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Appeal No. 63712-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE AT SEATTLE

Craig Bernhart, DDS, P.S.,

Appellant,

vs.

Cedar Professional Center, LLC,

Respondent.

APPELLANT'S REPLY BRIEF

Appeal from the Order and Judgment dated March 31, 2009 entered by Commissioner Lester Stewart of the Snohomish County Superior Court in the matter of Cedar Professional Center, LLC v. Craig Bernhart, DDS, P.S. case number 09-2-03723-8

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A. INTRODUCTION

The Court Commissioner committed three reversible errors in this case:

Initially, the Commissioner erred by entering the Order To Show Cause when it was not supported by any competent admissible evidence or supporting declarations. It was supported only by an unattested statement of counsel who lacked personal knowledge of any facts (CP39). Respondent fails to cite any authority authorizing the court to rely on such statements as evidence.

Second, the Commissioner erred by not setting this matter for trial. Respondent does not dispute that a commercial tenant has an absolute right to trial pursuant to RCW 59.12.130 when any pleading is filed which indicates that the payment of rent is in dispute or contested. In the context of the present case, the Court Commissioner was thus obligated to set the case for trial upon Appellant's:

(a) filing a notice of appearance (CP 7);

(b) filing an answer (CP 8);

(c) filing a declaration contesting the default (CP 9);

(e) personally appearing in court;

(f) tender of evidence, cancelled checks and an accounting showing payment.

The Court Commissioner also erred when he considered the

Respondent's Declaration of Kay Anderson (CP12) submitted by the Respondent on the day of the hearing while at the same time refusing to consider evidence offered by the Appellant.

B. ARGUMENT IN REPLY

1. The Trial Court Erred By Issuing An Order To Show Cause Which Was Not Supported By Any Competent Evidence.

The trial court erred by issuing an Order to Show Cause which was not supported by competent evidence. The Complaint was not verified, attested to, or sworn to by any witness. (CP 43-44). A copy of the lease was not attached to the Complaint, nor any related pleading filed at that time. The Order was supported only by a bald statement of Respondent's counsel Elizabeth Hebner that rent was due (CP39) .

The Respondent seeks to side step this deficiency by arguing that the Court also had the Declaration of Kay Anderson (CP 12) . However, this Declaration was not offered to the court at the time the Order To Show Cause was issued, and in fact is dated more than a week later. It was not filed or served on Appellant until the date of the show cause hearing.

In the absence of any supporting declarations, the sole basis of the Order To Show Cause is a bald statement of Respondent's

attorney Elizabeth Hebner. There were no other supporting declarations. Ms. Hebner's statement stated that rent was due.(CP39). It was not under oath or penalty of perjury, nor did it claim to be based or founded on any personal knowledge. (CP39).

A statement of counsel who lacks personal knowledge of the facts is not sufficient to meet landlord's burden of proof. The landlord has to prove his right of possession by a preponderance of the evidence. Housing. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn. App. 382, 292 (2005).

A statement of counsel is not sufficient to overcome a tenant's right of possession which is originally lawful and is presumed to be so until proven otherwise by admissible evidence submitted to the court in strict compliance with the statutory procedural process and rules of evidence. Duprey v. Donahoe, 52 Wn. 2nd 129, 135 (1958).

2. The Trial Court Erred By Following A Summary Show Cause Proceeding Not Authorized By RCW 59.12 When There Was a Factual Dispute Regarding the Payment of Rent.

The Commissioner erred by not setting the case for trial and by attempting a use a show cause procedure to address disputed matters.

RCW 59.12 does not expressly authorize the use of a show cause procedure for commercial evictions. The Court of Appeals has upheld the use of this procedure in a limited circumstance when there is no genuine issue of material facts. IBR, LLC v. Carmen Heuft, 141 Wn. App. 624 (2007).

In IBR,LLC, id. there was a legal dispute involving the adequacy of the notice given to "pay rent or vacate" and the relation between the notice requirements of the statute and the lease. The non-payment of rent was not in dispute. While the parties disagreed about which of two leases was the operative document, both contained the same notice language requiring a 10 day notice. As such the trial court did not take testimony. The Court of Appeals noted that all procedural safeguards had been met, and on that basis upheld the use of this procedure in this case. However, the same is not true in the present case.

Unlike the facts in IBR LLC, id. the facts in the present case reflect a material dispute. In response to the Order To Show Cause, on Monday March 30, 2009 the Appellant timely filed its Notice of Appearance, Answer and Declaration in opposition to the Show Cause Order (CP, 7, 8, and 9 respectively).

At the show cause hearing on Tuesday March 31, 2009 the Appellant proffered evidence of payment, cancelled checks and an

accounting to demonstrate that rent was not due, and that all rent had been paid in full. Under RCW 59.12.130 a tenant has the right to a jury trial when an issue of fact arises. The language of this statute is clear: .

> "Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury is waived as in other cases."

The right to a jury trial under this statute is triggered by the filing of any "pleadings" that present an issue of fact. The statute does not contemplate a mini trial. The right to a jury trial is and shall remain inviolate and may not be bypassed by summary proceedings before a judge. Tuschoff v. Westover, 60 Wn. 2nd 722 (1962).

3. The Trial Court Erred By Considering Evidence Not Given To Appellant Prior To The Show Cause Hearing.

The Commissioner erred by considering evidence in the form of the Declaration of Kay Anderson (CP 12) which had not been served or provided to Appellant prior to the hearing. Since it had not been served or provided to Appellant before the hearing, it should not have been considered by the court, and it can not support the issuance of a Show Cause Order which had been issued the week before. The eviction statutes require proper notice at all stages of the

process. Christensen v. Ellsworth, 162 Wn. 2d 365 (2007).

The Declaration of Kay Anderson is disputed, and the CAM charges claimed in it are not supported. (CP 31-33). The Commissioner considered the Respondent's Declaration of Kay Anderson but at the same time refused to consider the Appellant's records and proof of payment that Dr. Bernhart had brought with him. He did not consider Dr. Bernhart's Declaration. Nor did he review the Appellant's Answer or Notice of Appearance.

The following discourse reflects what occurred at the 3-4 minute hearing.

> Commissioner: I see. Okay. Mr. Bernhart, you're kind of hamstrung herein in terms of responding, but do you have proof that the rent has been paid and is current.
>
> Berhart: Yes, I do.
>
> Commissioner: It's current, is it?
>
> Bernhart: Yes, it is your honor.

After Dr. Bernhart indicated that he had documents he went on:

> Bernhart: I have documents to show that the rents were paid.
>
> Commissioner: Well, you know, Mr. Bernhart, what I'm inclined to do, you may have a meritorious defense. I don't know. Nothing was filed or supplied, filed with or supplied to the court prior to his hearing. ...
>
> Bernhart: You Honor, the documents were filed with the court

yesterday by five o'clock. They were also faxed to, uh, the law firm there showing proof of that the rents were paid.

In fact, the Appellant had timely filed its Notice of Appearance, Answer and Declaration with the Court Clerk and Court Administrator. The Commissioner, however, did not consider them because he did not have "copies", but then turned around and considered the Respondent's Declaration of Kay Anderson which had not been filed or served prior to the hearing.

The Commissioner refused to consider Appellant's checks and accounting demonstrating that no rent was due. The trial court thus has an obligation to allow a tenant to present evidence. Hartson Partnership v. Goodwin, 99 Wn. App. 227 (2000) the Commissioner had the additional duty to safeguard the Appellant's rights to afford Appellant "a meaningful opportunity to be heard" Carlstrom v. Hanline, 98 Wn. App.780, at 790 (2000).

C. CONCLUSION

The judgment against the Appellant should be vacated and the Appellant awarded its reasonable attorney fees on appeal as allowed under the parties' lease.

Dated this 7nd day of May , 2012.

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Attorney For Appellant

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON AT SEATTLE

CRAIG BERNHART, DDS, P.S.,	)	
	)	
Appellant,	)	
vs,	)	Case No. 63712-6-I
	)	
CEDAR PROFESSIONAL CENTER,	)	CERTIFICATE OF SERVICE
	)	APPELLANT'S REPLY BRIEF
Respondent.	)	
	)	

The undersigned hereby certifies under penalty of perjury that on this date he caused or had caused to be served upon the Respondent copies of the Appellant's REPLY Brief and Appendix by U.S. mail postage prepaid addressed to the Respondent Counsel, Craig Sternberg, 500 Union Street Suite 500, Seattle, Wa. 98101

Dated this 7st day of May, 2012.

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