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No. 96836-5

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS DIV I No. 77510-3

SUBWAY REAL ESTATE, LLC, a Delaware limited liability
company,

Appellant,

v.

REBECCA J. ARMOUR AKA REBECCA J. WILSON, an
individual,

Respondent.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Subway grossly mischaracterizes the posture of this case as it seeks review of an issue that was not litigated below, in its attempt to avoid paying attorneys' fees after it lost to its franchisee. This is, however, actually a very simple matter.

Subway brought an unlawful detainer action against its franchisee Rebecca Wilson. The trial court ruled that Subway lacked standing to maintain a statutory unlawful detainer action because Ms. Wilson did not owe any rent to Subway, regardless of whether it had contract claims against her. Accordingly, the trial court dismissed. Neither the trial court nor the court of appeals addressed in any manner the validity of Subway's contract claims.

Subway's *only* assignment of error on appeal was whether the dismissal should have been with prejudice or without. It did not appeal the lack of standing determination.

Dismissal with prejudice was proper because the lack of standing means Subway is precluded from commencing unlawful detainer again. That preclusion makes the decision a final judgment between the parties on the question of *whether Subway can maintain an unlawful detainer action*. Because there was a final judgment on that issue, an award of attorneys' fees was appropriate under RCW 4.84.330.

Now, for the first time in this litigation, Subway is asserting that it in fact had standing to pursue unlawful detainer. That issue cannot be raised for the first time in a petition to this Court.

II. STATEMENT OF THE CASE

Subway leased space in Kirkland (CP 6-51) and in turn subleased that space to its franchisee, Ms. Wilson, to operate a Subway store (CP 53-58). Ms. Wilson has been a Subway franchisee since 1993, operating six different stores over those 25 years. CP 114. The sublease provided, among other things, that Ms. Wilson was to make rent payments directly to the landlord, not to Subway. CP 53 at ¶ 4.

At the Kirkland location, disputes arose between Ms. Wilson and the landlord as to the amount of rent due, rent abatement, credits, and offsets. The landlord asserted that Ms. Wilson owed rent; she contended that she actually had a credit balance. CP 114-117, 213-214.

Based on the landlord's assertion that Ms. Wilson was past due on rent owed to the landlord, Subway commenced this lawsuit *solely* as a statutory unlawful detainer action. CP 1-4. Directly contrary to what Subway repeatedly states in its opening brief, it did not assert any claims for breach of contract, or any other causes of action, based on the sublease between it and Ms. Wilson.

The Honorable John Ruhl of the King County Superior Court determined that because Ms. Wilson owed rent directly to the landlord, and not to Subway, Subway lacked standing to bring a statutory unlawful detainer action. In his oral ruling, Judge Ruhl stated: "Subway really shouldn't be asserting the landlord's claims against the tenant, and Subway cannot assert the tenant's claims against the landlord either. Verbatim

report of proceedings pp. 42-43. “[T]he tenant doesn't owe rent to Subway anyway. The tenant owes the rent to the landlord. So I just don't see Subway -- standing to sue for rent directly.” *Id.* at 43. Contrary to the assertion of “fact” in Subway’s petition, the trial court did *not* agree “that Seawest should be a party” to the current case. What the court actually said was that because Subway lacked standing, its unlawful detainer action had to be dismissed, and the landlord was free to commence its own, separate unlawful detainer action.

Subway’s counsel conceded the lack of standing for unlawful detainer: “So I think the safest thing to do would be dismiss this action without prejudice and let the landlord file an unlawful detainer act.” RP p. 46.

On July 25, 2017, the trial court entered a written order of dismissal in which the court determined that “Subway is not the proper party to bring an unlawful detainer action against the Subtenant in this situation,…” CP 99. Judge Ruhl went on to note that the *landlord* could bring an unlawful detainer action, and he indicated he was not taking any position on the merits of any of the claims between the landlord and Ms. Wilson. On August 10, 2017, the trial court entered an amended order of dismissal that did not change any legal reasoning but simply changed the dismissal to one with prejudice, rather than without.

Because the trial court had made a final ruling that Subway was precluded from bringing an unlawful detainer action, Judge Ruhl granted

Ms. Wilson's motion for attorneys' fees under RCW 4.84.330. CP 221-225.

On appeal Subway challenged the amended order of dismissal, but not the original order of dismissal, based solely on the change from dismissal without prejudice to dismissal with, and it appealed the award of attorneys' fees. CP 221. The assignment of error in Subway's opening brief to the court of appeals raised *only* the issue of whether dismissal should have been with or without prejudice. There was not a single sentence in any briefing in court of appeals addressing whether Subway had standing to bring an unlawful detainer action.

The court of appeals upheld the dismissal with prejudice and the fee award, and it awarded additional attorneys' fees.

In seeking review in this Court, Subway has grossly mischaracterized the posture of the case in the lower courts. First, Subway did not appeal the trial court's order of July 25, 2017, which was the order that held that Subway lacked standing to bring an unlawful detainer action. Thus, that decision regarding standing is not subject to challenge on appeal, and the ruling of lack of standing would remain in place even if the amended order of dismissal were vacated. Second, in the court of appeals, Subway never challenged whether it had standing to bring the unlawful detainer action. Rather, it challenged solely whether dismissal with prejudice, and the award of attorneys' fees, was proper when it still had non-statutory contract claims against Ms. Wilson.

In the conclusion of its opening brief in the court of appeals, Subway summarized its appeal as follows:

Subway has important contractual rights against Wilson (outlined in the Sublease that Wilson signed) that were never decided on the merits and must be available to Subway in any future lawsuit brought by Seawest. In short, it was error for Judge Ruhl to have changed his mind and acted as if he had, in fact, ruled on the merits of all of Subway's claims against Wilson. He did not. In fact, in his oral ruling, Judge Ruhl specified that "[c]ertainly, Subway can sue [] the tenant for rent that didn't get paid." RP at 41:4-5. In other words, Judge Ruhl made it clear he was not ruling on the merits of Subway's claims against Wilson for unpaid rent and other charges under the Sublease.

Nowhere in that brief, or the reply brief, was there any discussion of whether Subway had standing to bring an unlawful detainer action.

It is disingenuous for Subway to now complain that the court of appeals acknowledged the lack of standing "without any analysis or citation to authority." (Petition p. 7.) While Subway is apparently trying to make the court of appeals look bad, the fact is that there was no need for *any* analysis or authority because that issue was never raised or briefed on appeal, so there was no need for the court to analyze it.

Subway is now seeking to argue in this Court, for the first time in this litigation, that it did in fact have standing to bring an unlawful detainer action. Because the trial court's July 25, 2017, ruling that Subway lacked standing for unlawful detainer was not challenged in either the trial court or the court of appeals, and the issue of standing was not raised in the court of appeals, Subway cannot raise that issue for the first time in its petition for review.

III. ARGUMENT

A. Error Raised for the First Time on Appeal

A Washington appellate court can refuse to consider any claim of error that was not raised in the trial court. RAP 2.5(a). Here, not only was the new claim of error regarding standing not raised in the trial court, it was also not raised in the court of appeals. The Court should not countenance an attempt to raise a claim of error for the first time in the petition for review.

In fact, this Court has previously rejected exactly such an attempt. In *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998), the Court stated it “does not generally consider issues raised for the first time in a petition for review.”

As the Court explained more than three decades ago,

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Here, not only did Subway not point out the error at trial, it conceded the point both at trial and in the court of appeals. The attempt to belatedly raise the existence of standing for an unlawful detainer action as a basis for review by this Court should be rejected outright.

B. Statutory Versus Contract Claims

A second basic error with Subway's petition is the conflation of the statutory unlawful detainer action with an action based on contract-based claims. Here, the trial court ruled both orally and in two written decisions that Subway lacked standing for a statutory unlawful detainer action, but it explicitly made no ruling regarding the merits of contract claims Subway might have against Ms. Wilson.

Subway's appeal has been based on the assertion that because the trial judge did not rule on its contract claims, dismissal with prejudice was improper. This is where Subway attempts to hide the difference between the two types of actions.

Subway commenced this action under RCW 59.12 as an unlawful detainer action based on failure to pay rent. It did not raise any contract claims under its sublease with Ms. Wilson. In fact, to do so would have been improper, because under the statutory scheme of RCW 59.12, issues other than the right of the landlord to regain possession of the property cannot be considered.

As the court of appeals has stated, summarizing decisions from this Court,

An unlawful detainer action under RCW 59.12.030 is a summary proceeding designed to facilitate the recovery of possession of leased property; the primary issue for the trial court to resolve is the "right to possession" as between a landlord and a tenant. *Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wn. App. 431, 436, 979 P.2d 917 (1999); see also *Munden*, 105 Wn.2d at 45. It is well settled in Washington that, "[i]n an unlawful detainer action, the

court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues.” *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830, cert. denied, 464 U.S. 1018 (1983). Thus, an unlawful detainer action is a “narrow one, limited to the question of possession and related issues such as restitution of the premises and rent.” *Munden*, 105 Wn.2d at 45.

Angelo Prop. Co. v. Hafiz, 167 Wn. App. 789, 808-809, 274 P.3d

1075, 1085 (2012).

Subway filed this solely as an unlawful detainer action. The trial court ruled solely that Subway lacked standing to bring an unlawful detainer, because the rent was owed to the property owner, not to Subway. Because that ruling, formalized in the July 25, 2017, written decision that was not appealed, was a final decision on the narrow question of Subway’s right to maintain a statutory unlawful detainer action, and it did not address any issues outside unlawful detainer, all of Subway’s arguments in its petition about its contractual claims are irrelevant. Those claims have never been considered by a court, and they are certainly not subject to the trial court’s dismissal of this unlawful detainer action with prejudice.

C. Subway’s Rule 19 Argument Misrepresents the Lower Court Rulings

In raising Civil Rule 19 as a basis for review (another issue raised for the first time in the petition for review), Subway dramatically mischaracterizes the lower court rulings.

First, Subway now asserts that the trial court dismissed the case for failure to join Seawest, the landlord, and that the court of appeals affirmed on the same ground. That is absolutely untrue. Rather, the trial court determined that because the explicit terms of the lease required Ms. Wilson to pay rent to Seawest, Subway had no standing to maintain an unlawful detainer action, and that action would have to be brought by Seawest. The court did not even hint that Subway could maintain an unlawful detainer action as long as Seawest was made a party. Further, Subway's counsel agreed at trial that the proper remedy was to dismiss the action and let Seawest commence an unlawful detainer action.

Similarly, Subway asserts that the court of appeals held that because Ms. Wilson's offset claims could be asserted against only Seawest, failure to include Seawest was fatal to Subway's standing. Petition at 13. Untrue. To the contrary, what the court of appeals stated was "[u]nder the sublease, Wilson owed rent to Seawest, not Subway. Consequently, Subway did not have standing to bring the unlawful detainer action." Opinion at 4.

It is axiomatic that if a plaintiff lacks standing, it cannot invoke the jurisdiction of the court, thus the only option for the trial court was to dismiss and allow the proper party to institute an unlawful detainer action. "Absent standing, we are without subject matter jurisdiction to entertain the ... claim." *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit Cty.*, 135 Wash. 2d 542, 580, 958 P.2d 962, 981 (1998).

Rule 19 is irrelevant to this appeal. Subway lacked standing to bring an unlawful detainer action because its sublease explicitly stated that Ms. Wilson was to pay rent to Seawest, not to Subway. No amount of inclusion of other parties would have changed the fact that Subway lacked standing to assert that statutory claim because it was not owed rent.

D. The Petition Fails to Meet the Criteria of RAP 13.4(b).

In addition to the fatal flaws discussed above, Subway's petition should be denied for lack of a justifiable basis. Subway asserts two grounds for review under RAP 13.4(b). Neither has merit.

First, under RAP 13.4(b)(1), Subway asserts, incorrectly, that the decisions of the lower courts preclude master tenants from enforcing their sublease agreements, which allegedly conflicts with precedent. Nothing could be further from the truth. Despite Subway's assertion that "[t]he court of appeal's decision in this case is predicated on the conclusory assertion that Subway, a master tenant, lacks standing to *enforce its own Sublease Agreement with the Respondent*" (Petition at 8, emphasis added), both courts below recognized that Subway might have legitimate contractual claims against M. Wilson based on the sublease, but both also recognized that those potentially legitimate contract claims were wholly irrelevant to the question of standing to maintain a statutory unlawful detainer action. Thus, neither court addressed those potential lease claims in any manner.

All the lower courts did was rule that because no rent was owed to Subway, it could not bring a statutory unlawful detainer action. Those rulings in no way inhibit Subway, or any other master tenant, from enforcing contractual provisions in a sublease.

Subway cites three cases for the proposition that a master tenant can maintain an unlawful detainer action, but none had anything to do with the facts present in this case, where no rent was owed to Subway.

In *Stahl Brewing & Malting Co. v. Van Buren*, 45 Wash. 451, 88 P. 837 (1907), there was no written lease, but the subtenant was paying rent to the master tenant. When the rent payments stopped, unlawful detainer was allowed. In contrast here, Ms. Wilson was not paying rent to Subway, and pursuant to the written lease Subway had no right to receive rent. That case is irrelevant.

In *Sanders v. Gen. Petroleum Corp. of Cal.*, 171 Wash. 250, 17 P.2d 890, 893 (1933), rent was owed to the plaintiff, and the court acknowledged the obvious, which was that when payments pursuant to that obligation stopped, the plaintiff could bring an unlawful detainer action. Here, no rent was owed to Subway, so again the case is irrelevant.

Finally, in *McRae v. Way*, 64 Wn.2d 544, 392 P.2d 827 (1964), the court held that where the plaintiff assigned its right to possession to a third party before the unlawful detainer trial, it no longer had standing. There was no issue in the case of whether rent was owed to the plaintiff. Again, an irrelevant case.

Subway has not cited a single case for the proposition that a master tenant can bring an unlawful detainer action if the subtenant has no obligation to pay rent to the master tenant. Thus, even if the court of appeals *had* in fact ruled on that issue (which it of course did not), there is no decision of this Court that would conflict with that ruling, and therefore no ground for review under RAP 13.4(b)(1).

Second, under RAP 13.4(b)(4), Subway asserts that there is a substantial public interest in ensuring master tenants can enforce their subleases. No one disputes that, and the lower court decisions in this case do not inhibit that interest in any manner.

In its continuing habit of misrepresenting what happened below, Subway states: “The court of appeals held, as a matter of law, that Subway did not have standing to enforce the express terms of its own Sublease Agreement with the Respondent.” Petition at 11. That is untrue. In reality, the court of appeals merely held that Subway lacked standing only to maintain a statutory unlawful detainer action. The court in no possible construction of its ruling opined on Subway’s standing to enforce the terms of the sublease.

Both lower courts recognized that Subway may well have contractual claims against Ms. Wilson, and neither acted in any way to rule on those potential claims. Since unlawful detainer is a statutory proceeding of very limited scope, and it does not involve contractual issues, ruling that Subway lacked standing to bring an unlawful detainer

action in no way impeded Subway's ability to assert those claims in an appropriate civil action.

Consequently, Subway's litany of horrors about the impact on commercial leasing relationships if master tenants cannot enforce the provisions of their subleases are wholly groundless and are in no way implicated by the lower court decisions in this case.

IV. CONCLUSION

Subway seeks to vacate the amended order of dismissal and overturn the award of attorneys' fees to Ms. Wilson. All the amended order of dismissal did was clarify what was intrinsic in the trial court's oral ruling and first order of dismissal – Subway lacks standing to bring an unlawful detainer action, therefore the dismissal of that specific claim, which is all that is involved in this action, was in fact a final determination.

Even if the amended order of dismissal were vacated, as Subway seeks on appeal, the award of attorneys' fees was appropriate under RCW 4.84.330 because the determination in the first order of dismissal that Subway cannot maintain an unlawful detainer action is preclusive and is therefore a final judgment between the parties in this action.

The petition for review should be denied, because Subway is raising issues for the first time in its petition for review, and it does not meet the criteria of RAP 13.4(b).

In addition, Ms. Wilson should be awarded the attorneys' fees she has incurred since the award of fees by the court of appeals. RAP 18.1(j).

Respectfully submitted this March 25, 2019

ADVOCATES LAW GROUP, PLLC

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused to be filed with Supreme Court, and served via COAL electronic filing, a true and correct copy of this document to:

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DATED at Issaquah, Washington, March 25, 2019.



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