FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37426-9-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

C & V HOSSMAN, JR., ET AL,

Appellants,

v.

TNA FOOD SERVICE, dba JACKIE'S TERIYAKI, aka GERMAN ORTEGA & SERGIO TOSTADO PARTNERSHIP, aka T&A FOOD SERVICE CORPORATION,

Respondents.

RESPONDENT'S BRIEF

Michael W. Johns
WSBA No. 22054
Attorneys for Respondents

DAVIS ROBERTS & JOHNS, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335
(253) 858-8606

ORIGINAL

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I. ARGUMENT

A. Standard of Review.

This Court may affirm the Trial Court's judgment "on any grounds established by the pleadings and supported by the record." Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 766, 58 P.3d 276 (2002); In re Marriage of Rideout, 150 Wash.2d 337, 77 P.3d 1174 (2003).

Where the Trial Court has weighed the evidence, the Appellate Court's review is limited to determining whether substantial evidence supports the trial court's findings and, if so, whether the findings in turn support the conclusions of law and the judgment. City of Tacoma v. State, 117 Wash.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wash.2d 693, 712, 732 P.2d 974 (1987). If the evidence satisfies this standard, the Court of Appeals will not substitute its judgment for the trial court's, even though it may have resolved disputed facts differently. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wash.2d 873, 879-80, 73 P.3d 369 (2003).

The Respondent, T & A Food Service Corporation (hereinafter the "Tenant") will address the issues raised by the Appellants (hereinafter collectively referred to as the "Landlord") in same order as presented in the Landlord' brief.

B. The Trial Court Properly Concluded That The Tenant Was Not Obligated to Begin Paying Rent Until April, 2006.

1. The Trial Court Properly Concluded That The Lease Was Not Valid Until Signed By The Landlord.

The Landlord acknowledges in its brief that because the lease was for more than one year, it was required under the statute of frauds to be in writing. The Landlord goes on to quote RCW 19.36.010, which provides that in order to be valid, the lease had to be signed by the party to be charged therewith. The Landlord does not dispute that it did not sign the lease until the end of December, yet nonetheless disputes the Trial Court's finding that there was no valid lease until late December.

The Landlord argues that simply because one of the parties to the lease, the Tenant, had signed the lease, the Trial Court's finding is wrong. But as the Landlord itself quoted from the statute, until the Landlord signed the lease, it was not bound by it. The Tenant, while being potentially bound to the lease if and when the Landlord signed the lease, enjoyed no rights and could not enforce

the lease against the Landlord unless and until the Landlord signed the lease. The Tenant thus could not without great risk begin expending monies on tenant improvements until it had a valid lease, one it could enforce against the Landlord.

The Trial Court thus properly found that there was no valid lease that could bind both parties, and upon which the Tenant could rely, until the end of December. (Finding of Fact 3, CP 255).

2. The Trial Court Properly Found That The Tenant Was Entitled To Three Months Of Free Rent.

The Landlord acknowledges in its brief that the lease specifically provided that the Tenant was entitled to three months of free rent. (Ex 1, page 1). Because the parties originally anticipated the lease would begin at the beginning of December, the lease noted that March was the first month rent would be due.

However, as set forth above, the Trial Court properly found that, despite the parties' original intent, the Landlord did not sign the lease until the end of December, with the result that the lease term did not start at the beginning of December as originally planned, but in January. (Finding of Fact 3, CP 255). Thus the three months of free rent were January, February and March, and rent started in April, not March as originally intended.

3. The Trial Court Properly Found That The Final Rent Check Was For November.

Because the Landlord did not sign the lease until the end of December, and thus the term of the lease did not start until January rather than December as the parties originally intended, the Trial Court properly found that the Tenant's last rent payment was for November 2006, not October as the Landlord claimed. The Landlord persisted throughout the length of the Tenant's tenancy in treating the lease as having started at the beginning of December instead of January, and thus calculated rent payments as being due commencing in March 2006 rather than April 2006. Because the lease clearly provided for three months free rent, and because the lease did not start until after the Landlord signed the lease, the Landlord's rent calculations were always one month off, and the parties actively disputed this issue throughout the first few months of the lease. (Ex 39; RP 214, line 6 – RP 215, line 15).

However, even if the Trial Court had been incorrect in determining that the lease term did not commence until January 2006, the Trial Court also found that the parties in September 2006 met to try to resolve their long running dispute over the lease commencement date and other outstanding issues. (Finding of

Fact No. 8, CP 256). The Trial Court further found that the parties reached an agreement to resolve those disputes. Finding of Fact No. 8, CP 256).

Under the basic principles of contract law, "[t]he right to modify a written contract by a subsequent oral one is unquestioned." Haley v. Brady, 17 Wn.2d 775, 788, 137 P.2d 505 (1943). Thus, regardless of who was right with respect to the start date of the lease term, the parties orally modified the terms of the lease at their September 2006, meeting. The Trial Court found that the Landlord accepted at the meeting - and subsequently cashed - two rent checks, one for September and one for October 2006. (Finding of Fact No. 10, CP 256).

Thus, both because the lease did not actually commence until January 2006, and because regardless of when the lease term started the parties' resolved their dispute over the issue during their September 2006 meeting, thereby modifying the lease, the final rent check given to the Landlord, on October 10, 2006, was for the November rent, as the Trial Court properly found.

C. The Trial Court Properly Found An Agreement Was Reached At The September 4, 2006 Meeting.

The Trial Court found that the parties reached an agreement regarding their outstanding disputes as a result of their September 4, 2006 meeting. (Finding of Fact No. 8, CP 256). This finding was based not only on the testimony of the parties, but also upon the undisputed fact that Landlord accepted and cashed the checks tendered by the Tenant at the meeting.

Prior to the meeting, in late July the Landlord improperly locked the Tenant out of the premises for at least eleven days. (Finding of Fact No. 7, CP 256; RP 215, lines 20-24). Though the Landlord restored the premises to the Tenant in August, the disputes that led the Landlord to lock the Tenant out were not resolved at that time. The Landlord continued to threaten to terminate the lease and demanded payment of back rent and Cam charges it alleged were due.

It was in that context that the parties' September 4, 2006 meeting occurred. Mr. Tostado testified that the parties reached an agreement at the meeting, and that he agreed to compromise on the CAM issue as part of that agreement. (RP 219, line 6, RP 220, line 8). He further testified that he gave Mr. Klakring a number of

checks for rent and CAM pursuant to the parties' agreement. (RP 217, line 23, RP 218, line 9.)

While Mr. Tostado understood that Mr. Klakring was going to discuss the results of the meeting with his father in law, he thus fully believed the parties had reached an agreement. This was confirmed when the Landlord proceeded to cash the checks it had been provided according to the schedule the parties had agreed upon. (Finding of Fact No. 10.)

Thus prior to the meeting the Landlord had locked the Tenant out and was continuing its threats to terminate the lease. During the meeting the parties reached an agreement and the Landlord accepted the Tenant's current and post dated checks. The Landlord then proceeded after the meeting to immediately cash the current checks and later to cash the post dated checks, and further ceased any further threats to terminate the Tenant's tenancy.

The Trial Court properly found, based not only on the testimony of the parties, but also on the clear actions of the Landlord in accepting the Tenant's checks at the meeting and then cashing the checks and ceasing its threats to evict the Tenant

following the meeting, that the parties reached an agreement at the September 4, 2006 meeting.

D. The Trial Court Properly Found That The Landlord Failed To Prove The Tenant's Final Rent Check Was Not Valid.

In its Finding of Fact No. 11, the Trial Court found that the Tenant tendered payment for the November rent, but that the Landlord did not attempt to deposit the check until March, 2007, long after the Landlord had terminated the Tenant's tenancy and the Tenant had closed its account. The Trial Court thus found that the Landlord had not accepted the Tenant's last check. (CP 257, lines 23 – CP 258, line 2).

Ms. Hossman acknowledged during her testimony that she did not deposit the check in October 2006, and in fact waited to even attempt to deposit it until March, 2007. (RP 294, lines 7-17) The Landlord provided no documentation to prove that the check would not have bounced had it been presented to the bank in October 2006. Instead, the sole evidence the Landlord presented was Ms. Hossman's testimony that she was told by some unnamed bank employee that there were not sufficient funds to cover the check in October 2006. (RP 287, lines 9-20) In response, Mr.

Tostado testified that there were funds in October 2006, when the check was given to the Landlord. (RP 222, lines 11-17).

The Trial Court found that the Landlord had failed to prove that the check was not good in October, 2006. Though not expressly stated in the finding, the Trial Court clearly found that Mr. Hossman's testimony regarding conversations with unnamed third parties was not mote persuasive on the issue than Mr. Tostado's testimony that there were sufficient funds in October 2006. This Court cannot substitute its judgment for the Trial Court's on this issue of fact. Sunnyside Valley Irrigation Dist. v. Dickie, supra.

Moreover, the Trial Court's finding is further supported by the fact that the Landlord never raised this issue in October or November, 2006. It did not ever inform the Tenant, in any of its notices or other communications with the Tenant, that it believed the Tenant's rent check for November 2006 was insufficient and would bounce. It in fact never informed the Tenant that it had decided not to deposit the check. (RP 294, line 18 - RP 295, line 1). There thus was no way for the Tenant to respond to the Landlord's "concern" regarding the validity of the rent check at the time.

Because the Landlord provided no documentation to support its assertion that the November rent check was insufficient, the Tenant's president testified that there were sufficient funds, and the Landlord never provided any notice to the Tenant of the claimed defect with the check, the Landlord failed to meet its burden of establishing the rent check was not good and the Trial Court's finding is supported by the evidence.

E. The Landlord Was Not Entitled To A Finding That The Tenant Was Guilty Of Unlawful Detainer.

1. The Landlord Did Not Have A Good Faith Belief That The Amounts Listed In The Five Day Notice Was The Amount The Tenant Owed.

After the entry of the Trial Court's Findings of Fact, Conclusions of Law and Judgment, the Landlord filed a motion for reconsideration. The Landlord's asserted in its motion, as it does here in its brief, that it had a good faith belief that the amounts set forth in its Five Day Notice to Pay of Vacate demanded payment, $5,845.88. It further asserted that even though the Trial Court found that only one month's CAM charge in the amount of only $360.00 was actually owed, because at least some amount of money was owed and the Landlord had a good faith belief that the

amount listed in the Notice was accurate, the Court was required to find the Tenant guilty of Unlawful Detainer.

The Landlord based its argument on reconsideration, as it does here in its brief, primarily on Foisy v. Wyman, 83 Wn.2d 22 (1973), although in that case the Washington Supreme Court reversed a judgment in favor of the landlord and remanded the case to the trial court with instructions to allow the tenant to present defenses the trial court had not considered.

Though it was not central to its decision, the Foisy Court did note that because it appeared that the landlord's demand in the notice was based on a good faith determination as to the amount of rental due, the fact that the amount actually found due by the Court was less than the amount claimed in the notice would not, as the tenant claimed, automatically defeat the landlord's claim. Foisy at 32. The Foisy Court's holding - that a landlord can still obtain judgment even if the amount found due is less than the amount claimed in the notice - is a far cry from the Landlord's assertion that a Court must, as a matter of law, award judgment in favor of a landlord and terminate the tenant's rights under the lease if the Court determines that even one dollar was owed at the time the notice to pay or vacate was given.

Certainly, under Foisy and the other cases cited by the Landlord, a Court can enter a judgment in favor of a landlord even if the amount the Court determines to be due is less than the amount set forth in the notice to pay or vacate. But nothing in any of those cases "mandates" that a Court do so. Furthermore, before a Court under Foisy could even consider entering judgment in favor of a landlord when the amount found due by the Court is less than the amount set forth in the notice, a Court would have to determine that the demand in the pay or vacate notice was made in good faith.

The Trial Court considered the Landlord's motion for reconsideration on February 15, 2008. The Trial Court denied the motion. In doing so, it stated as follows:

> COURT: Well, let me just tell you, I speak -- I just want to speak directly to you. If I felt I made a mistake, I would not hesitate to change my decision. I have done that before; certainly in the minority of cases, but I have changed my mind. I think that the judge has to keep an open mind until this case is truly over. So I don't want to stick with this decision just to stick with it and to be able to say, Well, I've never changed my mind, because I have. But I am not going to change my mind in this case, and I'm going to deny the motion for reconsideration. I believe the amount that was owing was one month's cam charges, not 793, but approximately $360. It may have been 370. So that's my decision in that regard.
>
> What I really believe happened here -- it looks like this case is headed for Court of Appeals. I'll tell you that straight out. It probably is. So I think the Court of Appeals should

have the benefit of my reasoning at this stage of the proceeding.

I think Mr. Klakring made this deal with Mr. Tostado that I find was made on September 4, 2006. Mrs. Klakring prepared the accounting here and, I believe, submitted it to counsel. This is three months ago now that the trial took place, but that is kind of my recollection. That notice to pay rent or vacate was predicated on the fact that there was no agreement on September 4 of 2006. It totally ignores the agreements that were made in 200 -- September 4, 2006. I don't believe -- it may have been an innocent mistake on behalf of the Klakrings, but I really don't find that this was a good-faith accounting made by the landlords.

I do agree with Mr. Johns' reasoning in that regard.

Now, I've read these cases that were cited by Mr. Allen, and this Foisy versus Wyman case is pretty much in point. I have to concede that. However, here, this is a case where $75 a month was claimed for two months, and the trier of the fact allowed $50 a month. There was no question about there being an agreement and anything such as that. That is a far cry from the case that we've got in front of us here.

The Court there said, "It appears that is the plaintiffs demand for rental in the notice was in conformity with his good-faith determination as to the amount of rental due." And that accounting totally ignores the September 4, 2006 contract that was made here.

So having that in mind and the fact that I really don't think that it was a good-faith accounting that was submitted, I don't think that the rule as set forth in this Foisy verses Wyman case mandates that I find in favor of plaintiff in this case.

MR. ALLEN: You just don't go along with the --

THE COURT: When I say when these gentlemen confronted each other sometime in the middle of the five-day notice, as I recall, the 9th or 10th or something like that in November, all this was pointed out. And the answer from the other side was, "You owe this money. Pay it or get out of here."

I don't think that if the 360 were tendered then -- it may have been accepted. I think the landlord probably

> would have accepted anything that was tendered. But the question is, would the unlawful detainer actually stop? I think it's highly improbable that it would have stopped. Highly improbable because it would be totally contrary to the theory of plaintiffs that the plaintiffs set forth in the notice to pay rent or get out.

(RP February 15, 2008 Hearing, Page 35, line 7 to Page 37, line 25.)

The Trial Court thus found that, in view of the agreement reached at the September 4, 2006 meeting, the Landlord could not have had a good faith belief that the amounts set forth in the Five Day Notice were indeed owed by the Tenant. The Trial Court further found that it did not believe that the Landlord would have stopped the unlawful detainer action had the Tenant tendered payment of the small CAM charge actually owed.

The Tenant was thus not guilty of unlawful detainer as a result of its refusal to pay the grossly inflated amounts the Landlord demanded in its Five Day Notice to Pay of Vacate.

F. Pursuant to RAP 18.1, The Tenant Requests An Award Of Its Attorneys Fees On Appeal.

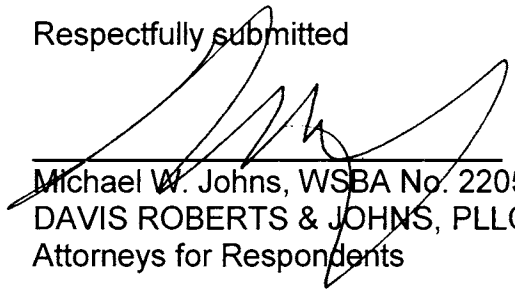
The parties' lease provides for an award of attorney's fees to the prevailing party, and applies to any appeal. Pursuant to RAP 18.1, the Tenant requests it be awarded its attorney's fees and costs incurred in this appeal.

II. CONCLUSION

For all of the reasons set forth above, the Trial Court's judgment should therefore be affirmed.

Dated: October 22, 2008.

Respectfully submitted



Michael W. Johns, WSBA No. 22054
DAVIS ROBERTS & JOHNS, PLLC
Attorneys for Respondents

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08 OCT 22 PM 4: 12

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CARL HOSSMAN and VIRGINIA HOSSMAN, husband and wife; ASHLEY HOSSMAN and JOSH KLAKRING, husband and wife, Appellants, vs. T & A FOOD SERVICE CORPORATION, DBA JACKIE'S TERIYAKI, Respondent.	NO. 37426-9-II AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON)
) ss.
County of Pierce)

PAMELA M. GIBSON, being first duly sworn on oath, deposes and says:

That on the 22nd day of October, 2008, she delivered to the following:

ORIGINAL

David M. Jacobi
Shawnmarie Stanton
WILSON SMITH COCHRAN DICKERSON
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161

the following items: **Respondents' Brief and Affidavit of Delivery,**

by depositing the same in a receptacle for ABC Legal Messenger

Service to be delivered on October 24, 2008.

Pamela M Gibson
PAMELA M. GIBSON

SIGNED AND SWORN to before me this 22nd day of October, 2008.

Kristine R. Pyle
NOTARY PUBLIC in and for the
State of Washington, residing at
Yelm, WA
My Commission Expires: 9-4-09

KRISTINE R. PYLE
NOTARY PUBLIC
COMMISSION EXPIRES
09-04-09
STATE OF WASHINGTON