

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

No. 44985-4-II

Group 44, Inc.,

Appellant,

vs.

Ebony Keys, LLC and Out Loud Entertainment Group, Inc.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF RESPONDENT EBONY KEYS, LLC

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Introduction

Ebony Keys purchased two dueling piano bars (Chopstix) from Out Loud Entertainment: one in Seattle and the other in Tacoma. The purchase of the Seattle business was without problems, while the purchase of the Tacoma business was not. For the Tacoma location Ebony Keys agreed to assume the existing lease, or enter into a new lease on the same terms as the exiting lease with the landlord, Group 44, Inc. At closing on April 5, 2011, there was no assignment or new lease for Ebony Keys to sign. It was not until a few months after closing that Ebony Keys and Group 44 realized they had different understandings of what the "existing lease" for the Tacoma location was. Group 44 had two leases with Out Loud – one signed in 2005, and one signed in 2010. The real estate agent only gave Ebony Keys the 2005 lease. Ebony Keys and Group 44 could not reach an agreement for a new lease and Ebony Keys vacated the premises at the end of August 2012. When Ebony Keys vacated, Group 44 claimed Ebony Keys should pay rent and triple net charges under the 2010 lease, and claimed some property Ebony Keys bought from Out Loud and took with it belonged to Group 44. The trial court concluded Ebony Keys was not aware of the 2010 lease, and therefore not bound by it. Further, the court concluded Group 44 failed to provide sufficient evidence it owned the property in dispute. Finally, the court awarded Group 44 a judgment against Out Loud for unpaid rent, and found that the rent Ebony Keys paid Group 44 during its occupancy was reasonable.

Statement of Issues

1. Ebony Keys and Group 44 failed to agree to lease terms for the Tacoma piano bar. To maintain the status quo pending resolution of the disputes among the parties, Ebony Keys and Group 44 agreed that Ebony Keys would pay monthly rent of \$7,187.50, which is the amount of base rent in the leases, and the amount of rent advertised for the premises. Ebony Keys paid \$7,187.50 for each month it occupied the premises. Under the theory of quantum meruit, Group 44 asks the court to order Ebony Keys to pay triple net charges under the 2010 lease. Was the trial court's decision that Ebony Keys owed no rent or triple net charges beyond \$7,187.50 per month supported by substantial evidence?

2. When Ebony Keys vacated the Tacoma location it took personal property purchased from Out Loud Entertainment. Was the trial court's decision that this property belonged to Ebony Keys supported by substantial evidence when Ebony Keys had a bill of sale for the property, and when Group 44's principal could not identify what property Group 44 owned?

Statement of the Case

In January or February of 2011, Ebony Keys, LLC, agreed to purchase two dueling piano bars (Chopstix) from Out Loud Entertainment Group, Inc. CP 2; 64 (Finding of Fact 3). One bar was located in Seattle, and the other in Tacoma. RP 26-27, 82-83. Ebony Keys agreed to purchase the business assets from Out Loud, and enter

into a new lease or assume the existing lease for each of the locations.
RP 85-88.

Ebony Keys learned about the sale of Chopstix through a business opportunity flyer. Ex. 3. The flyer listed monthly rent of \$7,187.50 for the Tacoma location. Ex. 3. The listing broker provided Ebony Keys a copy of a lease, without addenda, dated February 10, 2005 ("2005 lease"). Ex. 5. The 2005 lease was between Group 44 and Out Loud and had a term of five years with two five year extensions. *Id.* Paragraph 27.1 of the 2005 lease stated that rent during the first lease extension would be \$7,187.50 per month, and would remain fixed during that term. *Id.* The lease said nothing about triple net or common area maintenance (CAM) charges. *Id.* An undated addendum to the 2005 lease added a provision for the payment of triple net charges, but this addendum was never given to Ebony Keys. Ex. 13-A; RP 39 (line 6), 87, 130-131, 161-162; CP 64 (Finding of Fact 4), 69 (Conclusion of Law 4).

Prior to closing, representatives of Out Loud and Ebony Keys conducted an inventory of the personal property in the building. RP 43-49, 209-210; Ex. 7. This handwritten inventory was typed up and attached to Ebony Keys' bill of sale at closing. Ex. 8; RP 49. Out Loud told Ebony Keys that all the inventoried property belonged to Out Loud. RP 211; Ex. 8.

Ebony Keys also received a 2010 preliminary profit and loss statement from Out Loud prior to closing. Ex. 14; RP 67-69. According

to Out Loud's representative, Mr. Drewry, this document was merely an estimate based upon certain assumptions. RP 67-68. It was not an accurate reflection of the business's expenses. RP 67-69. It was a "made-up" document to reflect "what-if" scenarios. RP 69. The document reflected no triple net charges. RP 68. One of the owners of Ebony Keys, George Hasenohrl, rounded off the rent figures from this report and incorporated it into a business plan. Ex. 16; RP 113-120. Mr. Hasenohrl said he never paid attention to the rent numbers in the business plan and forgot about the business plan shortly after he finished it. *Id.*

Closing took place on April 5, 2011. Ex. 18, RP 144, 148. Prior to closing, the closing agent was given a copy of the 2005 lease without addenda. RP 155. The real estate agent told the closing agent he would bring to closing a lease assignment for the Tacoma location. RP 145-146. He did not. RP 94, 145-146. Two days later Group 44 outlined its conditions for a new lease, and notified the parties it owned a type 1 hood, 6 burner stove, and two microwaves it did not want subordinated to Ebony Keys' loan with its bank. Ex. 21.

Two or three weeks later, Ebony Keys contacted Group 44 directly about entering into a new lease. RP 96-98. In the meantime, Ebony Keys paid rent of \$7,187.50 per month. RP 98-99, 244-245. After about 2 months of rent payments, a representative of Group 44, Charles Farnsworth, notified Ebony Keys they were delinquent in their rent payments for failing to pay triple net charges. RP 98-99, 268, 274. At this

point Ebony Keys and Group 44 realized they were looking at different leases. RP 98-100, 244, 274.

Mr. Farnsworth told Ebony Keys there was a lease dated March 1, 2010 ("2010 lease"). Ex. 4; RP 100, 269. Out Loud never gave the real estate agent the 2010 lease. RP 61, 63. Ebony Keys asked Mr. Farnsworth to forward a copy of the 2010 lease, but Mr. Farnsworth declined on the basis that doing so might violate the parties' privacy. RP 100, 245, 259. Ebony Keys eventually got a copy of the 2010 lease around July of 2011. RP 259. The 2010 lease provided for base rent in the same amount as the 2005 lease, plus triple net charges of \$1,559.50 per month. Ex. 4; CP 64 (Finding of Fact 2), CP 66 (Finding of Fact 11) (Ex. 4 shows tenant is only responsible for taxes, not insurance or CAM charges). Out Loud misrepresented to Ebony Keys that the 2005 lease was still in effect. CP 64 (Finding of Fact 4). Ebony Keys relied on this misrepresentation when it completed the purchase of Chopstix. CP 64 (Finding of Fact 5).

While Ebony Keys and Group 44 were discussing a new lease, Group 44 also mentioned it owned some personal property at the Tacoma location. RP 103-104, 172. But Group 44 did not identify which property it claimed to own. *Id.*

In October 2011, Group 44 filed an unlawful detainer action against Ebony Keys and Out Loud based upon non-payment of the triple net charges. CP 66 (Finding of Fact 13). In December of 2011, Ebony Keys and Group 44 agreed to dismiss the unlawful detainer

action without prejudice in exchange for entering into a temporary occupancy agreement. Ex. 15, 19; CP 66-67 (Findings of Fact 14 and 15). The temporary occupancy agreement was terminable upon 30 days' notice. *Id.* Ebony Keys continued paying agreed rent of \$7,187.50 per month under the temporary occupancy agreement. *Id.* In July of 2012, Ebony Keys gave notice to Group 44 that it intended to vacate the premises by August 31, 2012. CP 67 (Finding of Fact 18).

In the interim, Ebony Keys commenced this lawsuit against Out Loud for breach of contract and misrepresentation in the sale of Chopstix. CP 1-5. When Ebony Keys vacated the Tacoma Chopstix location, Group 44 intervened in this litigation alleging breach of the 2010 lease by both Out Loud and Ebony Keys. CP 21-29, 67 (Finding of Fact 20).

The trial court found that Ebony Keys and Group 44 had no meeting of the minds concerning the terms of the lease for the premises. CP 69 (Conclusion of Law 6). Out Loud was found liable to Group 44 for rent and triple net charges owing under the 2010 lease. CP 70 (Conclusion of Law 12). Group 44 was granted a judgment against Out Loud for \$288,135.26, which has not been appealed. CP 72-74. But since Ebony Keys paid all rent due during its occupancy, including the amounts agreed to under the temporary occupancy agreement, Group 44's claim for rent against Ebony Keys under the 2010 lease was dismissed. CP 70 (Conclusion of Law 8). Group 44 now appeals. CP 88-102.

Argument

- 1. The standard of review is whether, viewed in the light most favorable to Ebony Keys, the evidence at trial would persuade a fair-minded, rational person of the truth of the findings made by the trial court, and whether those findings support the conclusions of law.**

The court is asked by Group 44 to review certain findings of fact and the conclusions of law drawn from those facts relating to the payment of triple net charges and ownership of personal property. This is a two-part process. *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 30 P.3d 8 (2001).

We first determine whether the trial court's findings of fact were supported by substantial evidence in the record. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is evidence which, viewed in the light most favorable to the party prevailing below, would persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). If the findings are adequately supported, we next decide whether those findings of fact support the trial court's conclusions of law. *Landmark Development*, 138 Wn.2d at 573, 980 P.2d 1234.

Tegman, 107 Wn. App. at 874.

In determining whether there is substantial evidence to support the findings of fact, the court does not review evidence in the record contrary to the findings. *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 716, 658 P.2d 679 (1983). Instead, the court looks at the evidence favoring the prevailing party to determine if that evidence supports the challenged findings. *Id.*

2. **Because the parties had no meeting of the minds, because Ebony Keys never saw the 2010 lease, and because Ebony Keys paid the rent that was advertised and agreed to by the parties, the trial court's decision that Ebony Keys was not liable for triple net charges under the 2010 lease was supported by substantial evidence.**

Although Group 44 labels its first argument as based upon quantum meruit, it is really arguing the trial court should have found the parties agreed to the 2010 lease. Quantum meruit assumes there is no contract between the parties. *Heaton v. Imus*, 93 Wn.2d 249, 252, 608 P.2d 631 (1980). The purpose of quantum meruit is to avoid unjust enrichment. *Id.* In the present case there was no lease agreement between Ebony Keys and Group 44, and there was never a meeting of the minds as to what would be in a new lease. CP 69 (Conclusion of Law 6); RP 102, 175, 245; *Blue Mountain Construction Co. v. Grant County School District 150-204*, 49 Wn.2d 685, 688, 306 P.2d 209 (1957). Therefore, if quantum meruit is the applicable legal concept on the question of rent, the issue is whether there is substantial evidence to support the trial court's determination that \$7,187.50 per month is a reasonable rental value. *Provident Mutual Life Insurance Co. of Philadelphia v. Thrower*, 155 Wn. 613, 285 P.654 (1930).

The evidence at trial was that when Out Loud and Group 44 entered into the lease in 2005, they agreed \$7,187.50 was a reasonable amount for occupying the premises during the second five year term of the lease. CP 67 (Finding of Fact 15); Exs. 3, 4 and 5. This is the rental amount advertised for the premises. Ex. 3. The additional charges agreed to between Out Loud and Group 44 were not the value of

renting the premises, but were the actual cost for expenses beyond occupancy including taxes, insurance, and common area maintenance. Ex. 4 (see particularly page 2, paragraph 5).

After Group 44 and Ebony Keys determined they had no lease, they agreed that Ebony Keys could continue paying \$7,187.50 to occupy the premises. Ex. 15. Based upon this evidence, there was substantial evidence in the record to support the trial court's determination that \$7,187.50 was reasonable compensation for occupying the premises.

But Group 44 argues Ebony Keys should have deduced what the terms of the 2010 lease were and therefore it would be unfair not to enforce those terms against it. Brief of Appellants, pp. 8-11. This argument can be rejected outright because Group 44 did not assign error to Conclusion of Law 6 that the parties did not have a meeting of the minds concerning the terms of the effective lease. CP 69. Even if this conclusion of law were considered a finding of fact, it would be a verity on appeal. *State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000); *See also West Coast Airlines, Inc. v. Miner's Aircraft & Engine Service, Inc.*, 66 Wn.2d 513, 517, 403 P.2d 833 (1965) (unchallenged finding of fact is a verity on appeal even if error is assigned to the related conclusion of law). Nevertheless, there is substantial evidence in the record to support the court's conclusion there was no meeting of the minds concerning the terms of the effective lease.

Group 44 first argues that Ebony Keys knew rent was more than \$7,187.50 per month because it incorporated rent numbers received

from Out Loud into a business plan. Brief of Appellant, pp. 8-9. But Mr. Drewry, who prepared the preliminary profit and loss statement from which these numbers came, testified these were not actual rent numbers. RP 69. He called the profit and loss statement an estimate based upon certain business model assumptions. RP 67-68. He said it was a “made-up” document. RP 69 (lines 5-6). It was a “what-if” scenario. RP 69 (lines 11-15). He admitted the document disclosed no triple net charges. RP 67-68. Ebony Keys’ principal, George Hasenohrl, testified he simply copy and pasted the rent numbers from Mr. Drewry’s worksheet. RP 113-116. He understood these numbers were estimates only, and may have included rental fees for storage or rental fees for other locations. RP 113-116. Because he knew the rent numbers used in his business plan were estimates only he did not rely upon them. RP 119-120. Instead, he relied upon the rent stated in the 2005 lease and the flyer. RP 119-120. Viewing this evidence in the light most favorable to Ebony Keys, there was substantial evidence in the record to support the trial court’s findings and conclusions that Ebony Keys did not have knowledge of the 2010 lease, or that the 2010 lease called for triple net charges. *Structurals Northwest*, 33 Wn. App. at 716.

Next, Group 44 argues that Ebony Keys should have deduced from the escrow closing statement that rent was more than \$7,187.50 per month. Brief of Appellants, p. 9. But Mr. Hasenohrl testified he did not look closely at the rent numbers on the closing statement, which were pro-rated and preliminary. RP 123-125; Ex. 18. He only looked at

the bottom line number he was supposed to pay at closing. *Id.* Again, viewing this evidence in the light most favorable to Ebony Keys, there was substantial evidence to support the trial court's conclusion that there was no meeting of the minds regarding the 2010 lease or triple net charges. *Structurals Northwest*, 33 Wn. App. at 716.

Finally Group 44 argues that Ebony Keys had knowledge of the rent amount in the 2010 lease because it remained in possession of the premises after learning of the error and did not immediately sue Out Loud. Brief of Appellants, pp. 9-10. But it is not logical to conclude that Ebony Keys knew about the 2010 lease prior to closing just because it learned of the error later. The unchallenged findings of fact and conclusions of law are that Out Loud misrepresented to Ebony Keys what lease was in existence. CP 64 (Finding of Fact 4), 69 (Conclusion of Law 4).

Group 44 seems to be arguing Ebony Keys waived its right to avoid the terms of the 2010 lease by remaining in the premises and waiting less than a year to file a complaint against Out Loud. But waiver is an intentional abandonment or relinquishment of a known right. *Mid-Town Limited Partnership v. Preston*, 69 Wn. App. 227, 233-34, 848 P.2d 1268 (1993). The acts or conduct constituting waiver must be unequivocal and inconsistent with any intention other than waiver. *Id.* During the time Ebony Keys remained in possession of the premises, it was trying to determine what was going on, paying the rent it believed was due, and working to negotiate a lease with Group 44. CP 66

(Finding of Fact 12); RP 96-102, 244-245, 274. These facts contravene waiver. They demonstrate Ebony Keys was trying to solve the problem it found itself in by negotiating for a new lease with Group 44. Only when those attempts failed did Ebony Keys vacate the premises and commence suit against Out Loud.

There is substantial evidence in the record to support the trial court's conclusion that \$7,187.50 per month was reasonable rent for Ebony Keys to pay for its occupancy of the premises under the theory of quantum meruit. This is the rent advertised when the business was listed for sale. Ex. 3. This is the rent provided for in both the 2005 and 2010 lease. Ex. 4 and 5. And this is the rent Ebony Keys and Group 44 agreed to in the temporary occupancy agreement. Ex. 15; CP 66-67 (Findings of Fact 14 and 15).

Group 44 presented no other evidence of rental value at trial. The 2010 lease was never provided to the real estate agent or the closing agent prior to closing. RP 63, 155. It was not until several months after closing that Ebony Keys received a copy of the 2010 lease. RP 63, 98-100, 244-245. Even then, the 2010 lease does not provide for the payment of triple net charges. Ex. 4 (compare paragraphs 2(B), 5, 12, 18(b) and 20). It only provides for the payment of taxes. *Id.* There was no evidence at trial showing how much of the extra charges were taxes, insurance or CAM charges. When looking at all this evidence in the light most favorable to Ebony Keys, the trial court decision should be affirmed.

Finally, any different award under the doctrine of quantum meruit would give Group 44 a greater recovery than it is legally entitled to. Quantum meruit is designed to provide the plaintiff with what it deserved. *Heaton v. Imus*, 93 Wn.2d 249, 253 (1980). But,

“If a plaintiff has in fact received the equivalent which he expected in exchange for an act done by him, the fact that incidentally someone else has also derived a benefit should not give him a cause of action. In such a case it cannot properly be said that there is an unjust enrichment on the part of the defendant at his expense, since he has received an equivalent which he regarded as ample when he did the act.”

Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 605, 137 P.2d 97 (1943), quoting Keener, *Quasi Contracts*, p. 361. In the present case, Group 44 obtained a judgment against Out Loud for the full base rent, additional rent, late fees, and interest owing under the lease. CP 72-74. Group 44 has also retained all the payments from Ebony Keys made during its occupancy of the premises. Group 44 has received more than what it expected for the premises in payments from Ebony Keys and a judgment against Out Loud. The fact that Ebony Keys benefitted by occupying the premises – in exchange for paying rent – does not entitle Group 44 to a greater recovery. *Chandler*, 17 Wn.2d at 605.

- 3. Ebony Keys’ bill of sale combined with the supporting testimony of Mr. Hasenohrl, Mr. Drewry, and Mr. Stoneman, and Group 44’s inability to identify what property it owned, constitutes substantial and un rebutted evidence that Ebony Keys owns the property on the bill of sale.**

Group 44 cites no authority to support its argument that it owns certain items of personal property. Under the circumstances, the court

can decline to consider Group 44's argument and affirm the trial court. RAP 10.3(a)(6); *In re the Marriage of Fahey*, 164 Wn. App. 42, 59, 262 P.3d 128 (2011); *Regan v. McLachlan*, 163 Wn. App. 171, 178, 257 P.3d 1122 (2011). But even if the court considers Group 44's argument, there was substantial evidence in the record that Group 44 only proved ownership of a type-1 hood, six burner stove, and two microwaves.

A bill of sale is prima facie evidence of ownership of the property listed in it. RCW 62A.2-401; *Wildman v. Taylor*, 46 Wn. App. 546, 557, 731 P.2d 541 (1987). The bill of sale admitted at trial as Exhibit 8 is prima facie evidence that Ebony Keys owns those items. *Id.* Ebony Keys' ownership of the property in the bill of sale was also supported by the testimony of Mr. Drewry, Mr. Hasenohrl, and Mr. Stoneman. RP 41, 43-49, 111, 132, 211. Once Ebony Keys established its prima facie case of ownership, it was Group 44's obligation to rebut that evidence. *Hall v. American Friends Service Commission, Inc.*, 79 Wn.2d 230, 233, 484 P.2d 376 (1971). Looking at the evidence in the light most favorable to Ebony Keys, there is substantial evidence to support the trial court's conclusion that Group 44 failed to establish ownership of the personal property at issue on appeal – a finding of fact to which no error has been assigned. CP 68. *State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000); *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 716, 658 P.2d 679 (1983). *See also West Coast Airlines, Inc. v. Miner's Aircraft & Engine Service, Inc.*, 66 Wn.2d 513, 517, 403 P.2d 833

(1965). Because Group 44 failed to establish ownership of the disputed property, the trial court decision should be affirmed.

Even looking at the evidence presented by Group 44, the trial court correctly concluded Group 44 failed to establish ownership of the disputed property. Group 44 argues it is “undisputed” it agreed with Out Loud in 2005 that certain items of personal property belonged to Group 44. Brief of Appellants, p. 11. Group 44 relies upon two addenda to the 2005 lease to support the argument it owns the personal property. Addenda A states that Group 44 will install at its own expense 3 microwave ovens, a 6 burner gas stove, and some other miscellaneous items. These are items the trial court found Group 44 owned, and Ebony Keys does not dispute the finding. CP 68 (Finding of Fact 26).

The personal property at issue is what is listed on Addendum B. Ex. 13-A. The lease and Addendum B do not say what Group 44 argues they do. Paragraph 31.2 of the lease says the property listed in Addendum B will remain on the premises, but it does not say who owns it. Ex. 5. Addendum B does not say who owns the items listed there either. Ex. 13-A. Aside from the list of property, the only thing Addendum B says is, “Inventory count for Fenders.” *Id.* Fenders was apparently a tenant before Out Loud. RP 71-71. The lease and addendum are not helpful. The language there could mean that the property belonged to Fenders, Out Loud, Group 44, or anyone else.

When asked about Addendum B, Out Loud’s principal, Mr. Drewry, initially testified he understood Addendum B was a list of

property owned by Out Loud. RP 71-74. On cross examination, Mr. Drewry changed his testimony to say the property on Addendum B belonged to Group 44. RP 74. When there is conflicting evidence, the appellate court does not weigh the conflicting evidence. *Structurals Northwest, Ltd.*, 33 Wn. App. 710, 716-717. Rather, the court views the evidence in the light most favorable to the prevailing party to see if that evidence supports the trial court's decision. *Id.* Even though Mr. Drewry's testimony was conflicting, his initial testimony that Out Loud owned the disputed property was consistent with the bill of sale and testimony of Mr. Hasenohrl and Mr. Stoneman.

Group 44 did not submit evidence to rebut the bill of sale or testimony of the other witnesses. When Group 44's principal, Anthony Valenzuela, was asked about the property on Addendum B compared to the property on Ebony Keys' bill of sale, he could not say who owned the property on the bill of sale. RP 180-190. Similarly, prior to the lawsuit, Mr. Valenzuela only claimed ownership of the type-1 hood, six burner stove, and 2 microwaves, which Ebony Keys does not dispute. Ex. 21. When asked by Ebony Keys shortly after closing what other personal property Group 44 might own, Mr. Valenzuela could not identify anything else. RP 103-104. Finally, both Mr. Drewry and Mr. Valenzuela testified that much of the property on Addendum B was replaced by Out Loud at its own expense prior to Ebony Keys buying it. RP 70-71, 132, 211. The implication of this testimony was that when

Out Loud replaced the property, the new property belonged to Out Loud. *Id.*

It is still unclear what property Group 44 claims to own. In its brief, Group 44 simply says it is entitled to the property in Addenda A and B. Ebony Keys does not dispute Group 44's ownership of the items in Addendum A. CP 68 (Finding of Fact 26). As for the items in Addendum B, Group 44's principal does not know if those items still exist. RP 180-190. When asked about the items on Ebony Keys' bill of sale, Mr. Valenzuela could not say who owned those items. *Id.* The bill of sale and testimony of Mr. Drewry, Mr. Hasenohrl, Mr. Stoneman, and Mr. Valenzuela constitute substantial evidence that Ebony Keys owns the items in the bill of sale. Because Group 44 has not rebutted this evidence, the trial court should be affirmed. *Wildman v. Taylor*, 46 Wn. App. 546, 557, 731 P.2d 541 (1987); *Hall v. American Friends Service Commission, Inc.*, 79 Wn.2d 230, 233, 484 P.2d 376 (1971).

4. Ebony Keys should be awarded statutory costs and fees on appeal as the substantially prevailing party.

RAP 18.1 provides for an award of costs and fees on appeal if otherwise permitted by applicable law. RAP 18.1(a). Title 14 of the Rules of Appellate Procedure provides for an award of statutory costs and attorney fees to the substantially prevailing party on appeal. RAP 14.2. An award of costs and statutory attorney fees to the prevailing party are also permitted by statute. RCW 4.84.010. If this

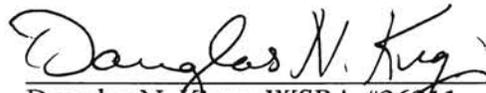
court determines that Ebony Keys is the substantially party on appeal, it asks permission to submit a cost bill as provided by RAP 14.4 and 18.1.

Conclusion

There is substantial evidence in the record to support the trial court's conclusion that Ebony Keys was not liable for rent or triple net charges beyond what it already paid. The amount paid by Ebony Keys is the amount of rent provided for in the 2005 and 2010 leases, is the amount advertised as rent for the premises, and is the amount agreed to by the parties in their temporary occupancy agreement. There is also substantial evidence to support the trial court's decision that Ebony Keys owns the property listed in its bill of sale. The bill of sale and testimony of the witnesses was that the property was owned by Out Loud and sold to Ebony Keys. The testimony of Mr. Valenzuela did not rebut this evidence because Mr. Valenzuela did not know who owned the property listed in the bill of sale. For these reasons the trial court's decision should be affirmed and Ebony Keys should be awarded statutory costs and fees as the substantially prevailing party.

Respectfully submitted this 8th day of January, 2014.

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Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 8th day of January, 2014, she placed with ABC Legal Messengers, Inc. an original Brief of Respondent and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

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via U.S. Mail, first class, postage pre-paid.

Dated this 8th day of January, 2014, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.



Heather D. Alderson
Paralegal

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DIVISION II