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No. 66533-2-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

JIMI LOU STEAMBARGE,

Appellant,

v.

BELLEVUE SQUARE, LLC,

Respondent,

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

BRIEF OF APPELLANT
(AMENDED)

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by granting a summary judgment when genuine issues of material facts do exist, are in dispute, and were presented by the non-moving party according to CR 56.
2. The trial court erred by not recording the proceedings of the hearing under RCW 2.32.180 and RCW 2.32.050.
3. The trial court erred by not allowing Defendant to truly present her case and was unwilling to allow Defendant to orally present the material facts in dispute.
4. The trial court erred by entering a unverified monetary Judgment full of errors and miscalculations.
5. The trial court erred by moving forward with a summary judgment hearing when discovery had yet to be conducted by Defendant, especially when key material facts to the action were within the knowledge of the moving party.
6. The trial court erred by not determining if the real party of interest brought suit against the Defendant.

II. STATEMENT OF THE CASE

Steambarge entered into a lease based on a solicited, premeditated and skilled sales presentation by Miss Stephanie Neil from Bellevue Square, LLC and/or Kemper Development Company. Bellevue Square

was marketed as “the Product.” Defendant only entered into the agreement based on good faith and with the expectation of the same from Bellevue Square, LLC and/or Kemper Development Company. Defendant had the expectation that Plaintiff would fully perform within the terms of the presentation. The contract was based and derived on a collective purpose, in addition to facts and circumstances; this proved to be misrepresented. These misrepresented material facts formed the basis upon which the Lease was constructed and Ms. Steambarge would not have entered into the agreement without the proposed intent of the parties to be reasonable and as intended. The facts proved to be falsified, exaggerated and inflated. (CP 140-151).

Conversations between the parties were initiated by Bellevue Square, LLC and/or Kemper Development Company on repeated occasions and were conducted by Miss Stephanie Neil. It is unclear if Miss Neil works for Bellevue Square, Kemper Development Company or both. Miss Neil consistently represented herself as Defendant’s exclusive contact. Prior to agreement all conversations were exclusively had with Miss Neil. With the exception of one meeting with Robert Dallain in late February, all conversations and negotiations were between Steambarge and Neil exclusively.

If Ms. Steambarge did abandon and terminate the contract, it took

place only after Bellevue Square's several material breaches forced her to do so. Steambarge made numerous good faith attempts to resolve the issues amicably, but she was forced out of the lease in an abrupt manner in the midst of mediation talks with Miss Neil and Robert Dallain, Sr. Vice President of Kemper Development Company. Breaching Defendant's covenant of quiet enjoyment, David Nold, lead counsel for Plaintiff, and Miss Neil entered the leased premises, unannounced, uninvited and disruptive, on March 23, 2010. (See Declaration of Jimi Lou Steambarge, Exhibit B) (CP 87-115). This encounter was followed by several e-mails from Mr. Nold, ending with the statement, "you should close the store tonight and leave." (See Declaration of Jimi Lou Steambarge, Exhibit B) (CP 87-115).

Rent payments were constantly made and Plaintiff did not notify Defendant that she was in default. Three payments were made in March 2010, including one on March 22, 2010. It was very apparent that Mr. Nold and/or Bellevue Square planned this timed scenario starting with Nold and Neil's visit, followed by Nold's string of e-mails, and finally the business day ending with a visit from a Kemper Development Company Security Officer confirming the intentions of Bellevue Square, LLC, Kemper Development Company and/or David Nold. The security officer stated that he was told by Plaintiff that Steambarge would be exiting from

her space that evening; Steambarge never stated this and nor did she provide this information to Plaintiff.

Ms. Steambarge did send Miss Neil and Mr. Dallain a letter only after she felt that Bellevue Square, LLC and/or Kemper Development Company had grossly breached the Lease. Steambarge's letter of March 1, 2010, proclaimed that she had just cause and opened the door for continued discussions. (See Declaration of Robert Dallain, Exhibit B) (CP 15-56). Plaintiff refused to recognize Steambarge's allegations and/or had no true intentions to perform. The letter clearly shows that there are disputes of material facts. It was intended to allow Bellevue Square, LLC and/or Kemper Development Company the opportunity to respond with the hope that the parties could find a tangible and fair solution. Ms. Steambarge was continuing to act in good faith. Furthermore, Bellevue Square, LLC and/or Kemper Development Company originally proposed March 31st as the date of separation.

Plaintiff claims Defendant vacated the leased premises on March 29, 2010, and that "she failed to remove her sign." (See Declaration of Robert Dallain) (CP 16-56). According to 20.1 (a) of the Lease, "an intent to vacate or abandon the Leased Premises shall be deemed to exist if Tenant's business in the Leased Premises remains closed to the public for more than five (5) days." (See Declaration of Robert Dallain, Exhibit A)

(CP 16-56). Steambarge did not have the opportunity to remove her sign because on Wednesday, March 24, 2010, Glen Bachman, Vice President of Retail Operations at Kemper Development Company and his team removed the sign without prior discussion and without notification. (See Declaration of Jimi Lou Steambarge - Attached Exhibit C – String of Emails between Mr. Dallain, Ms. Steambarge and Mr. Bachman Dated March 26, 2010) (CP 87-115) AND (See Declaration of Axel Duerr) (CP 82-86) AND (See Declaration of Robert Dallain) (CP 16-56). This was less than 24-hours from the time when Mr. Nold and Miss Neil were in the premises during business hours. Not only did Mr. Bachman remove the sign, but also in addition he substantially damaged the sign and caused it to be unusable in its current state of condition. (See Declaration of Axel Duerr) (CP 82-86) AND (See Declaration of Jimi Lou Steambarge) (CP 87-115). Bellevue Square, LLC and/or Kemper Development Company's action of removing Steambarge's sign on March 24, 2010, was a direct breach of the 20.1 (a) of the Lease and constitutes a Constructive Eviction. (See Declaration of Robert Dallain, Exhibit A, Page 22) (CP 16-56). This alone is a material fact with genuine issue that is in dispute.

Furthermore, Robert Dallain's Declaration of September 27, 2010, is false and according to CR 56 (g) if an affidavit is "presented in bad faith" the court "shall forthwith order the party employing them to pay to

the other party the amount of the reasonable expenses which the filling of the affidavits cause him to incur, including reasonable attorney fees” and more importantly, “any offending party or attorney may be adjudged guilty of contempt.” Mr. Dallain and counsel, Thomas Stone and/or David Nold, are guilty of such offense.

On one hand Mr. Dallain presents himself as unaware of the sign’s removal when questioned by Ms. Steambarge, but then states in his Declaration that “she failed to remove her sign.” (See Declaration of Robert Dallain) (CP 16-56) AND (See Declaration of Jimi Lou Steambarge - Attached Exhibit C – String of Emails between Mr. Dallain, Ms. Steambarge and Mr. Bachman Dated March 26, 2010) (CP 87-115). On the other hand, Mr. Dallain was not only made aware at the time of the incident through a string of e-mails between Mr. Dallain, Ms. Steambarge and Mr. Bachman, but also again through discovery produced by Ms. Steambarge. What is clear is that Mr. Dallain, Bellevue Square, LLC and/or Kemper Development Company, chose to act in bad faith by attaching out of context e-mails in attempt to cover up their breach and lead the court to believe that Ms. Steambarge abandoned the premises and her sign according to the Lease. This is another example of the many genuine and material facts existing and which are in dispute between Steambarge and Bellevue Square, LLC.

Shortly thereafter, Bellevue Square hastily filed a suit against Steambarge as if they had done no wrong and owned no fault. Steambarge will show through testimony that this is a long-standing pattern and mode of operation for Bellevue Square LLC and/or Kemper Development Company. Bellevue Square LLC alone filed at least eight lawsuits, as the Plaintiff, in 2010 against tenants. Documents show that Bellevue Square was preparing to file suit even prior to Steambarge's departure. Furthermore, Bellevue Square did not attempt to minimize damages that could have completely been avoided. Bellevue Square acted unfairly and deceptively. "The law requires that contracting parties act in good faith and not deceive one another." *Kammerer v Western Gear Corporation*, 27 Wash. App. 512, 525, 618 P.2d 1330, 1339 (1981).

III. ARGUMENT

PROCEEDINGS NOT RECORDED

On October 29, 2010, Steambarge appeared pro se for a summary judgment hearing. On July 19, 2011 Steambarge filed a Statement of Arrangements and ordered a transcription of the report of proceedings from the court of that hearing. Bonnie Reed of Reed, Jackson and Watkins of Seattle, Washington, was named to perform the duty of transcription, but through the process both Steambarge and Reed were made aware of the fact that a recording of the October 29, 2010, hearing between

Bellevue Square and Steambarge did not exist and was not performed.

According to RCW 2.32.180 it is the duty of every superior court judge to appoint a stenographic reporter to be attached to the judge's court. The stenographic reporter shall become an officer of the court and shall be designated and known as the official reporter for the court or judicial district for which he or she is appointed. Furthermore according to RCW 2.32.050 (2) it is the duty of the clerk of the superior court for which he or she is clerk to record the proceedings of the court.

The state constitution provides that the superior courts shall be courts of record and as a court of record, a superior court must keep an adequate record of its proceedings. A clerk's minute entries do not constitute an adequate record. On October 29, 2010 only the clerk's minutes were provided in the court's papers.

In *State v. Woods* the court stated "the appellate court may remand a case for a new trial where the trial court's report of proceeding is inadequate." 72 Wn. App. 544, 550, 865 P.2d 33 (1994). In *State v. Larson*, the defendant claimed that he was denied due process on appeal by an inadequate record. 62 Wn. 2d 64, 381 P.2d 120 (1963). The Supreme Court granted Larson a new trial, concluding that to satisfy due process, "we must have a record of sufficient completeness for a review of the errors raised by the defendant." *Larson*, 62 Wn.2d 64, 67, 381 P.2d

120 (1963). Therefore, the superior trial court's failure to record the hearing has denied Steambarge a complete record of which to appeal and a new trial is appropriate as she is prejudiced by the inadequate record. Furthermore, the large amount of judgment awarded is more than significant and should involve serious due process concerns.

NOT ALLOWED TO PRESENT CASE

Steambarge was barely allowed even a brief testimony. She was interrupted within a few minutes and not allowed to present clear facts that were genuine issues of dispute. It was as if the court was very one-sided in favor of the Plaintiff and had no need to hear Steambarge's testimony. It seemed as if the outcome was predetermined. Statements made during the hearing would lead one of a reasonable mind to believe this scenario to be found true. If a recording of the proceedings existed in accordance with RCW 2.32.180 and RCW 2.32.050 (2), Steambarge would be allowed and afforded the opportunity to attach supporting details to the errors assigned so that she may obtain an adequate review of her appeal, but that is not the case and Steambarge is denied due process.

MATERIAL FACTS EXIST AND ARE IN DISPUTE

Testimony will clearly show clear that significant dispute lies between the Bellevue Square and Steambarge and that Summary Judgment should have in fact been denied to Bellevue Square. According

to CR 56 a summary judgment can only be granted if there are not issue as to any material facts. In *Capital Hill Methodist Church of Seattle v City of Seattle*, the court stated that Washington’s rule 56 “was adopted almost verbatim from Federal Rule of Civil Procedure 56, 28 U.S.C.A” and quoted that the procedure (of summary judgment) “is not to be used as a substitute for a regular trial of cases in which there are disputed issues of material fact upon which the ultimate outcome hinges, and it should be invoked with due caution to the end that litigants may be afforded a trail where there exists between them a bona fide dispute of material facts.” 52 Wash.2d 359, 363, 324 P.2d 1113, 1117 (1958). Pursuant to CR 56 summary judgment should not have been granted.

In addition to the question of who is the real party of interest, the fact that Bellevue Square induced Steambarge into a lease that proved to be based on false information, and that a judgment was entered full of errors and miscalculations, the dispute of whether Bellevue Square fully and adequately mitigate is also a material fact. “The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts.” *Cobb v Snohomish County*, 86 Wash. App. 223, 230, 935 P.2d 1384, 1389 (1997).

Bellevue Square is attempting to collect rent, from Steambarge, for

the 60 days of benefit and free rent provided to the new 205 tenant Papyrus. (See Rebuttal Declaration of Robert Dallain, Exhibit A, the Papyrus Lease) (CP 125-136, 140-151). In actuality Papyrus was already an existing tenant of Bellevue Square. The 60 days of free-rent comes to a total of nearly \$18,000 (\$17,944.82), which is 31.41% of the requested Judgment. The number of days between Occupancy and Tenancy of a new tenant is a question of fact and not a matter of law. The number of days Plaintiff decided to provide rent-free is at their discretion. Only through discovery will we know if their negotiations and agreement was reasonable.

Dallain's Declaration states that, "Plaintiff acted with all possible haste to secure a replacement tenant, but was not able to do so until August 23, 2010." No proof in the record supports this or the means by which Plaintiff might have possibly been attempting to secure a replacement tenant. (See Original Declaration of Robert Dallain) (CP 16-56, 125-136). Neil told Steambarge in early February 2010 that she was already talking with another tenant to move into Steambarge's space. It is known that Bellevue Square intentionally moved Papyrus in part of their long-range "neighborhood plan." Bellevue Square did what was in their personal best interest and the interest of Papyrus.

Bellevue Square found it reasonable to only offer Steambarge 15

days of free-rent. (See Declaration of Jimi Lou Steambarge, Exhibit I) (CP 152-214). Plaintiff's offer of 60-days free rent to a new tenant at the expense of Steambarge is unreasonable. It is unjust that Steambarge be held liable for the amount Bellevue Square is attempting to collect.

Furthermore, according to Papyrus' Lease at space 205, Bellevue Square is charging the new tenant, Papyrus, more than double the amount of base rent that it was charging Allusia for the same. (See Rebuttal Declaration of Robert Dallain, Exhibit A, the Papyrus Lease) (CP 125-136). The question should be asked: did Bellevue Square fully and adequately mitigate? Did they act in a reasonable manner by attempting to secure a new tenant in what they call, "tough economic times," at a rate more than double as to what they found "reasonable" just months prior. It is clear that Plaintiff more than benefited from the situation and that material fact issues exist as to the time it took to rent the premises, the reasonableness of the rent charged by Bellevue Square to the new tenant, and the amount of free-rent provided new tenant at the expense of Steambarge. (See Declaration of Robert Dallain, Exhibit A, the Lease) (CP 16-56, 125-136).

"The injured party's duty is to use such means as are reasonable under the circumstances to avoid or minimize the damages." *Cobb v Snohomish County*, 86 Wash. App. 223, 230, 935 P.2d 1384, 1389 (1997).

Plaintiff did not fully and adequately mitigate. This “free-rent” discrepancy is nearly 32% of the requested judgment. This is more than significant and is a matter of fact in dispute that can only be determined through discovery and testimony. Plaintiff has admitted that a new tenant was in possession of space 205 on July 1, 2010, and therefore Defendant should not be found liable for rent from at least this period forward.

**MONETARY JUDGMENT FULL OF ERRORS &
MISCALCULATIONS**

From the onset, Steambarge has held firm that the amount owed to Bellevue Square, if any, is strongly in dispute. The significant disputed monetary amounts have been unverified and are material questions of fact to be resolved through the trier of fact. During the October 29, 2010 hearing, Steambarge attempted to present testimony and a list of discrepancies, errors, miscalculations, and double-dips regarding the amount of monetary award Bellevue Square was seeking, but was cut short and not allowed to do so by trial court judge. Not only was a wrongful monetary judgment awarded to Bellevue Square without any supporting documents being presented by the Plaintiff or Plaintiff’s counsel, but also a grossly miscalculated amount was awarded. The court let the discrepancies go forward without any proof that Steambarge’s claims were incorrect.

During the proceedings it seemed as if Bellevue Square could have named any dollar amount and they would have been easily awarded their request; this practice seems an abuse of the legal system. If a record of the proceedings existed, the record would not only show the described scenario, but also the statement made of free-will by Bellevue Square's counsel David Nold that he would review the list of discrepancies and adjust if warranted. This never occurred.

Bellevue Square's claims are mathematically incorrect, not supported, and knowingly wrong. For example, Steambarge listed a claim of double dipping when legal fees of \$1,522.50 were listed both on Bellevue Square's statement and on that of Nold's legal fees statement (CP 140-151). This claim was never addressed, removed or adjusted, even though both Bellevue Square and counsel were made aware of a blatant double entry in their individual bookkeeping records. "Knowing failure to reveal something of material importance is 'deceptive' within the Consumer Protection Act." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington*, 162 Wn.2d 59, 75, 170 P.2d 10 (2007). According to RCW 19.86.020, deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. In this case, Bellevue Square's deception is obviously not only misleading to the court, but unlawful.

Steambarge not only list this particular discrepancy, but also the following in her Motion to Reconsider Motion for Summary Judgment. The discrepancies are material facts in dispute and total over 50% of the monetary judgment requested by and awarded to Bellevue Square. Furthermore, Bellevue Square did not provide supporting documents or testimony that disproved any of Steambarge's claims.

- Payments made by Steambarge totaling \$3000 during the month of March 2010, of which Plaintiff shows no record. This equates to 5.46% of the original requested judgment (CP 16-56, 140-151).
- Bellevue Square's attempt to collect charges for a third party of \$2,788,37, which equates to 5.04% of the original requested judgment (CP 16-56, 140-151).
- The double entry legal fees of \$1,522.50, which equates to 14.49% of the original legal fees and 3.18% of the claim presented by Bellevue Square (CP 16-56, 140-151).
- A deposit of \$4,228.92, which was held by Bellevue Square, but never credited to Steambarge. This equates to 7.70% of the original requested judgment (CP 16-56, 140-151).
- Fees that were to be removed according to Stephanie Neil if Steambarge made installment payments during the month of March. These fees total \$1885.93 and equate to 3.43% of the

requested judgment (CP 16-56, 140-151).

The sum of \$17,254.63, which was provided to the new tenant Papyrus through 60 days of free-rent. Bellevue Square claimed that Steambarge owes this amount, which equates to 32.41% of the judgment requested and alone is more than a significant amount in dispute (CP 125-136, 140-151).

\$2,800 in damages caused by Bellevue Square to Steambarge's electronic sign which they removed without authorization (CP 82-86, 87-115, 140-151).

Bellevue Square's monetary claims are unfair, deceptive, misleading and fraudulent as a matter of law.

DISCOVERY NOT YET CONDUCTED

From the onset of this legal action, Steambarge has represented herself pro se without the aid of any legal representation or assistance due to lack of financial resources. Steambarge has no legal training, nor any real knowledge of the finer details of the law. When served with the Motion for Summary Judgment, Steambarge was not only surprised, but also shocked that she would not be entitled to a fair trial to present her case. Steambarge was also assured that under RCW 4.40.060 she would be granted a trial before a jury of her peers, as an issue of fact, in an action for the recovery of money only shall be tried by a jury. She felt she did not

have the ability to lay out every detail and discrepancy of this multi-layered case within a written motion and would have to rely on the testimony of witnesses from Bellevue Square. Furthermore, she had not had the opportunity to present Interrogatories to Plaintiff, nor conduct any other of the necessary discovery. According to the case schedule discovery deadlines were very far down the road. Defendant Steambarge attempted to argue this during the October 29, 2010 hearing, but was allowed no space to be heard.

In this case, the truth could only come from the detail testimony of the true parties involved, which includes the Plaintiff, especially that of Miss Stephanie Neil, a Plaintiff employee and Steambarge's contact throughout the relationship, which began in approximately 2007 when Neil began persistently soliciting Steambarge and eventually induced her into a lease in late 2009. Without the sworn affidavit and verbal testimony of Miss Neil, a key and critical witness, Steambarge would be unable to substantiate many of her claims. Bellevue Square is aware of this and has purposely sheltered and removed Neil from the formula, where she is the only Bellevue Square and/or Kemper Development Company employee with first-hand knowledge and Steambarge's contact from beginning till the end. "Where material facts to an action are particularly within the knowledge of the moving party, courts have been reluctant to grant

summary judgment. In such cases, it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.” *Riley v. Andres*, 107 Wash. App. 391, 396, 27 P.3d 618, 620 (2001). In *Michigan Nat’l Bank v. Olson* it was earlier stated that when “material facts averred in an affidavit are particularly within the knowledge of the moving party, it is advisable that the cause proceed to trial.” 44 Wn. App. 898, 905, 723 P.2d 438 (1986). This is the case in *Bellevue Square vs. Steambarge*, as Neil holds the knowledge of the moving party and her testimony or affidavit has not been provided to support Plaintiff’s case or disprove Steambarge’s claim. Steambarge attested to this during the October 29, 2010 hearing, but was not allowed to present her case or be heard (CP 140-151).

Typically, summary judgment motions are not made until each side has had a chance to engage in formal discovery, in order to gather evidence and to assess the opposing party’s evidence. In ruling on a motion for summary judgment, the court must consider “all reasonable inferences there from in favor of the nonmoving party.” *Klinke v. Famous Recipe Fried Chicken*, 94, Wash. 2d 255, 257, 616 P.2d 644, 645 (1980).

In *Deterich v. Rice* the purchasers of land stated allegations of misrepresentations by the seller as to the fertility of the soil, the amount of

crops raised in preceding years, and its location with respect to a public highway. The action was based on fraud and deceit. It was alleged that “as an inducement to the purchase of the land, it was represented that the land was in a vicinity free from destructive frosts, was tillable agricultural land, that the soil thereof was fertile, and of extra good crop-producing quality; that each year, for several years next prior to the execution of the contract, the threshing bill for threshing grain grown on the land was between \$300 and \$400 each year; that the average production of wheat per acre for three successive years next prior to the execution of the contract had been between 25 and 30 bushels per acre, and that the average production of oats per acre for a like period had been between sixty and seventy-five bushels; that in one certain year the land produced at the rate of 46 bushels of wheat and 103 bushels of oats per acre; that the hay therefore grown on the land had averaged between 1 ½ and 2 ½ tons per acre in each year; that the orchard thereon produced fruit in every year sufficient for the use of any family; that the land abutted upon a public highway, connecting directly with the city of Spokane, from which place buyers of produce came to the farm each year for the purchase of produce grown on the farm; and that the defendant had sold to such purchasers as much as \$700 worth of produce in one day.” *Deterich v. Rice* 115 Wash. 365, 367, 197. P. 1, 1 (1921). The purchasers negated the truth of the representations and

averred the land had little or no value for agricultural purposes. This land analogy is nearly identical to the method and empirical sales pitch used by Stephanie Neil to induce Steambarge.

Neil marketed Bellevue Square as “the Product” through a very skilled sales presentation where demographics, psychographics, sales projections and other empirical data were heavily and repeatedly used in a consistent manner to induce and seduce the Defendant. (See Declaration of Jimi Lou Steambarge, Exhibit A) (CP 140-151, 152-214). Eventually Neil induced Steambarge into entering an agreement based on the information she provided. Neil knew that “the numbers” significantly mattered to Steambarge and that she was relying on her projections, supposed knowledge, and the presented data to confirm whether to join Bellevue Square or not. Neil and Steambarge discussed these matters and the calculations numerous times; Neil repeatedly confirmed the accuracy of the calculations and assured Steambarge of Allusia’s success as a tenant of Bellevue Square. Neil intentionally misled Steambarge concerning expected sales per square foot, overall sales volume and customer demographics. Neil contrived and schemed to obtain Allusia as a tenant.

Following is a strong example of the integral data Neil supplied to Steambarge. Neil’s method mirrors the method in *Deterich v. Rice*. The data was consistently used between the parties and was key in Steambarge

entering into an agreement. Neil told Steambarge in repeated conversations that the average sales per square foot was between \$600 and \$700 and that Steambarge should run her numbers at the lowest point of \$350 per square foot, but that she expected through her experience that Steambarge's sales would be much higher. Neil said that she would not be surprised if they were in the upwards of \$900 per square foot; Neil never considered anything below the \$350 per square foot figure. In an August 2008 e-mail from Neil to Steambarge, Neil stated that in Bellevue Place, a secondary shopping place from Bellevue Square in which a space was available, that the "average gross sales for the retail tenants in Bellevue Place is \$400 per square foot per year." (See Declaration of Jimi Lou Steambarge, Exhibit B) (CP 152-214). Neil went on to say that "we structure rent deals based on projected gross sales to try to have minimum rent be about 10% of gross sales." Kemper Freeman, owner of KDC and BS, himself stated in a Seattle Post Intelligencer article, included in Plaintiff's tenant promotional packet, that "the sales at the 1.3 million-square-foot Bellevue Square to be just over \$600 per square foot, well above the national average of \$386." (See Declaration of Jimi Lou Steambarge, Exhibit C) (CP 152-214). In a WWD article Kemper stated that, "the center (BSQ) is tracking \$650 in sales per square foot this year, and has been averaging 10 percent increases for the last five years." (See

Declaration of Jimi Lou Steambarge, Exhibit D) (CP 152-214).

It is clear that the same sales per square foot information was consistently and repeatedly being provided by Plaintiff and its agents to prospective tenants and the public, even though Plaintiff denies this fact. Steambarge relied on the honesty and accuracy of Neil's information, "as a party to whom a positive, distinct, and definite representation has been made is entitled to rely on that representation." *Douglas Northwest v Bill O'Brien & Sons Construction, Inc.*, 64 Wash. App. 661, 680, 828 P.2d 565, 577 (1992).

Allusia's sales were so far off the mark and the relied upon projections of Neil. (See Declaration of Jimi Lou Steambarge, Exhibit E) (CP 152-214). Over the four full months reported Allusia was at an average of \$129 per square foot, with two months being below \$60 and \$70 per square foot. (See Declaration of Jimi Lou Steambarge, Exhibit F) (CP 152-214).

Defendant presented Plaintiff with sheets of calculations from notebooks consistently showing the numbers provided by Neil were used to make an important determination. (See Declaration of Jimi Lou Steambarge, Exhibit G) (CP 152-214). Each sheet shows that the minimum \$350 per square foot to \$500 per square foot of sales was used in the entire calculation process, as instructed by Neil. Furthermore in another Neil e-mail dated June 26, 2009, which includes phone discussion notes, similar

numbers were provided. Neil stated to Steambarge in the follow-up conversation that the average mall sales per square foot were at \$687. (See Declaration of Jimi Lou Steambarge, Exhibit H) (CP 152-214). Additionally, in an e-mail dated 8/12/09, Steambarge states to Neil that she ran calculations based on Neil's data. Neil never disputed Steambarge's statement.

Neil fraudulently induced Steambarge through misrepresentation. "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." *Yakima County (West Valley) Fire Protection District No. 12 v City of Yakima*, 122 Wash. 2d 371, 390, 858 P.2d 245, 256 (1993). This scenario alone is a genuine matter of fact that is in dispute. Neil made certain promises and only based on those promises did Steambarge enter into an agreement. Furthermore, Neil's testimony is crucial as she holds the knowledge of actual conversations between herself and Steambarge. Of course there is a reason why Bellevue Square has left Neil's testimony and affidavit out and in this situation we should apply the rule stated in *Boeing Airplane Co. v. Firemen's Fund Indem. Co.*, 44 Wash. 2d 488, 499, 268 P.2d 654. "The first and best resort in the construction of contracts is to put oneself in the place of the parties at the time the contract was executed – to look at it

in prospect rather than retrospect – for, when money disputes have arisen, the perspective is apt to be clouded by the unexpected chance of gain or self-interest.” *Long-Bell, Lbr. Co. v National Bank of Commerce*, 35 Wn. 2d 522, 529, 214 P. 2d 183 (1950).

WHO IS THE REAL PARTY OF INTEREST

Steambarge asks who, is the “real party in interest?” This question is never addressed, as if it was improbable. During all negotiations and conversations between the parties, Neil did not distinguish a difference between Bellevue Square and Kemper Development Company. The two names were used interchangeably as if they were one. Neil did not distinguish her employment as working for one or the other. It is obvious that her behavior is ambiguous.

It seems as if the Plaintiff is not clear in its own projection of who it is. In the suit brought against Steambarge, the Plaintiff and Landlord are named as Bellevue Square, LLC, but on Page 18 11.3 Line 8 of the Lease “Landlord” is named as Kemper Development Company. It states the following, “Landlord, Kemper Development Company and any other parties in interest designated by Landlord, shall be named as an additional insured.” (See Original Declaration of Robert Dallain, Exhibit A, the Lease) (CP 16-56). If Kemper Development Company is the Landlord, then why is Bellevue Square, LLC named as the Plaintiff?

In heading 1.1 of Plaintiff's Complaint the Plaintiff states that "Bellevue Square is the owner of the subject premises herein," but in truth it is Kemper Development Company that owns Bellevue Square. (See Plaintiff's Original Complaint as a Record of the Court) (CP 1-3). KDC states in its glossy promotional materials that they "specialize in the development, ownership, management, and leasing of premier properties. Additionally, Robert Dallain states in his Declaration that he is Vice President of Plaintiff Bellevue Square, when in fact he is Vice President of Kemper Development Company. (See Original Declaration of Robert Dallain) (CP 16-56).

Furthermore, Bellevue Square is attempting in their Judgment request to collect charges for a third party. According to Page 19, 12.1 of the Lease, "Bellevue Square Association, Inc.," is a not-for-profit Washington corporation. (See Original Declaration of Robert Dallain, Exhibit A, the Lease) (CP 16-56). The fees being claimed by Plaintiff are nearly \$3000 (\$2,788.37) and equate to 5.04% of the requested Judgment. All monies billed by the Merchants Association were done separately and payments by Steambarge were made payable directly to Bellevue Square Merchants Association, not that of Bellevue Square, LLC. Once again the question of fact to be asked is: who is the party of interest and is the correct Plaintiff present? This question of fact requires discovery and

testimony to determine if the correct plaintiff is bringing suit and is a genuine issue of material fact in dispute.

IV. CONCLUSION

According to CR 56 a summary judgment can only be granted if there are no issue as to any material fact. A fact is “material” when its existence facilitates the resolution of an issue. A “material fact is one upon which the outcome of the litigation depends, in whole or part.” *Vacova Company v Farrell*, 62 Wash. App. 386, 395, 814 P.2d 255, 261 (1991). In ruling on motion for summary judgment, “all facts and reasonable inferences must be considered in the light most favorable to the nonmoving party.” *Peterson v Graves*, 111 Wash. App. 306, 311, 44 P.3d 894, 896 (2002).

In the dispute between Bellevue Square, LLC and Steambarge an exponential number of material facts exists and are in dispute. It can be proved that the disputed facts are relevant to the outcome and that summary judgment was wrongly awarded.

Furthermore, for Bellevue Square to seek equity, they must come from a place of equity with clean hands, which they do not. The “clean hands doctrine” “is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause

of action, but he must come into the court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matter in controversy should be placed before the court. The complainant ought not to be the transgressor himself, and then complain that by chance he has been injured on account of his own wrongful misconduct. When, as is sometimes the fact, the original wrongdoer is the party who sustains the greater injury by reason of his inequitable scheme or plan, he ought to bear the burden and the consequences of his own folly, and the equity court will not lend him its jurisdiction to right a wrong of which he himself is the author.” *J.L. Cooper & Co. v Anchor Securities*, 9 Wash.2d 45, 72, 113 P.2d 845, 857 (1941).

Courts are ordained for the enforcement and vindication of the law and legal rights. As in *Dieterich v. Rice*, the judgment should be reversed and the case should be reinstated to put Bellevue Square upon their defense. Appellant prays the Court of Appeals grants relief and reverses the trial court’s order on summary judgment and allow Steambarge due process. The Court should also award Steambarge her reasonable fees and costs incurred.

Respectfully resubmitted this 5th day of April 2012.

Jimi Lou Steambarge



Appellant, Pro Se

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 APR -6 AM 8:47

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC,

Respondent,

Case No: 66533-2-1

RE: King County No: 10-2-12868-9 SEA

vs.

DECLARATION OF SERVICE

JIMI LOU STEAMBARGE d/b/a ALLUSIA,

Appellant.

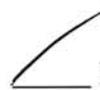
I hereby certify that on April 6, 2012 I caused to be served the following documents:

A. Appellant's Brief (Amended)

B. Declaration of Service.

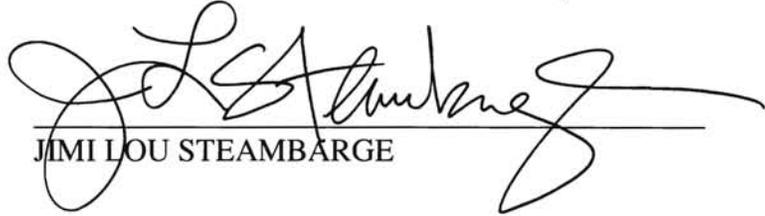
To:

Thomas Stone
Nold & Associates
Bellevue Place, Suite 930
10500 NE 8th Street
Bellevue, WA 98004

 First Class Mail, Postage Prepaid

I declare under penalty under the laws of the state of Washington that the foregoing is true and correct.

Dated this 4-6-12 at Seattle, WA.



JIMI LOU STEAMBARGE