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PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
By _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

John Paradiso as trustee of the Revocable
Living Trust of John Paradiso,

Plaintiff,

vs.

Jeanne E. Drake, a married woman as her
separate estate,

Defendant.

The Honorable Lisa Worswick

NO. 05-2-04207-4

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT, AND
PLAINTIFF'S CROSS MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

On October 27, 2004, Defendant Jeanne Drake executed a standard form purchase and sale agreement to convey nine vacant lots on Ketron Island to Plaintiff, the Revocable Living Trust of John Paradiso ("Paradiso"). Prior to the scheduled closing, Drake received a more attractive offer for the property. As a result, Drake refused to complete the sale to Paradiso, and this litigation ensued. Drake now seeks Summary Judgment, advancing a variety of justifications for her failure to close.¹ Drake's purported justifications all fail as a matter of law, and the Court should deny Defendant's Motion for Summary Judgment. In addition, because there are no genuine issues of material fact, and because Paradiso is entitled to specific

¹ Defendant's Motion for Summary Judgment was filed after the dispositive motion deadline established by the Court's current trial schedule. Plaintiff previously filed its opposition to Defendant's Motion to Continue the trial date, which motion is currently noted for September 2, 2005. However, because there do not appear to be any material factual issues requiring trial, Plaintiff does not object to Defendant's Motion on the grounds of lateness. Plaintiff requests the Court's permission to file its own Cross-Motion for Summary Judgment contained herein, and will withdraw its objections to Defendant's Motion to Continue.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT, AND
PLAINTIFF'S CROSS MOTION FOR SUMMARY
JUDGMENT - 1

ORIGINAL

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1 performance as a matter of law, the Court should grant Paradiso's Cross-Motion for Summary
 2 Judgment conveying the property in question to Paradiso by statutory warranty deed. Paradiso
 3 also requests his reasonable attorneys fees, as provided for by the purchase and sale agreement.

4 II. FACTS

5 Drake sets forth her version of the relevant facts in her motion and accompanying
 6 Declaration of Support of Summary Judgment ("Drake Decl."). As will be established below,
 7 the evidence presented by Drake raises no genuine issues of material fact that would prevent
 8 summary judgment for Paradiso. Nonetheless, a more complete account of the facts will help
 9 place the legal issues here in their proper context. Except where otherwise noted, the following
 10 facts are based on the Declaration of Johnnie Paradiso ("Johnnie Paradiso Decl.").

11 Johnnie Paradiso ("Johnnie"), daughter of John Paradiso, represents Paradiso by virtue of
 12 a power of attorney. Johnnie has owned property on Ketron Island for approximately 16 years.
 13 Ketron Island is a relatively small island, with less than two square miles in area, and probably
 14 fewer than 20 full time residents. Ever since she first became familiar with it, Johnnie has
 15 regarded the island as a special place. She has often recommended to her father that he attempt
 16 to purchase property there, both because she believed it would be a good investment and because
 17 she believed he would enjoy the island. Johnnie Paradiso Decl, ¶¶ 2-7.

18 In early October, 2004, Johnnie began to pursue the possibility of purchasing property on
 19 the island on behalf of her father or his Living Trust. She sent a letter of inquiry to various
 20 persons who own property on the island, and Bill Graves ("Bill"), Jeanne Drake's husband,
 21 responded. Bill informed Johnnie that Jeanne might be interested in selling nine vacant lots that
 22 she owned as her own individual estate. Bill also told Johnnie that Jeanne had given him
 23 authority to negotiate regarding the property on her behalf. Johnnie Paradiso Decl., ¶¶ 8-9.

24 After Bill gave her the lot numbers and addition names of Jeanne's property (all of the
 25 lots in question are either located in the "Ketron Sunrise" or "Ketron Sunset" additions), Johnnie
 26 looked them up on a map and then visually inspected the lots. While doing so, she recognized

1 that one of the lots—Lot 8 in Block 2 of the Ketrion Sunset Addition—is a lot that is purportedly
 2 partially occupied by a septic drain field that serves an adjoining property, currently owned by
 3 Pat Lord. The existence and purported location of the drain field have been common knowledge
 4 to property owners on the island for many years. Johnnie Paradiso Decl., ¶ 10.

5 After inspecting the lots, Johnnie decided to call Bill back and make him an offer. On or
 6 about October 25, 2004, Johnnie offered Bill \$55,000 for all nine lots on behalf of her father's
 7 trust. At the time she made this initial offer, Johnnie told Bill that one of the reasons she was
 8 not offering more was because of the purported septic drain field on Lot 8. Bill indicated to
 9 Johnnie that he was aware of the septic field. Bill also told Johnnie that he accepted the offer.
 10 Johnnie Paradiso Decl., ¶¶ 11-12.

11 On October 26, 2004, Bill called to tell Johnnie that he had received an offer of \$60,000
 12 for the lots, and that he intended to take it. In response, Johnnie made a new offer of \$65,000,
 13 which Bill again said he accepted. The next day, Johnnie went to Bill and Jeanne's home in
 14 Edmonds to make a deposit and sign a purchase and sale agreement. Johnnie Paradiso Decl., ¶
 15 13.

16 When Johnnie arrived at Bill and Jeanne's home on October 27, Bill presented her with
 17 the form purchase and sale agreement that Jeanne Drake has attached to her Declaration as
 18 Exhibit A. Bill, Jeanne and Johnnie sat down and went through the form together. As they were
 19 discussing the Agreement, Johnnie reiterated that she understood that her father's trust was
 20 taking the lots subject to whatever rights Pat Lord might have to the septic drain field on lot 8.
 21 She explicitly offered to make some written record of her understanding, but Bill said that this
 22 would not be necessary. Neither Bill nor Jeanne said anything at this time regarding writing an
 23 easement to describe the drain field. Johnnie Paradiso Decl., ¶¶ 14-16.

24 Bill, Jeanne, and Johnnie also briefly discussed the "as is" clause in the same addendum
 25 to the Agreement that contains the legal descriptions of the lots. Neither Bill nor Jeanne said
 26

1 anything to indicate that the clause pertained to warranties of title, as opposed to warranties
2 regarding the physical condition of the lots. Johnnie Paradiso Decl., ¶ 17.

3 Because Johnnie had not previously exercised her power of attorney on her father's
4 behalf, and because she knew that her sister Nina was more actively engaged than she was in the
5 daily management of her father's financial affairs, Bill, Jeanne, and Johnnie agreed that Nina
6 should sign the Agreement on behalf of the trust. Bill faxed the Agreement to Nina, and she
7 signed, dated, and faxed it back. The copy of the Agreement attached as Exhibit A to the Drake
8 Declaration bears Nina Paradiso's signature on behalf of the Paradiso Trust. Johnnie Paradiso
9 Decl., ¶ 18.

10 On the day the Agreement was executed, Johnnie made a \$1,000 cash down payment. By
11 mid-November, Nina deposited the full purchase price, plus buyer's share of the escrow fees,
12 with The Escrow Group in Bellevue, Washington. The Escrow Group was chosen by Bill to
13 handle the closing. The full purchase price remains on deposit at The Escrow Group. Johnnie
14 Paradiso Decl., ¶ 19.

15 During the weekend of October 30, 2004, Pat Lord came by Johnnie's cabin on the island
16 and told her she had just heard that Johnnie had bought Drake's nine vacant lots. Pat Lord asked
17 if it was a done deal, and Johnnie told her that there was a signed purchase and sale agreement
18 and that she had put down \$1,000 in earnest money. Pat Lord then asked if Johnnie would
19 consider selling her the two vacant lots (lots 6 and 8) on either side of her house, which is located
20 on lot 7. Johnnie told her that she wasn't sure what she and her father would be doing with the
21 property, but that they would keep Pat Lord in mind. Johnnie Paradiso Decl., ¶ 20.

22 Approximately a week after the Agreement was executed, Johnnie received a call from
23 Susan Boyer, who identified herself as a real estate broker. She indicated that she was now
24 representing Drake in the transaction, and that Johnnie should deal with her rather than Bill
25 Graves. She also mentioned that Bill and Jeanne had received higher offers for the lots. Johnnie
26 Paradiso Decl., ¶ 21.

1 A few days later, on or about November 19, 2004, Susan Boyer called Johnnie again.
2 She said that Jeanne and Bill had just discovered that there was an unrecorded septic drain field
3 on lot 8. Johnnie was surprised, and told Boyer that in fact she had discussed the drain field with
4 Drake and Bill Graves prior to the execution of the Agreement. Susan Boyer told Johnnie that
5 she didn't have to buy the property, but Johnnie made it clear that she wanted to proceed with the
6 transaction. Susan Boyer then informed Johnnie that it would be necessary to draft and record an
7 easement to clarify the status of the drain field. Johnnie Paradiso Decl., ¶ 22.

8 This was the first time anyone had mentioned the need to draft such an easement.
9 Johnnie did not object to the drafting of an easement. However, she reiterated her willingness to
10 make a written record of her lack of objection to the drain field as an alternative to drafting an
11 easement. She also told Susan that her boy friend, Eddie True, was a professional surveyor who
12 could draft the easement. Susan declined both of these offers, and indicated that Drake preferred
13 her lawyer to handle the drafting of the easement. Susan also told Johnnie that drafting the
14 easement could take time, and that an extension of the closing date might be necessary. Johnnie
15 agreed to a brief extension. Johnnie Paradiso Decl., ¶ 23.

16 On Monday, November 22 Johnnie went to the offices of The Escrow Group in Bellevue
17 and signed the closing documents, and also signed the extension agreement. Because Susan
18 Boyer had been the one to propose the extension, Johnnie believed that Drake would also sign.
19 Johnnie Paradiso Decl., ¶ 25 and Exhibit B

20 During this visit to The Escrow Group, Johnnie also reviewed and initialed the
21 Commitment for Title Insurance issued by LandAmerica Transnation on November 2, 2004,
22 along with two supplemental commitments, dated, respectively November 10 and November 11,
23 2004. Johnnie Paradiso Decl., ¶ 26 and Exhibit C.

24 On November 29, the original closing deadline (after allowing for the fact that November
25 27 fell on a Saturday), Johnnie received an unexpected call from Pat Lord. She asked if Johnnie
26 would be willing to participate in a conference call with Bill Graves, and Johnnie agreed. Bill

1 then came on the line. Pat Lord proceeded to tell Johnnie that Bill had agreed to sell her two of
 2 the lots Drake was under contract to sell to her father's trust. According to Pat Lord, she was to
 3 pay \$65,000 for lots 6 and 8, bordering her existing home on lot 7. Bill indicated that he would
 4 now be willing to sell Johnnie the remaining seven lots—as opposed to the nine lots Drake was
 5 under contract to sell—for \$55,000. Johnnie was stunned. She told Bill and Pat that the
 6 Agreement was for all nine lots, not for seven. Pat Lord responded by stating that the Agreement
 7 expired on that day, and that Johnnie no longer had any legal rights to the lots. After telling
 8 them what she thought of their behavior, and informing them that she was going to seek legal
 9 counsel, Johnnie hung up. Johnnie Paradiso Decl., ¶ 27.

10 The Escrow Group has recently produced evidence in response to a subpoena that reveals
 11 that as early as November 2, Bill Graves had called the closing agents, informed them that he
 12 had a better offer, and asked how he could get out of the contract. Supplemental Declaration of
 13 Michelle Johnson (“Supplemental Johnson Decl.”), ¶ 6 and Exhibit A. See also Declaration of
 14 David Corbett (“Corbett Decl.”), ¶¶ 5-6 and Exhibit C. On November 23, Susan Boyer, who
 15 was Drake's real estate agent, called and informed the closing agent that Bill Graves had told her
 16 “he was going to let the contract run out and ‘just see’ if the buyer sues him.” Supplemental
 17 Johnson Decl., Exhibit A. See also Corbett Decl., ¶ 6. The Escrow Group's “Transaction
 18 Memo Log” also contradicts Jeanne Drake's statement in her Declaration that she appeared at
 19 their offices on November 29, 2004, and instead dates her only appearance to November 24,
 20 2004. Supplemental Johnson Decl., Exhibit A. Jeanne's failure to show up on November 29,
 21 2004 is confirmed by a handwritten faxed letter dated November 30, 2004, signed by Bill
 22 Graves, indicating that Jeanne had decided not to go to The Escrow Group the previous day on
 23 account of her health. Corbett Decl., ¶ 7, and Exhibit D.

24 After hearing from Bill Graves and Pat Lord on November 29, Johnnie engaged an
 25 attorney. On December 3, 2004, her attorney wrote to Jeanne Drake demanding that the
 26 transaction proceed. Although her attorney subsequently received proposals for an alternative

1 deal from both Pat Lord and the attorney who was Jeanne Drake's counsel at the time, at no
 2 point on or after November 29 and prior to the commencement of this litigation did Jeanne Drake
 3 proffer title to all nine lots on the terms called for by the Agreement. Johnnie Paradiso Decl., ¶¶
 4 28-30, and Exhibits D, E, and F.

5 III. EVIDENCE RELIED UPON

6 Plaintiff relies upon the Declaration of Johnnie Paradiso, the Declaration of David J.
 7 Corbett, and the Supplemental Declaration of Michelle Johnson, and on the exhibits attached
 8 thereto, all filed herewith, as well as on the Defendant's Declaration of Support of Summary
 9 Judgment and the exhibits attached thereto, and on the pleadings and files of record.

10 IV. ISSUES

- 11 1. Should the Court deny Defendant's Motion for Summary Judgment because Defendant
- 12 fails to show that she is entitled to judgment as a matter of law?
- 13 2. Should the Court grant Paradiso's Cross-Motion for Summary Judgment because
- 14 Defendant cannot raise any genuine issues of material fact concerning Paradiso's
- 15 entitlement to specific performance as a matter of law?

16 V. ARGUMENT AND AUTHORITY

17 A. Summary Judgment Standard

18 Summary judgment is proper only when there are no genuine issues of material fact, and
 19 the moving party is entitled to judgment as a matter of law. CR 56. On a motion for summary
 20 judgment, the evidence and all reasonable inferences to be derived therefrom are viewed in the
 21 light most favorable to the non-moving party. *See, e.g., Mountain Park Homeowners Ass'n v.*
 22 *Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). When there are cross-motions for
 23 summary judgment filed by opposing parties, the court must apply this summary judgment
 24 standard to the arguments and evidence of each party in turn, taking into account each party's
 25 respective burden of proof.
 26

