

No. 45278-2-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FINANCIAL ASSISTANCE, INC., a Washington Corporation,
Appellant

v.

BYRON SLACK, MICHAEL BUCKNER and MAUREEN BUCKNER,
and the marital community composed of MICHAEL BUCKNER and
MAUREEN BUCKNER,
Respondent

BRIEF OF APPELLANT

Presented by:
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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court judge erred by not recusing himself for possessing bias against the Assignor due to a negative working relationship wherein the trial court judge was legal counsel to the Assignor.
2. The trial court judge erred in not fully disclosing the nature of his relationship with the Assignor, thereby extinguishing Appellant's counsel's ability to make an informed decision on objecting to the judge's continued adjudication of the matter.
3. The trial court judge erred in not recusing himself because the appearance of fairness standard could not be met given his past relationship to the Assignor.
4. The trial court erred in finding that Byron Slack, as a co-lessee, is not responsible for debts accrued by his co-lessees, Michael & Maureen Buckner, pursuant to the lease's plain language.
5. The trial court erred in finding that insufficient evidence was presented to establish Appellant's damages.

II. STATEMENT OF THE CASE

Statement of Facts

On April 30, 2004, Hazel Dell Development Co. ("Assignor") entered into a commercial lease with Michael & Maureen Buckner ("Buckners") and Byron Slack ("Slack"). Memorandum, page 1, lines 18-

19. Hazel Dell is owned by Milton Brown (“Brown”). Clerk’s Papers (“CP”), Item 16, Declaration of Hazel Totem, LLC. The lease was for a commercial space to be used for the supply and sales of camera-based security, voice/data access control, and fire equipment systems. CP, Item 20, page 1.

Originally, the Assignor was not comfortable with leasing the premises to the Buckners due to a lack of financial history and references Verbatim Report on Proceedings (“RP”), page 12, lines 1-3. Slack signed the lease, along with the Buckners, as a lessee; he did not sign as a guarantor or as a surety. Exhibit 1 at trial, page 1, paragraph 2. The lease was for a period of one year, *Id* at paragraph 3, after which, it converted to a month-to-month tenancy under Paragraph 41 – the holdover provision. *Id* at page 12.

According to Slack, he and the Buckners stopped communicating in January of 2006. RP at page 43, lines 9-11. On February 9, 2007, the Buckners signed a promissory note for back due rent. Memorandum, page 2, lines 13-20. In addition to their signatures, it had a signature purportedly belonging to Slack. *Id*. However, upon review, it appears that Slack’s signature was forged. *Id*. Appellant does not contest that the Buckners may have forged Slack’s signature on the Promissory Note and conceded the matter at trial. *Id*.

The Buckners gave notice to terminate the lease on or around August of 2007. Memorandum, page 2, lines 20-22. This was the first notice by any of the lessees of their intent to vacate the premises.

Procedural History

Pre-Trial

Slack was served with a Summons and Complaint on September 21, 2009. CP, Item 5. On December 22, 2009, Slack filed an Answer to Appellant's Complaint wherein he admitted to signing the lease, but generally denied all other claims. CP, Item 11. On November 18, 2011, Appellant motioned for summary judgment. CP, Item 16. This motion was denied and the matter was submitted to mandatory arbitration. CP, Items 22 and 22a, respectively.

Arbitration

The arbitration hearing for this matter occurred on July 10, 2012. CP, Item 24. The arbitrator found in favor of the Appellant for past due unpaid rent pursuant to the terms of the Lease and, in particular, the holdover provision in Paragraph 41. *Id.* Appellant was awarded \$7,856.75, together with interest at the rate of ten percent (10%) per annum from July 23, 2012. *Id.* Respondent sought trial de novo under MAR 7.1. CP, Item 25.

Trial

The trial for this matter occurred on June 24, 2013. It was a bench trial.

At the beginning of the trial, Judge Gregerson (“Gregerson”), who was only assigned the case a week before, disclosed that he represented the Assignor and/or Brown in the past on “a commercial lease situation not dissimilar to this” present matter. RP, page 4, lines 14-25. Gregerson provided no further detail as to the nature and state of that relationship. Rather, he conveyed that moving forward with adjudicating the matter, “doesn’t make a difference from [his] standpoint.” *Id.* Relying on this information, Appellant’s counsel did not object to moving forward with the trial. *Id.* at page 6.

During the trial, John M. Steiger (“Steiger”) was called as an Appellant’s witness to testify regarding the commercial lease transaction, the ledger outlining moneys owed and paid by the lessees, and the procedures and levels of oversight around managing the property. RP at pages 11-23. With respect to the ledger outlining moneys owed and paid, the document was missing the fourth page to demonstrate how the ledger balance jumped from \$1,115.00 to \$1,315.02. Memorandum, page 4, lines 11-13.

The trial court found in favor of the Respondent. Findings of Fact and Conclusions of Law (“Findings”). In reaching this judgment, the trial court determined that Slack was never contacted or given some actual notice by the landlord of the arrearages created by the Buckners, and that absent some indication that Slack was actively involved in the ongoing business or availing himself of the lease holdover, it was inequitable to hold him liable for the debts accrued by the other lessees. *Id.* The court also found that Appellant was barred under a theory of laches. *Id.* Further, the Court determined that the ledger lacked any details as to the charges and credits and was thereby insufficient to prove Appellant’s damages. *Id.*

Appellant now appeals.

IV. STANDARD OF REVIEW

A trial court’s recusal decision is reviewed for an abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.App. 836, 840, 14 P.3d 877 (2000). A trial court’s factual conclusions are reviewed under a “clearly erroneous standard.” *State v. Walton*, 64 Wn.App. 410, 414, 824 P.2d 533 (1992). An appellate court reviews underlying questions of law de novo. *Mayer v. Sto Industries, Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006).

V. APPELLANT'S ARGUMENTS

A. The Trial Court's Judgment Should Be Vacated and the Case Remanded for a New Trial in Front of a New Judge Because the Presiding Judge's Past Relationship With Owner of Assignor Creates an Untenable Bias.

The right to an impartial and disinterested tribunal is one of the bedrock principles of American jurisprudence for both civil and criminal matters. This right is not only secured by the Due Process Clause of the Constitution, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), but is one that is elevated in many jurisdictions by common law, statute, and the professional standards of the bench and bar. *Bracey v. Gramley*, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (citing, in part, ABA Code of Judicial Conduct (CJC) Canon 3C(1)(a) (1972)). The State of Washington is one such jurisdiction.

Under Washington Law, the rules regarding judicial bias are outlined in both common law and the Code of Judicial Conduct ("CJC"). Washington cases have long recognized the requirement for judges to recuse themselves when actual or potential bias is suggested by the facts. *See Dimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966) ("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties."). Indeed, Washington's "system of law has always endeavored to prevent even the

probability of unfairness.” *State v. Madry*, 8 Wn.App. 61, 68, 504 P.2d 1156 (1972).

The State’s position towards avoiding even the appearance of unfairness was codified by way of the CJC in 1973. CJC 2.11 states in part the following:

“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might be reasonably questioned, including...[when] the judge has a personal bias or prejudice concerning a party or party’s lawyer.”

CJC, Rule 2.11(A)(1)

The comment section of this rule provides greater clarity about a judge’s duty. Comment 1 states: “a judge is disqualified whenever the judge’s impartiality might be reasonably questioned. *Id.* Comment 5 states “a judge should disclose on the record information that the judge believes the parties or their lawyers ***might reasonably consider relevant to a possible motion for disqualification*** (emphasis added), even if the judge believes there is no basis for the disqualification. *Id.*

In 1992, the State Supreme Court went a step further in applying the appearance of fairness doctrine, previously limited to quasi-judicial proceedings, to judicial proceedings. *State v. Post*, 118 Wn.2d 596, 826 P.2d 172, 175-76, 837 P.2d 599 (1992). This doctrine is violated when a judge fails to recuse him or herself in accordance with the judicial canons.

To show a violation, evidence of a judge’s actual or potential bias must be provided. *In re Marriage of Meredith*, 148 Wn.App. 887, 903, 201 P.3d 1056, *review denied*, 167 Wn.2d 1002, 220 P.3d 207 (2009). Further, the “moving party must demonstrate a risk of injustice to the parties if relief is not granted.” *Tatham v. Rogers*, 170 Wn.App. 76, 81, 283 P.3d 583 (2012). A judicial proceeding is only considered valid if a “reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” *In re Marriage of Meredith* at 903.

If this standard is not met, then it results in a judgment that may be vacated under CR 60(b)(11). *Tatham* at 81. Under that rule, a “a court may relieve a party or his legal representative from a final judgment, order, or proceeding for any...reason justifying relief from the operation of the judgment.” CR 60(b)(11).

1. Gregerson had actual bias against the Assignor because he was discharged as Assignor’s attorney in a past matter.

At the beginning of the trial, Gregerson made a brief reference to the past working relationship that he had with the Assignor and/or Brown, in his capacity as owner of Assignor. However, he neglected to disclose the details of the relationship and more specifically, the negative aspects of it.

Brown hired Gregerson, then an attorney, for a collection matter.

Subsequently, they worked on defending against an adverse possession claim. In that claim, Gregerson made multiple mistakes in representation that ultimately led to Brown discharging him. In doing so, Brown expressed his anger over the poor quality of legal work provided by Gregerson. After the relationship ended, Gregerson also failed to forward critical court correspondences that ultimately led to Brown's case being dismissed. In short, this was not an amicable relationship.

Appellant contends that this negative past relationship created an actual bias in Gregerson against Brown and Assignor, through Brown's capacity as the owner. Brown's firing of Gregerson and the subsequent inaction of Gregerson that led to Brown's case being dismissed cultivated a level of animosity. And while Brown did not overtly express this animosity, it was shrouded in and formed the basis for his decision in the present matter. Given this bias, Gregerson should have disqualified himself pursuant to the well-established common law and ethical codes of this State.

Gregerson's failure to recuse himself clearly abused his discretion. As a consequence, his findings of fact and conclusions of law were skewed by his negative bias towards Brown and the Assignor. Given this, allowing the decision to stand would create a significant injustice to both the Assignor and Appellant as they will be deprived of the monetary

compensation otherwise guaranteed under the lease agreement.

Accordingly, Appellant requests that this judgment be reversed, pursuant to CR 60(b)(11), and the case be remanded for a new trial to be adjudicated by a new judge.

2. Even if Gregerson is not biased, the matter should still be remanded because there is evidence of his potential bias.

Satisfying the appearance of fairness doctrine requires that a judge adhere to the requirements of judicial canon. CJC 2.11 clearly states that a judge is disqualified if his or her impartiality can be reasonably questioned. CJC 2.11, Comment 1. And the rule requires a judge to disclose ALL information that may reasonably be relevant to a motion for disqualification. *Id* at Comment 5.

In the present matter, had Appellant's attorney been made aware of the contentious nature of this past relationship – the discharge of Gregerson by Brown and the subsequent events that led to the Brown's case being dismissed – he would have certainly motioned that Gregerson recuse himself. Instead, Gregerson characterized the relationship as insignificant and not “[making] a difference from [his] standpoint.” RP, page 4, lines 21-24.

While it is true that “[a] litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge

the court's qualifications on appeal,” *In re Welfare of Carpenter*, 21 Wn.App. 814, 820, 587 P.2d 588 (1978), such a waiver should not apply to the present matter. The case was placed on Gregerson’s docket a mere week before the trial, and the previous relationship between him and Brown was not disclosed until minutes before the trial began. Prior to this point, Appellant’s attorney had no knowledge or notice of the change in judges. When these temporal limitations are considered in conjunction with the limited nature of the disclosure, Appellant’s attorney had no reason to believe a potential bias existed and no reasonable time with which to conduct a meaningful independent investigation to uncover the potential bias.

To allow this decision to stand - given the strong evidence that a potential bias exists, the lack of opportunity to investigate or object to said bias, and the below-discussed mistakes – would be a significant injustice to the Appellant. Accordingly, Appellant requests that this judgment be reversed, pursuant to CR 60(b)(11), and the case be remanded for a new trial to be adjudicated by a new judge.

B. Even if Gregerson Was Unbiased and the Appearance of Fairness Standard Was Met, There Are Multiple Mistakes That Warrant Remanding This Matter For a New Trial.

- 1. The trial court erred in ignoring the plain language and terms of the lease that Slack admits he read and signed.**

It is well settled law in Washington that an abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Mayer* at 684. The court reviews the underlying questions of law de novo. *Id.*

In the present case, it is undisputed that Slack signed the commercial lease along with the Buckners. RP, page 45, line 24-page 46, line 14. See also Exhibit 1 at trial, Page 14. Slack even testified at trial that he read it. RP at page 14. The plain language of the lease makes him a lessee, not a guarantor, not a co-signor, and certainly not a surety. Nevertheless, the Court fixates on the issue of discharge of surety in its questioning of counsel. *Id* at page 54-55. There was no evidence presented whatsoever that identified Slack as a surety. Amazingly, even in the court's memorandum of decision, it refers to the fact "[t]he tenants (Buckners) stayed in the premises...." Memorandum at page 2. The plain language of the lease document is very clear; Slack was a tenant/lessee, nothing less. To arrive at a different conclusion would require the court to rely upon purely unsupported facts.

Nothing in the record contravenes the fact that Slack was a tenant. The fact that only the Buckners operated the business and paid the rent is legally immaterial to the terms of the lease. Paragraph 41 of the lease –

the Holdover Provision - is expressly clear:

“In the event the Lessee for any reason shall hold over after the expiration of this Lease, such holding over shall not be deemed to operate as a renewal or extension of this Lease, but shall only create a tenancy from month-to-month based upon the same terms and conditions contained in this Lease except that the tenancy may be terminated upon thirty (30) days’ written notice from Lessor to Lessee, or by thirty (30) days’ written notice from the Lessee to Lessor.”

Exhibit 1 at Trial.

This provision says nothing about releasing one or more of the lessors after a year. Nothing in the record, at any point, takes Slack out of the terms and conditions of the lease and places him in the position of a surety or guarantor.

Under Washington law, a person who signs a contract is presumed to have read and understood its terms. *Hein vs. Family Life Ins.*, 60 Wn.2d 91, 95, 376 P.2d 152 (1962). Here, Slack admits as much. If his intent was simply to be their guarantor, he could have refused to sign the lease, insisted on modification to the language, or taken some other approach. Instead, he signed what was presented to him.

Secondly, the court blatantly ignores the lease provisions on notice. Under the terms of the lease, “notice is to be given in writing personally or by depositing the same into the U.S. mail, postage pre-paid, certified mail with return receipt requested and addressed to” the

designated address for the tenant (said address being the leased premises). Exhibit 1 at trial, page 11, paragraph 38. Further, in order for a lessee to not to be subjected to the lease beyond the initial one year term, he or she was required to provide a thirty day notice to vacate. *Id* at Paragraph 41.

With respect to notices related to the lessor's obligations, testimony at trial was unrefuted that they were sent to the lessees in accordance with the lease. RP, page 32, lines 2-14. As argued at trial, any issue with notices is really an issue of agency. Mr. Slack chose to voluntarily sign this lease, which he admits and concedes that he read. If he had concerns about the Buckners, he could easily have submitted a change of address, as allowed for under the lease. Exhibit 1 at trial, page 11, paragraph 38. Alternatively, Slack could have separately sought to be released. However, and despite the clear language of the lease, the trial court separated Slack's continued liability under the lease because notice was not sent to him personally. Memorandum at page 3. This conclusion of law is erroneous and goes against the contractual language.

The trial court also asserts that the Assignor "slumber[ed] on its rights" creating an "untoward delay in litigation," and that "absent some indication Slack was actively involved in the ongoing business or was availing himself of the benefits of the lease holdover, it is inequitable to

impose continued liability.¹ Memorandum, page 3, line 7 – page 4, line 9. This theory of laches, however, is not supported by the record. The lessor operated within the constructs of the lease and did not pursue collection/litigation efforts until a notice to vacate was provided by the lessees, in this case the Buckners, in late 2007. *Id* at 20-22. Prior to this notice, lessor was actively involved in securing its interests on the debt owed. After the Buckners vacated the premises, the lessor continued to pursue collection efforts, ultimately leading to the filing of this case in late 2009. At no point did lessor “slumber” on pursuing its interests in this matter. Accordingly, this theory of laches is also erroneous.

Further, the lessor was under the impression that all three lessees were business partners. RP, page 25, line 7 and page 21, lines 8-19. At any time, Slack could have provided notice to the lessor to terminate the lease under the holdover provision. However, no such notice was given by Slack. The lessor had no knowledge of the independent arrangement that Slack and the Buckners entered into, and should be able to rely on that arrangement in pursuing its rights under the plain, unambiguous language of the lease.

¹ It is important to note that the trial court relied on a broad body of rules found in *AmJur 2d*, Landlord and Tenant, §§673-680. However, upon review of said rules, there is nothing on point to support the legal conclusions proffered. Additionally, the court makes a finding of equity wherein no equitable principle is cited.

2. The trial court erred in finding that Appellant's evidence lacked "any detail as to the charges and credits."

Exhibit 2 at trial, the account ledger, contains a highly detailed series of debits and credits on the account from the commencement of the lease until termination. The charges for each month are detailed, as are the payments on the lease, including month, day, year, amount, description and check number, as appropriate. Again, it appears that the Court simply chose to ignore the document entirely. No reasonable person could view the subject ledger and find it "lacked any detail as to charges and credits." Memorandum at page 5. If the evidence admitted is a yellow crayon, the court cannot simply find that said crayon was red. Additionally, the mere fact that a page was missing, resulting in a discrepancy of only \$200.00, does not void the proof of damages for the roughly \$8,500.00 that was provided.

VI. CONCLUSION

Appellant seeks a new trial in this matter. First, Appellant contends that the "disclosure" by Gregerson at the commencement of the trial was insufficient as a matter of law to allow Appellant, through counsel, to sufficiently and intelligently address the court's history with Appellant's

Assignor, and any bias or appearance of unfairness that may result therefrom.

Second, Appellant contends that even if the court finds that Gregerson gave sufficient disclosure as to his past relationship with Appellant's Assignor, the review of the evidence and interpretation of the admitted facts and documents simply does not support the conclusions he reached in his decision. In order to do so, he must ignore the plain language of the parties' agreement, and substitute an outcome that no reasonable person reviewing the same evidence could support.

Respectfully submitted this 23rd day of January, 2014



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COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

FINANCIAL ASSISTANCE, INC., a
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Plaintiff,

vs.

BRYON SLACK, MICHAEL BUCKNER
and MAUREEN BUCKNER, and the
marital community composed of
MICHAEL BUCKNER and MAUREEN
BUCKNER,

Defendants.

No. 45278-2-II

DECLARATION OF MAILING

The undersigned declares under penalty of perjury: That he / she is now
and at all times herein mentioned was a citizen of the United States and resident of the State of
Washington, over the age of eighteen years, not a party to or interested in the above entitled
Action, and competent to be a witness herein.

That on January 24, 2013, at the address of 705 Second Avenue, Suite
605, Seattle, King County, Washington State, I duly mailed by United States Mail a copy of
Appellant's Brief. Said documents were mailed to the following persons and addresses:

Name: Catherine Wright Smlth, WSBA # 9542
Address: 1619 8th Ave N, Seattle, WA 98109-3007

Name: Ian C. Cairns, WSBA # 43210
Address: 1619 8th Ave N, Seattle, WA 98109-3007

Additionally, on January 30, 2014, I mailed a copy of the Verbatim Report of the
Proceedings to the following persons and addresses:

Name: Catherine Wright Smith, WSBA # 9542
Address: 1619 8th Ave N, Seattle, WA 98109-3007

Name: Ian C. Cairns, WSBA # 43210

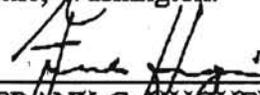
DECLARATION OF MAILING - I

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SIGNED this 30 day of January, 2014, at Seattle, Washington.


FRANK G. HUGUENIN
Declarant

DECLARATION OF MAILING - 2

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