

No. 48507-9-II

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

CHARLES R. WOODS,

Plaintiff/Respondent
and Cross-Appellant,

TOM and KAREN HALL, husband and
wife, in their individual and marital capacities;
HALLMARK GROUP, LLC, a Washington
limited liability company; HARWOODS, LLC,
a Washington limited liability company, and
RTM ENTERPRISES, LLC, a Washington
corporation

Defendants/Appellants
and Cross-Respondents

REPLY BRIEF OF APPELLANTS/ CROSS-RESPONDENTS

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A. REPLY ON COUNTERSTATEMENT OF FACTS

Woods opened up a Martini Bar/Restaurant in Camas, Washington in January, 2010. Although hopes were high, the restaurant never made a profit. Hoping to get out from underneath the failing restaurant, Woods sold 100% of his ownership interest in the restaurant's LLC to the Halls, who also owned 100% of the LLC that leased the premises to the restaurant LLC. The Purchase and Sale Agreement ("PSA") provided that the purchase price would be paid in installments over five (5) years. (Ex. 1, page 2, Section 2.2, paragraph 1) To secure payment under the PSA, the Halls granted to Woods a security interest in the LLC's restaurant assets. (Ex. 1, page 2, Section 2.2, 2nd paragraph). There was no list of restaurant assets appended to the installment contract, just several general references as to what the parties intended the secured assets to include:

"At closing Seller shall surrender ownership, possession and control of Company assets, including all ***tools, equipment, inventory, and books and accounts*** in connection therewith."

"Buyers hereby grant Seller a security interest in ***inventory, equipment, accounts, and supplies*** until such time as all of Buyers' contractual obligations are fully and completely performed."

"If the default is not cured within five (5) days, then Buyer shall surrender ownership, possession and control of the Company, including ***books and other corporate documentation, all its original assets, tools and small equipment (or comparable assets currently in use) along with all food, condiments and beverages*** reasonable needed to conduct the business and will perform all acts

required to transfer the business back to Seller." (Ex. 1, page 2, Section 2.2)

Two (2) years prior to the PSA, the restaurant LLC had entered into a lease with the Landlord ("Lease"). (Ex. 53). The PSA therefore was subject to the terms of the Lease and its characterization of the ownership of tenant improvements. Woods, in his Response Brief, maintains that the restaurant LLC had the ability to remove attached fixtures at any time during the Lease. (Br. of Resp't/Cross-App., p.5) . The Lease actually provides that during the term of the Lease, Tenant was unable to remove assets, such as an installed stove hood and bar, without the Landlord's consent:

"10.1 NO ALTERATIONS. Tenant shall not make or suffer to be made any alterations of the demised premises, or any part thereof, without the prior consent of the Landlord..." (Ex. 53, page 5)

The Lease went on to prohibit Tenant from removing any attached fixtures at the termination of the Lease:

"10.4 REMOVAL. Upon the expiration or earlier termination of this Lease, Tenant shall not remove any original improvements installed by Landlord or permanent partitions, attached electrical or plumbing items or other alterations or additions added by Tenant; unless requested by Landlord. Notwithstanding the foregoing, all personal property and trade appliance shall be removed by Tenant unless agreed otherwise. Any damage done to the demised premises in connection with the removal by Tenant of any property shall be repaired at Tenant's sole cost and expense.

Unless removed as specified in this paragraph, all such alterations, additions, fixtures, trade fixtures and personal property left on the demised premises shall at the expiration or earlier termination of this Lease become the property of the Landlord and remain on the demised premises. All costs incurred by Landlord in the subsequent removal of trade fixtures and personal property or any other additions required to be removed by Tenant hereunder, and the repair of any damage associated with such removal, shall be reimbursed by Tenant to Landlord upon completion of such removal." (Ex. 53, page 5).

Therefore, the Lease provided that Tenant was *unable* to remove attached fixtures both during the term of the Lease without the consent of the Landlord, and at the termination of the Lease, unless requested by the Landlord. The Tenant had the right only to remove its "personal property and trade appliance."

In June 2012, with the restaurant still losing money, the Halls informed Woods that they intended to stop making monthly payments and requested that Woods exercise his remedies on default, which were limited to taking over the LLC/restaurant business or repossessing the restaurant assets. (Ex. 1, Section 2.6; RP 10/12/15, p. 13). Woods, not wanting to either take over the restaurant or repossess the restaurant assets, instead insisted that the Halls try to sell the restaurant, although the Halls had no obligation to do so. (Br. of Resp't/Cross-App., p.7) Finally, in August 2012 Woods requested that the Halls shutter the restaurant and elected to repossess the restaurant assets. RP 10/12/15 (Woods), p. 16.

During this time, a dispute arose between the parties over what assets Woods was entitled to repossess. The Halls contended that the installed bar and stove hood system were not assets owned by the restaurant LLC but instead were owned by Landlord pursuant to the Lease. CP 21. There was no dispute that Woods was entitled to repossess the movable assets located on the premises, such as appliances, furniture, equipment, dishes, etc. CP 21, RP 10/21/15, p. 14. Woods, in his Response Brief, misstates the evidence by broadly asserting that the Halls threatened to sue him for conversion and theft if he attempted to repossess the assets and threatened law enforcement if he entered the restaurant for any reason. (Br. of Resp't/Cross-App., p.7). The Halls never objected to Woods removing the "movable" business assets. However, in a response to an e-mail from Woods in which he threatened to remove the stove hood and dismantle the attached bar, the Halls' attorney responded:

"The Lease specifically prohibits Tenant from removing '...attached electrical or plumbing items or other alterations or additions added by Tenant...' Therefore, the removal of the kitchen hood and the dismantling of the bar are not allowed under the Lease but are to become the property of the Landlord. Any attempt made to remove these items will be considered conversion and theft. The Halls intend to have police assistance available during the removal of the business assets. Any attempt to remove these fixtures will result in your agents' immediate removal from the premises." CP 21.

The Halls made clear, therefore, that if Woods attempted to remove the hood and bar, that the police would be called. The Halls, however, never objected to Woods repossessing the movable assets.

The parties agreed that Woods would pick up the restaurant assets on September 8, 2012. (Br. of Resp't/Cross-App., p.8) Woods insisted that the Halls place all of the restaurant assets on the busy Camas sidewalk. CP 21, RP 10/12/15 (Woods), pp. 17-18; RP 10/14/15, pp.11-18. Citing security and safety concerns, the Halls made it clear that Woods could come onto the premises to pick up the assets. RP 10/12/15 (Hall), pp.7-8. Accordingly, the Halls disassembled furniture, packed up cutlery, glasses and dishes as well as inventory, and stacked up the assets inside the premises anticipating Woods' retrieval. CP 21, RP 10/12/15 (Woods), pp. 17-18, RP 10/12/15 (Hall), pp. 6-8. At the appointed time, the Halls opened up the premises but Woods refused to enter the premises and eventually left without retrieving any assets. CP 21, RP 10/12/15 (Woods), pp. 17-18, RP 10/12/15 (Hall), pp. 6-8. For weeks, Woods made no further arrangements to pick up the restaurant assets, despite several requests by the Halls. Ex. 48. A provision in the Lease stated that any personal property left on the premises after termination of the Lease became the property of the Landlord. (Ex. 53, p.5) Accordingly, the Landlord (Hallmark Group, LLC), sold the movable assets left on the

premises to a new tenant on November 1, 2012 for Ten Thousand (\$10,000.00) Dollars. (Supp. Ex. 5, page 2).

B. ARGUMENT IN REPLY

1. *What assets was Woods, as a secured party, entitled to repossess?*

i) The court erred determining that Woods was entitled to repossess the attached bar and hood.

The Lease clearly provides that attached fixtures stay with the premises and the Tenant would obtain ownership only if the Landlord requested that the Tenant remove the attached fixtures. Consistent with the Lease, the PSA lists generally the types of assets that constitute the business assets subject to Woods' security agreement as tools, equipment, inventory, books and accounts, food condiments and beverages. Notably, there is no mention of "fixtures" in the PSA.

The trial court concluded, without any reference to either the Lease or PSA, that the exhaust fan hood and bar were secured assets based upon their "removability":

"Prior to establishing the fair market value of the secured property, an analysis of what property was secured and available to Woods at default. Woods argues that the exhaust fan hood and the bar must be included in that list. Testimony from Sean Herron supports this belief when he stated that it was common to remove the hood and bar. Defendant expert Bill Hayden further testified that he was involved in the development of Harwoods restaurant and has removed three (3) hoods within the last 30 days. Based upon this evidence, the court finds that the exhaust hood was

equipment available to the secured party minus any repair costs to premises damage. Likewise, the bar was available as equipment to secured party, minus any repair costs to premises damage." CP 137, p. 4.

The trial court asserts no logic or basis for using "removability" as a basis for determining ownership of the bar and hood. The Lease addresses ownership of improvements made by the Tenant. Unless the language is ambiguous, the ownership rights of the Landlord and Tenant should be determined from the four corners of the Lease.

ii) Because Woods could only proceed with respect to the hood and bar pursuant to judicial process, ownership of these assets on September 8, 2012 was not yet determined and therefore, the conversion claim for the hood and bar cannot stand.

Unlike the movable assets, the trial court, in his decision, acknowledged that the ownership of the hood and bar was disputed. CP 137, pp. 3-4. Woods was entitled to come onto the premises to repossess the movable assets pursuant to the self-help measures under RCW 62A.9A-609 which allows a secured party to repossess assets without court intervention. However, these self-help measures are not available if the secured party cannot proceed without a breach of the peace. RCW 62A.9A-609(b)(2). The Halls made it clear that Woods could retrieve the movable assets, but with respect to the hood and bar, he could not proceed without a breach of the peace. Therefore, Woods' only option with respect

to the bar and hood was to proceed pursuant to judicial process. Because on September 8, 2012, the ownership of the bar and hood had not yet been judicially determined, the element of conversion that requires depriving the *rightful owner* of possession was not established. The lower court erred in finding that the Halls converted the bar and hood on September 8, 2012.

iii) The Halls did not waive their right to object to the Court's characterization of the hood and bar as secured assets.

Woods, in his Responsive Brief, asserts that the trial court granted Woods' claim of declaratory judgment, which is not challenged on appeal. (Br. of Resp't/Cross-App., pp 16-17). The trial court held that "Wood's claim for Declaratory Judgment is granted and based upon the written agreement with Hall's for the repossession of restaurant assets created an entitlement to ownership and possession of the assets or its value." It should be noted that Wood's First and Second Amended Complaints state: "Plaintiff seeks a Declaratory Judgment, as against all Defendants, holding that Plaintiff is entitled to ownership and possession of the Assets..." Although an Exhibit "A" was referenced, no Exhibit was appended to either of the Amended Complaints. CP 14. Therefore, the "Assets" subject to the declaratory judgment were not specified in the Complaint. The Halls, in their Assignment of Error in their initial Brief, specifically states

that the trial court erred in finding that Woods was entitled to ownership and possession of the hood and bar. (Appellant's Brief, page 1).

Therefore, the Halls have not waived any right to assert that the bar and hood were not secured assets.

2. Are the Halls liable for conversion by refusing to place assets on the sidewalk at the request of Woods, even though Woods had access to the premises to retrieve the assets?

i) The court, in its ruling, erroneously imposes the requirement that the Halls make the assets available at a place specified by Woods pursuant to RCW 62A.9A-609 as a basis for his determination that the Halls converted the assets.

It is inappropriate for the trial court to apply RCW 62A.9A-609 as a basis for finding that the Halls effectively deprived Woods of possession of the assets on a conversion claim. In holding that there was conversion, the court opined that RCW 62A.9A-609 applies and that Woods, as a secured party, could require the Halls, as debtor, to make the assets available at a place to be designated by the secured party which is reasonably convenient to both parties, in this case the sidewalk. CP 137, p.4. The court went on to conclude that because Woods demanded that the business assets be placed on the sidewalk, Hall's refusal to do so constituted intentional interference with chattel's belonging to Woods and thus was conversion. CP 137, p.4. Significantly, the judge ***did not*** find that

Woods was not allowed to enter the premises to collect the removable assets. The trial court merely noted that Woods testified that he was "uncomfortable" coming onto the premises because of the "law enforcement involvement threat." CP 137, p.4.

Conversion is a tort developed under common law, a security interest is a creature of statute. Combining the two is inappropriate. The official comment g to § 237 of the Restatement (Second) of Torts recognizes the difference between the two and is directly on point in this case:

"The defendant ordinarily is not required to do more than permit the Plaintiff to come and get the chattel. Even where the terms of the agreement under which the defendant is in possession require him to transport and deliver it back to the Plaintiff, his refusal to do so may be a breach of the contract, but is not in itself a conversion, unless the circumstances indicate that he is refusing to surrender the chattel at all."

This is directly on point. Woods was permitted to come onto the premises to retrieve the assets but failed to do so. Even if under the UCC the Halls were required to transport and deliver the assets to Woods, their refusal to put the assets on the sidewalk at Woods request might have been a breach of contract, but it did not constitute conversion. Woods, in his Response Brief, never addresses or even mentions comment g to § 237 of the Restatement (Second) of Torts.

3. Was the lower court's reliance on receipts and invoices for purchase of the assets in 2009 & 2010 sufficient evidence to support the lower court's determination of fair market value of the assets at the time of the conversion on Sept. 8, 2012?

The lower court correctly concluded that conversion damages are the fair market value of the property at the time it was converted. The court relied on the testimony of several expert witnesses to establish the fair market value of the hood. CP 137, p.4. However, with respect to the remaining assets, the court established the value not based upon the testimony, but on an ER 1006 Summary (see Ex. 2 & 45) based upon receipts and invoices at the time of purchase of the assets in 2009 and 2010:

"Woods provided evidence submitting exhibit #45 'The Business Assets-ER 1006 Summary'. After hearing testimony, and scant evidence from either party regarding the fair market value of assets on September 8, 2012, sets the value of all secured equipment (assets) at \$40,123.04. This valuation was established by reducing the value of the hood, removing the POS terminal, signage, inventory, last month's rent, security deposits, and attached sinks with faucets." CP 137, p.4.

Woods, in his Response Brief, cites the testimony of Sean Herron to establish the fair market value of the restaurant equipment as of 2012 as set forth in Exhibit 45. (Br. of Resp't/Cross-App., p.16). This misstates the judge's ruling. Other than testimony regarding the value of the hood, nowhere in the judge's decision, does he rely on the testimony of Herron

to establish the value of the other assets. The lower court, as the trier of fact, chose to disregard the testimony of Sean Herron concerning the fair market value of assets other than the hood. The reviewing court will not substitute its judgment for that of the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108864 P.2d 937 (1994).

Evidence of the purchase price of converted asset several years prior to the conversion is not evidence of the fair market value of the assets at the time of conversion. *Anstine v. McWilliams*, 163 P.2d 816, 24 Wash. 2d 230, 239 (1945). The evidence, therefore, does not support the trial court's determination of the fair market value of the assets at the time of conversion.

4. The trial court correctly denied Woods' claim for prejudgment interest.

i) Woods is not entitled to prejudgment interest because Woods' claim for damages for conversion was not liquid or readily determinable.

Whether prejudgment interest is awardable depends on whether the claim is "liquidated" or "readily determinable" as opposed to unliquidated. *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1968). A "liquidated" claim is one in which evidence furnishes data which makes it possible to compute the amount with certainty, without reliance on

opinion or discretion. *Hansen*, 107 Wn.2d, 468, 472. By contrast, an "unliquidated claim" is one in which the last analysis depends upon the opinion or discretion of the judge. *Hansen*, 107 Wn.2d, 468, 473.

In this case, the judge relied, in part, upon the opinion of experts, and also exercised his discretion with respect to which costs on Exhibit #45 he would include as damages. Woods in his Response Brief discusses the various different values of the business assets ranging from \$40,123.04 to \$78,454.01 thus supporting the conclusion that the damages were not liquidated or readily determinable. He also characterizes the items that the trial court removed from the equipment list as "inconsequential," a difference of over \$38,000.00. (Br. of Resp't/Cross-App., p.19)

Woods inserts the term "chattel" when discussing cases on prejudgment interest presumably to suggest that prejudgment interest should apply in cases where the fair market value of a chattel is at issue: "Prejudgment interest compensates a party for the loss of use of money or *chattel* to which it was entitled. The rationale is that the claimant had funds tied up in the contested *chattel* which, if liquidated, could have been applied elsewhere." (Br. of Resp't/Cross-App., p.18-19). While Woods' assertions suggest that prejudgment interest is appropriate in the case of the fair market value of chattels, the cases that Woods cite in favor of these propositions, the term "chattel" or its equivalent is never used.

Woods also cites the *Aker Verdal* case, however, in that case the damages were repair costs incurred and consequential damages after a crane collapse. The repair costs were determined by an outside source in the position of a third party adjustor, so the court deemed the claim to be a liquidated claim. *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 191, 828 P.2d 610 (1992). Woods cites no case where determining the fair market value of chattels several years after their purchase was determined to be a liquidated claim.

ii) The trial court's denial of prejudgment interest is not an abuse of discretion.

Woods correctly states in his responsive brief that the standard for a review of prejudgment interest is abuse of discretion. An abuse of discretion occurs only when exercised in a manifestly unreasonable manner or on untenable grounds. *In re Marriage of Littlefield*, 133 Wn. 2d 39, 940 P.2d 1362 (1997). " A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record, it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133

Wn. 2d 39, 47. Woods cites no facts that would support a finding that the trial court's denial of prejudgment interest is an abuse of discretion.

5. The court correctly denied Woods' request for attorney fees.

i) Woods is not entitled to attorney fees pursuant to a Lease to which he is not a party.

Woods' asserts that he, as a **nonparty** to a Lease between the Landlord (Hallmark Group, LLC) and Tenant (Harwoods, LLC) is entitled to attorney fees pursuant to RCW 4.48.330. This misconstrues the language of that statute. The statute applies to attorney fees provisions in contracts or leases where there is a unilateral attorney fee provision entitling one party to attorney fees but not the other. The remedial purpose behind the enactment of RCW 4.84.330 is that unilateral attorney fees provisions be applied bilaterally. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App 188, 196-97, 692 P.2d 867 (1984). "The statute ensures that no **party** will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision." *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009) (emphasis supplied). The phrase "...the prevailing party, **whether he is the party specified in the contract or lease or not.**" in the statute does not, as Woods asserts, apply to non-parties, but instead refers to a party to the agreement who unilaterally is excluded from the attorney fee

provision in the contract. Moreover, RCW 4.84.330 is not directly applicable to an action on an agreement that contains a bilateral attorney fee provision. *Almanza v. Bowen*, 155 Wn.App. 16, 24, 230 P.3d 177 (2010).. *Kaintz v. PLG, Inc.*, 147 Wn.App. 782, 786-7, 197 P.3d 710 (2008). The Harwoods-Hallmark Lease attorney fee provision is bilateral awarding attorney fees to both Tenant and Landlord and therefore RCW 4.84.330 is inapplicable.

Moreover, Woods prevailed on a conversion claim, and did not recover under the Lease under which he now claims he is entitled to attorney fees. To be entitled to attorney fees under RCW 4.48.330 he would have to prevail on an action under the Lease to which he alleges another has contract liability. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App 188, 197. A contractual provision that authorizes attorney fees for enforcement of a contract authorizes attorney fees only for claims directly related to the contractual document containing that provision. *Boguch v Landover Corp.*, 153 Wn.App 595, 619-20, 224 P.3d 795 (2009). In this case, not only did Woods not bring a cause of action under the Lease, but he failed to address the additional requirement of being a "prevailing party."

Woods asserts that as a non-party, he is entitled to attorney fees under the Lease because the Halls relied significantly on the Lease

provisions. (Br. of Resp't/Cross-App., p.23). The Halls looked to the Lease in arguing that the hood and the bar were not assets of the restaurant LLC, who leased the premises as Tenant under the Lease. Woods asserts in his brief that he was "forced to defend against the Lease throughout the proceedings" and that he defeated the Halls' claims under the Lease. (Br. of Resp't/Cross-App., p.23). Woods, a nonparty to the Lease, is attempting to obtain legal fees from Halls, who also were nonparties to the Lease.

Attorney fees cannot be obtained against a nonparty to a contract. In *Mutual Security Financing v Unite and Guzman*, 68 Wn.App. 636, 847 P.2d 4 (1993) the court held that RCW 4.84.330 did not supply a basis for awarding attorney fees under a unilateral attorney fee provision in a promissory note against a nonparty to the promissory note, even though the nonparty had assumed obligations under a deed of trust securing the promissory note. *Mutual Security Financing v Unite and Guzman*, 68 Wn.App. 636, 643.

ii) Woods is not entitled to attorney fees under RCW 62A.9A-607(d) because it only applies to self-help measures.

Woods also seeks attorney fees under RCW 62A.9A-607, titled "Collection and enforcement by secured party," which pertains to self-help

measures undertaken by the secured party. Subsection (c) of that statute allows the secured party to proceed in a commercially reasonable manner to collect and enforce their security interest. Subsection (d) authorizes the secured party to "deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorney fees..." Therefore, the provision that Woods relies on only allows him to deduct attorney fees from the collections that he obtains under the self-help measures set forth in this provision. Judicial foreclosure is addressed in RCW 62A.9A-609, which has no similar attorney fee provision.

C. CONCLUSION

The trial court erred in finding that the Halls converted assets for several reasons. First, Woods had access to the restaurant premises to retrieve the assets, therefore the Halls did not deprive Woods of possession. The trial court erred as a matter of law in concluding that the Halls wrongfully deprived Woods of possession because they did not take the affirmative act of placing the assets on the sidewalk at Woods' request. This may support a breach of contract action, but not a finding of conversion. Second, Woods' right to ownership of the disputed items, the bar and the hood, was not established on September 8, 2012 because he was required to have a court determine ownership of these assets.

Therefore, the conversion of the bar and hood is not supported by the facts. In determining the ownership of the bar and hood, the court did not reference the Lease, the document determining ownership of the bar and hood. Instead he relied on the "removability" of these assets to make this determination. The court's decision is manifestly unreasonable. Finally, the trial court's determination of the fair market value of the assets as of the date of conversion is unsupported by the evidence.

There is no basis to award Woods either prejudgment interest or attorneys' fees, therefore, the trial court's denial of Woods' request for this relief should be affirmed.

DATED THIS 27th day of September, 2016.

Respectfully submitted,



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Attorney for Appellants and
Cross-Respondents Thomas Hall and
Karen Hall

CERTIFICATE OF SERVICE

On the 27th day of September, 2016, I caused a true and correct copy of the following document: Reply Brief of Appellants/ Cross-Respondents in Court of Appeals Cause No. 48507-9-II to be hand-delivered to the following:

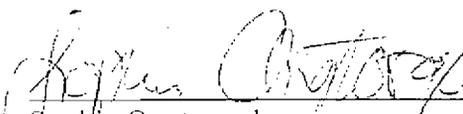
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At: Camas, WA 98607



Sophie Ongtooguk

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