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NO. 68753-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

4105 1ST AVENUE S. INVESTMENTS, LLC,

Respondent,

v.

GREEN DEPOT WA PACIFIC COAST, LLC,

Appellant,

and

ECOHAUS, INC., a Washington corporation and successor in interest to BUILT-E, INC., d/b/a ENVIRONMENTAL HOME CENTERS,

Defendants.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE CASE

In March 2007, plaintiff/respondent 4105 1st Avenue Investments, LLC, as Landlord, and Built-E, Inc., as tenant, executed a Lease for approximately 38,000 square feet of commercial real property in Seattle for a five-year term expiring March 22, 2012. CP 100 (3), 103-05. Built-E assigned the leasehold interest to Ecohaus, Inc., which assigned it to the defendant/appellant, Green Depot WA Pacific Coast, LLC. CP 38 (¶3), 45-48.

The Lease includes an attorneys' fees clause which provides:

> If either party brings an action regarding terms or rights under this Lease, the prevailing party in any action, on trial or appeal, is entitled to reasonable attorneys' fees as fixed by the court to be paid by the losing party. The term "attorney's fees" shall include, but is not limited to, reasonable attorneys' fees incurred in any judicial, bankruptcy, reorganization, administrative and other proceedings, including appellate proceedings, whether the proceedings arise before or after entry of a final judgment and all costs and disbursements in connection with the matter.

CP 107-08 (24.11).

In January 2012, the Landlord brought a commercial unlawful detainer action under RCW chapter 59.12, against Built-E, Ecohaus, and Green Depot, seeking to recover possession, unpaid rent and attorney fees pursuant to the Lease. CP 1-3. Green Depot appeared at the February 24, 2012 show-cause hearing and answered the complaint, denying default on

rental payments under the Lease, CP 21-23, which was set to expire on March 22, 2012. Green Depot's denial of default created an issue of fact, triggering RCW 59.12.130, which provides:

> Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.

Accordingly, the court commissioner, instead of issuing a writ of restitution on February 24, 2012, entered an order certifying the matter for trial and scheduling trial for the earliest available date, March 26, 2102. CP 16-18. The Landlord and Green Depot also reached an agreement, CP 18, which was reduced to writing and attached to and referred to in the trial certification order, CP 17, allowing Green Depot to hold over, at its option, in a limited portion (13,608 sq. ft.) of the premises until April 15 or May 31, 2012. The February 24 agreement did not resolve the claim for past unpaid rent or the issue of possession of the premises not subject to the agreement.

It is undisputed that, on or about March 22 (four days before trial), Green Depot vacated all of the premises except the 13,608 sq. ft. portion that the February 24 agreement allowed it to continue occupying. *See* CP 133. Once Green Depot vacated the premises at issue, that rendered moot

the Landlord's claim for possession and divested the Superior Court of subject matter jurisdiction under the unlawful detainer act, RCW ch. 59.12. The case thus was no longer entitled to priority on the court's trial calendar pursuant to RCW 59.12.130. *E.g., Munden v. Hazelrigg*, 105 Wn.2d 39, 45-48, 711 P.2d 295 (1985).

To pursue its claim for unpaid rent against a tenant that has vacated after being sued in an unlawful detainer action, a landlord has an option. The landlord may seek to have the unlawful detainer action "converted" to an "ordinary" civil action, or it may pursue a separate ordinary civil breach-of-lease lawsuit. *Munden,* 105 Wn.2d at 45-46. As the Court explained in *Munden*,

> Unlawful detainer actions are brought pursuant to RCW 59.12.030, which provides generally for a summary proceeding to determine the right of possession as between landlord and tenant. The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent, such that when restitution is no longer sought because possession is no longer at issue . . . an ordinary civil action becomes the more appropriate vehicle for resolving the dispute between the parties" and their dispute is no longer entitled to the calendar priority afforded an unlawful detainer action by RCW 59.12.130.

Id. at 45. Here, the Landlord had filed a separate, essentially backup complaint for breach of contract on January 27, 2012 (even before Green Depot appeared to deny failing to pay rent per the Lease), to insure as

early a trial date as possible in case Green Depot moved out. That lawsuit is pending under King County Case No. 12-2-03517-2; trial is scheduled for July 15, 2013. *See* CP 174-75.[1]

Thus, the unlawful detainer action was not "converted" into an "ordinary" civil lawsuit. The Landlord is pursuing its claim for unpaid rent in the separate "ordinary" civil action; there is no claim or defense to be adjudicated under the cause number assigned to the unlawful detainer action.

The Landlord accordingly proposed to Green Depot that they stipulate to entry of an order dismissing the unlawful detainer action without award of costs or fees. CP 133. Green Depot responded by declaring itself the prevailing party in the unlawful detainer action and filing a motion for award of attorney fees under ¶24.11 of the Lease. CP 87-94, seeking more than $28,000, CP 116.[2] The Landlord opposed the motion, arguing that Green Depot had not prevailed, CP 131-37. The trial court denied Green Depot's fee-award motion. CP 145-46. Green Depot

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[1] See footnote 3, below, regarding the citation to CP 174-75.

[2] At page 12 of its opening brief, Green Depot quotes an attorney's fees provision in a separate Assignment Agreement, CP 45-46, which it asserts that the landlord "blatantly ignore[d]" in the Landlord's answer to Green Depot's Motion for Discretionary Review. The Assignment Agreement fee provision, however, was not relied on or even cited in Green Depot's submissions to the trial court or in its Motion for Discretionary Review. Green Depot claimed "prevailing party" fees solely under Lease ¶24.11.

then filed a Notice for Discretionary Review in the trial court, and a Motion for Discretionary Review in this Court.

In its answer to Green Depot's Motion for Discretionary Review, the Landlord argued that the RAP 2.3(b) criteria were not met but that, because no substantive issues of claim or defense remained to be litigated in the unlawful detainer action – the Landlord's separate damages lawsuit for breach of lease being the case in which unpaid-rent claims will be litigated – the matter could and should be converted to an appeal. Green Depot did not claim in reply that substantive issues remain to be litigated in the unlawful detainer action, and this Court converted the case to an appeal.

In December 2012, Green Depot moved for, and the Landlord agreed to entry of, an order dismissing the unlawful detainer claim – but not the Landlord's still-pending separate action for breach-of-lease damages – with prejudice. CP 174-75.[3] Green Depot then filed a "renewed" motion for a fee award as the prevailing party in the unlawful

[3] The Landlord designated that Order for inclusion of in the Clerk's Papers on February 4, 2013. As of the (extended) date for filing this brief (February 7), no index had been received. Rather than seek an additional extension of the due date for filing this brief, the Landlord's counsel has calculated that the Order will be indexed as CP 174-75 based on its number of pages and on the King County's alphabetical system for indexing clerk's papers. If that calculation is incorrect, this Court can identify the order based on the King County "Sub" number (55) and filing date (January 11, 2013) that will appear on the Index.

detainer action. CP 159-60.[4] The Landlord opposed the renewed fee-award motion, and the trial court denied the motion on the ground that it lacks jurisdiction to decide the very issue before this Court on Green Depot's initial appeal. CP 173-74.[5] The Landlord anticipates that Green Depot will appeal from the order denying its Renewed Motion for Fees.

II. ARGUMENT

A. Green Depot Incorrectly Identifies Abuse of Discretion as the Applicable Standard of Review.

What this Court has to decide is not whether the trial court had a tenable reason for denying Green Depot an award of attorney fees, but rather whether Green Depot "prevailed" and is entitled to attorney fees under ¶24.11 of the Lease. Because that raises issues of law and contract interpretation, review is *de novo*. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009) (whether a litigant is a "prevailing party is a question of law subject to de novo review); *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 716, 281 P.3d 693 (2012) ("a trial court's interpretation of the language of a contract is a question of law we review de novo").

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[4] See preceding footnote. If Respondent has miscalculated the indexing of Green Depot's Renewed Motion for Fees, the motion is "Sub" 57 and was filed January 23, 2013.

[5] See preceding two footnotes. The Landlord's opposition is "Sub" 60, filed January 28, 2013; the Order should be "Sub" 63, dated (d presumably filed) February 1, 2013.

Because review is *de novo*, it does not matter whether the trial court's order denying Green Depot's fee-award motion was "unexplained" or not, *see App. Br. at 8,* and this Court may affirm on any ground supported by the record, regardless of whether the trial court based its decision on that ground. *E.g.*, *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

B. The Superior Court Properly Denied Green Depot's Fee-Award Motion Because Green Depot Was Not Entitled to an Award of Fees Under the Lease.

The facts are not complicated. The Landlord sued Green Depot under RCW ch. 59.12, seeking a writ of restitution. Green Depot answered, denying it had underpaid the rent it owed, and thereby created an issue of fact with respect to the Landlord's right to retake possession of the premises, such that RCW 59.12.130 required the court to hold a jury trial. Accordingly, the trial court adjudicated nothing; it simply set the case for expedited trial. Before trial, Green Depot vacated the premises that were subject to the Landlord's unlawful detainer claim as modified by the parties' February 24 holdover agreement (ER 18).

Green Depot's vacation of the premises rendered the right-to-possession issue moot but left the landlord's breach of contract claim for unpaid rent to litigate. Possession having been eliminated as an issue, the court lacked subject matter jurisdiction to hold an expedited trial under

RCW 59.12.130. *Munden v. Hazelrigg*, 105 Wn.2d at 45-46; *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830, *cert. denied*, 464 U.S. 1018 (1983); *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 815-16, 274 P.3d 1075, *rev. denied*, 175 Wn.2d 1012 (2012). Litigation of the unpaid rent claim was occurring in the Landlord's separate breach-of-lease lawsuit.

In light of *Housing Authority of Seattle v. Bin*, 163 Wn. App. 367, 260 P.3d 900 (2011), the Landlord does not dispute that the superior court would have had jurisdiction, even after the issue of possession became moot, to award "prevailing party" attorney fees to Green Depot *if* Green Depot had been contractually *entitled* to an award of fees. The superior court correctly denied the fee-award motion because Green Depot was *not* contractually entitled to fees. Green Depot did not "prevail" and the landlord did not "lose."

Green Depot argues that, because the Landlord didn't get a trial scheduled and obtain a writ of restitution before Green Depot vacated the premises at the end of the Lease term, Green Depot "prevailed." That argument is without supporting authority or merit. Green Depot moved out on its own, not because the court awarded it relief or ruled in its favor on any substantive point of law. The Landlord got what its unlawful detainer action sought, *i.e.*, possession of the premises not subject to the February 24 holdover agreement.

As a general rule, the "prevailing" party is the party in whose favor judgment is entered. RCW 4.84.010; RCW 4.84.330; *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990) ("a prevailing party is generally one who receives a judgment in its favor").[6] Depending on contract wording, a final judgment may be unnecessary for "prevailing party" status in litigation arising under a *bilateral* attorney-fee clause to which RCW 4.84.330 does not apply (because it applies only to unilateral fee-recovery clauses). *Wachovia SBA Lending*, 165 Wn.2d at 490; *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 287-88, 787 P.2d 946 (1990). No decision has ever held or suggested, however, that a defendant "prevails" merely by persuading a trial court not to grant summary relief in the plaintiff's favor and to set a case for trial instead, and by then taking unilateral action (in this case moving out) that renders moot the issue to be litigated and leaves the plaintiff with what it sought in the first place.

Contrary to what Green Depot's opening brief asserts, the Landlord did not "fail" to evict it, *App. Br. at 13*, nor did Green Depot "successfully defend[ ] against Respondent's unlawful detainer action,"

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[6] "If neither [party] wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997) (citing *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993)); *Rowe v. Floyd*, 29 Wn. App. 532, 535 n.4, 629 P.2d 925 (1981)). Green Depot has not argued that it was the *substantially* prevailing party, nor could it so argue because it was afforded no relief.

App. Br. at 14 and 16. Certainly none of the decisions Green Depot cites support either assertion or Green Depot's "prevailing party" argument.

The decision on which Green Depot principally relies, *Walji*, 57 Wn. App. at 284, *App. Br. at 14*, stands for the propositions that a "prevailing party" provision in a commercial lease does not necessarily incorporate the definition of "prevailing party" in the reciprocal attorney fee statute, RCW 4.84.330 ("'prevailing party' means the party in whose favor final judgment is rendered"), and that a dismissal of the landlord's case without prejudice, even though not a "final judgment," does not necessarily foreclose a claim by the tenant for "prevailing party" attorney fees. *Walji*, 57 Wn. App. at 287-89.[7] The court held that Walji, the tenant, had "prevailed" under that word's commonsense meaning. *Id.* at 288. But the court so held not because Walji had vacated the premises before the issue of right to possession could be litigated, as Green Depot did; the court held that Walji had prevailed because the landlord had taken a voluntary nonsuit after resting its case at trial, with Walji apparently remaining in possession.[8] The *landlord* thus had withdrawn from the field of battle after battle was joined at trial; but here, battle could not be joined

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[7] "The reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has "prevailed" as things stand at that point." *Walji,* 57 Wn. App. at 289.

[8] The decision does not indicate that the issue of possession became moot or that the tenant vacated.

because *the tenant* (Green Depot) abandoned the field. Thus, *Walji* is based on facts materially different from those presented here, including the key fact that the landlord, not the tenant, ended up in possession.

Hawk v. Branjes, 97 Wn. App. 776, 986 P.2d 841 (1999), which Green Depot cites as well, *App. Br. at 14*, stands for the proposition that an award of attorney fees under a contractual provision allowing such an award to "the successful party" in litigation is proper in a commercial unlawful detainer action when the plaintiff landlord takes a voluntary nonsuit before trial. The lease at issue in *Hawk* provided that "[i]n the event either party employs an attorney to enforce any terms of this agreement and is successful, the other party agrees to pay a reasonable attorney's fee." *Hawk*, 97 Wn. App. at 778. This case is unlike *Hawk* (1) because the Landlord here did not throw in the towel by electing to take a nonsuit rather than exercise a right to continue litigating the issue of possession; (2) a decision by the Landlord to quit litigating did not leave the tenant here – Green Depot – in possession of the leased premises (except a limited portion thereof, and then only by mutual agreement, not any court ruling); and (3) the fee provision in the Lease at issue here is

triggered by one party prevailing and the other losing, not by a party being "successful" or not in an effort to enforce the lease.[9]

In *Council House v. Hawk*, 136 Wn. App. 153, 147 P.3d 1305 (2006), which Green Depot also cites, *App. Br. at 15*, the issues were whether an award of prevailing party attorney fees under the *Residential* Landlord-Tenant Act is mandatory or discretionary, and whether a court may award fees under that act to a prevailing tenant who was represented *pro bono*. Neither issue arose here. *Council House* thus is inapposite to start with.

The *Council House* court held that Hawk, the tenant, was the prevailing party because the landlord had taken a voluntary nonsuit.[10] But the nonsuit wasn't taken because Hawk had vacated her apartment; Hawk remained *in* the apartment. The case ended because the landlord chose to give up and stop litigating after the parties had engaged in briefing First

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[9] Green Depot's reliance on *Hawk* is also misplaced because the court there specifically noted that it had held in *Walji* that "[v]oluntary nonsuits may come shortly after service before discovery even starts, or may come after days of trial before a jury[, such that t]he decision as to whether a particular voluntary nonsuit should trigger attorney fees should be left to the discretion of the trial judge in light of the circumstances of the particular case, whether interpreting a contract clause or statute." *Hawk*, 97 Wn. App. at 783 (quoting *Walji*, 57 Wn. App. at 290). Thus, even if this case had involved the taking of a voluntary nonsuit by the Landlord, the decision of whether or not to award Green Depot attorney fees would have been discretionary; Green Depot would not have been legally *entitled* to a fee award.

[10] The court also held that fee awards under RCW 59.12.290 are discretionary and that fees may be awarded for *pro bono* work.

Amendment issues raised by Hawk's retaliatory eviction counterclaim. In the present case, there was no counterclaim; the Landlord did not elect to give up; and the tenant did not remain in possession of the premises after the Landlord gave up. Instead, the issue of possession became moot here, and thus did not need to be litigated (and *could* not be litigated) because Green Depot agreed to, and ultimately did, cede possession (except insofar as the parties mutually agreed it could retain possession of a portion of the leased premises). *Council House* is neither on point nor instructive by analogy or extrapolation.

None of the decisions on which Green Depot relies support its argument that it "prevailed."

C. A Fee Award Was Correctly Denied Both Because Green Depot Was Not "the Prevailing Party," and Because the Landlord Was Not "the Losing Party," under ¶24.11 of the Lease.

Paragraph 24.11 of the Lease implicitly defines "losing party" with reference to "final judgment" in its final sentence, where it expressly allows awards of fees, costs and disbursements incurred in all stages of proceedings "whether the proceedings arise before or after entry of a final judgment." CP 107-08. The assumption implicitly is that the court may entertain a fee award only upon entry of a final judgment, although it may award fees for attorneys' pre- and/or post-judgment work. Green Depot's argument based on ¶4 in a Separate Assignment and Assumption

document, CP 45-46, *App. Br. at 12,* must be disregarded because Green Depot neither relied on that provision nor cited it to the trial court, and thus did not preserve an argument based on it for consideration on appeal. This Court may *affirm* on any ground supported by the record, *Truck Ins.*, 147 Wn.2d at 766, but Green Depot cites no authority allowing the Court to *reverse* based on arguments an appellant failed to make to the trial court.

Even ignoring Lease ¶24.11's reference to "final judgment," however, the provision under which Green Depot sought a fee award not only required Green Depot to "prevail" but required the Landlord to lose, because "prevailing party" attorney fees have to be paid only by "the losing party." CP 107. The issue of right to possession either was resolved *de facto* in the Landlord's favor when Green Depot rendered the issue moot by moving out, or was left unresolved because the trial that would have determined a winner or loser was derailed by Green Depot's move-out and must be resolved by (unexpedited) trial, which will occur in the Landlord's "ordinary" civil action for breach of the Lease.[11] There was no loser specifically in the unlawful detainer action from which this appeal has been taken.

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[11] The commissioner's oral statement that she was not willing to issue a writ to the Landlord immediately because she was "not entirely sure that there is money owing," which Green Depot quotes at page 5 of its opening brief, hardly qualifies as a ruling in Green Depot's favor or a loss for the Landlord.

D. The Trial Court's Denial of Fees to Green Depot Did Not "Immunize" the Landlord Against Potential Liability for a Fee Award.

Green Depot argues, *App. Br. at 16-8*, that this Court, by affirming the superior court, would effectively immunize, from exposure to fee awards, landlords who bring "last-minute" eviction lawsuits but are "unsuccessful" in obtaining writs of restitution because their tenants are able to "fend off" summary eviction and then move out at the end of the lease. Green Depot seems to forget that it remains the defendant in the Landlord's separate lawsuit for nonpayment of the full amount of rent required under the Lease. If Green Depot "prevails" as against the Landlord's nonpayment-of-rent claim, and if the Landlord is "the losing party" in that lawsuit, Green Depot will be in a position to argue that the unlawful detainer claim in the action in which this appeal has been taken (which claim was based solely on failure to pay rent) was without merit, and to apply for an award of fees under Lease ¶24.11 accordingly. This appeal is on the record of the unlawful detainer action, in which the superior court did nothing except set the case for expedited trial and then cancel the expedited trial when Green Depot made the issue of possession moot. On that record, no court can assign "prevailing party" status to Green Depot, much less assign "losing party" status to the Landlord. It would be incongruous and unjust to declare Green Depot the "prevailing

party" and the Landlord the "losing party" and make the Landlord pay Green Depot's attorney fees for "fending off" an eviction effort that a judgment against Green Depot in the nonpayment-of-rent lawsuit would establish was meritorious.

E. Respondent Should Be Awarded Its Attorney Fees for This Appeal.

Paragraph 24.11 of the Lease provides that in "an action regarding terms or rights under this Lease, the prevailing party . . . on trial *or appeal*, is entitled to reasonable attorneys' fees as fixed by the court to be paid by the losing party [italics added]." That neither party prevailed in the superior court because that court decided no issue in either party's favor does not mean *this* Court will decide no issue in either party's favor. This Court *will* decide whether Green Depot is or is not contractually entitled to an award of fees it incurred in the superior court. If this Court decides that Green Depot was not entitled to fees in the superior court, the Landlord will have "prevailed" on appeal (and Green Depot will have "lost" on appeal). Pursuant to that Lease provision and RAP 18.1(b), the respondent Landlord asks this Court to award it the attorney fees it has incurred for this appeal and the RAP 2.3(b) proceedings that preceded it.

III. CONCLUSION

For the foregoing reasons, the trial court correctly denied Green Depot's motion for an award of "prevailing party" attorney fees pursuant

to ¶24.11 of the Lease because Green Depot did not "prevail" and because the Landlord was not "the losing party" for purposes of the Landlord's mooted summary possession claim under RCW ch. 59.12. This Court should affirm and award the respondent Landlord the attorney fees and expenses it has incurred for the proceedings in this Court.

RESPECTFULLY SUBMITTED this 6th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 6th day of February, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

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SENT VIA:
☐ Fax
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☐ Express Mail
☑ Regular U.S. Mail
☐ E-file / E-mail

DATED this 6th day of February, 2012, at Seattle, Washington.

Paula Polet
Paula Polet, Legal Assistant