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No. 52917-3-II

Trial Court No. 18-2-01102-18

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

Ahmet Chabuk,

Appellant,

vs.

Frances Miller
and all other occupants,

Respondent.

REPLY BRIEF
OF APPELLANT

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In Reply to Pages 17-18: Miller admits that the trial court had no authority to make a title determination in this unlawful detainer action. Yet, the trial court, referring to *Tischner v. Rutledge*, 35 Wn. 285, 286, 77 P. 388, 388 (1904), explicitly stated in its oral ruling that this provision of the rental agreement was “**of the most significance in the outcome of this case**” and that it “**cannot distinguish in any way the language in this particular rental agreement from the language that exists in the Tischner case. The language is clear and unequivocal.**” (CP 133-134; 154) (emphasis added) . . . 11

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In Reply to Pages 19-20: Miller’s attempt to raise the **affirmative defense of equitable estoppel** is barred because it cannot be raised now for the first time on appeal and, as an affirmative defense, it was not pleaded pursuant to CR 8(c). 13

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**REPLY TO BRIEF OF RESPONDENT
AND ARGUMENT**

Ahmet Chabuk (“Chabuk”), Appellant, replies to the Brief of Respondent, Frances Miller (“Miller”), as follows:

Citations to the Record: Throughout her “Brief of Respondent,” Miller fails to cite to relevant portions of the record, as required by RAP 10.3(a)(6). Miller’s arguments without citations to the record should not be considered. *Cowiche Canyon Conservancy vs. Bosley*, 118 Wash.2d 801, 828 P.2d 549 (1992).

In Reply to Page 1: Miller’s argument about the attorney-client relationship is misleading and what is implied is false because the attorney-client relationship between Chabuk and Miller had ended long before Miller and her family became Chabuk’s tenants.

Chabuk began to represent Miller in late 2002 on a court case which lasted “several years” before completion. (CP 27; 257; 266.) Years later, Miller and her family became Chabuk’s tenants — during the last few days of 2007 or early 2008. (CP 196.) And the rental agreement in question was signed in April 2010 — years after the legal representation had ended. (CP 235.)

In Reply to Page 1: The argument about the “redacted” response from Miller is misleading in alleging that Chabuk had redacted the entire document. Chabuk redacted only the offensive portions of the handwritten and unsworn response (which did not contain an Answer) and asked the court to strike it. (CP 5:19).

Chabuk redacted only the offensive portions of the handwritten and unsworn response (which did not contain an Answer) and asked the court to strike it. (CP 5:19). Miller’s arguments are incorrect.

In Reply to Page 1: The argument that, during the show cause hearing, “the court found the matter contested and set it for trial” is ironic because the parties almost always appear before a judge because their matter is contested. And the judge is required to consider the evidence of both sides before deciding whether to set the matter for a trial, which the judge failed to do.

Miller’s argument has no merit because the parties almost always appear before a judge because their matter is contested. And the judge is required to consider the evidence of both sides before deciding whether to set the matter for a trial, which the judge failed to do.

In Reply to Page 2: Miller is incorrect in her argument that Miller’s motion for a continuance “was not ruled upon.” The clerk’s minutes clearly show that Miller’s motion was to continue the trial date, and the clerk’s notation states the “court grants conti[nuance].” (CP 75.)

The clerk’s minutes clearly show that Miller’s motion was to continue the trial date, and the clerk’s notation states the “court grants conti[nuance].” (CP 75.) Moreover, Miller’s order, item 7, states: *“On June 1, Defendant brought a motion to continue the trial [date] based on discovery issues.”* (CP 87.)

In Reply to Pages 5-6: Miller has waived any objections to narrative reports of proceedings because RAP 9.5(c) requires any such objections to be served and filed within 10 days after receipt of the report of proceedings, which Miller failed to do.

Any objections to narrative reports of proceedings was waived because Miller waited until filing her responsive brief in the Court of Appeals. In addition, her arguments have no merit:

First, a narrative report of proceedings is prepared by a party, not a court reporter or transcriptionist. RAP 9.3; *See State v. Martinez*, 18 Wn. App. 85, 566 P.2d 952 (1977) (approving narrative report prepared by trial counsel).

Second, Miller's objection in the trial court to use of the narrative reports was denied by the trial court upon consideration of Chabuk's motion for reconsideration, and Miller has failed to cross-appeal that ruling and has also failed to provide a sufficient record of her objection. (CP 145-146).

Third, Miller's argument that the narrative report is not accurate because it contains ellipses is contrary to RAP 9.3, which provides in pertinent part that the narrative report should include only the evidence "material to the issues on review." Chabuk has provided a fair and accurate statement of the evidence material to the issues on review.

In Reply to Pages 6-7: Miller is incorrect in her arguments that her attorney's own unsworn hearsay "Answer" (and her offensive fabrications against Chabuk during the oral arguments at the show cause hearing) justified the need for a full trial, pursuant to RCW 59.12.130, while admitting that Miller failed to appear for her own show cause hearing, failed to submit any evidence, and failed to show cause. Therefore, Miller **failed to show any "issue of fact."**

In support of her arguments over the "issue of fact," in page 6 of her response, Miller cites *Housing Authority of City of Pasco and Franklin County v. Pleasant*, 126 Wn. App. 382, 392, 109 P.3d 422

(2005). In *Pleasant*, during the show cause hearing, the trial judge did not hear any testimony or examine the parties or witnesses. Rather, it based the issuance of the writ on the oral arguments, which was found to be an error. *Id.* at 390. In *Pleasant*, the Court of Appeals ruled:

The statute uses the mandatory term “shall,” which requires that the parties and any witnesses be examined. RCW 59.18.380. Its use of the word “shall” is presumptively imperative and operates to create a mandatory duty. See *State v. Marking*, 100 Wn. App. 506, 510, 997 P.2d 461 (2000). The examination of parties and witnesses is not a formality as the Housing Authority asserts. It is the basis for the issuance of the writ pendente lite. Further, the statute uses the term “shall” in directing that the matter be set for trial. RCW 59.18.380.

. . . [T]he rules of evidence still apply; inadmissible evidence may not be considered.

. . . [I]f the pleadings in an unlawful detainer action disclose a material issue of fact, the issue must be resolved at trial

Pleasant at 391-392 (emphasis added).

Prior to and during the show cause hearing, Miller submitted zero evidence in her support, while her attorney made some offensive fabrications against Chabuk. Yet, in her response brief, the same attorney argues that, in this simple unlawful detainer action, she was entitled to a full two-day trial, for a “full disclosure of all the facts” to come out. The attorney’s argument has no merit and is frivolous.

Miller makes this argument in spite of the fact that the same argument was rejected by the Court of Appeals (and was already cited by Chabuk in his opening brief) in *Tafoya v. Hunter*, No. 76798-4-I (Wash. Ct. App. Div. 1, Sept. 17, 2018) (unpublished, cited pursuant to GR 14.1(a)), as cited in Chabuk’s opening brief at page 41, footnote 1:

[T]he words “issue of fact” normally require a party to establish a fact issue with evidence, not mere allegations. CR 56 (c), (e). If trials could be obtained by mere allegations in an answer, show cause hearings would be meaningless.

Tafoya, slip opinion at 6 n.1 (emphasis added) (citing *Leda v. Whisnand*, 150 Wn. App. 69, 207 P.3d 468 (2009)).

At the show cause hearing, the court should have issued the writ of restitution together with a default judgment, and should not have ordered a full trial. This error alone is dispositive and warrants reversal. *See Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 329, 722 P.2d 67 (1986) (holding that a default order is the proper remedy when the defendant fails to appear at a show cause hearing as ordered by the trial court).

In Reply to Page 9: Miller incorrectly argues that the trial court had continued the trial date as an “*adjustment of trial date based on calendar considerations due to a lack of available judges*” because her argument is contradicted by the record.

The parties would have no reason to appear before a judge for a “calendar adjustment” long before the assigned trial date. The clerk’s minutes make it clear that Miller brought her motion to continue the

trial date and the “**court grants cont.**” (CP 75.) In addition, the order denying Chabuk’s motion for a protective order (prepared by Miller’s attorney) clearly states:

“7. On June 1, Defendant [Miller] brought a motion to continue the trial based on discovery issues. A new trial date was set for July 9, 2018.”
(CP 87 – emphasis added.)

Moreover, in her “Motion and Declaration to Continue Trial or Set Discovery Date,” Miller’s attorney argued “discovery from Mr. Chabuk was necessary for a full development of the facts at trial.” (CP 47:12; 64:12 – emphasis added.)

The continuation of the trial date, based “*on discovery issues,*” compelled Chabuk to ask for a protective order from the request for production of documents (including production of tax returns for ten years). With the order denying the protection, the court awarded \$337.50 as attorney’s fees against Chabuk. (CP 88.)

Although the issue of the trial court’s order in continuing the trial date may be moot now insofar as the appellate court may not provide relief, the issue is not moot because the trial court erroneously awarded Miller \$337.50 as attorney’s fees against Chabuk when it denied Chabuk’s motion for a protective order. (CP 88.)

In Reply to Pages 9-10: Miller’s argument that Chabuk and Miller had a prior attorney-client relationship is a distortion of the facts and irrelevant to any of the issues in this case because the attorney-client relationship had ended long before Miller and her family became Chabuk’s tenants.

Chabuk testified that in late 2002 he began to represent Miller on her ERISA disability claims, (CP 266:13; 266:25), “which took several years to completion.” (CP 98:20; CP 266:20). The “several years to completion” had ended long before Miller and her family became Chabuk’s tenants in late 2007 or early 2008. (CP 196:12.) The legal representation ended long before 2010, when the lease agreement was signed on April 1, 2010. (CP 235.) Miller’s argument now has no merit.

In Reply to Pages 9-10: Contrary to Miller’s arguments, extrinsic evidence may not be used to contradict unambiguous terms of a final written contract. *Emrich v. Connell*, 105 Wn.2d 551, 555-556, 716 P.2d 863 (1986).

Miller is incorrect in her argument that the rent amount in the written contract (\$1250) is a **recital of fact** rather than a term of the contract. Miller cites no authority to support her argument. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. the Seattle Post-Intelligencer*, 60 Wn. 2d 126, 372 P.2d 193 (1962).

A “recital of fact” in a contract is an assertion of some factual matter being true, not a term of the contract. See BLACK’S LAW DICTIONARY (9th ed.) at 1385.¹ In *Black v. Evergreen Land Developers*,

¹ **recital.** (16c) **1.** An account or description of some fact or thing <the recital of the events leading up to the accident>. **2.** A preliminary statement in a contract or deed explaining the reasons for entering into it or the background of the transaction, or showing the existence of particular facts <the recitals in the settlement agreement should describe the underlying dispute>.

Inc., 75 Wn.2d 241, 250, 450 P.2d 470 (1969), the Supreme Court held that the following provision of a written contract was a **recital of fact**, which was properly shown to be false by parol evidence: “There are no verbal or other agreements which modify or affect this agreement.” *Id.* That sentence is a recital of fact because it is an assertion of a factual matter being true: the non-existence of any other agreements which affect the subject agreement. However, in this case, the amount of rent due each month is a term of the contract, not an assertion of a factual matter being true. Therefore, Miller’s argument fails.

Moreover, the lease agreement and the total amount of rent to be paid was reviewed and approved by the Bremerton Housing Authority. (CP 239; 243.) There is no evidence to suggest that the amount of rent in the lease was not the actual amount agreed upon.

In Reply to Pages 11-14: Miller’s argument that any ambiguity in the written contract should be construed against Chabuk is irrelevant because there is no ambiguity in the contract.

The rental agreement unambiguously provides that Miller shall pay rent in the amount of \$1250 per month. The Bremerton Housing Authority acknowledges and repeats the same amount in the contract. (CP 243.) The rental agreement also unambiguously provides that either party may give 20 days notice to vacate after the initial six-month tenancy.

In addition, with regards to the issue of perpetual renewal, under *Tischner v. Rutledge*, 35 Wash. 285, 288-9, 77 P.388 (1904), the trial court is obligated to construe the contract so as to avoid a finding of perpetual renewal if possible — which is contrary to Miller’s argument (at her response page 14) that the contract should be construed against Chabuk to justify a finding of perpetual renewal. Moreover, the *Tischner* Court ruled against a finding of a perpetuity in the lease agreement in that case, which is in Chabuk’s favor.

Furthermore, the Bremerton Housing Authority reviewed and approved the terms of the lease agreement and acknowledged that the total rent amount was \$1250. (CP 243.) Therefore, there is no ambiguity in the lease agreement.

In Reply to Pages 11-12: Miller’s argument that the contract is unenforceable because Chabuk allegedly did not comply with RPC 1.8, citing *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014) should be disregarded because it raises a new argument for the first time on appeal in the Court of Appeals.

The Court should disregard this argument because it was never argued or considered in the trial court. *Seattle-First v. Shoreline Concrete*, 91 Wn.2d 230, 240-1, 588 P.2d 1308 (1978) (“Respondents, having failed to raise this issue before the trial court, are precluded from raising it for the first time on appeal.”)

If this had been raised as an issue in the trial court, the parties would have briefed the relevant legal authorities, and Chabuk would

have submitted additional evidence to further show that his prior legal representation for Miller had ended long before the rental agreement was signed.

In the Alternate, as indicated above, Chabuk's representation of Miller had ended long before Miller and her family became Chabuk's tenants: Chabuk began to represent Miller in late 2002, (CP 90:19), in her ERISA disability claim, which took "*several years to completion.*" (CP 98:20). The rental agreement was signed on April 1, 2010, (CP 235), which was long after Chabuk's legal representation of Miller had ended. Miller's arguments now cannot be anything other than manipulations, could not have been made in good faith, have no merit, and are frivolous.

In Reply to Page 13: Miller's arguments about "*whether the automatic renewal of the contract terms included a renewal of the obligation to pay rent, or whether the sum of the total amount of rent due indicated that all rent due*" are frivolous because the rental agreement clearly states "*the lease shall be deemed automatically renewed for one month **under the same conditions and terms** and thereafter from month to month . . .*" (CP 233, #2 – emphasis added.)

The rental agreement clearly states "*the lease shall be deemed automatically renewed for one month **under the same conditions and terms** and thereafter from month to month . . .*" (CP 233, #2 – emphasis added.) Miller's argument has no merit.

In Reply to Page 16: Miller's argument that Chabuk had a sworn statement alleging that he had received no rent from Miller for 8 years is false and incorrect because the said "sworn statement" simply

states that the tax return forms Schedule E do not provide any names of any tenants who paid any rent.

The stipulation referred to by Miller was drafted by Miller's attorney, and any ambiguity in it must be construed against her.

The said stipulation clarifies that the tax return forms simply provide the total amount of rent paid by the tenants, not the names of the tenants. Miller's attorney had demanding copies of Chabuk's tax returns for ten years. The tax return forms do not indicate that no rent was paid by Miller. Chabuk had simply stipulated that none of the tax returns Schedule E show any names of the paying tenants. (CP 191:12-14.) In fact, Miller admitted in court that she had stopped paying her share of the rent 3 years earlier, (CP 197:13), while the Bremerton Housing Authority continued paying their share.

In Reply to Pages 17-18: Miller admits that the trial court had no authority to make a title determination in this unlawful detainer action. Yet, the trial court, referring to *Tischner v. Rutledge*, 35 Wn. 285, 286, 77 P. 388, 388 (1904), explicitly stated in its oral ruling that **this provision** of the rental agreement was **“of the most significance in the outcome of this case”** and that it **“cannot distinguish in any way the language in this particular rental agreement from the language that exists in the Tischner case. The language is clear and unequivocal.”** (CP 133-134; 154) (emphasis added).

In *Tischner*, the contract did not provide any provisions to terminate the tenancy. Yet the *Tischner* Court still ruled against finding a perpetual tenancy. In this case before the Court, the contract provides provisions to terminate the tenancy. The trial court's ruling is

erroneous in its interpretation of *Tischner* as well as in its reading of the rental agreement, and Miller's argument has no merit.

In Reply to Pages 18-19: Miller's argument that Chabuk implicitly consented to trying the issue of waiver "by permitting the introduction of evidence on whether he had in fact been receiving rent" fails because the trial evidence was relevant to Miller's fabrications in her unverified Answer (signed by her attorney alone) and the attorney's argument that Miller never paid rent and was never obligated to pay rent (despite Miller's own contradictory testimony, CP 196-198). (Miller's Trial Brief, CP 90-94).

The argument by Miller that she never paid rent and was never obligated to pay rent was her only defense at the trial. Her arguments were not about waiver of her obligation to pay rent. Instead her argument was that "the rent now nor was never due under . . . the contract" (Miller's attorney's opening statement, CP 184:16-17.)

Furthermore, Miller's argument that Chabuk implicitly consented to trying the issue of waiver fails in light of the Supreme Court's holding in *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 437-438, 886 P. 2d 172 (1994). In *Federal Signal Corp.*, the Supreme Court found that the affirmative defense was not tried by implied consent of the parties where it was first argued in closing argument. *Id.* at 435. In this case, the waiver issue was not even argued at all by the parties or mentioned by the trial court; instead, the trial court sua sponte applied the affirmative defense of waiver in its oral ruling (on 7/13/2018) three days after the closing arguments (on 7/10/2018).

Moreover, in his Complaint, Chabuk did not ask for the unpaid rents prior to his notices reinstating Miller's rent payment obligations. In his complaint, Chabuk asked for only the \$650 as unpaid rent after his notices "reinstating" her obligations to pay her share of the rent. (CP 4:14).

In Reply to Page 19: Miller's argument that "*Chabuk acknowledged, in a sworn statement he provided in lieu of turning over his tax returns in discovery, that he had not received any payments from Miller from the years 2010 through 2017*" is a misrepresentation of facts because the said "acknowledgment" simply states that the tax return forms Schedule E do not provide the names of the tenants who paid the rent.

The tax forms simply provide the total amount of rent paid by tenants without identifying their names. In her own testimony, Miller admitted that she made the rent payments and she stopped paying her share of the rent three years earlier, (CP 191:10-14; 196:4-9; 197:13), while the Bremerton Housing Authority kept paying their share.

In Reply to Pages 19-20: Miller's attempt to raise the **affirmative defense of equitable estoppel** is barred because it cannot be raised now for the first time on appeal and, as an affirmative defense, it was not pleaded pursuant to CR 8(c).

Miller attempts to belatedly raise another affirmative defense. Just as with waiver, estoppel is an affirmative defense that must be pleaded pursuant to CR 8(c), but was neither pleaded nor argued in this case. It therefore cannot be raised for the first time on appeal.

Additionally, "[e]quitable estoppel is not favored, and a party asserting it must prove each of its elements by clear, cogent, and

convincing evidence.” *Cornerstone Equipment Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 907, 247 P. 3d 790 (2011). Yet, Miller concedes “*the trial court did not make specific findings on the question of equitable estoppel . . .*” (Br. of Resp’t at 20.) The absence of a finding of fact in favor of a party who bore the burden of proof on an issue (such as an affirmative defense) is construed as an adverse finding on that issue. *State v. Budd*, 185 Wn.2d 566, 580 n.2, 374 P.3d 137 (2016). Thus, Miller’s argument fails.

Lastly, Miller fails to identify how she relied on the alleged waiver of past rent such that she would be injured by the repudiation of said alleged waiver. The case she cites and relies on does not provide any support for her argument. In *Cornerstone*, 159 Wn. App. at 909, the Court of Appeals rejected the defendant’s claim of equitable estoppel “because there is no evidence of detrimental reliance,” and the defendant’s argument, in *Cornerstone*, that he had materially changed his position in reliance on the plaintiff’s waiver was “speculative at best.” *Id.* Therefore, Miller’s argument fails.

Miller kept paying her share of the rent until 3 years earlier, while the Bremerton Housing Authority kept paying their share. Chabuk wrote off the previous unpaid rents from Miller as uncollectible but provided notices to her that she must pay her share of the rent or vacate.

In his complaint, Chabuk did not ask for award of the rent for the previous months. He asked for only the \$650 as the current month's unpaid portion of Miller's rent. Therefore, there can be no issue on waiver.

Both Chabuk and Miller testified that they had not talked with each other for the previous 3 years. The friendships or any previous friendships cannot have any bearing on any rental agreements. There are often even family members and close relatives renting rooms and houses from each other. During the years Chabuk represented Miller on her ERISA mental disability claims, Chabuk had developed great sympathy for Miller's suffering and tried to be helpful to her in any way he could. This cannot be construed that she is entitled to have completely free rental arrangements while even many family members pay rent to their close relatives.

In Reply to Pages 17 and 21: Miller's argument that "*the contract was void due to its violation of RPC 1.8(a) and Miller was thus under no obligation to pay rent*" is frivolous and could not have been made in good faith because there is no court finding that the contract was void and Chabuk's representation of Miller had ended years before Miller and her family became Chabuk's tenants, and the lease agreement was signed in April 2010. Moreover, there has been no showing that the rental agreement violated any of the conditions for an RPC 1.8(a) violation.

There is no trial court finding that the contract was void. Miller is trying to introduce a new argument on appeal, which is not permissible. Chabuk's representation of Miller began in 2002, lasted

“several years before completion” and ended years before Miller and her family became Chabuk’s tenants. The lease agreement was signed in April 2010. Moreover, there has been no showing that the rental agreement violated any of the conditions for a RPC 1.8(a) violation.

In addition, Miller’s income and the rental agreement has been examined and approved by the Bremerton housing authority, as demonstrated in the exhibits cited above. Miller’s arguments have no merit.

In Reply to Page 23: Miller’s argument that the “*amount in controversy is not relevant to the award of attorneys’ fees under the unlawful detainer statute . . . but the question of the tenant’s right to occupancy is far more significant*” has no merit because the entire argument Miller’s attorney made was that this was not an unlawful detainer action, and that it should be dismissed.

Miller’s attorney had inconsistent positions and always argued that this was not an unlawful detainer action, and that it should be dismissed, and that Chabuk may use an ejectment action against Miller, in which case, Chabuk would have to come back and evict Miller with an ejectment action. (CP 92, l 6-8; CP 184, l. 4-19). The result, as argued by Miller’s attorney, would give Miller only a few months to remain in the premises with hardly any significant benefit to her.

Miller has been arguing against application of unlawful detainer laws in this case but asking for award of attorney fees under the same unlawful detainer statutes. Miller should be judicially estopped from

benefiting from her inconsistent positions. *Arkison v. Ethan Allen, Inc.*
160 Wash.2d 535 160 P.3d 13 (2007).

Therefore, Miller's attorney's arguments have no merit.

CONCLUSION: The Court of Appeals should reverse the trial court, and vacate the judgment against Chabuk, award attorney's fees to Chabuk and against Miller's attorney, together with an order for a writ of restitution and a default judgment for unpaid rent.

Respectfully submitted on this 14th day of June 2019.

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CERTIFICATE OF SERVICE: I certify that on the date this document was filed, a copy of this document was served by e-mail on Karen Richmond, attorney for Respondent, via the Appellate Court Portal.

/s/ Christopher M. Constantine
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