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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 308405

Spokane County Superior Court Cause No. 11-2-01768-5

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PEYTON BUILDING, LLC, a Washington  
Limited Liability Corporation,

Respondent,

v.

NIKO's GOURMET, INC., a Washington Corporation;  
LAITH and ABIR ELAIMY, a marital community,

Appellants.

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APPELLANTS OPENING BRIEF

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## **I. ASSIGNMENTS OF ERROR**

- No. 1.** The Court erred in granting Summary Judgment for Landlord Peyton Building and against all Defendants (CP 155-156).
- No. 2.** The Court erred in denying and failing to grant Tenants' Motion for Reconsideration, (CP 157-160).

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- No. 1.** Whether there were genuine issues of material fact which would preclude a granting of summary judgment.
- No. 2.** Whether there was a waiver by the Tenants of the Landlord's right to foreclose its claim under the Landlord's Lien.
- No. 3.** Whether an assignment of the Lease was necessary from the original Landlord allowing the Assignee Landlord to collect on the Lease.
- No. 4.** Whether the original Guarantors are liable under the lease to a successor Landlord, who did not receive an assignment of the Lease?
- No. 5.** Whether or not the Tenants are entitled to an offset for the conversion of the personal property against the unpaid rent due the Landlord.
- No. 6.** Whether the Tenants are entitled to attorney's fees and costs in the lower court and on appeal.

## **II. STATEMENT OF THE CASE**

This appeal involves the interpretation of the Washington Landlord's Lien Statute. The Landlord's alleged Assignee claimed rights to inventory and personal property under the Landlord's lien statute and subsequently retained possession without commencing a foreclosure action. The Landlord's successor should return the converted property to the Tenant, or alternatively, to provide the Tenant with credit for the converted items against the unpaid rent.

## **III. SUMMARY OF THE FACTS**

Defendants Niko's Gourmet, Inc., a Washington corporation, as Lessee (hereinafter "Tenant"), and Laith and Abir Elaimy, a marital community, as Guarantors, entered into a commercial lease on May 20, 2002, with Pacific Security Financial, Inc., a Washington corporation, (CP 6-21). Peyton Building, LLC (hereinafter "Landlord"), alleges that it is successor in interest to Pacific Securities (CP 124) and (CP 24). The lease terms began September 1, 2002, and ended August 31, 2012 (CP 7).

At the commencement of the lease, Tenant's monthly rent was \$6,222.00 (CP 7). Over the term of the lease, the rental amount was to increase each year, eventually becoming \$8,171.00 per month after September 1, 2011 (CP 7).

Tenant was unable to pay rent on approximately February 2011 (CP 2, 68). At the time that Tenant vacated the premises, the monthly rental amount was \$7,933.00 (CP 68)). In addition to being unable to pay rent under its lease, Tenant had outstanding obligations owed to Washington Trust Bank and the IRS (CP 58).

Washington Trust Bank, as a secured creditor, held a security interest in Tenant's inventory, chattel paper, accounts, equipment, and general intangibles (CP 60).

As a priority lien holder, the IRS held a priority lien for unpaid taxes against all property owned by Tenant (CP 63).

On or around March 21, 2011, Landlord presented Tenant with a "Stipulation and Agreed Order on Eviction Complaint for Unlawful Detainer" (CP 53-56). This document stated in part, among other things, that

[Tenant] agrees to surrender the Property to [Landlord] together with all non-perishable inventory (specifically including all wine and other alcoholic beverages), restaurant equipment and trade fixtures. [Tenant] specifically recognizes [Landlord's] claim to a lien on such inventory, equipment and fixtures pursuant to RCW 60.72.010. [Tenant] also acknowledges the security interest of Washington Trust Bank in such property identified in this paragraph, and that Plaintiff and Washington Trust Bank will be negotiating in the future over the

disposition of such property. The IRS makes claim to this property as well.

(CP 54).

In May 2011, Tenant entered into a stipulation with Washington Trust Bank, wherein Washington Trust Bank was granted "possession of, and foreclosure on, [Tenant's] inventory, chattel paper, accounts, equipment, general intangibles, and fixtures, and an order that the same may be sold at a private sale pursuant to the Uniform Commercial Code, or at a sheriff's sale." (CP 59-60).

Subsequent to this stipulation and order, Washington Trust Bank chose not to foreclose against all collateral to which it held a secured interest, instead foreclosing only against Tenant's wine inventory and a minor portion of Tenant's personal property and inventory (CP 125).

Similarly, on or about June 13, 2011, the IRS also relinquished its rights under a priority lien to foreclose against the remaining fixtures, furnishings and equipment owned by Tenant (CP 125).

Landlord has since relet the premises to a new tenant (CP 70). Included in the rental agreement is a list of the furniture, inventory and property of Tenant as property belonging to the Landlord and available to be used by the new tenant (CP 94-96). The total equipment value, as evidenced by an attachment to the lease was approximately \$110,235.00 (CP 67). Under the lease to the new Tenant, the rent increased from

\$7,933.00 to \$10,000.00 per month with fixtures and equipment included (CP 71). The fixtures and equipment were converted by the Landlord from the Tenant. None of the lien holders foreclosed their liens against the fixtures and equipment (CP 117).

Tenant has requested Landlord credit the value of the personal property converted against the unpaid rent owed, and has likewise been refused (CP 68-69).

Landlord has brought an action against Tenant for sums of money owed under the terms of the lease (CP 1-3). Tenant disputes the amount due, as the Landlord has converted personal property belonging to the Tenant with a value that exceeds the amount of rent due under the lease (CP 68-69). The lease is oral, as the former Landlord did not assign the lease, which is the subject matter of this litigation, to Peyton Building, L.L.C.

Landlord filed for, and was granted, Summary Judgment against the Tenant and guarantors (CP 31-36, 140-141). In response, Tenant moved for reconsideration and was subsequently denied such request (CP 104-115, 149-152). Tenant has filed this appeal, along with the guarantors (CP 153-154).

#### IV. STANDARD OF REVIEW

The standard of review on appeal of a summary judgment order is *de novo*. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). The reviewing court performs the same inquiry as the trial court. *Id.* Summary judgment is appropriate only if the moving party shows that there is no genuine issue of material fact. CR 56(c); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 140, 960 P.2d 919 (1998). In performing its analysis, the reviewing Court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (citing *Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1972)).

#### V. ARGUMENT

**A. The amount of rent due and the value of the personal property retained are disputed by the parties involving Genuine Issues of Material Fact precluding summary judgment.**

As mentioned above, summary judgment is appropriate only if the moving party shows that there is no genuine issue of material fact. CR 56(c); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 140, 960 P.2d 919 (1998). A “material fact” is a fact upon which the outcome of the

litigation depends, in whole or in part. CR 56; *Barber v. Bankers Life & Casualty Co.*, 81 Wn.2d 140, 144, 500 P.2d 88 (1972).

In the present case, Landlord contends that the amount due under the lease is \$104,558.08 (CP 25). Tenant contends that the amount due under the lease is \$76,540.97, including commission and legal fees (CP 47, 68). This amount of \$76,540.97 is grossly overstated because there was no written lease between the Landlord and Tenant. The former Landlord never assigned the lease.

There is a dispute as to the amount of rent owed by the Tenant to the Landlord. This is a material issue of fact (CP 47).

Similarly, the value of the personal property retained by the Landlord under their claim of a landlord's lien is significantly different than the value determined by the Tenant. Specifically, Landlord stated that the personal property had "little value" (CP 125). However, the Landlord itemized and had appraised the value of the property belonging to Tenant at \$110,235.00 (CP 67-68). Tenant contends that the property, at \$110,235.00, has significant value and should be used to offset the unpaid rent due (CP 67-68). Landlord contends Tenant is estopped to claim any loss of personal property (CP 121-122). There is a disputed issue of fact as to the value of the personal property converted.

If there is no lease, except oral month-to-month, the Tenant would not be liable to the Landlord for real estate commission on releasing and other miscellaneous charges that were assessed and included in the Judgment (CP 25) (CP 156).

The amounts in contention are material facts vital to the outcome of litigation. As such, the trial court erred by granting summary judgment in favor of the Landlord.

**B. Landlord failed to obtain an Assignment of Lease from the original Lessor; therefore it did not have standing, to enforce the terms of the lease or the guarantee.**

While a new landlord is entitled to enforce the Tenant's covenant to pay rent for all rent that comes due after the sale of the premises, *see Roderick v. Swanson*, 6 Wash. 222, 33 P. 349 (1893), only those covenants that run with the land are enforceable by the new landlord as an assignee of the original lease. *Mullendore Theatres, Inc. v. Growth Realty Investors Co.*, 39 Wash. App. 64, 65, 691 P.2d 970 (1984).

Lease covenants are those that run with the land "touches or concern" the land. *Id.* For a covenant to touch or concern the land, it must be so related to the land as to enhance its value and confer a benefit upon it. *Id.* at 65. If it does not enhance the value of or confer a benefit upon the land, it is considered a collateral and personal obligation of the original Lessor. *Id.*

Although no Washington case directly addresses the issue as to whether all covenants bind the tenant and a subsequent grantee landlord, the Washington Practice Series suggests the following:

[t]o be sure that they will both be bound by all lease covenants, the grantee of the reversion and the tenant need to make a contractual agreement to be bound by all of them or, if they prefer, to enter into a new lease that contains all the provisions of the original lease.

17 Wash. Prac., Real Estate § 6.69 (2d ed.).

As one example, the Court in *Mullendore Theaters* held that a covenant to refund the security deposit did not bind a grantee landlord and did not run with the land. *Id.* at 67.

Landlord should have obtained a written assignment of the lease from Landlord's predecessor in title.

Civil Rule 17A provides:

. . . (a) REAL PARTY IN INTEREST.  
Every action shall be prosecuted in the name of the real party in interest.

Landlord, at the Summary Judgment Hearing, provided no proof of a written assignment of the Lease from Pacific Security Financial, Inc., a Washington corporation, to Peyton Building, L.L.C., a Washington Limited Liability Company. RCW 4.08.080 requires an assignment where the fact of an assignment is put in issue. Proof of the assignment is

essential to a recovery by the Assignee. The burden of proof of the assignment is on the one claiming to be the Assignee. *Unifund CCR Partners v. Sunde*, 163 Wn.App 473, 260 P3d 915 (2011). Here the assignment was put in issue (CP 38).

The aforesaid statute requires an assignment to be in writing in order to bring suit in the Assignee's name. *MRC Receivables Corp. vs. Zion*, 152 Wn.App 625, 218 P.3d 621, publishing at 151 Wn. App 1023 (2009) precluded a summary judgment in a collection action against a credit card holder for an unpaid debt without proof of written assignment of the debt. In these proceedings the Tenant specifically pleaded that there was no privity of contract between the Landlord and the Tenant (CP 38).

The Landlord has no standing in bringing the action, nor has it pleaded any assignment, and consequently, it is not entitled to recover against the Tenant and the Guarantors.

**C. The Landlord cannot require the Personal Guarantors under the original lease, to guaranty the outstanding debt as the covenant does not run with the land.**

The Trial Court entered judgment against the Guarantors (CP 56). This involves Issue No. 4. The original lease was between Pacific Securities Financial, Inc., a Washington corporation, as Lessor, and Niko's Gourmet, Inc., a Washington corporation, as Lessee (CP 6-23). When the present Landlord purchased the building between 2003 and 2004, it did

not enter into a subsequent agreement with the Tenant to be bound by the provisions of the previous lease; nor did the Landlord request the Tenant to enter into a new lease containing the same or any altered provisions of the original lease (CP 124).

Tenant argues that the Guaranty provisions within the lease do not touch and concern the land and therefore do not extend to a new assignee of the Lessor absent a written agreement or new lease entered between the parties.

A guaranty is governed by terms of contract. *Wash. Mach. & Supply Co. v. Zucker*, 19 Wn.2d 377, 143 P.2d 294 (1943). *Wilson Court Ltd v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 5909 (1998). The terms of the contract are strictly construed. *Rawleigh Co. v. Langeland*, 145 W 525, 261 P. 93 (1927). There was no contract between Peyton Building, L.L.C. and the Guarantors, Laith Elaimy and wife.

Paragraph 40 of the Lease, which is the subject matter of this litigation, reads as follows:

CONTINUING UNLIMITED  
GUARANTEE.

Laith Elaimy and Abir Elaimy, husband and wife, jointly and severally (“Guarantor”) absolutely and unconditionally guarantee and promise to pay all amounts due by the

Lessee under this Lease, on the terms and conditions set forth in this lease (CP 18).

Paragraph 41 of the Lease deals with nature of the guarantee (CP 18). That paragraph says that the guarantor's liability under the guarantee shall be open and continuous for as long as the lease is unpaid. Paragraph 42 is the guarantor's representations and warranties (CP 18). Paragraph 43 deals with guarantor's waivers (CP 18). The lease with Pacific Security Financial expired when it sold the premises to Peyton Building, L.L.C. as it was never assigned to the Landlord.

The lease does not provide that the guarantors extend to any successor in interest to the Lessor's interest (CP 18-19). The guarantee only extends to "Pacific Security Financial, Inc." CP 18-19). The Landlord's successor, Peyton Building, LLC, is not a party to the lease, nor the guarantee agreement contained in the lease (CP 6). The amount of guarantor's liability is controlled by contract.

As pointed out in *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 135 P.2d 95 (1943):

A contract of guarantee, being a collateral engagement for the performance of an undertaking of another, imports the existence of two different obligations, one being that of the principal debtor and the other that of the Guarantor. If a primary or principal obligation does not exist, there

cannot be a contract of guarantee. 'To constitute a guarantee, there must be a principal debtor or obligor'. Without a principal debt, there can be no guarantee.

*Id.* at 255.

Here, since the lease no longer existed, there could be no principal debt, and there can be no guarantee.

Here since there is no Pacific Security Financial, Inc. involved, there can no longer be a guarantee. Further, there was no assignment of the Pacific Security Financial, Inc.'s lease to Peyton Building, L.L.C., so there is no privity of agreement or contract between the present Landlord and the guarantors.

*Robey* was again quoted in *Freestone Capital v. MKA Real Estate*, 155 Wn. App. 643, 230 P.3d 625 (2010). The Court said:

The guarantors correctly argue that a guarantee is a separate legal undertaking from the principal obligors undertaking on a note. *Robey v. Walton Lumber Co.*, . . .

*Id.* at 660.

Since Peyton Building, L.L.C. is not a party to the lease agreement as the successor Landlord, it is not in a position to sue the guarantors. The judgment against Laith and Abir Elaimy and the marital community should be reversed and they should be dismissed with prejudice and be awarded their attorney's fees and costs independent from any decision as to the Tenant.

**D. Landlord has failed to comply with the statutory requirements of a Landlord's Lien.**

This argument addresses Assignments of Error Nos. 1, 2 and Issue No. 4.

Landlord's Liens are defined as "a statutory lien on a tenant's personal property at the leased premises in favor of a landlord who received preferred-creditor status on the property. Such a lien usually secures the payment of overdue rent or compensation for damages to the premises." BLACK'S LAW DICTIONARY (9th ed. 2009), Lien.

Washington Courts have defined Landlord's Liens as "creature[s] of statute" that are not recognized under common law. *See e.g. Sixpine Leaseholders v. Seattle Recreation Co.*, 171 Wash. 139, 145, 18 P.2d 12 (1933) (Stating that "[i]n the absence of statutory authority, a landlord would have no lien for rent upon any property of his tenant.") As such, Landlord's Lien statutes are strictly interpreted against the landlord claiming the lien. *Paris American Corp. v. McCausland*, 52 Wn. App. 434, 440, 759 P.2d 1210 (Div. II, 1988). In order to claim the benefits of a Landlord's Lien, the Landlord or its assignee must demonstrate that they have strictly complied with the statute. *Id.*

Governance of the Landlord's Lien is found under RCW chapter 60.72. RCW 60.72.010 defines how the lien is created, its priority in relation to other liens, the extent to which it is allowed, and discusses a number of exceptions to the lien. In Washington the lien is restricted to two months rent due.

With regards to its creation, RCW 60.72.010 states

[a]ny person to whom rent may be due, his or her executors, administrators, or assigns, shall have a lien for such rent upon personal property which has been used or kept on the rented premises by the tenant . . . Such lien shall not be for more than two months rent due. . . . No writing or recording shall be necessary to create such lien . . . (emphasis added)

It is not necessary for a Landlord to assert a lien claim or provide a record or writing to perfect such a lien when a valid lease has been created and the Tenant subsequently has not paid the Landlord (or one of its successors-in-interest) rent owed under the lease. *Id.*

In order to Claim a Landlord's Lien, a Landlord must, immediately after taking possession of the personal property, commence a lien foreclosure. *Paris American Corp.* 52 Wn.App. at 440, 759 P.2d 1210.

In *Paris American Corp.*, the Defendant Landlord had notified the Tenant that it was in default on the lease agreement because it had failed

to make the required monthly lease payments. *Id.* At 436. The Seller, Paris American Corp., had sold equipment to the Tenant, which equipment was secured by a properly filed security agreement. *Id.* One month after the Landlord notified the Tenant it was in default, the Defendant Landlord informed the Tenant it was asserting a landlord's lien on all the personal property located on the leased premises and that they would be conducting a sale of "the property" at a time and place to be determined, unless "other arrangements" were made. *Id.*

Just under three months after the notice was sent, the Landlord leased the premises to a new tenant. *Id.* at 436-37. The Seller, Paris American Corp., attempted to assert its security interest in the equipment, which was still located on the premises and were prevented by the Landlord. *Id.* at 437.

Six weeks later, the Landlord sent a general notice of public sale of personal property to the Seller, Paris American Corp., who commenced an action for conversion and trespass to chattels. *Id.*

The trial court granted summary judgment in favor of the Landlord concluding that it had a valid landlord's lien for two months rent. *Id.* The Court of Appeals reversed, holding that the Landlord's lien had expired

because it had failed to bring the action within two months of default as required under the statute. *Id.* at 436.

In these proceedings Peyton Building, L.L.C., the Successor Landlord, took possession of the personal property under a Stipulation and Agreed Order that read as follows:

6. Disposition of Inventory, Equipment and Personal Property on Property. Defendant agrees to surrender the property to Plaintiff, together with all nonperishable inventory (specifically including all wine and other alcoholic beverages), restaurant equipment and trade fixtures. Defendant specifically recognizes Plaintiff's claim to a lien on such inventory, equipment and fixtures pursuant to RCW 60.72.010. Defendant also acknowledges the security interest of Washington Trust Bank in such property identified in this paragraph, and that Plaintiff and Washington Trust Bank will be negotiating in the future over disposition of such property. The IRS makes claim to this property as well. (emphasis added)

(CP 54).

In the Stipulation the parties recognized and acknowledged the Landlord's Lien (CP 54). Peyton Building, L.L.C. had the duty and obligation under RCW 60.72.040 to foreclose the lien. It did not foreclose the lien (CP 120). Landlord admits it did not foreclose the lien (CP 120). The Tenant was entitled to credit of two months rent, if and when the personal property was foreclosed and sold at a public sale. Any overage

after credit of two months rent would either have to apply to the unpaid rent, or be paid over to the Tenant. This was not done, as the Landlord converted all the personal property and included it in the new lease to a new tenant. Tenant received no credit for the converted personal property on the unpaid rent (CP 68). The Landlord appropriated and converted all Tenant's personal property (CP 117).

Peyton Building, L.L.C. in its Amended Complaint, sought to foreclose the Landlord's Lien under Paragraph 7 (CP 3). This paragraph reads as follows:

7. Enforcement/Foreclosure of Landlord's Lien. Pursuant to RCW 60.72.010, Plaintiff has a lien on all personal property remaining on the premises. Pursuant to RCW 60.72.040, said lien may be foreclosed pursuant to Chapter RCW 60.10. Washington Trust Bank has also claimed a security interest in said property. Plaintiff therefore requests the Court to issue a Decree of Foreclosure on the Landlord's Lien held by Plaintiff, and to declare therein the respective rights of Plaintiff and Washington Trust in the property pursuant to RCW 60.72.010, as well as determining any other possessory or equitable means held by the Plaintiff in the property by virtue of its expenditures securing and protecting the property.

(CP 3).

RCW 60.72.040 provides for foreclosure of a lien. A lien may be foreclosed as provided in Chapter RCW 60.10. Here, Peyton Building,

L.L.C. never foreclosed the Landlord's Lien (CP 120). Washington Trust Bank and the IRS did not foreclose their liens (CP 51, 60, 62). Peyton Building, L.L.C. converted the personal property without foreclosing the Landlord's Lien, and is liable for conversion. The property was appraised by an appraisal firm for \$110,235.00 (CP 68). Since the value of the fixtures and equipment is certain, judgment should be entered against Peyton Building, L.L.C. for \$110,235.00 for the conversion.

Landlord is confused. Surrendering possession of the personal property by this Tenant does not constitute surrendering ownership. The Tenant here surrendered possession of the personal property, but did not surrender title. Landlord's Complaint seeking to foreclose Landlord's Lien acknowledges that title did not pass to Landlord. The foreclosure was never completed, merely alleged (CP 120).

**E. Landlord's failure to comply with the statutory requirements of the Landlord's Lien resulted in Landlord's conversion of Tenant's personal property.**

This assignment involves Assignments of Error No. 1 and No. 2, and Issue No. 5. "A conversion is a willful interference with a chattel without lawful justification whereby a person entitled thereto is deprived of the possession of it." *Paris American Corp. v. McCausland*, 52 Wn. App. at 443 (quoting *Olin v. Goehler*, 39 Wn. App. 688, 693, 694 P.2d

1129, *review denied*, 103 Wn.2d 1036 (1985)). Intent is not a necessary factor of conversion, and good faith cannot be used as a defense. *Paris American Corp.* 52 Wn. App. at 443 (citing *Clapp v. Johnson*, 186 Wn. 327, 57 P.2d 1235 (1936)). Landlord here did not foreclose its lien for two months rent (CP 3), even though it alleged and prayed for a foreclosure in the amended Complaint (CP 3)(CP 120).

It is only when a valid dispute exists concerning the claims to personal property that possession can lawfully be denied until the identity of the rightful claimant is found. *Paris American Corp.* 52 Wn.App. at 444. However, a party claiming an interest in property is not justified in withholding the property for an unreasonable amount of time in order to enforce its own interests in the property. *Id.* A party who does such act risks becoming a converter of any property if it is determined that the party's claim is inadequate. *Id.*

This was precisely the case in *Kohout v. Brooks*, 185 Wash. 4, 9, 52 P.2d 905 (1935). The landlord was owed unpaid rent and had refused to surrender the possession of the tenant's personal property unless the entire delinquent amount was paid. The Supreme Court affirmed the trial court's finding that the landlord could not assert a claim on personal property for more than two months rent as prescribed by statute. *Id.* at 10-

11. By retaining the entire property retained by the tenant, the landlord had exercised a wrongful conversion of the tenant's property. *Id.* at 11.

Similarly, in *Paris American Corp.*, the landlord withheld the tenant's personal property for a period much longer than was necessary to determine whether a security interest was created on the property. 52 Wn.App. at 444. As such, the Court of Appeals held that the property had been converted by the landlord and damages were assessed. *Id.*

In the present case, the Stipulation and Agreed Order on Eviction Complaint for Unlawful Detainer entered into between the parties states "Defendant specifically recognized Plaintiff's claim to a lien on such inventory, equipment and fixtures pursuant to RCW 60.72.010" (CP 54). However, Landlord failed to properly foreclose against the Tenant's personal property as required under RCW 60.72.010 (CP 3, 120). This failure to foreclose as required by the statute resulted in the Landlord converting the personal property of the Tenant.

RCW 60.72.010 provides for a landlord's lien against the personal property of a defaulting tenant to the extent of two months rent. At the time the stipulation was entered into, the rental amount owed by Tenant was \$7,933.00 per month (CP 53). Thus, Plaintiff is entitled to a lien claim against the personal property of \$15,866.00. The personal property

retained by Plaintiff had an approximate value of \$110,235.00 (CP 68). Landlord's right to retain the remaining approximate \$95,000.00 of personal property without crediting Tenant the amount of the property retained, will result in a windfall to the Landlord. Tenant respectfully requests this Court deny such an inequitable result and relief to the Landlord. Tenant is entitled to offset for the value of its property that was converted. The Summary Judgment should be reversed

**F. Personal Property kept in excess of two months rent is conversion of Defendant's personal property.**

In *Paris American Corp.*, the court held one cannot hold personal property with a value exceeding a landlord's lien claim of lien for two months unpaid rent, even if more than two months is owed. A claim in excess would constitute conversion. 52 Wn.App. at 444. It is pointed out in *Paris American Corp.*, you cannot retain possession any longer than is necessary to determine identity and foreclosure.

Landlord, in its Amended Complaint, sought foreclosure of the Landlord's Lien, but did not complete the foreclosure (CP 3). This position by the Landlord is inconsistent with Landlord's position now that the Tenant surrendered title to all the personal property to the Landlord. Landlord bypassed the foreclosure proceedings and converted all of

Tenant's fixtures and equipment valued substantially in excess of two months rent. In the end, the Tenant did not receive two months rent credit, nor did he receive any credit for the personal property, which had a value of over \$100,000.00 (CP 68). The Landlord was unjustly enriched.

A claim of unjust enrichment has three elements:

- (1) A benefit conferred on the Defendant by Plaintiff,
- (2) An appreciation or knowledge by the Defendant of the benefit, and
- (3) The acceptance or retention by Defendant of the benefit under such circumstances to make it inequitable for Defendant to retain the benefit without payment of its value. *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008).

Here there is no question that the Landlord acquired over \$100,000.00 of fixtures and equipment and did not credit the Tenant towards the unpaid rent, nor did it foreclose its Landlord's Lien (CP 68). The Landlord allowed no credit towards the fixtures and equipment it converted (CP 155-156). The Tenant had no lease with Landlord, as it was never assigned to Peyton Building, L.L.C. The Landlord had an oral month-to-month tenancy. Landlord was unjustly enriched.

*Young* provided the standard of recovery for unjust enrichment by stating:

Washington law states the measure of recovery for unjust enrichment to a faultless claimant where the claimant's improvements to land are measured in one of two ways. It may be measured 'by the amount which the benefit conferred would have cost the Defendant had it obtained the benefit from some other person in Plaintiff's position.'

*Id.*

Here Tenant is entitled to the reasonable fair market value of the personal property converted. The appraisal value represents the fair market value of the property converted, which is the sum of \$110,235.00 (CP 68). The value of the personal property was disputed and held as a matter of law that the Tenant's personal property was converted. The value of property converted should be determined on retrial. The Appellant Court should reverse the summary judgment and hold as a matter of law that the personal property was converted leaving the only issue the value thereof.

## VI. MOTION FOR ATTORNEY'S FEES

Niko's Gourmet, Inc., a Washington corporation, and Laith and Abir Elaimy, move the Court for reasonable attorney's fees in the lower Court, as well as in the Court of Appeals.

The invalid lease that existed between Pacific Security Financial, Inc., a Washington corporation, and Niko's Gourmet Restaurant, Inc., at Paragraph 25, provided for either Lessor or Lessee to recover attorney's fees, whichever party prevailed. Even though the lease was invalid and unenforceable, it provides the basis for reasonable attorney's fees under the ruling of *Stryken v. Panell*, 66 Wn. App. 566, 832 P.2d 890 (1992).

Under RCW 4.84.330, the prevailing party is entitled to reasonable attorneys' fees and costs. Washington Law also provides that contractual provisions for award of attorney's fees support award of attorney's fees on appeal. *Reeves v. McClain*, 56 Wn. App. 301, 783 P.2d 606 (1989).

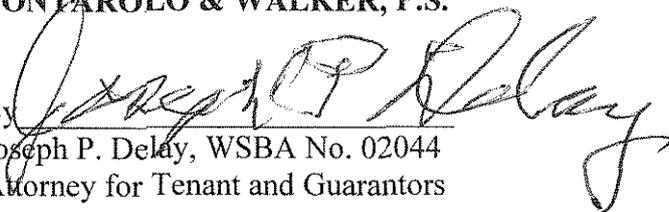
## VII. CONCLUSION

Niko's Gourmet, Inc., a Washington corporation, and Guarantors, Laith and Abir Elaimy, seek a reversal of the Trial Court's Summary Judgment (CP 155-156). This Court should make a finding that Peyton Building, L.L.C. converted the Tenant's furniture and fixtures and the amount thereof be an offset against the rent. The Tenant should be awarded judgment, reasonable attorney's fees incurred in the Lower Court, and attorney's fees incurred on appeal, pursuant to an Affidavit to be filed under RAP 18.1(d). The guarantors should be dismissed with prejudice and be awarded their attorney's fees.

Dated this 7<sup>th</sup> day of June, 2012.

Respectfully Submitted.

**DELAY, CURRAN, THOMPSON,  
PONTAROLO & WALKER, P.S.**

By   
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Attorney for Tenant and Guarantors

**FILED**

**JUN 08 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 308405

Spokane County Superior Court Cause No. 11-2- 01768-5

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PEYTON BUILDING, LLC,  
a Washington Limited Liability Corporation

Respondent,

v.

NIKO'S GOURMET, INC., A Washington corporation;  
LAITH and ABIR ELAIMY, a marital community,

Appellants.

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AFFIDAVIT OF MAILING  
APPELLANTS' OPENING' BRIEF

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