

No. 330613

FILED

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

JAN 27 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

KPS MANAGEMENT,

Appellant,

v.

EDWARD ESIWILY AND EUKENIO ESWINI,

Respondents.

**RESPONDENT ESIWILY'S RESPONSE TO APPELLANT'S BRIEF
SEEKING REVERSAL OF THE SUPERIOR COURT ORDER
AWARDING RESPONDENT ATTORNEY'S FEES**

Barry Pfundt, WSBA #41686
Center for Justice
35 W. Main, Ste. 300
Spokane, WA 99201
509-835-5211
University Legal Assistance
PO Box 3528
Spokane, WA 99220
509-313-5791
Attorney for Respondent Esiwily

TABLE OF CONTENTS

I. STATEMENT OF THE CASE1

II. ARGUMENT.....3

**A. APPEAL IS LIMITED TO THE REASONABLENESS OF THE
ATTORNEY FEE AWARD 3**

**B. ALTERNATIVELY, RESPONDENTS ARE THE PREVAILING
PARTY 3**

**C. THE TRIAL COURT WAS REASONABLE IN AWARDING
RESPONDENT \$12,820.00 IN ATTORNEY’S FEES.....6**

D. REQUEST FOR REASONABLE ATTORNEY FEES ON REVIEW11

III. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Angelo Prop. Co., LP v. Hafiz, 167 Wn.App. 789, 808, 274 P.3d 1075 (2012) 4

Dahl v. Gillespie, 172 Wn. App. 1021 (2012)..... 4

Hafiz, 167 Wn. App at 807, 274 P.3d 1075, 1084..... 7

Hall v. Feigenbaum, 178 Wn. 2d. 811, 823 review denied, 180 Wn.2d. 1018 (2014)..... 7

Hawkins v. Diel, 166 Wn. App. 1 (2011) 5

Hous. Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 371(2011)..... 7

Josephinium Assocs. V. Kahli, 111 Wn.App. 617, 626 (2002)..... 6

Kelsey v. Kelsey, 179 Wn. App. 360, 370 (2014) review denied, 180 Wn.2d 1017 (2014) 3

Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 669 (2010)..... 6

Scott Fetzer Co. v. Weeks, 122 Wn. 2d 141, 151 (1993).....11

Statutes

RCW 2.43.060 10

RCW 4.84.330 12

RCW 59.12.030 4

Rules

ER 408 8

RAP 18.111

RAP 2.2(a)(1)..... 3

I. STATEMENT OF THE CASE

This memorandum is in response to Appellant's brief seeking reversal of the Superior Court Order award of attorney fees.

Defendants Edward Esiwily and Eukenio Esiwini (Respondents), signed a Lease Agreement with Kaley Property Services, Inc. (Appellant) on March 5, 2014. CP 32, Findings of Fact, p. 2, ¶1. Appellant signed Housing Assistance Payment (HAP) contract with the Spokane Housing Authority (SHA) to pay a majority of Respondent's rent. CP 32, Findings of Fact, p. 3, ¶2. Respondent Esiwily's protective payee, Goodwill Industries, was responsible for paying the balance of any rent owing. CP 32, Findings of Fact, p. 3, ¶3.

Due to the actions of the Appellant, both SHA and Goodwill Industries stopped making rent payments. CP 32, Conclusions of Law, p. 5, ¶2. Appellant then served a Three-Day Notice to Pay Rent or Vacate, which was immediately followed by the filing of an unlawful detainer against Respondents based solely on nonpayment of rent. CP 1.

The Court appointed Barry Pfundt of the Center for Justice to represent Respondent Esiwily, due to the fact that he is severely disabled. CP 7. Mr. Pfundt immediately sent a request for reasonable accommodation to the Appellant, requesting that the Appellant accept full payment of the amount of rent owed, dismiss the unlawful detainer, and

allow the Respondents to remain in their home. CP P5. Appellant denied the request and refused to dismiss the unlawful detainer. CP 21.

The parties mutually agreed to two continuances of the show cause hearing in an attempt to reach settlement. CP 6, CP 8. On August 18, 2014, Appellant was faxed a letter from Dave Scott stating that the Spokane Housing Authority would provide rent and back pay if the Respondents were allowed to remain in their home. CP D107, CP 41. Appellant decided to proceed with the unlawful detainer action. CP 21.

On September 3, 2014, the Spokane County Superior Court denied Appellant a Writ of Restitution. CP 23. Furthermore, on October 21, 2014 the Court filed an Order stating that Respondents were entitled to remain in the apartment, that all claims were adjudicated and resolved, and inviting the Respondents to submit a request for attorney fees. CP 32. On December 19, 2014, the Court entered an Order awarding said fees. CP 45.

The Appellant filed a Notice of Appeal for all three of these Orders on January 5, 2015. This Court found that the appeal of the September 3 and October 21 Orders were untimely, a decision that was upheld on review. (Commissioner's Ruling and Notice of Decision). The last issue before the Court is the reasonableness of the Superior Court's Order regarding fees.

II. ARGUMENT

A. APPEAL IS LIMITED TO THE REASONABLENESS OF THE ATTORNEY FEE AWARD

Appellant appears to be contesting the Order assigning attorney's fees, not just the reasonableness of the fee award.

A subsequent appeal does not revive an untimely appeal of final judgment. *Kelsey v. Kelsey*, 179 Wn. App. 360, 370 (2014) review denied, 180 Wn.2d 1017 (2014). Here, the September 3, 2014 and October 21, 2014 Court Orders denying a Writ of Restitution and granting attorney's fees constituted a final judgment in this case. (Commissioner's Ruling Upheld on Review)

Appellant is barred from appealing the assignment of attorney's fees, as that judgment was rendered final on October 21, 2014 and upheld by this court. *Id.* Therefore, the Appellant may only contest the reasonableness of the fee award. RAP 2.2(a)(1).

B. ALTERNATIVELY, RESPONDENTS ARE THE PREVAILING PARTY

According to the Appellant, neither party is entitled to attorney's fees because there was no singularly prevailing party. The Appellant contends that he partially prevailed, because he was ordered to accept rental payments.

The Appellant brought an unlawful detainer action against the Respondents. CP 1. The purpose of an unlawful detainer is to regain possession. *Dahl v. Gillespie*, 172 Wn. App. 1021 (2012) (citing *Angelo Prop. Co., LP v. Hafiz*, 167 Wn.App. 789, 808, 274 P.3d 1075 (2012) (“An unlawful detainer action under RCW 59.12.030 is a summary proceeding designed to facilitate the recovery of possession of leased property; the primary issue for the trial court to resolve is the ‘right to possession’ as between a landlord and a tenant.”). Judge O’Connor herself stated, “[t]his is only an unlawful detainer action for possession. That is all I am going to deal with.” RP p. 12, ln. 14.

The Appellant was denied the Writ of Restitution, the Respondents were granted possession, and the case against the Respondents has been dismissed. CP 32. The Respondents obtained the exact result they were seeking in a letter sent to the Appellant immediately following the appointment of defense counsel, in which Respondents requested to be allowed to pay rent and remain in their home. CP P5. Rent was again offered on August 18, 2014, this time by the Spokane Housing Authority. CP D107, CP 41. On that date, Appellant’s attorney received a fax, in which David Scott stated that the housing authority would pay the Respondent’s back rent provided he was able to keep possession of the

unit. *Id.* Instead the Appellants opted to proceed with the unlawful detainer action.

In the end, the result was even more beneficial to the Respondents than they had requested. The judge reduced the total amount the Appellant was requesting by removing late fees and other charges that had been unlawfully added as “rent.” CP 32.

It is also important to note that the Court specifically ordered that the Appellant “shall accept payment.” CP 23. This wording acknowledges the fact that the Respondent had offered payment, and the Appellant refused to accept it until he was ordered to do so. It is an odd interpretation of the facts that leads the Appellant to claim that he is a prevailing party in this action.

Alternatively, if it is established that the Appellant prevailed in some way, the Respondent should still be entitled to attorney’s fees, because he is the substantially prevailing party. “The substantially prevailing party in an action on a contract or lease need not prevail on his or her entire claim, in order to be entitled to an award of attorney fees.” *Hawkins v. Diel*, 166 Wn. App. 1 (2011).

The Respondent acknowledged that rent was owed and received the final judgment they were seeking from the beginning of this case. CP P5. They also avoided homelessness and the loss of their housing voucher.

Given that counterclaims are not allowed in an unlawful detainer action (See, *Josephinium Assocs. V. Kahli*, 111 Wn.App. 617, 626 (2002)), it is difficult to imagine what else the Court could have awarded the Respondents.

C. THE TRIAL COURT WAS REASONABLE IN AWARDING RESPONDENT \$12,820.00 IN ATTORNEY'S FEES.

The Appellant contends that the trial court abused its discretion in awarding the Respondent attorney's fees.

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take. A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 669 (2010).

The Appellant correctly explains that Washington courts have adopted the lodestar methodology to assess reasonable attorney's fees. However, Appellant contends that Judge O'Connor erred in the application of the lodestar methodology. Specifically, Appellant contends that the Respondent was granted attorney fees for unproductive time, mistakes, and unsuccessful and improper claims.

Appellant starts his argument by stating that this was a simple unlawful detainer that should have cost no more than \$850 to \$1,000 including costs – *nothing* in the record supports this assertion; there are no declarations, no testimony, no cases, no evidence at all that supports this statement, but the Appellant continues to repeat this assertion citing only his own brief as authority. Appellant’s Brief p. 10, paragraph 2.

In reality, unlawful detainer actions are no different than other cases and Washington courts have granted a range of fee awards. *Hall v. Feigenbaum*, 178 Wn. 2d. 811, 823 review denied, 180 Wn.2d. 1018 (2014) (awarding costs and attorney’s fees of \$43,000 for an unlawful detainer action); *Hafiz*, 167 Wn. App at 807, 274 P.3d 1075, 1084 (awarding costs and attorney’s fees of \$134,876.05 for an unlawful detainer action); *Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. 367, 371(2011) (awarding costs and attorney’s fees totaling \$8,574.77 for an unlawful detainer action). Each case has its own unique set of facts and circumstances that justify such an award, this case is no exception.

The circumstances in this case were unusual, and posed novel and difficult issues of law and fact. Judge O’Connor was conscious of this, and in her order, she stated:

The issues addressed at the hearing were different than the usual unlawful detainer hearing because part of the rent was being paid by the Spokane Housing Authority and part by Goodwill Industries on behalf of the tenant. When the

Plaintiff served the three day notice to Quit or Pay rent on the Defendant and notified the SHA of this fact, SHA and GI ceased paying the rent. This circular problem was ultimately resolved but it took three hearings, including a substantial hearing in my court and an Order, to do it. (CP 45, p. 3, ¶1)

The Appellant's next argument concerning the appropriateness of the fee award relies on the repetition of his tired and factually incorrect allegations of bad faith during settlement negotiations. The Appellant's only support for these accusations is the assertion that the Respondent did not bill for negotiations so there must not have been any. Respondent has refrained from bickering over the nature of settlement negotiations because the Court has no more reason to accept Respondent's version of events than the tale being told by the Appellant, and also in no small part because "[e]vidence of conduct or statements made in compromise negotiations [are] not admissible." ER 408.

The facts speak for themselves: both continuances prior to the first hearing were *mutually agreed* to by the parties; and less than two weeks after Mr. Pfundt was appointed as defense counsel he had successfully overturned the termination of Respondents' Section 8 housing benefits, and the housing authority stated in writing that they would pay rent to the Appellant if Respondents were allowed to stay in their home. (CP D107) That should have been the end of this case, but Appellant refused to dismiss and opted instead to seek a Writ of Restitution.

The Appellant's next argument relies on the fabrication of the events that occurred on August 20, 2014, again without citing any record or authority substantiating his version of events. At the first of two hearings held on August 20th, the Respondents, a family member to provide translation, and the Respondents' witnesses were all present and prepared to proceed. CP 36, ¶4. The only person present for the Appellant was legal counsel, Mr. Frank King. *Id.* A representative for the Appellant did not show up until several minutes into the hearing. *Id.* During the hearing, Respondent provided an offer of proof in the form of documents from the City of Spokane Public Defender's Office. *Id.* Judge Linda Tompkins disclosed a connection to the PD's office, and Appellant requested that the judge recuse herself. *Id.*

Next, the Appellant has the temerity to blame Respondent for delays in the second hearing on that same day. It was the Respondent that sought to immediately set this matter before another judge, while the Appellant was in no hurry to proceed. CP 43, ¶3.

The matter was set before Judge James Triplet and issues regarding the need for translation immediately arose. CP 36, ¶5. The Appellant assigns blame for the lack of an interpreter on the Respondent; however, he fails to mention that Chuukese is not a "certified language" and at the time of the hearing there were no Chuukese interpreters with proper

certification in Spokane. RP, pp. 4-6. Again, Respondents were present at the hearing ready to proceed with witnesses and a family member to translate. CP 36, ¶5. Respondent Esiwily even offered to waive his right to an interpreter in accordance with RCW 2.43.060. *Id.* However, Judge Triplet was concerned about Co-Defendant Mr. Esiwini, who was not represented by counsel. *Id.* Judge Triplet declined to allow the hearing to proceed without a translator and offered to make arrangements to have one available for a future hearing. *Id.* The truth is that the Appellant, rather than take responsibility for the fact that he knew or should have known about the language barrier of the Respondents, his tenants, has chosen to blame defense counsel for the Appellant's own failure to make proper arrangements to move *his* case forward.

After accusing the Respondents of a failure to prepare, the Appellant next chooses to object to the Respondent spending too much time preparing for the third hearing. However, in reality, the court record states that Judge O'Connor *required* additional preparation, including an exhibit list, witness list, and requests for additional briefing. It would have been malpractice to not spend the time necessary on what was to be essentially a trial of the case.

Finally, the Appellant contends is that the trial court erred in failing to discount hours pertaining to unsuccessful theories or

claims. In support of this argument the Appellant cites *Scott Fetzer Co. v. Weeks*, 122 Wn. 2d 141, 151 (1993), which states that "[t]he court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time."

Appellant fails to acknowledge that Respondent did discount legal services, including *all* time expended drafting a proposed order that did not meet Judge O'Connor's requirements. CP 24. Judge O'Connor's Order for Reasonable Attorney's Fees recognizes this and states, "I find that, with the deductions made by Mr. Pfundt, the number of hours expended on this case was reasonable." CP 30.

Judge O'Connor complied with the guidelines set forth in the lodestar analysis. She provided proper justification for the fee award, and the Appellant has provided no good argument that she abused her discretion in this matter. Therefore, the judgment of the Superior Court should be upheld.

D. REQUEST FOR REASONABLE ATTORNEY FEES ON REVIEW

If found to be the prevailing party, Respondent requests an award of attorney fees in accordance with RAP 18.1. When a lease provides for attorney fees for either party, the prevailing party, whether specified in the

lease or not, is entitled to reasonable attorney fees. RCW 4.84.330. The lease signed by the parties to this action states, "TENANT agrees to pay LANDLORD's costs, expenses and attorney fees in any action or proceeding arising out of any default or breach by TENANT of any terms of this agreement." [emphasis in original] CP P4, p. 4, paragraph 15.

III. CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court uphold the attorney fee award granted by the trial court and award additional attorney fees for responding to this appeal of the trial court's judgment and orders.

Dated this 27th day of January, 2016.

Respectfully submitted,

UNIVERSITY LEGAL ASSISTANCE

Genevieve Mann for
 #34968
BARRY PFUNDT, WSBA #41686
Attorney for Respondent, Esiwily