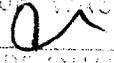


No. 42365-1-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 

DEPUTY

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

KYB FARMS, INC.,

Appellant,

v.

JUNG JIN and HAE JIN, husband and wife,

Respondents.

BRIEF OF APPELLANT KYB FARMS, INC.

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I. INTRODUCTION

Washington law requires a landlord to provide statutorily-prescribed notice to a defaulting tenant prior to commencing an unlawful detainer action. Without proper notice, the trial court has no jurisdiction over the action. Here, the trial court confirmed that the landlord did not provide proper notice to its tenants. However, despite implicitly finding the notice to be improper, the trial court asserted jurisdiction and issued a judgment against the tenant. The tenant appeals because the notice was defective in three respects.

II. ASSIGNMENTS OF ERROR

The trial court erred in concluding that Respondents Jung Jin and Hae Jin (collectively referred to as “Jins”) were entitled to an award for unpaid rent in their unlawful detainer action against Appellant KYB Farms, Inc., where the Jins’ required Three Day Notice to Pay Rent was issued prematurely, was incorrect on its face, and was issued to the wrong party, which is confirmed by the trial court’s Findings of Fact. As of the date of the Notice, KYB Farms was fully current in its rental payments and the trial court’s Findings of Fact do not support its Conclusions of Law, therefore requiring reversal.

A. Issues Pertaining to Assignments of Error

1. Did the trial court err in concluding that the Jins were entitled to judgment where the Findings of Fact state that

the Jins did not comply with the statutory notice requirement and issued a Notice to Pay Rent or Vacate (1) prior to any delinquency in the payment of rent, (2) for the incorrect amount, and (3) to the wrong party?

III. STATEMENT OF THE CASE

A. Substantive Facts

This appeal arises out of an unlawful detainer action filed by the Jins. The Complaint stemmed from a lease agreement between KYB Farms and the Jins. Clerk's Papers ("CP") 1-4. While the precise terms of the lease were disputed, there is no dispute that the parties entered into an agreement whereby KYB Farms agreed to lease farmland and a dwelling owned by the Jins in exchange for monthly rent.¹ CP 12-13. The lease began in March 2009 and from March 2009 through August 2010, KYB Farms paid \$1,200 per month in rent to the Jins.² CP 13-14. Every month the Jins accepted the \$1,200 in rent without complaint or comment. CP 14, Finding of Fact No. 12.

KYB Farms continuously made its monthly rental payments, including the August 2010 rent. CP 14, Finding of Fact No. 12. On August 27, 2010, the Jins issued a Notice to Pay Rent or Vacate the Premises ("Notice") to Yong Bong Kim and Jin Hae Han. CP 14, Finding

¹ There were additional terms regarding lump sum payments to the Jins that are not at issue in this appeal. CP13.

² At trial, the parties disputed the amount owed under the terms of the lease. The trial court resolved this dispute in its Findings of Fact and determined that \$1,200 was the proper monthly rent. See CP 14, Finding of Fact No. 16.

of Fact No. 13; Trial Exhibit (“Exhibit”) 4. The Notice is improper in three respects.

First, it was issued three days before the next rent payment was due and 23 days before the rent would have been late. CP 14, Findings of Fact Nos. 14, 16. (According to the Jins’ Complaint, they were entitled to collect a late fee if the rent was not paid by the 20th of each month. CP 2.) Thus, as of August 27, 2010, when the Notice was issued, there was no delinquency in rental payments. CP 14, Finding of Fact No. 16.

Second, the Notice stated an incorrect amount supposedly owed by KYB Farms. Exhibit 4. It stated that Yong Bong Kim and Jin Hae Han were delinquent \$800 per month from March 2009 to August 2010, the difference between the \$1,200 monthly payments made by KYB Farms and the \$2,000 monthly rent the Jins claimed was due under the lease. At trial, there was dispute as to the terms of the lease at issue, including the monthly rent amount owed by KYB Farms. The trial court resolved all issues of fact and determined that KYB Farms owed \$1,200 per month in rent. CP 14, Finding of Fact No. 16. The trial court also concluded that KYB Farms was current in its rental payment through August 2010. *Id.* Thus, none of the allegedly delinquent rent identified in the Notice was actually due and owing when it was issued.

Third, the Notice was issued to the wrong party. Exhibit 4. The individuals Yong Bong Kim and Hin Hae Han were not parties to the lease, and the trial court awarded them attorney fees as prevailing parties. Exhibits 2, 7; Conclusion No. 7.

Simply put, the notice was premature; identified allegedly delinquent rent that the trial court found was not due and owing; and was directed to the wrong party,

The trial court made the following undisputed findings of fact:

1. Plaintiffs Jung Jin and Hae Jin, husband and wife, are the owners of the following described agricultural property in Pierce County, commonly known as 4720 and 4508 Gay Road East, Tacoma, Washington 98443 (Pierce County tax parcels 0320131071 and 0320132014). The parcel known as 4508 Gay Road East also contains an incidental residential dwelling.
2. Defendant KYB Farms, Inc., is a Washington corporation owned and controlled by defendant Yong Bong Kim.
3. In August, 2008, Yong Bong Kim, then a resident of South Korea, came to Pierce County hoping to buy or invest in a business that would entitle him to bring himself and his family to the United States under an E-2 (business investor) visa.
4. Yong Bong Kim met with Byung Jin, the son of plaintiffs, who was then operating a farming business known as BJ Jin's Farm utilizing the two parcels owned by plaintiffs.
5. Byung Jin did all the negotiating with defendant Yong Bong Kim, including the negotiations on behalf of plaintiffs, regarding the lease of their above described land.

6. Defendant Yong Bong Kim had retained the services of a Korean speaking attorney, Isabella Kim, to assist him with regard to getting his visa and later, closing the transaction whereby he purchased the farm business from Byung Jin, and leased the land from plaintiffs.

7. There was a "Commercial Premise Lease Agreement" dated August 21, 2008 (Exhibit 2), drawn by attorney Kim for the two parcels which called for rent payments of \$2,000.00 per month. There was no finalization of any purchase of the business at that time.

8. On August 25, 2008, there was apparently a "Farming Land Lease Agreement" drawn up by attorney Kim regarding the above-described two parcels of farm land (Exhibit 5). It called for rent payments of \$400.00 per month, while at the same time requiring the landlord to pay the real estate taxes, which were in excess of the total amount of rent which was to be paid each year (Exhibits 15 and 16). Said lease was not indicative of any agreement between the parties, and may have been only for the purpose of helping defendant Kim obtain a visa.

9. Defendant Yong Bong Kim went back to Korea, and then returned again in March of 2009. At that time, utilizing the corporation, KYB Farms, Inc., Yong Bong Kim purchased the farm business from Byung Jin (Exhibits 13 and 1) and in conjunction with that purchase, a lease was prepared dated March 2, 2009 (Exhibit 7), which is almost identical to the earlier executed one dated August 21, 2008 (Exhibit 2), calling for rental payments of \$2,000.00 per month for the two parcels. Attorney Kim had prepared the purchase and lease documents.

10. The said lease was for a period of five years. However, the signatures of the lessors were not acknowledged by a Notary Public.

11. Notwithstanding the terms of the written lease dated March 2, 2009, the tenant paid the landlord \$1,200.00 per month as rent, plus \$15,000.00 to each of the plaintiffs (a total of \$30,000.00) as W2 wages. The wages would be

reported on a W2 form and Social Security and Medicare would be withheld. The plaintiff landlords were not expected to do any work for the corporation although Jung Jin did some watering and gave some advice on planting.

12. In the year 2010, defendant lessee continued to pay \$1,200.00 per month rent through August 2010, but did not pay the extra \$30,000.00 in wages claimed to be due by plaintiffs, while still continuing to use the leased premises. Plaintiffs accepted the rent checks without objection until late August, 2010.

13. On August 27, 2010, plaintiffs served defendants with a Three-Day Notice to Pay Rent or Vacate (Exhibit 4).

14. Defendants tendered another rent payment of 1,200.00 which was returned (Exhibit 12), but never tendered any of the claimed wages for 2010, nor tendered any rent payments to the registry of the court.

15. Defendants Yong Bong Kim and Jin Hae Han, his wife, continued to reside in the incidental dwelling unit on one of the leased agricultural parcels.

16. **Defendant KYB Farms, Inc., is delinquent in the payment of rent for the year 2010 in the amount of \$1,200.00 per month for the months of September 2010, through June 2011, which is a total of \$12,000.00, plus late charges as provided in the lease of \$600.00, a grand total of \$12,000.00 for unpaid rent and \$600.00 for late charges.**

CP 11-14 (bold and underlining added).

KYB Farms does not dispute any of these facts and agrees that (1) the two written leases were never complied with by either party, (2) KYB Farms owed \$1,200 per month in rent; (3) KYB Farms paid its monthly rent through August 2010 and attempted to pay the September 2010 rent,

but the check was returned; and (4) any delinquency occurred as of September 20, 2010, i.e. after the Notice.

B. Procedural History

This case was tried via bench trial in Pierce County Superior Court. The Jins filed suit against both KYB Farms and its owners, Yong Bong Kim and Jin Hae Han. CP 1-4; CP 12, Finding of Fact No. 2.

Based upon its findings of facts, the trial court issued the following conclusions of law:

1. The court has jurisdiction over the parties and the subject matter of this action.

2. Defendant corporation (KYB Farms, Inc.) is delinquent in its payment of rent to the plaintiffs.

3. **Plaintiffs gave defendants a Three-Day Notice to Pay Rent or Vacate on August 27, 2010, and thereafter commenced this action under RCW 59.12.**

4. Said defendants did not pay or vacate the premises, and are unlawfully detaining possession of the premises. Plaintiffs are entitled to a judgment terminating the lease.

5. Plaintiffs are also entitled to a Writ of Restitution restoring to them the premises commonly known as 4720 and 4508 Gay Road East, Tacoma, Washington 98443 (Pierce County tax parcels 0320131071 and 0320132014), including the incidental residential dwelling.

6. Plaintiffs are entitled to a judgment against defendant KYB Farms, Inc., for unpaid rent and late charges in the total amount of \$12,600.00.

7. The written agreement of the parties provides, in Section 20, that in the event of any litigation, the prevailing party shall be entitled to recover reasonable attorney's fees and costs against KYB Farms, Inc. Plaintiffs' reasonable attorney's fees for 45.2 hours are \$11,300.00, together with necessary costs of \$266.80 as set forth in the billing of plaintiffs' attorney. Defendants Yong Bong Kim and Jin Hae Han are awarded reasonable attorney's fees and costs of \$16,195.15 against plaintiffs.

CP 14-15 (bold and underlining added).

The trial court also concluded that Yong Bong Kim and Hin Hae Han were not proper parties to the case since they were not named in the lease. *Id.* The trial court dismissed them and granted their attorneys' fees. *Id.*

KYB Farms timely appealed the judgment against it. Yong Bong Kim and Hin Hae Han do not appeal their dismissal and are not parties to this appeal.

IV. ARGUMENT

A. The Trial Court's Conclusions of Law are Not Supported by its Findings of Fact, Requiring Reversal.

In reviewing a trial court's findings, this Court looks to whether substantial evidence supports the findings of fact, which must then support the conclusions of law. *See, e.g., Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). This Court reviews a trial court's conclusions of law de novo. *Ridgeview Properties v. Starbuck*, 96 Wn.2d

716, 719, 638 P.2d 1231 (1982). Where the findings of fact do not support the conclusions of law, reversal is warranted.

Here, KYB Farms agrees that substantial evidence supports the Findings of Fact. Thus, the only relevant question is whether the Findings of Fact support the Conclusions of Law. They do not.

B. The Jins were Required to Give Proper Notice Prior to Commencing this Action. Because They Did Not, the Trial Court's Conclusions of Law are Not Supported by its Findings of Fact.

RCW 59.12.030 provides that a cause of action for unlawful detainer is improper unless a landlord serves the tenant with proper notice after the rent becomes due. The statute states in pertinent part:

When [a tenant] continues in possession in person or by subtenant after a default in the payment of rent, **and after notice in writing** requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time **after** the rent becomes due;

RCW 59.12.030(3) (bold and underlining added).

Washington courts have held that the unlawful detainer statutes – including RCW 59.12.030 – create a special, summary proceeding for the recovery of possession of real property. *See Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745 (1990), (citing *Wilson v. Daniels*, 31 Wn.2d 633, 643-44, 198 P.2d 496 (1948)). Because the

statutes are considered to be in “derogation of the common law,” they are strictly construed in favor of the tenant. *Housing Authority of the City of Seattle v. Silva*, 94 Wn. App. 731, 734, 972 P.2d 952 (1999); *see also Terry*, 114 Wn.2d at 563, 789 P.2d 745. While a landlord may commence an unlawful detainer or eviction proceeding based upon certain tenant breaches, under Washington law, the landlord must provide the tenant with proper notice. RCW 59.12.030(3) -(5) ,(7) ; *Silva*, 94 Wn. App. at 734. Failure to comply with the notice requirement “**defeats the court’s jurisdiction over the action.**” *Silva*, 94 Wn. App. at 734-35 (bold and underlining added); *see also Terry*, 114 Wn.2d at 564, 789 P.2d 745 (citing *Sowers v. Lewis*, 49 Wn.2d 891, 894, 307 P.2d 1064 (1957)); *Kessler v. Nielsen*, 3 Wn. App. 120, 123, 472 P.2d 616 (1970).

Prior to the commencement of any action based upon the tenant’s breach of a lease, the tenant must be given notice of an opportunity to perform the lease and avoid eviction. RCW 59.12.030(3) (requiring three days’ notice for a default in rent); RCW 59.12.030(4) (requiring ten days’ notice for breach of any other covenant); *Terry*, 114 Wn.2d at 564, 789 P.2d 745; *Silva*, 94 Wn. App. at 734-35.

Thus, proper notice is a prerequisite for the Jins’ Complaint against KYB Farms, which prerequisite was not met. By its own findings, the trial court confirmed that there was no proper notice in this case. Thus,

the trial court lacked jurisdiction and could not support its conclusions of law finding KYB Farms delinquent in paying rent.

Specifically, Finding of Fact No. 16 does not support the Conclusion of Law No. 3 that “Plaintiffs gave defendants a Three-Day Notice to Pay Rent or Vacate on August 27, 2010, and therefore commenced this action under RCW 59.12.” CP 14-15 (underlining added). The Notice was improper, which is confirmed in the Findings of Facts. Reversal is warranted where, as here, a trial court’s conclusions of law are not supported by the findings of fact. *See Landmark*, 138 Wn.2d at 573.

1. Notice was defective because it was issued before a default occurred.

The Notice was defective because, according to the trial court’s Findings of Fact, KYB Farms was not in default at the time the Jins served their Notice. Under RCW 59.12.030(3), a notice of default must be served **after** the rent becomes due. As the trial court specifically held, KYB Farms was current through the month of August 2010. CP 14, Finding of Fact No. 16. Under the lease, rent was due on the first of each month. Exhibit 7, ¶ 3. Thus, the Notice sent on August 27, 2010, was made before the rent became due.

2. Notice was defective because none of the allegedly delinquent rent was found to be due and owing.

The Notice was also defective because none of the allegedly delinquent rent identified in the Notice was actually due and owing when it was issued. While the Notice identifies allegedly delinquent rent in the amount of \$800 per month from March 2009 to August 2010, the trial court found that the \$1,200 monthly payments made by KYB Farms reflected the correct amount, not the \$2,000 monthly rent the Jins claimed was due under the lease. CP 14, Finding of Fact No. 16. Thus, none of the rent claimed to be delinquent under the Notice was found to be due and owing by the trial court.

3. Notice was defective because it was not directed to the tenant.

Finally, the Notice was defective because it was directed to Young Bong Kim and Jin Hae Han individually, not to the tenant KYB Farms, a corporation. Exhibit 4. Strictly construing the statutory notice provisions in favor of the tenant, KYB Farms, notice to Kim and Han, who were awarded attorney fees as prevailing parties, does not constitute proper notice to the corporate tenant. CP 15, Conclusion No. 7.

C. KYB Farms is Entitled to an Award of Attorney Fees and Costs as Prevailing Parties.

KYB Farms is entitled to an award of attorney fees and costs as the prevailing party in this action under attorney fee provision in the lease.

Exhibit 7, ¶ 20. Because the Notice was defective, the trial court lacked jurisdiction to proceed in the trial before. Because the proceeding should have been dismissed on jurisdictional grounds, KYB Farms should be found to be the prevailing party and should be found to be entitled to an award of attorney fees and costs, both in defending the proceeding below and in the instant appeal.

V. CONCLUSION

The trial court's findings of fact establish that the Jins' Notice under Chapter 59.12 RCW was improper. Accordingly, the trial court's conclusions of law are unsupported and are in error, requiring reversal. KYB Farms respectfully requests this Court reverse the trial court's conclusion that the Jins are entitled to judgment on this matter, direct dismissal of the proceeding on the grounds that the trial court lacked jurisdiction, and award attorney fees and costs to KYB Farms as the prevailing party.

RESPECTFULLY SUBMITTED this 26th day of September,
2011.

KELLER ROHRBACK L.L.P.

By 
Rob J. Crichton, WSBA #20471
Holly E. Hinterberger, WSBA #37281
Attorneys for Appellant KYB Farms,
Inc.

COURT OF APPEALS
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CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

BY _____
DEPUTY

I, Ruth Beckett, declare under penalty of perjury under the laws of the State of Washington that I am employed by the law firm of Keller Rohrback L.L.P., a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On September 26, 2011, I caused a true and correct copy of the following document(s) to be served on counsel listed below in the manner indicated:

- 1) Brief of Appellant KYB Farms, Inc.

Thomas G. Krilich
Krulich, La Porte, West &
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524 Tacoma Avenue S.
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- Via first class mail
- Via facsimile
- Via legal messengers
- Via email

DATED this 26th day of September, 2011.



Ruth Beckett