

74795-9

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Appeals Court No. 74795-9-I

Court of Appeals, Division I
Of the State of Washington

In Re:

FABIAN VAKSMAN, Appellant

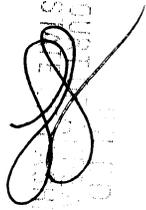
And

BRUCE LYSTAD, Respondent

RESPONSE BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
CLERK



ORIGINAL

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STATEMENT OF THE CASE

On 15 December 2015 a show cause hearing was held in this Unlawful Detainer suit in Snohomish County Superior Court. At that time the only documents put into the record by the Defendant for consideration was the Defendant's answer (Clerk's Papers 12-18). Plaintiff relied on the complaint (Clerk's Papers 35-39) and one exhibit of a rule change notice (Clerk's Papers 43-44) and notice pursuant to RCW 59.18.375 (Clerk's Papers 40-42) and the declaration of service of that notice (Clerk's Papers at 34). At the time of the hearing there was no money placed into the court registry and there was no separate answer on record in response to the notice pursuant to RCW 59.18.375. The Defendant did not ask to be sworn in and offer any testimony and as such was not sworn in but admitted to having not paid the rent in question. At that hearing an order granting Plaintiff a Writ of Restitution was entered.

Defendant then moved for a stay pending a Motion for Revision. The stay was granted and the Motion for Revision was heard on 22 January 2016. Defendant's Motion for Revision was denied and the stay was vacated (Clerk's Papers 31-32 and 33). During the period in which the stay was in place the Snohomish County Sheriff's Office did not toll the writ with regard to the time limit to execute the writ.

Defendant then moved for Reconsideration of the order denying the Motion for Revision. That Motion for Reconsideration was considered by the same Court that had denied the Motion for Revision and the Reconsideration was also denied on 9 February 2016 (Clerk's Papers 26-27). That same day Plaintiff moved for and was granted a new writ at the Sheriff's Office insistence (Clerk's Papers 30 and 28-29 and 25). That writ was executed on 1 March 2016 (Clerk's Papers 19-24).

ARGUMENT

The Appellant makes five assignments of error. While Appellant's brief seem to jump back and forth between each of them, Respondent will address each assignment of error one at a time and ignore the fact that Appellant spends much of Appellant's brief attempting to testify and enter new and unsubstantiated facts into evidence as Appellant has done at every procedural step since the initial show cause hearing.

First, the Appellant argues that the Court erred "in allowing the managing broker to operate without a real estate license." The Appellant is referring to Cynthia Lystad and Cynthia Lystad is not the Plaintiff in this matter but she is the "Landlord." The Appellant ignores the definition of "Landlord" that is provided in RCW 59.18.030(14) which reads:

(14) "Landlord" means the owner, lessor, or sublessor of the dwelling unit or the property of which it is a part, and in addition means any person designated as representative of the owner, lessor, or sublessor including, but not limited to, an agent, a resident manager, or a designated property manager.

Nothing in this statute limits a non-broker from being a manager or an agent of an owner or subletting with the owner's permission. The statutory language is clear "the legislative intent is apparent... we will not construe the statute otherwise." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Bruce Lystad is the Plaintiff and the owner of the subject property. There is nothing on record to argue or attempt to proffer any evidence that Bruce Lystad is neither the proper Plaintiff nor the owner of the subject property or has standing to bring this suit. Appellant has done nothing to dispute that through the entire record. "Unchallenged findings are verities on appeal." Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)

Further, Cynthia Lystad is the sister of the Plaintiff and a resident manager and agent of the property owner and Plaintiff, Bruce Lystad, with the authority to manage, act as agent and sublet. The Appellant has made no record of any kind to argue or support that as being factually untrue and the Court ruled that Cynthia Lystad had authority to act as agent for Bruce Lystad (Clerk's Papers at 31) Cowiche Canyon Conservancy v. Bosley, *Id.*

In fact, the record shows clearly that Bruce Lystad acknowledged the Appellant as a tenant when Bruce Lystad issued the written 30 day rule change (Clerk's Papers at 44). The fact that Bruce Lystad brought the underlying suit for failure to pay shows that Bruce Lystad accepted the acts of Cynthia Lystad as his resident manager and/or agent and/or her authority to sublet. Without a showing of some evidence that Cynthia Lystad had no authority to manage or act as agent or sublet, then there is no error. "Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true." Hegwine v. Longview Fibre Co., Inc., 132 Wn.App. 546, 555-56, 132 P.3d 789 (2006)

Instead the Appellant makes an incorrect assertion which would require that anyone qualifying under any definition of "Landlord" in RCW 59.18.030(14) must also be a licensed broker under RCW 18.85. The statute does not say that State v. J.P., Id.

The Appellant also made a similar argument to the State Supreme Court in his 18 March 2016 motion in his Question #4 for discretionary review. There Appellant argued that lack of a broker's license made the 3 day pay or vacate notice invalid. Appellant's relief was denied but the Appellant seems to make the same argument here without addressing several key problems.

Appellant does nothing to explain how, if his argument is correct *arguendo*, that Cynthia Lystad had the authority to enter into a rental contract with the Appellant in the first place yet somehow loses that authority with regard to giving a notice demanding payment of the rents. Appellant's argument would require that we suspend Appellant's own argument with regard to the parties ability to enter into the contract and then continue to suspend Appellant's argument that the landlord had no authority for the entire time the Appellant paid rent to Cynthia Lystad and resided at the residence pursuant to said contract. Then we must suddenly begin to apply Appellant's theory that a broker's license is required but only for and at the point where Cynthia Lystad issued a 3 day pay or vacate notice. Appellant wants the benefit of that rental contract, interred into with that landlord, despite Appellant's own argument that the parties could not legally do so, and then Appellant wants to be exempted from that same landlord being able to exercise any authority under that same contract.

In fact, the statute that Appellant relies on RCW 18.85.331 deals with a person attempting to sue for compensation or payment for broker services without first having proven that the suing party possessed a broker's license at the time of rendering the alleged broker services. This was not that suit at all.

Appellant's brief on page 3 cites only part of the statute and leaves out the subsequent remedy for violation of the portion he did cite to.

...No suit or action shall be brought *for the collection of compensation* as a real estate broker, real estate firm, managing broker, or designated broker, without alleging and proving that the plaintiff was a duly licensed real estate broker, managing broker, or real estate firm before the time of offering to perform any real estate transaction or procuring any promise or contract for the payment of compensation for any contemplated real estate transaction.

This suit was not for compensation of any activity contemplated in the statute cited by the Appellant. Further, nothing in this statute says or implies that contracts for real estate, or specifically rental agreements, would be void or unenforceable if brokered by a party without a broker's license State v. J.P., *Id.* Of course, the Appellant is not actually asking for the contract to be void, only that the landlord be prohibited from enforcement of the landlord's rights that would arise out of said contract.

Aside from failing on the legal argument, the Appellant has failed to engage in proving any factual argument at all. The Appellant has done absolutely nothing to make any record or provide any facts as to whether or not Cynthia Lystad was or wasn't a licensed broker. Even if we assume *arguendo* that Cynthia Lystad was not a broker, which Appellant needs to prove, and assume *arguendo* that landlords under RCW 59.18 need to

have a broker's license, Appellant would still need to establish facts supporting the position that the exceptions provided in RCW 18.85.151(2) and (13) do not apply to this landlord. That statute must be considered if we assume RCW 18.85 applies at all. RCW 18.85.151(2) and (13) provides:

This chapter shall not apply to: ... (2) *Any duly authorized attorney-in-fact acting under a power of attorney without compensation*;... (13) Any person employed or retained by, for, or on behalf of the *owner* or on behalf of a designated or managing broker if the person is limited in property management to any of the following activities:

- (a) Delivering a lease application, a lease, or any amendment thereof to any person;
- (b) Receiving a lease application, lease, or amendment thereof, a security deposit, rental payment, or any related payment for delivery to and made payable to the real estate firm or owner;
- (c) Showing a rental unit to any person, or executing leases or rental agreements, and the employee or retaineer is acting under the direct instruction of the owner or designated or managing broker;
- (d) Providing information about a rental unit, a lease, an application for lease, or a security deposit and rental amounts to any prospective tenant; or
- (e) Assisting in the performance of property management functions by carrying out administrative, clerical, financial, or maintenance tasks.

(emphasis added). Even if the Appellant had shown that the legislative intent of RCW 18.85.331 was to void and make unenforceable any real estate transaction, or some vestige thereof, involving a non-broker acting

as broker, then the Appellant would still need to show that the party in question was not a broker and that none of the above exceptions apply. Appellant made no such showing. In Appellant's motion for revision the Court specifically found that Cynthia Lystad had authority to act as agent for the Plaintiff Bruce Lystad (Clerks Paper's at 31) Hegwine v. Longview Fibre Co., Inc., Id.

Appellant's second assignment of error is that the underlying notice is "Fraudulent." Appellant makes no attempt to define what he means by "Fraudulent" but Respondent assumes Appellant means defective as Appellant has made no attempt to define or demonstrate the elements of fraud. There is absolutely no evidence on record that the notice is defective. The Appellant offered no sworn testimony by way of declaration or affidavit before or at the show cause hearing. Appellant did not ask to be sworn in and present any sworn testimony at the show cause hearing. There were no supporting documents or items of any kind offered into evidence or of record at the time of the hearing. There was nothing for the Commissioner to consider other than an offering of proof that because the Appellant claims to have moved into the unit two days after the parties had agreed to rent the space that Appellant felt the rental period should be different. Taking that argument the Court would have had to conclude that the rental period never starts until the tenant gets

around to moving in and the landlord would need to hold units off the market without collecting rent until the tenants decided it was a good time to move.

In contrast, the Respondent did have on record the 3 day pay or vacate notice which specifically referred to the rental period as the 10th of each month to the 9th of the following month (Clerks Papers 35-39 at 39).

Respondent also had on record Plaintiff's exhibit of a 30 day rule change pursuant to RCW 59.18.140 (Clerks Papers 43-44 at 44). The latter of which was also considered by the Court in the Appellant's motion for revision (Clerk's Papers 31-32) where the Court found that the written 30 day rule change delivered on the 8th of October 2015 not only increased the rent as of the 10th of November 2015 but identified the rental period as beginning on the 10th of the Month, November 2015 specifically. This would have effectively changed the rental period even if the Appellant had successfully argued that the correct rental period began on the 12th of each month, *arguendo*, because the 30 day written rule change was timely even if the Appellant was correct.

Either way, the Commissioner would have needed to be provided a record with some evidence and or testimony by, and in favor of, the Appellant before the Court could have been in error ruling for the

Respondent. There was nothing factually at all on record in support of the Appellant's argument Hegwine v. Longview Fibre Co., Inc., Id.

The third assignment of error by the Appellant is that the court "...unlawfully ignored the *facts* retaliation and failed to uphold the statutes... by not reading or understanding these statutes *before* the hearing..." (emphasis added). Importantly, the Appellant fails to point out which law(s) require(s) the Court to read the statute "before" a hearing and importantly fails to point to any evidence that the Court didn't do exactly that. With regard to the facts, the Court could not have considered any facts because there simply are no facts at all offered into the record by the Appellant anywhere in this process. At no point is there any sworn testimony in any form, oral, declaration or affidavit. The Court would have to be presented with some facts by Appellant in order to have considered them.

What the Appellant argued in the form of an unsworn offering of proof, without adding any supporting evidence or sworn testimony into the record, was that Cynthia Lystad was upset at the Appellant for allegedly damaging some marijuana allegedly being grown in the garage. Again, with no proof for the Court to consider. What the Court did was read the relevant portion of the RCW 59.18.240 out loud in open court while making the Court's ruling and findings that it did not apply to the

allegations put forth by the Appellant in his argument and/or unsworn offering of proof (Clerk's papers at 33). Specifically RCW 59.18.240 states

So long as the tenant is in compliance with this chapter, the landlord shall not take or threaten to take reprisals or retaliatory action against the tenant because of any good faith and lawful:

(1) Complaints or reports by the tenant to a governmental authority concerning the failure of the landlord to substantially comply with any code, statute, ordinance, or regulation governing the maintenance or operation of the premises, if such condition may endanger or impair the health or safety of the tenant; or

(2) Assertions or enforcement by the tenant of his or her rights and remedies under this chapter

As to RCW 59.18.240(1) *supra*, the Appellant had made no complaints or reports of any kind to government agencies about anything at all, let alone violations of code, statute, ordinances or regulations, of any kind, or let alone about conditions that may endanger or impair the health or safety of the tenant. None of those statutory prerequisites existed and none were presented to the Court. As to RCW 59.18.240(2) *supra* even if we take the Appellant's argument as true, *arguendo*, it is not the case that a dispute about whether or not a tenant damaged any marijuana crop is protected as "his or her rights and remedies under this chapter." The Court was precisely correct when the Court read that portion of the statute in open

court and concluded that retaliation under RCW 59.18.240 did not apply (clerk's papers 33).

If we ignore the fact that no complaint was made to any government agency, it is still true that RCW 59.18.250 goes on to explain that with respect to RCW 59.18.240 the presumption of retaliation for any notice within 90 days of that complaint to a government agency is rebuttable. In the present case the Appellant admitted to not having paid the rent, a fact reiterated in the Courts order denying the Motion for Revision when the Court noted that despite having been served a notice pursuant to RCW 59.18.375 (Clerk's papers at 34 and 40-42) there had been no money placed into the registry and no separate sworn written statement denying rents were owed (Clerk's papers at 32). That alone makes the writ compulsory Duvall Highlands v. Ellwell, 104 Wn.App. 763; 19 P.3d 1051 (Wash.App.Div.1 01/08/2001) and an appellate court may "sustain a trial court's judgment upon any theory established by the pleadings and supported by proof." Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). It would seem axiomatic that establishing rents to be due in a suit brought specifically to collect rents would successfully rebut claims of retaliation, had the retaliation claim even been legally relevant, which it is not.

The Appellant would seem to be implying in this assignment of error that since the Court did not rule in his favor on the point the Court must have ignored it or misunderstood it or both. The record does not support these assumptions in any way, however.

The Appellant's fourth assignment of error is basically that the Court failed to change the court rules for him. The Appellant admits in his brief that motions for reconsideration are considered by the Court that decided the matter in the first place (Appellant's Brief at 10). Appellant then seems to argue that this rule is not consistent with the rule that civil motions go before the sitting Civil Motions Court and that somehow this is a violation of due process.

Clearly there is an appellate process that the Appellant is engaging in presently so the Appellant has not been deprived of any opportunity to have the decision of the Superior Court Judge reviewed. Clearly there is no violation of due process that can be reasonably entertained in this instance and the Appellant does not cite to any example to the contrary. The Appellant simply took advantage of the procedural opportunity to ask the Court to take a second look at the motion. Appellant did so without any additional evidence but hoping a different Court would rule differently on the same motion and same evidence, or lack thereof. The same Court did consider the Motion for Reconsideration, and issued a ruling denying

the Motion for Reconsideration (Clerks Papers 26-27). Respondent is not aware of any process for one Superior Court Judge to revise another Superior Court Judge and that is precisely what the Appellant is arguing the rule should be. Superior Court Judges may revise Commissioners and the Court of Appeals corrects errors by Superior Court Judges as this Honorable Court well knows. The Appellant is simply saying that Appellant should be allowed to shop for a Judge. Appellant desires this Honorable Court of Appeals to allow a process by which one Superior Court Judge may correct another Superior Court Judge. Again, without a stitch of any statute, case law or compelling new argument to support this novel concept.

Finally, Appellant argues that the writ of restitution had expired. This argument was also made to the State Supreme Court in the Appellant's Question #1 for discretionary review in his motion of 18 March 2016. Appellant's relief was denied. The Writ had not expired. The Appellant seems to be arguing that because RCW 59.18.380 requires the writ be executed in 10 days that no extension is allowed. The statute says absolutely nothing prohibiting extensions.

It is true that writs contain language that put a time limit on the execution of said writ. That is not, however, because the Court's decision to grant the writ along with the mandate that the writ be executed, has

some shelf life. The Court's decision does not have some inherent expiration date. The deadline is to force the execution to happen timely for the benefit of the party requesting the writ as the court found in *State ex. Rel. Barnes* where it finds:

“Nor is there any merit in the contention of relators that the writ of restitution issued at the time of the commencement of the action had lost its force and vitality because of the passage of more than twenty days after its issuance. The twenty-days provision in the statute, Rem. Code, § 819, is merely a provision that the sheriff shall return the writ with his doings thereon, within twenty days after its date. The life of the writ endured until the final determination of the right of possession of the premises. When the defendants in possession gave a counter bond and retained possession, they suspended and held in abeyance the writ of restitution, and when, under the statute, the defendants lost their right of possession by failure to comply with the statute, the writ of restitution instantly revived and could be enforced.”

State ex. Rel. Barnes, 96 Wash. 581, 165 P. 493 (1917).

In the present case, Snohomish County Sheriff's Office elected not to toll the time limit on the execution of the first writ during the period in which the writ was stayed. Arguably, the Sheriff's Office may not have any legal authority to refuse to toll the time period while there is a court order directing that the writ is stayed, but regardless, there is no prohibition on moving for additional time or reissuance of a writ. That is exactly what happened in this instance.

On 9 February 2016 there was a Motion for Alias Order for Writ of Restitution (Clerks Papers, at 30) and an Alias Order granting that writ (Clerks Papers, 28-29) and the resulting Writ of Restitution (Clerks Papers at 25). That writ granted the 30 days that the Sheriff's Office requires to execute each writ and the writ was, in fact, executed on 1 March 2016 (Clerks Papers 19-24 at 19) and within the time limit granted by both the writ and the alias order granting it.

It may be that the Sheriff's Office does not have the authority to ask for a 20 day extension but it is true that the Sheriff's Office's will not honor a writ that does not provide 10 days with an automatic 20 day renewal in the language of the writ. It is also true that Courts have been granting the additional time that the Sheriff's Offices have required for some time. It is also true that this is a legally moot issue as the moving party could simply continue to move a court for extensions or alias orders until the Sheriff's schedule finally allowed for them to execute writ. There is no prohibition on moving the court for additional time, over and over and over if necessary so trying to limit the Sheriff to 10 days with a 10 day extension rather than the 20 day extension has no relevant legal effect that would benefit a Defendant.

Across many, if not all Sheriff's Offices the Sheriff's mandate this additional time or they will not accept the writ. The Sheriff's would get

their additional time anyway by forcing the moving party into additional motions. In the case of Unlawful Detainers this would most likely prejudice the Defendant in that it would likely mean additional attorney fees and costs assessed to the Defendant tenants, the Appellant in this present case. In Unlawful Detainers the courts may grant reasonable attorney fees and cost pursuant to RCW 59.18.380 *et al.*

To put a finer point on the issue, in the present case the Appellant is not assigning error to the Court for granting the specific language increasing the automatic renewal to 20 days on both the Order and Writ as much as it seems to the Sheriff's Office for executing it. This appeal would not be the proper mechanism to scold the sheriff for complying with a court ordered writ.

The Sheriff executed the writ exactly as the writ instructed and the Court has the authority to reissue and extend writs in perpetuity until the writ is executed or no longer necessary. By extending the renewal language the Court executes its authority in a way that saves the Defendant tenant who is being evicted from additional costs. For all these reasons the Appellant is wrong and the issue is moot.

CONCLUSION

The Respondents respectfully requests this Honorable Court find for the Respondent and denies all relief requested by the Appellant and grant the Respondent reasonable attorney fees and cost in defending this appeal and the various motions by the Appellant subsequent to the initial judgment.



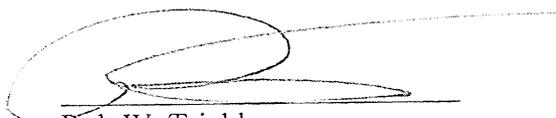
Rob W. Trickler

PROOF OF SERVICE

I certify that on the 15th day of December, 2016, I caused a true and correct copy of this Response Brief to be served by email used by the Appellant.

fvaksman@gmail.com

Dated this 15th day of December, 2016, at Everett, Washington.



Rob W. Trickler