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CASE # 51074-0-II

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

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

V.

CLEAR CHANNEL OUTDOORS, INC., Respondent

REPLY BRIEF OF APPELLANT

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I. REPLY TO ISSUES PRESENTED

This case arises from the positioning of a “structure” in 1999 on property which was purchased by Appellants in April 2004 without a lease of the structure being recorded. The case was dismissed by the trial court under CR12(b)(6). Because of the nature of that rule, the parties are confined to a review of the complaint of Plaintiff/Appellant to ascertain what facts are contained within that complaint that should have caused the trial court to realize there was buried within it a cause of action.

As alleged in the Complaint the structure on the premises was apparently residing there because of a lease entered into between the predecessors of Appellant and Respondent. It appears to be a standard form lease. The issue is whether the rent should have been increased when there was use of multi-faced signs, rather than a single-faced sign. Those allegations are within the Complaint.

Also contained within the Complaint is the allegation that the City of Vancouver would not allow multiple faced signs in 1999. Therefore, the predecessors to Appellants could not have anticipated multi-faced signs of any kind and therefore did not negotiate an increase in their rent as a result of increased fair rental value of the signage or structure itself.

What Appellant seeks is simply a matter of fairness. While Respondent asserts that it always timely tendered the annual rent, there is no resistance to the allegations by Appellant that it timely rejected the rent each and every time it was paid. That allegation is in the Complaint. As argued in Appellants' opening brief, the trial court entered two separate orders dismissing Appellant's Complaint based on Civil Rules other than CR12(b)(6). Both of those other civil rules required that Appellant be allowed to bring in extraneous evidence to prove its case. After argument the court simply changed the rule it had cited rather than allow Appellant to have any further evidence brought in. This is argued in Appellant's opening brief despite the footnote (Resp Br p8) in Respondent's brief suggests otherwise.

In the Complaint Appellant asserts a couple of things that the trial court seemed to ignore. First, that the Appellant/Plaintiff consistently rejected the measly rent tendered to Appellant of \$733 a year. Secondly, the breach asserted by Appellant ceased August 1, 2014. Why didn't the court find that to be a relevant date? As pointed out in Respondent's brief, the reason August 1, 2014, is important is because the parties finally negotiated an amendment to the lease which related back to August 1, 2014 (Res Br p5). Until that time, the Appellant continued to reject the annual lease payments in an effort to get Respondent to the negotiating table to increase to a fair rental payment.

II. RESTATEMENT OF ISSUES PRESENTED

A. Statute of Limitations does not expire until six years after damages accrued to Appellant.

Appellant would not know it had damages until Respondent, Clear Channel, refused to negotiate further to cover the space between the time Appellant took ownership of the property in 2004 and the resulting amendment effective August 1, 2014. Respondent insists in its brief that the written contract must be sued upon when the breach occurred and it believes it occurred in June 2002.

B. Interpretation of the terms of the lease resulting in multiple signs results in ambiguity.

Respondent asserts that the lease is read just one way, which allows multi-faced signs to be put on the structure without adjusting the rent. Appellant asserts that the lease only took into account single-faced signs and when each single-faced sign is changed periodically that results in multiple signs.

C. There is a claim for violation of the breach of good faith and fair dealing.

Appellant asserts it was continually attempting to negotiate a new rent based on larger burden on the structure and asking only for a fair

value. Because of the nature of the relationship of landlord and tenant there is a commonality of needing good faith.

III. RESTATEMENT OF CASE

As indicated above, the Appellants commenced this lawsuit simply to create a semblance of fairness about the Structure that it found on its land sometime after purchase of the property. Respondent argues that the lease explicitly authorizes AK Media, predecessor to Clear Channel, and then Clear Channel to install several signs of varying kinds (Res Br p12-13). It emphasizes the purpose of the lease and quotes were made under the clause of the lease as follows:

1. “Purpose. The purpose of this lease is for Tenant to construct, maintain and operate a structure (The “Structure”) on the property and to operate painted, printed, illuminated and/or electrical signs on the Structure, and all other uses not inconsistent therewith, including all necessary supporting structures and devices, illumination facilities and connections, service ladders and other appurtenances...”

It should be noted that there is no specific definition or identification of other “signs”. There is no reference, for example, to a rotating sign or to a tri-vision sign. So does the use of the word signs with a plural “s” mean multi-types of signs or does it simply mean that a single-faced sign can be replaced with another single-faced sign which would result in multiple “signs”?

Respondent also points out that the lease had a fixed annual rent; a flat \$733 for the entire 25-year term. Isn't it possible that the Sohas, the original landlords of the Structure, would have negotiated an increase in rent if they thought that the tenant or the owner of the Structure could ultimately make more money by using multi-faced signs such as rotating or tri-vision signs? These facts are asserted hypothetically in the Complaint of the Appellant.

Respondent asserts that the ordinance provided by The City of Vancouver cannot be used to change the terms of the contract. Appellant is not suggesting that. Rather, what Appellant is suggesting is that the original negotiators to the original lease did not anticipate the city changing the rules between 1999 and 2002. Had they made that anticipation the terms of the contract may well have been different. And, as pointed out by Appellant above, each time that Respondent tendered the annual rent payment it was rejected and sent back by Appellant in an effort to get Respondent to the negotiating table to amend the lease. Having accepted the modest measly \$733 per year, minus the taxes that Respondent took out, Appellant would have essentially confirmed the terms of the lease without any ability for review. As pointed out in both briefs the review finally resulted in renegotiation of the lease in 2015 going back to August 2014. It was at that point that Appellant realized that it had been

damaged because the Respondent would not relate the increases at least back to the date of purchase by Appellant in 2004.

Respondent further asserts that Appellant has not appealed the first three orders handed down by the court (Res Br p15). Why should it? Those orders may have been correct. Those orders cite CR56 and CR12(c) both of which require the trial court to allow or permit the additional evidence to be brought in by Appellant to substantiate the case. Those orders were appropriate under the circumstances because the trial judge was as confused about why the motion was being made as was Appellant. But, what happened was that the trial judge believed that he had erred and tried to correct that by entering the final order which has been appealed by Appellant. Based on the trial and error of the trial judge, the Appellant believes that the ultimate order is the one that needs to be appealed.

Respondent goes to great length to argue the “rules of contract interpretation”. (Res Br p13) It asserts that courts must give a contract “the ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates the contrary intent” and cites *Hearst Communications, Inc., vs. Seattle Times Co., 154 Wn 2d, 493, 504, 115 P.2d,262 (2005)*. It explains that the meaning of the plural word “signs” means more than one. That well could be true, but equally true is the possibility that it meant multiple signs

over a period of the term of the lease. Every time a single-faced sign is changed to a single-faced sign that creates a multiple “signs”. Isn’t that the same ordinary, usual and popular meaning of that contract term?

Respondent uses *Badgett v. Sec PSCC. State Bank, 16 Wn 2d., 563, 807 P.2d, 356 (1991)* to show that there was no breach of a duty of good faith. In the *Badgett* case the dairy farmers waffled back and forth on whether to be dairy farmers and take money from the bank and made a proposal to the bank once they decided to quit the farming business. They claimed that the loan officer went to the loan committee ill prepared and failed to bring back negotiation. The court held that there was no duty, good faith or otherwise, for the bank to negotiate since that really wasn’t the terms of the application.

That’s not where the Appellant found itself once it had purchased the real estate and had the Structure defined for it. At that point the Respondents were using multi-faced signs to increase their revenue without passing on any portion of that revenue to Appellants. That claim can be found “hypothetically” within Appellant’s Complaint.

In summary, Respondent’s argument is two-fold; one, that there is a six-year statute of limitations regarding a breach of contract, which commenced when the multi-faced signs were first put on the structure in 2002, even before Appellants owned the real property, and secondly, that the lease itself calls for

the ability of the tenant to put on multiple “signs”. Therefore, as a matter of law, the Respondent was within its rights to do so.

IV. ARGUMENT

1. Appellant’s claims are not barred by the statute of limitations.

A. Appellant’s damages did not accrue until Respondents amended the lease.

It is absurd to accept Respondent’s assertion that breach of the contract occurred in 2002 resulting in damages to Appellant. Appellant didn’t even own the property or the structure until April 2004. Then, it would be revealed that Appellant denied that the structure was on his property until a lawsuit under Clark County Superior Court Cause No. 05 2 00329 8 resulted in his being found to be not a bonified purchaser and was saddled with the structure and its related signage. (Order Granting Summary Judgment entered July 20, 2007.) Thereafter, while Respondent tendered the annual payment called for in the lease, Appellant consistently rejected that tender and sent it back to Respondent stating that it was not sufficient. Ultimately, that resulted in a renegotiation and amendment of the lease in 2015 relating back to August 1, 2014.

The analysis of the statute of limitations related to contract commences with RCW 4.16.005 entitled Commencement of Actions. It provides:

“Except as is otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued”.

So, when did the cause of action accrue? As indicated in Appellant’s opening brief, the case of *Ericksen v. Chase*, 156 Wn. App 151, 231 P.3d 1261 (2010) states that the statute of limitations runs when the party has a right to apply to the court for relief. Building upon that, the court should look at *Gazija v. Nicholas Jerns Company*, 89 Wn. 2d 215 543 P.2d 338 (1975). That involved a fisherman who’s insurance for being on the water lapsed, unbeknownst to him. He didn’t realize that he had no insurance until his boat sank. The court indicated Plaintiff could have proceeded either under a tort or contract theory. The court also recognized that in his case the lapse of the insurance policy some several years prior to the boat sinking would not have resulted in any damages because the boat hadn’t sunk. The *Gazija* court went on to say:

“...Actual loss or damage is an essential element in the formulation of the traditional elements necessary for cause of action in

negligence. *Lewis v. Scott* 54 Wn. 2d 856 341 P.2d 488; *Lindquist v. Mullin* 45 Wn. 2d 675 277 P.2d 724 (1954)

“...There is now a wave of modern decisions which abandon these fictions and these simply hold that the statute will no longer be construed as being intended to run until the Plaintiff has, in fact, discovered that he has suffered injury or by exercise of reasonable diligence should have discovered it. *Prosser Section 30 at 144-145 Janisch v. Mullins* 1 Wn. App. 393 461 P.2d 895 (1969)” *Gazija v. Jerns, supra*, 340-341

The foregoing case is referenced by the case of *Hashlund v. City of Seattle*, 86 Wn. 2d 607 547 P.2d 1221 (1976), which stated:

“Implicit in this discussion was our recognition that accrual of an action should not depend upon by technical breach of duty which determines whether Plaintiff has a right to seek judicial relief, but upon the existence of a practical remedy. Statute of limitations are seldom amended, thus, the “delicate process of adjustment is left to the rationalization and interpretation by the courts”....

“...The determination of the time at which a Plaintiff suffered actual and appreciable damage is a question of fact.” *Hashlund v. City of Seattle, supra* p. 620.

B. What is the status of the “discovery rule”?

Appellant admittedly has a difficult time in overcoming the statute of limitations question as announced in *100 Virginia Limited Partnership v. Vertecs Corporation*, 158 Wn.2d 566 146 P.3d 423 (2006). After analysis of the case of *Taylor v. Puget Sound Power and Light Company*, 64 Wn.2d 534 392 P.2d 802 (1964) and *Lindquist v. Mullen* 45 Wn.2d 675 277 P.2d 724 (1954) Washington Supreme Court clearly states the “discovery rule”

should apply to contracts involving latent construction defects but Lindquist holds that contract actions accrue on breach should remain the law of the state.

This ruling somewhat contradicts earlier rulings in which the court said

“Statutes of limitations do not begin to run until a cause of action accrues. RCW 4.16.005. Usually, a cause of action accrues when a party has a right to apply to a court for relief.” *Gazija v. Nicholas Jerns, supra*

“This does not mean the action accrues when the Plaintiff learns that he or she has a legal cause of action, rather, the action accrues when the Plaintiff discovers the salient facts underline the elements of the cause of action.” *Green v. A.B.C. 136 Wn.2d 87 962 P2.d 912 (1998)*

The practical side of the ruling in *1000 Virginia* is that the Appellant in this case would have had to bring a lawsuit within six years of the alleged breach in 2002 even though he didn't acquire the property until 2004. Assuming that the trial in the mid-2000s did not result in any change then he would have had to bring a lawsuit again six years after that because the damages would not have accrued in 2006. It would have only been past actual damages but no damages into the future. Accordingly, Appellant's accrual took place only when the amendment was negotiated raising the rent August 1, 2014.

While the “discovery” seems to be applied in negligence actions some of the quotations in the Washington Supreme Court decisions suggest that it would

be equally possible to have nominal damages only in contract breaches. In the

Gazija case, supra, the quote is from a California case:

“ . . . until a plaintiff can show as a consequence of negligence, he cannot establish a cause of action. Thus, although a right to recover nominal damages will not commence the period of limitation, the infliction of actual appreciable damage will trigger the running of the statute of limitations. *Davies v. Krasna*, 14 Cal3.d 502 535 P2.d 1161 (1975). Implicit in this discussion was our recognition that accrual of an action should not depend upon a technical breach of duty which determines whether a Plaintiff has a right to seek judiciary relief, but upon the existence of a practical remedy. Statutes of limitations are seldom amended and thus the delicate process of adjustment is left to rationalization and interpretation by the courts.”

In *US Oil and Refining Company v. Washington State Department of Ecology*, 96 Wn.2d 85 633 P2.d 1329 (1981) indicated that it has a duty to construe and apply limitation statutes in a manner that furthers justice in doing so. It quoted *Ruth v. Dight*, 75 Wn.2d 53 P2.d 631 (1969).

Appellant’s submits, therefore, this cause of action accrues in damages only upon the renegotiation of the lease because then he knows how much damages he has sustained since he acquired the property. Before that, assuming the lawsuit took place six years after the acquisition of the property or even two years earlier than that there would have been future damages that would not have been part of the breach of the contract alleged to have happened in 2002.

C. What is the interpretation of the lease itself?

On this issue we don't fully know the trial court's reasoning behind its granting of Respondent's Motion to Dismiss under CR 12(b)(6). All it did was simply adopt the proposed order of Respondent and dismiss the case. To get there, he had to adopt Respondent's argument that the lease allows multiple signs. Multiple signs in the Respondent's perspective means electronic signs, tri-vision signs, rotating signs, etc. However, the word "signs" is subject to interpretation and could have another meaning. Appellant does not take issue with the assertion in *Hearst Communications, Inc., v. Seattle Times*, 154 Wn. 2d 493 115 P.3d 262 (2005) where you have the "ordinary, usual and popular meaning" of words in a contract. However, Appellant submits that simply arguing the plural of the word "sign" does not necessarily mean different kinds of signs but could mean equally, as well, multiple, single-faced signs over a period of time.

The burden of the trial court in a CR 12(b)(6) motion is to only give the Defendant making the motion an Order of Dismissal if it is beyond reasonable doubt that there is any set of facts which could result in the Plaintiff having an appropriate cause of action. *Tenore v. AT&T Wireless Service*, 136 Wn. 2d 322 962 P.2d 104 (1998). This trial court did not do that. It did not see that there could be two interpretations of this plural word "signs". The trial court simply adopted Respondent's view of the meaning of the words in the body without determining

beyond reasonable doubt that Appellant would have a cause of action with a different interpretation.

D. Respondent should have negotiated new lease terms under its duty of good faith and fair dealing.

Respondent cites *Badgett v. Security State Bank*, 116 Wn.2d 563 807 P.2d 356 (1991) as standing for the principal that the duty of good faith and fair dealing does not require a party to amend the existing contract terms solely because surrounding circumstances have changed. In *Badgett*, we have a case of a couple who had gone into the dairy business, fluctuated in its desire to continue, and went to its bank to try to obtain new terms. The loan officer went to the loan committee without success and the court ruled there was no sub-contract requiring the bank to negotiate.

In our case, the Appellants clearly were trying to negotiate new terms. Every time they got a check for \$733 they sent it back and asked for more money based on the larger burden put on the structure. For many years Respondent simply didn't respond. Then, ultimately, it entered into an amendment to the lease which increased the rent as it should have previously. That would indicate an understanding or relationship between the landlord and the tenant that new terms

could have and should have been negotiated. In that respect, this case is different that the *Badgett* case.

In the case at bar, Appellant's only evidence was that the lease entered into in 1999 did not contemplate rotating signs, tri-vision signs, road or multiple faced signs. The City statute did not allow it. Accordingly, if there was that change then the parties would have anticipated the change. Since they didn't anticipate the change, then, in a spirit of good faith and fair dealing, the lease payments should be renegotiated.

2.. **The trial court entered its first two orders which carries with them an obligation in requiring the court to seek additional evidence from Appellant.**

Appellant has appealed the "final order" entered by the trial court. The trial court simply adopted Respondent's Order of Dismissal without explanation. The trial court had previously entered two orders under CR12(c) and CR56 both of which require the trial court to seek additional evidence from the opposing party. That did not occur. Accordingly, it was inappropriate to enter the final order of dismissal.

V. CONCLUSION

Based on all of the foregoing arguments the trial court should be found to have erred in dismissing Appellant's case. It had a duty under existing law to not dismiss the case under CR12(b)(6) unless it is beyond reasonable doubt to find that

Appellant would have had a cause of action. The statute of limitations should not apply until all the damages had accrued to Appellant which didn't happen until the parties entered into an amendment of the lease. Similarly, the parties had joint obligations of good faith and fair dealing to accomplish the same thing. The court ignored those components in Appellant's Complaint and, further, made procedural mistakes that should have been corrected in favor of the Appellant.

For all of these reasons, the trial court's order should be reversed and the case remanded for trial.

Respectfully submitted this 26th day of April, 2018.

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By: 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 26th day of April, 2018, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellant" to be delivered in the manner indicated below to the following counsel of record:

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