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No. 62931-0-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

ILIA KERTSMAN and JOHN DOE KERTSMAN, husband and wife, and the marital community comprised thereof; BAZA INTERNATIONAL, LLC a Washington limited liability company; WILLIAM GROVER and TERESA GROVER, husband and wife; and the marital community comprised thereof; GROVER INTERNATIONAL, LLC, d/b/a Baza International, a Washington limited liability company, YURI SUSHKIN and TATYANA RUBTSOVA, husband and wife, and the marital community comprised thereof,

Appellants,

vs.

LOSH FAMILY, LLC, a Washington limited liability company,

Respondent.

BRIEF OF RESPONDENT LOSH FAMILY, LLC

Jeffrey P. Downer, WSBA No. 12625
Stefanie L. Peppard, WSBA No. 39290
Of Attorneys for Respondent Losh Family,
LLC

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

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A. INTRODUCTION

The six-page letter ruling of King County Superior Court Judge Deborah Fleck granting Losh Family, LLC's summary judgment motion presents a well-reasoned discussion of the trial court's legal analysis. This court should adopt that reasoning in affirming the trial court's rulings. None of the evidence presented by the Grovers to the trial court, nor the arguments presented in their opening brief to this court, provide a compelling reason to overturn the trial court's decision.

The Grovers' lease was a valid contract that bound them to payment on a commercial lease for a specific term. The Grovers admit they occupied the premises in connection with Grover International, LLC, that payments were made to Losh, and do not deny that the lease is in breach. They have questioned who the real party in interest is, but this attempt to evade their lease obligations raised no genuine factual dispute. Further, the plain terms of the lease agreement established that Losh was entitled to recovery of attorney fees and costs incurred by the Grovers' default of their lease obligations.

No genuine factual dispute existed to preclude the trial court's finding that the lease was in breach and the tenant and subtenants are liable for that breach. Accordingly, this court should affirm the trial court's entry of summary judgment against all defendants.

B. ASSIGNMENTS OF ERROR

Assignments of Error

Plaintiff/Respondent Losh Family, LLC (“Losh”) assigns no error to the trial court’s decisions.

Issues Pertaining to Assignments of Error

Losh disagrees with the statement of Issues Pertaining to Assignments of Error by Defendants/Appellants William and Teresa Grover (“the Grovers”). Losh believes that the issues on appeal are more properly stated as follows:

Whether the trial court properly granted Losh’s claims for breach of lease and damages as a matter of law on summary judgment, where:

- a. The Assignment of Lease between the Kertsmans and Grovers is a valid and enforceable instrument;
- b. The Grovers entered the agreement as individuals;
- c. The Grovers’ performance under the agreement eradicates any argument that the lease was invalid;
- d. The lease agreement stipulates that Losh is entitled to recovery of fees and costs where the tenant breaches the agreement.

C. COUNTERSTATEMENT OF THE CASE

RAP 10.3(a)(5) requires that appellate briefs contain “a fair statement of the facts and procedure relevant to the issues presented for

review, without argument.” Much of the Grovers’ Factual Background relies on subjective statements that are irrelevant to the issues presented on appeal. Respondent Losh Family, LLC therefore submits this Counter-statement of the Case.

- 1. The brief procedural history of this matter confirms that the issues presented were straightforward and well-supported by the evidence and existing case law.**

This matter involves a commercial lease agreement entered into between Losh and Ilia Kertsman, for the property located at 329 Wells Avenue South, Renton, King County, Washington, 98055, followed by later assignments and assumptions of the lease agreement to William and Teresa Grover, and Yuri Sushkin and Tatyana Rubtsova. CP 6-7.

On August 29, 2008, Losh filed and served its Motion for Summary Judgment. CP 56. King County Superior Court Judge Deborah Fleck heard oral argument on the motion on September 26, 2008. Judge Fleck granted Losh’s motion on September 30, 2008. CP 163-64. Judge Fleck submitted a six-page letter ruling providing the legal basis for her decision and rejecting each of the defendants’ arguments against Losh’s motion. CP 166-171.

Pursuant to the trial court’s letter ruling and the lease agreement awarding fees to the prevailing party, Losh filed a motion for attorney fees

and costs on October 23, 2008. CP 15, 166-71. On February 26, 2009, Judge Fleck granted Losh's motion for fees in the amount of \$37,747.00. CP 592-597.

2. The lease between Losh and Ilia Kertsman was a valid and enforceable instrument.

The Lease between the Losh Family LP and Ilia Kertsman began on September 1, 2003. CP 12. J. Brian Losh signed the Lease on behalf of Losh Family, LLC. *Id.* Mr. Kertsman was required to pay rent pursuant to the Lease beginning on September 1, 2003. *Id.* The Lease required the tenants to pay rent in the amount of \$4,150.00 per month, as well as a pro rata share of real property taxes, insurance, and utilities ("Triple Net Costs") in the amount of \$1,015.00 each month. CP 12, 18. Thus, Mr. Kertsman owed a total of \$5,165.00 in monthly rent and utilities obligations.

Losh's Complaint provided the following legal description of the commercial property:

The property which is the subject of the commercial lease agreement between the parties ("Properties") is located at 329 Wells Avenue South, Renton, King County, Washington, 98055, and is legally described as follows:

PARCEL A: LOT 4 AND THE SOUTH 48 FEET OF LOT 5, BLOCK 20, TOWN OF RENTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 1 OF PLATS, PAGE 135, RECORDS OF KING COUNTY, WASHINGTON.

PARCEL B: LOT 5, LESS THE SOUTH 48 FEET, AND LOT 6, BLOCK 20, TOWN OF RENTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 1 OF PLATS, PAGE 135, RECORDS OF KING COUNTY, WASHINGTON.

SITUATE IN THE CITY OF RENTON, COUNTY OF KING, STATE OF WASHINGTON.

CP 6. The Grovers' Answer to Losh's Complaint admits that the above legal description is the accurate legal description for the subject property.

CP 50.

The legal description of the leased property was stated on the lease as follows:

The Lessor does hereby lease to Lessee...those certain Premises situated in the City of Renton, County of King, Washington described as follows:

Approximately 10,000 square feet on the ground floor located on the southerly section of Lots 4, 5, 6, Block 20 of the City of Renton as recorded in Plats, Records of King County.

[H]ereinafter called "Premises." Commonly known as 329 Wells Avenue South, Renton, WA 98055-2740.

CP 12. The lease included the following provision limiting

Mr. Kertsman's right to assign the lease:

ASSIGNMENT

...This lease shall not be assignable by operation of law. If Lessee is a corporation, then any transfer of this lease from Lessee by merger, consolidation or liquidation and any change in the ownership of, or power to vote, the majority

of its outstanding voting stock shall constitute an assignment for the purpose of this paragraph.

CP 14. Mr. Kertsman signed the lease as follows:

“LESSEE, Ilia Kertsman.”

CP 17. The lease also contained the following “LANDLORD IMPROVEMENTS” provision:

Tenant agrees to pay the remaining balance towards the installation of an air conditioning system and new office carpet.

CP 17. From September 1, 2003 to December 12, 2005, Mr. Kertsman enjoyed the full benefits of its lease agreement and paid his rental obligations timely. CP 75.

3. The Assignment between the Kertsmans and Grovers was a valid and enforceable instrument.

On or about December 12, 2005, Mr. Kertsman assigned his interest in the Lease to Mr. and Mrs. Grover (the “Grover Assignment”).

CP 20, 38-43, 46-48. Pursuant to the terms of the Grover Assignment, Mr. and Mrs. Grover accepted the assignment and agreed to perform all of the duties and obligations of Mr. Kertsman under the Lease:

WHEREAS, **William and Teresa Grover as individuals**, dba Grover International, LLC, has agreed to accept the benefits and burdens of the Lessee interest of Ilia Kertsman dba Baza International, LLC[.]

CP 20 (Emphasis added). Mr. Kertsman remained secondarily liable for the completion of the terms and conditions of the Lease:

NOW, THEREFORE, For Value Received It Is Agreed As Follows:

1. Ilia Kertsman dba Baza International, LLC hereby assign interest to William and Teresa Grover as individuals, dba Grover International, LLC its Lessee's interest in the attached commercial lease agreement. **Ilia Kertsman dba Baza International will be secondarily liable for the completion of the terms and conditions of the assigned lease.**

2. William and Teresa Grover as individuals, dba Grover International, LLC accepts such assignment and agrees to perform all of the duties and obligations of Lessee under the Ilia Kertsman dba Baza International, LLC as Lessee.

Id. (emphasis added). Mr. Grover and Mr. Kertsman personally signed the above conditions on December 12, 2005 as follows:

ASSIGNEE: Grover International, LLC by William Grover, member

ASSIGNOR: Baza Int'l, LLC by Ilia Kertsman, member

Id. Additionally, the Assignment named the Grovers "as individuals" five times, i.e.:

William and Teresa Grover as individuals, dba Grover International, LLC has **agreed to accept the benefits and burdens** of the Lessee interest...

Lessor has agreed to approve said assignment and to accept William and Teresa Grover **as individuals**, DBA Grover International, LLC as Lessee...

App. Br. at 12; CP 20. As to the original lease's "LANDLORD IMPROVEMENTS" provision, the provision was attached to the Grover

assignment “and made a part hereof as though set forth at length herein.”

CP 17, 20. Therefore, the “LANDLORD IMPROVEMENTS” provision required the following of the Grovers:

Tenant agrees to pay the remaining balance towards the installation of an air conditioning system and new office carpet.

CP 17, 20. As to the Grovers’ personal liability, the trial court held:

[T]he Grovers as business people involved in leasing commercial space are bound by the language of the Assignment and that placing the name of the LLC first and adding the work ‘member’ after the personal signature did not change the language of the Assignment that the individual lessors, or at a minimum Mr, [sic] Grover, are parties to the contract. ... [A] commercially reasonable construction makes him individually as well as the community liable.

CP 168. Between December 12, 2005 and March 25, 2006, Mr. and Mrs. Grover and Mr. Kertsman enjoyed the full benefits of the sublease agreement and paid all rent obligations timely. CP 75-76.

4. Losh Family, LLC is the real party in interest.

Shortly after the sublease agreement was entered between the Kertsmans and Grovers, Losh Family LP merged with Losh Family Properties, LLC, on December 12, 2005. CP 75-76. In August of 2006, the entity formally changed its name to Losh Family, LLC, the respondent in this action. CP 75-76.

5. The sublease between the Grovers and Sushkins was a valid and enforceable instrument.

On or about March 25, 2006, the Grovers assigned their interest in the Lease to Mr. Sushkin and Ms. Rubtsova (“the Sushkin/Rubtsova Assumption”). CP 22. Pursuant to the terms of the Sushkin/Rubtsova Assumption, the Sushkins accepted the assignment from the Grovers and assumed the Lease as lessee thereunder. *Id.* Mr. and Mrs. Grover remained jointly and severally liable for the completion of the terms and conditions of the Lease:

Sushkin’s assumption of the lease shall not otherwise affect Baza’s rights and obligations under the lease.

...Lessor [plaintiff] and Grover agree that the assumption of this lease shall not create, modify, or affect in any way the legal rights or obligations of Lessor and Grover regarding the claimed assignment.

Id. Mr. and Mrs. Grover, Mr. Sushkin, and Ms. Rubtsova all signed the Assumption on March 25, 2006. *Id.* The Assumption defines “Grover” to mean “William and Teresa Grover.” *Id.* The Grovers’ signatures contain no description of any representative capacity. *Id.*

Between March 25, 2006 and October 31, 2006, Mr. Sushkin and Ms. Rubtsova enjoyed the full benefits of their sublease agreement and paid their rent obligations timely. CP 75-76.

6. The tenants breached the lease and subleases as of November 2006.

The tenants and subtenants enjoyed the full benefits of their lease agreements and made timely payments on their rental obligations for more than three years. CP 75-76. Beginning in November 2006, the tenants failed to make timely rent and Triple Net Costs payments to Losh pursuant to the agreements. *Id.* As such, on or about November 30, 2006, Losh served all tenants and subtenants with a notice of default and a demand for payment. CP 92-93. None of the tenants responded to Losh's notice of default. CP 75-76. In or about mid-December 2006, the tenants vacated and/or abandoned the portion of the Property they had leased without the consent of Losh. *Id.* When it became apparent that the tenants would not be returning to the property and did not intend to resume their lease obligations, Losh entered the premises to clean the property and attempt to mitigate its damages by seeking new tenants. *Id.*

7. Due to breach of the lease agreements, Losh incurred damages in the amount of \$74,670.86.

Losh mitigated its damages by re-letting the property on October 1, 2007. CP 75-77. Losh was able to sign a new tenant paying the same monthly rent as the defendants had agreed to in their lease and subleases, \$4,150.00 per month in rent, plus \$1,015.00 in monthly triple net costs.

Id. Thus, Losh's damages from the defendants' breach of contract accumulated from November 1, 2006 to October 1, 2007.

In total, the tenants and subtenants owed Losh \$45,650.00 for 11 months of unpaid rent, and \$11,165.00 in Triple Net Costs for the same 11-month period. CP 61. Losh also incurred multiple costs relating to the tenants' breach of the lease, including \$5,825.00 for the cost of janitorial labor and cleanup, \$251.91 for repair work, \$2,278.10 for the removal of debris and other items left on the Property by the defendants, and \$3,017.88 in costs for re-letting the Property. CP 143-44. At the rate of interest permitted by RCW 4.56.110, the full amount owed by the tenants for their breach of contract was \$74,670.86. CP 163-64.

8. Pursuant to the lease agreements, Losh was entitled to an award for attorney fees and costs in the amount of \$ 37,747.00.

Here, the lease entered between Losh and the Kertsman defendants included a provision for attorney fees if the tenants defaulted on the rental agreement. CP 82. Specifically, the lease provided:

If by reason of any default on the part of Lessee [defendants] it becomes necessary for the Lessor [Losh] to employ an attorney or in case Lessor shall bring suit to recover any rent due hereunder, or for breach of any provision of this lease or to recover possession of the leased Premises, or if Lessee shall bring any action for any relief against Lessor, declamatory or otherwise, arising out of this lease and Lessor shall prevail in such action, then and in any of such events, Lessee shall pay Lessor reasonable

attorneys' fees and all costs and expenses expended or incurred by the Lessor in connection with such default or action.

Id. The above provision was included in the lease agreement for this precise scenario. Since Losh was the prevailing party, pursuant to the parties' contractual agreement, the trial court agreed that Losh was entitled to recovery of fees and costs. CP 82, 592-97. Based on the lodestar method, the trial court awarded Losh \$37,474.00 in total defense costs and attorney fees. CP 592-97.

D. SUMMARY OF ARGUMENT

The trial court properly granted Losh's summary judgment motion, because there was no genuine issue of material fact. The Kertsmans, Grovers, and Sushkins entered valid and enforceable lease and sublease agreements for commercial property. All tenants fully performed under the agreements for more than three years. All tenants breached their lease and subleases by failing to perform under the agreements beginning in November 2006.

Further, pursuant to the lease agreements, Losh was entitled to recovery of fees due to the tenants' breach.

In sum, numerous grounds exist to affirm the trial court. This court also should award Losh its costs and attorney fees incurred on appeal.

E. ARGUMENT

1. Summary judgments are reviewed *de novo*.

“Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *see* CR 56(c). The purpose of summary judgment is to avoid useless trials on issues which cannot be factually supported, or, if factually supported, could not, as a matter of law, lead to a result favorable to the non-moving party. *Burriss v. General Ins. Co. of America*, 16 Wn. App. 73, 553 P.2d 125 (1976).

The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (overruled on other grounds). The nonmoving party then has the burden of submitting competent evidentiary materials showing specific disputes as to material facts. CR 56(e). The nonmoving party may not rely on “speculation, bald argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Rather, the nonmoving party must set forth specific facts that

sufficiently rebut the moving party's contentions. *Id.*; CR 56(e).

On appeal the court reviews summary judgment rulings *de novo*. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 300, 174 P.3d 1142 (2007). In its *de novo* review of a grant of summary judgment, this court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998); *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990).

In their effort to generate factual disputes, the Grovers virtually ignore the six-page letter ruling of the trial court dismissing their arguments on appeal that (1) based on the signature line of their Assignment, they are not personally liable for breach, and (2) despite three years of performance on the five-year lease term, the legal description lends the lease to merely a month-to-month agreement of which they were not in breach.

Losh was entitled to summary judgment because the lease and subleases were valid, enforceable agreements that were breached by all tenants and subtenants as of November 2006. As a matter of law, the Grovers have not presented any evidence to preclude summary judgment.

2. The trial court properly determined that the Assignment between the Kertsmans and Grovers, establish that the Grovers are personally liable.

The Grovers mistakenly assert that the Assignment only bound Grover International, LLC, and not William and Teresa Grover personally.

App. Br. at 8. Mr. Grover's signature appeared as follows:

ASSIGNEE: Grover International, LLC by William Grover, member

CP 20. As support for this argument, the Grovers argue that the above signature represented Mr. Grover only in his capacity as a member of Grover International, LLC. App. Br. at 11-12. Notwithstanding the Grovers' cited authority, the Grovers ignore the legal analysis of the trial court.

In evaluating Losh's motion for summary judgment, the trial court properly held that the Kertsman-Grover Assignment must be read as a whole, with reasonable effect given to each of its parts. CP 168 (citing *Public Employees Mut. Ins. Co. v. Sellen Const. Co.*, 48 Wn. App. 792, 796, rev. den., 109 Wn.2d 1016 (1987)). The Grovers mistakenly state that the trial court "determined that the signature was ambiguous, but nonetheless ruled that it could resolve that question on summary judgment." App. Br. at 11. In fact, the trial court held:

[T]he Grovers as business people involved in leasing commercial space are bound by the language of the Assignment and that placing the name of the LLC first and adding the work 'member' after the personal signature did not change the language of the Assignment that the individual lessors, or at a minimum Mr, [sic] Grover, are parties to the contract. . . . [A] commercially reasonable construction makes him individually as well as the community liable.

CP 168. Accordingly, the trial court did not determine that the lease agreement was ambiguous, but rather, that a commercially reasonable interpretation of Mr. Grover's signature deemed him personally liable for performance under the agreement. *See also, Wilson Court Limited Partnership v. Tony Maroni*, 134 Wn.2d 692, 710, 952 P.2d 590 (1998) (“[O]ur commercially reasonable construction of the Guaranty resolved the ambiguity by imposing personal liability on [the defendant] . . . If [defendant] Riviera did not intend personal liability, he should have said so”).

The Grovers' participation in Grover International, LLC, does not preclude obligations on the Kertsman-Grover Assignment, where they agreed to be liable as individuals. Despite the Grovers' argument that “there is not a single shed [sic] of evidence that either of the Grovers ever agreed to be personally bound to the Assignment,” the Grovers entered the Assignment “as individuals” five times, e.g.:

William and Teresa Grover as individuals, dba Grover International, LLC has agreed to accept the benefits and burdens of the Lessee interest...

Lessor has agreed to approve said assignment and to accept William and Teresa Grover **as individuals**, DBA Grover International, LLC as Lessee...

App. Br. at 12; CP 20. They cannot now deny that they signed and are bound to the Assignment. Further, Mr. and Mrs. Grover personally signed the Sushkin Assumption individually. CP 22. The Grovers ignore the simple fact that they remained jointly and severally liable for the completion of the lease conditions pursuant to the Sushkin Assumption. Just as they personally signed the Assumption, they are personally liable under the first Assignment.

- 3. The trial court aptly determined that the Grovers' performance under the lease agreement precludes the argument that the agreement was invalid.**

Similarly, the Grovers fail to present any evidence to dispute the trial court's determination that the statute of frauds was satisfied.

- a. The legal description was sufficient to satisfy the statute of frauds.**

Finding that the doctrine of partial performance satisfied the statute of frauds, the trial court did not specifically determine whether the lease's legal description was adequate. As discussed in § III.B., *infra*, the trial court was proper in so holding. However, it is Losh's position that the

legal description provided in the parties' lease was sufficient to satisfy the statute of frauds.

The parties' commercial lease was for a five-year term. The legal description of the leased property was stated as follows:

The Lessor does hereby lease to Lessee...those certain Premises situated in the City of Renton, County of King, Washington described as follows:

Approximately 10,000 square feet on the ground floor located on the southerly section of Lots 4, 5, 6, Block 20 of the City of Renton as recorded in Plats, Records of King County.

[H]ereinafter called "Premises." Commonly known as 329 Wells Avenue South, Renton, WA 98055-2740.

CP 12. The Grovers overstate the general rule that in "every contract or agreement involving a sale or conveyance of platted real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county, and state." *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949) (emphasis added).

The Grovers mistakenly assert that the legal description on the parties' lease is invalid "because it could be any plat or addition in Renton." App. Br. at 12-13. As support for their hypertechnical application of the *Martin* Court's holding, the Grovers cite to *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 237, 189 P.3d 253, 256

(2008). App. Br. at 12. The Grovers' application of these holdings is inapplicable to the lease in this matter.

In *Home Realty*, this court reviewed a residential purchase and sale agreement pertaining to a home in Bellevue, Washington. *Id.* at 233. It was undisputed that the purchase and sale agreement did not a legal description of the real property, but did contain boilerplate language authorizing the real estate agent to insert, **attach** or correct the Legal Description of the Property. *Id.* at 234 (emphasis in original). There was conflicting evidence as to whether the statutory warranty deed, which contained a complete legal description of the property, had been attached to the purchase contract. *Id.* When the sale failed to close, the seller refused to return the purchaser's earnest money. *Id.* at 235. The trial court granted the seller's summary judgment motion and held that despite the lack of a physically attached legal description, the statute of frauds had been satisfied where the proper legal description was available in the parties' file of documents. *Id.* at 235-36. On review, this court determined:

We conclude that the trial court erred in ruling that the statute of frauds was satisfied **based solely on oral testimony of the parties' intent** to "attach" the purchase and sale agreement and statutory warranty deed. This ruling plainly **contravened Washington's well-established, strict rule against recourse to oral testimony in satisfying the statute of frauds.** Although

the court faulted the Lees for failing to submit competing evidence regarding the parties' intent, in Washington, the legal description **must be sufficiently adequate** to avoid the need to examine intent.

Id. at 239 (emphasis added). The court of appeals in *Home Realty* determined that the statute of frauds had not been met where the trial court relied on oral testimony of the parties to determine their intent. Additionally, this court confirmed in *Home Realty* that an adequate legal description was required "to avoid the need to examine [the parties'] intent." *Id.*

The Grovers also rely on the unhelpful holding in *Martin*, 35 Wn.2d at 229, to support their argument that without the identification of the plat or addition, the legal description of the parties' lease is insufficient to satisfy the statute of frauds. App. Br. at 12. In *Martin*, a buyer and seller of real property entered a contract for the sale of property legally described on the earnest money agreement as "at 309 E. Mercer and furniture as per inventory in the City of Seattle, County of King, State of Washington." *Martin*, 35 Wn.2d at 224. The trial court held that the earnest money agreement did not sufficiently meet the statute of frauds where parol evidence would have to be resorted to in identifying the property. *Id.* at 225. On review, the Court agreed:

In the interests of continuity and clarity of the law of this state with respect to legal descriptions, we hereby hold that every contract or agreement involving a sale or conveyance of platted real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county, and state. In so far as the *Thompson* case, supra, conflicts with this rule, it is hereby overruled.

Id. at 228 (citing *Thomson, Swan & Lee v. Schneider*, 127 Wash. 533, 221 P. 334 (1927)).

The *Martin* opinion has since been explained by the court in *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 368 P.2d 372 (1962). The *Tenco, Inc.* court reviewed an earnest money agreement wherein the agreement between the buyer and seller provided an inaccurate property description encompassing fifty acres of land, when the seller owned and intended to sell only twenty acres. *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 480-81, 368 P.2d 372 (1962). Among other issues considered was whether the earnest money agreement was unenforceable under the statute of frauds where the land description was inaccurate. *Id.* at 482. The applicable portion of the opinion provides:

The classic case in Washington law with respect to property description problems is, of course, *Martin v. Seigel* (1949), 35 Wn. (2d) 223, 212 P. (2d) 107, 23 A. L. R. (2d) 1. . . . The court volunteered a rule for determining whether descriptions of platted property were sufficient by indicating that a memorandum must contain ‘the description of such property by the correct lot number(s),

block number, addition, city, county, and state.’ *Martin v. Seigel* has since been qualified to a certain extent, but, along with *Bingham v. Sherfey* (1951), 38 Wn. (2d) 886, 234 P. (2d) 489, which sets forth description requirements for unplatted property, and other cases, it stands for the **general proposition that compliance with the statute of frauds in land transaction contracts or deeds requires a description of land sufficiently definite to locate it without recourse to extrinsic evidence** or else reference must be made to another instrument which does contain a sufficient description.

Id. at 484-85 (emphasis added) (citing *Bigelow v. Mood*, 56 Wn.2d 340, 353 P.2d 429 (1960)).

As emphasized in the holdings cited by the Grovers, to comply with the statute of frauds, an instrument must contain a description sufficient to locate the land without recourse to oral testimony. *Ecolite Mfg. Co. v. R.A. Hanson Co.*, 43 Wn. App. 267, 270, 716 P.2d 937 (1986). In this case, none of the tenants have offered or been required to testify as to the intent of the parties or the understanding of the lease agreements. Moreover, the lease agreement at issue here **did** provide a legal description of the leased premises, unlike the purchase and sale agreement in *Home Realty*. Accordingly, the Grovers’ reliance on the cases cited is misplaced and unresponsive of their argument. Further, Losh’s Complaint provided the following legal description of the commercial property:

The property which is the subject of the commercial lease agreement between the parties (“Properties”) is located at

329 Wells Avenue South, Renton, King County, Washington, 98055, and is legally described as follows:

PARCEL A: LOT 4 AND THE SOUTH 48 FEET OF LOT 5, BLOCK 20, TOWN OF RENTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 1 OF PLATS, PAGE 135, RECORDS OF KING COUNTY, WASHINGTON.

PARCEL B: LOT 5, LESS THE SOUTH 48 FEET, AND LOT 6, BLOCK 20, TOWN OF RENTON, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 1 OF PLATS, PAGE 135, RECORDS OF KING COUNTY, WASHINGTON.

SITUATE IN THE CITY OF RENTON, COUNTY OF KING, STATE OF WASHINGTON.

CP 6. The Grovers' Answer to Losh's Complaint admits that the above legal description is the accurate legal description for the subject property.

CP 50. As the lease's legal description met the general requirements for a valid instrument, the statute of frauds has been satisfied.

b. The trial court properly concluded that the statute of frauds was satisfied under the doctrine of partial performance.

The trial court's finding that partial performance was met by the Grovers is well-supported by Washington law and the facts of this case. CP 170-71. The Grovers contend that Losh offered no evidence of part performance and that the trial court never explained how the Grovers' possession and payment of rent unmistakably pointed to a five-year lease

as opposed to a month-to-month agreement. App. Br. at 13, 16. For the following reasons, the Grovers' argument fails.

First, partial performance has been repeatedly recognized in holdings where tenants and subtenants contend that a lease is invalid. See *Tiegs v. Watts*, 135 Wn.2d 1, 15-16, 954 P.2d 877 (1998) (lease was held enforceable under the doctrine of partial performance because the parties acted upon the instrument as a lease: "We have recognized as enforceable leases ones that do not fully comply with statutory requisites when under the facts it would be inequitable for the challenging parties to assert invalidity of their own agreements."); *Stevenson v. Parker*, 25 Wn. App. 639, 608 P.2d 1263 (1980) ("The parties do not dispute [the lease's] basic terms. Absent then are the evils — the potential for fraud and the uncertainty inherent in oral agreements — which necessitated the statute of frauds"). If a lease need not be signed by the lessee, provided that he accepts it and acts thereunder, then it need not be acknowledged by him. *Tiegs*, 135 Wn.2d at 16. Where a commercial lease is inadequately acknowledged by the lessee, the lessee waives its right to avoid the lease by paying rent and possessing the premises; the lessee's part performance took the lease outside the statute of frauds. *Ben Holt Industries, Inc. v. Milne*, 36 Wn. App. 468, 675 P.2d 1256 (1984).

As the Court of Appeals explained in *Stevenson*:

The principle elements or circumstances involved in determining whether there has been sufficient part performance to unequivocally point to the contract are (1) delivery and assumption of actual and exclusive possession of the land, (2) payment or tender of the consideration, whether in money or property or services, and (3) the making of permanent, substantial and valuable improvements, referable to the contract. *Powers v. Hastings*, 20 Wn. App. 837, 847, 582 P.2d 897 (1978).

Applying these elements to the facts, we find sufficient part performance to remove the lease from the operation of the statute of frauds. First, [tenant] Mrs. Corbray took possession of the house in May 1974, under the terms of a written lease which the parties have subsequently treated as the measure of their rights. This long acquiescence, in itself, has been held to be a sufficient waiver of the right to avoid a lease for lack of an acknowledgment. *Gattavara v. Cascade Petroleum Co.*, 27 Wn.2d 263, 265-66, 177 P.2d 894 (1947); *Metropolitan Bldg. Co. v. Curtis Studio of Seattle*, 138 Wash. 381, 386-87, 244 P. 680 (1926).

Stephenson, 25 Wn. App. at 644-45. Notwithstanding the first two elements of partial performance, the Grovers' personal possession and payment under their sublease terms, as correctly stated by the trial court:

It is clear from a number of cases, including the *Pardee v. Jolly* case cited by the Grovers, that all three elements are not required to overcome the statute of frauds.

CP 170-71. The trial court's letter ruling granting summary judgment went on to quote *Powers v. Hastings*, 93 Wn.2d 709, 612 P.2d 371 (1981):

Although the strongest case for part performance in presented where all three part performance elements [sic] possession, payments and improvements are present, this

court repeatedly has found sufficient part performance where two elements exist. [Citations omitted.]

Id.

As to the first two elements, the Grovers argue that the trial court improperly held that the Grovers “acknowledge both possession and payment.” App. Br. at 14. Rather, the Grovers argue, Grover International, LLC occupied the premises and paid rent, not the Grovers personally. This argument was raised by the Grovers in their motion for reconsideration, and remains incorrect. As explained in § II, *supra*, the Assignment rendered the Grovers personally liable for the lease agreement; accordingly, the occupation of the premises and payments made likewise render the Grovers personally liable for these payments. By entering the Assignment in their personal capacity, they were bound to the terms of the agreement. Moreover, this argument is dispelled by the Grovers themselves:

The Grovers performed the lease while they occupied it, and Sushkin and Rubtsova performed it for more than a month after they assumed it.

App. Br. at 16. The Grovers cannot argue that they did not personally perform under the lease when by their own admission, “the Grovers” performed under the lease agreement during their occupation of the premises. Further, the Grovers’ Answer to Losh’s Complaint admits that

the legal description is the accurate legal description for the subject property. CP 50.

The Grovers cite *Pardee v. Jolly*, 163 Wn.2d 558, 567, 182 P.3d 967, 972-73 (2008) to support their argument that partial performance was been met because Losh “presented no evidence that any improvements had been made.” App. Br. at 13-14. The Grovers are wrong for two reasons. First, as properly noted by the trial court, the parties’ original lease contained the following “LANDLORD IMPROVEMENTS” provision:

Tenant agrees to pay the remaining balance towards the installation of an air conditioning system and new office carpet.

CP 17. The provisions was attached to the Grover assignment “and made a part hereof as though set forth at length herein.” CP 20. The tenants not only performed on the five-year lease but also contracted to make substantial long-term improvements to the premises, for the benefit and enjoyment of the tenants.

The *Pardee* Court analyzed similar facts in reviewing an option contract between parties wherein it was argued that an inadequate legal description precluded enforcement of the agreement. *Pardee*, 163 Wn.2d at 568. The *Pardee* Court affirmed the enforceability of the option contract and found that the elements of part performance satisfied the statute of frauds where the option contract provided the purchaser with the

right to make permanent and valuable improvement to the home. *Id.* at 567.

The Grovers' next unsupported argument is that despite the lease agreement's provision requiring the tenants to pay a portion of the office's newly-installed air conditioning and carpet, Losh did not provide evidence that the contracted improvements had actually been performed. App. Br. at 14. In making this argument, the Grovers attempt to take a "second bite at the apple," where this argument did not appear in any briefing opposing Losh's summary judgment motion or in the Grovers' motion for reconsideration. The Grovers argued the following in their opposition to Losh's summary judgment motion:

In this case, Losh has evidence of occupancy and payment of rent. ...Losh has no evidence such as substantial tenant improvements that would tip the balance in favor of a long term lease.

CP 117. In its reply briefing, Losh included the lease's provision for landlord improvements quoted above. CP 141. In their motion for reconsideration, the Grovers similarly fail to succinctly argue that sufficient evidence of repairs had not been provided. CP 176-77. It is clear that the Rules of Appellate Procedure disfavor new arguments raised for the first time on appeal. *See* RAP 10.3(g) (the "appellate court will only review a claimed error which is included in an assignment of error or

clearly disclosed in the associated issue”). It is inappropriate for the Grovers to now claim that insufficient evidence exists to establish that the tenants made improvements to the property evidencing their intent to enter the contracted agreement.

Interestingly, the Grovers make this new argument in support of their general claim that the lease was effective only as a month-to-month lease. This point was dismissed by the trial court’s explanation:

[T]he doctrine of part performance also imposes a requirement that the “acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other relationship ... or may be accounted for on some other hypothesis, there are not sufficient. [Citation.]

... [T]he acts of payment and possession point unmistakably to the existence of the Lease.

CP 171 (quoting *Miller v. McCamish*, 78 Wn.2d 820, 479 P.2d 919 (1971), quoting *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623, 626 (1947)). As the trial court noted and the Grovers admit, they made timely payments for several months prior to the Sushkins’ occupation. App. Br. at 16. If the Grovers believed they were leasing the premises monthly and did not intend to be bound to the full term of the lease, then they would have had no cause to enter the sublease with the Sushkins.

In sum, the trial court properly determined that the lease was valid under the doctrine of partial performance. The ruling of the trial court is

supported by numerous cases that find partial performance where a lessee occupies the leased space, pays rent, and makes improvements to the premises. In this case, the trial court reviewed the lease agreements between the parties and the evidence that the Grovers met all three elements of partial performance where they personally occupied the premises, paid the monthly rental payments for several months, and were contractually obligated to make substantial tenant improvements at the property.

4. Losh moves for an award of attorney fees and costs pursuant to the parties' lease agreement.

The parties' lease agreement included a provision for attorney fees and costs for responding to the present appeal. Specifically, the lease provided:

If by reason of any default on the part of Lessee it becomes necessary for the Lessor [Losh] to employ an attorney or in case Lessor shall bring suit to recover any rent due hereunder, or for breach of any provision of this lease or to recover possession of the leased Premises, or if Lessee shall bring any action for any relief against Lessor, declamatory or otherwise, arising out of this lease and Lessor shall prevail in such action, then and in any of such events, Lessee shall pay Lessor reasonable attorneys' fees and all costs and expenses expended or incurred by the Lessor in connection with such default or action.

CP at 82. The above provision was included in the lease agreement for this precise scenario. Since Losh was the prevailing party, pursuant to the parties' contractual agreement, the trial court agreed that Losh was entitled

to recovery of fees and costs and awarded Losh \$37,474.00 in total defense costs and attorney fees. CP 592-97. The above lease provision also applies to the Grovers' appeal. Accordingly, Losh is entitled to its attorney fees in the trial court and on appeal.

Further, pursuant to RAP 18.1, RAP 18.9(a), CR 11, and RCW 4.84.185, Losh requests an award of attorney fees and costs. An appeal is frivolous (and a recovery of fees warranted) "if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *In re Marriage of Greenlee*, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992) (quoting *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, rev. denied, 104 Wn.2d 1020 (1985)).

Similarly, RCW 4.84.185 provides:

In any civil action, the court ... may, upon written findings . . . that the action ... was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense... .

As outlined above, well settled authority provides for fees associated with defending frivolous actions, such as the appeal before this court.

Accordingly, Losh is entitled to recovery of fees and costs pursuant to the parties' lease agreement, as well as RAP 18.1, RAP 18.9(a), CR 11, and RCW 4.84.185.

5. This court should affirm the trial court's Order granting summary judgment to the Kertsmans.

Finally, although not fully briefed herein, Losh adopts by reference the arguments of the Kertsman respondents as pertains to the trial court's rulings between the Kertsmans and Grovers. For the reasoning set forth in the Kertsman Respondents' Brief, this court should adopt the trial court's Orders granting summary judgment and for recovery of fees and costs. CP 505-07; 605.

F. CONCLUSION

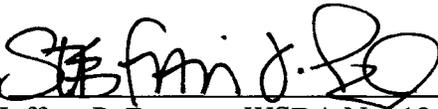
This court should affirm the decisions of the trial court, which properly granted summary judgment to Losh against all tenants and subtenants, and properly granted Losh an award of attorneys' fees as provided in the parties' lease agreements. The Grovers offer no evidence or authority of which this court was unaware when it granted Losh's summary judgment motion. The Grovers simply reiterate the arguments they presented in their opposition motion, at oral argument, and in their motion for reconsideration. The trial court's decision found that based on the evidence presented and supporting case law, the Grovers were in

breach of their lease agreement, and that the Grovers were personally liable for damages incurred. The trial court presented a well-reasoned six-page letter ruling granting Losh's summary judgment motion, and that decisions should be affirmed.

In addition, this court should award attorney fees to Losh, pursuant to RAP 18.1, 18.9(a), RCW 4.84.185, and CR 11 for having to defend against this frivolous appeal.

RESPECTFULLY SUBMITTED this 5th day of August, 2009.

LEE SMART, P.S., INC.

By 
Jeffrey P. Downer, WSBA No. 12625
Stefanie L. Peppard, WSBA No. 39290
Of Attorneys for Respondent Losh Family,
LLC

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on August 5, 2009, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. Matthew Clark, Counsel for defendants Kertsman
Mr. Charles S. Wright
Davis Wright Tremaine, LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

VIA LEGAL MESSENGER

Mr. Matthew F. Davis, counsel for defendants Grovers
Demco Law Firm, P.S.
5224 Wilson Avenue S., Suite 200
Seattle, WA 98118

VIA LEGAL MESSENGER

Mr. Martin Snodgrass, counsel for defendants Sushkin and Rubstova
Attorney at Law
3302 Oakes Avenue
Everett, WA 98201-4401

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COURT OF WASHINGTON
STATE OF WASHINGTON
JULY 15 DIV. 31

DATED this 5th day of August, 2009, at Seattle, Washington.

Marie Vestal Sharpe
Marie Vestal Sharpe, Legal Assistant