

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

BRUCE L. MELKONIAN)	Case No. 36850-1-II
)	
Appellant,)	Clark County Case No's:
)	District Ct. 27004
v.)	Superior Ct. 07-2-01857-1
)	
THEODORE & DEBI KAY)	
MAHONEY,)	
)	
Respondents.)	

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DIVISION II
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STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

Appeal from the decisions of the
District Court for Clark County,
Hon. Richard Melnick, and from
the Superior Court for Clark
County, Hon. Barbara D. Johnson

Appellant:

Bruce L. Melkonian
14911 S.E. Northshore Circle
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(360)254-8220

Respondents:

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February 2008

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Melkonian v. Mahoney

Court of Appeals No. 36850-1-II

APPELLANT'S OPENING BRIEF

INTRODUCTORY STATEMENT

This case involves the landlord's rights following the tenants' termination of their residential tenancy. Tenants had rented a house from landlord on a two year written lease, but the lease was not notarized. Later tenants prevailed on the landlord to extend the term of the lease if appellant would install a security system, which he did. Shortly thereafter tenants changed their minds--they decided to buy a house instead--gave the landlord appropriate notice, and vacated. These and all the other facts are undisputed, and the only issues, questions of law, are set forth in the assignments of error.

ASSIGNMENTS OF ERROR

First Assignment of Error: The court erred in ruling that the landlord's contractual right to a lease termination fee upon the tenants' termination of their residential tenancy was impaired by the fact that the written two year lease was not notarized.

Second Assignment of Error: The court erred in ruling that the operative lease (the original House Lease combined with the Amendment to House Lease)

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was, in law, no more than a month-to-month tenancy, giving landlord no rights (either for stipulated damages or for actual damages) as a result tenants' unilateral termination of that lease.

STATEMENT OF THE CASE

Procedural History:

On April 1, 2006, landlord filed his action in the small claims court of Clark County, Case No. 27004, in which he sought damages against tenants in the sum of \$4,000.00 because, he alleged, "defendants breached lease agreement for house at 2304 SE Norelius Drive, Vancouver."

On April 6, 2006, tenants filed their answer, to which they attached a number of documents (the lease and its amendment, and various letters they had sent to landlord), and which contained the following affirmative defense:

"Lease was never acknowledged as required by Washington State Statute of Frauds. Mr. Melkonian as a licensed attorney (fn 1) was provided sufficient notice as required by law."

On April 6, 2006, trial was held in the District Court of Clark County before Hon. Richard Melnick.

(fn 1) Appellant is an active attorney in good standing in Oregon, but he has never been admitted to practice in Washington.

His opening comments (RP 1) set the tone of the trial and the testimony:

"Okay. This is Small Claims Court. Let me explain how this works. It's not like TV. It's not like Judge Judy or Judge Wapner. You two aren't going to fight with each other. You're going to be civil. I understand there's a dispute. I've read the file and I've actually done some independent research on it. [emphasis added]."

After trial the judge filed Findings of Fact, Conclusions of Law and Order, in which he determined that the stipulated damages provision of the lease was unenforceable because of RCW 59.18.200, 210 and 220, and that the purported lease was in fact only a month-to-month rental agreement. He denied landlord all monetary relief.

On April 6, 2006, landlord filed for review by the Clark County Superior Court. The matter was given case number 07-2-01857-7, and was assigned to Hon. Barbara D. Johnson. On October 5, 2007, Judge Johnson issued a Memorandum Opinion in which she agreed with the trial court judge, concluding that "the lease between the parties became a month-to-month tenancy due to operation of Washington law."

On October 17, 2007, landlord filed his appeal to the Court of Appeals with the Clark County Superior Court.

Substantive Facts:

On July 6, 2005, landlord leased a house on Norelius Drive in Vancouver to tenants, Ex. 1. The length of the lease, which was written by landlord and signed by both parties, was two years. It was not notarized or witnessed. Its principal provisions were as follows:

- a. Lease term: July 6, 2005 through June 30, 2007.
- b. Monthly rent: \$1,600.
- c. Refundable security deposit: \$1,000. The permissible applications of the security deposit are important because the lease does not permit landlord to apply the security deposit to the lease termination fee. Those permissible applications are set forth on page 1 of the lease, and are as follows:

"Landlord may apply the security deposit to any unpaid rent, to cleanup of the premises, lost keys, missing property of the Landlord provided with the premises, to the repair of any damage beyond normal wear and tear, to any damage caused by any failure of Tenant to comply with all terms of this Lease including but not limited to advertising expense caused by failing to give the thirty days prior written notice of intent to vacate."

- d. Utility payments: All by tenants
- e. Early termination by tenants: Permitted, but requires payment of a fee equal to one month's rent. The exact language of the early termination provi-

sion, page 4 of the lease, is important to this case, and is set forth here:

"In the event Tenant wishes to terminate his/her lease early, this may be done upon payment to Landlord of a termination fee equal to one month's rent, but only upon first communicating with Landlord and so advising him of Tenant's intent, and only if the amount of security deposit is deemed adequate to offset any foreseen damage to the premises."

On December 13, 2005, the parties entered into an agreement (Ex. 2) entitled Amendment to House Lease. It also was not notarized. This modification was requested by tenants (RP 6), and it generally provided as follows: The lease termination date was extended to December 31, 2007, the rent was raised to \$1,630 per month, and landlord was to pay both the installation charge and the monthly fees for a home security system, which he did.

On March 30, 2006 tenants mailed landlord a letter (Ex. 3), which stated in relevant part:

"Debi and I wanted to provide you with ample notice so that we could schedule a move out inspection on Monday, the 29th of May, and sufficient time for lease termination. Let us know if the date needs to be changed. We want to vacate 2304 SE Norelius Drive, Vancouver WA 98683 by 31 May 2006."

On May 26, 2006 tenants sent landlord a letter (Ex. 5) which stated in part:

"Just in case we will provide you an additional \$300 Bringing the total to \$1,800 including the

deposits. Let us know if you find anything you believe is not normal wear & tear."

The trial judge described (RP 13) this tender as "an offer of settlement," but it could equally well have been (fn 2) a partial payment toward the \$1,500 early termination fee as provided in the lease.

On June 5, 2006, landlord sent a letter to tenants (Ex. 7), which says in relevant part:

"I am returning your check number 5379. I don't know where you got the idea that you could buy your way out of your lease with me for \$300."

On June 9, 2006, landlord sent a letter to tenants (Ex. 8), which says in relevant part:

"Please find enclosed my check made payable to you in the sum of \$1,025.00, which represents your initial \$1,000.00 security deposit on the Norelius Drive house, plus interest on that deposit for 340 days at 2.5 per cent per annum.

"This payment is made solely to avoid the complications which could arise from the residential landlord and tenant act. This payment is not a waiver of any of my claims against you."

By letter dated June 12, 2006, Ex. 9, attorney Denise J. Lukins wrote landlord a letter (Ex. 9), in which she stated in part:

"Thank you for returning the Mahoney's check in the amount of \$300.00.

(fn 2) Tenants did not explain, either with the letter or at trial, what they intended that "additional \$300" or the \$1,800 total to apply to.

* * *

"The failure to provide a written checklist when the Mahoneys first obtained possession is an absolute bar to the collection of a deposit. Therefore, the Mahoneys demand that you immediately return their \$1,000.00 deposit."

The letter from the lawyer did not mention the lease cancellation fee.

Landlord testified (RP 14) that he refunded the entire security deposit because "I was in a big hurry to get to Europe," and "I did not want to come back and find out that I had a lawsuit filed against me because I failed to account for money and failed to . . . to refund the security deposit."

Landlord listed the house on the for-sale market just before he went to Europe (RP 26) but received no offers. When he returned, and after the listing expired, he put the house on the rental market, but (RP 26) "It took quite a while to find suitable tenants " and (RP 26) he "had to reduce the [rental] price." The rental amount to the new tenants was \$1,400 per month, Ex. 20.

Landlord was unaware (RP 10) of the notarization requirement of RCW 59.18.210. The tenants did not testify on that point, but they did not contradict landlord's assertion that neither party was aware of

this requirement, RP 10.

Since the trial judge had read the file and was aware of the lease termination fee, most of landlord's testimony centered on actual damages which he incurred as a result of tenants' conduct. They were greater than the stipulated damages, and according to landlord's testimony, were as follows (fn 3):

Ex. 12	Painting	\$	62.50
Ex. 13	Postage		4.05
Ex. 15	Water bill		24.06
Ex. 17	Electricity (apportioned)		9.19
Ex. 18	Water bill (apportioned)		86.36
Ex. 19	Advertising		152.08
	Lost revenues (see below)		5,810.00
	TOTAL		\$6,148.24

The loss traceable to tenants' early termination was computed as follows: The intended expiration date of the extended lease with the tenants was December 31, 2007. Monthly rent of \$1,630. After tenants vacated the house, landlord listed it for sale. That listing expired "about July 27th

(fn 3) There were a couple of additional items claimed at trial which landlord has omitted here. They include utility bills and advertising bills which required prorating between for periods when he was trying to rent the house (therefore chargeable to tenants), and when he was trying to sell the house (obviously not chargeable to tenants). Enough time has passed that landlord is no longer sure that he handled a couple of those pro-rates correctly, and the ones he is unsure about are the ones omitted.

[2006]," RP 26. It was then put on the for-rent market until landlord rented it to the new tenants on September 7, 2006 at a monthly rent of \$1,400.00 (Ex. 20), which is \$230.00 per month less than the tenants (respondents) were paying. Assuming that a month has 30.5 days, the lost rental revenues were therefore computed as follows:

7/28/06 thru 9/7/06, 41 days @ \$1,630 per 30.5 days	= \$2,191
9/7/06 thru 12/31/07, 480 days \$230.00 per 30.5 days	= 3,619
Total	= \$5,810

("7/28/06" was the date when the property was put back on the rental market, "9/7/06" was the date on which the new tenancy began, and "12/31/07" was the anticipated lease termination date with Mr. and Mrs. Mahoney as tenants.)

The foregoing tabulation of actual damages shows that the early termination fee was a reasonable beforehand estimate of landlord's damages in the event tenants ended the lease early, and not a penalty.

The tenants did not testify at any great length, and neither of them contradicted either any part of the landlord's testimony, or any of his exhibits. Mr. Mahoney explain the issue concerning the supplemental lease and the security system (RP 20). He concluded his statement on that subject by saying (RP 21) as follows:

Mr. Mahoney: * * * * And I said I'm not against . . . you know . . . taking care of the monthly payment fees but the system was not mine. I would be paying for a system that was not operational. So I just wanted . . .

The Judge: Okay.

Mr. Mahoney: . . . to bring that to you [sic, should be your] attention as to how we got the amendment. The rest of it, sir, I think it pretty much speaks for itself and I appreciate your time.

This limited testimony, plus some of the statements made by the tenants before litigation began (fn 4) all go to show that the original two year lease, and the amendment to that lease, was entirely voluntary and above-board as to all parties to these two transactions.

At the conclusion of the trial, Judge Melnick commented regarding the requirement that leases for more than a year be notarized, saying (RP 29) "Until I got this case I had no idea that a lease over a year had to be acknowledged either. And frankly, I

(fn 4) For example, the following comes from tenants' letter of repudiation dated 30 March 2006:

"Bruce, Debi and I want to thank you for your support in helping us rebuild our credit."

The tenants would not have used this friendly tone if they had any complaints concerning the way the landlord had treated them.

talked to another judge and he didn't know it either." The judge also gave his findings and analysis, RP 32:

"I agree with [landlord] that at the time of it [the making of the lease], I have no question what the parties' intent was and that was the [sic, should be "to"] make the lease for as long as it was. And I have no question that that was the parties' intent, that that's what they intended to do, but again, based on the law as given by the legislature and interpreted by the courts, it becomes an unenforceable contract. It becomes . . . not unenforceable. Unenforceable as to those terms, it does revert to or become a tenancy month to month. And that's what the law says. Again I can't say I'm necessarily happy about that, but that's what the law says."

Judge Melnick also filed a written opinion, which appellant will discuss later in this brief.

ARGUMENTS

The statute of fraud involved here is no model of clarity. It can be found at both RCW 59.04.010 as a part of the general tenancy statute, and 59.18.210 as a part of the residential landlord and tenant act. It states:

"Tenancies from year to year are hereby abolished except when the same are created by express written contract. Leases may be in writing or print, or partly in writing and partly in print, and shall be valid for any term or period not exceeding one year, without acknowledgement, witnesses or seals."

Although most other American states have a statute of frauds pertaining to leases over one year in length,

Washington stands alone with the requirement of acknowledgement, witnesses or a seal. (In fact Washington may be alone in having a statute which even refers to seals, as they were abolished at least one hundred years ago, Rem. & Bal.'s Code of Washington, Sec. 1871).

The purpose of the statute of frauds is, not surprisingly, to prevent fraud. However, any overly strict application of such a statute can cause serious injustice, and therefore courts have fashioned exceptions. Both Clark County judges focused on the exception known as the part performance doctrine, and so this brief will discuss it first.

Part Performance

The rule about part performance taking a case outside of the statute of frauds has been most frequently employed in the context of the sale of land. It doesn't work too well in other settings, and the phrase "part performance" is barely mentioned in the Second Restatement of the Law of contracts (fn 5). Some courts have gone so far as to suggest that part

(fn 5) The phrase "part performance" appears only in sections 34, 45, and 370 of the Restatement, and in commentaries to sections 45, 62 and 87. None of these sections have anything to do with the statute of frauds.

performance as a device for avoiding the statute of frauds, especially in a context other than a land sales contract, it is an obsolete concept, and has vitality only when seen as a part of the more general concept of estoppel. For example, in Kolkman v. Roth, 656 N.W. 2d 148, 156 (Iowa, 2003), the court said:

"Promissory estoppel is broader than part performance and ultimately utilizes special standards to determine whether injustice can be avoided by enforcing a promise otherwise unenforceable under the statute of frauds. * * * The doctrine of promissory estoppel does not eviscerate the statute of frauds, but only applies to circumvent the statute when necessary to prevent and injustice. It requires the party asserting it as a means to avoid the statute of frauds to prove (1) a clear and definite promise; (2) the promise was made with the promissory's clear understanding that the promisee was seeking assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his or her substantial detriment in reasonable reliance on the promise; (4) injustice can be avoided only enforcement of the promise."

There are really two problems with the concept of part performance taking a case out of the statute of frauds. One is logical: How can you partly perform a promise to stand good for the debts of another? How can you partly perform a contract which cannot be performed within one year? And how can a landlord partly perform a promise to rent real property, other

than to make it available to the tenant pursuant to the agreement? Because the idea of "part performance" in these contexts seems illogical, part performance language is most often found in the context of a contract for the sale of land. If "P" made a substantial initial payment to "S", and then paid "S" a significant sum of money each month, and if he also made major improvements to, say, Blackacre, and if he testifies about an oral contract for the purchase of Blackacre, with a full explanation as to the price and terms, courts have been relatively willing to find an oral contract for the purchase and sale of Blackacre (rather than a lease, which "S" usually contends for). It is those cases in which "part performance" as a device to take the case outside of the statute of frauds makes the most sense.

The other problem with the concept of part performance is historic; it comes from equity, and many courts have declined to apply it in cases which were historically at law rather than in equity. See 73 AmJur 2d, Statute of Frauds, Sec. 312-318. Washington has, however, been more liberal than many states in allowing an action at law to lie where part performance was the rationale for avoiding the statute of frauds in an action at law; see *infra*.

Promissory Estoppel

The rule of promissory estoppel has long existed in contract law, and is usually referred to as Section 90 (of the Restatement of Contracts). The original Section 90 was not intended to apply to statute of frauds case. Its domain was the agreement for which there was no consideration, in which estoppel operated as a substitute for consideration. When the Second Restatement was promulgated in 1981, it added an entirely new section to cover the subject of promissory estoppel in the statute of frauds context. Section 139 of the Second Restatement of the Law of Contracts states:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making

and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.

In the instant case the landlord has no possible remedy except money damages, his action (he gave possession of the real property to the tenants) was substantial, there is no dispute at all about the existence of the contract or concerning its terms, the landlord was entirely reasonable in relying on the promises of his tenants, and doubly so after the tenants induced him to provide a security system, entirely at landlord's expense both for the system's capital costs and for its monthly service fees.

This whole "reliance" concept is discussed at length in the multi-volume A Treatise on the Law of Contracts, 4th Ed., nominally by Samuel Williston but actually by Richard Lord, WestGroup, 1999. The authors state, Sec. 27:16:

"Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the Statute of Frauds. This is based upon the principle established in equity, and applying in every transaction where the Statute is invoked, that the Statute of Frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting,

or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme. It is called into operation to defeat what would be an unconscionable use of the Statute, and guards against the utilization of the Statute as a means for defrauding innocent persons who have been induced or permitted to change their position in reliance upon oral agreements within its operation.

"Under the circumstances of the kind stated, it is universally agreed that the doctrine of equitable estoppel may be invoked to preclude a party to a contract from asserting the unenforceability of a contract by reason of the fact it is not in writing as required by the Statute. In other words, the Statute of Frauds may be rendered inoperative by an estoppel in pais [outside of court, Cochran's Law Lexicon, 5th ed]. The Statute was designed as the weapon of the written law to prevent frauds; the doctrine of estoppel is that of the unwritten law to prevent a like evil.

* * * *

"The party asserting the estoppel must be prepared to show affirmatively that he or she has changed his or her position to his or her prejudice in reliance upon the representations of the person sought to be estopped. Whether the elements necessary to erect an estoppel have been established is ordinarily a question of fact. On the other hand, without regard to whether the elements of an estoppel exist, the question of whether promissory estoppel is available to remove an agreement from the Statute in the first instance has been held to be one of law. * * *

"Actual intent or design to mislead is not, however, essential. There need not be a corrupt motive or evil design; it is sufficient if the circumstances are such as to render it unconscionable to deny facts which the defendant by his silence or representation has caused the plaintiff to believe in and act upon, and the denial of which must operate as a

fraud upon the plaintiff." [all footnotes and citations of authorities omitted]

See also Annotation, Promissory Estoppel as Basis for Avoidance of the Statute of Frauds, 56 ALR 3rd 1037 (1942), cited with approval in Klinke v. Famous Recipe Fried Chicken, infra, 94 Wa. 2d at 258.

A number of cases have been decided by the Washington Supreme court and the Washington Court of Appeals which illustrate the merits of landlord's position.

Long ago, in Rowland v. Cook, 179 Wn. 624, 38 P.2d 224 (1934), landlord and tenant entered into a written but not-acknowledged six year lease of a storeroom. Tenants took possession and remained in possession for three years, and then vacated. The landlord sued for specific performance (!?--wouldn't the landlord have a viable remedy at law for money damages?). The trial court entered such a decree, and the Supreme Court affirmed. In doing so, it said, 179 Wn. at 626:

"While the doctrine of part performance has not been so frequently invoked on behalf of lessors to enforce unacknowledged or oral leases for more than one year, it is equally applicable on the ground of mutuality. In three instances, at least, this court has enforced unacknowledged leases at the hest of lessors [citing the three cases]."

Two of those three cases are still instructive. In Metropolitan Bldg. Co. v. Curtis Studio, 138 Wn. 381, 244 P. 680 (1926) the written but unnotarized lease was indefinite in duration but could exceed one year. It had a lease termination option for the lessor, which required three months' notice to exercise. The landlord terminated the lease without giving the notice, and the case wound up in court. The tenant raised various objections to the eviction action, including the fact of non-notarization. To this the court said, 138 Wn. at 387:

"But such a lease is voidable rather than void, and the parties thereto may by their acts waive their right to avoid it. [citing case]. Possession was taken under the lease shortly after its execution, and the record shows that the parties have treated it as the measure of their rights ever since that time. While other matters could be cited sufficient to to work an estoppel, this long [seven years] in the term of the lease is alone sufficient for that purpose."

Note the court's use of estoppel rather than part-performance language. Admittedly the instant landlord can't point to a seven year occupancy, but he can and does point to a year occupancy, the lease extension agreement made at tenants' instance, and the improvements he made (the alarm system) to meet the tenants' after-the-fact needs.

In the other case, Jones v. McQuesten, 172 Wn.

480, 20 P.2d 838 (1933) the landlord leased a combination garage-down and apartments-up building to tenant by a written but unnotarized two year lease. Nine months later, over landlord's objections, tenant vacated, and landlord sued for damages. The tenant set up the statute of frauds as a defense. In sustaining the trial court, which had overruled tenant's demurrer, the court said, 172 Wn. 483:

"To that rule [the statute of frauds] there are certain exceptions, one of which is that, where there is consideration going to the entire term of the lease, it is enforceable even though for a longer period than one year, and unacknowledged. Metzger v. Arcade Building & Realty Co., 80 Wash. 401, 141 Pac. 900, L.R.A. 1915A, 288.

"We think this case falls within the exception. The exchange contract [there were other properties involved in this complex deal] expressly provided that the [tenant] would guarantee the lease for the rental of the basement and the first floor of the building for a period of two years [stating dollar amounts]. This agreement with reference to a two-year lease was something for which [tenant] received a consideration in the transfer of the properties."

For another older case with a similar holding, see Goddard v. Morgan, 193 Wn. 83, 87, 74 P.2d 894 (1937).

In Miller v. McCamish, 78 Wn.2d 821, 479 P.2d 919 (1971), the plaintiff brought an action at law against the buyer. The court departed from its own precedents and held that in such a case (an oral con-

tract to convey land, and the relief sought by the seller is money damages only), relief can be granted if the evidence of the existence of a contract is clear enough. The court explained its holding, 78 Wn.2d 828:

"As we have previously noted, there can be little question as to the intent of the legislature in the enactment of RCW 19.36.010 and RCW 64.04.010. The clear purpose and intent behind these statutes of fraud is the prevention of fraud. To apply these statutes in such a manner to promote and encourage fraud would be to defeat the clear and unambiguous intent of the legislature in their enactment [emphasis by the court]."

" * * * [T]he 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 [emphasis by the court]."

Note Mr. Mahoney's testimony at pp. 9-10 of this brief, and the trial judge's comments at pp. 10-11 of this brief. There is no dispute whatsoever as to the terms of the lease, its amendment, or the intent of the parties. The part performance, if that's what it is to be called (landlord prefers the estoppel theory), includes the landlord's act in making the house available to the tenants for those many months, plus his willingness to amend the lease and to install the security system tenants wanted.

In Tiegs v. Boise Cascade, 135 Wn. 2d 1, 954 P.2d 877 1998), Tiegs leased farm land from Watts, for a potato-growing cycle, which apparently is two years, with the tenant reserving the option to renew for a second potato-growing cycle. The lease required Watts to provide good quality irrigation water, and when he was unable to do so, Tiegs sued for breach of contract. (He also sued Boise Cascade for allegedly polluting the water supply.) Watts defended on the statute of frauds theory--the lease wasn't notarized--the jury found in favor of Tiegs and awarded money damages, the Court of Appeals affirmed, and Watts brought the matter to the Washington Supreme Court. It affirmed, embracing the estoppel theory, saying, 135 Wa. 2d at 15-16:

"We have recognized as enforceable leases ones that do not comply with the statutory requisites when under the facts it would be inequitable for the challenging parties to assert invalidity of their own agreements. An instrument maybe taken out of operation of the statute of frauds by a form of equitable estoppel based upon the notion it would be inequitable for the challenging party to assert invalidity of the instrument to which that party agreed. An unacknowledged lease, which is to some extent a parol contract concerning real estate, must be proven by clear and convincing evidence. A lease prepared by a lessor should be interpreted in favor of the lessee. Leases have been sustained where the lessee had performed acts called for in the lease in reliance upon it, giving rise to estoppel or part performance.

The facts must show the parties acted upon the instrument as a lease [all footnotes omitted]." (fn 6)

Klinke v. Famous Recipe Fried Chicken, 94 Wn. 2d 255, 616 P.2d 644 (1980) was decided just about the time the Second Restatement of Contracts, with its Section 139 previously discussed, came into existence. Plaintiff had been a successful franchisee of one of defendant's chicken restaurants in California. He sold his restaurant, moved to Alaska, and then decided that he wanted to move to Tacoma and set up another chicken restaurant. The franchisor promised to "make and execute a written franchise agreement" for the Tacoma area. Plaintiff took steps in furtherance of such a franchise (the exact nature of those steps--whether plaintiff sold his home in Alaska and moved to Washington, for example--is not set forth in the opinion), only to be advised that the chicken franchisor had changed its mind. Plaintiff sued, defendant set up the statute of fraud as a defense, and plaintiff asserted estoppel to apply

(fn 6) The court misspoke when it said that "a lease prepared by a lessor should be interpreted in favor of the lessee." The correct statement is that ambiguities in such a lease should be construed against the party who drafted the lease. Gaylord v. Tacoma School Dist. 10, 88 Wn.2d 286, 294, 559 P.2d 1340 (1977).

the statute. The court addressed the issue of whether estoppel can be used to sustain such a claim, saying, 94 Wn. 2d at 258:

"Equitable estoppel is based upon a representation of existing or past facts, while promissory estoppel requires the existence of a promise. Equitable estoppel is available only as a 'shield' or defense, while promissory estoppel can be used as a 'sword' in a cause of action for damages. Promissory estoppel based on Restatement of Contracts section 90 (1932) has long been recognized in this state and may serve as the basis for an action for damages [cases and other authorities, and one footnote, omitted]."

The Section 90 to which the court referred is probably the most famous section of the original restatement, and of the second restatement, of the law of contracts. It was intended to cure the situation in which a promise was made and relied upon, but for which there was no responsive promise or other consideration. It has been adopted for use in other situations, including statute of frauds situations, by many courts because the underlying principle is sound. It states as follows:

"A promise which the promisor should reasonably expect to induce such action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

In the instant case the facts of the contract, and its amendment, are undisputed, the tenants have attempted to avoid their own contract because it was not notarized, and, as Judge Johnson correctly noted on page 5 of her Memorandum Opinion, "The focus of this case * * * has been almost entirely on the legal issue of whether the lease was enforceable for the term set forth in the Lease and Amendment, or became a month-to-month tenancy by operation of law."

In Klinke the Supreme Court expressly chose not to adopt Section 139 of the Second Restatement. It did the same in some other cases involving different types of statutes of frauds [see footnote 3 in Berg v. Ting, 125 Wn.2d 544, 560, 886 P.2d 564 (1995)], and it chose not to follow the Court of Appeals' superior reasoning in Greaves v. Medical Imaging Systems, 71 WnApp 894, 862 P.2d 643 (1993), rev. 124 Wn.2d 389, 879 P.2d 276 (1994). A Restatement is not a statute and does not deserve the dignity of a statute, but a restatement does reflect contemporary American law and the trend of that law. There is little to be said for going it alone in such a basic field as contracts law. Although the distinction between swords and spears is clear, the distinction between equitable estoppel and promissory estoppel is

not, at least not in the instant case, where both types of estoppel are present (we clearly have the tenants' promises, and equally clearly, it would be inequitable to ignore them). Finally, landlord notes that the opening language of Section 139 is identical to that of Section 90 of the Second Restatement, and neither says a word about equitable estoppel. So even if Section 139 of the Second Restatement is not the law of Washington, Section 90 is, and the instant case is a clear case of promissory estoppel.

Is landlord, one might ask, arguing that Washington statute of frauds for leases is never to be enforced? Certainly not. That statute does have importance, but it should be applied carefully and gracefully, when it is needed to fulfill an actual need. For example, let's say the putative tenant to a purported lease for more than one year denies having signed it, or claims that he signed it under duress, or that the putative landlord misrepresented it to him. If he makes such a claim, and if the purported lease was not properly acknowledged, the party advocating the lease (the landlord in this hypothetical) should not even be heard. If that landlord had evidence that the putative tenant had the lease reviewed by the best lawyers in town, while

surrounded by all of his friends and family, and that ten photographers recorded him in the act of touching pen to paper while a large and contented smile lit up his face, even then he should not be heard.

Continuing with a discussion of case law, in Central Building Co. v. Keystone Shares Corp., 185 Wa. 645, 56 P.2d 697 (1936) the written commercial lease had a term of slightly more than four years. Tenant paid rent for a while, quit paying rent, and abandoned the premises. Landlord sued for rent, and tenant defended on the basis of Washington's statute of frauds, noting that the lease, although signed and acknowledged by the landlord, was only signed, not acknowledged, by the tenant. The court quoted (185 Wn. at 651) from an earlier case for the following proposition:

"[I]t is not necessary to the validity of a lease that it be signed by the lessee, provided the lessee accepted the lease and acts thereunder, which acceptance is generally shown by taking possession or the payment of rent * * * ."

The court then concluded as follows (also at p. 651):

"If a lease need not be signed by lessee, providing that he accepts it and acts thereunder, then manifestly it need not be acknowledged by him [emphasis by the court]."

In Garbrick v. Franz, 13 Wa.2d 427, 125 P.2d 295 (1942), the parties entered into a written five year

lease which contained a clearly unenforceable option to buy. Both parties signed the instrument, but only the signature of the tenant was notarized. In apparent reliance on the option, tenant made substantial, and gratuitous, improvements to the property. Then he sued to enjoin landlord from interfering with his use of the property, and for reformation. Landlord's defense was based on the fact that his signature was not notarized. The Supreme Court would have none of that. It affirmed the trial court's decision in favor of the tenant, and in so doing it quoted from an older Washington case, 13 Wn.2d at 435:

"[The general rule of estoppel] applies not only to estop one who receives and retains a benefit from denying the validity of the transaction from which he receives it, but it also applies to estop one party to a transaction from denying the validity of the transaction which, if not sustained and valid, would put the other party, who has acted on the faith of the first party's attitude therein, in a materially worse position than he would otherwise have been."

In Stevenson v. Parker, 25 Wa. App. 639, 608 P.2d 1263 (1980), the year written house lease was for a term of one year, and "continuing from year to year," 25 WnApp at 640, with an option to buy after five years. It was not notarized. After four years the landlord notified tenant that the lease was terminated for non-payment of rent, and then sued to evict.

Tenant resisted, citing improvements she had made to the premises in anticipation of exercising the option to buy, and the fact that landlord had accepted late rent several times. The trial judge ruled that the lease was invalid because it was not notarized, and restored possession to the landlord. The Court of Appeals disagreed, saying, 25 WnApp at 643:

"In general an unacknowledged lease for a term exceeding 1 year, with monthly rental reserved, is effective only as an oral lease, and results in a tenancy from month to month. [citing cases] But this rule is not absolute, especially when there are equities sustaining the lease or estopping a denial of its validity.

' [Quoting from a cited case] Obviously the purpose of the statute of frauds is to prevent a fraud, not to perpetrate one, and in this regard the courts of this state are empowered to disregard the statute when necessary to prevent a gross fraud from being practiced [citing case]. The legislative intent in enacting the statute was to prevent fraud resulting from the uncertainty inherent in oral contracts of this nature [citing case].'

"Here, we have an express, but unacknowledged, written lease. The parties do not dispute its basic terms. Absent then are the evils--the potential for fraud and the uncertainty inherent in oral agreements--which necessitated the statute of frauds."

Ben Holt Industries, Inc. v. Milne, 36 WnApp 468, 675 P.2d 1256 (1984) involved a tenancy terminated by the tenant one year into a five year lease.

Landlord sued, and tenant defended on the theory that the notarization was defective. The court cited Miller v. McCamlish, supra, and Stevenson v. Parker, supra, saying, 36 WnApp at 476:

"[T]he application of RCW 64.04.010 in this situation would defeat the purpose behind the enactment. The parties intended to create a lease. There is no uncertainty inherent here. Allowing a technical flaw in the acknowledgement to invalidate the lease does not prevent fraud or uncertainty, rather it enhances it."

Faulty Analysis by the Trial Court

The trial judge was clearly sympathetic with landlord's cause, but he erroneously felt that Washington case law required him to rule in favor of the tenants. He misread Stevenson v. Parker, supra, and relied upon it to sustain his decision. He also erroneously relied on Omak Realty Co. v. Dewey, 129 Wn. 385, 225 P. 236 (1924), which was factually dissimilar to the instant case, and which is legally inconsistent with Klinke v. Famous Recipe Fried Chicken, discussed supra.

He also relied upon a somewhat convoluted case, Saunders v. Callaway, 42 Wa. App. 29, 708 P.2d 652 (1985). Callaway leased some agricultural land to Saunders for six years. She later entered into a contract with Norris to allow Norris to lease the

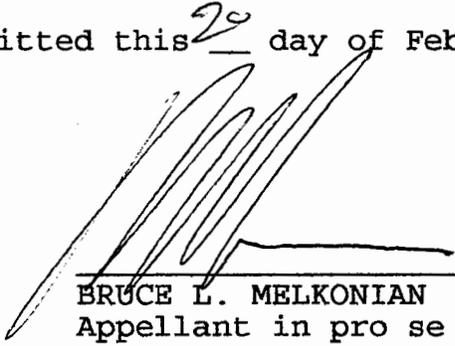
land after the Saunders lease expired. The Norris contract, which also contained an option to buy the land, was not notarized, contrary a different statute of frauds. The court held that the contract to make the Callaway-Norris lease-option was invalid because it was not notarized, because it did not contain certain basic terms of the anticipated lease, and because there was no consideration given for the option to buy the land. Saunders, which instant landlord agrees may well have been correctly decided for the reasons given by the court, is distinguishable from the instant case because: it involved a different statute of frauds with different values and interests to protect, there was no detrimental reliance of the Section 90 type on Norris's part, and so far as we can tell from the opinion (unless the unexplained award of \$25,000 was intended to compensate her for an economic loss), Norris did not suffer any damages.

CONCLUSION

The tenants signed the lease, then prevailed upon the landlord to extend its duration. They enjoyed its benefits, and then sought to avoid their obligation to pay a lease termination fee, a fee which was reasonable in amount when compared with

landlord's actual damages, because of a little known variation on the common law statute of frauds, a variation which does not exist in any other state, and a variation which was unknown even to the trial judge. Whether or not the court adopts Section 139 of the Restatement (Second) of the Law of Contracts, the general (Section 90) concept of promissory estoppel to avoid fraud is well established in Washington and should be applied here.

Respectfully submitted this ²⁰ day of February, 2008.



BRUCE L. MELKONIAN
Appellant in pro se

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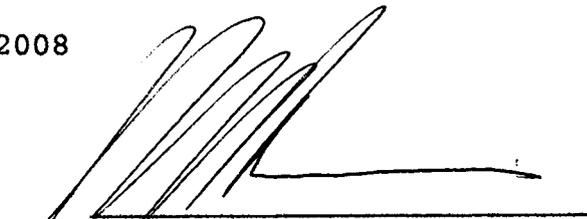
STATE OF WASHINGTON
BY _____
DEPUTY

PROOF OF SERVICE BY MAIL

The undersigned appellant hereby certifies
that on this date he mailed by ordinary U.S. mail
a true and exact copy of APPELLANT'S OPENING BRIEF
to the respondents at their address of record,
namely:

Theodore & Debi Kay Mahoney
2701 N.E. 115th St.
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DATED February 20, 2008



BRUCE L. MELKONIAN
Appellant