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Court Of Appeals, Division 1 Of The State Of Washington

No. Coa 69071-0

One Der Works LLC II, Respondent,

v.

James K Duncan, Appellant,

Appeal From The Superior Court

For King County

Cause No. 12-214807-4 SEA

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STATE OF WASHINGTON
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Brief Of Appellant

Dated, January 02, 2013

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The appellant [judgment defendant], James Duncan, is hereinafter referred to as “the tenant”

The respondant [judgment plaintiff], One Der Works II LLC, is hereinafter referred to as “the Landlord” and / or Landlord’s counsel.

1] Introduction:

After 5 years of peaceful tenancy, rent always paid timely, no complaints from the landlord; was constructively evicted from the leased premises. The constructive eviction was accomplished by One Der Works II, LLC [hereinafter referred to as “the landlord” or “Plaintiff” and her agents; by the following acts, negligence or errors:

- a] The landlord’s continued refusal for 6 months to repair loss of all heating, deteriorating insulation, unsafe structural members, and the unsafe electrical system.
- b] The constructive eviction was augmented by the landlord’s agent[s] [Dave Valenti, et al] who own the house adjacent to the rented premises, beginning on or about February 01, 2011; immediately after surveyors and geo-tech personnel were at the property as part of a property development permit process.
- c] The landlord’s agents; beginning on or about 03-15-2011 suddenly began to harass of the tenant; with daily verbal insults yelled loudly across the fence, designed to provoke violence, by threats of violence, by physical trespass, and also began to set their dogs upon the tenant in the rented premises yard on several occasions, eventually causing serious injuries to the tenant.
- d] The tenant informed the landlord of these acts and was met by ridicule and insult, *including a demand in writing that the tenant shall not call 911 or any other emergency service while at the rented premises.*

e] The tenant, however; did call police and other authorities due to dog bites, threats, trespass, and assault. Subsequently, immediately, the landlord intervened on behalf of her agents by contacting Officer Gilliland at the Kirkland PD, and protected her agents from prosecution by claiming the tenant had a disability of the mind.

f] The tenant subsequently experienced discrimination based upon an allegation of disability from the authorities to whom the landlord had made these unsubstantiated claims. There are numerous official records of these contacts. Consequently, none of the assaults and trespasses were prosecuted, and the harassment escalated.

g] The tenant became acutely aware of serious danger to himself, that he was being constructively evicted and on or about September 2011, assured the landlord that he was planning to move out, hoping to get the dog attacks and harassments to stop.

h] The harassment increased, injuries to the tenant resulted by means of a dog attack in his yard, the dogs were released into the rented yard about 10 times and several times got under the house, tore down the insulation under the floor, causing cold and damp to be uncontrollable.

i] Beginning on or about 10-15-2011, after 5 years of continuous use, the old woodstove, the only source of heat, developed cracks and began to leak smoke and sparks into the house. The electric system could not support an electric heater of any kind. When the tenant notified the landlord in writing,

several times, the landlord mockingly replied that “you could just move out” and stated that she refused to repair, or replace the heating system, insulation, or upgrade the electric system.

j] Subsequently, the harassment from the landlord’s agents increased, the weather grew colder and the heat was non functional. December 2011, and January 2012 the rent checks from the tenant were ignored. Finally, the landlord asked that new checks be mailed in February 2012.

k] The tenant was to locate a place to store his belongings and began moving out, at an untimely season [cold and rain] in haste; instead of moving out as planned, by the end of the lease, 7-31-12.

l] The tenant deducted rent due to the lack of habitability of the rented premises due to the lack of heat. The landlord had been notified in writing numerous times over the span of 6 months about the conditions of no adequate heat, insulation and electricity. The tenant had the city housing inspectors make a housing report which was forwarded to the landlord by the City of Kirkland. *[CP 11-21]*

m] The landlord subsequently started an eviction process, and through counsel, made a contract in settlement with the tenant. Subsequently the landlord caused her agent[s] to lock out the tenant, seized and destroyed or sold the tenant’s emblements and temporary fencing, and other fixtures that were not covered by the contract, before obtaining a writ and the execution of a writ by the sheriff as required by law.

Then, after accepting the keys to the property and the tenant had fulfilled all of

the terms of the contract, the landlord's counsel obtained a writ and judgment in violation of that contract [settlement agreement]. The landlord's counsel concealed this from the tenant.

II. Assignments of Error

1. Violation of right to fair hearing: The trial court erred by failure to allow enough time to properly hear the motion to vacate the judgment; at the motion hearing on June 12, 2012, 11:54 am to 12:10pm [*CP 44, 45 and CP 46; audio log w325-3 transcript*]
2. The trial court erred by failure to put either or both parties under oath before proceeding. at the hearing [*CP 44, 45 and CP 46; audio log w325-3 transcript*]
3. The Trial Court Judge erred by violations of the Rules of Judicial Conduct: in interfering with the tenant's presentation of evidence and oral argument at the motion hearing on June 12, 2012; extending preferential treatment to the judgment plaintiff's counsel, and dismissing the motion arbitrarily and capriciously. [*CP 44, 45 and CP 46; audio log w325-3 transcript*]
4. At the June 05, 2012 hearing; the trial court erred in permitting a violation of the tenant's right to Due Process; by granting a judgment and writ based upon a disputable contract; with no actual supporting evidence, when the moving party had not served notice of its motion on the tenant. [*CP 37-43*]
5. At the June 05, 2012 hearing; the trial court erred by failing to actually examine [read] the case file and evidence presented by the judgment plaintiff in support of the motion for entry of findings of fact, conclusions of law, judgment and issuing order for writ of restitution, June 05, 2012, [*CP 37-43; ex A,B*]
6. At the June 05, 2012 hearing; the attorney for the plaintiff purposefully made

several untrue statements under oath in order to get a quickly granted judgment without further examination. All of the untrue statements were in direct conflict with the files presented, or files which were of record, and would have been detected had the file and submitted motion paperwork been read by a judge, before being granted.

III Issues Pertaining to Assignments of Error

1. Shall the Trial Court be allowed to arbitrarily cut short a pro se tenant's testimony and argument and thereby deny a pro se tenant's right to a fair hearing for the sake of expedience?
2. Shall the Trial Court take testimony and render judgment based upon that testimony involving a disputable contract, conflicting rights and interests of a serious nature, without placing both parties under oath before proceeding?
3. Shall the Trial Court discriminate against pro se litigants by the application of double standards; by refusal to hear the pro se litigant with fairness and decorum, by the application of lesser standards of evidence and procedure; in favor of the litigant with an attorney?
4. Shall the Trial Court allow final adjudication of a matter involving a disputable contract, conflicting rights and interests of a serious nature without notice to the defendant?
5. Shall the trial court be permitted to apply a lesser standard of proof, or completely fail to examine a case file when presented ex parte, and grant the motion without question; involving a disputable contract, conflicting rights and interests of a serious nature?
6. Shall the Trial Court permit judgment plaintiffs represented by counsel, appearing ex parte, without opposition, to be exempt from their requirement to truthfully and accurately testify to the facts and evidence presented under oath?

III. Statement of the case:

1. At the motion to vacate judgment and writ hearing on June 12, 2012, 11:54 am to 12:10pm King County Superior ct. Ex parte div.; the trial court dealt with the tenant's motion arbitrarily and capriciously. The trial court quickly dismissed the motion by the tenant, sharply limiting and censoring the tenant's defense, limiting the hearing to a few minutes to avoid encroaching a lunch break instead of rescheduling the hearing. *[CP 44, 45 and CP 46; audio log w325-3 transcript]*.

2. The Honorable Carlos Vellategui, The Ex Parte Judge, violated standards of judicial conduct when he did not allow complete sentences in the oral arguments from the tenant; did not reschedule the hearing, interfered with the tenant's presentation of evidence, applying pressure to the tenant, cutting short the tenant's testimony abruptly, and ordering the tenant to leave the courtroom immediately, at 12:10; at the same time, extending obvious preferential respect and treatment to the plaintiff [respondent's] counsel. *[CP 44, 45; CP 46; audio log w325-3 transcript]*

3. The trial court did not put both parties under oath before proceeding, at the June 12, 2012 hearing. *[CP 44, 45 and CP 46; audio log w325-3 transcript]*

4. A pro se tenant will experience harsh and discriminatory treatment when seeking their rights at law in the ex parte div of King County Superior Court. The Judge, at the hearing on June 12, 2012; made his anger, disgust and

contempt for the pro se tenant abundantly clear; causing the tenant to fear asking that court for any of his rights at law.

The trial court accepted unsworn, unproven, hearsay evidence from the respondent's attorney, helped the plaintiff's attorney complete sentences and suggested words for him. The judge did not accept photographic evidence of a lockout and the tenant's evidence of compliance with the contract, cutting short the hearing by interrupting, mocking and over riding the tenant, then suddenly ordering the tenant to leave the courtroom at 12:10 pm June 12, 2012; to avoid encroaching lunch break, instead of rescheduling the hearing. *[CP 44, 45 and CP 46; audio log w325-3 transcript]*

5. Discrimination against pro se tenants at the trial court appears to be an established policy, aided by the Housing Justice Project who have a business relationship with the trial court, to divert tenants away from trials, at the expense of their rights at law. The tenant had learned of the writ of restitution by means of a telephone call on June 11, 2012 from the sheriff; and forthwith appeared in court to contest the writ and judgment. Since the tenant had long since vacated the premises and kept the agreement, the tenant was unaware of the writ, or the sheriff's posting until mid day June 11, 2012. When the tenant arrived at the trial court at 9:30 am June 12, 2012, he immediately asked housing justice project staff and counsel to defend and back up by representation, the agreement which they authored and promoted and caused the tenant to sign under duress. The HJP staff and counsel refused to support their legal work and the contract the

HJP counsel was signatory to, and sent the tenant into court pro-se. The tenant was last to be heard before lunch, at 6 minutes before lunch break. At approximately 11:20 am before the case was called to the bench; the court clerk at the bench apologized loudly, across the courtroom to the plaintiff's counsel about having to wait until tenant's motion was heard, the pro se tenant then understood the outcome of the case was predetermined in favor of the attorney for the landlord in that court. [CP 44, 45 and CP 46; audio log w325-3 transcript]

6. In the motion for entry of findings of fact, conclusions of law, judgment and issuing order for writ of restitution, June 05, 2012, King County Superior ct. Ex parte div.; the trial court failed to examine the case file before granting the ex parte motion; demonstrated by the failure to notice that the issues addressed by the agreement were fully met, that the evidence provided by the judgment plaintiff was not covered by the agreement, and relied upon a *deceptive statement* from the judgment plaintiff's counsel {“tenant is said to still be in residence”} Yet, the issue of residence was clearly not a condition of the contract. [CP 37-43; ex A,B]

a] Further proof that the motion for judgment was not examined by the court before being granted exists in the files submitted, which are contradictory, and make no case for granting the motion.

From the exhibit A, The Settlement Contract specifically excludes residence as a condition of “Vacate the premises” in the contract, pgph 2. The issue of

residence does not appear in the contract. Yet, the sworn statement by the landlord's counsel in the motion falsely claims the tenant was in residence and made the claim that it was a violation of the contract [CP 37-43, ex A, B]

According to the contract, it is quite obvious the tenant's residence at the premises was not an issue, therefore the landlord's counsel had no need to put that condition into the contract, since it was well known to all parties the tenant had moved out of the residence in dire haste, due to constructive eviction, to avoid danger to his person, from unsafe housing conditions, and from continual harassment by the landlord's agent[s], which included repeated threats and assaults by the use of the landlord's agent[s]' dogs to attack and injure the tenant.

It does appear to the tenant that the landlord-plaintiff was attempting unjust enrichment by engineering a way to seize, without adjudication or recompense, \$30,000.00 of nursery stock, and \$3,500.00 of fencing and fixtures from the tenant by ending the lease early, hounding the tenant off the property so quickly that recovering the emblements and fixtures would not be possible.

Within the contract, Exhibit A., which states that it governs the tenancy, Pgph 3 of the contract defines the condition "vacant" explicitly and states *"for the purpose of this stipulation, the term vacant means that all personal belongings of the tenants, any packing materials, detritus or junk will be removed from the subject premises, and all keys to the premises, including [if applicable] access codes and garage door openers, will be returned to*

the plaintiff.” [CP 37-43; ex A,B]

Yet, the judgment plaintiff’s counsel stated that proof of the violation of the contract was his unsubstantiated statement made to imply that the plaintiff’s counsel was an actual witness; “tenant is known to still be in residence at the premises” That was a false and misleading statement designed to deceive the court.

The issue of residence is not mentioned in the contract, since the tenant had moved his residence prior to the show cause hearing and authorship of the contract. [CP 37-43; ex A, B]

The emblements and fencing [fixtures] which were attached to the land were left out of the contract by HJP counsel and judgment plaintiff’s counsel under protest from the tenant. The tenant therefore was legally prevented from removing these items since they were attached to the soil at the premises, and would require permission or adjudication to be removed legally.

b] At the hearing of the motion hearing, on June 05, 2012, the judgment plaintiff’s counsel also failed to mention the lockout, and seizure of the items not mentioned in the contract. That lockout and seizure also made it impossible for the tenant to have removed those items. *The disputed emblements and fixtures were attached to the soil at the premises, the tenant could not legally remove them without some agreement or adjudication*

Because the contract provided by HJP and the plaintiff’s counsel refused to deal with or mention these items under protest from the tenant; and the premises

was locked and guarded even before a writ was obtained, it is not reasonable or just to make it a violation of the contract. *These items claimed as proof of violation; were not covered by the contract. [CP 37-43; ex A,B]*

c] In the motion hearing on June 05, 2012, The sworn statement by the plaintiff's counsel that he had prepared, and retained a process server to serve a summons and complaint is false; as shown in a. the filed complaint, b. affidavits of service, c. answer to eviction, d. notice of substitution of counsel. a [*CP 1,2*], b [*CP 6-1*], c [*CP 11-21*], and d [*CP 57-58*]

d] The plaintiff's counsel did not personally witness, had no actual evidence, and did not identify any other witness that the tenant was violation of the contract terms or in possession of the property either by residence or under the terms of the contract.

The plaintiff's counsel had personal knowledge and communications that the tenant had already returned the keys, emptied the buildings of all personal effects, and had not been living in the residence for two weeks, contrary to the landlord's counsel written, sworn statements. [*CP 37-43; ex A,B*]

e] The Plaintiff's counsel's statements about the tenant's violation of the contract were in direct conflict with information contained in exhibits A and B. [*CP 37-43; ex A,B*]

f] In the motion hearing on June 05, 2012, the timely notice of substitution of counsel was not mentioned or presented. A copy of the summons and initial notice was not submitted at that hearing. [*CP 37-43; ex A,B*]

8. *From the second Restatement of Contracts: "The contract or agreement for settlement is void due to extreme Duress, unequal bargaining power of the parties, unconscionable terms, failure of one or both parties' understanding or meeting of minds as to the "meanings" and "interpretation..."*; In this case, terms describing what constitutes personal property, and what are the tenant's rights to emblements. The contract was not fully integrated because certain issues were left out by the authors who were in the position of dominance and control, disregarding the protest by the tenant who was not an equal party.

The tenant was forced to accept and sign a contract which he did not author, nor was permitted to edit; or risk losing the right to a trial by appearing pro se, suffering the immediate loss of all his personal possessions by writ and seizure. The tenant was told by HJP staff and counsel that appearing at a show cause hearing, pro se, in that court, would result in an immediate eviction, regardless of setoffs, and that no trial would be granted.

The contract is void because it contained a provision which allowed an adjudication hearing of the contract without notice to the tenant, which is in violation of the constitutional right to Due Process, under the Fourth Amendment; and in violation of CR5a.

From the second Restatement of Contracts:

§175. "When Duress By Threat Makes A Contract Voidable"

(1) "If a party's manifestation of assent is induced by an improper threat by the

other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

(2) *“If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.”*

Comment:

“a. Improper threat.....Courts originally restricted duress to threats involving loss of life, mayhem or imprisonment, but these restrictions have been greatly relaxed and, *in order to constitute duress, the threat need only be improper within the rule stated in §176*”

b. “No reasonable alternative. A threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it. It is sometimes said that the threat must arouse such fear as precludes a party from exercising free will and judgment or that it must be such as would induce assent on the part of a brave man or a man of ordinary firmness. *The rule stated in this Section omits any such requirement because of its vagueness and impracticability. It is enough if the threat actually induces assent (see Comment c) on the part of one who has no reasonable alternative...*”

“The standard is a practical one under which account must be taken of the exigencies in which the victim finds himself, and *the mere availability of a*

legal remedy is not controlling if it will not afford effective relief to one in the victim's circumstances....”

c. “Subjective test of inducement. In order to constitute duress, the improper threat must induce the making of the contract....A party's manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent. The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress.”

“Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered, including such matters as the age, background and relationship of the parties. Persons of a weak or cowardly nature are the very ones that need protection; the courageous can usually protect themselves. Timid and inexperienced persons are particularly subject to threats, and it does not lie in the mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims' infirmities.

“§176. When A Threat Is Improper

(1) A threat is improper if

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad

faith, or:

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, or

(c) what is threatened is otherwise a use of power for illegitimate ends.”

9. The contract is also void because it was not fully integrated and did not reflect the intent of one of the parties, the tenant, James Duncan. The tenant did not author the contract and the authors of the contract deliberately ignored the tenant’s request to specifically address the subject of “emblems” nor include the terms emblems, crops, nursery stock, or fencing contrary to the repeated requests of the tenant. The parol evidence in the contested contract is pertinent and essential to the interpretation of the contract and should be considered as cited below. The items omitted from the contract, under protest, consisted of \$30,000.00 worth of nursery stock or “emblems” owned by the tenant and stored at the rented premises along with certain fixtures including installed temporary fencing valued at approximately \$3500.00 all of which were stored in the yard of the rented premises. These items were seized and destroyed or sold after a lockout by the judgment plaintiff prior to obtaining a writ of restitution. The landlord and her agent[s] violated the law in doing so, even if

these items were included in the contract. The fate of these items were omitted from the contract under protest from the tenant.

Cite: 115 wn.2d 657, 801 p.2d 222 Berg v. Hudesman cause number:

56656-9 file “The terms of a written contractual instrument that is not fully integrated, I.E., one that was not intended by the parties as the final expression of all the terms agreed upon, may be supplemented by additional terms proved by extrinsic evidence so long as such additional terms are not inconsistent with the written terms.”

[1] “Contracts - Construction - Distinguished From Interpretation. By determining the legal effect of a contract, a court is construing it. By ascertaining the meaning of a contract, a court is interpreting it.”

[2] “Contracts – Construction - Purpose. A court's purpose in interpreting a contract is to ascertain the intention of the parties.”

[3] “Contracts – Construction - Rules of Construction - Nature. Rules of contract interpretation should not be applied as absolutes.”

[4] “Contracts – Construction - Meaning of Words - Single Meaning. Only in rare circumstances does a contractual word or phrase have only a single meaning that is readily understood by any reader.”

[5] “Contracts – Construction - Extrinsic Evidence - Context Rule. As an aid in ascertaining the intent of contracting parties, a court may admit extrinsic

evidence relating to the entire set of circumstances under which the contract was formed, including the subsequent conduct of the contracting parties and the reasonableness of the parties' respective interpretations.”

[6] “Contracts – Construction - Extrinsic Evidence - Ambiguity - Necessity. Extrinsic evidence of the circumstances surrounding the formation of a contract is admissible to ascertain the intent of the contracting parties regardless of whether or not the meaning of the contract language is plain and unambiguous on its face.”

“ (St. Yves v. Mid state bank, 111 Wn.2d 374, Boeing airplane co. V. Firemen's fund indem. Co., 44 Wn.2d 488, Bellingham sec. Syndicate, inc. V. Bellingham coal mines, inc., 13 Wn.2d 370, and other cases holding to the contrary are overruled insofar as they are inconsistent.)”

[7] “Contracts - Construction - Meaning of Words - Terms of Art - Effect. Language that is technical or that constitutes a term of art is given its technical meaning when used in an agreement within its technical field.”

[8] “Contracts - Parol Evidence - Elements - In General. Under the parol evidence rule, parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written contractual instruments that are [valid, complete, unambiguous, and not affected by accident, fraud, or mistake.”

[9] “Contracts - *Parol Evidence* - Integration - Partial Integration - Effect.

The terms of a written contractual instrument that is not fully integrated, I.E., one that was not intended by the parties as the final expression of all the terms agreed upon, may be supplemented by additional terms proved by extrinsic evidence so long as such additional terms are not inconsistent with the written terms.”

[10] “Contracts - Construction - Ambiguity - Resolution - Reasonableness.

When contractual language is subject to two possible constructions, the more reasonable and just construction should be adopted.”

[11] “Contracts - Construction - Ambiguity - Resolution - Against Drafter.

Ambiguous contractual language is construed against the party who drafted the contract.”

10. The contract was not filed with the court or otherwise recorded, nor reviewed or seen by a Judge, until June 05, 2012. *[CP 37-43; ex A,B]*

IV. Summary of Argument

1] The tenant was denied due process in the hearing on June 05, 2012, [CP 37-43]

2] The tenant was denied due process in the hearing on June 12, 2012 [CP 44, 45 and CP 46]

2] The settlement agreement upon which the judgment and writ were granted [hereinafter known as the “contract”] is void or voidable due to the following:

a] Void due to undue influence; The contract was authored and presented to the tenant by the landlord’s counsel and HJP counsel who purportedly represented the tenant but did not accurately reflect the intent of the tenant, nor act in the tenant’s best interests; including a clause under protest by the tenant, that judgment could be obtained without notice or opportunity for defense.

b] Void by a failure of one or both parties’ understanding and meeting of minds as to “meanings” and “interpretation” The contract failed to deal with or mention crops and fixtures that the tenant had stored upon the rented property, outside of any building. [The right to emblements]

The tenant tried to get the matter of emblements and fixtures included in the contract, including the subject in the response to summons and thereafter serving and posting written notices; but HJP counsel, a signatory to the contract and author, and Landlord’s counsel, signatory to the contract and author, refused to include or mention these items in any way. The tenant was not allowed to author any part of the contract nor alter its wording.

c] *Void due to undue influence, lack of equal bargaining power, Duress, and haste;* The HJP counsel verbally assured the tenant that they would defend the contract if the landlord violated it, pointing out that they had also signed it and that it would be filed and presented to and signed by a Judge. The contract was signed under Extreme Duress because HJP counsel warned the tenant if he did not quickly sign the agreement they and the landlord's counsel had written, then the tenant would be forced to appear at the show cause hearing pro se, and would very likely be evicted immediately leaving no time to move out, and experience the loss, seizure and destruction of all personal property at the rented premises.

The threat of immediate eviction and nearly immediate loss of all personal property *as a result of appearing pro se in a show cause hearing* in King County Superior court, ex parte division, was In fact real. This danger was demonstrated by the contemptuous manner that the subsequent pro se motion was dealt with in that same court, by the same Judge who would have heard the show cause. This type of risk and result for the pro se tenant is common in that court. When the sheriff executed the writ which was obtained without notice, the tenant was warned by the sheriff by telephone, not to be present and was forbidden to return to the property yard, or sidewalk to recover any of the possessions that might have been have been placed there in a proper execution of writ. The timely posted and served notice to store any personal property not covered by the contract was ignored. This is the standard operating procedure

by the King County sheriff when executing writs of restitution upon a tenant who is not represented by counsel. The sheriff's return of service falsely claimed that the tenant was "ousted" from the buildings; when in fact the tenant had long since moved out and the buildings were completely empty, and no personal property was found therein, the tenant took dated photos.

The emblements and fixtures in the yard that were not covered by the contract [under protest] were not mentioned in the sheriff's return of service. Thereafter the personal property "emblements" and temporary fencing which were not covered by the settlement contract was effectively and permanently not recoverable by the tenant. The request to store personal property not covered by the contract was posted on the property immediately after the tenant received notice from the sheriff by telephone on June 11, 2012; and served upon the judgment plaintiff's counsel on June 14 2012, two days after the writ and judgment were filed.

d] The tenant has a legal right to a trial based upon the facts, but, according to HJP counsel, failure to sign a settlement contract means the tenant would have to appear pro se, immediately. A trial likely will not be granted to a pro se tenant in that court because a pro se tenant will not be allowed to present a case to set for trial, no matter what the setoffs, therefore an immediate eviction will result. For a pro se tenant to gamble that they will receive a fair hearing at show cause and be able to take a well documented claim to trial is a gamble that tenant is sure to lose.

e] The tenant was painfully aware that those appearing pro se in eviction court have no rights or protection at law, and that once the tenant's personal possessions are seized and destroyed, there is no way to recover them, unless a tenant has a lot of money for an attorney and plenty of time. Therefore, the tenant signed the agreement in order to save his household possessions. As mentioned in [c] above, the tenant would certainly have lost all his possessions without recourse. Although such seizure and bar to recourse is contrary to Washington RCW Landlord-Tenant Laws, a tenant who is not wealthy has little chance of obtaining those protections in a timely manner, if ever. By this coercion, the tenant was denied due process at law, and the right to a trial.

f] Void due to Bad Faith: failure of judgment plaintiff to perform, and demonstrable lack of intent to perform: The tenant had fully vacated and returned the keys by the agreed upon date, however, the landlord locked out the tenant sometime between that date and June 04, 2012; and subsequently obtained a writ and judgment; in violation of the terms of the contract. The plaintiff counsel took extra steps to conceal the granting of the writ from the tenant.

g] On May 31, 2012, when the tenant called landlord's counsel to arrange delivery of the keys and finish the contract the plaintiff's attorney was out of the office, and returned the calls at about 5:30 pm. The tenant then told the attorney that the keys would be sent by certified mail since it was too late in the day to get to his office to deliver the keys. The landlord's counsel agreed to receive the

keys in that manner, as satisfaction of the contract. The landlord's counsel gave verbal permission to the tenant to remove emblems from the property during that week end, not mentioning that the premises yard had already been locked up and posted with do not enter signs, and guarded by landlord's agent[s].

h) Lockout: Some time after May 31, 2012 and before June 04, 2012, prior to obtaining a writ; the premises was posted with do not enter signs and the gates were locked by landlord's agent[s]; effectively preventing the tenant from removing emblems from the yard which were not covered by the contract; however the buildings were clean and empty, and the keys returned as agreed.

2] The statement of facts presented by the landlords attorney at the hearing for obtaining the writ and judgment contained significant errors and false statements, the evidence presented was not proof that the contract was violated, and the statement that the tenant was "said to be still in residence" was untrue, known to be untrue by landlord's counsel and unsubstantiated by any named witness or other proof. *A reasonable and just Trier of fact would have had serious doubts about the finding of facts supporting the motion and called for a hearing, but apparently the motion and supporting documents were not read carefully, or at all, by the Judge or court staff. [CP 44, 45 and CP 46; ex A, B]*

The Landlord's counsel did not prepare or serve a summons upon the tenant, *contrary to his sworn statement. [CP 44, 45 and CP 46; ex A, B]*. The judgment plaintiff's counsel made several tricky and unprofessional maneuvers,

designed to circumvent due process, court rules, Landlord Tenant law in order to gain a writ and judgment contrary to the terms of the contract. These acts served to unjustly enrich the landlord, and defraud the tenant. [CP 37-43; ex A,B]

V. Argument

A. The judgment and writ granted ex parte on June 05, 2012 should be vacated for the following reasons: Tenant was denied due process:

1. The Appeals Court should reverse the ex parte judgment and writ granted on June 05, 2012 because the trial court abused its discretion by granting the motion for judgment based upon a disputable contract, without examination, without actual evidence of violation, without witness, and without notice to the tenant. The use of an ex parte hearing without notice to the tenant in this case is contrary to the following Statute: RCW 4.22.060 'Effect of settlement agreement:

Cite: "A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party."

1. The tenant was locked out of the premises prior to June 05, 2012 the date of

the ex parte judgment hearing. And the tenant informed the trial court of this fact on June 12, 2012, during the hearing of the motion to vacate. The Judge at that hearing laughed it off and dismissed the motion carelessly and in haste. The lockout voided the contract; the landlord cannot evict a tenant without going through a court process (RCW 59.18.290, RCW 59.18.300) "*The unlawful detainer statute, chapter 59.12 RCW, is in derogation of the common law and must therefore be strictly construed in favor of the tenant.*" {Hous. Auth. v. Terry, 114 8} And; "*Unlawful detainer statutes are in derogation of common law and generally must be strictly construed.*" { Marsh McLennan Building, Inc. v. Clapp, 96 Wn. App. 636, 640 n.1, 980 P.2d 311 (1999) }.

2. The tenant was denied due process, by reason of failure to notify, preventing a defense. Cite: "[1] *The law favors determination of controversies on their merits and, consequently, default judgments are disfavored.*" [Griggs V. Averbek Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)]. "*A proceeding to vacate a default judgment is equitable in character, and relief is to be afforded in accordance with equitable principles. The court should exercise its authority to the end that substantial rights be preserved and justice done between the parties.*" White V. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968).

3. The ex parte judgment and writ granted on June 05, 2012 should also be vacated due to a void contract. The contract is void because it contradicts law;

by specifying that the tenant would be required to give up his right to be notified of a hearing, thereby revoking his rights to due process. A contract can not be enforced if it overrides the law or denies a party protection or right at law.

From the second Restatement of Contracts:

“ §208. Unconscionable Contract or Term”

“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”

364. Effect of Unfairness:

(1) Specific performance or an injunction will be refused if such relief would be unfair because

(a) the contract was induced by mistake or by unfair practices...or

(c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.

“Comment:

a. Types of unfairness. Courts have traditionally refused equitable relief on grounds of unfairness or mistake in situations where they would not necessarily refuse to award damages. Some of these situations involve elements of mistake, misrepresentation, duress, or undue influence that fall short of what is required for avoidance under those doctrines....Still others involve elements of substantive unfairness in the exchange itself or in its terms that fall short of what

is required for unenforceability on grounds of unconscionability.”

The judgment plaintiff’s argument and supporting evidence would not appear complete or factual to a reasonable person or Trier of fact, was unsupported by witness or evidence, cannot withstand scrutiny and confirms that the judgment should be overturned on grounds of mistake, misinterpretation, and lack of opportunity to defend an obvious misinterpretation of he contract.”

The notice from the tenant which was submitted as evidence of a contract violation referred to property which was not mentioned in the contract, which property was also illegally seized, sold or destroyed by the judgment plaintiff and her agent[s] by Lockout.

“§205. Duty Of Good Faith And Fair Dealing”

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

5. Cite: “[1] The law favors determination of controversies on their merits and, [p-consequently, default judgments are disfavored. Griggs v. Averbeck Realty, inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). A proceeding to vacate a default judgment is equitable in character, and relief is to be afforded in accordance with equitable principles. The court should exercise its authority to the end that substantial rights be preserved and justice done between the parties.” White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968).

CR 60(b)(1)” *allows the court to relieve a party from a final judgment for "mistakes, inadvertence, surprise, excusable neglect or irregularity in*

obtaining a judgment or order".

A motion to vacate a default judgment under CR 60(b)(1) must be brought within 1 year after the judgment was entered. The default judgment in this case was obtained on December 27, 1979. Lee waited for the 1-year period to elapse before obtaining a writ of garnishment on January 19, 1981, thus denying Western the opportunity to base its motion on CR 60(b)(1). «3»”

In this case, the judgment plaintiff’s counsel made efforts to circumvent the tenant’s rights at law by failure to notify the tenant before the hearing, then concealing the fact that a writ and judgment was obtained by failing disclose that to the tenant in subsequent communications with the plaintiff’s counsel.

B. The Appeals Court Should Vacate the Trial Court’s Dismissal of the Motion to Vacate on June 12, 2012, Because It abused its discretion in denying the tenant the opportunity to present any evidence that the contract was fulfilled, and that it was a void or voidable contract. *[CP 37-43; ex A,B]*

1. The tenant has strong defenses on the merits, and was entitled to present a defense with associated arguments, evidence, cross examination and to be afforded equal due process and fair hearing, as court rules and the law require, at the motion hearings on June 05, 2012, and June 12, 2012. *[CP 37-43], [CP 44, 45 and CP 46]*

2 The judgment plaintiff, counsel and other agents’ inequitable behavior, lockout, and manifested intent to violate the contract voids the contract which

obviously, independently mandates reversal of judgment and writ granted on June 05, 2012. [CP 34-36]

C. The tenant has a right to a trial, on the issues of possession, emblements, lockout, constructive eviction, loss of use of the rented premises, injuries, other losses and expenses; due to violations of the Landlord Tenant Law by the landlord and her agent[s].

The tenant's settlement contract in which possession and claim rights were waived, were void because of its terms and other defects. The contract was also voided by the landlord when the landlord violated its terms.

The right to a trial is supported by many appeals court decisions upholding tenant's rights concerning these laws.

Cite: "A tenant dispossessed by writ of restitution has a right to a trial on the issue of possession under both the unlawful detainer statute (RCW 59.12.130) and the Residential Landlord-Tenant Act" (RCW 59.18.380 and .410).

Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); Housing Auth. v. Pleasant, 126 Wn. App. 382, 389, 109 P.3d 422 (2005).

"The issue is not moot merely because the tenant no longer has possession; a displaced tenant who does not concede the right of possession is entitled to have that right determined". Pleasant, 126 Wn. App. at 389. "unlawful detainer actions brought under RCW 59.12.030 are a summary proceeding to determine the right of possession as between landlord and tenant." Munden, 105 Wn.2d at 45.} "The action is a narrow one,

limited to the question of possession and related issues such as restitution of the premises and rent.?” “ Id. In order to protect the summary nature of the proceedings, other claims, including counterclaims, are generally not allowed, except when the counterclaim, affirmative equitable defense, or setoff is based on facts which excuse a tenant’s breach.” Id.; see Heaverlo v. Keico Indus., Inc., 80 Wn. App. 724, 728, 911 P.2d 406 (1996). Under RCW 59.18.080, “a tenant may raise as a defense in an unlawful detainer proceeding that there is no rent due and owing.” {No. 28635-5-III}”

The tenant’s response to summons made a claim of setoff due to an uninhabitable house, and also tried to bring that issue to trial, but was obstructed from obtaining the right to a trial.

VI. Conclusion:

The appellant, James Duncan, seeks the following relief:

1. That the contract [settlement agreement] be declared void.

[Second Restatement of Contracts]

2. That the judgment and writ of restitution granted June 05, 2012, be vacated.

[CR 60(b)(1) allows the court to relieve a party from a final judgment for "mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order".]

3. That the records of eviction, writ of restitution, and judgment be purged. *The retaliatory eviction and judgment record places an unreasonable and very costly restraint upon the 60 yrs old Appellant, effectively barring him from employments, renting, insurance policies and other vital personal and business pursuits.*

4. That the appellant be awarded court costs and labor fees .

5. That the issues of possession, emblements, fixtures, lockout, constructive eviction, loss of use of the rented premises, injuries, other losses and expenses remain judicable.

Dated, January 02, 2013 Respectfully submitted,

James Duncan, pro-se

Signature: _____

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Court Of Appeals, Division 1 Of The State Of Washington

No. Coa 69071-0

One Der Works LLC II, Respondent,

v.

James K Duncan, Appellant,

Appeal From The Superior Court

For King County

Cause No. 12-214807-4 SEA

Received

JAN 02 2013

Law Office of Evan L. Loeffler PLLC

Brief Of Appellant

Dated, January 02, 2013

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