

FILED
Court of Appeals
Division II
State of Washington
12/20/2018 1:52 PM
No. 52557-7

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

CCT CONSTRUCTION INC. and CRAIG SHIPMAN,

Respondents,

v.

4EVER HEALING LLC and SARANJIT BASSI,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

4Ever Healing LLC (“4Ever”) appeals the trial court’s award of \$72,366.48 to its landlord, CCT Construction, Inc. (“CCT”). 4Ever leased premises from CCT in June 2017, but CCT failed to deliver exclusive possession and in September 2017, improperly ousted the tenant from the leased premises. For these reasons, the trial court erred in awarding CCT rent for the remaining five-year term of the lease. In addition, the trial court erred in holding that CCT was entitled to an award for personal property removed by 4Ever.

4Ever asks this court to reverse the judgment, award damages for its personal property withheld by CCT, and remand this matter to the trial court for an award of fees and costs to 4Ever.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it awarded rent that would accrue over a five-year lease term, regardless of a lease provision barring prospective rent claims. **(Conclusions of Law 2, 3, 8, 11, 13, 14)**

2. The trial court erred when it held that the landlord was entitled to rent despite the landlord’s failure to deliver exclusive possession as required under the lease. **(Conclusions of Law 2, 11, 13, 14)**

3. The trial court erred when it held that the landlord's re-taking of the leased premises without proper notice of default was not a material breach of the lease. (**Finding of Fact 15**).

4. The trial court erred when it held that the landlord's positioning vehicles to block entrance to the leased premises did not deny the tenant access to the leased premises. (**Finding of Fact 16**).

4. The trial court erred when it excused the landlord from making any effort to relet the property, substituting unsubstantiated opinions of rental value for reasonable mitigation effort. (**Conclusions of Law 5, 6, 8, 11, 13, 14**)

5. The trial court erred in determining that personal property became part of the realty, when the personal property were trade fixtures purchased by the tenant for conducting its business and which could be removed without damage to the building. (**Conclusions of Law 9, 10**)

6. The trial court erred in finding CCT to be the prevailing party, and awarding attorneys' fees and costs. (**Conclusion of Law 16**)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did CCT materially breach its lease with 4Ever when it failed to deliver exclusive possession of the leased premises under the terms of the lease, and then physically excluded 4Ever from the leased premises? (**Assignments of Error 2, 3, 4**)

2. Did CCT materially breach its lease with 4Ever by failing to provide a notice of default either by certified mailing as required by the lease or by regular mail as required by Washington law, and by excluding 4Ever from the leased premises prior to expiration of the three-day period on its posted notice to pay rent or vacate? (**Assignments of Error 3**)

3. Was 4Ever entitled to remove personal property which was purchased for its own business, and which could be removed without damage to the landlord's property? (**Assignment of Error 5**)

4. Did the trial court err in awarding rent and additional rent for a five-year term, and substituting unsubstantiated opinions of value for a reasonable effort to relet? (**Assignments of Error 4**)

5. Should the tenant be awarded its attorneys fees and costs under the terms of the lease, for trial and this appeal? (**Assignment of Error 6**)

IV. STATEMENT OF THE CASE

In December 2013, Saranjit Bassi entered a Washington state lottery and won the right to open the single marijuana store allotted to Bonney Lake. Report of Proceeding (RP) vol. I, pp. 62, 127-128 (RP I:62, 127-28), RP I:61, Ex. 7. In 2016, the Washington State Liquor and Cannabis Board (“WSLCB”) issued a license to 4Ever. RP I:127. Bassi wished to change the location of his store to accommodate his landlord. RP I:152.

Craig Shipman lived on Bonney Lake property belonging to CCT, a corporation he manages. RP I:8,9. The location had previously been offered to the unsuccessful Bonney Lake applicant. RP I:63, 153; CP Ex. 7. Bassi approached Shipman about leasing the detached garage Shipman used as a shop. RP I:13. The parties began negotiating. Bassi informed the WSLCB of the proposed move, and CCT received a notice from Bonney Lake that a cannabis store would violate city rules. CP Ex 2; RP I:146. Bonney Lake had a moratorium on cannabis stores. RP I:147. Shipman was willing to proceed as long as 4Ever paid any fines. CP Ex. 101, RP I:158-59. The rent would be \$2,200 per month for the shop. RP I:159.

Before the parties signed a lease, Shipman proposed to move out of his house and lease 2.39 acres to 4Ever, reserving an area for advertising CCT and parking its equipment. CP Ex. 104-03; Ex. 106; RP I:159, 166-68. CCT's draft sought 10% of 4Ever's proceeds as additional rent, which is not allowed under WSLCB rules, and extended the term to five years. RP I:166, 168. Bassi objected. RP I:166. Ultimately, 4Ever signed a lease for \$8,500 per month ("the Lease"). CP 9; RP I:171. The Lease required Shipman to deliver exclusive possession within 60 days of May 28, 2016, or by July 27, 2016. CP 9. Bassi did not realize that the final Lease did not reflect the parties' agreement that rent would be \$6,000 per month until the store opened, and that it added a requirement for tenant to pay property tax,

which had not been discussed or agreed upon. RP I:86. CCT accepted payment of \$21,000 on June 7, 2016, consisting of first month's rent and relocation fee. RP I:34, 43-45, 139, 172.

4Ever's crew remodeled the garage into a retail showroom at their own expense. RP I:135. They removed and stored Shipman's heavy equipment, tools, and personal property RP I:185. They spent the next two months working to prepare for the WSLCB inspection scheduled for September 1, 2016. RP I:37, 135. They purchased supplies, a security system, display cases and monitors to display 4Ever's products to customers. RP I:155, 233-38, 141.

As agreed, 4Ever paid \$6,000 rent in July and August. RP I:34, 43, 140, 172; RP II:225. In August, Shipman told Bassi his checkbook was stolen, and cash removed from his account, and he needed funds to buy property in Puyallup. Bassi loaned him \$6,000. RP I:140-41. Shipman also failed to vacate the premises at the end of July. RP I:32. 4Ever had to cancel the residential subleases it had arranged, which would have brought in \$3,400 per month. RP I:144-45, 208-9. The parties' relationship began to deteriorate when Bassi protested that Shipman had not moved, and that he would need the revenue. RP I:144. On August 28, Shipman did pay back \$2,000 of his loan from Bassi. RP I:208.

On September 1, 2016, the WSLCB inspected and approved the new store location. RP I:135. However, the same day, Bonney Lake officials refused to issue city permits. RP I:142, 193. Bassi confirmed that the city's refusal was based on the moratorium, and not the premises. RP I:195-96.

Before Bassi could decide what to do, the decision was taken out of his hands. At 8:20 p.m. on Friday, September 16, 2016, CCT posted a 3-day Notice to Pay Rent or Vacate. CP Ex. 13. The notice demanded \$13,100 in rent for June through September within three days of service, apparently using the \$8,500 rental rate. Id.

Upon finding the notice, Bassi began removing the detachable personal property, leaving structural improvements such as trim work. RP I:141, 197-99. When Bassi arrived on September 18, Shipman had used a recreational vehicle and other vehicles to block access to the leased premises, as well as an air conditioning unit, although the notice period had not expired. RP I:187-88, 199.

After ousting 4Ever, Shipman decided not to seek a new tenant. RP I:89. He continued to reside in the residence, and used the detached garage for storage, keeping it intact for a future marijuana shop. Id. CCT then sued 4Ever and Bassi seeking rent for the five-year lease term plus damages. 4Ever and Bassi filed counterclaims for breach of lease and damages.

Following a bench trial, the court awarded CCT \$72,366.48, consisting of \$45,800.00 rent, \$6,700.00 for removal of the tenant's personal property, and \$8,000.00 for property tax through 2021, plus attorney's fees and costs, less \$4,000.00 CCT owed to the tenant.

V. SUMMARY OF ARGUMENT

CCT is not entitled to recover rent under the lease because CCT materially breached the lease by failing to deliver exclusive possession to the tenant, failing to give proper notice of default, and denying access to its tenant while the tenant was entitled to exclusive possession. At the time of CCT's actions, 4Ever had not abandoned the premises. Thus, CCT's actions deprived it of the right to recover further rent. Nor was CCT entitled to damages for personal property removed by the tenant, because the property was not part of the realty under Washington law. 4Ever and Bassi should be awarded fees as the prevailing party under the lease.

VI. ARGUMENT

A. Standard of Review

On appeal after a bench trial, the appellate court determines whether challenged findings of fact are supported by substantial evidence in the record, and if so, whether the findings support the trial court's conclusions of law. *Bank of America, N.A. v. Wells Fargo Bank, N.A.*, 126 Wn. App. 710, 714, 109 P.3d 863 (2005). Substantial evidence exists if the record

contains "evidence of sufficient quality to persuade a fair minded rational person of the truth of the declared premise." *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991). Questions of law are reviewed de novo. *Bank of America, N.A.*, 126 Wn. App. at 714.

B. CCT Materially Breached Its Lease With 4Ever

There are three reasons the trial court erred when it held that CCT did not breach the lease. First, CCT failed to deliver exclusive possession of the leased premises. Second, CCT failed to give proper notice of default, either under the lease terms or pursuant to Washington law. Third, CCT breached the lease by blocking its tenant's access to the leased premises.

1. CCT failed to deliver possession.

The lease required Shipman to vacate Unit A within 60 days. CP 9. Shipman did not. RP I:32.

Implied in every lease agreement is a covenant or duty of the landlord to deliver exclusive possession to the tenant. *Draper Machine Works, Inc. v. Hagberg*, 34 Wn. App. 483, 486, 663 P.2d 141 (1983). Except as limited by lease terms, a tenant has the right to exclusive possession as against the landlord. *Port of Pasco v. Stadelman Fruit, Inc.*, 60 Wn. App. 32, 802 P.2d 799 (1990). Preventing a tenant from having exclusive possession breaches the covenant of quiet enjoyment and excuses any obligation of the tenant to pay rent. *Draper Machine Works*, 34 Wn. App. at 486.

Shipman contended 4Ever waived the landlord's duty to vacate in exchange for a waiver of payments that would have become due if 4Ever's store opened. RP I:32-33. There was no evidence 4Ever agreed to such a proposal, even if it were made, and the court made no finding that Shipman's testimony was credible. CCT's failure to fulfill its obligation to vacate and deliver exclusive possession within 60 days was a material breach of the lease.

Instead of addressing CCT's failure to vacate, the court found that the parties agreed to waive \$2,500 of the monthly rent until the store opened, and that the additional rent never became due:

12. 4Ever Healing paid rent for June, July, and August of 2016 in the amount of \$6,000.00 for each month. The amount of monthly rent for the property was \$8,500.00, but the parties agreed to waive \$2,500.00 of that rent each month until 4Ever Healing was open and generating revenue at the Premises.

13. 4Ever Healing never opened its marijuana retail shop at the Premises and therefore the additional \$2,500.00 in monthly rent never became due.

CP 70-71. These findings were consistent with the evidence at trial. What was not supported by the evidence was the conclusion that 4Ever should be responsible for the property tax on CCT's property for the next five years, as well as rent. CP 84. CCT's failure to fulfill its obligation to deliver exclusive possession within 60 days was a material breach which resulted in the forfeiture of its right to charge rent under the lease thereafter.

2. **CCT did not give 4Ever legal notice of default.**

A 3-Day Notice was posted on the leased premises at 8:20 p.m. on September 16, 2016. Ex 20. CCT did not send the notice by certified mail, as required in the lease. CP 12-13 (§13). If it had, the notice would not have been effective until two business days later. Id. Nor was the notice mailed to the leased premises, as required by statute. RCW 59.12.040. CCT was only allowed to re-enter the premises “upon giving the notice required by law,” which did not occur. CP 14.

17. If any rents above reserved, or any part thereof, shall be and remain unpaid when the same shall become due ... then the Lessor may cancel this Lease ***upon giving the notice required by law***, and re-enter the Premises ...

CP 14 (emphasis added). Even if CCT had mailed the 3-day notice on Thursday, September 15, the notice period would not have expired until Tuesday, September 20. And if the September 16 posting were deemed legally sufficient, the notice period would have expired on Monday, September 19. Either way, CCT’s actions on Sunday, September 18, materially breached the lease by constructively evicting the tenant.

A landlord constructively evicts a tenant when it intentionally or injuriously interferes with a tenancy by materially impairing or depriving the tenant of beneficial enjoyment of the property. *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 8, 329 P.3d 83 (2014). When

a tenant is constructively evicted, it has no obligation to pay rent after it vacates the premises. *Id.* at 8. In the absence of legal notice of default and expiration of the cure period, 4Ever had the exclusive right to possession, and its constructive eviction deprived the landlord of the right to rent.

The trial court did not address the adequacy of the eviction notice. Rather, the court held that the tenant vacated upon seeing the posting, and that by positioning vehicles to block access the very next day “Defendants’ access to the shop was not denied.”

15. CCT posted a 3-day Notice to Pay Rent or Vacate Premises at the Premises and on the shop on September 17, 2016, and as a result thereof *4Ever Healing vacated the Premises* without paying the rent.

16. *Although Mr. Shipman positioned vehicles on September 18, 2016, so that items could not be removed from the shop, the Defendants’ access to the shop was not denied.* The Defendants were prevented from removing an outside air conditioning unit.

CP 71 (emphasis added).

The trial court also did not address the amount claimed to be due in the posted 3-Day Notice to Pay Rent or Vacate Premises. The notice demanded payment of \$13,100. CP Ex. 13. It is unclear how CCT arrived at this figure, when it had received \$33,000 from 4Ever, and claimed to have waived \$5,000 in exchange for a delay in delivering possession of Unit A. RP I:32-33. If the trial court had credited Bassi’s extra \$6,000 payment to Shipman as rent (since Shipman denied having taken the sum as a personal

loan), 4Ever's payment of \$39,000 meant it was fully current in its rent, having paid the \$15,000 relocation fee, and \$24,000 for four months' rent. *Contrast* RP I:52-53 (Shipman claims he gave Bassi checks not as repayment but as a loan to Bassi, which would mean the extra \$6,000 Shipman received should have been applied to 4Ever's rent) *and* CP 73 (Finding of Fact 26, finding Bassi's testimony regarding the loan more credible than Shipman's, and allows 4Ever a \$4,000 credit for the unrepaid portion of the loan).

In either case, CCT's notice did not properly state the amount due, and it was not served as required under the terms of the lease and under Washington law. CCT's improper eviction notice was itself a material breach of lease; the deprivation of access was another. As discussed in the following section, the finding that 4Ever's "access to the shop was not denied" is not supported by substantial evidence.

3. CCT blocked the tenant's access to the leased premises.

Shipman used his trucks and recreational vehicle not only to block the alley where 4Ever left an air conditioning unit it had purchased, but also to block *the entry* to the detached garage of the leased premises. Ex. 111-09, RP I59. The court recognized that the vehicles were positioned "so that items could not be removed from the shop." CP 71. As seen in the exhibits, at least three vehicles blocked doors and windows. Ex. 111-10, RP I59.

Washington law is clear that by engaging in “self-help” to exclude a tenant, a landlord forfeits the right to rent. *See, e.g., Aldrich v. Olsen*, 12 Wn. App. 665, 531 P.2d 825 (1975).

In *Aldrich*, the court held that a landlord’s unlawful act which ousts a tenant from physical possession constitutes an actual eviction, and a breach of the warranty of quiet enjoyment. *Aldrich*, 12 Wn. App. at 672. No landlord “may ever use non-judicial, self-help methods to remove a tenant.” *Gray v. Pierce County Housing Authority*, 123 Wn. App. 744, 757, 97 P.3d 26 (2004) (citing *Olin*, 39 Wn. App. at 692; *Aldrich*, 12 Wn. App. at 672). A landlord who does so is “liable for any damage caused by his self-help eviction” as well as “for the conversion of the personality in the leased building.” *Olin*, 39 Wn. App. at 693.

Moreover, the action precludes the landlord from recovering further rent. As the court in *Olin* explained:

Once having unlawfully ousted the Goehlers, Olin himself was in default and could not retrench and take advantage of his own re-entry rights; he is precluded from recovering the rents thereafter accruing.

Olin, 39 Wn. App. at 693. *See also Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn. App. 495, 503, 962 P.2d 824 (1997) (“A landlord’s act preventing a tenant from gaining possession of leased property constitutes constructive eviction and excuses the tenant’s obligation to pay

rent.”). CCT had no right to recover rent accruing after the eviction, and 4Ever is entitled to recover damages proximately caused by the eviction.

4. Vacating the premises does not excuse CCT’s breach.

At trial, CCT argued that 4Ever “abandoned” the lease by vacating upon discovery of the 3-day notice posted on the premises. RP II:298. The trial court did not address this issue. Moreover, there is substantial evidence in the record that 4Ever did not abandon the premises.

In Washington, the intent to discontinue occupation is not enough to establish an abandonment in breach of a lease; rather, there must be “clear, unequivocal and decisive evidence” of an “absolute relinquishment” of the leased premises. *Olin v. Goehler*, 39 Wn. App. 688, 693, 694 P.2d 1129, review denied, 103 Wn.2d 1036 (1985); see also *K and C Associates v. Airborne Freight Corp.*, 20 Wn. App. 653, 655 581 P.2d 1082 (1978).

For example, in *Olin v. Goehler*, the Goehlers sold a restaurant business and assigned their lease to the Carters, retaining a security interest in the assets, including the leasehold. 39 Wn. App. at 690. When the Carters gave up the restaurant, the Goehlers asked the landlord, Olin, for access to operate the business or negotiate a sale. *Id.* at 690-91. Olin refused to grant access because the Carters owed rent, and instead put the assets in storage and relet the building. *Id.* The court held that because the Goehlers’ right to

possession was superior to that of the landlord, the landlord was liable for damages caused by the unlawful eviction of the Goehlers. *Id.*

Similarly, in *Aldrich v. Olson*, Mrs. Aldrich leased a house to Mr. Olson with an option to purchase. 12 Wn. App. 665, 531 P.2d 825 (1975). When rent was not paid, she called the house and found the number disconnected; she also discovered the occupant appeared to be moving, so she changed the locks. *Id.* at 667-68. The court found she did not have the right to do so because evidence of “intent not to occupy” does not equate to legal abandonment in breach of a lease. *Id.* at 669.

Here, 4Ever saw the posted notice and began moving its personal property. 4Ever did not believe it owed the rent stated in the 3-day notice. RP I:143. 4Ever was also required to have premises tied to its LCB license, and after extensive improvements by 4Ever, the LCB had approved the leased premises for a marijuana store. After the improper ouster, 4Ever was able to locate new premises and move its license to a new location. RP I:125-127. However, the trial court did not hold that 4Ever’s departure after its eviction constituted a legal abandonment, and the facts would not have supported such a conclusion. Vacating the premises does not excuse the landlord’s prior, material breaches of the lease.

5. The trial court improperly awarded damages to CCT.

CCT was paid \$33,000 by 4Ever. RP 72 (Finding of Fact 22). The trial court awarded CCT an additional \$45,800. Id. By awarding additional rent, the court implicitly held the landlord had not breached the lease. Yet, the facts which support a material breach by the landlord were not disputed: the landlord failed to deliver possession, did not give proper notice to pay rent or vacate, and then unilaterally blocked the tenant's access. These breaches preclude CCT from charging rent thereafter.

Moreover, courts have long held that it is a landlord's duty to mitigate its damages by making reasonable efforts to relet the premises. *Int'l Tr. Co. v. Weeks*, 203 U.S. 364, 367, 27 S. Ct. 69, 51 L.Ed. 224 (1906). The requirement is a general principle of avoidable consequences. *Cobb v. Snohomish Cty.*, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997). A landlord's duty to mitigate continues throughout the term of the lease. *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn. App. 495, 505 n. 2, 962 P.2d 824 (1997).

Shipman decided to retain possession after the ouster. CCT did not present any evidence of an effort to relet the leased premises, much less a reasonable and honest one. The trial court did not address CCT's failure to mitigate, noting only that the lease allowed the landlord to re-enter upon giving the notice required by law, and that liability would not be

extinguished by such reentry. CP 71 (Finding of Fact 14). The court found that 4Ever paid \$33,000 in rent and a “relocation fee,” and that CCT “never relocated from Unit A on the property.” CP 71 (Finding of Fact 17). Although the lease stated the tenant would be liable for any deficiency as rent became due, the trial court awarded rent and property tax through 2021, deducting what it deemed to be reasonable rental value, apparently based on hearsay from the “Zillow” website. RP I:92.

The court started with the original oral agreement to lease Unit B (the detached garage converted to a retail store) for \$2,200 per month. CP 71 (Finding of Fact 18). Deducting this amount from the \$6,000, it found that CCT must have been charging \$3,800 per month for Unit A. CP 72 (Finding of Fact 22). Rather than deducting \$3,800 per month based on the failure to deliver possession of Unit A, the trial court deducted \$3,400 per month for August and September 2016, based on 4Ever’s lost residential subleases for a portion of Unit A (the house without the attached garage). RP I: 35, 209-210. Id. (Finding of Fact 20, 21). For the balance of the term, the court deducted only \$2,700 for Unit A, arriving at a rent award of \$45,800.00. The court awarded CCT \$8,000 for five years of property taxes. CP 84 (Conclusion of Law 11). With rent, tax, and personal property, the award to CCT before attorney fees was \$56,500. CP 84 (Conclusion of Law 13). There was no factual or legal basis for this award.

Even if the landlord were entitled to rent after the ouster, the failure to make a reasonable effort to relet the premises precluded an award. By awarding future rent, before a “deficiency” incurred, the court excused the landlord from any duty to mitigate throughout the life of the lease, and substituted an award based on hearsay for the landlord’s breach of duty.

This was not consistent with Washington law or the lease terms:

17. ... Lessee covenants and agrees to make good to the Lessor any deficiency arising from a re-entry and reletting of the Premises at a lesser rental than herein agreed to. The Lessee shall pay such deficiency each month as the amount thereof is ascertained by the Lessor.

CP 14.

CCT’s ouster precluded 4Ever from realizing any benefit from the leased premises, in which it had made a significant investment to improve. Even if 4Ever could not open a cannabis store, it could have used the property for some other business, and subleased for its own benefit, as consent was not to be unreasonably withheld. CP 12 (¶11). At trial, Bassi testified that he believed he was current at the time of the ouster, and would have continued leasing the premises, but for the ouster. RP I:206, 208.

The landlord may not retake the improved property for its own benefit, and then recover rent and taxes from the tenant while declining to mitigate its damages. If the existing ruling were affirmed, CCT could obtain a windfall and multiple recovery. For example, after collecting five years of

property tax from 4Ever, CCT could enter into a new lease and charge the next tenant for the same property tax. At trial, Shipman testified that he had another party interested in leasing. RP I:89-90. CCT could then compound its windfall by selling the real property for which it already collected rent and property taxes, without crediting its former tenant 4Ever. Accordingly, it was error to award damages to CCT.

C. PERSONAL PROPERTY WAS NOT PART OF REALTY

The lease states that “alterations, additions or improvements” will be surrendered as a part of the premises. CP 13. Washington follows the common law test for determining when an improvement is a “fixture” that has become part of the realty:

A chattel becomes a fixture if: (1) it is actually annexed to the realty, (2) its use or purpose is applied to or integrated with the use of the realty it is attached to, and (3) the annexing party intended a permanent addition to the freehold. **Each element of this three-pronged test must be met before an article may properly be considered a fixture.**

Glen Park Assocs., LLC v. Dep't of Revenue, 119 Wn. App. 481, 487, 82 P.3d 664 (2003), *review denied*, 152 Wn.2d 1016 (2004) (citations omitted) (emphasis added). With respect to the third prong of the test, “[e]vidence of intent is gathered from the surrounding circumstances at the time of installation.” Id. (citation omitted). Factors bearing on the annexor's intent may include “the nature of the article affixed, the relation and situation to the freehold of the annexor, the manner of annexation, and the purpose for

which the annexation is made.” Id. at 488. “Generally, appliances that are not specially designed for or permanently affixed to the building and need only be plugged in to operate remain personal property and do not become fixtures.” Id. at 488 (citation omitted).

The appliances in *Glen Park* had not been specially designed for the building and could be removed without damage to the building. Thus, stoves attached to a floor with an antitipping bracket and connected by a removable electrical plug, and dishwashers in a built-in cabinet, connected to a dedicated circuit and through plumbing hoses, were not fixtures that became part of the realty. *Id.* at 484-85.

Here, 4Ever purchased and mounted television monitors to display its products to customers. It purchased cases to show products, which were attached to a wall by caulk at one end, and according to plaintiff, by screws to the floor. RP II:254, I:187. The air conditioning units were connected by hoses or wires, not installed inside the walls. None of these items was specially designed for the building, and all could be removed without damage. Indeed, the trial court held that no damage was shown. CP 73 (Finding of Fact 24). Yet, the court concluded that the show cases, television monitors and air conditioning units were fixtures that were to remain with the building. CP 72, 74 (Finding of Fact 23, Conclusion of Law 9). The court awarded \$6,800 in damages for removed items and declined to award

4Ever damages for an air conditioning unit CCT prevented it from retrieving. CP 74, Conclusion of Law 7.

Not only were these items not intended to become part of the realty, they were purchased by 4Ever for its business. Washington law has long held that such trade fixtures do not become part of realty. *Becwar v. Bear*, 41 Wn.2d 37, 39, 246 P.2d 1110 (1952). The court held in *Becwar* that a tenant should have been permitted to remove heating equipment attached to the building by “ordinary bolts and couplings” which could be removed without damage to the building.

Courts continue to follow *Becwar*’s holding that “Intent is the cardinal inquiry in determining whether a chattel has become a fixture.” *Kane v. Timm*, 11 Wn. App. 910, 912, 527 P.2d 480 (1974) (citing *Becwar* at 40). In *Kane*, some improvements were held to be fixtures, including (1) a sink and cabinet combination attached by pipes running through the floor, (2) an exhaust fan in a wall, and (3) carpeting and padding attached to the floor by nailing strips and staples; on the other hand, baseboard heaters attached to a wall by screws were not. *Id.* at 911. The objective indicia of intent that supported the holding with regard to the fixtures, namely, improvements were made over six years, after the tenant lived in the home for 17 years on an indefinite lease term from his mother. The tenant made the improvements

to “modernize” the home and allowed it to be listed as “remodeled,” and never expressed intent to remove improvements until trial. *Id.* at 913.

By contrast, the property at issue here were trade fixtures purchased by 4Ever for its business, which do not become part of realty:

Articles placed in or attached to leased property by the tenant, to facilitate the trade or business for which he occupies the premises, or to be used in connection with such business, or promote convenience and efficiency in conducting it. Such personal property as merchants usually possess and annex to the premises occupied by them to enable them to store, handle, and display their goods, which are generally removable without material injury to the premises. Unlike regular fixtures, *trade fixtures* are not considered part of the realty.

Black’s Law Dictionary, 6th Ed., p. 638.

4Ever’s belief that it was entitled to remove its trade fixtures from the property it had leased from CCT was consistent with Washington law. See, e.g., RP I:201-2. The trial court’s conclusion to the contrary was error.

D. PREVAILING PARTY ENTITLED TO FEES AND COSTS

The lease provides that the landlord is entitled to recover reasonable attorney’s fees and all costs and expenses if it prevails in a dispute with the tenant. CP 14. By law, such provisions are reciprocal. RCW 4.84.330. In addition to the costs of trial, if appellants/defendants substantially prevail in defending against plaintiff’s claims and proving their own claims, they are entitled to recover attorney’s fees and costs on appeal. RAP 18.1.

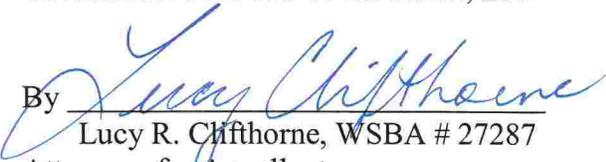
VII. CONCLUSION

Appellants ask this court to reverse the trial court and hold that CCT materially breached its lease with 4Ever by failing to deliver possession, failing to give proper notice of eviction, and engaging in a self-help ouster of its tenant while the tenant was still entitled to exclusive possession. This court should reverse the trial court's award of rent and property taxes to the landlord, and remand for an award of damages to 4Ever for the air conditioning unit wrongfully withheld by CCT, and any other damages the trial court deems appropriate in light of the appellate court's ruling.

Appellants further ask that they be deemed the prevailing parties, entitled to recover their attorney fees and costs incurred at trial and in this appeal.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

VANDEBERG JOHNSON & GANDARA, LLP

By 

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Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused to be [] mailed, [X] delivered by Legal Messenger Service, [] sent via facsimile transmission, a true copy of this document to the attorneys of record for Respondents, Stephen Andrew Burnham, 317 S Meridian, Puyallup, WA 98371.

Dated this 20th day of DEC, 2018, at Tacoma, Washington.



Kim Redford, Legal Assistant

VANDEBERG JOHNSON

December 20, 2018 - 1:52 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52557-7
Appellate Court Case Title: 4Ever Healing LLC and Saranjit Bassi, Appellants v. CCT Construction Inc.,
Respondent
Superior Court Case Number: 16-2-12861-6

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