

No. 73455-5-I

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

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APEX ENTERPRISES 2014, LLC dba Apex Adult Family Homes;  
MYRNA CONTRERAS; GEROGE P. TREJO III, and all other occupants

Appellants,

v.

KEYES, LLC,

Respondent.

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**REPLY BRIEF OF RESPONDENT**

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## **I. REPLY**

Respondent, Keyes, LLC, provides the following response to Appellants' Brief.

## **II. STATEMENT OF THE CASE**

### **a. Facts of the Case**

Respondent and Petitioner entered into a Commercial Lease Agreement on or about March 31, 2014. Lease terms are: rent for the first year at \$3,000.00 per month, if not timely paid, a late fee of 10% would be assessed, that insurance was required and for Respondent to use the property as an Adult Family Home. Although the lease is not part of the Clerk's Papers, these facts were established at the show-cause hearing on April 8, 2015 (see Verbatim Report, pgs 6-8, and 27, herein "VR").

Michael Keyes, representative of Respondent, testified that Petitioners had been late on rent for eight months, with late fees totaling \$2,400.00 (VR 8). On January 23, 2015, Respondent had served a 20 day notice for Petitioners to pay the late fees, which were not paid in the 20 day period (VR 8-9 and 49, CP 61). Section 4.3 of the lease, as read in by the Court Commissioner, stated "Acceptance by landlord of partial payment of rent, interest, or any other sums due hereunder shall not constitute a waiver of any remaining unpaid rent, interest, or other sums." (VR 59)

Mr. Keyes also testified that, per the commercial lease agreement, Petitioners failed to obtain insurance within the 20 days after receipt of the 20 day notice. (VR 9) The commissioner found that this had not been obtained within the 20 day period regardless if the full coverage required by the lease was possible or not (VR 60-61).

A third issue raised at the show-cause hearing was damages to the door. The Commissioner found a “technical violation.” (VR 60, ln 22)

The final issue addressed at the show-cause hearing was the operation as a boarding house and not as an adult family home. (VR 63, CP 54). The lease allowed for operation as an adult family home. (VR 14, lns 7-11). The parties agreed to allow one international student (VR 31, lns 1-7). The Commissioner still found a violation as the lease was for an adult family home, with the one exception, not a boarding house (VR 63).

Last, Apex Enterprises 2014, LLC was never a formed Limited Liability Company per the Washington Secretary of State website (CP 53, VR 48, lns 18-25 and 49, lns 1-6). Judgment was taken against Petitioners individually (CP 67-70). It should be noted that Petitioner Myrna Contreras filed for bankruptcy relief after the judgment was entered.

**b. Procedural History**

Respondent filed the matter on March 10, 2015. A show-cause hearing occurred on April 8, 2015. The Commissioner issued a Writ of Restitution and judgment in favor of Respondent. Petitioners' appealed the ruling of the Commissioner.

**III. LEGAL AUTHORITY AND ARGUMENT**

Petitioners raise four Issues of Error in this matter. It is unclear from the Brief of Petitioners what CP and exhibits are referenced. Exhibits were provided at the Show-Cause hearing but are not part of the Clerk's Papers. Respondent is operating that the Court does not have these exhibits.

**a. Commissioner Err in Finding Eviction Proper**

Petitioners first argue that good cause did not exist for the commissioner to terminate the lease agreement. Petitioners' cite to the Washington Residential Landlord-Tenant Act (RCW 59.18) in their briefing. However, this is not a residential lease controlled by RCW 59.18. It is a commercial lease, which is clear from the facts of the case.

Specifically, Mr. Keyes testified that it was a commercial lease agreement (VR pg 6, lns 7-9). Then he reads in the first line of the lease which states, "This commercial lease is made and entered to – entered into as of March 31, 2014." (VR 6, lns 23-25, and 7, lns 1-2) (emphasis

added). The Commissioner agreed with this position during testimony (VR 27, lns 10-23). Therefore, application of RCW 59.18 does not apply to this case.

Although Petitioners' cited RCW 59.18.250 for retaliation, this statute is incorrect. However, retaliation is considered a factor per *Port of Longview v. International Raw Matters Ltd*, (96 Wash. App 431 (1999)). No retaliation occurred in this matter and no evidence is provided that would show that it did. The only evidence provided was notices from Petitioners which were dated March 13, 2015 and March 25, 2015 (CP 49), after the 20 day notice had been served on January 23, 2015 (CP 61). At this point, Respondent was already moving forward with its unlawful detainer action as the case had been filed on March 10, 2015. These notices were merely attempts to try and create retaliation that did not exist. Retaliation was not a motivating factor of Respondent.

Petitioner also argues that a dispute of fact existed for this matter to be set for trial. No dispute of fact existed. It was not disputed that rent had been paid late resulting in a late fee. It was not disputed that the late fee was not paid (VR 49 ,ln 12-17). The late fee was 10% of the amount owing totaling \$2,400.00 for eight months. (VR 8, lns 4-18).

It was not disputed that insurance was required by the lease and it had not been obtained within the 20 days after the 20 day notice was

served. Petitioners argue that it was impossible to obtain insurance and that they obtained what they could. However, this was not even obtained until after the 20 day period had passed. The landlord had no obligation to accept this any further. (VR 60, ln 9-13).

It was not disputed that there was damage from painting the door and it had not been cleaned up (VR 48, ln 2-4). Although a “technical violation,” as the Commissioner stated, it was a violation none the less.

Last, notice was provided from the City of Kent to stop operating as a boarding house (CP 54). This was included in the 20 day notice served (VR 11, lns 21-25). Operating as a Boarding House was not within the allowance of the lease. The parties agreed to allow one international student (VR 31, lns 1-7). This does not modify to allow operation as a Boarding House. So, no dispute existed that stated Petitioners were not operating as a Boarding House.

Based on the evidence presented, the Commissioner ruled no dispute of fact existed on these four issues and issued a judgment, termination of the lease, and a writ of restitution (CP 67-70).

**b. Rent Payment**

“Although the acceptance of rent waives the right to declare a forfeiture for prior breaches, it does not operate as a waiver of a continuance of the breaches or of any subsequent breaches” *Wilson v.*

*Daniels*, 31 Wash.2d 633, 641, 198 P.2d 496, 500 (1948). “The consent of the lessor in any instance to any variation of the terms of this lease, or the receipt of rent with knowledge of any breach, shall not be deemed to be a waiver as to any breach of any covenant or condition herein contained, nor shall any waiver be claimed as to any provision of this lease unless the same be in writing, signed by the lessor or the lessor's authorized agent.” *Id.* at 641, 501 (citing *In re Wil-Low Cafeterias* 95 F.2d 306 (1938)). This case established that waiver language can be added preserving the right to pursue any remedies.

In this matter, the Commissioner read in the language that stated that the acceptance of rent “shall not constitute a waiver” (VR 59, ln 19-23). Under the established case law, if the receipt of the rent on March 7, 2015 was an acceptance, the right to move forward with the unlawful detainer was not waived because of this provision. The Commissioner agreed with this position based on his reading of the lease.<sup>1</sup>

The question of acceptance is important to address. It was testified Petitioners provided an envelope with money. It was also

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<sup>1</sup> The record does not show that the lease, under section 28.1, also states, “The subsequent acceptance of rent hereunder by landlord shall not be deemed to be a waiver of any preceding default by Tenant of any term, covenant, or condition of this lease, other than the failure of Tenant to pay the particular rental so accepted, regardless of Landlord’s knowledge of such preceding default at the time of the acceptance of such rent.”

testified that the envelope was returned approximately 10 minutes later. (VR pg 44 Ins 16-23). The record does not show whether knowledge of the contents of the envelope was known by Respondent. Regardless, the holding of the envelope and returning of its contents within 10 minutes would not be an acceptance of rent. Respondent was entitled to understand what was inside the envelope and make an informed decision whether to keep its contents or not. He did not.

Even if the rent was accepted, it would only be a waiver of prior breaches that are not ongoing. The only breach that would not have been ongoing is the late fee. The remaining breaches (ie. no insurance, damage, and boarding house) were ongoing and were not remedied, even at the time of the show-cause hearing. These were grounds alone for the judgment, termination of the lease, and issuance of the writ of restitution.

**c. Abuse of Discretion**

Petitioners' argue that the breach of warranty of habitability would offset any claims of Respondent.

“In Washington, the implied warranty of habitability does not generally extend to commercial leases.” *Olson v. Scholes*, 17 Wash.App. 383, 392, 563 P.2d 1275, 1281 (1977). “In the Foisy case the court was concerned with a residential lease where the defects in the premises were items which made a rented house unfit for human habitation.” *Id.* at 392,

1281. Taking the record provided, no evidence was given to show that a breach of habitability had occurred. There were issues on breach of the lease agreement but these are not habitability issues. Especially given that it was a commercial lease.

Also, the notices from Petitioners (March 13 and 25) were not given to Respondent until after the breaches had occurred, the 20 day period had passed, and Respondent had filed the unlawful detainer action (CP 49). Raising habitability issues does not forgive other breaches of the lease, such as no insurance, renting as a boarding house, or repairing damages caused.

Petitioners argue that they raised the implied warranty of habitability but provided no evidence to support such or why that would forgive obligations under the lease, not related to rent. It was there requirement to show this breach, which they failed to do, and why it should forgive obtaining insurance, fixing damages, and stop operating as a boarding house.

**d. Failure to Consider Tenants' Documents**

The Commissioner did accept the exhibits, which is clear in the record (VR 39, lns 6-12). He also reviewed them in the limited time he had as they were not filed before the hearing (VR 56-57). There is no evidence or argument to support Petitioners' position that the



Commissioner did not read or consider tenants documents.

Petitioners also attempt to indicate that because these documents were provided, the matter should be set for trial. As previously argued, none of these exhibits raise defenses or offset to the issues ruled upon (ie. that late fees were due, insurance had not been obtained, damages not repaired, and operating as a boarding house). There is no need for trial when these issues were not in dispute and a ruling could be made.

**e. Attorney Fees and Costs**

The lease allows for attorney fees and costs, which were awarded at the show-cause hearing (CP 67-70). The Commissioner at the show-cause hearing ruled correctly in favor of Respondent. Nothing has been provided by Petitioners that would lead to another conclusion. Therefore, Respondent is entitled to its attorney fees and costs.

**IV. CONCLUSION**

Three of the issues before the Commissioner were on going issues that were not remedied even as of the day of the show-cause hearing. The fourth issue, late fees, was not waived per the lease agreement, and therefore grounds for the judgment and writ of restitution.

Petitioners' argument for habitability is for offset of rent, not an obligation to fulfill terms of the lease. Otherwise the argument of Petitioners is that they raised issues so it must go to trial. However,

simply raising issues does not show why obligations of the lease must be complied with.

Therefore, Respondent request that Petitioners action be denied and reasonable attorney fees and costs be awarded.

DATED this 18<sup>th</sup> day of March, 2015.

HANIS IRVINE PROTHERO, PLLC

A handwritten signature in black ink, appearing to read "Brian J. Harris", is written over a horizontal line.

Brian J. Harris, WSBA #35367  
Attorney for Keyes, LLC

**CERTIFICATE OF SERVICE**

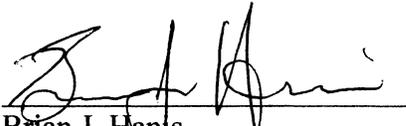
I hereby certify that on March 18, 2016, copies of the following document:

1. Respondent's Reply Brief was served on opposing at the following address, via first class mail, postage prepaid:

Myrna Contreras  
Geroge P. Trejo, III  
PO Box 77457  
Seattle, WA 98177

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

DATED this 18<sup>th</sup> day of March, 2015, at Kent, Washington.

  
Brian J. Hanis