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Case No. 51074-0-II

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

**SOMYOT LAOCHUMNANVANIT and ARUNEE
CHARLERMPRADIT, husband and wife,**

Plaintiffs-Appellant,

v.

CLEAR CHANNEL OUTDOOR, INC., a Delaware corporation,

Defendant-Respondent.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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I. INTRODUCTION

This case arises from an upgrade in 2002 of a billboard sign on property owned by Somyot Laochumnvanit and Arunee Chalermpradit, the appellants (“Appellants”).¹ The governing lease allows Clear Channel Outdoor, Inc., the respondent, to operate “painted, printed, illuminated and/or electrical signs” on the property, and it fixed annual rent at \$733—no matter the number or kind of signs. The Appellants concede that Clear Channel has always timely tendered the annual rent.

Even so, the Appellants allege that Clear Channel should have voluntarily paid more after upgrading the billboard sign with electronic technology allowing for three sign faces instead of one. To keep the peace, Clear Channel later agreed to increase the rent effective 2014. Despite accepting this rent increase, the Appellants commenced this action in 2017 seeking additional rent for the period before 2014—all the way back to 2002. They argue that Clear Channel breached contractual and good faith duties to adjust the rent when it upgraded the billboard. This requirement is nowhere in the lease, and the implied duty of good faith and fair dealing does not impose a free-floating obligation to increase rent gratuitously when circumstances change.

¹ The Appellants’ names have been spelled several ways throughout these proceedings. Because Clear Channel is unsure of the correct spellings, it has spelled their names as they appear in Clark County’s property tax records. No disrespect is intended if Clear Channel’s spellings are incorrect.

This action is time-barred and substantively meritless. This is evident from the pleadings, which as a matter of law include the lease at issue. There was no need to convert Clear Channel's motion into one for summary judgment. The trial court correctly dismissed this case under CR 12(b)(6). This Court should affirm.

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. First Assignment of Error: Trial Court's Order to Dismiss for Failure to State a Claim

1. The limitations period for written contract actions is six years from the date on which the act constituting the breach occurred. The act constituting the breach alleged in this case occurred in June 2002, yet the Appellants waited until 2017 to commence this action.

Did the trial court correctly dismiss this action as untimely?

2. The Appellants allege Clear Channel breached the lease by installing a multi-faced sign without adjusting the rent. The lease allows multiple signs and fixed rent at \$733 no matter how were on the property.

Did the trial court correctly dismiss the Appellants' contract claim?

3. The Appellants allege Clear Channel also breached the duty of good faith and fair dealing by installing a multi-faced sign without adjusting the rent. The Supreme Court has held that this duty does not include a free-floating obligation to renegotiate existing contract terms each time the surrounding circumstances change.

Did the trial court correctly dismiss the Appellants' claim for breach of the good faith duty?

**B. Second Assignment of Error:
Dismissal on the Pleadings Instead of Summary Judgment**

A trial court must convert a CR 12 motion into one for summary judgment, and allow the opposing party to submit evidence, only if the moving party presents matters outside the pleadings. Attaching a contract to or referring to a contract in a Complaint does not take a CR 12 motion outside the pleadings. Did the trial court correctly conclude that its review of the lease identified in the Complaint did not require it to convert Clear Channel's CR 12 motion into a motion for summary judgment?

III. STATEMENT OF THE CASE

This case arises out of a billboard-sign lease on property in Vancouver, Washington. The original parties were Clyde and Pauline Soha, as owners and lessors, and AK Media Group, Inc., as lessee. (CP 8). The Appellants acquired the property from the Sohas in 2004, and Clear Channel acquired AK Media's interest before that. (CP 1-2 at ¶¶ 1-5).

A. The original lease fixed annual rent at a flat \$733 and authorized multiple electric signs on the property.

The lease explicitly authorizes Clear Channel to install several signs of varying kinds, including electrical signs:

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...

2. Tenant’s Right to Enter and Use. For the duration of this Lease, Tenant has the non-exclusive right to enter onto the Property and to use the Structure for the purposes described in this Lease...

(CP 8) (emphasis added). In addition, the lease contemplates that Clear Channel may operate multiple signs on the property. For example, it provides that Clear Channel “is and remains the owner of the Structure, and all signs and permits of any kind in relation thereto...” (CP 9 at ¶ 7) (emphasis added).

The lease also fixed annual rent at a flat \$733 for the entire 25-year term—without regard to the number or kinds of signs on the property:

3. Term. The term of this Lease is for twenty-five (25) twelve month periods from August 1, 1999....
4. Rent. Tenant shall pay Landlord rent of Seven Hundred Thirty-three and xx/100 dollars (**\$733.00 per year paid annually, inclusive of all taxes**, with the first of such payments to be made on the Effective Date and thereafter annually on the anniversary of the Effective Date,

(CP 8) (emphasis added). The rent provision does not require Clear Channel to revisit this amount for any reason, and there is no other provision in the original lease that speaks to rent. (See CP 8-13).

B. Clear Channel upgraded to an electric three-faced sign in 2002 and always tendered the full rent due under the lease.

As allowed by the lease, Clear Channel installed an electric rotating multi-faced sign in June 2002. (CP 2 at ¶ 5). Following this, the Appellants demanded that Clear Channel renegotiate the rent. (CP 14). To quell these demands, and despite no obligation to do so, Clear Channel renegotiated rent and agreed to amend the lease in 2015. (CP 14-17). It agreed to increase annual rent from \$733 to \$1,500 for the five-year period from August 1, 2014 to August 1, 2019, and to \$1,725 thereafter. (CP 15). Clear Channel dutifully tendered \$733 (less taxes) prior to the amendment, and the Appellants do not allege Clear Channel missed a payment after the amendment. (*See* CP 14). This is not an action to collect unpaid rent.

C. The Appellants waited until 2017 to assert contract claims arising from the sign upgrade.

Instead, the gravamen of the Appellants' complaint is that Clear Channel's voluntary rent increase did not go back far enough—*i.e.*, it should have retroactively raised rent going all the way back to 2002, when Clear Channel upgraded the sign:

An annual rate was (sic) assigned in 1999 was \$733 per year. That was eventually increased in 2014 by negotiation between Appellant and Respondent....When Respondent failed to increase the annual rent before August 1, 2014, Appellant began this litigation in March of 2017.

(App. Br. at 3). Accordingly, their claim for breach of lease seeks damages for the period “from June 2002 to August 1, 2014.”(CP 3 at ¶ 9). The damages they seek for breach of the duty of good faith and fair dealing cover the same period. (*Id.* at ¶ 12). The Appellants’ basic grievance is that Clear Channel did not renegotiate rent after upgrading to a three-faced sign. This is their cause of action, and it occurred in 2002.

D. The trial court’s final order dismissed the Appellants’ claims solely on the pleadings.

The Appellants commenced this action in 2017. Clear Channel’s sole response was to move for dismissal under CR 12(b)(6). The Complaint states that a copy of the lease is attached. (CP 2 at ¶ 2). The Appellants did not actually attach a copy. Because they explicitly referred to the lease as an exhibit to their Complaint, however, Clear Channel submitted a copy with its dismissal motion. (CP 5-17). The authenticity of that document is not in dispute. The Appellants submitted an identical copy with their motion for reconsideration. (CP 98-103).

Submitting the lease, however, caused some confusion. Though Clear Channel moved for dismissal under CR 12(b)(6), the trial court’s initial dismissal order in June 2017 referred to CR 12(c) and CR 56. (CP 43-44). Because the trial court clerk’s office never actually delivered that order to the parties, the trial court vacated it and issued an identical order

in August 2017. (CP 90-93). The trial court did this at the Appellants' request. (*Id.*) The Appellants again moved for reconsideration arguing this time that, because the trial court appeared to dismiss the case under CR 12(c) and CR 56, the trial court should have given them an opportunity to present evidence. (CP 156-61). On reconsideration, the trial court deleted the reference to CR 56:

The sole reason Civil Rule 56 was referenced in the Order was due to the Court's consideration of the Lease Agreement and First Amendment to Lease. Because consideration of the documents did not require conversation to a summary judgment motion, reference to Civil Rule 56 in the Order Granting Defendant's Motion to Dismiss is stricken."

(CP 175). The trial court also replaced the citation to CR 12(c) with one to CR 12(b)(6), the rule under which Clear Channel filed its motion. (*Id.*)

E. The Appellants have appealed five orders but assigned error to only two of them.

The Appellants appealed. (CP 189-213). Their notice of appeal lists five orders from the trial court: (1) the first dismissal order, dated July 5, 2017; (2) the first order on reconsideration, dated August 25, 2017; (3) the second dismissal order, dated August 25, 2017; (4) the second order on reconsideration, dated September 26, 2017; and (5) the order awarding Clear Channel's attorneys' fees and costs. (*Id.*) Their assignments of error, however, are limited only to the second dismissal

order, dated August 25, 2017, and the second order on reconsideration, dated September 26, 2017. (App. Br. at 1).

IV. ARGUMENT

This Court should affirm both orders on appeal.² The Appellants first contend it was error to dismiss this case under CR 12(b)(6). As the second error, they argue the trial court treated Clear Channel's motion as one for summary judgment and thus should have allowed them to offer evidence. An order to dismiss under CR 12(b)(6) is subject to *de novo* review. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). A trial court's interpretation and application of court rules is also reviewed *de novo*. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). On review *de novo*, an appellate court may affirm on any ground supported by the law and the record. *Bartz v. State Dep't of Corr. Pub. Disclosure Unit*, 173 Wn. App. 522, 534, 297 P.3d 737 (2013).

A. The Appellants' claims are barred by the statute of limitations and the substantive law of contracts.

The trial court correctly dismissed this case under CR 12(b)(6). In analyzing a CR 12(b)(6) motion, a trial court must presume all facts alleged in the complaint are true. *Kinney*, 159 Wn.2d at 842. It may also

² The Appellants have waived their appeal of the other three orders by failing to assign errors and present argument in their opening brief. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

consider any hypothetical situation conceivably raised by the complaint. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). A trial court should dismiss if the “plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). The complaint in this case presents two insuperable bars to relief.

1. The Appellants commenced this action well after the six-year limitations period on contract actions expired.

The first is the statute of limitations. Actions on “liability express or implied arising out of a written agreement” must be commenced within six years of accrual. RCW 4.16.040(1). A contract action accrues on breach. *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). Other than in a limited context that does not exist here, the discovery rule does not apply to contract actions.³ *Id.* at 578.

The Appellants’ claims accrued in 2002 and expired six years later. In their Complaint, they allege Clear Channel “commenced using multiple faces and electronically changing faces to advertise on the [sign]” beginning in June 2002. (CP 2 at ¶ 5). They claim Clear Channel “was in breach of the Lease Agreement from June 2002 to August 1, 2014.” (CP 3 at ¶ 9). They seek damages for the alleged “breach during that period of

³ In *1000 Virginia*, 158 Wn.2d at 590, the Supreme Court held that the discovery rule applies to “actions on construction contracts involving allegations of latent construction defects.”

time in the amount of \$28,200 or such other sum as may be proven at trial.” (*Id.*) The Appellants likewise allege Clear Channel breached the duty of good faith by failing to adjust rent after upgrading the sign:

By failing to increase the rental amount paid to Plaintiffs, Defendant breached its covenant of good faith and fair dealing. It received additional revenue for the three faced sign but left Plaintiffs at the basic rental amount of \$733.00 dollars per year, which Plaintiffs consistently rejected.

(CP 3 at ¶ 11). They again measure damages “from 2002...to August 1, 2014.” (*Id.* at ¶ 12). On both claims, the Appellants cut off their damages at August 1, 2014, because that is when Clear Channel started paying higher rent. (CP 15 at ¶ 2). On both claims, the Appellants seek damages for an unbroken 12-year period in which Clear Channel operated a three-faced sign but paid only the rent stated in the original lease. (CP 2-3 at ¶¶ 8, 11). These claims accrued in 2002 and expired in 2008.

a. The Appellants’ claims are based on one continuing breach, not a series of periodic payment defaults.

To avoid dismissal under the statute of limitations, the Appellants mischaracterize this as an action to collect rent, akin to an action on an installment note. (App. Br. at 16). The Appellants concede, however, that they “received \$733 each year except for what was deducted for income tax.” (*Id.* at 5). That is exactly what the original lease required. (*See* CP 8 at ¶ 4). The subsequent amendment also confirms Clear Channel’s annual

rent payments were “timely and, in all respects, compliant with the terms of the Lease.” (CP 14 at ¶ B). This is not an action to collect unpaid rent.

Rather, this action arises from an alleged continuing breach. “A continuing breach is ‘a breach of contract that endures for a considerable time or is repeated at short intervals.’” *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 161, 293 P.3d 407 (2013) (quoting Black’s Law Dictionary 213 (9th ed. 2009)). In *Schreiner*, the Court of Appeals held that breaches of “lease provisions regarding assignment, sublease, **authorized use**, and legal compliance” are continuing breaches that begin when the tenant “first committed the alleged acts.” *Id.* at 162 (emphasis added). The timeliness of actions on continuing breaches is “measured from the date the alleged breaches began.” *Id.*

The analysis in *Schreiner* applies here. Like the plaintiff in that case, the Appellants here allege an unauthorized use: “Defendant Clear Channel Outdoor, Inc. failed, neglected and refused to seek Plaintiffs’ permission to add additional burdens to the structure by using multiple signs.” (CP 2 at ¶ 7). They allege Clear Channel breached its duty of good faith when it “received additional revenue for the three faced sign but left [the Appellants] at the basic rental amount of \$733.00 dollars (sic) per year...” (CP 3 at ¶ 11). What they seek is the “fair-market value of rent for the lease which went from a single faceted (sic) sign to a multi-faceted

sign with perhaps mechanical aspects.” (App. Br. at 14). The “fair-market value of rent” is simply the way the Appellants measure their damages. Clear Channel began the allegedly unauthorized use, and triggered its alleged good-faith duty to renegotiate rent, in June 2002. That is the month from which the timeliness of this action must be assessed. *Schreiner Farms*, 173 Wn. App. at 162.

The Appellants had from June 2002 to June 2008 commence this action. RCW 4.16.040(1). They waited until 2017. The trial court correctly dismissed this case as untimely.

2. Clear Channel had no contractual or good-faith duty to adjust rent payments after installing a multi-faced sign.

Besides being untimely, the Appellants’ claims fail as a matter of substantive contract law. This is the second “insuperable bar to relief.” *Tenore*, 136 Wn.2d at 330. The Appellants allege Clear Channel breached the lease when, without permission, it “commenced using multiple faces and electronically changing faces to advertise on the structure.” (CP 2 ¶¶ 5-6). They further allege Clear Channel breached the duty of good faith “by failing to increase the rental amount” after installing the multi-faced sign. (CP 3 ¶ 11). Neither claim is viable.

a. The lease allows multiple signs with no change in rent.

The lease terms directly contradict the Appellants’ contract claim. The lease authorizes Clear Channel to “operate painted, printed,

illuminated and/or electrical signs” on the property. (CP 8 at ¶ 1). The Appellants argue the plural word “signs” does not mean “more than one sign” because the City of Vancouver did not allow more than one sign when the original parties signed the lease. (App. Br. at 12-13).

This argument defies the rules of contract interpretation. Courts must give words in a contract “their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). The ordinary, usual, and popular meaning of a plural word is “more than one.” Extrinsic evidence, such as the status of local land use law, cannot be used to “vary, contradict, or modify the written word.” *Id.* at 503. Because the lease already allowed multiple signs when the City of Vancouver changed its laws, Clear Channel did not need to get special permission from the Appellants to upgrade to a three-faced sign. It also did not need to increase rent after doing so. The original lease fixed rent at a flat \$733 per year without regard to the quantity or kind of signs. (CP 8 at ¶ 4). The trial court correctly dismissed the contract claim.

b. The law has never extended the good faith duty to compel a renegotiation of an existing contract.

The trial court was also right to dismiss the Appellants’ claim under the duty of good faith and fair dealing. They allege Clear Channel

breached this duty “by failing to increase the rental amount” after upgrading the sign. (CP 3 at ¶ 11). The duty of good faith and fair dealing does not require a party to amend existing contract terms solely because the surrounding circumstances have changed. *Badgett v Sec. State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991).

In *Badgett*, a couple sued for breach of the good faith duty because their bank declined to restructure their existing loan. *Id.* at 565. The trial court dismissed the claim. *Id.* at 567-68. The Supreme Court affirmed, holding that while “parties may choose to renegotiate their agreement, they are under no good faith obligation to do so. The duty of good faith implied in every contract does not exist apart from the terms of the agreement.” *Id.* at 572. Rather, the duty “exists only in relation to the performance of a specific contract term.” *Id.* at 570. The borrowers conceded their loan agreement did not obligate the bank to restructure their loan. *Id.* at 569. Instead, they urged the Supreme Court “to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract—a free floating duty of good faith unattached to the underlying legal document.” *Id.* at 570. The Supreme Court declined. *Id.*

The *Badgett* case is directly on point. The lease does not require Clear Channel to adjust rent based on the number of signs on the property.

On the contrary, it kept rent flat without regard to those things. (CP 8 at ¶ 4). Like the borrowers in *Badgett*, the Appellants ask this Court to recognize and enforce a free-floating duty the Supreme Court has roundly rejected. This Court should follow precedent and decline the invitation.

B. The trial court had no obligation to convert the CR 12 motion to one for summary judgment and solicit evidence.

Finally, there was no procedural error. The Appellants say the trial court should have invited them to present evidence in response to Clear Channel's dismissal motion. (App. Br. at 17). In making this argument, they conflate the initial versions of the trial court's dismissal order with the final version. (App. Br. at 17-18). The initial versions mistakenly cited CR 12(c) and CR 56. (CP 43-44, 92-93). On final reconsideration, the trial court deleted the citations to CR 12(c) and CR 56 and replaced them with a single reference to CR 12(b)(6). (CP 175).

The trial court was correct to do this. The right to present matters outside the pleadings arises only if the moving party has done so as part of its CR 12(b)(6) motion:

If, on a motion ... to dismiss [under CR 12(b)(6)], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment..., and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by rule 56.

CR 12(b); *see also* CR 12(c) (“If, on a motion for judgment on the pleadings, matters outside the pleading are presented to...”). The sole reason the trial court cited CR 56 in earlier versions of its dismissal order “was due to the Court’s consideration of the Lease Agreement and First Amendment to Lease.” (CP 175).

On reconsideration, the trial court recognized these documents are not outside the pleadings. A contract attached to a pleading “becomes part of the pleading for purposes of any CR 12(b) or CR 12(c) motion. Conversion from a CR 12(b) or CR 12(c) motion to summary judgment is unnecessary if the sole reason for conversion is the attachment of a contract or similar instrument to a pleading.” *P.E. Sys.*, 176 Wn.2d at 205. The Appellants intended to attach the lease to their Complaint. That they failed to do so is irrelevant. “Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss.” *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 827, 355 P.3d 1100 (2015).

The Appellants’ authorities do not change the result. In *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 438, 667 P.2d 125 (1983), “the trial court stated in its order granting dismissal that it considered the records herein, which included interrogatories and answers.” Unlike *Blenheim*, no one in this case took discovery. The trial court based its

decision solely on the Complaint and the lease. (CP 175).The Appellants' citation to the Court of Appeals' decision in *P.E. Sys., LLC v. CPI Corp.*, 164 Wn. App. 358, 264 P.3d 279 (2011), actually undermines their argument because the Supreme Court reversed on this precise point: "We hold a contract may be attached to a pleading and that a contract so attached becomes a part of the pleading for purposes of any CR 12(b) or CR 12(c) motion." *P.E. Systems*, 176 Wn.2d at 205.

Clear Channel did not present matters outside the pleadings by submitting the lease identified as an exhibit to the Complaint. There was no procedural error.

V. REQUEST FOR ATTORNEYS' FEES AND COSTS

Clear Channel respectfully requests an award of the attorneys' fees and costs it has incurred in this appeal. The lease entitles the prevailing party in an appeal to recover its fees and expenses from the other party:

In the event either party brings an action or proceeding...to enforce or construe this Lease or otherwise arising out of this Lease, then the substantially prevailing party in an action or proceeding shall be entitled to recover its costs and expenses of suit **and any appeal and review**, including (without limitation) reasonable attorney fees, from the losing parties.

(CP 12) (emphasis added). After affirming, this Court should award Clear Channel's attorneys' fees and expenses as the prevailing party. Clear Channel will file "an affidavit detailing the expenses incurred and services

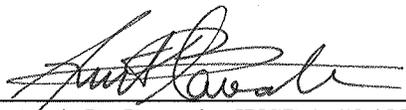
performed by counsel” within 10 days after a decision awarding fees and expenses. RAP 18.1(d).

VI. CONCLUSION

This lawsuit is almost a decade late, and it has no substantive merit in any event. Clear Channel upgraded to a multi-faced sign in 2002, yet the Appellants waited until 2017 to complain. What is more, the lease explicitly allows more than one sign, and it originally fixed rent at \$733 per year no matter how many were on the property. Clear Channel always tendered the rent stated in the lease, and the law does not impose a free-floating duty to renegotiate rent as circumstances change. The trial court correctly dismissed this case on the pleadings. This Court should affirm.

RESPECTFULLY SUBMITTED this 27th day of March, 2018.

HILLIS CLARK MARTIN & PETERSON P.S.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be delivered via agreed email service and via Washington State Courts' Portal to the following:

- Brian H. Wolfe
bwolfe@bhw-law.com

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 27th day of March, 2018, at Seattle, Washington.


Heather Halverson

HILLIS CLARK MARTIN & PETERSON P.S.

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