver on the part of the Respondent, and (ii) a written amendment of the Purchase Agreement, modifying the date for the closing:

Seller’s conduct was not consistent with that of a seller waiving the due date for the payment of the purchase price. The parties never executed a written waiver as contractually required to effectively waive or modify any terms of the purchase agreement, including the August 14, 2006 closing date.

Order at 4. An analysis of the Trial Court’s error here requires an examination (i) of the Respondent’s conduct with respect to the law regarding waiver, and (ii) the effect of the non-waiver clause in the Purchase Agreement on any initial conclusions so reached.

It is beyond dispute that Respondent did nothing to further the closing on the specified date. By an email dated August 2, 2006, the Appellant’s real estate counsel asked Respondent’s real estate counsel “[h]ow would you like to handle the closing?” Appendix at 37. A series of communications then take place between various principals of Appellant and Respondent, all prompted by the unresponsiveness of Respondent’s real estate counsel. Appendix at 45, 47, 49. When counsel for the Respondent finally does make a reply, on August 29, 2006, she provides an “update on the the (sic) transaction”, noting that “we will be ready to close once we agree on the easement.” Appendix at 51. Because no other

transactions or closings were contemplated as between the Appellant and the Respondent within the timeframe between June 16, 2006, and August 29, 2006, counsel for the Respondent must, by common sense and by process of elimination, be updating Appellant's counsel on "the transaction" contemplated by the Purchase Agreement and the closing contemplated by the Purchase Agreement.

Furthermore, if it were the case, on August 29, 2006, that Respondent was not waiving strict compliance with the already passed August 14, 2006, why does counsel for Respondent (i) care about any easement agreement – the Respondent does not need an easement on land it owns free and clear of any claims by Appellant, or (ii) not write back to Appellant's real estate counsel "deal's off because you did not pay" or words to that effect? What Respondent's counsel wrote is either evidence of Respondent's intent to waive the August 14, 2006, closing or intentionally misleading. Because the Appellant has no reason to assert that Respondent's counsel was acting in bad faith, only one logical conclusion is left – that Respondent's waived the August 14, 2006, closing date.

This conclusion is consistent with the legal principles that generally govern waiver. Appellant and the Trial Court agree that waiver occurs where (i) a party relinquishes a known right, and (ii) that relinquishment is "clearly made to appear from the facts disclosed." Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc., 441 N.W.2d 483, 487 (Minn. 1989); Order at 4. Further, Appellant also

concur with the Trial Court (and the Minnesota Court of Appeals) that “Ignoring a provision in a contract will constitute a waiver if the party whom the provision favors continues to exercise his contract rights knowing that the condition is not met.” Order at 4 *quoting Patterson v. Stover*, 400 N.W.2d 398, 401 (Minn. Ct. App. 1987). However, the Trial Court’s analysis on waiver is not complete, as explained below.

The factual circumstances in this matter are analogous to those found in Wolff v. McCrossan, 210 N.W.2d 41 (Minn. 1973), where the Supreme Court affirmed a lower court’s conclusion that a seller under a real estate contract waived her right to insist on strict performance of certain, time-sensitive terms of the contract. Specifically, the prevailing party in that action, a tenant holding an option/right of first refusal, was assured by counsel for the seller that “he need not be concerned about the specific time provisions of the option agreement.” 210 N.W.2d at 42-43.

In its analysis, the Supreme Court relied on Corbin on Contracts, Section 310, noting “where performance by the plaintiff within a specified time was a condition precedent to the defendant’s duty to perform his part - if the plaintiff has been caused to delay his performance beyond the specified time by the request or agreement or *other conduct of the defendant*, the plaintiff can enforce the contract in spite of his delay.” 210 N.W.2d at 44 *quoting* 2 Corbin, Contracts, § 310, p. 112

(emphasis added). Applying this principle of contract law and waiver, the Supreme Court agreed that the seller's conduct evidenced a waiver of the time provisions of the option contract, writing:

Minnesota case law is in accord with the proposition that where the course of conduct of a party entitled to the performance of certain terms or conditions of a contract *has led the other party to believe that such performance will not be required until it has become too late to perform*, the person who has so conducted himself is barred from asserting the right he had.

Wolff v. McCrossan, 210 N.W.2d at 44 (citing Malmquist v. Peterson, 183 N.W. 138 (Minn. 1921)) (emphasis added).

While counsel for Respondent made no statement regarding the closing until after the closing date had lapsed, the principle nevertheless applies. The silence and unresponsiveness of Respondent's counsel during the time frame from August 2, 2006, (when Appellant's counsel first asked about the closing arrangements) and August 29, 2006, (when Respondent's counsel finally responds) sent the same message as in Wolff – that the Appellant need not be concerned about the closing date. To conclude otherwise would be to create a rule whereby a party, such as the Respondent, could defeat another party's contractual rights simple by stony silence, by stonewalling the other party until the date for a critical act had passed. Obviously this makes no sense at all, and in Giles Properties, Inc., v. Kukacka, A06-1275 (Minn. Ct. App. April 24, 2007), this Court of Appeals had no hesitation in affirming a lower court ruling ordering specific performance of a land sale

contract where, among other facts, the specified closing date “came and went without action by either party.” Slip op. at 1 (Appendix at 69).

Indeed, the Trial Court seems to tacitly accept the argument of waiver by conduct; but avoids it by relying on the non-waiver clause in the Purchase Agreement. The Trial Court appears to conclude that the non-waiver clause effectively immunized the contract and the Respondent from Appellant’s waiver arguments: “The parties never executed a written waiver as contractually required to effectively waive or modify any terms of the purchase agreement, including the August 14, 2006 closing date.” Order at 4. This legal conclusion is simply wrong.

In Pollard v. Southdale Gardens of Edina Condominium Ass’n., Inc., 698 N.W.2d 449 (Minn. Ct. App. 2005), the Minnesota Court of Appeals quickly and plainly dealt with the same error, reversing a lower court decision granting summary judgment. The facts and procedural history of Pollard may be summed up simply – a condominium association took steps to enforce a “no pets” rule that had otherwise long been observed in the breach, i.e. for a period of 12 years or more the “no-pets” rule had not been enforced. Relying on a non-waiver clause in the association bylaws, however, the trial court granted summary judgment to the association. The Court of Appeals reversed the lower court, writing: “It is well settled that a written contract may be modified by subsequent acts and conduct of the parties to the contract. Because a nonwaiver clause may be modified by

subsequent conduct, *the mere presence of a nonwaiver clause does not automatically bar a waiver claim.*” 698 N.W.2d at 453 (citing Huver v. Opatz, 392 N.W.2d 237, 241 (Minn. 1986) and Green v. Minnesota Farmers’ Mut. Ins. Co., 251 N.W. 14, 17 (1933)) (emphasis added). It is anticipated that Respondent will argue that Pollard should not apply here, because the waiver in Pollard occurred over a 12 year period, whereas, in this matter, the waiver occurred over a much short time period. This is nonsense; whether a waiver occurred is viewed by the facts of each case – Respondent would have us construe Pollard to hold that waiver, in the face of a non-waiver clause, can only occur over a 12 year time period.

With the entire basis relied on by the Trial Court for rejecting waiver on the part of the Respondent now stripped away, Appellant hereby respectfully requests that the Trial Court be reversed and that waiver of the closing date on the part of the Respondent be found as a matter of law.

B. **Alternatively, a Fact Issue Remains as to Whether Respondent’s Conduct Constituted Waiver of the Closing Date.**

While Appellant takes the primary position that waiver of strict compliance with the closing date requirement may be found as a matter of law on the facts presented to the Trial Court, the alternative position is not summary judgment in Respondent’s favor. Even counsel for Respondent recognized this.

The matter regarding Respondent's silence as to the closing arrangements was first raised by the Appellant in its November 26, 2008, Memorandum in Opposition to [Respondent's] Motion for Summary Judgment and the accompanying Supplemental Affidavit of that same date. Respondent could present no further affidavits or other evidence to show that Respondent, or Respondent's real estate counsel, did not in fact remain silent and unresponsive during the August 2 to August 29, 2006, timeframe. Instead, Respondent's litigation counsel argued that the evidence of Respondent's silence, taken together with the stipulated facts, created a fact issue, so that summary judgment simply was not proper:

Parties developed a detailed Stipulation of Facts in the hope that cross motions for Summary Judgment could be employed to resolve this dispute. Perhaps, this hope was vain from the outset in light of the complexity of factual questions presented. In any event, it is now clear that this dispute involved too many unresolved and contested issues of fact to amenable (sic) to resolution by summary judgment.

[Respondent]'s Reply to Plaintiff's Memorandum in Support of Motion for Summary Judgment, December 4, 2008, at 1. The Trial Court ignored the advice of Respondent's counsel in this regard, granting Respondent summary judgment on grounds, as shown above, that are legally erroneous. As noted above, Appellant's position is that summary judgment in Appellant's favor is sustainable as a matter of law. If this court concludes otherwise, however, then Appellant concurs with

Respondent's counsel that summary judgment is not available because fact issues remain that require further testimony at a trial.

3. *The Trial Court Erred By Denying Appellant Specific Performance of the Purchase Agreement.*

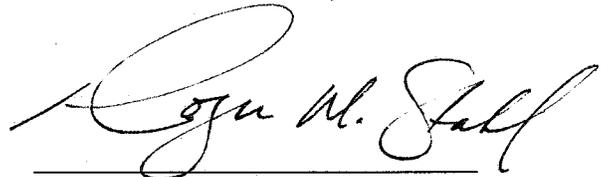
On its cross motion, Appellant moved for summary judgment on its specific performance claim. The Trial Court ruled that specific performance was "inappropriate because there was no enforceable contract formed between the parties based on Buyer's failure to provide consideration for its' (sic) promise and a lack of an effective waiver by Seller." Order at 3. While Appellant acknowledges that, as an equitable remedy, specific performance is not "a matter of absolute right", Boulevard Plaza Corp. v. Campell, 94 N.W.2d 273, 284 (Minn. 1959), it is nevertheless the case that, with real estate involved, "specific performance is a proper remedy, even if the other remedies would be adequate." Schumacher v. Ihrke, 469 N.W.2d 329, 335 (Minn. Ct. App. 1991). Because the arguments and authorities in the foregoing sections explain the error in this conclusion and because the undisputed facts support specific performance of the Purchase Agreement, Appellant requests that this Court remand this matter to the Trial Court with instructions to fully consider there Appellant's request for specific performance of the Purchase Agreement.

## CONCLUSION

Based upon the foregoing arguments and authorities, the Appellant respectfully requests the following: (i) that the Trial Court's Order of March 9, 2009, be reversed, granting summary judgment in favor of Appellant and denying summary judgment as to Respondent, and (ii) that this matter be remanded to the Trial Court with instructions to fully consider Appellant's request for specific performance of the Purchase Agreement.

Dated: November 30, 2010

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