

FILED  
Court of Appeals  
Division II  
State of Washington  
3/1/2018 11:05 AM

CASE # 51074-0-II

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

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SOMYOT LAOCHMANAVANIT AND ARUNEE  
CHARLEMPRADIT, HUSBAND AND WIFE, Appellant,

V.

CLEAR CHANNEL OUTDOORS, INC., Respondent

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**AMENDED BRIEF OF APPELLANT**

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## **I. ASSIGNMENTS OF ERROR**

**A) Did the Trial Court err in dismissing Appellant's Complaint based on CR12(b)(6) for failure to state a cause of action?**

### **Issues pertaining to this assignment of error**

- 1) The Trial Court failed to apply the standards of review under CR 12(b)(6).**
- 2) The Trial Court erroneously based the dismissal of Appellant's Complaint by concluding the lease itself was broad enough to include a multi-faced billboard.**
- 3) The Trial Court erred by concluding the Appellant's claim was timebarred by the six year statute of limitations.**

**B) Did the Trial Court err by not allowing or requesting submission of additional evidence because the Court was applying the principles of CR 12(c) and CR 56.**

## **II. STATEMENT OF THE CASE**

This matter began when Appellant acquired property in Vancouver, Washington in 2004. At that time Appellant did not receive a copy of the lease of

the questioned sign. On the real property purchased by Appellant there was a large “billboard” (CP 1). Since he did not get a copy of the lease and was not told about it at the time of the transaction and the lease was not recorded so therefore was not on the title report. The Appellants were not aware of their relationship to that sign.

The lease for the sign was entered into between prior property owners, Clyde Soha and Pauline Soha and a media business known as AK Media/Northwest (CP 1). By the time Appellants acquired the property the billboard had been sold by AK Media to Clear Channel Outdoor, Inc., Respondent herein (CP 2). The lease was entered into between Soha and AK Media in 1999 (CP 2). In 1999 the City of Vancouver prohibited multi-face or mechanical billboards within the City (CP 2). That changed in 2002 and Respondent immediately began using multiple faces on the billboard and electronically changing the faces that they became mechanically mobile.

An annual rate was assigned in 1999 was \$733 per year (CP 2). That was eventually increased in 2014 by negotiation between Appellant and Respondent. Respondent asserted that the fair market value for multiple face signs was \$2,400 (CP 2). In August 2004, it increased by \$750 and August 2012 until the new relationship between Appellant and Respondent commencing August 1, 2014 (CP 2).

When Respondent failed to increase the annual rent before August 1, 2014, Appellant began this litigation in March of 2017 (CP 1, 3).

Respondent Clear Channel Outdoor Inc. brought a Motion to Dismiss relying on CR 12(b)(6). They alleged that the suit was time-barred, was meritless as a substantive matter and was procedurally deficient because it was filed in the wrong forum. Under CR 12(b)(6) the facts relied upon are meant to be stated in the Complaint. No extrinsic evidence was brought in through Affidavits and Declaration, and if they are, the Motion becomes one to dismiss under the Motion for Summary Judgement CR 56.

The essence of Respondent's Motion to Dismiss was that the Complaint alleged that the breach of contract took place starting in 2002 (CP 18, 23). More than 6 years had expired since 2002 and therefore there was a continuing breach of statute of limitations. Respondent also plead that the lease itself used the plural signs with an "s" allowing sign. That meant that the lease always anticipated multi-faced or mechanical signs.

Appellant responded asserting legal principals but not entering into any Affidavits or Declarations to change the procedural methodology under CR 12(b)(6). Appellant pointed out that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff could

prove no set of facts in support of his claim, which entitled him to relief (CP 24-33).

As to the statute of limitations issue, Appellant pointed out that each year was a new year so far as payment of rent is concerned (CP 27-28). It was a written document subject to 6-year limitation but each year was a new rent payment and each year was a continuing failure to pay fair-rental value. Appellant asserted that the breach occurred each year that the lease and its rental payment for undervalued. Appellant refused to accept the undervalued rent check and documented that which was outlined in the Complaint (CP 2).

Appellant further asserted that the lease appeared to be a form lease submitted by AK Media to the Sohas. The principal of “one size fits all” was used (CP 29). At the time of the lease signing in 1999 the City of Vancouver would not allow the multi-faced signs (CP 2). Appellant asserted that there could have been no foreseeability by Sohas or anyone succeeding the Sohas position to know that the illegal sign can be placed on the premises.

Without explanation the trial court granted Defendant’s Motion to Dismiss on June 30, 2017 citing CR 12(c) and CR 56 (CP 92-93). That Order was not transmitted to the parties which resulted in Motion by each party complaining to the court that they have not received the Order. That resulted in the Court entering two Orders. One Granting Plaintiff’s Motion to Vacate or Amend Order which

was done on August 26, 2017. On the same day, an Order Granting Defendant's Motion to Dismiss again citing CR 12(c) and CR 56. Both of those cited civil rules would have allowed for additional evidence to be brought to the court's attention through Declarations or Affidavits. However, at no time did the trial judge ask whether or not there was any additional evidence or information (RP).

Appellant then brought a Motion for Reconsideration accompanied by the Declaration of Plaintiff, Somyot Laochmnanavanit, which outlines the whole history with Plaintiff with the sign and pointed out that he tried to have the sign removed, including filing a lawsuit under Clark County Cause No. 05-2-000329-8 (CP 96-124 and 125-155). In that case he was found to not be a "bonafied purchaser" because the pole and billboard were there to be seen even though the 25 year lease had not been recorded in the County Recorder's Office.

He also pointed out that he had received \$733 each year except for what was deducted for income tax and that he had sent back each check as it was received telling them that it was not acceptable (CP 95).

Appellant pointed out that Respondent Clear Channel Outdoor Inc., proposed a new lease which would have increased the rent but not to the point that Plaintiff/Appellant believed to be a fair rental value (CP 95). Respondent also asked for an extension of the term of the lease which Appellant did not wish to do (CP 95-96).

The Declaration further stated that there was an amendment entered into in 2015 where the same term was kept as was in the original lease but the income was increased effective August 1, 2014 and had a steady increase on 5-year increments to its termination in 2025 (CP 96).

The Declaration of Appellant also pointed out that there was an agreement reached between City of Vancouver and AK Media in January of 2002 which required the City to change the ordinance allowing multi-faceted signs (CP 96).

Appellant in his Motion pointed out that CR 12(c) allowed treatment of the matter as a Motion for Summary Judgment and was also provided in Rule 56 and Rule 56 is a Motion for Summary Judgement. The Rules say that all parties shall be given reasonable opportunities to present all materials made pertinent to such Motion.

Rather than grant Appellant's Motion for Reconsideration, the Court found that oral argument was not necessary but reviewed the pleadings and decided that he had cited the wrong rules and that Defendant/Respondent's Motion was really under CR 12(b)(6) and not CR 12(c), he ended up entering the Order which simply struck reference to CR 12(c) and CR 56 and denied Appellant's Motion for Reconsideration and upheld Defendant's Motion to Dismiss (CP 174-176).

The net result of this procedural incorrectness was that Appellant/Plaintiff was never allowed to fully describe the facts of the relationship between the City of Vancouver, Defendant Clear Channel and themselves as property owners.

### III. STANDARD OF REVIEW

In CR 12(b)(6) the standard of review is that the Appellate Court reviews the matter “de novo”. This principal is found in *Holiday Resort Community Association v. Echo Lake Associates, LLC* 134 Wn.App 210, 135 P.3d 499 (Div. 1, 2006), and *Tenore v. AT&T Wireless Services* 136 Wn.2d 322, 329-30 962 P.2d 104 (1998). In the latter case, it is very clear and states that “the dismissal under this rule (CR 12(b)(6)) involves a question of law which is reviewed de novo by a an appellate court and is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery. In such a case, a plaintiff’s allegations are presumed to be true and a court may consider hypothetical facts not included in the record. CR 12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face that the complaint that there is some insuperable bar to relief’” *Tenore v. AT&T Wireless*, supra pg. 329, 330.

#### IV. ARGUMENT

A) **Did the Trial Court err in dismissing Appellant’s Complaint based on CR12(b)(6) for failure to state a cause of action?**

1) **The Trial Court Failed to Apply the Standards of Review under CR 12(b)(6).**

Civil Rule 12(b)(6) is one of the Civil Rules for procedures in the State of Washington. It is somewhat unique in that it allows a Defendant to challenge the sufficiency of Plaintiff’s complaint. Under Washington Law it is necessary to have a complaint that simply gives the Defendant the notice that a claim is being made. Increasingly, Defendants are using CR 12(b)(6) to challenge the statement of facts within a complaint. Appellant submits this is a principal of law contained in certain cases, a sporadic indication that facts do not need to be alleged in a complaint. Starting with case of *Sherwood v. Moxee School District No. 90* 58 Wn.2d 351, 363 P.2d 138 (1961) the Washington Supreme Court was still reviewing Civil Rules under Rules of Pleading Practice and Procedure 7(c). Citing *Conley v. Gibson* 355 U.S. 41, 45 78 S.Ct. 99 2 L.Ed.2d 80, United States Supreme Court stated the test:

“In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint

should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

The *Moxee* case also cited a number of other Federal cases, supra pg. 353.

In the *Holiday Resort Community Association v. Echo Lake Associates, LLC* 134 Wn.App 210, 135 P.3d 499 (Div. 1, 2006) the standard of review of 12(b)(6) issue was verbalized. The Court stated:

“A complaint can be dismissed under CR 12(b)(6) for failure ... to state a claim upon which relief can be granted. Whether a CR 12(b)(6) dismissal is appropriate is a question of law and Appellate reviews de novo. *Tenore v. AT&T Wireless Services* 136 Wn.2d 322, 329-30 962 P.2d 104 (1998). A dismissal for failure to state a claim under CR 12 (b)(6) is appropriate only if it appears beyond doubt that the Plaintiff can prove no set of facts, consistent with the complaint, that would entitle the Plaintiff to relief.” *Haberman v. Wash. Pub. Power Supply System* 109 Wn.2d 107, 744 P.2d 1032 (1987) [citations omitted] In undertaking such an analysis “a Plaintiff’s allegations are presumed to be true and a court may consider hypothetical facts not included in the record”. *Tenore*, supra.

“A CR 12(b)(6) motion should be granted sparingly and with care” Only in the unusual case in which Plaintiff includes allegations that show on the face of the Complaint that there is some insuperable bar to relief. [citation omitted]” *Holiday Resort v. Echo Lake Associates*, supra pg. 218.

In a Division II case *Stiles v. Kearney* 168 Wn.App. 250, 277 P.3d

9 (2012), the court held that:

“Dismissal of a claim under CR 12(b)(6) is the appropriate ‘only if it can be said that there is no state of facts which the plaintiff can prove in support of entitling him to relief under his claim.’ *Barnum v. State* 72 Wash.2d 928, 929, 435 P.2d 678 (1967) (quoting *Gold Seal Chinchillas, Inc. v. State*, 69 Wash.2d 828, 830, 420, P.2d 698 (1966))” *Stiles v. Kearney*, supra pg. 266.

So what does the Complaint of Appellant/Plaintiff provide? It points that there was a sign on a large pole on the real estate (CP 2). That there was a lease signed between predecessors of Defendants and predecessors of Plaintiff in 1999 (CP 2). The Complaint further pointed out that the City of Vancouver did not allow multiple signs until sometime after 1999, believed to be 2002.

The Complaint further states that when Plaintiffs/Appellants acquired the property in 2004 the annual rent was \$733 per year. That rent was set forth in the 1999 lease. The Complaint further pointed out that Plaintiff consistently rejected this rent year after year. The Complaint further pointed out that fair-rental value of multifaceted signs starting in August 2004 was \$2,400 and increased (CP 2). The Complaint then indicated that even by breach of contract to by the

covenant of good faith and fair dealing, the fair-market rent of the multifaceted sign, which increased Defendant's revenues should have correspondingly increased rent to the landlord.

The Trial Court clearly made a mistake when it did not realize that there were facts asserted in the Complaint that could lead to the cause of action against Respondent. For this reason the Court should be reversed.

2) **The Trial Court erroneously based the dismissal of Appellant's Complaint by concluding the lease itself was broad enough to include a multi-faced billboard.**

While the Trial Court entered three separate Orders dismissing Plaintiff's/Appellant's Complaint, we still don't know for sure what his reasoning was (CP 43 and 44, CP 92 and 93, CP 174 and 176). He initially simply adopted the proposed Order submitted by Respondent.

One of Respondent's arguments was that that the lease entered into between Sohas and AKA Media in 1999 used the plural word sign(s). That meant to Respondent that the lease was already in place when the City of Vancouver changed its ordinances. Unfortunately, the Trial Judge was well-intended but did not allow any external information to be submitted by Plaintiff/Appellant. At the same time, the Complaint

at CP 2 pointed out that the City of Vancouver allowed only one face per sign when the lease was signed.

Plaintiffs/Appellants submitted that the lease was produced by AK Media and was a “one-size fits all” form lease. In 1999 there arguably could have been no foreseeability by either party that the City would change its rules.

In *Matsyuk v. State Farm Fire & Casualty Company*, 173 Wn.2d 643, 272 P.3d 802 (2012) the issue before the Court was whether or not the insurance company had committed fraud. State Farm brought a motion to dismiss based on CR 12(b)(6). The Supreme Court pointed out that the Trial Court should not dismiss a case unless there is finding beyond a doubt that no facts would lead to a claim. But what the Supreme Court further said was that there was a dispute of the facts relating to the claim but that Plaintiff had stated a potential breach of State Farm’s duty to treat its insured fairly and honestly and in good-faith. “Because there is a viable legal claim and the facts are contested about the nature of the relief sought, the trial court should not have dismissed Matsyuk’s bad faith claim.” *Matsyuk v. State Farm*, pg. 662.

There is nothing in the lease itself that is relevant to what Defendant Clear Channel may put up on the sign. According to their argument, simply the plural of the word “sign” permits any type of sign there. Appellant raised that issue in its Complaint believing that the sign as he discovered it in 2004 was illegal under former City code and their fair-market rental value of the multi-faceted sign was not taken into account in the lease itself. That would be addressed not only in the straight cause of action for breach of contract but also under the theory of good faith and fair dealing.

It is impossible to conclude that the language on the face of the lease would look into the future and determine that the City of Vancouver would change its rules. Accordingly, to dismiss this claim because it is on the face of the lease is inappropriate. The Trial Court should have allowed Appellant to expand its theory through trial as to why the matter should result in increased rent.

3) **The Trial Court erred by concluding the Appellant’s claim was timebarred by the six year statute of limitations.**

In its response to Plaintiff’s /Appellant’s Response to its Motion to Dismiss, Respondent attempts to change Plaintiff’s cause of action from increase in rent to an alleged violation of “use”. (CP 35, 36).

Respondent succeeded because the trial court ultimately dismissed Appellant's case. But that use allegation is not the truth of what Appellant was seeking. It is clear from the Complaint that Appellant is seeking fair-market value of rent for the lease which went from a single faceted sign to a multi-faceted sign with perhaps mechanical aspects.

In Washington law a Complaint is necessary only to provide the Defendant with notice of the claim that is being made. In this case, Appellant's Complaint clearly states that Appellant was seeking the increased rent based on the fair rental value of the sign. Appellant had done investigations which don't need to be revealed in the Complaint. Those investigations led them to realize that they were being underpaid for the increased market of the sign by Respondent. For reasons that were not necessary to be stated in the Complaint, but were revealed to the trial judge in Appellant's Motion for Reconsideration, the City of Vancouver had an ordinance prohibiting the multi-faceted signs until 2002. It was at that point that the ordinance got changed. However, that was well after the lease was signed in 1999 and parties to that lease would have realized that the ordinance prohibited multi-faceted signs. The Complaint shows that

the Appellants acquired the property with the sign in 2004 and were only paid a measly \$733 a year from which the Respondent deducted income tax. Knowing that that was well below the fair rental value of multi-faceted signs in the community, Appellants sued to obtain fair rental value through a cause of action in this lawsuit denominated as a breach of contract. Appellants' cause of action did not begin to accrue, at the earliest, in 2004 when they acquired the property, but each year thereafter would have accrued a new cause of action when they rejected the low rent payment sending it back to Respondent and asking for additional rent. That happened each and every year and that is set forth in Appellant's Complaint.

What has happened then is that Respondent used the case of *Schreiner Farms, Inc. v. American Tower, Inc.* 173 Wn.App. 154, 293 P.3d 407 (Div. 3 2013) can lead the Trial Court to believe that there was a "continuing breach". By their argument the continuing breach started in 2002 when the City of Vancouver allowed multi-faced signs or in 2004 when Plaintiff bought the property. In both instances the Respondent changed the Plaintiff/Appellant's theory of claim against Respondent.

As stated in *Erickson v. Chase* 156 Wn.App. 151, 231 P.3d 1261 (2010), Division 2 it clearly states that “the statute of limitations does not necessarily begin running from the date of the written agreement. It begins running when the cause of action accrues, meaning when a party has the right to apply to the court of relief.”[citation omitted] In the case at bar, each year that goes by when the rent has been rejected by Appellant creates a new cause of action by Appellant/Plaintiff against Respondent. That being said, then the statute of limitations applies each year much like a promissory note that is an installment plan note. For each year that Appellant rejected Respondent’s offer of lease payment, Appellant achieved a new cause of action. If the parties reached agreement in 2015, then at the very least what the Trial Court should have done is looked back 6 years from that date. That would take it back to approximately to 2009 or 2010. Not giving that thought because of the argument of Respondent, Trial Judge precluded Plaintiff/Appellant from receiving any increased compensation based on the fair-rental value of the sign.

**B) Did the Trial Court err by not allowing or requesting submission of additional evidence because the Court was applying the principles of CR 12(c) and CR 56.**

As indicated, Trial Court took three attempts to enter an Order dismissing Appellant's Complaint. The first order (CP 43 and 44) was entered on July 5<sup>th</sup>, 2017 but was not disseminated to the parties. Each party made a Motion to have the Court review that Order. The Respondent's is found in CP 65 to 71 and the Appellant's is found in CP 83-84. Following the hearing of those Motions, the Court entered its second Order on August 25 (CP 92 and 93).

What is important is that in both Orders the Motion to Dismiss was granted pursuant to CR 12(c) and CR 56. Both of those rules not only allow but require the Trial Court to find out whether or not either party has additional evidence to be submitted for review. Reviewing the transcripts of the hearings, no request was made by the trial court to seek additional evidence by the Plaintiff/Appellant or the Respondent. Had it been allowed, all the evidence found in the Declaration of Plaintiff (CP 91-124) could have been submitted as evidence.

The Trial Court then attempted to correct his issue by entering an additional Order on September 26 (CP 174-176) wherein he eliminated CR 12(c) and CR 56 without taking any additional evidence.

Now maybe this was well-intended, but certainly it was erroneous. In the cases of *Blenheim v. Dawson & Hall LTD* 35 Wn.App. 435, 667 P.2d

125 (1983) and *P.E. Systems LLC v. CPI Corp.* 164 Wn.App. 358, 264 P3d 279 (2011) it was determined that a CR 12(c) motion required the Court to give a reasonable opportunity to the parties to present materials on summary judgment. The factual allegations in the complaint must be accepted as true and the court cannot exclude evidence simply to avoid tainting the pleadings in a way that trips the matter into summary judgment proceeding.

The Trial Court itself seems to have been confused over what kind of a motion he was considering. Even in his oral statements on August 25, (RP 24) he still apparently believed that this was a Motion for Summary Judgment not a CR 12(b)(6) motion challenging the sufficiency of the Complaint. At RP 24 he uses the phrase “Summary Judgment Motion” on line 3 and again line 13. Even later in the same morning when Respondent argues its motion for attorney’s fees and clarifies that fees are allowed under CR 12(b)(6) the Order entered later that same morning continues to cite CR 12 (c) and CR 56.

As indicated above, the Trial Court needed to ask for additional evidence from both parties if he transfers the item to a CR 12(c) or a CR 56 motion. In *Blenheim v. Dawson & Hall*, supra, that Court of Appeals

said that parties must be given reasonable opportunity to present material on summary judgement:

“While ordinarily a trial court treats a motion under CR 12(b)(6) or 12(c) as one for summary judgment it must ask all parties if they wish to present materials, where the appealing party in fact presented materials and argued the motion as one for summary judgment the trial court need not on its own initiative ask the parties if they wish to present additional materials.” *Blenheim v. Dawson & Hall*, supra pg. 439.

And in the case of *P.E. Systems LLC v. CPI Corp* the Court of Appeals indicated that motion to dismiss for failure to state a claim is appropriate only if it is beyond doubt that the plaintiff cannot prove any set of facts that lead to recovery. In that case the trial court refused to consider evidence and circumstances to add information to the agreement. The Court of Appeals held:

“The court cannot exclude evidence simply to avoid tainting the pleadings in a way that trips the matter into a summary judgment proceeding. And simply attaching the contract to the answer does not avoid the conclusion that the court considered matters outside the pleadings.

...  
... and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.” *P.E. Systems LLC v. CPI Corp*, supra, pg. 364-366.

The problem in this case is that there was no effort on the part of the Trial Court to elicit further evidence from Plaintiff/Appellant. He didn't ask for it from either party. That is clearly erroneous.

## V. CONCLUSION

As indicated in this Brief, Appellant submits that the Trial Court erred by not applying the rules of CR 12(b)(6) which require the Court to accept as true all of the facts stated in a Complaint and that it should dismiss said Complaint if it is only beyond all doubt that the Plaintiff can prove no set of facts consistent with the Complaint that would entitle the Plaintiff (Appellant) to relief. This is buttressed by the fact that the Court wrongfully applied the language of the lease itself drafted in 1999 to foresee that City of Vancouver would change what was allowed in this area in 2002.

Trial Court also concluded that the statute of limitation for six years which started either from 2002 or 2004 when Plaintiff purchased the property. Both of those starting points are wrong. As pointed out, the statute of limitations begins when the cause of action accrues. Appellants suggest that the cause of action accrued each year that he refused and returned the rent payment that was inadequate and beneath fair-market value.

For all of the foregoing reasons, and including the fact that the Court was confused itself about which rules apply and therefore failed to require the parties to submit additional evidence, the decision made by the Trial Court should be reversed and matter returned to him for further consideration.

Respectfully submitted this 1<sup>st</sup> of March, 2018.

BRIAN H. WOLFE, P.C.

By:   
Brian H. Wolfe, #04306  
Attorney for Appellants

## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 1<sup>st</sup> day of March, 2018, I caused a true and correct copy of the foregoing document, "Brief of Respondents" to be delivered in the manner indicated below to the following counsel of record:

### Counsel for Respondents

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- E-Mail

DATED this 1<sup>st</sup> day of March, 2018, in Vancouver, Washington.



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Ewa North, Assistant to Brian H. Wolfe

**BRIAN H. WOLFE., P.C.**

**March 01, 2018 - 11:05 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51074-0  
**Appellate Court Case Title:** Somyot Laochmnavanit, et al, Appellants v. Clear Channel Outdoor, Inc.  
Respondent  
**Superior Court Case Number:** 17-2-00531-6

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