

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

YAKIMA AIR TERMINAL-
MCALLISTER FIELD, an agency
of the City of Yakima and the
County of Yakima, Washington,

Respondent,

v.

M.A. WEST ROCKIES
CORPORATION, a Nevada
corporation,

Appellant.

Case No. 293068

BRIEF OF APPELLANT
M.A. WEST ROCKIES
CORPORATION

Sternberg Thomson Okrent & Scher, PLLC

BY: _____


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Attorneys for Appellant

M.A. West Rockies Corporation

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TABLE OF CONTENTS

I.	Introduction.	1
II.	Assignment of Error.	2
III.	Statement of Relevant Facts.	3
	A. Procedural	3
	B. Substantive Relevant Facts.	5
	1. Lease and Related Agreements	5
	2. Notices	7
	a. Miscommunication of YAT regarding simultaneous notices	9
	3. Funds Held By YAT on March 15, 2010	10
	4. Invoice regarding Attorney’s Fees Not Provided After Notice	11
IV.	Argument.	11
	A. Standard of Review is De Novo.	11
	B. Requirements for Unlawful Detainer.. . . .	12
	C. Trial Court Never Properly Obtained	

Subject Matter Jurisdiction	12
1. Respondent YAT Failed to Follow the Prescribed Time Under the Notice and Statute.	13
2. Respondent YAT Failed to Follow the Prescribed Time Under the Lease Agreement.	14
3. The Notices Were Confusing	15
4. Attorneys' Fees are Not Delinquent Rent	18
5. Acceptance of the March 22, 2010 Payment as Rent Rather than as a Replenishment of the Additional Security Amounted to Waiver of the Alleged Default	19
6. The Accounting Showed No Delinquent Rent	20
D. Possession Should Be Restored to M.A. West.	24
V. Attorneys' Fees and Costs.	25
VI. Conclusion	25
Proof of Service	27

TABLE OF AUTHORITIES

Table of Cases

<u>Camty. Invs., Ltd v. Safeway Stores, Inc.</u> , 36 Wn. App. 34, 37-38, 671 P.2d 289 (1983)	13,14
<u>Carlstrom v. Hanline</u> , 98 Wn. App. 780, 785, 990 P.2d 986, 989 (2000)	12,16
<u>Christensen v. Ellsworth</u> , 162 Wn.2d 365, 372, 173 P.3d 228 (2007)	13
<u>City of Seattle v. Megrey</u> , 93 Wn. App. 391, 393, 968 P.2d 900 (1998)	12
<u>Codd v. Westchester Fire Ins. Co.</u> , 14 Wn. 2d 600, 605, 128 P.2d 968 (1942).	15
<u>Daniels v. Ward</u> , 35 Wash. App. 697, 669 P.2d 495 (1983)	18,19
<u>Duvall Highlands LLC v. Elwell</u> , 104 Wn. App. 763, 771 n. 18, 19 P.3d 1051 (2001)	11,12
<u>First Union Management v. Slack</u> , 36 Wn. App. 849 (1984).	17
<u>Gray v. Gregory</u> , 36 Wn. 2d 416, 418-19, 218 P.2d 307 (1950).	13
<u>Housing Authority of Pasco and Franklin County v. Pleasant</u> , 126 Wn. App. 382, 109 P.3d 422 (2005)	25
<u>Housing Authority of the City of Everett v. Terry</u> , 114 Wn.2d 558, 563 (1990)	12
<u>Laffranchi v. Lim</u> , 146 Wn.App. 376, 383, 190 P. 3d 97 (2008)	12
<u>Provident Mutual Life Insurance Co. of Philadelphia v. Thrower</u> , 155 Wash. 613, 285 P. 654 (1930)	15

<u>Signal Oil Co. v. Stebick</u> , 40 Wn.2d 599, 245 P.2d 217 (1952)	.	20
<u>Wilson v. Daniels</u> , 31 Wn.2d 633, 198 P.2d 496 (1948)	.	12,20

Table of Statutes

RCW 59.04.040.	14
RCW 59.12.030	12
RCW 59.12.040			1,2,13,14,15,23

Table of Rules

RAP 18.1(a)	25
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I. INTRODUCTION

This is an appeal from a series of rulings entered in a commercial unlawful detainer matter by Yakima County Superior Court Judge C. James Lust where the Court granted Yakima Air Terminal's (YAT) request for a Writ of Restitution and entered Amended Findings of Facts and Conclusions of Law and an Amendment to Order Directing Issuance of Writ of Restitution and Judgment Dated June 7, 2010. (CP 285-292, CP 356-358, and CP 371-372) The appeal was filed after denial of motions for reconsideration brought by M.A. West Rockies Corporation (M.A. West). (CP 269 and 343)

M.A West was a tenant of YAT at McAllister Air Field in Yakima County, Washington. (CP 28) It leased airport ramp space to allow its customers access to the airport. (CP 5, 52, and 89)

YAT refused the timely tender of rent due under a Notice of Default for Failure to Pay Rent claiming it was not timely. The refusal to accept the tender was in violation of RCW 59.12.040 and the extended mailing rule in both the statute and the Lease. (CP-20, section 24 A) Further, the multiple competing notices regarding default and replenishment of additional security, the mystery accounting and the admitted miscommunication between YAT's Financial Administrator and its counsel proved deceptive and misleading. In addition, the Notice of

Default in Failure to Pay Rent included amounts that were both not yet due and owing and not considered rent. Finally, if YAT applied the March 22, 2010 payment to rent and not replenishment of the additional security, as admitted at the hearing, (RP 44, line 3-20 and RP 47, lines 1-13) then the acceptance of rent before the expiration of the deadline was a waiver of that alleged breach.

II. ASSIGNMENTS OF ERROR

Was the Superior Court in error in granting YAT's motion to issue a writ of restitution and in entering the Amended Findings of Fact and Conclusion of Law and in denying the M.A. West motions for reconsideration, when:

1. YAT refused to accept tender of the rent within the agreed waiting period for an unlawful detainer pursuant to the Lease;
2. YAT refused to accept tender of the rent within the statutory waiting period for an unlawful detainer pursuant to RCW 59.12.040;
3. YAT's Notice of Default for Failure to Pay Rent dramatically overstated the amount of rent then due and owing;
4. YAT's notices were confusing, deceptive and misleading;
5. YAT included in its Notice amounts that are not rent;

6. YAT accepted rent within the waiting period thereby waiving any breach to maintain the current unlawful detainer action;

7. M.A. West attempted to tender funds which would have brought it current in its rent before the expiration of the waiting period?

Is M.A. West entitled to an award of its attorneys' fees and costs in bringing this appeal?

Should the Court of Appeals remand this case with instructions to restore the property to M.A. West?

III. STATEMENT OF RELEVANT FACTS

A. Procedural Facts.

YAT served M.A. West via United States mail and posting a packet combining a Notice of Application of Deposit (Notice of Application) dated March 15, 2010 and a Notice of Default for Failure to Pay Rent (Notice of Default) also dated March 15, 2010. (CP 39-41)(emphasis added)

On March 22, 2010, M.A. West tendered and YAT accepted funds that M.A. West believed were for the March 15, 2010 Notice of Application. M.A. West then tendered further payment at 4:15 P.M. on March 26, 2010. (CP 82, 195 and RP 22, lines 7-8). This March 26, 2010 payment was acknowledged received by YAT. (CP 137 (bottom), RP 11, lines 3-6 and RP 17, lines 23-24). The tender of those March 26, 2010

payments were later refused by YAT. (CP 137 and RP 11, lines 3-6, RP 38, lines 11-12)

YAT filed its unlawful detainer action on March 30, 2010 (CP 1). M.A. West, on or about April 16, 2010, then deposited into the Registry of the Court \$6,250.00. (CP 51 and CP 159)

An unlawful detainer show cause hearing was held on May 20, 2010. On June 7, 2010 Judge C. James Lust of the Yakima County Superior Court entered YAT's proposed Findings of Fact, Conclusions of Law and Order Directing the Issuance of a Writ of Restitution and Judgment. (CP 162-164 and CP 271) A subsequent Order of Amended Findings of Fact, Conclusions of Law and an Amendment to Order Directing Issuance of Writ of Restitution and Judgment Dated June 7, 2010 were entered on July 9, 2010. (CP 285-288 and CP 371-72) YAT received \$6,251.00 from the Registry of the Court on June 11, 2010. (CP 164)¹

On June 17, 2010 and July 19, 2010, M.A. West filed Motions for Reconsideration. (CP 178 and CP 293) On June 30, 2010 and July 28, 2010, Judge Lust denied M.A. West's Motions for Reconsideration. (CP 269 and CP 343) On June 10, 2010, the Writ of Restitution was issued.

¹ Those funds, as applied to a proper accounting and at the time the June 7, order was entered, would have made M.A. West current through the end of May 2010, with June rent not due for three more days.

(CP 156) A stay of enforcement of the Writ was included in a motion for reconsideration which was later denied. (CP 343)

The Notice of Appeal (CP 344) and the Amended Notice of Appeal (CP 354) were filed on August 16, 2010 and September 2, 2010.

B. Substantive Relevant Facts.

1. Lease and Related Agreement

M.A West was a tenant of YAT at McAllister Air Field in Yakima County, Washington through an assignment of a lease on February 22, 2008. (CP 28) M.A. West's President is Brad Goodspeed. (CP 69) The property leased was assigned from Noland Decoto Flying Service, Inc. and is airport ramp space. (CP 5) The leased parcel is essential to M.A. West as it allows its customers to park their airplanes on and in hangers on its adjacent parcel and to access the airport with their airplanes. (CP 52 and 89) The monthly rent was \$2,718.29 due by the tenth of the month. (CP 5)

YAT, as a condition of granting its consent to the lease assignment, required an additional agreement (Agreement) regarding the payment of rent and the security deposit which is dated February 21, 2008. (CP 30-32).

The assigned Lease (CP 10-26) (Lease) provides specific provisions regarding notice and the payment of rent:

Rent to be paid on or before the tenth day of each month. Payments are to be made to the Yakima International Airport-McAllister Field in care of the Airport Manager's office. (CP 11 section 4.A.)

All notices of default of any terms and conditions under the lease by Lessee, except for the payment of rent, shall have a 30 day notice. (CP 20, section 24. A.)

Notices shall be deemed received three days after mailing to the Lessee. (CP 20, section 24. A.)

The February 21, 2008 Agreement (Agreement) required M.A. West to deposit \$3,000.00 with YAT as "additional security" for the payment of rent. The Agreement further provides that in the event M.A. West is more than five days late in the payment of rent YAT "shall" be entitled to apply the "additional security" to the delinquent rent. When YAT does apply any or all of the "additional security" towards the payment of rent they "shall" notify M.A. West in writing that it applied such amount to delinquent rent and that M.A. West has five days to deposit such amount to return the total deposit to \$3,000.00. It further provides if M.A. West fails to make the required deposit YAT may then proceed without further notice to remedies under the Lease including unlawful detainer. The Agreement does provide that from that additional security the YAT can pay attorney's fees incurred only for preparation of any notices under the agreement or the Lease. (CP 30-31)

2. Notices

On March 4, 2010, a Notice of Application of Deposit was executed on behalf of YAT. (CP 34) The \$3,000 requested in the Notice of Application was replenished by M.A. West on or about March 8, 2010. (CP 70 and 82) This replenishment is acknowledged in paragraph 8 of YAT's Complaint. (CP 6) YAT represented in its Complaint that the \$3,000 received from the March 4, 2010 Notice was then applied to rent. (CP 6) YAT, however, through its Financial Administrator and without notifying M.A. West, failed to apply the funds towards rent as it had represented to M.A. West when it issued the subsequent March 15, 2010 Notice of Application. (RP 44, lines 3-20)

Thereafter, two different notices, a Notice of Default for Failure to Pay Rent (CP 36) and the Notice of Application of Deposit Towards Unpaid Rent (CP 86) were mailed on March 15, 2010. (CP 39-40, Affidavit of Mailing)

Those multiple notices were allegedly posted and stapled together as one document and which were then apparently taped to a fence outside of the M.A. West offices on March 15, 2010. (CP 302 and 329) It is undisputed that M.A. West did not become aware of the stapled and multiple confusing and conflicting notices until March 16, 2010. (RP 18, lines 1-4) and CP 71). There are 17 buildings on the property. (CP 71)

M.A. West made what it believed was a replenishment payment to YAT on March 22, 2010 which it made based upon the Notice of Application of March 15, 2010. (CP 82) YAT, without notifying M.A. West, accepted the payment as a rent and not replenishment. (RP 46, lines 5-19, RP 48 line 21 to RP 49 line 9) M.A. West, in spite of the Notice of Application, made that payment unaware that YAT was not applying that money to the additional security. (RP 47, lines 10-13) M.A. West was also unaware and not informed by YAT that the prior money paid was not applied to rent.

On March 26, 2010, at about 4:15 p.m., the eleventh day of the thirteen day waiting period, M.A. West delivered to YAT, at the airport manager's office, three checks. (RP 22, lines 7-8) As YAT's counsel confirmed in the hearing the lease agreement as modified provided for a ten day notice and again confirmed that the payment was tendered on March 26, 2010. (RP 11) The Finance Administrator for YAT, Rebecca Brown testified that she returned the checks to M.A. West on advice of counsel. (RP 38, lines 11-12)

The Notice to Pay provided on March 15, 2010 provided an amount due of \$6,250.82, which included \$754.50 for non-invoiced attorneys' fees. M.A. West tendered \$2,716.29 on March 22, 2010. M.A. West then tendered payment of \$2,920.56 on March 26, 2010 with three

checks which were subsequently returned with YAT asserting untimely payment. (RP 17). If the YAT had accepted the payments there would not have been the unlawful detainer action. (RP 15, lines 23-25) (CP 81)

a. Miscommunication of YAT regarding simultaneous notices.

There was confusion between the YAT Finance Administrator and the YAT counsel in how monies were being applied before the two combined March 15, 2010 notices were sent out to M.A. West. YAT's counsel was under the impression that the prior replenishment of the additional security was applied to the M.A. West then outstanding balance when Ms. Brown actually did not apply the funds as implied.

SANDLIN: And then on March 15th you applied \$2716.29 from the trust account, didn't you?

BROWN: No, I didn't.

SANDLIN: You didn't? Okay, let's take a look at Exhibit "S". Now, this is a notice of application to deposit towards unpaid rent, do you see that?

BROWN: Yes.

SANDLIN: Now, that notice indicated that \$3,000.00 was taken, doesn't it?

BROWN: It does, but I didn't officiate it.

SANDLIN: So, you kept the \$3,000.00 inside the account?

BROWN: \$3,000.00 is in the account, yes.

SANDLIN: It's still there?

BROWN: Yes.

SANDLIN: Even though on March 15, 2010, your lawyer indicated that the \$3,000.00 was withdrawn?

BROWN: No, I think there was a failure of communication there.

(RP 44, lines 3-20)

Also, see:

BROWN: I don't know what Mr. Goodspeed thought.

SANDLIN: Okay ---

BROWN: But at no time did I tell him I had withdrawn the --- I believe Mr. Russell misunderstood there --- we misunderstood each other. I thought I was doing as directed and not replacing it and using it.

SANDLIN: I see

(RP 47, lines 1-13)

3. Funds Held by YAT on March 15, 2010

The YAT Finance Administrator testified that if YAT had made the application of the deposit to rent as it represented to M.A. West in the March 15, 2010 Notice of Application, then the amount due on the Notice of Default for Failure to Pay Rent would have reduced the M.A. West balance to \$3,258.82 (including the yet to be invoiced attorneys' fees of \$754.50) and have caused simultaneously another invoice for \$3,000.00 to replace that deposit. (RP 65, lines 5-12)

At the time of the commencement of the unlawful detainer and the hearing there was \$3,000.00 still in the trust account. (RP 45, lines 19-21) Ms. Brown confirmed that in her mind that as of March 15, 2010, the March rent was owed and there was \$3,000.00 in the trust account. (RP 46, lines 17-18)

4. Invoice regarding Attorney's Fees Not Provided After Notice

Providing an invoice to M.A. West is done simply as a matter of courtesy and is not a determination of when the rent is due. (RP 25, lines 1-5) However, the first indication of how much is due for attorney's fees or badges, etc. is provided through the invoice. M.A. West did not receive the invoice detailing the charges until after March 17, 2010. (CP 83 and 111-112)

Ultimately, despite the wrongful refusal of tender of rent, despite the confusing and deceptive notices, M.A. West was forced out of the property when the Writ of Restitution was issued.

IV. ARGUMENT

A. Standard of Review is De Novo.

The scope of appellate review of a trial court's action with regard to the adequacy of a termination notice under a lease is de novo. Duvall Highlands LLC v. Elwell, 104 Wn. App. 763, 771 n. 18, 19 P.3d 1051 (2001). "The interpretation of a lease is a question of law reviewed de

novo." Duvall Highlands, L.L.C. v. Elwell, 104 Wn. App. at 771 n. 18. (citing Carlstrom v. Hanline, 98 Wn. App. 780, 784, 990 P.2d 986 (2000)). A trial court's conclusions of law are reviewed de novo. City of Seattle v. Megrey, 93 Wn. App. 391, 393, 968 P.2d 900 (1998).

B. Requirements for Unlawful Detainer

Relief under the unlawful detainer statute requires: (1) the tenant's breach; (2) notice to the tenant of the existence of a breach together with an opportunity to correct; and (3) failure by the tenant to correct the breach. RCW 59.12.030(4); and see, Wilson v. Daniels, 31 Wn.2d 633, 643, 198 P.2d 496 (1948).

C. The Trial Court Never Properly Obtained Subject Matter Jurisdiction.

The unlawful detainer statute is in derogation of the common law, the statute is construed strictly in favor of the tenant. See, Housing Authority of the City of Everett v. Terry, 114 Wn.2d 558, 563 (1990).

The failure of YAT as the landlord to comply with all statutory requirements in an unlawful detainer action deprives the court of subject matter jurisdiction. Laffranchi v. Lim, 146 Wn.App. 376, 383, 190 P. 3d 97 (2008).

When the parties contract for a specific time or manner of notice, compliance with such a condition is a *jurisdictional prerequisite to relief*

in an unlawful detainer proceeding to the same extent as compliance with the statutory requirements is necessary. *See, Camty. Invs., Ltd v. Safeway Stores, Inc.*, 36 Wn. App. 34, 37-38, 671 P.2d 289 (1983).

A termination notice that fails to follow a lease's terms is ineffective to maintain an unlawful detainer action. *See, Gray v. Gregory*, 36 Wn. 2d 416, 418-19, 218 P.2d 307 (1950).

1. Respondent YAT Failed to Follow the Prescribed Time Under the Notice and Statute

Strict compliance is required for time and manner requirements in unlawful detainer actions. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007)(citations omitted.)

YAT allegedly posted on a gate on a fence bordering the property on March 15, 2010 with a ten day Notice of Default for Failure to Pay Rent and also, as required by statute, then mailed the Notice to Mr. Goodspeed. When notice is mailed, RCW 59.12.040 provides for an additional day for the tenant to cure the deficiency. The last day according to statute was March 26, 2010. YAT acknowledged to Judge Lust via email of May 27, 2010 that:

“MA West tender of payment to the Air Terminal on March 26, 2010 was rejected by the Air Terminal; as it was made after the expiration of the ten-day period within

which MA West was required to cure the default for nonpayment of rent.” (Emphasis added)

March 26, 2010 is also consistent with Mr. Goodspeed’s undisputed testimony that he slid the tender under the door on March 26, 2010 between 4 and 4:15 p.m. (CP 82 and RP 22, lines 7-8) In fact, March 26, 2010 was the eleventh day given the added statutory day for the mailing and the tender was not made after the expiration.

2. Respondent YAT Failed to Follow the Prescribed Time Under the Lease Agreement.

However, even more egregious is the fact that under the Lease the period is extended, not by one day, **but by three days from the mailing date.** See, paragraph 24 of the Lease. (CP 20) Regardless of when it was mailed and received, under the Lease the ten day period is expanded by the additional three days provided for in the Lease.

When a tenant contracts with his landlord for a notice period longer than the statutory period, he is entitled to the full time stated just as he is under the statute. Community Investments v. Safeway, supra, 36 Wn. App. at 38.

YAT ignored both the mailing rule in the statute and the mailing term in the lease. (CP 254-255) YAT misapplies RCW 59.04.040 as it must be read not only with RCW 59.12.040 which adds one day for mailing, but also with the lease which adds three days to any deadline

when mailing a notice.² This failure to comply with RCW 59.12.040 and the Lease regarding mailing is fatal to YAT's unlawful detainer. Their refusal of the March 26, 2010 tender was a breach of the Agreement.

Thus, it is undisputed that under the statute and the controlling Lease the tender was within the prescribed waiting period and it is undisputed that the tender was wrongfully rejected.

3. The Notices Were Confusing.

In addition to the lack of subject matter jurisdiction, the notices are confusing. Notices must also be sufficiently particular and certain so as not to deceive or mislead. See Provident Mutual Life Insurance Co. of Philadelphia v. Thrower, 155 Wash. 613, 285 P. 654 (1930) (substantial compliance suffices); Codd v. Westchester Fire Ins. Co., 14 Wn. 2d 600, 605, 128 P.2d 968 (1942) (notice must be particular).

In the present case, M.A. West was led to believe by YAT that YAT applied \$3,000 against the rent earlier in March rather than holding it in trust. This misrepresentation was made by YAT in the March 15, 2010 Notice of Application. Under the Agreement, YAT would only send out that Notice of Application if they had applied the already held \$3000.00 to any delinquent rent. (CP 30) The Agreement states that YAT "shall

² Under 59.12.040 when one posts a property they must also mail it to the tenant corporation at the same time.

notify” M.A. West when it applies the additional security to rent. (CP 30-31) The March 15, 2010 Notice of Application is such a notification. However, without notifying M.A. West, YAT did not follow the dictates of its own notice. YAT's own bookkeeper admitted that it was not until the day of the hearing that she was aware that YAT's counsel gave notice to M.A. West that the \$3,000 had been drawn down towards rent. (RP 67, lines 15-20)

Washington courts will construe ambiguities in a lease agreement against the one who drafts the agreement. Carlstrom v. Hanline, 98 Wn. App. 780, 785, 990 P.2d 986, 989 (2000). Additionally, when a lease is ambiguous, courts will adopt the interpretation that is "most favorable to the lessee." Id. at 785 (citing Allied Stores Corp. v. N.W. Bank, 2 Wn. App. 778, 784, 469 P.2d 993 (1970)).

These conflicting Notices drafted by YAT are beyond ambiguous as they are confusing with inaccurate amounts and differing time frames. The amount due for rent was drastically wrong in the notice and admittedly an error on the part of the Landlord as YAT provided testimony that its' Financial Administrator and its counsel that sent the notices had a miscommunication. (RP 44, lines 3-20 and RP 47, lines 1-13)

M.A. West had the right to assume payments were applied as represented by the Landlord. The Court in First Union Management v. Slack, 36 Wn. App. 849 (1984), states;

First Union argues it never accepted any rent from the Slacks after the notice of the default because it did not cash the checks until after notifying the Slacks, pursuant to the lease, that their right to possession was terminated. It reasons the checks were accepted not as rent but as partial damages. We disagree. **First Union never advised the Slacks it was holding and cashing their checks for the purpose of collecting damages. In these circumstances, the Slacks were justified in assuming First Union accepted their payment as rent, and thereby waived any default as to prior unpaid rent.** First Union's reliance on *Hartmeier v. Eiseman*, 34 Wn.2d 225, 208 P.2d 918 (1949) is misplaced. *Hartmeier* does not deal with the question presented here, *i.e.*, whether the summary remedy of unlawful detainer is proper where the lessor accepts money from the tenant following notice of default in rent without advising the tenant that he does not consider the payment as a cure of the default. First Union, supra, at 855-56(emphasis added).

Relying upon YAT's representations to M.A. West embodied in the Notice of Application of Funds dated March 4, 2010 and March 15, 2010, only \$2,406.14 would have been owed towards rent as of March 15, 2010. Then, also based upon YAT representations, they could have issued a March 15, 2010 Notice of Default for \$2,406.14 and then, under separate notice and time rules issue a Notice of Application of Replenishment. Instead, on March 15, 2010 YAT issued a Notice to Pay Rent or Vacate in the amount of \$6,250.82, which was \$3,844.68 more than was due and owing at that time for rent (CP 36) and another Notice of Application of

Funds and to Replenish. (CP 86) The Notices were deceptive and misleading. (Plus we now know they were still holding \$3,000.00)

4. Attorneys' Fees are Not Delinquent Rent

Although the 2008 Agreement allows for the deduction of attorneys' fees from the \$3,000 additional security deposit, it does not make attorneys' fees part of delinquent rent; it only makes attorneys' fees part of the charges that can be applied from the additional security replenishment and nothing more. Further, to require the attorneys' fees under the ten day notice when they were not formally invoiced until March 15, mailed March 17 and not actually received until after that date was improper and unfair.

The Lease defines what is due on or before the tenth of the month as the rent. (CP 11 section 4.A.) It does not include in the section of rent the other additional obligations of lessee such as taxes and liens (CP 12), utilities (CP 13) and insurance (CP 19). Further, the Agreement for additional security and replenishment does not define attorneys' fees as rent. (C 30-31)

In Daniels v. Ward, 35 Wash. App. 697, 669 P.2d 495 (1983), the issue of whether attorneys' fees were rent was addressed:

Two questions are determinative of this issue. First, we must decide whether the lease provision contemplates characterizing attorneys' fees as rent. Second, we must decide

whether RCW 59.12.170 permits parties to define attorneys' fees as rent for the purpose of obtaining double damages. We answer both questions negatively and reverse the trial court's decision insofar as it doubles the amount of attorneys' fees awarded.

We do not believe that the lease provision requires characterizing attorneys' fees as rent. The phrase in the lease "[a]ll sums to be paid by Tenant to Landlord under any of the provisions of this lease, in addition to the basic rent" applies to only payments from tenant to the landlord arising directly out of rental of the premises, for example, the percentage rent. It does not apply to payments that effectively are payments from tenant to landlord's attorneys. Even DMN in its brief recognizes that the parties probably did not contemplate defining attorneys' fees as rent.

Daniels, supra, at 707.

In spite of all this, M.A. West tendered more than the amounts properly due under the ten day notice to cure any default in rent. Those newly invoiced attorneys' fee charges if they were not paid or replenished would require a different notice, a five day Notice of Application or a 30 day Notice to Comply with the lease, but not a ten day Notice of Default for Failure to Pay Rent. (CP 20 section 24.A)

5. Acceptance of the March 22, 2010 Payment as Rent Rather than as a Replenishment of the Additional Security Amounted to Waiver of the Alleged Default.

YAT has waived any prior breach by M.A. West when its Financial Administrator, before the expiration of the Notice of Default for Failure to Pay Rent, admitted that YAT accepted the March 22, 2010 \$2,716.29 payment as rent and not as any replenishment to the additional

security account. (RP 44-46) In Washington, by accepting rental payment after service of the notice, the landlord waives all past breaches. Signal Oil Co. v. Stebick, 40 Wn.2d 599, 245 P.2d 217 (1952).

"The well established rule in Washington is that if a landlord accepts rent with knowledge of a prior breach of a lease covenant, the landlord waives the right to evict based on that breach." *Hous. Res. Group v. Price*, 92 Wn. App. 394, 401-02, 958 P.2d 327 (1998) (citing *Signal Oil Co. v. Stebick*, 40 Wn.2d 599, 603-04, 245 P.2d 217 (1952)).

When the breach is a continuing one, even though future breach apparently is not waived, the past part is, with the result that the unlawful detainer notice, being based on the past part, is nullified. Wilson v. Daniels, *supra*, 31 Wn.2d at 639-640.

Absent from the default and forfeiture provisions of the M.A. West-YAT assigned Lease are any provisions that even remotely state that acceptance of rent does not constitute a waiver of breaches. (CP 20-21)

6. The Accounting Showed No Delinquent Rent.

Both sides agree that as of February 24, 2010, \$5,687.85 remained due and owing. (CP 81, CP 103 and RP 43) At that time YAT also held \$3,000 as additional security under the Agreement as the next Notice of Application of Funds was not executed until March 4, 2010. (CP 34). When the March 4, 2010 Notice of Application is sent that means the prior

held \$3,000 as additional security is being applied to any delinquent rent. Therefore, on March 5, 2010, the amount due was \$2,687.85. Five days later the March rent became due (rent paid by the 10th of each month per lease) and is then added to the \$2,687.85 which then totals due \$5,406.14. On or about March 12, 2010, based upon prior Notice of Application, M.A. West delivered a check for \$3,000.00 to replenish the additional security. (CP 81-82 and 108) YAT issued and mailed another Notice of Application of Funds dated March 15, 2010 to M.A. West informing M.A. West that the trust fund \$3,000.00 was being applied to the outstanding amounts. (CP 82) With that written representation from YAT of the application of those latest funds, the balance then due and owing for delinquent rent would have been \$2,406.14. (Note, it was not until the hearing that it is discovered that YAT did not apply the \$3,000 as represented.) (RP 44, lines 10-20) On March 22, 2010, M.A. West delivered and YAT accepted \$2,716.29 from M.A. West. This was in reply to the March 15, 2010 mailed Notice of Application of Funds. Because the legal fees and process service charges were not yet due, the amount sent by M.A. West was \$2,716.29. (CP 82)

It was determined in the testimony of YAT Financial Administrator that she and YAT's attorney were not on the same page and she did not apply the money received from the March 4, 2010 Notice of

Application to the rent, but instead placed it in trust where it remained at the time of the hearing. (RP 44-47)

The invoice representing the “legal fees” of \$754.50, which were made part of the amount due in the March 15, 2010 Notice of Default for Failure to Pay Rent, was not mailed until two days later on March 17, 2010. (CP 111-112) The invoice refers to rent payments due by the tenth of the month and does not say that the legal fee charges are due immediately. (CP 112) M.A. West did not receive that invoice until around March 19 or 20, 2010. (CP 83) In fact, under the Lease any amounts due that are not rent and are not timely paid require a 30 day notice to comply or pay. (CP 20) Instead, YAT ignored that provision.

If YAT had accepted the March 26, 2010 tender, then M.A. West would have had a credit and there would be \$3,000 in the additional security account. (CP 94 and CP 190) YAT could have then taken the disputed attorney fees (\$754.50) from the trust and issued either a 30 day letter to pay the fees or a 5 day letter to replenish the trust the \$754.50 attorney charges. (They did neither)

YAT’s own filing of a clarification to the Court provided after the hearing supports M.A. West’s position. (CP 137) Many important points can be gleaned from this clarification.

First, the “clarification” ignores the alternative service mailing rule and the lease mailing rule when YAT states at the end of it accounting, “the ten day period within which M.A. West was required to cure the default in full expired on March 25, 2010. (CP 139) Under the Lease, because of the mailing of the Notice, it would be March 28, 2010.

Second, the YAT clarification deliberately tries to blend and blur the line between the statutory requirements and effects of a Notice of Default under RCW 59.12.040 and the Notice of Application which is not a notice under RCW 59.12.040.

Third, YAT’s approach to unlawful detainer is that even though YAT did not do what it represented in its notices the Court can ignore the notices and the errors because their internal accounting along with non-acceptance of the March 26, 2010 tender left M.A. West short of full payment.

Fourth, by following the accounting sequence in YAT’s “clarification” email (CP 137) M.A. West, when it tendered money on March 22, 2010 (YAT indicates a March 24, 2010 date) which was accepted by YAT, M.A. West would have a rent credit and nothing in trust. (The legal fees are not rent and are not counted here.) YAT would then have to send another Notice of Application.

Fifth, if YAT had not wrongfully refused the March 26, 2010 tender, then, depending upon how YAT applied that tender, M.A. West would either have:

a) a rent credit as of March 26, 2010 of \$3,232.96;

b) a rent credit of \$230.71 and the \$3,000 in trust; or

c) assuming, in the unlikely event, that legal fees are found to be rent for purposes of a Notice of Default, M.A. West still would have a rent credit and to the extent the trust is short the \$754.50 legal fees. YAT could either send out another Notice of Application or send out a 30 day notice to pay those fees per section 24 of the Lease. (CP 20)

In any event, the unlawful detainer statute is not suppose to be this difficult to apply in terms of amounts due and owing and the inconsistent accounting between YAT's counsel as represented in the Notices and YAT's Financial Administrator is exactly the type activity the Court's are to guard against. Normally, the sorry we made a mistake excuse in our notices and accounting and representations, normally does not support a viable unlawful detainer action.

D. Possession Should Be Restored to M.A. West.

Yakima Air Terminal executed on its Writ to take back the property; that does not mean it gets to keep the property. In 2005 this

Court in Housing Authority of Pasco and Franklin County v. Pleasant, 126

Wn. App. 382, 109 P.3d 422 (2005), noted:

A tenant's relinquishment of the property does not necessarily mean the right to possession is undisputed. *Sullivan v. Purvis*, 90 Wn. App. 456, 459, 966 P.2d 912 (1998) "We can determine whether Ms. Pleasant's right to possession was wrongfully terminated by the improper issuance of a writ and provide relief by restoring her possession. "

The property should be restored to M.A. West.

V. ATTORNEYS FEES AND COSTS

M.A. West is entitled to its attorneys' fees and costs in this matter under the provisions of the Lease (CP 22) and the Agreement (CP 31) and requests an award of attorneys' fees related to this appeal. A party on appeal is entitled to attorney fees where applicable law authorizes the award. RAP 18.1(a). M.A. West also requests this Court direct the trial court to award M.A. West its reasonable attorneys' fees and costs in the underlying unlawful detainer action.

VI. CONCLUSION

In Washington the unlawful detainer statute and related actions are strictly construed. The present case is littered with the landlord's time and manner mistakes (refusing timely tender by ignoring the mailing rule and lease), misrepresentations of amounts due for rent vs. the additional security, misrepresentations in including attorneys' fees as rent due and

owing under the Notice of Default, and a waiver by accepting rent before the ten days had expired.

M.A. West respectfully requests this Court to reverse the decisions of the Yakima Superior Court in this matter which granted YAT the right to be issued a Writ of Restitution and a Judgment and to reverse entry of all Findings of Fact and Conclusions of Law and remand the case to the trial court with directions that M.A. West is to be restored to the leased property. (CP 356-362 and CP 364-372) M. A. West also requests an award of its attorneys' fees and costs on this appeal and direction to the Superior Court on remand to award M.A. West its attorneys' fees and costs in the unlawful detainer action.

Dated this 31st day of January, 2011.

STERNBERG THOMSON OKRENT & SCHER, PLLC



Aaron S. Okrent, WSBA 18138
Attorneys for M.A. West Rockies Corporation

CERTIFICATE OF SERVICE

I, Aaron S. Okrent, do hereby declare under penalty of perjury that I have served the attached pleading and the Verbatim Report of Proceedings on the parties in interest by depositing them into first class mail, postage prepaid on January 31, 2011 as follows:

Mr. Russell H. Gilbert, Esq.
Lyon Weigand & Gustafson, PS
222 North Third Street
P.O Box 1689
Yakima, WA 98907

Dated January 31, 2011 at Seattle, Washington.



Aaron S. Okrent, WSBA#18138