

No. 68112-5-I

IN THE COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

FRED PALIDOR, Appellant

v.

DAVID HOVDE, et al., Respondents

BRIEF OF RESPONDENTS

**HARVEY AND JUDITH FLAX LIVING TRUST, JUDITH
 FLAX, HARVEY FLAX, and their marital community**

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COURT OF APPEALS
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A. INTRODUCTION

Nancy Taylor leased commercial property from the Harvey and Judith Flax Living Trust. Taylor got behind on rent. The Flaxes changed the locks and demanded Taylor pay \$20,000.00 of the back rent owed before she would be allowed back into the property. Taylor obtained \$10,000.00 from her husband Fred Palidor, and the Flaxes accepted that amount from Taylor as partial payment of back rent and allowed her back into the property.

Palidor, not Taylor, sued the Flaxes (and others) claiming the lockout was illegal and they coerced him into paying the \$10,000.00. However, Taylor was the tenant, not Palidor. And the defendants made threats to and coerced Taylor, if anyone, not Palidor. Thus, the trial court properly dismissed Palidor's suit on grounds that he was not the real party in interest under CR 17(a).

B. ASSIGNMENTS OF ERROR

Issues Pertaining to the Assignment of Error

1. Did the trial court properly hold Palidor was not the real party in interest on claims that the landlord's lockout of the tenant violated

landlord-tenant laws and violated terms of the tenant's lease when Palidor was not the tenant?

2. Did the trial court properly hold Palidor was not the real party in interest on claims that the defendants coerced him when (a) the tenant owed back rent; (b) the landlord locked out the tenant; (c) the landlord demanded the tenant pay back rent before the tenant would be let back in to the property; (d) the landlord made no threats or demands to Palidor; (e) Palidor volunteered to provide the tenant with money to pay to the landlord; and (f) Palidor gave money to the tenant who then gave it to the landlord to be let back into the property?

3. Did the trial court act within its discretion in dismissing Palidor's action for failure to add the real party in interest within a reasonable time after objection was filed when (a) failing to name the tenant as the plaintiff was not difficult or an excusable mistake; (b) the defendants filed their objection on November 4, 2011; (c) the hearing on the objection occurred 28 days later; and (d) before the hearing Palidor took no steps to bring in the tenant as a party?

C. STATEMENT OF THE CASE

1. Substantive Facts.

Harvey and Judith Flax are the trustors of the Harvey and Judith Flax Living Trust. Clerk's Papers 53–54 ("CP"). The trust owns a parcel of commercial property in Bellingham, Washington. CP 54. The Flaxes live in Los Angeles, California, so David Hovde manages the commercial property for them. *Id.* at 18 and 54.

Nancy Taylor leased the commercial property for her business Dream on Futon. CP 18. Taylor signed the lease and the lease extension individually. CP 32 and 39.

In May 2010, Taylor was several months behind on rent, owing approximately \$47,720.06. CP 18. In the evening on May 13, 2010, Hovde called Taylor and told her the next morning he would be changing the locks on the property and would not let her re-enter unless she paid at least \$20,000.00 of the back rent owed. CP 18. About an hour later Taylor called Hovde back and demanded access to the property. CP 12. The parties did not reach a resolution during their phone calls. *See id.*

Taylor did not have money to make a payment for the rent owed, so she spoke with her husband Fred Palidor. CP 12. Palidor told his wife that, if need be, he could come up with \$10,000.00 to get her back into the property. CP 12 and 14. Taylor then sent Hovde an email stating that she might be able to come up with \$10,000.00. CP 18 and 41. She also suggested the parties discuss ways she could continue to operate her business on the property on a short-term basis and stated her other option was to file bankruptcy. CP 41.

The next morning, Hovde responded to Taylor by email and reiterated to her that the Flaxes would not accept anything less than

\$20,000.00. CP 18 and 43. Hovde then met with a locksmith from Keywest Lock Service, Inc. at the property to change the locks. CP 18.

While Hovde was at the property, Taylor and Palidor arrived. CP 18. All three discussed the situation. *See* CP 12–13, 15, and 18. Hovde again reiterated that Taylor would not be allowed re-possession of the property unless Taylor paid \$20,000.00 towards the back rent owed. CP 15 and 18.

Hovde never made any demand to Palidor that Palidor himself pay the back rent owed by Taylor. CP 19. Rather, it was Palidor who offered to come up with \$10,000.00. *Id.* Taylor “agreed to allow [Palidor] to try to pay off Hovde.” CP 15. Palidor then negotiated with Hovde. *Id.* Hovde and the Flaxes agreed to accept \$10,000.00 of the back rent owed by Taylor. CP 19.

Palidor obtained a cashier’s check made out to “Dream on Futon Company” for \$10,000.00. CP 45. Taylor endorsed the check over to the Flaxes and gave it to Hovde. CP 16, 19, and 45. Upon receipt of the check, Hovde let Taylor back into the property. CP 19. The cashier’s check was deposited into the Flaxes’ account and applied towards the back rent owed by Taylor. CP 9, 47, and 49.

Four days later, on May 18, 2010, Taylor sent an email to Hovde acknowledging the \$10,000.00 payment in the form of a check endorsed

by Taylor to the Flaxes. CP 20 and 52. Thereafter, the parties were unable to reach agreement on lease terms going forward before Taylor filed for individual bankruptcy protection on June 18, 2010. CP 20 and 60. Taylor received a bankruptcy discharge on October 4, 2011. CP 132.

2. Procedural History.

While Taylor's bankruptcy was pending, Palidor filed a lawsuit in his own name and on his own behalf on December 27, 2010. CP 145–50. Palidor named the following parties as defendants: Hovde; the Flax Living Trust; the Flaxes individually; KeyWest Lock Service, the locksmith company hired by Hovde; and Gregory Purcell and his wife, the locksmith and owner of KeyWest. CP 145–46.

Palidor alleged the lockout of Taylor from the property violated landlord-tenant laws and the terms of Taylor's lease. *See* CP 148. He asserted three causes of action based on the lockout. CP 148–50. First, Palidor claimed he was entitled to restitution against the defendants because of their unjust enrichment in wrongfully coercing him to pay \$10,000.00. CP 148. Second, Palidor asserted a consumer protect act violation claim against the defendants based on the unfair or deceptive act of locking out Taylor and demanding the back rent she owed. CP 148–49.

Third, Palidor sought recovery against the defendants on the grounds that their actions constituted a civil conspiracy against him. CP 149–50.

The Flaxes filed a motion to dismiss Palidor’s lawsuit on November 4, 2011. CP 165–73. The Flaxes argued that pursuant to CR 17(a), Palidor was not the real party in interest on claims related to the lockout. *Id.* Palidor opposed the motion. *See* CP 153–64. On December 2, 2011, 28 days after the motion was filed and served, the motion was heard by the trial court. Verbatim Report of Proceedings 1 (“VRP”).

The trial court ruled Palidor was not the real party in interest. VRP 34. The court also found that a reasonable time had passed since the defendants raised their real party in interest objection and that the real party in interest had not been named in the action. *Id.* Therefore, the trial court granted the motion to dismiss. CP 3–5.

Palidor now appeals the trial court’s decision.

D. ARGUMENT

1. Standard of Review.

The Flaxes agree the trial court’s decision on whether a plaintiff is the real party in interest is reviewed de novo. However, a different standard of review applies to the trial court’s decision on whether to dismiss the action when the plaintiff is not the real party in interest.

The abuse of discretion standard is used when reviewing a trial court's decision to dismiss the action on real party in interest grounds. Washington courts apply an abuse of discretion standard to a trial court's decision to allow time to bring in the real party in interest rather than dismiss the case. In *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 269 P.3d 1038 (2011), the court applied an abuse of discretion standard to a trial court's decision to allow joinder of the real party in interest after the defendant had objected. *Id.* at 537–40. Similarly, the court in *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 982 P.2d 1202 (1999), applied the abuse of discretion standard in ruling the trial court abused its discretion in denying a CR 17 motion to substitute a bankruptcy trustee for a plaintiff-debtor with relation back to the original filing. *Id.* at 171–72, 179–80. Furthermore, in construing the identical federal rule, federal appellate courts have held the question of whether a party is a real party in interest is reviewed de novo, while the question of whether the case should be dismissed for failure to join the real party within a reasonable time after objection is reviewed for abuse of discretion. *E.g.*, *Magallon v. Livingston*, 453 F.3d 268, 271 (5th Cir. 2006); *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 43–44 (2d Cir. 2005); *Wieburg v. GTE*

Southwest, Inc., 272 F.3d 302, 305–08 (5th Cir. 2001).¹ Therefore, the abuse of discretion standard is applied to a trial court’s decision to dismiss the action rather than allow more time to bring in the real party in interest.

2. The Real Party In Interest is the Party Who Is Entitled to Enforce the Right Under Substantive Law.

CR 17(a) requires that a lawsuit be brought by the real party in interest:

Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

CR 17(a). To be the real party in interest, a person must show “he has some real interest in the cause of action.” *Kim v. Moffett*, 156 Wn. App. 689, 698, 234 P.3d 279 (2010) (internal quotations and citations omitted). In other words, CR 17(a) requires ““that the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right.”” *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*,

¹ “CR 17(a) is identical to Federal Rule of Civil Procedure 17(a). Thus, analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive.” *Sprague*, 97 Wn. App. at 172.

407 F.3d 34, 48 (2d Cir. 2005) (quoting 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543 (2d ed. 1990)). Because Taylor was the tenant who was locked out and because demands were made to Taylor to pay the back rent she owed, it is Taylor who is entitled to enforce rights against the defendants, not Palidor.

3. The Trial Court Properly Held Palidor Is Not the Real Party In Interest On Claims that the Lockout Was Unlawful Because Palidor Was Not the Tenant.

Palidor is not the real party in interest on allegations that the lockout of Taylor violated landlord-tenant laws or violated Taylor's lease agreement because Palidor had no rights in the property or the lease agreement.² Only a tenant, who has the right to occupy the leased property, can enforce claims against the landlord that the landlord violated landlord-tenant laws. *See Gilam v. City of Centralia*, 14 Wn.2d 523, 530, 128 P.2d 661 (1942) (the "right to damages for an injury to property is a personal right belonging to the owner . . ."). Also, a "party to a contract is entitled to enforce it and to sue in his own name." *Kim v. Moffett*, 156 Wn. App. 689, 700, 234 P.3d 279 (2010). However, Palidor was not the tenant and was not a party to the lease agreement. Taylor was the tenant of the property. CP 18, 32. There is no evidence or argument that Palidor

² Although Palidor does not bring direct causes of action against the defendants for violation of the landlord-tenant laws or terms of the lease, he made these allegations in this Complaint. CP 148.

himself had any right or interest in the property or in Taylor's leasehold interest in the property. And there is no evidence or argument that Palidor had any interest in the lease agreement between Taylor and the Flaxes. Therefore, Palidor is not entitled to enforce any right against the defendants for alleged violations of the landlord-tenant laws or the lease agreement. The trial court properly ruled Palidor was not the real party in interest on any such claims. Similarly, as explained next, Palidor is also not the real party in interest on his causes of action for restitution, violation of the consumer protection act, and civil conspiracy against the defendants arising out of the lockout and demands to Taylor.

4. The Trial Court Properly Held Palidor Is Not the Real Party In Interest On A Claim of Restitution Because He Did Not Make a Payment to the Defendants and He Was Not Coerced by the Defendants.

Palidor is not entitled to enforce a right of restitution against the defendants for several reasons. First, Palidor did not pay money to the defendants. Second, the defendants made no threats or demands to Palidor.

- a. Palidor is not entitled to restitution from the defendants because he did not make a payment to the defendants.

Palidor has no right of restitution against the defendants because he paid money to Taylor, not the defendants. The first element of an unjust enrichment claim is “a benefit conferred upon the defendant by the

plaintiff.”” See *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (quoting *Bailie Commc’ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159–60, 810 P.2d 12 (1991). In a claim for unjust enrichment/restitution, “[o]ne person ‘enriches’ another by transferring money or other benefit to the other.” *Davenport v. Wash. Educ. Ass’n*, 147 Wn. App. 704, 727–28, 197 P.3d 686 (2008). However, here Palidor did not confer a benefit upon the Flaxes or enrich them. Palidor conferred a benefit on Taylor when he gave her a \$10,000.00 cashier’s check made out to “Dream on Futon Company.” CP 19, 45. After getting the check, Taylor endorsed it to the Flaxes and gave it to Hovde. CP 19, 45. Thus, it was Taylor who conferred a benefit upon the Flaxes. Therefore, it is Taylor who may enforce a restitution claim against the defendants, not Palidor.

Palidor argues he has a restitution claim against the defendants even though he did not pay money directly to the defendants (*i.e.* he was not in privity with the defendants). See Appellant’s Opening Brief 13–14. However, the authorities cited to support this argument are not applicable to the facts of this case. Those authorities all deal with situations where a third party wrongfully obtains property from the plaintiff and then transfers it to the defendant. For example, in *Soderberg v. King County*,

15 Wn. 194, 45 P. 785 (1896),³ the sheriff wrongfully collected money from the plaintiff and transferred it to the county treasurer. *Id.* at 194–95. The plaintiff sued the county for restitution. The county argued it was not liable because payment was made to the sheriff, not the county treasurer. *Id.* at 199. However, the court ruled the sheriff obtained the money wrongfully and then transferred it to the county, thus the county had no valid or legal right to the money and it was inequitable for the county to keep it. *Id.* at 199–200. A similar situation was presented in *Fidelity National Bank of Spokane v. Henley*, 24 Wn. 1, 63 P. 1119 (1901), where the plaintiff alleged money owed to it was wrongfully held by a third party and then transferred to the defendant. *Id.* at 2–4. The court, relying on *Soderberg* and other cases, ruled the third party had no legal right to the money and thus the defendant to whom the money was transferred also had no right to the money and owed it back to the plaintiff. *Id.* at 6–7.

This same situation is also described in the secondary sources cited. The section from Williston on Contracts relates to a situation where a third party coerces property from the plaintiff and then that third party transfers the property to the defendant who has notice of the third party's

³ Palidor also quotes *Pacific Coal & Lumber Co. v. Pierce County*, 133 Wn. 278, 280, 233 P. 953 (1925), but the quoted language comes from a discussion of the ruling in *Soderberg*. The actual holding in *Pacific Coal* has no relation to Palidor's appeal. *Id.* at 278 (the sole question is whether the action for excess payment of taxes was commenced within the statute of limitations).

coercion of the plaintiff. *See* 28 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 71:17 (4th ed. 2003) (“If the party against whom duress is urged is a donee or transferee with notice of the duress, the defect in the transferor’s title is not cured; and the donee or transferee with notice will take only what its transferor had—voidable title—and the transaction will remain voidable as against the transferee, though the duress was committed by its transferor.”). The Restatements cited also cover this same situation. *See* Restatement (Second) Contracts § 175(2) (1981) (if the plaintiff’s assent is induced by a third party, the assent is voidable by the plaintiff unless the defendant acted in good faith and without knowledge of the duress); Restatement (Third) of Restitution and Unjust Enrichment § 58(1)–(2) (2011) (“claimant entitled to restitution from property may obtain restitution from any traceable product of that property” and “against any subsequent transferee who is not a bona fide purchaser”); *id.* § 66–67 (a bona fide purchaser or payee takes property free of any claim the claimant may have asserted against the grantor).⁴

In all of these cases and authorities, a third party wrongfully obtained or coerced property from the plaintiff and then gave it to the

⁴ *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 53 Wn. App. 77, 765 P.2d 339 (1988), stands for the same proposition. *See id.* at 85 (defendant liable for restitution when it obtained property of the plaintiff that was acquired by another through fraud).

defendant, who had knowledge of the coercion or wrong exerted by the third party on the plaintiff. Thus, these authorities are only applicable if Taylor coerced or wrongfully obtained the \$10,000.00 from Palidor and then gave that money to the defendants. However, there is no evidence in the record that Taylor coerced Palidor or wrongfully obtained the \$10,000.00 from him. Also, Palidor does not argue Taylor coerced or wrongfully obtained the money from him. Therefore, these authorities cited by Palidor are not applicable. Palidor does not have a right to enforce a restitution claim against the defendants when he did not give money to the defendants.

- b. Palidor is not entitled to restitution from the defendants because the defendants did not make any threats or demands to him.

Palidor has no claim of restitution against the defendants because he was not threatened, coerced, or subjected to duress by the defendants. A person claiming restitution against another based on coercion or duress must be someone who was coerced or subjected to duress themselves. The case cited by Palidor to support his argument that duress or coercion can form the basis of a restitution claim involves a situation where the plaintiff was the person to whom the threats were made. *Meylink v. Minnehaha Coop. Oil Co.*, 283 N.W. 161 (S.D. 1938) (defendant made threats to the plaintiff). Similarly, the Restatement sections cited are

based on threats being made to the plaintiff. *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 14 (2011) § 14, cmt. d, illus. 1 (employer makes threat of criminal prosecution of another and demand for payment to plaintiff); *id.* at cmt. d, illus. 2 (threat of criminal prosecution and demand made to plaintiff); *id.* at cmt. e, illus. 3 (B makes threats and demands to plaintiff). However, here no threats or demands were made to Palidor.

This is not a case where the defendants made threats to Palidor that they would lock out his wife if Palidor did not come up with money himself. Instead, any threats or demands from the defendants were made to Taylor that she pay back rent owed. In Hovde's initial call to Taylor, he informed her he was changing the locks and she would not be let back in unless she paid \$20,000.00 in back rent owed. CP 18. Later, Taylor emailed Hovde to tell him she might be able to come up with \$10,000.00. CP 18, 41. The next morning, Hovde responded by email to Taylor and again told her the Flaxes would not accept less than \$20,000.00 from her. CP 18, 43. Later that morning, when Hovde, Taylor, and Palidor were at the property, Hovde reiterated to Taylor that she would not be allowed back in unless she paid \$20,000.00 towards the back rent. CP 15, 18. No

threats or demands were ever made to Palidor.⁵ CP 19. Therefore, Taylor is the real party in interest on claims of restitution against the defendants based on coercion because she was the one threatened, if anyone.

Palidor argues “A party may reverse a transaction based on duress, even though the threat is made against another party.” Appellant’s Opening Brief 12. However, while a plaintiff may have a restitution claim when threats are made *against* another party, the threats must be made *to* the plaintiff. The authorities cited by Palidor all related to situations where threats are made to the plaintiff about what the defendant will do to a third person. For example, the following illustration is provided in the Restatement (Third) of Restitution and Unjust Enrichment:

Agent embezzles \$ 10,000 from Employer. Although Agent's Mother is not responsible for Agent's debts, *Employer induces Mother* to repay \$ 10,000 by threatening criminal prosecution of Agent if the demand is not met. Threats of criminal prosecution of a third party constitute impermissible coercion as a matter of law. *Mother is entitled to restitution* of \$ 10,000 from Employer.

Restatement (Third) of Restitution and Unjust Enrichment § 14, cmt. d, illus. 1 (2011) (emphasis added). This illustration is identical to the facts in *Meylink v. Minnehaha Cooperative Oil Co.*, 283 N.W. 161 (S.D. 1938), in which the court ruled a company was liable for restitution to the

⁵ Instead, it was Taylor herself who went to Palidor the night before the lockout. CP 12. It was Palidor who then suggested to Taylor that he could come up with \$10,000.00. CP 12, 14.

president of the company when the company made threats to the president that it would prosecute the president's son for embezzlement if the president did not pay the company back. *Id.* at 162. This situation of threats being made to the plaintiff about some other person is also discussed in the treatise cited. *See* 28 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 71:16 (4th ed. 2003) (describing a case in which the plaintiff in a will contest case makes threats to the daughter of the testator that the plaintiff will make false claims about incest with the testator unless the daughter makes a note payable to the plaintiff to settle the will contest). Thus, in the Restatement, *Meylink*, and Williston's treatise, threats were made about a third party but the threats were still made to the plaintiff.

This differs from the facts here where no threats were made to Palidor. Instead, the threats of a lockout and demands for back rent were made to Taylor. Therefore, the authorities cited by Palidor are not applicable. Palidor does not have a right to enforce a restitution claim against the defendants based on coercion when no threats or demands were made to him.

5. The Trial Court Properly Held Palidor is Not the Real Party In Interest On A Consumer Protection Act Claim Because No Deceptive Act or Practice Was Done To Palidor.

Palidor is not entitled to enforce a consumer protection act (“CPA”) violation claim against the defendants because any unfair or deceptive act or practice was done to Taylor, not Palidor. Two elements of a CPA claim are (1) an unfair or deceptive act or practice that (2) injures a person’s property or business. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). Thus, to bring a CPA claim against a defendant, the defendant must have done an unfair or deceptive act or practice to the plaintiff that injures the plaintiff: “What is necessary, and does constitute *the needed link between the plaintiff and the actor*, is that the violation cause injury to the plaintiff’s business or property as required by RCW 19.86.090.” *Id.* at 39 (emphasis added). For example, in *Panag*, even though there was no contractual relationship between the defendant debt collection companies and the plaintiffs, the defendants engaged in unfair or deceptive debt collection practices directly against the plaintiffs in attempting to collect debts. *Id.* at 35. Palidor does not cite any authority to support a plaintiff’s CPA claim against a defendant where the unfair or deceptive act was done to someone other than the plaintiff.

Here, any alleged unfair or deceptive act was done to Taylor, the tenant, not Palidor. The Complaint alleges the defendants “engaged in multiple unfair or deceptive acts or practices . . . when they unlawfully

took possession of the Premises from *Ms. Taylor* and *her* company, refused to return the Premises to *Ms. Taylor* unless *she* paid the Flax Trust \$10,000.” CP 149 (emphasis added). Thus, the lockout and demand for back rent are the unfair or deceptive acts complained of. But Taylor was the tenant locked out and demands for back rent were made to Taylor to pay back rent. Palidor was not locked out and no demands for back rent were made to him. Therefore, Taylor is the party entitled to enforce claims that the lockout and demands violated the CPA, not Palidor.

6. The Trial Court Properly Held Palidor Is Not the Real Party In Interest On A Civil Conspiracy Claim Because No Conspiracy was Conducted Against Palidor.

Similar to Palidor’s CPA claim, Palidor also is not entitled to enforce a civil conspiracy claim against the defendants because the defendants did not conduct a conspiracy against him. As the cases cited by Palidor show, a defendant is liable for civil conspiracy when the conspiracy is conducted against the plaintiff bringing the action. *See Newton Ins. Agency & Brokerage v. Caledonian Ins. Group*, 114 Wn. App. 151, 160, 52 P.3d 30 (2002) (holding the defendant’s actions towards the plaintiff support the plaintiff’s civil conspiracy claim); *Wilson v. State*, 84 Wn. App. 332, 350–52, 929 P.2d 448 (1996) (discussing the plaintiff’s conspiracy claim in terms of the alleged illegal acts conducted against the plaintiff by the defendant). However, any conspiracy here was directed

against Taylor. Taylor was the tenant who was locked out. And Taylor was the person from whom the defendants demanded payment of back rent. As a result, Taylor was the target of any conspiracy. No authority is offered to show Palidor has a civil conspiracy claim against the defendants when the alleged conspiracy was conducted against Taylor. Therefore, Taylor is the real party in interest on any claims of civil conspiracy against the defendants.

7. The Defendants Would Be Subject to Potential Liability to Both Palidor and Taylor and Would Be Prejudiced if Palidor is Found to Be the Real Party In Interest.

The defendants may be subject to dual liability if Palidor is found to be the real party in interest on claims arising out of the lockout of the tenant Taylor. The purpose of CR 17(a)'s requirement that every action be prosecuted in the name of the real party in interest is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure (sic) generally that the judgment will have its proper effect as res judicata." *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 172, 982 P.2d 1202 (1999) (quoting Fed. R. Civ. P. 17(a) advisory committee's note to 1966 amendment). As discussed above, Taylor is the actual party entitled to recover damages related to the lockout and demands that she pay bank rent owed. However, Palidor's lawsuit also seeks damages related to the lockout and back rent owed. Thus, if Palidor's lawsuit goes

forward, the defendants may be subject to liability in identical actions brought by Palidor and Taylor for the same damages. Similarly, finding Taylor is the real party in interest on claims related to the lockout and demands for back rent will make sure that any judgment on those claims will be subject to proper res judicata effect against Taylor as the party subjected to the lockout and demands.

Additionally, the defendants will suffer further prejudice if Palidor is allowed to proceed with his claims because the defendants may have certain defenses against Taylor that they may not have against Palidor. “CR 17(a) is intended to protect the defendant from prejudice by insuring that a claim is prosecuted by the proper party.” *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 227, 734 P.2d 553 (1987). Defenses to any claims brought by Taylor may include (1) Taylor’s bankruptcy filing and waiver of her claims, *see* CP 172–173; (2) the fact that Taylor owed the back rent demanded, *see* CP 18; (3) the Flaxes operated on the advice of legal counsel, CP 136; and (4) the Flaxes and Taylor settled the lockout issues, CP 52. These defenses may not be available against Palidor. Thus, dismissal of Palidor’s claims on grounds he is not the real party in interest serves CR 17(a)’s purpose of protecting the defendants from prejudice.

8. The Trial Court Did Not Abuse Its Discretion In Dismissing Palidor’s Lawsuit Because Palidor Is Not Entitled To a

Reasonable Time to Add the Real Party In Interest and In Any Event a Reasonable Time Was Allowed.

After finding Palidor was not the real party in interest, the trial court did not abuse its discretion in dismissing Palidor's lawsuit for two reasons. First, the provision in CR 17(a) allowing time to add the real party in interest only applies to situations where an excusable mistake resulted in the real party in interest not being named. Second, the trial court's holding that Palidor failed to join the real party in interest within a reasonable time after the defendants raised their objection was reasonable.

- a. Palidor is not entitled to a reasonable time to add the real party in interest because no difficult or excusable mistake occurred in not naming Taylor.

Dismissal was appropriate because failing to identify Taylor as the proper plaintiff was not difficult or an excusable mistake.⁶ The last sentence of CR 17(a) provides that an action shall not be dismissed on real party in interest grounds until a reasonable time has been allowed after objection for the real party in interest to ratify, join, or substitute in the action. However, the Washington Supreme Court has stated this sentence is not applicable ““when the determination of the right party to bring the action was not difficult and when no excusable mistake has been made.””

⁶ Although the trial court's dismissal was not based on this issue, VRP 34, the appellate court may affirm on any alternate legal ground the record adequately supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Beal v. City of Seattle, 134 Wn.2d 769, 778, 954 P.2d 237 (1998) (quoting 6A Charles Alan Wright et al., Federal Practice and Procedure § 1555 (2d ed. 1990)). The case should be dismissed when the determination of the right party was not difficult and no excusable mistake was made. *Id.*

The trial court properly dismissed Palidor's lawsuit because it was not difficult to determine Taylor was the real party in interest and no excusable mistake occurred in not naming her as the plaintiff. Taylor was the tenant. CP 18, 32, 39. Taylor was behind on rent. CP 18. Taylor was locked out of the property. *Id.* Demands were made to Taylor to pay the back rent she owed. CP 15, 18, 43. Thus, it was not difficult to see that Taylor was the real party in interest on any claims against the defendants. Nor was any excusable mistake made in not naming Taylor as the plaintiff under these circumstances. Therefore, the last sentence of CR 17(a) does not apply and the case was properly dismissed.

- b. The trial court properly held Palidor failed to add Taylor within a reasonable time.

Even if the last sentence of CR 17(a) does apply, the trial court did not abuse its discretion in dismissing Palidor's case after he had 28 days to add Taylor as a party. A trial court's dismissal under CR 17(a) is reviewed for abuse of discretion. *See supra* Part D.1.

Judicial discretion means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result. An appellate court will find an abuse of discretion only on a clear showing that the court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A trial court's discretionary decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A court's exercise of discretion is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.

T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423–24, 138 P.3d 1053 (2006)
(internal quotations and citations omitted).

The trial court made a sound and reasonable ruling that Palidor had a reasonable time to add Taylor but failed to do so. The defendants' motion to dismiss clearly argued Taylor was the real party in interest and put Palidor on notice of that position. CP 165–73. Twenty-eight days elapsed between the time the defendants raised their objection in the motion and the entry of the order of dismissal. CP 3, 57. However, within those 28 days, Taylor had not been added as a party. *See* VRP 34. There is no evidence in the record that any efforts were made to add Taylor during those 28 days. Thus, Palidor was on notice that Taylor was the real party in interest, but after 28 days had not taken any steps to make her a party. Under these circumstances, it was not manifestly unreasonable for

the court to find Palidor failed to bring Taylor into the case within a reasonable time.

Palidor's argument that dismissal was improper because Taylor informally ratified his lawsuit by submitting a declaration is without merit. *See* Appellant's Opening Brief 22. First, proper ratification under CR 17(a) "requires the ratifying party to: 1) authorize continuation of the action; and 2) agree to be bound by the lawsuit's result." *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 712 (9th Cir. 1992). Any informal ratification is insufficient. *Durabla Mfg. Co. v. Durabla Can. LTD.*, 124 Fed. Appx. 732, 734 (3d Cir. 2005). Taylor did not formally ratify Palidor's lawsuit. Second, there is no authority cited to support the argument that Taylor can simply ratify Palidor bringing Taylor's claims against the defendants for his own benefit. Third, even if Taylor could ratify the claims brought by Palidor, she is precluded from ratifying and pursuing those claims because they became property of the bankruptcy estate when she filed bankruptcy. *See Miller v. Campbell*, 164 Wn.2d 529, 540-41, 192 P.3d 352 (2008) (discussing a party is prevented from pursuing a claim that she had an obligation to disclose in bankruptcy but failed to do so). Only the bankruptcy trustee can ratify Taylor's claims. Therefore, informal ratification does not prevent dismissal of Palidor's lawsuit for failing to name the real party in interest.

9. The Flaxes are Entitled to Attorney Fees Because Palidor's Appeal is Frivolous.

Because the decisions of the trial court should be affirmed, Palidor is not entitled to attorney fees and costs. Instead, the Flaxes are entitled to their attorney fees under RAP 18.9(a) because this appeal is frivolous.

RAP 18.9(a) permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.

Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010) (internal citations omitted).

Palidor's appeal is frivolous for several reasons.

First, Palidor's appeal relies on a misstatement of the record. Throughout his opening brief, Palidor claims *he* was coerced or subjected to duress by the defendants. Appellant's Opening Brief 1, 12, 14, 18, 19–20. However, nothing in the record shows the defendants made any threats or demands to Palidor. The record shows demands for back rent were only made to Taylor, and Taylor went to Palidor who then volunteered to help Taylor. Therefore, Palidor's appeal is frivolous because it relies on a misstatement of the record in that there is no

debatable issue upon which reasonable minds might differ that the defendants did not threaten Palidor.

Second, Palidor's appeal relies on authorities that have no bearing on the facts presented in this case. An appeal is frivolous if it cites no judicial authority and no authority for reversal based on existing law, or if it makes no rational, good-faith argument for modification of existing law. *Delany v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475 (1997). Palidor's arguments, and authorities cited for support, lack factual support in the record. Palidor cites authorities that state a plaintiff who is coerced by a third party can recover against a defendant who receives the proceeds of the coercion from the third party with knowledge of the third party's coercion. *See supra* Part D.4.a. However, there is no evidence in the record that Taylor coerced money from Palidor and then transferred the money to the defendants who had knowledge of Taylor's coercion of Palidor. Palidor also cites authorities that state threats made by a defendant to a plaintiff about a third party can form the basis of a restitution claim by the plaintiff. *See supra* Part D.4.b. However, there is no evidence in the record that the defendants made any threats to Palidor about Taylor. Palidor offers no arguments for how these authorities apply to the facts here or why they should be extended to this present situation.

Therefore, Palidor's appeal is also frivolous because it relies on authorities that have no relevance to the facts of this case.

E. CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the trial court.

DATED this 25th day of June 2012.

Respectfully submitted,

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**IN THE COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON**

<p>FRED PALIDOR,</p> <p style="text-align:center">Appellant,</p> <p style="text-align:center">v.</p> <p>DAVID HOVDE, et al.,</p> <p style="text-align:center">Respondents.</p>	<p>No. 68112-5-I</p> <p>DECLARATION OF SERVICE</p> <p>The Honorable Judge Ira Uhrig Whatcom County Superior Court Cause No.: 10-2-03266-1</p>
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I hereby certify under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of a true and correct copy of the **Brief of Respondents Harvey and Judith Flax Living Trust, Judith Flax, Harvey Flax, and their marital community** to the parties listed below via electronic transmission and First Class / US Mail.

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

DATED this 25th day of June 2012 in Bellingham, Washington.



SHELLY JOHNSON