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No. 69305-1

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SEAWEST INVESTMENT ASSOCIATES L.L.C., a Washington Limited
Liability Company,

Plaintiff/Appellant,

v.

GEORGE CHARLES and WENDY CHARLES and the marital
community composed thereof, SAM DIBELLO and RENEE DIBELLO
and the marital community composed thereof, JILL JENSEN and
JEREMY AMES and the marital community composed thereof, EMO
ROWE and CAT ROWE and the marital community composed thereof,
and NWREA, LLC, a Washington limited liability company,

Defendants/Respondents.

PLAINTIFF / APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The trial court's rulings relieve Respondents Charles, DiBello, Rowe and NWREA, LLC of responsibility for unpaid rent, late charges and interest in excess of \$221,000 for the premises they leased and occupied (the "Property") for over four years. The trial court's summary judgment rulings were in error for many reasons.

First, the trial court's rulings were in error because the trial court improperly shifted the burden of proof to Seawest. (Seawest's Opening Brief Issue No. 1). Contrary to Respondents' assertions, the burden of proof did not *shift* to Seawest. The trial court's own language in its order makes it clear that it incorrectly placed the burden on Seawest *from the outset*.

Second, the trial court's rulings were in error because there is no authority to support Respondents' argument that an "informal lease" arose between Seawest and NWREA, LLC. (Seawest's Opening Brief Issue No. 7). Instead, Respondents occupied the premises under the terms of the parties' written Lease and the Amendment to that Lease for over four years.

Third, the trial court's rulings were in error because numerous genuine issues of material fact should have precluded the trial court's

grant of summary judgment. (Seawest's Opening Brief Issue Nos. 2, 3, 8 and 9). These issues include:

- Whether the Lease was signed by September 26, 2007;
- Even if the Lease was not signed by September 26, 2007, whether the parties' written Amendment to the Lease incorporated the terms of the original Lease and bound the parties;
- Even assuming, *arguendo*, that the Lease was not timely executed and the parties somehow entered an "informal lease," as Respondent alleges, there are genuine issues of material fact as to the identity of the tenant(s) under the Lease;
- There are also genuine issues of material fact surrounding the terms of any "informal lease;" and
- Finally, there are genuine issues of material fact regarding whether Seawest waived its right to collect additional rents under this "informal lease."

Instead of showing that there were no genuine issues of material fact and that the trial court was correct to grant summary judgment, Respondents' Brief actually highlights the numerous questions of material fact that should have precluded summary judgment, including the issue of the identity of the tenant(s) under the Lease.

Even if the trial court found no genuine issues of material fact, Respondents were not entitled to summary judgment as a matter of law, because Respondents waived their right to object to the timing of Seawest's signature on the Lease. (Seawest's Opening Brief Issue Nos. 4 and 6). The provision in the Lease requiring signature by September 26, 2007 gave Respondents a right to object to any untimely signature by Seawest. By performing in accordance with the specific terms of the Lease, seeking and obtaining an amendment to that Lease and performing in accordance with the Lease and Amendment for approximately four years, all without even suggesting that the Lease did not exist, Respondents waived this right.

Respondents not only waived any right to object to the timing of Seawest's signature on the Lease, but they are also estopped from denying the existence of the Lease. (Seawest's Opening Brief Issue No. 5). The principle of equitable estoppel precludes Respondents' arguments because (1) Respondents' current claims are entirely inconsistent with its earlier statements and actions during the Lease term; (2) Seawest relied on Respondents' earlier actions; and (3) Seawest would be harmed if Respondents were allowed to escape liability for the over \$221,000 Respondents owe in past due rent, late fees and interest.

Finally, the trial court's grant of summary judgment to Respondent NWREA, LLC specifically was also in error. (Seawest's Opening Brief Issue No. 10). Respondent NWREA, LLC never moved for or otherwise requested summary judgment. The trial court's order has the nonsensical result of ruling that no tenant is liable for unpaid rent in the space. Finally, the plain language of the order makes it clear that Respondents never even intended that Respondent NWREA, LLC be released from liability.

For all of the reasons outlined above, the trial court incorrectly: (1) awarded summary judgment to Respondents Charles, DiBello, Rowe and NWREA, LLC; (2) entered final judgment and awarded attorneys' fees and costs to Respondents Charles, DiBello and Rowe; and (3) denied Seawest's motion for reconsideration and motion to vacate. Seawest respectfully requests that this Court enter an order reversing the trial court's orders, awarding Seawest its attorneys' fees and costs incurred on this appeal, and remanding this case for further proceedings.

A. The trial court erroneously placed the initial burden of proof on Seawest. (Seawest's Opening Brief Issue No. 1).

Respondents Charles, DiBello and Rowe moved for summary judgment.¹ They had the initial burden to show there were no genuine issues of material fact. *Indoor Billboard/Washington, Inc. v. Integra*

¹ CP 707-712, 716-717, 721-723.

Telecom of Washington, Inc., 162 Wn.2d 59, 70, 170 P.3d 10, 15 (2007). The trial court was required to construe all facts and inferences in favor of Seawest, the non-moving party. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

The trial court failed to do so, and instead placed the initial burden of proof on Seawest, the non-moving party. In its order requesting supplemental briefing, the trial court stated:

The threshold issue is whether the lease was ‘executed by all parties by 5 p.m. September 26,2007.’ **If Seawest bears the burden of proof on this issue, arguably it has failed to do so.** CP 765. (Emphasis added).

The trial court then went on to say:

Hence, this Court invites supplemental briefing on the following narrow issue: **whether Seawest has made a showing sufficient to survive a summary judgment establishing that the lease was executed by all parties by 5 p.m. on September 26, 2007.** *Id.* (Emphasis added).

As evidenced by the trial court’s own language in its order requesting supplemental briefing, the trial court failed to view the facts in the light most favorable to Seawest. Instead, the trial court questioned whether Seawest carried the burden of proof, and then incorrectly placed the burden on Seawest to show that the Individual Respondents *were not* entitled to summary judgment. CP 765.

Respondents rely on the description of the summary judgment analysis in *Sligar v. Odell*, 156 Wn. App. 720, 233 P.3d 914 (2010) to argue that the burden of proof properly shifted to Seawest. In *Sligar*, the court stated:

A defendant may move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case. In a summary judgment motion, **the moving party bears the initial burden of showing the absence of an issue of material fact.** If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial', then the trial court should grant the motion. *Id.* at 725-726. (Internal citations omitted).

Had the trial court's findings played out consistently with the summary judgment analysis articulated in *Sligar*, the trial court's first step would have been to look at whether Respondents met their burden to prove that Seawest did not sign the Lease by September 26, 2007. *Sligar*, 156 Wn. App. at 725. If the trial court found that Respondents met this burden, and there was no issue of material fact as to when the Lease was signed, then step two under *Sligar* would have been for the trial court to look at whether Seawest could "make a showing sufficient to establish the existence of an element essential to [Seawest]'s case [...]." *Id.* at 725.

The trial court never reached step two of the analysis provided by *Sligar*, because its analysis at step one was not consistent with *Sligar*. This is clear from the language in its order requesting supplemental briefing. At step one, the trial court asked "whether Seawest has made a showing sufficient to survive a summary judgment establishing that the lease was executed by all parties by 5 p.m. on September 26, 2007." CP 765. The trial court should have asked "whether Respondents met

their burden to prove that the lease *was not* executed by all parties by 5 p.m. on September 26, 2007.”

Not only did the trial court improperly place the initial burden of proof on Seawest, the trial court’s uncertainty as to when the Lease was signed alone should have precluded Respondents Charles, DiBello and Rowe’s Motion for Summary Judgment without any further analysis.

B. Contrary to Respondents’ assertions, there is no authority for conversion of a valid, acknowledged written Lease into an “informal lease.” (Seawest Opening Brief Issue No. 7).

Respondents argue that when the written Lease “failed,” Respondents took possession pursuant to an oral, “informal lease.”² The only authority Respondents cite for this theory is a Washington Practice section. *Id.* However, this authority does not support Respondents’ position at all. Instead, the secondary authority provides that “informal leases” are created when a lease does not comply with the requirements of the statute of frauds. 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate* § 6.14 (2d ed. 2012). There is no allegation in this case that the Lease did not comply with the statute of frauds. As such, the secondary authority relied on by Respondents is irrelevant, and no such “informal lease” arose in the present case.

Not only is Respondents’ “informal lease” argument not supported by the law, but Respondents’ own behavior belies their argument that NWREA, LLC moved in under an oral, “informal lease.” For example,

² See Respondents’ Brief pp. 34-35.

why would Respondents make multiple requests for renegotiation of the Lease to Seawest if Respondents were in the Property under an “informal lease”? CP 433, 436. In an email requesting renegotiation of the Lease, Respondent George Charles writes:

On October 4, 2010, NWREA sent Seawest an October lease payment in the amounts of \$12,255 and \$2,600 for a total of \$14,855. **While this amount is less than the amount owed under the Lease, it is all that NWREA can afford to pay at this time.** NWREA hopes Seawest accepts this good faith payment. NWREA wants to continue leasing the property. In order to do this, however, **the Lease terms must be renegotiated.** [...]. Another option would be for NWREA to assign its interest in the Lease. Section 21.1 of the Lease requires Seawest’s consent to any assignment. Please let me know if Seawest would be amendable to an assignment and, of so, on what terms. CP 436. (Emphasis added).

Obviously, Respondents would have simply provided the required notice and vacated the space if they occupied pursuant to an oral, “informal lease” and could no longer afford the rent. They would not have referred to specific sections in the written Lease if it were not the source of the parties’ agreement. Further, Respondents would not have memorialized the rent reduction in a written amendment to a lease that did not exist. Finally, Respondents Charles, DiBello and Rowe would not have signed the Amendment if NWREA, LLC was the tenant in the space under an oral, “informal lease.” Of course, Respondents knew and intended that they were bound by the terms of the written Lease and Amendment.

C. Genuine issues of material fact should have precluded summary judgment.

There are numerous genuine issues of material fact that should have precluded summary judgment. Respondents argue that these issues of fact were irrelevant and immaterial.³ On the contrary, the following issues of material fact go to the heart of the case:

- Whether the Lease was signed by September 26, 2007;
- Even if the Lease was not signed by September 26, 2007, whether the parties' Amendment incorporated the terms of the Lease and bound Respondents;
- Who is the tenant(s) under the alleged "informal lease";
- What are the terms of the alleged "informal lease"; and
- Whether Seawest waived its right to receive additional rent by accepting less than the full rent.

1. There is a genuine issue of material fact as to when the Lease was signed. (Seawest's Opening Brief Issue No. 2).

Genuine issues of material fact regarding the timing of Seawest's signature on the Lease should have precluded summary judgment. The signature page of the Lease itself is dated September 26, 2007. CP 412. In his supplemental declaration, Mr. Aatai explained that he did in fact sign the lease on September 26, 2007.⁴ Contrary to Respondents'

³ See Respondents' Brief p. 4.

⁴ CP 778. Mr. Aatai's declaration was properly before the trial court on summary judgment, as the trial court requested supplemental briefing, and this supplemental declaration was never stricken.

assertion, Mr. Aatai's supplemental declaration was in front of the trial court *before* it ruled on summary judgment, not after.⁵

Viewing the facts in the light most favorable to Seawest, the non-moving party, there is a genuine issue of material fact regarding when the Lease was signed, and the trial court should have denied Respondents Charles, DiBello and Rowe's Motion for Summary Judgment on these grounds alone.

2. The Amendment incorporated all terms of the written Lease and bound Respondents. (Seawest's Opening Brief Issue No. 3).

Even if the trial court properly found there was no issue of material fact as to when the Lease was signed, there is a question whether the Amendment to the Lease incorporated and bound Respondents to all of the terms of the original written Lease.

The parties signed the Amendment on May 8, 2009. CP 433. The Amendment is titled, "Amendment to the Lease dated September 10, 2007 between Seawest Investment Associates, LLC, (Landlord) and Keller Williams Realty Kirkland (Tenant)." *Id.* The Amendment provided, in part:

The Guarantors subject to the original lease will be subject to this amendment with their signatures provided below. Except to the extent this amendment modifies the original lease, **all terms and conditions of the original lease shall remain in force.** *Id.* (Emphasis added).

⁵ See Second Supplemental Declaration of Massoud M. Aatai in Support of Plaintiff Seawest Investment Associates, LLC's Opposition to Charles', DiBellos' and Rowes' Motion for Summary Judgment, dated July 10, 2012 at CP 778-779; *see also*, Order Granting Defendants' Motion for Summary Judgment, dated August 10, 2012, at CP 931-932.

Therefore, even if the Lease was somehow found to be void, there is a genuine issue as to whether the May 2009 Amendment to the Lease expressly incorporated and bound the Respondents to the terms and conditions of the original Lease. There was not, and cannot be, any argument that the Amendment was not properly executed. The trial court never addressed the issue of the Amendment in any of its orders.

Respondents argue that the Amendment could not incorporate the terms of the Lease and bind the parties because the Amendment was not acknowledged. Under the doctrine of part performance, however, the Amendment may be valid even if it does not comply with the statute of frauds. *Losh Family, LLC v. Kertsman*, 155 Wn. App. 458, 465, 228 P.3d 793 (2010). The doctrine of part performance “prevents a party from asserting the invalidity of a contract where the other party has acted in conformity with the contract and thus placed himself in a position where it would be intolerable in equity to deny its enforcement.” *Stevenson v. Parker*, 25 Wn. App. 639, 643-44, 608 P.2d 1263 (1980). (Internal citations omitted).

In *Losh Family, LLC*, the court explained:

Part performance, originally an equitable remedy, can also sustain actions at law for damages when necessary to give effect to the legislative purpose of the statute of frauds. (Internal citations omitted). The purpose of the statute of frauds is ‘the prevention of fraud arising from uncertainty inherent in oral contractual undertakings. **Where no uncertainty exists in the oral agreement, the reason for the statute’s application similarly disappears.**’ *Id.* at 465 (quoting *Miller v. McCamish*, 78 Wn.2d 821, 826-29, 479 P.2d 919 (1971)). (Emphasis added). Therefore, ‘the court’s overriding concern is precisely directed toward and

concerned with a quantum of proof certain enough to remove doubts as to the parties' oral agreement.' *Id.* at 465 (quoting *Miller*, 78 Wn.2d at 826-29). Under *Miller*, there must be clear and unequivocal evidence which leaves no doubt as to the terms, character or existence of the contract. *Id.* at 465. (citing *Miller*, 78 Wn.2d at 829).

There is clear and unequivocal evidence of the parties' agreement in the present case. Both the Lease and the Amendment (which incorporates the terms of the Lease) provide explicit evidence of those terms.

As the *Miller* court explained, the purpose of the statute of frauds is "the prevention of fraud arising from uncertainty inherent in oral contractual undertakings." *Miller*, 78 Wn.2d at 829. "Allowing a technical flaw in the acknowledgment to invalidate the lease does not prevent fraud or uncertainty, rather, it enhances it." *Ben Holt Indus., Inc. v. Milne*, 36 Wn. App. 468, 476, 675 P.2d 1256 (1984). Allowing Respondents to escape any liability under the Amendment and the terms of the Lease (which were incorporated in the Amendment), based on a missing acknowledgement would not prevent fraud, but would in fact enhance fraud.

A court typically considers three factors when determining whether there is sufficient evidence of part performance: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements referable to the contract. *Losh Family, LLC*, 155 Wn. App. at 465-66. Even in the absence of all three factors, a court may find sufficient evidence to remove uncertainty and rule that a tenant was a

tenant under a multi-year lease, and not a month-to-month tenancy. *Id.* at 467. Long acquiescence alone can be sufficient part performance. *Stevenson v. Parker*, 25 Wn. App. 639, 644, 608 P.2d 1263 (1980).

All three factors are present in this case. Seawest had already delivered the Property to Respondents, and Respondents continued to possess the space. CP 757. Respondents continued tendering payment for the space, as they had under the original written Lease. CP 620-621. Finally, both Seawest and Respondents had previously made permanent, substantial and valuable improvements referable to the Lease. CP 417-418, 757.⁶ There was no uncertainty as to the terms of the Lease or the Amendment, as evidenced by both Seawest's and all Respondents' performance for over four years. Further, Respondents engaged in acquiescence for years. The doctrine of part performance should apply and the Amendment should be found valid and binding on Respondents, even though the Amendment is not acknowledged.

Viewing these facts in the light most favorable to Seawest, as the trial court was required to do on summary judgment, there is, at a minimum, a question whether the Amendment incorporated the terms of the Lease and bound Respondents to those terms. Respondents Charles, DiBello and Rowses' Motion for Summary Judgment, therefore, should have been denied.

⁶ While the tenant improvements listed in Exhibit C to the Lease were part of the original Lease, the terms of Exhibit C were incorporated into the Amendment. CP 417-418, 433.

3. Even if the written Lease is void, there are genuine issues of material fact as to the identity of the tenant(s) and the terms of any alleged “informal lease.” (Seawest’s Opening Brief Issue No. 8).

Even assuming there were no issues of fact regarding the timing of Seawest’s signature on the Lease, and assuming that Seawest’s signature was untimely, and assuming that the written Lease somehow converted to an “informal lease,” and assuming the Amendment did not incorporate the Lease terms, there are genuine issues of material fact as to the identity of the tenant(s) and the terms of this alleged “informal lease.”

Respondents Charles, DiBello and Rowe argued that Respondent NWREA, LLC was the tenant under the oral, “informal lease.”⁷ However, Respondents Charles, DiBello and Rowe all signed the Lease individually, with no indication that they intended to do so in a representative capacity. CP 412. Further, they, not NWREA, LLC, signed the Amendment to the Lease on May 8, 2009. CP 433. Assuming the written Lease did convert to an “informal lease,” as Respondents assert, there is a genuine issue of material fact as to the identity of the tenant(s) under the alleged oral, “informal lease.”

Respondents devote much of their brief to arguments about the identity of the tenant(s) under the “informal lease.” Respondents even make the new argument that the original Lease was invalid because there was no meeting of the minds as to the identity of the tenant(s) under that

⁷ See Respondents’ Brief pp. 34-35.

Lease.⁸ Respondents' arguments highlight the trial court's errors: there are numerous issues of material fact precluding summary judgment, including, especially the identity of the tenant(s).

The trial court never made any ruling as to whether there was a meeting on the minds regarding the tenant(s) under the Lease, nor did the trial court make any ruling as to the identity of the tenant(s) under that Lease. Instead the trial court dismissed, with prejudice, Seawest's claims against all potential tenants. In other words, the court effectively ruled that no one was liable for paying rent at the Property Respondents had occupied since 2007. The trial court's dismissal of Seawest's claims against all Respondents was in error. The genuine issue of material fact as to the identity of the tenant(s) alone warranted denial of Respondents Charles, DiBello and Rows' Motion for Summary Judgment.

4. There are genuine issues of material fact as to whether Seawest waived its right to additional rents. (Seawest's Opening Brief Issue No. 9).

The trial court erred in granting the Respondents' Motion for Summary Judgment, and in dismissing Seawest's claims, without addressing whether Seawest waived its rights to additional rent from any or all of these Respondents.

Respondents argue, without citing relevant authority, that when the written Lease failed, Respondent NWREA, LLC moved into the Property under an "informal lease."⁹ Respondents further argue that by accepting

⁸ See Respondents' Brief pp. 28.

⁹ See Respondents' Brief p. 34-35.

less than the full monthly rent, Seawest waived its right to collect any additional rent from NWREA, LLC under the terms of this “informal lease.”

Even assuming that NWREA, LLC was the tenant, pursuant to an “informal lease,” there remained a genuine issue of material fact regarding whether Seawest waived its right to collect the full rent owed from NWREA, LLC. The fully executed Lease, even if invalid, is strong, if not compelling or even decisive, evidence of the terms the parties’ agreement. That agreement includes a specific provision stating that Seawest would not waive its right to additional rent by accepting less than the full amount due. CP 411. Section 33.7 of the Lease provided:

The acceptance at any time or times by Landlord of any sum less than that which is required to be paid by Tenant shall, unless Landlord specifically agrees otherwise in writing, be deemed to have been received only on account of the obligation for which it is paid, and shall not be deemed an accord and satisfaction notwithstanding any provisions to the contrary written on any check or contained in a letter of transmittal. CP 411.

Further, when Respondents failed to make their rent payments, Seawest agreed to a rent deferral, with a later recovery of the back rent owed. CP 382. Respondents Charles, DiBello and Rowe all signed the Amendment agreeing to this arrangement, and acknowledging they were liable for the full amount of rent due. CP 433. This Amendment is additional compelling evidence that Seawest did not waive its right to

collect the full amount of rent due. Certainly it is enough evidence to raise a genuine issue of material fact regarding Respondents' claim of waiver.

Respondents argue that the terms of the Lease and Amendment are not relevant to determining whether Seawest waived its right to collection of additional rent from NWREA, LLC, because NWREA, LLC was not a tenant under the Lease or the Amendment.¹⁰ However, numerous other times in their brief and in prior pleadings before the trial court, Respondents argue that NWREA, LLC was the tenant.¹¹ Either NWREA, LLC was the tenant, or it was not the tenant -- Respondents cannot have it both ways.

Whether NWREA, LLC was the tenant or Respondents Charles, DiBello and Rowe were the tenants, the Lease and Amendment strongly evidence all parties' agreement and understanding that Seawest would not waive its right to additional rent by collecting less than the full amount of rent due. Viewing these facts in the light most favorable to Seawest, which the trial court was required to do on summary judgment, it cannot be said that there are no genuine issues of material fact and that Seawest waived its rights to additional rent. The trial court's grant of summary judgment to all Respondents was in error.

¹⁰ See Respondents' Brief p. 46.

¹¹ See, e.g. Respondents' Brief p. 34-35; see also CP 710, 759 913.

D. Respondents waived their right to object to the timing of Seawest's signature on the Lease. (Seawest's Opening Brief Issue Nos. 4 and 6).

Even if the trial court correctly found there were no genuine issues of material fact as to when the Lease was signed, Respondents were not entitled to summary judgment as a matter of law, because they unequivocally waived the right to object to the timing of Seawest's signature on the Lease. A waiver is the intentional relinquishment of a known right. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Waiver may be inferred from circumstances indicating an intent to waive. *Id.* Waiver can be express or implied. *Id.* Implied waiver can be shown by unequivocal acts or conduct evidencing an intent to waive. *Id.*

Respondents made numerous unequivocal acts indicating their intent to waive the signature deadline in the Lease, including the following:

- Respondents moved into the Property and began performing in accordance with their specific, written obligations under the Lease¹²;
- Respondents signed an Amendment to the Lease that explicitly incorporated all terms and conditions of the Lease¹³;
- Respondents later requested further renegotiation or assignment of the Lease¹⁴;

¹² CP 757.

¹³ CP 433.

¹⁴ CP 436.

- Respondents admitted the existence of a valid Lease in correspondence with Seawest, in their requested renegotiation or assignment of the Lease¹⁵; and
- Respondents never questioned the validity of the written Lease in multiple summary judgment motions and oppositions, in their testimony in deposition or in support of their position in the motions and replies. If Respondents believed the Lease was void on its face, they would have said so rather than arguing about the identity of the tenant(s) under the Lease they now claim they always knew was void.¹⁶

These acts clearly evidence Respondents' intent to waive the Lease provision at issue. Each of these acts alone is enough to create a genuine issue of material fact as to whether the Respondents admitted the Lease was valid. Together, these acts confirm that Respondents waived any right to challenge the validity of the Lease based on the timing of Seawest's signature. Respondents should not be heard to now argue that the Lease is void based on a provision they never mentioned, relied on or sought to enforce.

Respondents argue that they could not waive anything because they never acquired any rights under the Lease.¹⁷ They argue that the Lease never came into effect and therefore they could not waive any

¹⁵ See, e.g., CP 436, 736.

¹⁶ CP 84-88, 95-109, 216-217, 227-240, 347-348, 356-358, 579-580, 581-588, 598-599.

¹⁷ See Respondents' Brief p. 36.

provision of the Lease. *Id.* This argument ignores the plain language of the Lease. The Lease provides: “[t]his lease *will become* null and void unless it is executed by all parties by 5 p.m. September 26, 2007.” CP 391. (Emphasis added). The language explaining that the Lease “will become” void, by definition, requires that the Lease, at one point, was in effect.

Respondents argue that there was never a Lease, only an offer by Respondents to lease the space, and it was this offer to lease space that became void. Respondents’ argument not only ignores the plain language of the Lease, but their argument is also tautological. Their argument relies on the validity and operation of the provision requiring signature by September 26, 2007 by 5 p.m., while at the same time arguing that provision never came into effect because the Lease was never valid. Without the operation of this provision, Respondents would have no argument that the Lease failed due to an allegedly untimely signature. As soon as Seawest added its signature to the Lease, the Lease was in effect. When the Lease came into effect, Respondents had the right to object to the timing of the signature, and the Lease would “become null and void” at that point. Respondents made no objection, but instead moved into the space and performed consistently with the terms of the Lease. CP 757. For the next four plus years, Respondents gave Seawest every indication they thought the Lease was valid and in full force and effect.

Where one party performs under a contract and the other party accepts that performance without objection, it is assumed that such

performance was the performance contemplated by the contract. *Evans v. Laurin*, 70 Wn.2d 72, 76, 422 P.2d 319 (1966). If parties to a contract adopt by conduct a mode of performance that differs from the strict terms of the contract, neither party can assert a breach because the contract was not performed according to its letter. *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 674-676, 828 P.2d 565 (1992).

Respondents never mentioned, relied on or sought to enforce the provision requiring signatures by September 26, 2007. As such, they are precluded from now arguing the Lease is void due to Seawest's alleged untimely execution. Viewing these facts in the light most favorable to Seawest, as the trial court was required to do, there is, at a minimum, a genuine issue as to whether Respondents waived their right to object to the timing of Seawest's signature on the Lease.

E. Respondents are estopped from denying the validity of the Lease. (Seawest Opening Brief Issue No. 5).

Respondents were not entitled to summary judgment because they are estopped from denying the validity of the Lease. To prevail on a claim for equitable estoppel, a claimant must show: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by the claimant in reliance on the first party's act, statement or admission; and (3) injury that would result to the claimant from allowing the first party to contradict or repudiate the prior act, statement or admission. *Kramarevcky v. Dep't of Soc. and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Equitable estoppel is rooted in the principle that "a party should be held to

a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *Id.* (Citations omitted).

As to the first element of equitable estoppel, Respondents’ current claim that the Lease is void on its face is certainly inconsistent with their earlier actions. The individual Respondents signed the Lease, Respondents moved into the Property, and Respondents began performing in accordance with the specific terms of the Lease. CP 757. Respondent NWREA, LLC began tendering rent payments. CP 620-21. From the time the parties entered the Lease in September of 2007, until May of 2012, Respondents all acted in a manner indicating their agreement that the written Lease was valid and governed the terms of their tenancy.

Regarding the second element of equitable estoppel, Seawest unquestionably acted in reliance on Respondents’ conduct by allowing Respondents to occupy the Property. Seawest also made tenant improvements in reliance on Respondents’ representations in the Lease, and on their conduct consistent with the specific terms of the Lease. CP 426. Seawest negotiated an Amendment. Seawest further acted in reliance on Respondents’ agreements in the Lease and Amendment that Seawest would not waive any rights to collect additional rent in the event that Seawest accepted less than the full amount due. Seawest accepted less than the full amount of rent due from Respondents, but still allowed Respondents to remain at the Property based on that reliance.

As to the third element of equitable estoppel, Seawest would clearly be harmed if Respondents are permitted to escape all liability under the Lease and Amendment. Respondents owe Seawest in excess of \$221,000 in past due rent, late fees and interest.

Respondents take the untenable position that after all these acts, they are allowed to escape any obligations under the Lease due to Seawest's alleged late signature on the Lease back in September of 2007. The law prevents parties from taking advantage of one another in this manner, and Respondents are equitably estopped from denying the Lease's validity. The only conclusion one could reach from Respondents' conduct over the past four years is that the written Lease was in effect. Had Respondents behaved or suggested otherwise, Seawest would not have continued to let Respondents occupy the space.

F. The trial court erred in dismissing Seawest's claims against Respondent NWREA, LLC.

When the trial court granted Respondents Charles, DiBello and Rowe's Motion for Summary Judgment, the trial court erroneously entered summary judgment in favor of Respondent NWREA, LLC too. This order was in error for numerous reasons. First, the order was in error because NWREA, LLC never moved for summary judgment, nor did it join in the other Respondents' Motion for Summary Judgment. Second, the order was in error because it reached the nonsensical ruling that no one was liable for rent at the space Respondents were occupying at the time the order was entered. Third, the order was in error because it is clear from

the language of the order drafted by the DiBello Respondents that even Respondents did not expect NWREA, LLC to be dismissed on summary judgment. CP 960. The order itself states: “the court determining that there is no genuine issue of material fact which would preclude entry of judgment in favor of the **individual defendants** against plaintiff [...]” *Id.* (Emphasis added). Further, and importantly, the order awards attorneys’ fees and costs only to Respondents Charles, DiBello and Rowe, not Respondent NWREA, LLC. *Id.* Even if summary judgment in favor of Respondents Charles, DiBello and Rowe was somehow proper, Seawest’s claims against NWREA, LLC should not have been dismissed. Someone is liable for paying rent for the space Respondents occupied for years.

II. ATTORNEYS’ FEES

A. **The trial court erred in awarding attorneys’ fees and costs to Respondents.**

The trial court erred in granting summary judgment in favor of Respondents Charles, DiBello, Rowe and NWREA, LLC and in entering final judgment in favor of Respondents Charles, DiBello and Rowe. Thus, it follows that the court also erred in awarding their attorneys’ fees and costs.

B. Seawest respectfully requests an award of its attorneys' fees and costs on appeal.

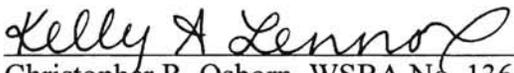
Seawest again respectfully requests an award of attorneys' fees and costs on appeal under RAP 18.1, Paragraph 26.13 of the Lease and Article 32 of the Lease. CP 407, 410.

III. CONCLUSION

The trial court erred in granting Respondents Charles, DiBello and Rows' Motion for Summary Judgment, in dismissing Seawest's claims against *all* Respondents, in entering final judgments and awarding attorneys' fees and costs to Respondents Charles, DiBello and Rowe and in denying Seawest's Motion for Reconsideration and Motion to Vacate. Numerous questions of material fact should have precluded summary judgment, and Respondents were not entitled to judgment as a matter of law. Seawest respectfully requests that this Court reverse the trial court's orders and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 8th day of April, 2013.

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

SEAWEST INVESTMENT
ASSOCIATES, L.L.C., a
Washington limited liability
company,

Plaintiff-Appellant,

v.

GEORGE CHARLES and WENDY
CHARLES and the marital
community composed thereof, SAM
DIBELLO and RENEE DIBELLO
and the marital community
composed thereof, JILL JENSEN
and JEREMY AMES and the marital
community composed thereof, and
EMO ROWE and CAT ROWE and
the marital community composed
thereof, and NWREA, LLC, a
Washington limited liability
company,

Defendants-Respondents.

No. 69305-1

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

CERTIFICATE OF SERVICE

On the date given below I caused to be served in the manner noted
copies of the following upon designated counsel:

1. Plaintiff / Appellant's Reply Brief; and
2. Certificate of Service.

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

Executed at Seattle, Washington, this 8th day of April, 2013.



Sonja Demco