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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 296491

COURT OF APPEALS

DIVISION III OF THE STATE OF WASHINGTON

JOHN LEPIANE and RUTH LEPIANE,
husband and wife,
Plaintiffs/Respondents,

vs.

IRREANTUM, LLC, a Washington limited liability company;
MARK W. GILBERT and SUSAN G. GILBERT, husband and wife,
individually and the marital community comprised thereof;
WG NISSAN, LLC, a Washington limited liability company,

Defendants/Appellants.

APPELLANTS' REPLY BRIEF

KRISTIAN E. HEDINE, WSBA #12668
Attorney for Appellants
Virtual In-House Counsel, PLLC
2225 Isaacs Avenue, Suite A
Walla Walla, WA 99362

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I. ARGUMENT

A. Contrary to respondents' assertion, the pertinent written documentation in this case does not include all material terms of the agreement between the parties.

Respondents ("Lepianes") assert in their brief in this appeal that the written documentation of the parties' agreement satisfies the statute of frauds by including all material terms of the parties' agreement. They make that assertion by pointing to the assignments and the personal guarantee and those documents' reference to a lease. They then assert that since the original lease contains a legal description, and the assignments and personal guarantee refer to a lease, the statute of frauds is thereby satisfied.

The flaw in Lepianes' argument is that the references in the assignments and personal guarantee are not clear or unambiguous references to the underlying lease. The Personal Guarantee refers to "that certain lease dated December 1, 2004 between John and Ruth Lepiane...Lessors, and Tri City Nissan, LLC as Lessee, and Irreantum, LLC as Assignee." (CP 41) This is not a correct reference to the underlying lease as the lease was between the Lepianes as Lessors and Tri-City Nissan, Inc., as Lessee. Irreantum,

LLC was in no way a party to the underlying lease. Thus that reference is not a clear or unambiguous reference to the Lease.

The Assignment refers to the underlying lease as the December 1, 2004 lease "executed by Assignor, as Lessee and (the Lepianes)." (CP 62) That reference is incorrect as the Assignor identified in the Assignment is WG Nissan, LLC, not Tri-City Nissan, Inc.

The only other document which might comport with Lepianes' argument and serve to comply with the requirements of the statute of frauds is the Consent document (CP 43). That document refers to the lease as "...that certain lease dated December 1, 2004 ("Lease") between Lessor and Tri-City Nissan LLC" which is incorrect since the original tenant or Lessee was Tri-City Nissan, Inc.

Lepianes rely on *Knight v. American Nat. Bank*, 52 Wn.App. 1, 5, 756 P.2d 757 (1988) for the proposition that the reference to the underlying lease was sufficient to identify the property to be leased without recourse to oral testimony. In *Knight*, the court held that a lease agreement lacking an adequate legal description satisfied the real estate statute of frauds because the lease agreement explicitly referred to and incorporated by reference a site plan containing the legal description.

Knight is distinguishable from the facts in this case since none of the subject documents (Assignment, Consent and Personal Guarantee) explicitly and clearly referred to the underlying lease and the only one which indicated that it incorporated by reference a copy of the attached underlying lease (the Assignment) in fact did not have a copy of the lease attached.

In most states an incomplete description or a street address is sufficient, and in certain circumstances parol evidence may be received to locate the land. That is not the case in Washington.

> "18 WILLIAM B. STOEBUCK & JOHN W WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 16.3, at 225 (2d ed. 2004). We do not apologize for the rule. We feel that it is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties."

Martin v. Siegel, 35 Wn.2d 223, 228, 212 P.2d 107 (1949).

This is not, as the Lepianes would have this court believe, a situation where Irreantum and the Gilberts are arguing that their obligations under the Assignment and Personal Guarantee are void based "on the misidentification of Tri-City Nissan as a limited liability company rather than a corporation in the personal guaranty." (p. 9 of Respondents' Brief) Instead, as Irreantum and the Gilberts

have shown, the documents upon which the Lepianes sought to impose liability completely and utterly fail to comply with the applicable statute of frauds. The appellants did not create the statute of frauds, but they are within their rights to rely upon it and to require that documents be in compliance with it in order to be legally enforceable.

B. Summary judgment is appropriate only if there are no genuine issues of material fact **and** the moving party is entitled to judgment as a matter of law. If an agreement fails to comply with the statute of frauds, then the moving party seeking to enforce that agreement is not entitled to judgment as a matter of law.

It is well settled that summary judgment is appropriate only when two conditions are met: there are no genuine issues of material fact; and the moving party is entitled to judgment as a matter of law. CR 56(c).

The Lepianes argue that Irreantum and the Gilberts failed to raise any issue of material fact sufficient to defeat summary judgment, and therefore summary judgment in their favor was appropriate. That argument is not well-taken for two reasons: first, the appellants did raise issues of material fact by pointing to the inadequacies and inconsistencies in the Assignment, Personal

Guarantee and Consent documents. Those issues were clearly raised and discussed in the appellants' Memorandum of Authorities in support of their motion for summary judgment (CP 50-57), which served as their response to the Lepianes' motion for summary judgment.

Second, and more significant, since the Lepianes failed to show that the documents upon which they sought to impose liability on the appellants failed to comply with the applicable statute of frauds, they were not entitled to judgment as a matter of law.

Summary judgment is only appropriate when both elements are present: no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Consulting Overseas Mgmt. v. Shtikel*, 105 Wn. App. 80, 18 P.3d 1144 (2001) (plaintiff not entitled to summary judgment, having failed to establish the elements of conversion and negligent misrepresentation) and *McCadam v. Hoshor*, 7 Wn. App. 913, 503 P.2d 756 (1972) (defendant not entitled to summary judgment even though no factual dispute as question of whether contract was ambiguous was matter of law.)

The Lepianes failed to show that the documents, upon which they relied in order to impose liability on Irreantum and the Gilberts,

complied with the applicable statutes of frauds. Accordingly, they were not entitled to judgment in their favor as a matter of law.

C. A party's alleged partial performance regarding an assignment of a lease does not eliminate the obligation to comply with the statute of frauds.

The Lepianes assert that since there was adequate alleged partial performance by the parties under the Assignment, the noncompliance with the statute of frauds should be overlooked by this court. They rely primarily upon the case of *Ben Holt Industries, Inc. v. Milne*, 36 Wn. App. 468, 675 P.2d 1256 (1984), a case out of Division I of the Washington Court of Appeals.

The *Ben Holt* case is distinguishable from the case at bar. First, the dispute in *Ben Holt* centered around the defective acknowledgment of a lease between the parties. There was no issue, as there is in this case, regarding what property was the subject of the lease and there was no allegation that the landlord had failed to either include a legal description or to refer to a valid document containing a legal description, as is the case here. Second, the parties to the dispute in *Ben Holt* were the original landlord and tenant, not the landlord and alleged assignees of the assignee of the original tenant, as is the case here.

There is another reason for this court to not consider the *Ben Holt* case as persuasive authority. The *Ben Holt* case departs from the traditional view of the courts regarding partial performance which is sufficient to remove a defective lease from the operation of the statute of frauds.

"The `part performance' is used by the courts in order to compel a party to perform in accordance with an oral contract that is within the provisions of the statute of frauds." 2 Corbin, CONTRACTS § 422A (1950).

The courts have generally held that an informal lease will be taken out of the statute of frauds if the tenant takes possession, pays rent, *and* also makes costly and permanent improvements on the demised premises. *Priestley Mining & Milling Co. v. Lenox Mining & Dev. Co.*, 41 Wn.2d 101, 247 P.2d 688 (1952); *Garbrick v. Franz*, 13 Wn.2d 427, 125 P.2d 295 (1942). The improvements need not enrich the landlord; they may be for the tenant's benefit — to aid the tenant in its business, for example. *Garbrick v. Franz*, 13 Wn.2d 427.

The *Ben Holt* case deviated from the requirement that there be a showing of the tenant making costly and permanent improvements on the demised premises in order to remove the

defective lease from the purview of the statute of frauds. The *Ben Holt* case has not been cited with approval by either the Washington Supreme Court or Division III of the Court of Appeals. Thus it should not be considered as mandatory, or even persuasive, authority in this case.

Partial performance provides a means of excusing noncompliance with the statute of frauds. However, in this case, the failure to comply with the statute of frauds is not limited to just one defect or one species of the statute of frauds, but instead pertains to two separate statutes embodying the statute of frauds (RCW 59.04.010 and RCW 64.04.010). In addition, the failure to comply with the statute of frauds is found not just in one document (e.g. a lease) but instead in all three documents upon which the Lepianes seek to impose liability on Irreantum and the Gilberts.

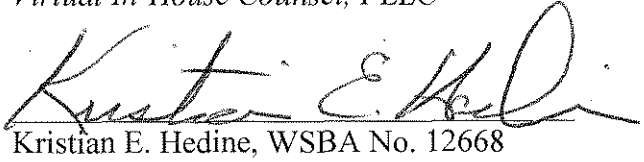
This case involves a much more egregious noncompliance with the applicable statutes of frauds than a defective acknowledgment on a lease as was the case in *Ben Holt*. The Lepianes' failure to comply with the applicable statutes of frauds renders the operative documents invalid and unenforceable.

II. CONCLUSION

The operative documents in this case, the Assignment, Consent and Personal Guarantee, all fail in one way or another to comply with the applicable statutes of frauds. Yet, the Lepianes assert that the trial court correctly granted summary judgment in their favor imposing liability on Irreantum and the Gilberts in connection with those documents. The Court of Appeals should reverse the trial court's decision granting summary judgment to the Lepianes and should determine that the appellants were entitled to summary judgment in their favor dismissing the Lepianes' action against them in its entirety.

Respectfully submitted this 25th day of July, 2011.

Virtual In-House Counsel, PLLC



Kristian E. Hedine, WSBA No. 12668
Attorney for Appellants