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No. 63733-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

G&I IV KIRKLAND LLC,
a Delaware limited liability company,

Respondent,

vs.

STAT MEDICAL, INC.,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DOUGLASS A. NORTH

BRIEF OF APPELLANT

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I. INTRODUCTION

Tenant Stat Medical! appeals the trial court's order granting summary judgment on landlord G&I IV Kirkland's claim that Stat Medical failed to pay holdover rent for the four months that it alleged Stat Medical remained on the premises after its lease expired. The trial court's summary judgment was based on its erroneous determination that the lease could not be orally modified to allow the waiver of holdover penalties, and ignored a genuine issue of material fact, based on the landlord's own correspondence, indicating that the parties reached an oral agreement allowing Stat Medical to remain on the premises for a short period after the lease expired without being subjected to a holdover penalty.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that the following "material facts exist without controversy:"

- a. Under the holdover provision in the Lease, the base rent as of August 1, 2006, was increased to \$23,006.00 – twice the amount of base rent in effect at the expiration of the Lease. (CP 439)
- b. Defendant was required to pay holdover rent beginning on August 1, 2006. (CP 439)
- c. Defendant did not provide Plaintiff with proper written notice that it was terminating its month-to-month tenancy. (CP 439)

- d. Based on its October 19, 2006, departure from the Leased Premises, Defendant's month-to month tenancy terminated on November 31, 2006. (CP 439)
 - e. Defendant owes Plaintiff \$54,570.83 for half of August 2006 holdover rent; September 2006 holdover rent; October 2006 holdover rent; and November 2006 rent, estimated CAM charges, and holdover rent (paragraphs 2(o), (p), (q), and (r), above). (CP 440)
 - f. Under the Lease, Plaintiff is entitled to a late fee charge equal to five percent (5%) of the amount of any late payment. (CP 440)
 - g. Defendant owes Plaintiff late fees and interest on the amounts owing for half of August 2006 holdover rent; September 2006 holdover rent; October 2006 holdover rent; and November 2006 rent, estimated CAM charges, and holdover rent. (CP 440)
2. The trial court erred in entering its Order Granting Partial Summary Judgment. (CP 437-40) (Appendix A)
3. The trial court erred in entering its Final Judgment. (CP 444-45) (Appendix B)

III. STATEMENT OF ISSUES

- 1. Did the trial court err in holding that the parties' oral agreement waiving holdover penalties was unenforceable because it was not in writing?
- 2. Did the trial court err in summarily finding the tenant liable for holdover penalties when there was a genuine issue of

material fact whether an oral agreement existed between the parties waiving holdover penalties?

3. Did the trial court err in summarily finding that the tenancy terminated at the end of November when the facts taken in the light most favorable to the tenant show that the tenant provided adequate notice of its intent to terminate its tenancy no later than October?

IV. STATEMENT OF FACTS

The following statement of facts is based on the pleadings considered on summary judgment, and relies upon reasonable inferences taken in the light most favorable to the appellant, the nonmoving party. *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 418, ¶ 10, 191 P.3d 866 (2008):

A. Tenant Stat Medical Began Pursuing Other Opportunities To Relocate Its Operations In Anticipation Of The Expiration Of Its Lease With Landlord G&I IV Kirkland.

Appellant Stat Medical, Inc. ("Stat Medical") is a provider of home medical equipment throughout Washington State and has been in business since 1979. (See CP 164) Stat Medical was the tenant under a lease with respondent landlord G&I IV Kirkland, LLC ("G&I IV Kirkland, LLC). (CP 28) The leased premises were located

at the Kirkland 405 Corporate Center, a suburban corporate office park in Kirkland, Washington. (See CP 28)

Stat Medical signed a lease in June 1999 with G&I IV Kirkland's predecessor-in-interest, Riggs & Company. (CP 33-67) The lease was amended twice, once in 1999 (CP 69), and a second time in 2003. (CP 74) The monthly rent was initially \$7,622 with annual increases. (CP 38, 69) By the time of the present dispute, monthly rent was \$11,503. (CP 69) The lease had a July 31, 2006 expiration date (CP 69), and provided that in the event the tenant holds over after the expiration of the lease, without the prior consent of the landlord, "Tenant shall be deemed to be occupying the premises under a month-to-month tenancy... during such tenancy, Tenant agrees to pay Landlord twice the rate of Base Rent in effect on the expiration or termination of the Lease Term." (CP 43) The lease also provided that the landlord's consent "shall be delivered in writing." (CP 56)

By November 2005, in anticipation of its lease expiring on July 31, 2006, Stat Medical sought other locations for the company. (CP 379) On April 27, 2006, Stat Medical signed a non-binding Letter of Intent for premises at Highlands Campus Tech Center in

Bothell. (CP 189, 379) Throughout the following month, Stat Medical negotiated a possible lease with the Highlands. (See CP 193-95, 197-99, 201, 254-68) Meanwhile, on May 24, 2006, Stat Medical was notified that plaintiff G&I IV Kirkland had purchased its leased premises and taken over as landlord. (CP 78)

B. G&I IV Kirkland Contacted Stat Medical Two Months Before The Lease Was To Expire In Hopes Of Retaining It As A Tenant, Agreeing To Waive Any Penalties If Stat Medical Was Unable To Timely Vacate The Premises.

Shortly after Stat Medical received notice of G&I IV Kirkland's purchase of the premises, Jack Rader, the managing member of Kirkland 405-LLC, one of the members of G&I IV Kirkland, contacted Daran Davidson, Stat Medical's broker. (CP 28, 379) Rader had learned that Stat Medical was looking for new space and G&I IV Kirkland was interested in keeping Stat Medical as a tenant. (CP 379) At his deposition, Rader testified, "when it became evident we were going to lose his business I was not happy. I mean we want to keep him. He was a good tenant, he always paid his rent and you could go down the list." (CP 372) Davidson explained to Rader that Stat Medical was already "pretty far along in their negotiations" with the Highlands in Bothell and that

G&I IV Kirkland would have to be “pretty aggressive to keep Stat Medical at their current location.” (CP 379)

The President of Stat Medical, Mike Conforto, was concerned that Stat Medical would be prejudiced by opening up negotiations with G&I IV Kirkland since it would delay Stat Medical’s conclusion of a lease in another location. (See CP 338) This delay could affect how “quickly [they] would move out of the building” and Stat Medical was “sensitive to the issue of holdover rent.” (CP 338) Rader assured Davidson that if Stat Medical would meet with G&I IV Kirkland, it “will not be financial[ly] hurt by talking with us.” (CP 379) As a result of this assurance, Conforto agreed to meet with Rader, and slowed down the negotiations with the Highlands. (CP 379, 389)

In late May or early June 2006, Conforto, Davidson, and Rader met to discuss the possibility of Stat Medical remaining as a tenant. (CP 29, 389) Rader apologized for not approaching Stat Medical sooner, recognizing that G&I IV Kirkland “were coming in sort of late.” (CP 372, 389) According to Conforto, Rader explained that he wanted to present Stat Medical with different options to encourage them to remain on the premises, and once

again assured both Conforto and Davidson that Stat Medical “would not be financially impacted” if it continued to negotiate with G&I IV Kirkland. (CP 389; see also CP 372, 379) Rader told Conforto and Davidson that “slowing [their] current process down to hear [G&I IV Kirkland] out and consider what they ha[d] to offer would not result in damaging [Stat Medical] in the form of holdover rent.” (CP 338)

C. Stat Medical Was Delayed In Vacating The Premises As A Result Of Its Failed Negotiations With G&I IV Kirkland.

On June 16, 2006, only six weeks before the lease termination date, G&I IV Kirkland presented a “Proposal to Lease” to Stat Medical. (CP 382-87) G&I IV Kirkland proposed that the new lease would commence on October 1, 2006 and that “tenant shall be allowed to hold over in existing space without any hold over penalty.” (CP 384) However, because the proposal required Stat Medical to relocate to another space owned by G&I IV Kirkland, Stat Medical rejected the proposal. (CP 371, 379)

On June 21, 2006, Stat Medical executed a new lease for property located at the Highlands in Bothell. (CP 110-33) The new lease could not start until October 1 because scheduling issues arose in part as a result of the several week delay in committing to

the Highland lease because of the negotiations with G&I IV Kirkland. (See CP 85, 338-39)

Conforto reasonably believed that the landlord had promised that Stat Medical would not be charged holdover rent as a result of any delay in vacating after the July 31, 2006 termination date. (CP 338) Consistent with Conforto's understanding, G&I IV Kirkland's property manager, Linda Kaivola, sent a letter to Stat Medical on August 16, 2006, over two weeks after the lease terminated, confirming that holdover rent would not take effect until October 1, 2006 even though the lease expired on July 31, 2006:

The First Amendment to Lease Agreement dated September 1, 1999 for Suite 180 expired on July 31, 2006. It is our understanding that Stat Medical would like to continue leasing Suite 180 on a month-to-month holdover basis... This letter serves as Landlord's thirty day notice effective *October 1, 2006*, the monthly Base Rent for Suite 180 will increase from \$11,503 NNN to \$23,006 NNN.

(CP 81, emphasis added) The agreement allowed the landlord to continue collecting the monthly base rent of \$11,503, but saved Stat Medical the double holdover rent of \$23,006. Conforto viewed the parties' agreement as a "win/win for all since our immediately vacating the space would have left it empty for our old landlords." (CP 339)

Six days after sending confirmation of the parties' agreement, Kaivola sent another letter to Stat Medical, marked "REVISED," on August 22, 2006. Kaivola's "revised letter" stated that rent would increase to \$23,006 on September 1, 2006, not October 1, 2006 as stated in her August 16, 2006 letter. (CP 83)

Stat Medical immediately contested its liability for holdover rent in a letter to Kaivola dated August 28, 2006, noting that the delay in Stat Medical leaving the G&I IV Kirkland premises was caused, in part, by its negotiations with G&I IV Kirkland, and that Rader had assured Stat Medical that it would not be penalized for those efforts:

In our discussion with Jack Rader, we expressed our concern that entertaining a new proposal was likely to take us beyond the end of our lease on the new project, should we decide not to renew at the current location. My broker Daran Davidson and I were told we would not be penalized for taking the time to explore any proposals they had for us.

(CP 85)

Stat Medical explained that while the negotiations with G&I IV Kirkland were brief, they nevertheless resulted in scheduling issues with the new lease that they signed after the negotiations with G&I IV Kirkland failed:

[W]e slowed down our pursuit of the new lease to listen to what Jack had to say and had a number of internal discussions about their proposal and the related issues... While we did not spend a great deal of time on this before we let Jack know that we would continue with the deal we had on the table, it did delay our progress as the delay to commit in Bothell resulted in our running into upcoming scheduling issues, vacations, and other projects our new landlord and other interested parties had going on.

(CP 85) Nevertheless, as a sign of good faith, Stat Medical provided a check for \$5,751.50 – one-half of the base rent – which Conforto explained was “certainly within the parameters of an appropriate holdover charge.” (CP 85-86, 390) Stat Medical also provided written notice that it intended to vacate the premises by the end of September, consistent with Kaviola’s initial letter. (CP 85)

Kaivola sent a “follow up” letter to Stat Medical asserting that any agreement to waive the holdover rental rate was conditioned on Stat Medical executing a new lease with G&I IV Kirkland. (CP 88) Accordingly, Kaivola asserted that Stat Medical owed holdover rent of \$23,006 starting August 1, 2006, contradicting her two earlier letters. (CP 88) Kaivola also acknowledged that Stat Medical intended to vacate the premises by approximately September 30, 2006. (CP 88) This letter was dated August 16,

2006, although clearly it was written well after that date since it purported to respond to Stat Medical's August 28 letter. (CP 88) It is unclear when this letter was actually sent by Kaivola, or received by Stat Medical.

In addition to the payment of \$5,751.50, Stat Medical continued to pay monthly rent of \$11,503 and estimated CAM charges for August, September, and October. (See CP 93, 439) Stat Medical vacated the premises on October 19, 2006 after providing written notice on October 3, 2006 of its intent to start moving out on October 13, 2006. (CP 328, 390, 439)

D. G&I IV Kirkland Sued Stat Medical Seeking Holdover Rent, CAM Reconciliations, Interest, And Attorney Fees.

On February 14, 2008, G&I IV Kirkland filed a complaint against Stat Medical for breach of contract. (Sub no. 1, Supp. CP ___) The complaint was amended on September 26, 2008. (CP 4) G&I IV Kirkland alleged that Stat Medical failed to pay holdover rent for the months of August¹, September, and October. (CP 6) In addition, G&I IV Kirkland alleged that Stat Medical failed to pay both base rent and holdover rent for November. (CP 6) Finally,

¹ The complaint acknowledges that Stat Medical paid \$5,751.50 as a "holdover charge" for August. (CP 6)

G&I IV Kirkland alleged that Stat Medical failed to pay its share of common area maintenance expenses (“CAM Reconciliations”) for November. (CP 6)

Stat Medical asserted several affirmative defenses, including, among others, accord and satisfaction, waiver, and equitable estoppel. (CP 12) Recognizing that it would owe some CAM charges and possibly holdover rent for October, Stat Medical deposited \$28,000 into the court registry of the King County Superior Court on March 19, 2008, an amount that Stat Medical asserted was greater than the amount owed, if any, to G&I IV Kirkland. (CP 1-3, 14, 377, 390)

On February 27, 2009, G&I IV Kirkland sought summary judgment that Stat Medical owed holdover rent under the terms of the lease and CAM reconciliation charges for 2006. (CP 362) The parties appeared before King County Superior Court Judge Douglass North (“the trial court”) on March 27, 2009. (CP 446)

The trial court expressed concern that any agreement to waive holdover rent was not in writing as required under the lease²:

Well, I guess what I am trying to do is, there is a provision in the contract indicating that the modification of the landlord's duties have to be indicated in writing, and we don't have anything in writing from the landlord indicating that something like this is going to occur.

(CP 452)

The trial court disagreed that the existence of an agreement to forego the increased rent in exchange for Stat Medical agreeing to negotiate with G&I IV Kirkland was a genuine issue of material fact because the agreement was not in writing:

The only [issue of fact] that I was aware of from reading the materials was the assertion that there had been an agreement to forego the increased rent in return -- in dealing with the negotiations. And I thought that there was some real concern about whether that was valid or not, in view of the requirement that things be done in writing.

(CP 453)

The trial court also expressed doubt that Stat Medical was delayed by the negotiations. The trial court doubted Conforto and

² The trial court was apparently relying on language in the lease that provides that "whenever Landlord's consent, approval, or other action is required under the terms of this Lease, such consent approval or action... shall be delivered in writing." (CP 56: Lease, ¶ 6.9)

Davidson's statements that they "slowed [other negotiations] down' without any evidence that that's true at all," concluding that it was all "smoke and mirrors:"

I guess what I'm not following, Mr. Gould, is finding any indication in the record that your clients were delayed in any way. It appears that they proceeded on a straight track to lease the other property and there is no indication that they were delayed in any fashion... But I'm supposed to just take – one can defeat summary judgment then simply by saying, 'oh, we slowed it down,' without any evidence that that's true at all... I think it's all smoke and mirrors.

(CP 465-66)

On May 4, 2009, the trial court granted partial summary judgment, holding that Stat Medical was required to pay holdover rent beginning on August 1, 2006 and based on its departure from the leased premises on October 19, 2006, that Stat Medical's month-to-month tenancy terminated on November 30, 2006. (CP 437-40) The trial court found that Stat Medical owed \$54,570.83 for holdover rent from August through November. (CP 440)

The trial court denied G&I IV Kirkland's motion for summary judgment on the CAM reconciliation charges without prejudice. (CP 440) Stat Medical did not oppose G&I IV Kirkland's renewed motion for summary judgment on the CAM reconciliation charges.

The trial court granted that motion on June 7, 2009, finding that Stat Medical owed \$11,531.52 for the 2006 CAM reconciliation charges. (CP 442) The trial court also found that G&I IV Kirkland was entitled to attorney fees. (CP 442)

Final judgment was entered on June 26, 2009. (CP 444) The principal judgment entered against Stat Medical was \$66,102.35. (CP 444) The trial court granted prejudgment interest of \$19,666.94. (CP 444) The trial court also awarded all of the attorney fees G&I IV Kirkland requested in the amount of \$43,719.50. (CP 444) Stat Medical appeals. (CP 434)

V. ARGUMENT

A. Standard of Review.

This court reviews an order granting summary judgment de novo. Summary judgment is proper only when there is no question of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); ***Pacific Northwest Group A v. Pizza Blends, Inc.***, 90 Wn. App. 273, 277, 951 P.2d 826 (1998). All reasonable inferences must be resolved in the non-moving party's favor. ***Pacific Northwest Group A***, 90 Wn. App. at 280.

B. Stat Medical Raised A Question Of Material Fact Whether The Parties Agreed To An Oral Modification Of The Lease Waiving Holdover Penalties.

The trial court erred in granting summary judgment because there were genuine questions of material fact whether the parties agreed that Stat Medical could remain on the premises until the end of September without a holdover penalty. The trial court based its order on summary judgment on its erroneous determination that any agreement modifying the lease “ha[s] to be indicated in writing.” (CP 452) But a “contract clause prohibiting oral modification is essentially unenforceable because the clause itself is subject to oral modification.” *Pacific N.W. Group A*, 90 Wn. App. at 277-78.

In *Pacific N.W. Group A*, the tenant’s written lease prohibited oral modification and provided that if tenant held over beyond the terms of the lease, rent would be assessed at 1.5 times the normal monthly rate. At the end of the term, the parties could not agree on a new lease. As here, a representative of the landlord and the tenant discussed the possibility of tenant remaining on premises on a month-to-month basis after the lease expired without holdover penalty. As here, the tenant asserted that the landlord’s representative “expressly agreed” to the arrangement – an

assertion that the representative denied. As here, the landlord in ***Pacific N.W. Group A*** filed suit against tenant to recover holdover rent and associated late fees. And as here, the trial court granted summary judgment in favor of landlord, finding that there was no issue of fact as to the enforceability of the holdover provision. 90 Wn. App. at 275-77.

This court reversed, holding that a “contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification.” ***Pacific N.W. Group A***, 90 Wn. App. at 277-78. Thus, the issue was whether the tenant raised a question of material fact as to the lease’s modification. ***Pacific N.W. Group A***, 90 Wn. App. at 280. Recognizing that all “reasonable inference must be resolved in [tenant]’s favor,” this court held that it “must assume that [tenant]’s testimony is truthful” and that the landlord agreed to allow tenant to remain on the premises and that without that agreement tenant would have vacated the premises at the end of the lease. ***Pacific N.W. Group A***, 90 Wn. App. at 280-81. “Whether there actually was a meeting of the minds for such a modification involves

credibility determinations that cannot be made here.” ***Pacific Northwest Group A***, 90 Wn. App. at 281.

Likewise here, Stat Medical raised a question of material fact as to whether the parties agreed to modify the lease to allow Stat Medical to holdover without penalty. According to both Conforto and Davidson, G&I IV Kirkland assured them that as long as Stat Medical agreed to entertain options to stay on as a tenant that Stat Medical would not be “financially hurt” in the form of holdover rent. (CP 338, 379, 389) Conforto asserted that he would not have otherwise negotiated with G&I IV Kirkland because he was concerned about the timing of the negotiations, and was “very sensitive to the issue of holdover rent and therefore did not want to do anything that could affect how quickly we could move out of the building.” (CP 338) G&I IV Kirkland agreed to allow Stat Medical to remain on the premises briefly because there were no other prospective tenants. (CP 339) For purposes of summary judgment, this testimony must be presumed to be “truthful.” ***Pacific Northwest Group A***, 90 Wn. App. at 281.

G&I IV Kirkland did not dispute that it had no other prospective tenants for the Stat Medical space. Further, the letter

from the landlord's property manager, a speaking agent of G&I IV Kirkland, provides objective evidence that is consistent with Stat Medical's understanding of their agreement – that holdover rent would only become effective on October 1, 2006 – two months after the lease expired. (CP 81) This letter was issued by the property manager, who had the actual and apparent authority to act for the landlord, whose managing member testified that he had “weekly calls” with the property manager. (CP 369) “Whether there actually was a meeting of the minds for such a modification involves credibility determinations that cannot be made here.” *Pacific Northwest Group A*, 90 Wn. App. at 281.

Stat Medical raised a question of material fact whether the parties agreed that Stat Medical could hold over on the premises without penalty. The trial court erred in granting summary judgment.

C. Stat Medical Raised A Question Of Material Fact Whether G&I IV Kirkland Is Estopped From Collecting Holdover Rent.

Stat Medical also raised a genuine question of material fact whether G&I IV Kirkland is estopped from collecting the holdover rent. The elements of equitable estoppel are: (1) an admission,

statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied on the statement if the court allows the first party to contradict or repudiate the prior act, statement, or admission.” ***Peterson v. Groves***, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). “To prevail on an equitable estoppel theory, [Stat Medical] must show that it reasonably relied on an admission, statement, or act of [G&I IV Kirkland] that is inconsistent with the claim that holdover rent is now due.” ***Pacific Northwest Group A***, 90 Wn. App. at 281.

Here, Stat Medical relied on its conversations with G&I IV Kirkland that it would not be assessed holdover penalties so long as they came to the table to negotiate. Although it was close to finalizing a lease on another property, Stat Medical “slowed down” its negotiations with the other property owner so that they could entertain options from G&I IV Kirkland. (CP 338-39, 379, 389) As a result, scheduling issues delayed Stat Medical from vacating the premises after negotiations with G&I IV Kirkland failed. (CP 85) Stat Medical is injured if G&I IV Kirkland is now allowed to collect holdover rent when it promised not to do so.

Stat Medical raised questions of fact on its affirmative defense that G&I IV Kirkland was equitably estopped from pursuing holdover penalties which preclude summary judgment. This court must reverse.

D. Stat Medical Raised A Question Of Material Fact As To Whether It Provided Timely Notice Of Its Termination Of Its Month-To-Month Tenancy.

The trial court erred when it found that the month-to-month tenancy terminated on November 30, 2006 because Stat Medical did not provide “proper written notice.” (CP 439) The lease provided that a month-to-month tenancy may be terminated “as provided by the laws of the state in which the premises are located.” (CP 43) RCW 59.04.020 provides that a tenancy from month to month “shall be terminated by written notice of thirty days or more, preceding the end of any of said months or periods, given by either party to the other.”

Here, Stat Medical provided written notice on August 28, 2006 that it intended to vacate the premises by the end of September 2006. (CP 85) When it appeared that the move would be delayed, Stat Medical provided verbal notice by Monday, October 2, 2006 (29 days before the end of the month) and written

notice on October 3, 2006 (28 days before the end of the month) that it would “start moving out Friday the 13th and throughout the weekend.”³ (CP 328) G&I IV Kirkland acknowledged that Stat Medical’s tenancy ended no later than October 31, 2006 because it did not attempt to bill Stat Medical for November holdover rent or November CAM charges in its June and July 2007 billing statements. (CP 377)

Because on summary judgment, Stat Medical was entitled to “all reasonable inference resolved in its favor,” *Pacific Northwest Group A*, 90 Wn. App. at 281, the trial court should have found an issue of fact regarding G&I IV Kirkland’s notice that Stat Medical was terminating its tenancy by no later than October 31, 2006. The trial court erred when it summarily determined that the tenancy ended on November 30, 2006 and concluded that Stat Medical owed rent, holdover rent, and estimated CAM charges for November. (CP 439)

³ It is undisputed that Stat Medical paid rent for the whole month of October as a result of its delayed vacation of the premises. (See CP 439)

E. Because Summary Judgment Was Improper, This Court Must Vacate The Attorney Fee Award And Order That Fees Abide The Result At Trial.

The trial court awarded attorney fees pursuant to the lease, which provides that “in the event suit is brought for the recovery of Base Rent, Additional Rent, or any other sums payable under the Lease... the non-breaching party shall be entitled to a reasonable sum for attorney’s and paralegal’s fees.” (CP 54) Although Stat Medical has not challenged its liability for CAM charges, because summary judgment was inappropriate on the issue of holdover rent, the attorney fee award must be vacated to abide the outcome of trial. ***Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.***, 149 Wn. App. 429, 438, ¶ 18, 203 P.3d 1077 (2009). In any event, this court should vacate the fee award, because it is not supported by findings of fact establishing the reasonableness of the fees. See ***Mahler v. Szucs***, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998) (remanding for reconsideration of attorney fee award in absence of findings of fact and conclusions of law).

On remand, the trial court should be directed to award fees to the prevailing party under the methodology established by this

court in **Marassi v. Lau**, 71 Wn. App. 912, 915, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490-491, 200 P.3d 683 (2009).⁴ Moreover, the trial court should be directed to consider any ultimate award of reasonable attorney fees in light of Stat Medicals' tender of \$28,000 into the court registry one month after the action was filed and before any significant litigation was commenced – an amount substantially in excess of Stat Medical's liability for CAM charges and October rent -- and its lack of opposition to its liability for the CAM charges.⁵ Thus, if Stat Medical prevails in enforcing the parties' oral agreement modifying the lease, it should be awarded all its attorney fees in this action, which will more than offset any award to G&I IV Kirkland. See **Transpac Development, Inc. v. Oh**, 132 Wn. App. 212, 219-20, ¶ 21, 130 P.3d 892 (2006) (when several distinct and severable breach of contract claims are at issue, defendant should be awarded attorney fees for those

⁴ While the fee provision relied upon by the trial court is bilateral under RCW 4.84.330, the lease also provides for an award of attorney fees if a party "requires the services of an attorney in connection with enforcing the terms of this Lease." (CP 54)

⁵ The fees incurred by G&I IV Kirkland to establish the CAM charges as part of its unopposed motion for summary judgment, amounted to \$2,190.50. (Sub no. 57, Supp. CP __)

claims he successfully defends, and plaintiff should be awarded attorney fees for claims it prevails upon, and award should then be offset).

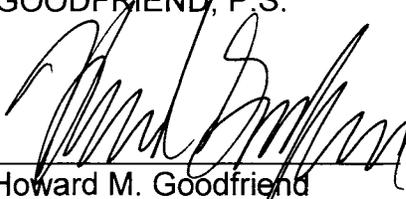
VI. CONCLUSION

The trial court erred in granting summary judgment as there were genuine issues of material fact on whether the parties agreed to modify the lease to waive holdover penalties while Stat Medical remained on the premises pending its relocation. There also were fact issues requiring a trial on whether G&I IV Kirkland is estopped from pursuing holdover penalties when it promised that Stat Medical could remain on the premises without penalty. This court should reverse, vacate the judgment against Stat Medical, and remand for trial.

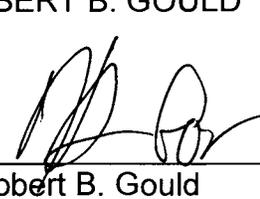
Dated this 14th day of October, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

LAW OFFICES OF
ROBERT B. GOULD

By: 

Howard M. Goodfriend
WSBA No. 14355
Valerie A. Villacin
WSBA No. 34515

By: 

Robert B. Gould
WSBA No. 4353

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 14, 2009, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Robert Gould Law Offices of Robert B. Gould 2110 N. Pacific St., Suite 100 Seattle, WA 98103-9181	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mr. Gregory M. Miller Carney Badley Spellman, P.S. 701 Fifth Avenue. Suite 3600 Seattle, WA 98104-7010	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jeffrey M. Sayre Christine Martin-Lord Sayre Law Offices 1320 University St. Seattle, WA 98101-2837	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 14th day of October, 2009.



Carrie O'Brien

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FILED
KING COUNTY, WASHINGTON

MAY - 4 2009

SUPERIOR COURT CLERK
BY ANNIE JOHNSON
DEPUTY

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

G&I IV KIRKLAND LLC, a Delaware limited liability company,

Plaintiff,

v.

STAT MEDICAL, INC., a Washington corporation,

Defendant.

No. 08-2-06112-4 SEA

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter came before the Court on the Plaintiff's Motion for Summary Judgment, requesting that he Court enter judgment against Defendant for a breach of commercial lease.

The Court heard the oral argument of counsel for Plaintiff, Christine Martin-Lord of Sayre Law Offices; and counsel for Defendant, Robert Gould of the Law Offices of Robert B. Gould. The Court considered the pleadings filed in this action, and the following evidence:

1. Declaration of James E. Christian in Support of Summary Judgment;
2. Declaration of Jack Rader in Support of Summary Judgment;
3. Declaration of Christine A. Lord in Support of Summary Judgment;

ORDER GRANTING PARTIAL SUMMARY JUDGMENT - 1

SAYRE LAW OFFICES
1320 University St
Seattle WA 98101-2837
206/625-0092
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 ORIGINAL

App. A

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- 1 c. On October 22, 2003, NewTower Trust Company, as trustee of the
2 NewTower Trust Company Multi-Employer Property Trust and
3 Defendant entered into a Second Amendment to Lease.
4 d. Plaintiff closed its purchase of 405 Kirkland Corporate Center,
5 including the Leased Premises, from NewTower Trust Company,
6 as trustee of the NewTower Trust Company Multi-Employer
7 Property Trust on May 24, 2006.
8 e. The Lease, as amended, expired on July 31, 2006.
9 f. Defendant did not vacate the Leased Premises after the Lease
10 expired.
11 g. After the Lease expired, Defendant's tenancy became a month-to-
12 month tenancy, beginning on August 1, 2006.
13 h. Under the holdover provision in the Lease, the base rent as of
14 August 1, 2006, was increased to \$23,006.00 – twice the amount
15 of base rent in effect at the expiration of the Lease.
16 i. Defendant was required to pay holdover rent beginning on August
17 1, 2006.
18 j. After the Lease term expired, Defendant only paid monthly rent
19 and estimated CAM charges for August, September, and October
20 2006.
21 k. Defendant vacated the Leased Premises on October 19, 2006.
22 l. Defendant did not provide Plaintiff with proper written notice that
23 it was terminating its month-to-month tenancy.
24 m. Based on its October 19, 2006, departure from the Leased
25 Premises, Defendant's month-to-month tenancy terminated on
26 November 31, 2006.
27 n. Defendant paid half of the holdover rent owing for August of 2006
28 in the amount of \$5,571.50.
o. Defendant did not pay the second half of the August 2006
holdover rent totaling \$5,571.50.
p. Defendant did not pay September 2006 holdover rent totaling
\$11,503.00.
q. Defendant did not pay October 2006 holdover rent totaling
\$11,503.00.
r. Defendant did not pay November 2006 rent, estimated CAM
charges, and holdover rent totaling \$25,993.33.

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- s. Defendant owes Plaintiff \$54,570.83 for half of August 2006 holdover rent; September 2006 holdover rent; October 2006 holdover rent; and November 2006 rent, estimated CAM charges, and holdover rent (paragraphs 2(o), (p), (q), and ®), above).
- t. Under the Lease, Plaintiff is entitled to a late fee charge equal to five percent (5%) of the amount of any late payment.
- u. Under the Lease, Plaintiff is entitled to interest on all past due balances at the lower rate of four percent (4%) above prime or the maximum rate allowed by law.
- v. Defendant owes Plaintiff late fees and interest on the amounts owing for half of August 2006 holdover rent; September 2006 holdover rent; October 2006 holdover rent; and November 2006 rent, estimated CAM charges, and holdover rent.

2. Plaintiff is entitled to judgment as a matter of law on the above material facts that exist without substantial controversy.

3. Plaintiff's Motion for Summary Judgment is denied in part, without prejudice, on the issue of 2006 CAM Reconciliation charges.

DONE IN OPEN COURT.

DATE: May 4, 2009

Douglas A. North
JUDGE/COURT COMMISSIONER

Presented by:

SAYRE LAW OFFICES

By: Christine Martin-Lord
Jeffrey M. Sayre, WSBA #19056
Christine Martin-Lord, WSBA #31847
Attorneys for Plaintiff.

Approved as to form; Notice of Presentation waived:

LAW OFFICES OF ROBERT B. GOULD

By: _____
Robert B. Gould, WSBA #4353
Attorneys for Defendant

ORDER GRANTING PARTIAL SUMMARY JUDGMENT - 4

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

G&I IV KIRKLAND LLC, a Delaware limited liability company,

Plaintiff,

v.

STAT MEDICAL, INC., a Washington corporation,

Defendant.

No. 08-2-06112-4 SEA

FINAL JUDGMENT

[Clerk's Action Required]

THIS MATTER, having come on regularly for hearing before the undersigned judge of the above-entitled court, and the court being fully advised in the premises, now makes the following judgment:

I. JUDGMENT SUMMARY

Judgment Creditor:	<u>G&I IV Kirkland LLC</u>
Judgment Debtor:	<u>Stat Medical, Inc.</u>
Principal Judgment	<u>\$66,102.35</u>
Pre-judgment Interest through 6/22/09	<u>\$19,666.94</u>
Attorney's Fees:	<u>\$43,914.50 \$43,719.50 D.H.V.</u>
Costs:	<u>\$2,497.90</u>
Interest Rate after Judgment:	<u>4% above prime rate beginning 6/23/09</u>
Other Recovery Amounts:	<u>Attorneys fees and costs incurred in collection of judgment upon motion of Plaintiff</u>
Attorney for Judgment Creditor:	<u>Christine Martin-Lord, Sayre Law Offices</u>
Attorney for Judgment Debtor:	<u>Robert Gould, Law Offices of Robert B. Gould</u>

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FINAL JUDGMENT - 1

ORIGINAL

App. B

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1 II. HEARING

2 2.1 Date. June 22, 2009.

3 2.2 Appearances. Plaintiff appeared by and through its counsel, Christine
4 Martin-Lord of Sayre Law Offices. Defendant Stat Medical, Inc. appeared by and
5 through its counsel, Robert Gould of the Law Offices of Robert B. Gould.

6 2.3 Purpose. To rule on Plaintiff's motion for specific attorneys' fees and
7 costs and for entry of final judgment.

8 III. PRIOR ORDERS

9 3.1 Plaintiff was awarded partial summary judgment on May 4, 2009.

10 3.2 Plaintiff was awarded summary judgment on June 7, 2009.

11 V. ADJUDICATION

12 ON THE BASIS OF THE FOREGOING, IT IS ORDERED, ADJUDGED, AND
13 DECREED:

14 Judgment. Plaintiff is awarded \$66,102.35 for judgment against Defendant Stat
15 Medical, Inc.; \$19,666.94 for late fees and prejudgment interest through June 22, 2009;
16 ~~\$43,914.50~~ ^{#195 of anticipated fees for responding to opposition to request for attorneys' fees deleted.} *D.A.N.*
17 \$43,719.50 *D.A.N.* for attorneys' fees, and \$2,497.90 for costs. Post judgment interest shall
18 accrue at a rate of 4% percent above the prime rate per annum pursuant to the Lease,
19 beginning on June 23, 2009.

19 DONE IN OPEN COURT.

20 DATE: June 26, 2009

Douglas A. North
JUDGE/COURT COMMISSIONER

21 Presented by:

Approved as to form; Notice of
Presentation waived:

22 SAYRE LAW OFFICES

LAW OFFICES OF ROBERT B. GOULD

23 By: Christine Martin-Lord
24 Jeffrey M. Sayre, WSBA #19056
25 Christine Martin-Lord, WSBA #31847
26 Attorneys for Plaintiff

By: _____
Robert B. Gould, WSBA #4353
Attorneys for Defendant

27
28 FINAL JUDGMENT - 2

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