

FILED

APR 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 293068

**STATE OF WASHINGTON, COURT OF APPEALS
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.

**RESPONSIVE BRIEF
OF YAKIMA AIR TERMINAL – McALLISTER FIELD**

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Air Terminal – McAllister Field

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I. PARTIES

M.A. West Rockies Corporation ("M.A. West") is the Petitioner and Yakima Air Terminal – McAllister Field ("YAT") is the Respondent.

II. ISSUES

1. Whether subject matter jurisdiction in this case was properly held by the Trial Court.

2. Whether service of the Notice of Default and the Notices of Application of Deposit were made in compliance with RCW 59.12.040.

3. Whether substantial evidence supported the Trial Court's findings that M.A. West failed to comply with YAT's Notice of Default, that M.A. West was guilty of unlawful detainer, and that the Lease Agreement was properly forfeited.

III. STATEMENT OF THE CASE

On or about April 24, 1997, YAT entered into a Lease Agreement ("Lease Agreement") with Noland DeCoto Flying Service, Inc. for approximately 215,884 square feet of airport ramp space. CP 10-26. The Lease Agreement was subsequently assigned to M.A. West on or about February 22, 2008. CP 28. The

monthly rent was \$2,718.29 due by the tenth day of each month.

CP 5.

As a condition of approving M.A. West's assumption of the Lease Agreement, YAT required M.A. West to agree to additional terms which included maintaining a \$3,000 security deposit with YAT as additional security for M.A. West's payment of rent. These terms were set forth in an agreement ("Deposit Agreement") between M.A. West and YAT dated February 21, 2008. CP 30-32.

Under the terms of the Deposit Agreement, M.A. West was required to deposit \$3,000 in the form of certified funds with YAT as additional security for the payment of rent which YAT was entitled to apply to delinquent rent and attorney fees incurred by YAT in the event that M.A. West was more than five (5) days late in the payment of rent under the Lease Agreement. CP 30.

In the event that M.A. West failed to pay rent and YAT elected to apply the \$3,000 deposit to unpaid rent due from M.A. West, YAT was required to notify M.A. West of the amounts of the security deposit applied to unpaid rent and attorney fees incurred in the preparation of the notice to M.A. West. CP 30-31. M.A. West was required to deposit such amount with YAT to return the total

deposit held by YAT to \$3,000 within five (5) days of YAT issuing a notice of application of deposit monies to M.A. West. CP 30.

In the event that M.A. West failed to comply with the notice of application of deposit funds within five (5) days of issuance of the notice, YAT could, without further notice to M.A. West, proceed with any remedy under the Lease Agreement, including, but not limited to, an unlawful detainer. CP 31.

M.A. West failed to pay the rental amounts due for the months of January, February and March, 2010. RP 32. On March 4, 2010, YAT issued a Notice of Application of Deposit Towards Unpaid Rent ("Notice of Application of Deposit") which was served on M.A. West on March 5, 2010 and applied the security deposit as specified in the said Notice. CP 34, 42. M.A. West failed to pay YAT the \$3,000 to replenish the deposit amount with five (5) days as required under the Deposit Agreement. RP 35. M.A. West did not deliver the \$3,000 replenishment amount to YAT until March 15, 2010. CP 6, 108. RP 35.

Following the application of the \$3,000 deposit amount, M.A. West remained in arrears on rent owed to YAT. CP 6. The Lease Agreement provides for the issuance of a three (3) day notice of default for nonpayment of rent. CP 20. YAT issued a ten (10) day

Notice of Default for Failure to Pay Rent ("Notice of Default") to M.A. West on March 15, 2010 which was posted on the main entry gate of M.A. West's fenced property on March 15, 2010. CP 36, 41, 245. RP 98. Said Notice was also mailed to M.A. West on March 15, 2010 in compliance with RCW 59.12.040. CP 230, 249.

As provided under RCW 59.12.040, M.A. West had one additional day to cure the deficiency based on the fact that the Notice of Default was mailed to M.A. West.

Brad Goodspeed, M.A. West's president, claims he tendered payment of the amounts due and owing for unpaid rent to YAT by slipping several checks under YAT's office door on Friday afternoon, March 26, 2010, after YAT's office was closed. CP 186. RP 22, lines 7-8. YAT did not receive M.A. West's tender until March 29, 2010. CP 109.

Irrespective of whether M.A. West made its tender on March 26, 2010 or March 29, 2010, M.A. West's tender failed to comply with the Paragraph 24 of the Lease Agreement which provides that as an additional condition of avoiding forfeiture, M.A. West was required to pay YAT's costs and expenses, including attorney's fees, for the preparation and service of the Notice of Default. CP 20, 82. RP 22, lines 7-8. M.A. West failed to tender such amounts

and, therefore, failed to cure the default as specified under the terms of the Lease Agreement.

Furthermore, the Notice of Default clearly specified that M.A. West was "required to pay the said rent, deposit increase, leasehold taxes, and delinquency charges to the undersigned[.]" CP 246. The signer of the Notice of Default was YAT's counsel and the name, address to which all payments were to be made was clearly shown on the Notice. CP 246. At no point in time did M.A. West tender any payment to YAT's counsel within the time allowed under the Notice of Default or any applicable provision of the Lease Agreement or statute.

YATS rejected and returned M.A. West's payments received at its office on March 29, 2010 because the tender was not timely. CP 109. Even if the payments had been slipped under YAT's office door on March 26, 2010, the payment was not tendered to the proper party, did not constitute payment in full of all rental amounts owed by M.A. West, nor did it include any amounts YAT incurred in the preparation and service of said Notices as required by Paragraph 24 of the Lease Agreement. CP 20, 109, 110.

YAT filed its Complaint for Unlawful Detainer on March 30, 2010, 15 days after the Notice of Default was posted on the

premises and mailed to M.A. West. CP 1-38. The Eviction Summons and Complaint for Unlawful Detainer were served on M.A. West on April 5, 2010. CP 46. On April 16, 2010, M.A. West paid \$6,251.00 into the Registry of the Court as and for the rent owed and delinquency charges. CP 159.

An unlawful detainer show cause hearing was held before the Honorable C. James Lust on May 20, 2010. After taking the matter under advisement, Judge Lust entered YAT's proposed Findings of Fact, Conclusions of Law and Order Directing Issuance of Writ of Restitution and Judgment; however, Judge Lust neglected to insert amounts to be awarded YAT for unpaid rent and delinquency charges and attorney fees on said Findings and Conclusions and Order. CP 158-165. This oversight was corrected by the Court on July 9, 2010 by the entry of an Order Granting Plaintiff's Motion to Amend Findings of Fact and Conclusions of Law and Order Directing Issuance of Writ of Restitution and Judgment dated June 7, 2010, Amendment to findings of Fact and Conclusions of Law, Amendment to Order Directing Issuance of Writ of Restitution and Judgment Dated June 7, 2010. CP 282-292.

A Writ of Restitution was issued on June 10, 2010. CP 156-157. The leased premises consisted solely of airport ramp space

and M.A. West maintained no personal property or equipment on the ramp space; therefore, the Writ was not formally executed due to the fact that M.A. West voluntarily vacated the premises.

On June 17, 2010, M.A. West filed a Motion for Reconsideration of the Court Orders and Judgment entered on June 7, 2010. CP 178-184. Judge Lust denied the Motion for Reconsideration on June 30, 2010. CP 269.

On July 19, 2010, M.A. West filed a second Motion for Reconsideration of the amended Findings and Conclusions and Order and Judgment entered by the Court on July 9, 2010. CP 293-342. The second Motion for Reconsideration was denied by Judge Lust on July 28, 2010. CP 343.

M.A. West filed a Notice of Appeal on August 16, 2010 and an Amended Notice of Appeal on September 2, 2010. CP 344-353, 354-372.

IV. ARGUMENT

A. Standard of Review.

As set forth in M.A. West's Opening Brief at page 11, the standard of review for issues of compliance with statutory requirements for service of notices of default for failure to pay rent,

interpretation of provisions of leases, and conclusions of law are questions of law which the appellate court reviews de novo.

B. Requirements for Unlawful Detainer.

The basis for relief under the unlawful detainer statute, RCW 59.12, is as described by M.A. West's Opening Brief at page 12.

C. Jurisdiction by the Trial Court was Proper.

- 1. The Notice of Application of Deposit and the Notice of Default were served on M.A. West in compliance with both the provisions of the Lease Agreement, RCW 59.12.040 and the Deposit Agreement.**

"The purpose of the notice [of breach] is to provide the tenant with 'at least one opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.'" Christensen v. Ellsworth, 162 Wn.2d 365, 371, 173 P.3d 228 (2007) (citations omitted). Notice of M.A. West's breach and the one last opportunity to correct it was provided by YAT serving M.A. West with a Notice of Default and Notice of Application of Deposit on March 15, 2010. Service of these Notices was made in full compliance with the requirements set forth in RCW 59.12.040, the provisions of the Lease Agreement, and the Deposit Agreement.

On March 15, 2010, YAT's process server could not obtain personal service on M.A. West and so, in compliance with RCW 59.12.040, affixed copies of the Notice of Default and Notice of Application of Deposit "in a conspicuous place on the property noted above." CP 41. On March 15, 2010, YAT also mailed copies of the Notices to M.A. West at the premises as required by RCW 59.12.040. CP 230, 245-249.

Brad Goodspeed, president of M.A. West, claims by mailing the two Notices to M.A. West in the same envelope and posting them together on the main entry gate for M.A. West's business, YAT somehow "deceived" M.A. West in that the Notice of Default was "deceptively provided in a concealed manner" which caused Brad Goodspeed to fail to see the Notice of Default. CP 70-71.

M.A. West's claims are without merit in that YAT's service of the Notices by posting "in a conspicuous place" on the property and mailing was accomplished in full compliance with RCW 59.12.040 and the provisions of the Lease Agreement and Deposit Agreement. Whether one Notice was behind the other, or whether they were stapled together to ensure that both Notices were securely affixed to the M.A. West entry gate is irrelevant. The fact

remains that both Notices were posted and mailed in the manner required by law.

2. Jurisdiction is statutory in unlawful detainer actions. YAT's strictly complied with these statutory requirements.

The law on the issue of valid jurisdiction is well settled. "Jurisdiction [in unlawful detainer actions] is statutory. A 10-day alternative to cure lease violations is a jurisdictional condition precedent to an unlawful detainer action for breach. Sowers v. Lewis, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957). Unlawful detainer is in derogation of common law; the statutes create a summary action. In order to take advantage of the act's provisions for summary restitution, however, the landlord must strictly comply with its requirements." Sullivan v. Purvis, 90 Wn. App. 456, 459, 966 P.2d 912 (1998) (citing Housing Auth. v. Terry, 114 Wn.2d 558, 563-64, 789 P.2d 745 (1990)).

YAT strictly complied with all notice and service of process requirements and, therefore, satisfied the strict subject matter jurisdiction requirements of Sullivan and RCW 59.12.040. Based on the foregoing irrefutable facts, the applicable provisions of the Lease Agreement, the Deposit Agreement and RCW 59.12.040,

subject matter jurisdiction in this case was properly held by the Trial Court. M.A. West's argument to the contrary fails.

3. M.A. West failed to timely cure its default in failing to tender its payments to YAT's counsel as specified in the Notice of Default.

The Notice of Default clearly stated as follows: **"YOU ARE FURTHER NOTIFIED AND REQUIRED** to pay the said rent, deposit increase, leasehold taxes, and delinquency charges to the undersigned, or its agents below named, within ten (10) days of the date of the service of this Notice upon you." (bold in original; underline added). CP 246.

M.A. West states that Brad Goodspeed "slipped" payments under YAT's office door at 4:15 p.m. on March 26, 2010. CP 82. RP 22, lines 7-8. This statement constitutes an admission by M.A. West that it failed to comply with the March 15, 2010 Notice of Default within the time period specified in the Notice and any additional time provided for in the Lease Agreement and by statute and before the unlawful detainer action was filed on March 30, 2010.

4. M.A. West's assertion that Brad Goodspeed "slipped the checks under the door" at 4:15 p.m. on March 26, 2010 is unsubstantiated,

unverified and undocumented and, therefore, was rejected by the Trial Court.

Brad Goodspeed's claim that he "slipped the checks under the door" of YAT's office at 4:15 p.m. on March 26, 2010 is, at best, a self-serving. CP 82. RP 22, lines 7-8. M.A. West offered no corroborating evidence to Mr. Goodspeed's claim. What is clear is that M.A. West's tender was not in compliance with the Notice of Default in that YAT did not receive the tender until March 29, 2010 and, as set forth in the this Brief at page 11, payment was not tendered in the manner and at the location specified in the Notice of Default. Rebecca Brown, YAT's Finance Administrator, stated in her letter to M.A. West dated March 29, 2010 that the checks "which we received on March 29, 2010", were being returned. CP 109.

M.A. West's tender of payment on March 29, 2010 was fourteen (14) days after YAT served and mailed the Notice of Default and was not tendered in compliance with the Notice. Paragraph 24 of the Lease Agreement specifies that notices of default are "deemed received three (3) days after mailing" which, in this case, would have been March 18, 2010. The Notice of Default was a ten-day notice which meant that in order to cure the rent

default, M.A. West would be required to tender payment of all amounts owed for rent, delinquency charges and costs and expenses, including attorney's fees, for the preparation and service of the said Notice, on or before March 28, 2010. In addition, all payments were required to be tendered to YAT's counsel.

In considering the issue in light of the totality of the evidence submitted by the Parties and the testimony of witnesses, the Trial Court found that M.A. West did not cure the default within the time allowed by law following service and posting of the Notice of Default and that M.A. West failed and/or refused to pay the rent and delinquency charges in compliance with the terms of the Lease Agreement. CP 159.

- 5. YAT strictly complied with the provisions of RCW 59.12.040 which provides that the tenant be allowed one additional day to cure the deficiency when the notice of default is mailed to the tenant.**

M.A. West claims that YAT failed to follow the prescribed time under RCW 59.12.040 which provides for an additional day for the tenant to cure the deficiency based on the fact that the Notice of Default was mailed to M.A. West. The provision of the statute at issue provides that "when service is made by mail one additional

day shall be allowed before the commencement of an action based upon such notice.” Id.

YAT, in full compliance with the statute as well as Paragraph 24 of the Lease Agreement, which adds three (3) days to the notice period if the notice is mailed, did not take action to file its Complaint for Unlawful Detainer until March 30, 2010 which was 15 days after the said Notice was posted on the premises and mailed to M.A. West.

During that 15-day period, M.A. West failed to tender all amounts due and owing under the Notice of Default for (1) unpaid rent, (2) delinquency charges, and (3) costs and expenses incurred by YAT in the preparation and service of the Notice of Default.

Most importantly, M.A. West’s payment to YAT, allegedly made on March 26, 2010 at 4:15 p.m., failed to cure the default in that the tendered amount did not include all amounts due and owing for unpaid rent, delinquency charges and the costs and expenses incurred by YAT in the preparation and service of said Notice as specified in the Notice of Default. Furthermore, M.A. West failed to tender any payment to YAT’s counsel as required under the terms of the Notice of Default. CP 82, 266. RP 22, lines 7-8.

6. M.A. West failed to comply with the second Notice of Application of Deposit served on March 15, 2010.

YAT served its second Notice of Application of Deposit on M.A. West on March 15, 2010. CP 230, 245-249. M.A. West failed to tender the \$3,000 as required within the five (5) days specified in the Notice. As M.A. West failed to make the required deposit, the Deposit Agreement provided that YAT “may proceed without further notice to M.A. West with any remedy under the attached Lease, including, but not limited to, an unlawful detainer.” Deposit Agreement, paragraph 3. CP 31.

D. Following a thorough review of the evidence and, in addition, reviewing the matter pursuant to M.A. West’s two motions for reconsideration, the Trial Court made its findings of fact and conclusions of law in light of the substantial evidence in the record.

1. Standard of Review.

The appellate standard of review of the Trial Court’s findings of fact and conclusions of law is as follows: “In reviewing a trial court’s findings and conclusions, we must determine whether substantial evidence supports challenged findings of fact and, in turn, whether the findings support the conclusions of law. Substantial evidence is evidence sufficient to persuade a fair-

minded, rational person of the truth of the finding.” Weyerhaeuser v. Health Dep't, 123 Wn. App. 59, 65, 96 P.3d 460 (2004) (citing Pilcher v. Dep't of Revenue, 112 Wn. App. 428, 49 P.3d 947 (2002)).

2. YAT's Notice of Default accurately reflected the amounts required to be paid by M.A. West to cure the default.

M.A. West claims that YAT's “notices were confusing”, that the amount stated to be due in the Notice of Default was “drastically wrong”, and that Rebecca Brown and YAT's counsel “had a miscommunication” which resulted in errors in calculating the amounts owed by M.A. West. M.A. West's Opening Brief at 15, 16. The record on appeal demonstrates that the Trial Court carefully considered all of these claims and the evidence submitted both in support of and against the issues before rejecting M.A. West's claims.

The testimony of YAT's Finance Administrator, Rebecca Brown, was exhaustive and submitted to vigorous cross examination by M.A. West's counsel as well as direct questioning from the bench. CP 29-48, 52-82. Ms. Brown's undisputed testimony was that as of March 15, 2010, the amount of unpaid rent, delinquency charges and interest and attorney fees and costs

incurred in the preparation and service of the Notices that was due and owing from M.A. West under the Lease Agreement and Deposit Agreement was \$6,250.82. This amount was specified in the Notice of Default which was served on M.A. West on March 15, 2010 as the amount required to cure the default. CP 36, 41, 60, 230, 246-249.

Mr. Goodspeed, in a vain attempt to comply with the Notice of Default, deposited \$6,251 into the Registry of the Court as and for the outstanding rent, delinquency charges, interest, attorney fees and costs on April 16, 2010. This amount was the amount specified in the March 15, 2010 Notice of Default; however, the date to comply with the Notice of Default had long passed. CP 159. RP 96.

M.A. West's argument that YAT's accounting and application of payments and the additional \$3,000 deposit amounts was erroneous is unsupported by the evidence presented at trial.

Ms. Brown testified that following the March 3, 2010 application of the \$3,000 additional deposit monies held by YAT, the balance owed by M.A. West for unpaid rent, delinquency charges and interest was \$5,451.32. RP 58. She further testified that \$799.50 was added to that amount for legal fees incurred in the

preparation of the Notice of Default and service of the same as provided for under the Lease Agreement and Deposit Agreement. CP 20, 31, 58. The total of these two figures (\$6,250.82) was the amount specified as outstanding on the Notice of Default posted on M.A. West's main entry gate and mailed to M.A. West on March 15, 2011. CP 36. The Trial Court found that there was no discrepancy in YAT's records and accounting and that the Notice of Default accurately reflected the amount required to be paid by M.A. West to cure the default. CP 159.

The substance of Ms. Brown's testimony regarding YAT's accounting of rental amounts, delinquency fees, interest and attorney fees and costs and application of the \$3,000 deposit amounts and the partial payments M.A. West made demonstrated that M.A. West failed to pay all amounts due and owing as specified in the Notice of Default within the time period specified in the said Notice and the additional three (3) days allowed for mailing. CP 266.

E. The evidence is viewed in the light most favorable to the prevailing party with deference given to the Trial Court's credibility determinations.

On appeal, the evidence is viewed "in the light most favorable to the prevailing party." Pilcher v. Dep't of Revenue, 112

Wn. App. 428, 435, 49 P.3d 947 (2002). Additionally, deference is given to the trier of fact regarding witness credibility or conflicting testimony. Weyerhaeuser at 65. "Because the superior court has the opportunity to evaluate the witnesses' demeanor, evaluate their credibility and find facts, the court's credibility determinations are **not reviewable** on appeal." In re the Pers. Restraint of Gentry, 137 Wn.2d, 378, 410-11, 378; 972 P.2d 1250 (1999) (emphasis in original).

YAT acknowledges that, as is typical at all trials, there was conflicting testimony at the Trial Court hearing; however, that, in and of itself, does not establish a basis for a finding that the Trial Court's findings of fact were not based on the substantial evidence at trial. In fact, "[c]onflicting evidence may be substantial so long as some reasonable interpretation supports it. That there may be other reasonable interpretations of the evidence does not justify appellate court reversal of a trial court's credibility determinations." Id. at 411.

The Trial Court had the opportunity to evaluate the witnesses' demeanor and judge their credibility. As recognized by the Supreme Court of in State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), "Credibility determinations are for the trier of fact

and cannot be reviewed on appeal." Accord In re the Pers. Restraint of Benn, 134 Wn.2d 868, 910 (1998) (holding that credibility determinations cannot be characterized as inaccurate).

Based on the foregoing, YAT respectfully submits that substantial evidence supported the Trial Court's challenged findings of fact which, in turn, supported its conclusions of law.

F. As an additional condition to avoid forfeiture of the Lease Agreement, M.A. West was required to pay YAT's costs and expenses, including attorney fees, for the preparation and service of the Notice of Default.

M.A. West's attempt to characterize YAT's attorney fees and costs incurred in the preparation and service of its Notice of Default as "rent" is unsupported by the provisions of Paragraph 24 of the Lease Agreement. M.A. West's Opening Brief at 19. While that paragraph does not characterize the attorney fees and costs as "rent", it does clearly specify that "as an additional condition to avoid forfeiture," M.A. West was required to pay YAT's attorney fees and costs incurred in the preparation and service of any notice issued pursuant to the paragraph. CP 11.

M.A. West's reliance on Daniels v. Ward, 35 Wash. App. 697, 669 P.2d 495 (1983) is misguided. In that case, the issue before the Court of Appeals was whether the landlord's attorney

fees incurred in the unlawful detainer proceedings should be recognized as rent for the purpose of application of RCW 59.12.170, which requires the court to double the amount of damages, including rent due. Id. at 706.

The lease agreement that was the basis of the unlawful detainer action in Daniels contained a provision which provided that the prevailing party “in any action for possession” was to be granted an award for its attorney fees incurred in the action. Id. at 705.

The Lease Agreement at issue contains a similar attorney fees provision; however, in addition to this “standard” attorney fee provision, Paragraph 24 of the Lease Agreement specifies that “as an additional condition to avoid forfeiture,” M.A. West was required to pay YAT’s attorney fees and costs incurred in the preparation of the Notice of Default. CP 20, 22.

There is no provision in Paragraph 24 that requires that the attorney fees be “invoiced” to M.A. West, or that a separate notice be issued demanding payment of the attorney fees before they are collectible as suggested by M.A. West. Furthermore, there is no provision in Paragraph 24 that requires YAT to issue M.A. West a 5-day, 30-day or some other type of notice to comply to collect its attorney fees and costs incurred in the preparation and service of

the Notice of Default. To the contrary, Paragraph 24 clearly makes payment of such fees and costs as an “additional condition” of avoiding forfeiture, the plain meaning of which is that such fees and costs are to be added to the delinquent rent amounts and included in the amount required to cure the default. CP 20.

G. YAT rightfully applied a portion of the \$3,000 deposit to pay for its attorney fees incurred in the preparation and service of the Notices of Application of Deposit and Notice of Default.

M.A. West’s argument that it shouldn’t be required to pay YAT’s attorney fees and costs incurred in the issuance of the Notice of Application of Deposit is without merit based on the plain language of the Deposit Agreement. M.A. West’s Opening Brief at 18. Paragraph 4 of the Deposit Agreement states that YAT “may also use the deposit to pay an attorney for the preparation of any notices hereunder and under the attached Lease. Any part of the deposit used for attorney fees shall be paid to [YAT] to return the total deposit to Three Thousand and no/100 Dollars (\$3,000) as is provided in Section 3 above.” CP 31. Although this language does not characterize YAT’s attorney fees as delinquent rent, it is clear that a portion of the \$3,000 deposit amount may be used to pay YAT’s attorney fees as well as being used to apply towards unpaid

rental amounts. The Deposit Agreement contains no requirement that YAT invoice M.A. West for its attorney fees before applying the \$3,000 deposit to such expenses or that they even are first paid by YAT. YAT's counsel invoice reflects that the attorney fees and costs for the preparation and service of the Notices were incurred between March 3 and March 15, 2010 and, therefore, were properly included in amounts to be paid by M.A. West as a condition of curing its default. CP 147-148.

YAT's action in applying a portion of the \$3,000 deposit to its attorney fees incurred in the preparation of the Notices of Application of Deposit and Notice of Default was done in the manner specifically contemplated by and agreed to by YAT and M.A. West at the time they signed the Deposit Agreement on or about February 21, 2008.

H. The evidence demonstrates that M.A. West failed to pay all amounts due and owing for unpaid rent, delinquency charges, interest and attorney fees and costs incurred in the preparation of YAT's Notices to M.A. West in the manner specified and within the time allowed.

M.A. West failed to replenish the \$3,000 deposit funds with YAT within the five (5) days specified in the March 15, 2010 Notice of Application of Deposit. CP 108, 266. This breach, in and of

itself, constituted a basis for termination of the Lease Agreement. CP 30-31. M.A. West's argument that YAT didn't actually transfer funds from one account to another when the application of the \$3,000 deposit funds was made on March 15, 2010 is irrelevant due to the fact that the \$3,000 deposit funds were, in fact, applied to M.A. West's delinquencies by YAT. CP 266. However, even with the application of these funds and the subsequent payments made by M.A. West received by YAT on March 24, 2011, M.A. West failed to pay all amounts due and owing as specified in the Notices within the time period allowed. CP 266.

M.A. West's argument that YAT's accounting showed no delinquency is not supported by the evidence. M.A. West's Opening Brief at 20. M.A. West argues that legal fees and process service charges incurred by YAT in the preparation of the Notices were not due yet and, therefore, a portion of the \$3,000 deposit should not have been applied to pay those expenses. M.A. West's Opening Brief at 21. As discussed above at pages 20-23, the terms of the Lease Agreement and the Deposit Agreement regarding the \$3,000 deposit simply do not support this claim. Neither the Lease Agreement nor the Deposit Agreement contains any provision that attorney fees and costs incurred in the

preparation and service of the Notices must be first invoiced before they are payable. CP 20, 31.

The Lease Agreement actually specifies that YAT's attorney fees and costs are to be paid "after receipt of notices and as an additional condition to avoid forfeiture[.]" CP 20. M.A. West's argument that no portion of its payments or application of the \$3,000 deposit should have been applied to these expenses is simply groundless.

Similarly, the Deposit Agreement specifies that attorney fees incurred by YAT in the preparation of any notice are payable from the deposit and that M.A. West is required to pay all such amounts to return the total deposit to \$3,000. CP 31.

In summary, YAT's accounting summary of M.A. West's delinquencies and application of payments and the \$3,000 deposit monies accurately reflects that M.A. West failed to comply with the Notice of Default and the March 15, 2010 Notice of Application of Deposit. CP 266.

I. Acceptance of partial payments of rent does NOT waive a default based on nonpayment of rent.

M.A. West's claim that YAT's acceptance of its \$2,719.29 payment and recognizing it as partial payment towards outstanding

unpaid rent amounts constitutes waiver of its breach of the Lease Agreement. M.A. West's Opening Brief at 19. M.A. West's claim is contrary to established Washington law.

Granted, a landlord does waive his or her right to declare a forfeiture by accepting full rental payments, even with a general nonwaiver provision. MH2 Co. v. Hwang, 104 Wn. App. 680, 684, 16 P.3d 1272, review denied, 144 Wn. 2d 1011, 31 P.3d 1185 (2001). A landlord does not, however, waive his or her right to proceed with an unlawful detainer proceeding by accepting partial rental payments. Hwang v. McMahill, 103 Wn. App. 945, 953, 15 P.3d 172 (2000), review denied, 144 Wn. 2d 1011, 31 P.3d 1185 (2001).

In this case, the record clearly shows that M.A. West owed back rent for several months. M.A. West's arrearage continued to increase with each passing month and M.A. West still owed a past due amount for the month preceding the Notice of Default. Under these circumstances, YAT's acceptance of M.A. West's payment of only a partial amount of the rent and charges that was owed by M.A. West does not constitute waiver of its right to proceed with an unlawful detainer action and evict M.A. West for nonpayment of rent. As there was still rent owing for the period before the Notice,

there was no waiver. See Housing Res. Group v. Price, 92 Wn. App. 394, 402, 958 P.2d 327 (1998).

V. ATTORNEY FEES AND COSTS

Paragraph 27 of the Lease Agreement provides that in the event of litigation to enforce the provisions of the Lease Agreement, “the prevailing party shall be entitled to its reasonable attorney fees in addition to court costs.” CP 22. Furthermore, as the Lease Agreement provides the basis for an award of attorney fees and costs to the prevailing party, that provision extends to and applies to this appeal under RAP 18.1(a).

Pursuant to RAP 18.1(a), YAT respectfully requests that this Court grant it an award of attorney fees and costs or, in the alternative, direct the Trial Court to enter an order awarding YAT its reasonable attorney fees and costs incurred in this appeal.

V. CONCLUSION

M.A. West failed to pay rent due and owing under its Lease Agreement with YAT. YAT's application of the \$3,000 deposit amounts on March 3, 2010 and March 15, 2010 first toward attorney fees and costs incurred in the preparation of notices and then to unpaid rent was proper under the provisions of the Deposit Agreement. Notices of Application of Deposit were duly issued to

M.A. West pursuant to the provisions of the Deposit Agreement; however, M.A. West failed to replenish the \$3,000 deposit following issuance and service of the March 15, 2010 Notice of Application of Deposit.

The Trial Court, after considering testimony and examining records, documents and accountings submitted by both Parties, concluded that (1) M.A. West was in default under the Lease Agreement for nonpayment of rent, (2) YAT properly posted and mailed its Notice of Default and Notice of Application of Deposit on March 15, 2010, (3) M.A. West failed and/or refused to cure the default on rent, delinquency charges and attorney fees and costs in compliance with the terms of the Lease Agreement and Deposit Agreement and as provided in the Notice of Default, (4) there was no substantial issues of material fact of the right of YAT to be granted the relief prayed for in the Complaint, (5) M.A. West was guilty of unlawful detainer as provided by RCW 59.12.030(3), and (6) a Writ of Restitution should be issued to remove M.A. West from and restore YAT to possession of the subject premises.

The Trial Court's found that substantial evidence supported its findings of fact and, in turn, its conclusions of law. When viewed in the light most favorable to the prevailing party, and with

deference given to the trier of fact regarding witness credibility and conflicting testimony, YAT respectfully submits that M.A. West's appeal should be denied.

YAT respectfully requests that this Court uphold the ruling of the Trial Court in this matter, dismiss M.A. West's appeal, and grant YAT an award of attorney fees and costs incurred on this appeal.

DATED this 28th day of April, 2011.



RUSSELL H. GILBERT,

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CERTIFICATE OF SERICE

UNDER PENALTY of perjury, under the laws of the state of Washington, I, Russell H. Gilbert, hereby certify that on the 28th day of April, 2011, I caused to be served by sending via First Class U.S. Mail, postage prepaid, a true and correct copy of the document to which this Certificate is affixed to the Party of record listed below:

Aaron S. Okrent
Sternberg Thomson Okrent & Scher, PLLC
500 Union Street, Suite 500
Seattle, WA 98101

DATED this 28th day of April, 2011.


Russell H. Gilbert, WSBA #24968
Lyon Weigand & Gustafson PS