

NO. A10-1945

State of Minnesota
In Court of Appeals

BOB ACRES, LLC,
a Minnesota limited liability company,

Appellant,

vs.

Schumacher Farms, LLC,
a Minnesota limited liability company,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

1. WHETHER THE TRIAL COURT CORRECTLY RULED THAT NO CONTRACT WAS FORMED FOR THE SALE AND PURCHASE OF THE SUBJECT PROPERTY.
 - A. WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT PURCHASE AGREEMENT WAS UNENFORCEABLE BY REASON OF BUYER-APPELLANT'S FAILURE TO PAY BARGAINED-FOR EARNEST MONEY CONSIDERATION.
 - B. WHETHER TAKEN AS A WHOLE, THE CONDUCT OF THE PARTIES DOES NOT EVIDENCE THE FORMATION OF A CONTRACT.

Trial Court's Ruling:

The Purchase Agreement was unenforceable by reason of Buyer-Appellant's failure to pay earnest money.

2. WHETHER THE TRIAL COURT CORRECTLY RULED THAT TIME-IS-OF-THE-ESSENCE PURCHASE AGREEMENT WAS UNENFORCEABLE BY REASON OF BUYER-APPELLANT'S FAILURE TO TENDER PERFORMANCE OF ANY KIND ON THE CLOSING DATE SPECIFIED BY CONTRACT.

Trial Court's Ruling:

Non-waiver clause in Purchase Agreement required Buyer-Appellant to perform, or tender performance, of its obligations under Purchase Agreement on August 14, 2006; failure to do so rendered Purchase Agreement unenforceable.

3. SPECIFIC PERFORMANCE REMEDY ISSUES ARE NOT PROPERLY BEFORE THIS COURT SINCE THE DISTRICT COURT WAS NOT REQUIRED TO EXERCISE DISCRETION TO DECIDE THAT MATTER. HOWEVER, SPECIFIC PERFORMANCE SHOULD NOT BE ORDERED IN THE CONTEXT OF THIS CASE.

Trial Court's Ruling:

Appellant-Buyer is not entitled to specific performance of the purchase agreement.

STATEMENT OF THE CASE

On March 9, 2009, the Trial Court correctly determined that Summary Judgment be granted in favor of Respondent. By that ruling, the Olmsted County District Court established that there was no enforceable Purchase Agreement on which to base an order for specific performance of the land transaction at issue. This case concerns a Purchase Agreement requiring earnest money, establishing a closing date and explicitly identifying time to be of the essence. Appellant-Buyer failed to pay earnest money and did not tender performance on the closing date. Appellant did not tender earnest money until after initiating this lawsuit. Further, it is clear that, after the parties failed to close as required by the Agreement, the transaction meandered into other negotiations and, then, stalled. Viewing the circumstances in their entirety, it is evident that the parties never achieved an enforceable understanding on issues integral to the transaction. Hence, no contract exists to be enforced.

Appellant-Buyer invites this Court to radically transform Minnesota real estate practice by rendering earnest money terms either unnecessary or unenforceable. Appellant further argues that the parties waived performance at the specified closing date as well as a contractual clause establishing time “to be of the essence”, notwithstanding a non-waiver clause in the Agreement. A ruling by this Court that the written non-waiver clause is to be ignored despite the absence of any words or conduct unambiguously modifying that contractual term will create grave uncertainties in real estate practice.

Here, Appellant didn't pay bargained-for earnest money consideration. It did not perform, nor tender performance, during a six month course of intermittent negotiations of shifting focus. In view of the non-waiver clause and contractual language requiring timely performance, no valid Purchase Agreement here exists to be enforced.

STATEMENT OF FACTS

BOB Acres, LLC (Appellant), is a real estate investment business. Schumacher Farms, LLC (Respondent), farms land in Wabasha County.¹

On June 12, 2006, Appellant and Respondent signed a Purchase Agreement for sale of 25 acres of land.² By that Agreement, Respondent offered to sell this land to Appellant at an agreed-upon purchase price.³ The Purchase Agreement contained four terms important to this Appeal:

- Earnest Money: Appellant as buyer was to pay Respondent/Seller \$500 earnest money.⁴ The Purchase Agreement specifies circumstances in which the earnest money would be refunded by Respondent to Appellant.⁵
- Closing Deadline: The land transaction was to close 60 days after Respondent's acquisition of the land on June 13, 2006—that is, on August 14, 2006.⁶
- Timeliness: The Purchase Agreement says “time is of the essence of all provisions

¹Stipulation of Facts attached to Appellant's Brief as Appendix 1 - 17, (hereinafter App. Appendix) at pp. 1-2, Paragraphs 1 and 2.

²App. Appendix at p. 2, Paragraph 3.

³App. Appendix at p. 2, Paragraph 3.

⁴App. Appendix at pp. 5-6, Paragraph 11.

⁵App. Appendix at pp. 10-11, Paragraphs 6 and 13; App. Appendix at p.12, Paragraph 2.

⁶App. Appendix at p. 5, Paragraph 9; App. Appendix at p. 11, Paragraph 9.

of this contract.”⁷

- Non-Waiver: The Purchase Agreement states “no waiver of any (contractual) terms will be effective unless in a writing executed by the parties.”⁸

At the time the Purchase Agreement was signed, Appellant did not pay earnest money. In fact, prior to this lawsuit’s inception, Appellant never paid or offered to pay earnest money. Neither did Respondent demand such payment.⁹

In June, 2006, Appellant obtained governmental approval for the sale and had the property surveyed as required by the Purchase Agreement.¹⁰ Respondent cooperated with these measures.¹¹

On the August 2006 closing deadline, neither party demanded that the Purchase Agreement be performed. In that same month, Respondent asked that an easement in favor of their family farming company be granted as part of the transaction.¹² This easement was for the purpose of allowing Respondent’s agricultural equipment enough space in which to turn while tilling or otherwise working adjacent property.¹³

⁷App. Appendix at p. 11, Paragraph 9.

⁸App. Appendix at p. 11, Paragraph 12.

⁹App. Appendix at pp. 5-6, Paragraph 11.

¹⁰App. Appendix at p. 5, Paragraph 10.

¹¹App. Appendix at p. 5, Paragraph 10.

¹²App. Appendix at p. 6, Paragraph 12.

¹³App. Appendix at p. 6, Paragraph 12.

Negotiations followed as to whether this easement should be deemed permanent (that is running with the land) or merely be enforceable as to the specific parties to the transaction.¹⁴ A final draft of the Easement Agreement was sent to Respondent on October 20, 2006. Respondent did not accept that Easement Agreement.

Between October 20, 2006, and December 11, 2006, neither party to the transaction did anything to complete the transaction. On December 11, 2006, Appellant inquired as to the status of negotiations. Respondent replied on December 14, 2006, that it was no longer willing to sell the land identified in the Purchase Agreement.¹⁵

Respondent contends that no Purchase Agreement exists in enforceable form between the parties. Since no contract exists, this Court need not consider what remedy is applicable to enforce the transaction.

By Stipulation, the parties presented remedy issues to the Trial Court. Since the Trial Court determined no contract existed, there was no need to decide whether specific performance is here warranted.

Facts stipulated by the parties relevant to specific performance are as follows:

1. Access: Appellant claims acquisition of the disputed tract provides more convenient access between its two otherwise separated parcels of land. Passage between these parcels is also presently available over a road crossing Respondent's

¹⁴App. Appendix at p. 6, Paragraph 12

¹⁵App. Appendix at p. 6, Paragraph 13.

property to which owners of Appellant have easement access. This road connects a public thoroughfare and is navigable by conventional vehicles.¹⁶

2. Contiguous Acreage: In Wabasha County, a parcel smaller than 80 acres may not be built upon. Appellant's possession of disputed tract would, in theory, result in 80 contiguous acres available for development. But Appellant presently owns other contiguous property adjacent to the disputed tract comprising 80 acres and, thus, also theoretically available for development. Development is theoretical at this time because the 55 acre tract owned by Appellant is deed-restricted and, so, cannot be combined with other acreage to reach the 80 acre total requirement until this restriction is lifted.¹⁷
3. Fence Line: Appellant's purchase of disputed land would enable it to secure a fence line preventing pasture animals from escaping from its current land holdings.¹⁸
4. Unclean Hands By Trespass: A principal of Appellant, Jack Briggs, as well as other persons associated with BOB Acres, LLC, have repeatedly trespassed on Respondent's land. By Stipulation and Order concluding the trespass aspect of this case, dated September 9, 2010, Appellant acknowledges:

¹⁶App. Appendix at pp. 3-4, Paragraph 6.

¹⁷App. Appendix at pp. 4-5, Paragraph 7.

¹⁸App. Appendix at p. 5, Paragraph 8.

--“No Hunting” signs were posted on other nearby land owned by Respondent;¹⁹

--Briggs pastured a herd of cattle on the disputed tract in the second half of 2006;²⁰

--Around Thanksgiving 2006, Briggs brought 20 hunters near the disputed land and trespassed on it;²¹

--One of Respondent’s owners told Briggs to avoid trespassing on the disputed tract and its other property. Notwithstanding this direct request, a day later Briggs entered onto the disputed tract armed with a shotgun for hunting purposes;²²

--Trespasses committed by BOB Acres, LLC, resulted in harm to Plaintiff compensable by money damages.²³

5. Incomplete Agreement: The Purchase Agreement addresses neither the easement issue nor the boundary dispute on the North side of the disputed tract.²⁴

Appellant seeks specific performance so that it can use the land for hunting, snowmobiling, 4-wheeling and hiking.²⁵ Respondent currently farms most of the disputed

¹⁹App. Appendix at p. 7, Paragraph 15; Resp. Appendix at p. 10, Paragraphs 16-18.

²⁰App. Appendix at p. 7, Paragraph 16; Resp. Appendix at p. 8, Paragraph 5.

²¹App. Appendix at pp. 7-8, Paragraph 17; Resp. Appendix at p. 8, Paragraph 9.

²²App. Appendix at pp. 7-8, Paragraph 17; Resp. Appendix at p. 9, Paragraphs 11-13.

²³Resp. Appendix at p. 10, Paragraphs 19-20.

²⁴App. Appendix at pp. 2-3, Paragraph 4.

²⁵App. Appendix at pp. 1-2, Paragraph 1.

tract.²⁶

STANDARD OF REVIEW

Appellant seeks review of the Trial Court's grant of Summary Judgment to Respondent, determining on the basis of a stipulated record that no Purchase Agreement existed to enforce between the parties. This ruling arises in a context where both parties agree that there are no genuine issues of material fact to be tried. The only question for Trial Court determination was the application of Minnesota law to an undisputed record. Since this threshold controversy involves only a matter of law, this Court reviews the Trial Court's determination as to whether an enforceable Purchase Agreement exist *de novo*. Art Goebel, Inc. v. North Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997).

Appellant further seeks this Court's determination that, if an enforceable Purchase Agreement was formed, that agreement should be specifically enforced. Whether to award specific performance is a matter of Trial Court discretion. Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 94 N.W.2d 273, 284 (Minn. 1959). This Court reviews a District Court's decision to grant or deny specific performance for an abuse of discretion. Tollefson Development, Inc. v. Estate of McCarthy, 2008 WL 2651420 (Minn. App. 2008)²⁷, also see Flynn v. Sawyer, 272 N.W.2d 904, 910 (Minn. 1978). Since the Trial

²⁶App. Appendix at p. 2, Paragraph 2.

²⁷Respondent's Appendix pp. 1-5.

Court did not reach the question of whether specific performance should be denied or granted, that issue is not now available for review. This Court's reversal of the Trial Court's grant of Summary Judgment in favor of Respondent would require that the issue of remedies be remanded to the discretion of District Court for determination on the stipulated record or for further proceedings should that Court find the record insufficient.

LEGAL ARGUMENT

1. WHETHER THE TRIAL COURT CORRECTLY RULED THAT NO CONTRACT WAS FORMED FOR THE SALE AND PURCHASE OF THE SUBJECT PROPERTY.
 - A. WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT PURCHASE AGREEMENT WAS UNENFORCEABLE BY REASON OF BUYER-APPELLANT'S FAILURE TO PAY BARGAINED-FOR EARNEST MONEY CONSIDERATION.

No Minnesota decision holds that a land Purchase Agreement is enforceable in the absence of earnest money actually paid as specified by the contract. In Minnesota real estate practice, a Purchase Agreement is often referred to as an Earnest Money Contract. See Elliot v. Mitchell, 311 Minn. 533, 249 N.W.2d 172 (Minn. 1976); Lohman v. Edgewater Holding Company, 227 Minn. 40, 33 N.W.2d 842 at 847 (Minn. 1948). Appellant invites this Court to venture the incongruous holding that a so-called "Earnest Money Contract" is enforceable without payment, or tender of payment, of earnest money. Such a ruling would create chaos with respect to enforceability of real estate transactions and would subvert long-standing practices central to Minnesota land conveyancing.

If earnest money is not required to bind a land contract, what other reliable index exists as to the enforceability of a Purchase Agreement? Under what circumstance would negotiated earnest money terms be enforceable? Would a sliding scale be enforced with earnest money consideration small in percentage to the ultimate purchase price less enforceable than contracts requiring larger earnest money payments? By what judicial

fiat would the magic number constituting the enforceable ratio between earnest money and purchase price be determined? And would such a determination impermissibly invade the rights of parties to determine their own terms of contract?

Carefully read, Appellant's Brief radically posits that no earnest money term in a land Purchase Agreement need ever be enforced. Appellant's analysis invoking promise-for-promise bilateral contract theory, if accepted by this Court, would require the conclusion that earnest money is never necessary as consideration underpinning a land transaction. All Purchase Agreements necessarily rest on a promise to sell given in exchange for a promise to buy, and, therefore, Appellant's argument might well preclude all earnest money terms from enforceability. This outcome would fly in the face of dozens, if not hundreds, of robust Minnesota cases addressing various issues relating to earnest money paid in real estate transactions.

Consideration is "bargained-for." Deli v. Hasselmo, 542 N.W.2d 649 at 656 (Minn. Ct. App. 1996). Here, parties to an executory bilateral contract agreed, as part of their bargain, that earnest money in the amount of \$500 be paid. Perhaps, they could have forged an enforceable agreement by bargaining for merely an exchange of promises. But, that was not the case. The consideration bargained for included exchange of promises and payment of earnest money. To regard the earnest money term in the Purchase Agreement as a mere formality is to substitute this Court's judgment for the agreement of the parties. Simply put, no contract exists because no part of the consideration was ever

performed or tendered as performance to Respondent prior to Appellant's service of process commencing this lawsuit.

Appellant cites Craigmile v. Sorenson, 239 Minn. 383, 58 N.W.2d 865 (Minn. 1953), as "apposite" and argues this decision is helpful Minnesota authority. This is incorrect. In fact, Craigmile does not involve a Purchase Agreement nor does it address issues relating to earnest money or consideration. Unlike this case where there is no enforceable agreement, Craigmile arises in the context of a Contract for Deed acknowledged enforceable by all parties. After executing this Contract calling for a \$2,500 down payment, Vendor vacated his farm upon first showing purchaser how to use an appliance in the home. With his family, Purchaser moved into the house. Vendor subsequently accused Purchaser of trespass.

In Craigmile, a dispute existed as to whether the purchaser was to immediately pay \$2,500 as a down payment or have an opportunity to seek financing for that sum. Purchaser was occupying the farm and sowing seed on its land when vendor claimed the Contract for Deed had been breached by purchaser's failure to tender this down payment. The Court considered disputed testimony and determined that parol evidence as to preliminary negotiations afforded sufficient proof to conclude that tender of the down payment was not a condition precedent to vendor's obligation to perform. Neither the

word “consideration” nor that concept appears anywhere in this decision.²⁸

Craigmile tells us nothing about whether earnest money is required, as generally assumed by real estate practitioners, in the context of a land Purchase Agreement.

Appellant’s other case citations are even farther afield.

Appellant detours into mercantile law citing as “apposite” Koehler & Hinrichs Mercantile Co. v. Illinois Glass Company, 173 N.W. 703 (Minn. 1919). Koehler & Hinrichs involves a contract for the sale of flasks negotiated between a manufacturer and Plaintiff purchaser, a wholesale glass dealer. This contract is of the kind now governed by the Uniform Commercial Code enacted generally into Minnesota law at Chapter 336 of the Minnesota Statutes Annotated. The contract at issue did not involve earnest money consideration. To the contrary, “the purchaser was to make payment” for flasks “within thirty days after shipment.” *Supra* at Koehler & Hinrichs at 703. A contract for the sale of goods of this kind is ordinarily enforceable without earnest money consideration. See Minn. Stat. § 336.2-205 providing that consideration is not required in commercial option contracts for the sale of goods. Also see Minnesota Code Comment (1966), *Discussion*, expressly noting that the statute overrules Koehler & Hinrichs Mercantile. The Supreme Court’s inquiry focused on mutuality of obligation—that is, whether both parties could sue

²⁸Craigmile involved a Contract for Deed that stated receipt of the down payment was “hereby acknowledged.” Although this distinction is minor in view of other more important factors distinguishing the case, the Purchase Agreement here does not contain these words.

to enforce the bilateral promises made. This question was readily answered: The glass manufacturer asserted a right to treat the sales contract for flasks “as a liability of (the purchaser) if the factory (saw) fit to enforce it.” Thus mutuality of obligation clearly existed. It is hard to understand how Koehler & Hinrichs is relevant to this case except with respect to some broad principles expressed in generalities and, seemingly, ornamental dicta to the reasoning in the case.²⁹

In the present case, Respondent landowner never threatened to enforce the contract at issue and, so, the mutuality question central to Koehler & Hinrichs is not applicable. Even more remote from the facts of this case is Kielley v. Kielley, 674 N.W.2d 770 (Minn. Ct. App. 2004). That decision relates to enforceability of a stipulation regarding a dissolution of marriage, circumstances wholly distinct from those relevant to this case.

Other cases asserted as persuasive by the Appellant are foreign.

3511 13th Street Tenants’ Association v. 3511 13th Street N.W. Residences, LLC, 922 A.2d 439 (D.C. Ct. App. 2007), is primarily procedural in import. The case holds that the Trial Judge erred in granting Summary Judgment against a prospective purchaser on the basis of that Judge’s inference that the purchaser’s motive in executing the purchase agreement was “possibly fraudulent or, at least, insincere” and that issuance of a \$25,000 earnest money check was “a mere pretense and not a reality”:

²⁹See authority cited with respect to promise-for-promise consideration in a bilateral contract at Koehler & Hinrichs, *supra* page 704, and relied upon by Appellant in its Brief at p. 17.

In effect, the Judge concluded that (purchaser) never intended to be bound by its (purchase agreement) and promise to pay \$1,300,000 for the property.

3511 13th Street Tenants' Association at 444.

Although the D.C. case offers some *dicta* that actual payment of earnest money is not theoretically necessary as consideration supporting a real estate transaction, nothing in this complex decision would persuade a real estate practitioner to not require such consideration in drafting a purchase agreement. The Court merely indicates that the unique issues arising within Washington's regulatory framework required trial to determine whether earnest money was necessary or not in light of the Purchaser's motives. Indeed, within that framework, the Court noted that failure to pay earnest money might also invalidate the Purchase Agreement on the basis of an anticipatory repudiation or immediate material breach of the contract—also issues requiring Jury Trial findings of fact. See, *supra* at 445.

The present case does not hinge on issues as to the parties' motives. Appellant, apparently, was sincerely motivated to reach some kind of agreement with Respondent as to its land. But, no earnest money was paid and unlike 3511 13th Street Tenants' Association even offered. Nothing in the web of tort and contract lawsuits in the D.C. case establishes that a sincerely bargained-for and properly paid earnest money consideration is not required to bind a land contract in the Nation's Capitol. At most, 3511 13th Street Tenants' Association expresses the Appellate Court's skepticism as to whether the particular record in that case was sufficient to show that the offer of earnest

money was actually “bargained for” and, therefore, a legitimate requirement of the contract.

A Florida case, Peterson Homes, Inc. v. Johnson, 691 So.2d 563 (Fla. Ct. App. 1997), cited by Appellant does not involve specific performance and, rather, is postured as a breach of contract action. Peterson Homes, Inc., does not invoke a Purchase Agreement of the kind familiar to Minnesota practitioners but, rather, a contract providing that purchaser deposit \$600,000 in an escrow account toward a \$1,100,000 purchase price upon seller’s acceptance of the contract. When buyer failed to make this deposit, constituting more than 50% of the sales price applicable, the seller initiated an action for breach of contract claiming liquidated damages in the amount of \$600,000 by virtue of a forfeiture clause. The Florida Appellate Court found that a binding contract existed between the parties. The Court determined that payment of earnest money was not necessary to the formation of the contract since the agreement itself provided that “no portion of the earnest money deposit had to be paid at the time that the (contract) was signed.” Peterson Homes, Inc., at 564. Accordingly, the parties apparently did not bargain-for any earnest money but, rather, agreed upon a contract price on the basis of a mutual exchange of promises and, then, established a payment schedule. The contract at issue in Peterson Homes, Inc., differs so markedly from the Purchase Agreement involved in this lawsuit that the case has no application to any issue here presented. Further, the case does not say that if the earnest money deposit had been required to be paid at the

time the agreement was signed, a failure to pay such earnest money would have been legally excused.

The essence of consideration is that it is something of value “bargained for” between parties. Where the parties explicitly agreed that money-consideration be paid, the Purchase Agreement embodying that term is not validly formed in the absence of such payment.

B. WHETHER TAKEN AS A WHOLE, THE CONDUCT OF THE PARTIES DOES NOT EVIDENCE THE FORMATION OF A CONTRACT.

Appellant argues that the conduct of the parties after the Purchase Agreement was signed on June 12, 2006, if objectively examined, shows an enforceable contract was formed. This theory may seem plausible if examination of the parties’ conduct is limited to June and July, 2006. However, if the totality of circumstances preceding Appellant’s initiation of this lawsuit more than six months later is objectively assessed a very different picture emerges. By mid-December 2006, Respondents had repudiated the contract in writing. No earnest money had been paid, nor had a tender of earnest money been made. The contract price relating to the property had not been tendered. The clause in the purchase agreement specifying a closing date and establishing time-of-the-essence had been breached. Negotiations involving an easement running to Respondent’s benefit had failed to achieve agreement. Between the date of last activity relating to the transaction and the Respondent’s written declaration that Schumacher Farms was unwilling to convey

the land more than six weeks had passed without any communications at all. Considered in their totality, these factors objectively show that there was no meeting of the minds with respect to this land transaction and that no contract was formed.

Perhaps it is well to state the obvious: Prior to the August 2006 date called for closing of the transaction, Respondent was willing to perform. This willingness is evident from Respondent's cooperation with survey work and zoning board appearances. Certainly, on June 12, 2006, Respondent signed the Purchase Agreement in good faith intending to perform the transaction. But trespass by the Appellant intervened. Appellant "jumped the gun," pasturing cattle on the Respondent's property and, then, brazenly trespassing during hunting season. See the Appendix, Stipulation and Order concluding the trespass action at App. 6. It may be inferred that this conduct caused Respondent to change their mind about selling the land to the Appellant: Respondent may have had concerns about the "neighborliness" of BOB Acres with respect to common boundaries as well as other issues of importance between the parties. The question presented by this case is whether the Respondent had the legal right to change their mind about this transaction, repudiating attempts to achieve an agreement that they would have probably otherwise performed. Under the circumstances of this case, where the contract was defectively formed *ab initio*, where only desultory efforts were made to conclude the transaction, where no tender of either earnest money nor purchase price was ever made, and where closing dates proposed by the purchase agreement were ignored, it seems

reasonable for the Respondent to withdraw from negotiations that, after six months, had failed to achieve an agreement.

Appellant's argument that promise-for-promise consideration trumps the bargained-for requirement of consideration specified in the purchase agreement accomplishes nothing unless Appellant also claims that these promises overcome the time-is-of-the-essence clause in the contract. Such an argument is unpersuasively over-powerful – if Appellant is right, neither bargained-for earnest money clauses nor provisions requiring closing by a specified date will ever be enforceable with respect to Minnesota land transactions. And such an outcome clearly abrogates legal authority that is both longstanding and integral to Minnesota real estate law.

As early as 1885, the Minnesota Supreme Court held that identifying a time for performance of a real estate contract made that agreement into one in which time is of the essence. Judd v. Skidmore, 22 N.W. 183 (Minn. 1885). In Judd, our Supreme Court held that failure to meet a closing date twenty days from the execution of the contract precluding specific performance of a real estate transaction. This rule was reaffirmed in 1978 by Merriman v. Sandeen, 267 N.W.2d 714 (Minn. 1978). In Merriman, parties attempted formation of an option contract for the conveyance of 282 acres. The check providing consideration for the option contract was dishonored and payment had not been tendered by the date on which performance was required in the agreement. The Supreme Court held that the option contract was one in which time was of the essence and that

failure to pay consideration for the option precluded enforcement of the agreement. This rule is in accord with an earlier decision Johnson v. Herbst, 167 N.W. 356 (Minn. 1918) holding that where the defendant seller failed to clear liens encumbering title to real property by the closing date, the purchaser was not required to perform the transaction. All of these cases involving time-is-of-the-essence provisions, either explicitly or by establishment of deadline dates, would be implicitly overruled by a decision by this Court finding an enforceable contract in circumstances here presented.

Petition of Hilltop Development, 342 N.W.2d 344 (Minn. 1984) provides guidance as to what a party must do in order to require enforcement of an agreement when the other party balks at performing on a date specified by the contract. The party seeking enforcement should tender performance of a purchaser by offering payment of the purchase price to show its willingness to meet the required deadline. No tender of performance was made in this case.

The contract at issue in this case doubly specifies that time-is-of-the-essence – first a deadline for closing is established and, further, a separate clause declares time to be essential. Failure to comply with the closing date provided by the purchase agreement represents a decisive *objective* manifestation that this agreement in its June 12, 2006, form was a dead letter after mid-August of that year.

2. WHETHER THE TRIAL COURT CORRECTLY RULED THAT TIME-IS-OF-THE-ESSENCE PURCHASE AGREEMENT WAS UNENFORCEABLE BY REASON OF BUYER-APPELLANT'S FAILURE TO TENDER PERFORMANCE OF ANY KIND ON THE CLOSING DATE SPECIFIED BY CONTRACT.

Appellant failed to perform (or tender performance) on the August 14, 2006, closing date established by the Purchase Agreement. If the purported agreement between the parties was not moribund before that date, surely the agreement was a dead letter after that time. The Purchase Agreement establishes that "time is of the essence." On the specified closing date, August 14, 2006, no earnest money was paid or offered, no contract price tendered and no other measures undertaken to consummate the transaction. No formal or informal extension of the Purchase Agreement was negotiated. Instead, the transaction detoured into an ultimately unproductive discussion about an easement on the land—that is, a transaction with significantly different features.

An interesting question, but one not before this Court, is whether this transaction might have been salvaged if Appellant had tendered the earnest money on or before the closing date. That issue, perhaps, may be considered in shades of gray—particularly in light of efforts undertaken before August 14, 2006, to secure governmental approval relating to some aspects of the conveyance. But, on the closing date, no tender was made, no performance of any kind offered, and no agreement to extend the Purchase Agreement discussed. Therefore, it is clear that the proposed land contract between the parties was unenforceable after that date.

Appellant asserts Respondent waived various rights embodied in the original Purchase Agreement. The scope of these claimed waivers guts the original agreement and, in effect, substitutes preliminary and incomplete negotiations for a materially different new contract for the original proposed transaction. This new contract did not require earnest money, has no definite closing date, does not treat “time as of the essence”, contains no enforceable non-waiver term, and, apparently, involves an easement not part of the original negotiations. In effect, Appellant urges this Court to enforce a wholly different transaction than that embodied in the original Purchase Agreement. This argument expands the doctrine of waiver so as to affect not merely a single term but to engulf and rewrite the whole of the purported contract.

Appellant adopts this position on the basis of its claim that after August 14, 2006, the parties acted as if they wished to consummate the original transaction. But this is manifestly wrong. The original “time is of the essence” transaction didn’t involve an easement, required earnest money and established a closing date. Since no proof exists of any words or negotiations intentionally or knowingly waiving existing Purchase Agreement terms, the parties’ conduct after the specified closing date becomes relevant. This conduct, however, does not serve to resuscitate the original failed agreement. Rather, the conduct of the parties after the closing deadline consists of a rather desultory attempt to substitute a new contract for the old—and, a new contract with materially different terms.

Respondent's request for an easement proposes substitution of a new contract for the previous failed agreement. The proposed addition of an easement term is a material change to the earlier defunct contract. Where there is no prescription, an easement can be acquired only by grant. Braaten v. Jarvi, 347 N.W.2d 279 (Minn. Ct. App. 1984). An easement cannot be established by parol or mere oral evidence; rather, an easement by grant must be in writing. Alstad v. Boyer, 228 Minn. 307, 37 N.W.2d 372 (Minn. 1949). It is clear that an easement creates an encumbrance on title and represents a material contract term that must be agreed-upon in writing between the purchaser of land and its seller. See Wertheimer v. Byrd, 278 Minn. 150, 153 N.W.2d 252 at 253 (Minn. 1967). Accordingly, negotiations for the easement were directed toward a contract term controlling marketability of title. Wertheimer, supra at 253. As a matter of law, adding an easement term to the previously negotiated Purchase Agreement in the circumstance of a contract already unenforceable for failure to pay earnest money (as well as failure to close as agreed), in effect, constitutes an offer for an entirely new contract with new materially different terms. Was that offer accepted? This stipulated evidence shows it was not.

Beginning August, 2006, and continuing through October 20, 2006, the parties negotiated on the easement issue. A draft Easement Agreement forwarded to the Respondent was not accepted. After October 20, 2006, neither party did anything to complete the transaction. Approximately 8 weeks (54 days) passed with neither

Appellant nor Respondent doing anything to advance the transaction. On December 14, 2006, almost exactly six months after the Purchase Agreement was signed, Respondent informed Appellant that they were no longer interested in completing the sale of their land on any terms.

Simply put, the parties' conduct after August 14th consisted of discussions relating to an easement and, then, protracted silence on both sides followed by Respondent's clear message that they no longer wanted to sell the land. Appellant cites no cases from which this Court may construe this course of conduct as waiving Purchase Agreement terms as to earnest money, time-of-the-essence and closing date, particularly in light of the Agreement's non-waiver clause.

Waiver occurs where a party relinquishes a right and that relinquishment is "clearly made to appear from the facts disclosed." Citizens National Bank of Madelia v. Mankato Implement, Inc., 441 N.W.2d 483, 487 (Minn. 1989). By that criterion, Respondent did not waive any of its rights under the Agreement. Further, none of the cases cited by Appellant come close to suggesting that a waiver exists on the stipulated facts here at issue.

Two decisions cited by Appellant as relevant to waiver issues arise in the context of transactions remote from land conveyancing. Green v. Minnesota Farmers' Mutual Insurance Company, 190 Minn. 109, 251 N.W. 14 (Minn. 1933) occurs in the setting of an insurance forfeiture dispute. Pollard v. Southdale Gardens of Edina Condominium

Association, Inc., 698 N.W.2d 449 (Minn. Ct. App. 2005) is a landlord-tenant controversy involving the failure by the landlord over a 12-year period to insist upon enforcement of a “no pets” clause in Lease Agreements. Since these cases are embedded in a matrix of other substantive law (in Green, for instance, the rule that Courts should, if possible, avoid forfeiture of insurance coverage), they are not persuasive in this matter.

Two real estate cases cited by Appellant are similarly unhelpful. In Wolff v. McCrossan, 296 Minn. 141, 210 N.W.2d 41 (Minn. 1973) a seller was estopped from asserting non-performance of written contractual terms that she had expressly modified by her own statements. The Court held closing date requirements set forth in the written contract were waived by the Seller’s attorney expressly stating at least two times that his party was “not in a hurry” to close the transaction. Wolff supra at 42. Similarly, Seller herself specifically agreed to modify payment terms established in the written option agreement. Wolff at 43. There is no indication that the Wolff case involved a non-waiver agreement of the kind applicable here. Wolff would be relevant to this dispute only if Appellant were in possession of facts indicating express oral statements by the Respondent that it intended to waive provisions of the written contract. No such evidence exists here.

Giles Properties, Inc. v. Kukacka, 2007 W.L. 1191801³⁰ is similarly unpersuasive. No issue of waiver arises in the case. Rather, the decision turns upon the Seller’s failure

³⁰App. Appendix pp. 68-70.

to take any action when the Buyer expressly demanded that the transaction either be closed on a specified date or formally be canceled. Giles manifests the importance of earnest money in Minnesota real estate practice--significant to the Court was the fact that a \$20,000 earnest money payment called for by contract was duly made by the Buyer. This decision stands for the proposition that where a buyer explicitly demands that either the transaction close on a set date or be formally canceled, the Seller ignores such a demand at its peril. In this case, neither party demanded that the transaction close nor was there any other performance tendered by either Buyer or Seller prior to Respondent's December, 2006, statement that it did not wish to sell the land.

Here non-payment of earnest money was coupled with failure to tender purchase price proceeds and failure to demand that the agreement be timely completed in mid-August, 2006. Instead of asserting the vitality of the June Purchase Agreement, the parties, rather, embarked upon futile negotiations involving an easement that would have materially modified the original transaction.

Although the original transaction may well have been operable in June or July 2006, *if earnest money had been paid*, that agreement was a dead letter after August 14, 2006, and no longer thought to be binding between the parties. Certainly, in the context of this case, an inference that the parties were returning to the "drawing board" to renegotiate the agreement is preferable to assuming that the non-waiver clause of the Purchase Agreement is of no effect and that the Appellant's failure to pay earnest money,

failure to close as contractually required and failure to tender any performance at any time should be excused by waiver.

3. SPECIFIC PERFORMANCE REMEDY ISSUES ARE NOT PROPERLY BEFORE THIS COURT SINCE THE DISTRICT COURT WAS NOT REQUIRED TO EXERCISE DISCRETION TO DECIDE THAT MATTER. HOWEVER, SPECIFIC PERFORMANCE SHOULD NOT BE ORDERED IN THE CONTEXT OF THIS CASE.

The District Court's threshold ruling that no enforceable Purchase Agreement was formed between Buyer and Seller ended this case. Accordingly, the Trial Judge did not consider the secondary issue relating to remedies – that is, whether specific performance of this contract to convey land should be ordered. The District Court's determination that there was no contract to enforce obviated consideration of specific performance issues. Whether to grant specific performance of a real estate contract is decided on equitable grounds subject to the Trial Court's discretion. Boulevard Plaza Corp., 94 N.W.2d 273, 284.

Assuming *arguendo* that this Court reverses the Trial Judge's Summary Judgment in favor of Respondent and finds that an enforceable Purchase Agreement exists, then, remedy issues must be remanded to the discretion of the District Court. Three possible outcomes arise in that hypothetical context:

1. The Trial Judge finds the stipulated record sufficient to support an award of the equitable remedy of specific performance; or
2. The Trial Judge determines the record does not support specific

performance; or

3. The Trial Judge determines that the stipulated record is inadequate to support either grant or denial of specific performance and requires that parties try to the Bench issues relating to the remedy here applicable.

Since the Trial Court did not exercise discretion with respect to establishing a remedy in this case, nothing exists for this Court to review. Logically, no additional argument related to remedies should be required. This Court's reversal of the Trial Judge compels remand of remedies issues to the District Court.

Out of an abundance of caution, Respondent, however, will briefly identify compelling reasons that the present record does not support specific performance of the disputed land contract.

Specific performance of a conveyance of realty is not a matter of absolute right. Rather, a Court must carefully weigh the circumstances and, then, exercise discretion as to whether specific performance should be compelled. Boulevard Plaza Corp., 94 N.W.2d 273. Review of all relevant circumstances should persuade this Court that the remedy of specific performance is not available.

First, and most obviously, no land contract exists to specifically enforce. The writing between the parties was preliminary and incomplete. The agreement did not address the boundary dispute on the North side of the property, an important issue with respect to exactly what should be conveyed under the contract. Thus, it is unclear what

exactly the Court should enforce as to property boundaries. Clearly the purported agreement does not address where exactly the North boundary of the disputed tract lies, an issue that must be determined to give effect to the agreement with another entity (SBRA) negotiated through Briggs' involvement in Respondent, to "quiet" potential boundary issues to the East of the tract at issue.³¹ Similarly, easement issues important to the parties were never finally resolved. Equity would require this Court (or the District Court) to develop findings as to whether an easement should be part of the transaction to prevent undue hardship on Respondent's farming operation.

This Appellate Court is without authority to make a contract for the parties. Kennedy v. Hasse, 262 Minn. 155, 114 N.W.2d 82 (Minn. 1962). In order to fashion equitable relief, this Court (or the District Court) would have to establish legal descriptions, quiet a boundary dispute and, possibly, frame an easement between the litigants—all of this in the absence of any reasonable written guidance from the parties. This Court should decline that task.

Specific performance is not justified except upon a balancing of the equities. Dakota County HRA v. Blackwell, 602 N.W.2d 243 (Minn. 1999). Balancing equities between Appellant and Respondent does not result in any clear advantage to either side. Rather, this criterion for specific performance seems to be neutral.

At least preliminarily, Appellant would use the land for recreational purposes.

³¹App. Appendix at pp. 2-3, Paragraph 4.

Respondent presently farms the land. No case law establishes any preference between these two competing uses. Appellant's implication that it may wish to develop 80 acres of property assembled from contiguous tracts is conjectural in that deed restrictions now preclude this use and no pending plans for such development have been shown. In any event, Appellant already possesses a tract of land to the West of the disputed property sufficiently sized to allow it to demonstrate ownership of 80 contiguous acres. Since Appellant has no contracts pending with third party developers or contractors, no interests of anyone outside of the litigants will be impaired if the *status quo* pre-litigation is preserved. No proof has been submitted that Appellant will suffer any appreciable collateral losses should the transaction with Respondent not now proceed to completion.

Improvement of the fence line would make the disputed tract more favorable for pasturing animals. Since Appellant doesn't engage in farming, presumably, it raises this argument on behalf of one of its principals, Jack Briggs. In 2006, Briggs used the pasture on the disputed tract for feeding cattle.³² This argument does not favor Appellant, however, and, in any event, nothing precludes the existing fence line from being improved to achieve the same beneficial outcome.

Convenience of access between Appellant's existing tracts is similarly not a compelling factor promoting specific performance. Appellant stipulates that its property can be reached by a slightly longer, but navigable, roadway that does not pass over the

³²App. Appendix at p. 7, Paragraph 16.

tract in dispute.³³ Appellant's land to the North and East of the subject property is not land-locked.

Accordingly, a balancing of equities shows Appellant and Respondent in approximate parity. Thus, no compelling argument favoring specific performance exists with respect to this factor.

Further, Appellant, through one of its principals, Jack Briggs, has shown a disturbing pattern of invading Respondent's property interests with respect to the disputed tract. On the basis of these trespasses, Appellant does not approach this Court with the "clean hands" required to support specific performance. Earle R. Hanson & Associates v. Farmers Cooperative Creamery Company of Clear Lake, Wisconsin, 403 F.2d 65 (8th Cir. 1968). The degree of wrongdoing by a party sufficient to defeat its application for specific performance must be that adequate to afford a basis for legal action. Earle R. Hanson & Associates, 403 F.2d 65 (8th Cir. 1968). In this case, the Stipulated Facts show that Appellant, or one of its principals, Jack Briggs, repeatedly, and with impunity trespassed on Respondent's property—notwithstanding the fact that he had been asked to refrain from this tortious conduct.

Trespass alleged to constitute unclean hands touches directly upon the property at issue, arises in the context of the dispute as to who has the right to possess this land and is egregious. The inequitable conduct here shown is the incursion by trespass of armed men

³³App. Appendix at pp. 3-4, Paragraph 6

onto property that is in dispute—that is, actions in derogation to the Respondent’s property interests apparently motivated by the belief that the niceties of the law in transferring title need not be followed. In essence, a principal of Appellant felt that he had a possessory interest in Respondent’s land, even though, in fact, it is stipulated that no such interest existed at that time. Knowing that his trespass was offensive to the Respondent, Appellant’s principal entered onto the disputed land, disregarding the fact that at the time of the trespass the land transaction between the parties was stalled and, in fact, appeared to have been abandoned. Such impunity should not be rewarded by equity with specific performance.

CONCLUSION

Respondent respectfully requests that the Trial Court’s Order of March 9, 2009, be affirmed. In the event that this Court reverses the Trial Court’s previously mentioned Order, then this matter should be remanded to the Trial Court for a determination as to whether this record supports specific performance or, in the alternative, for Trial with respect to remedies issues.

DATED: December 13, 2010

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