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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 338703-III

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

SUMMIT LEASING, INC., a Washington corporation,

Respondent,

vs.

**CHHATRALA EDES, LLC, a limited liability company;
SHIVA MANAGEMENT, INC., a corporation; ASHISH
PATEL, an individual; the marital community of ASHISH
PATEL & JANE DOES PATEL, husband and wife;
JENISH PATEL, an individual; and the marital community
of JENISH PATEL & JANE DOE PATEL,**

Appellants.

1st Amended Respondent's Response Brief

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I. INTRODUCTION

This appeal results from the Trial Court's granting of Summit Leasing, Inc.'s ("**Summit**") motion for summary judgment. This case is not a complex case and the facts are largely undisputed. The case ultimately turns on the question of whether an alleged party to a contract, who in its Answer to the Complaint (a) admits that the contract was signed; and (b) fails to raise any defense regarding its alleged lack of signature or make any mention of the same, can subsequently avoid summary judgment based solely on a self-serving, conclusory, and objectively unsupported declaration that does nothing but deny the party executed the contract when the self-serving declaration is contrary to all of the documentary evidence in the record?

The answer, to this question, with which the Trial Court agreed, is that this sort of blanket, unsupported denial that contradicts evidence in the record is not sufficient to overcome a contract plaintiff's prima facie case on summary judgment.

The Appellants, on the other hand, argue that a defendant in any contract action can always avoid summary judgment simply with a one sentence declaration stating "I did not sign the contract." In the Appellants' words, "[a]s a matter of common sense, a defendant who denies signing a contract creates an issue of fact as to the existence of the contract, rendering summary judgment inappropriate." Amended Opening Brief of Appellants at pg. 1.

Appellants' position falls apart when put under the slightest scrutiny and would lead to absurd results. For instance, even if (a) the signature of a contract defendant was notarized; (b) the notary submits a declaration stating she remembers the contract defendant signing in front of her; (c) a

handwriting expert gives a declaration stating the signature is that of the contract defendant; and (d) the mother of the contract defendant states that she personally saw her son sign the contract, summary judgment would not be proper as long as the contract defendant submits a one sentence declaration stating that he did not sign. While this example may be a little extreme, it is only a small step from the facts in this record and it shows the absurdity of the Appellants' position.

The Appellants' position would essentially destroy the use of CR 56 motion practice in contract disputes. Instead, a contract defendant could force all matters to a jury trial with a one sentence declaration regardless of the contrary evidence. This is ridiculous and is certainly not the law. The Court should uphold the order of the Trial Court.

II. RESTATEMENT OF THE ISSUE

1. Was the Trial Court's Order granting summary judgment in favor of Summit proper when the Appellants' only defense is a self-serving, contradictory denial that s/he signed the contract?

III. RESTATEMENT OF THE FACTS

3.1 Restatement of Facts - Background

The relevant facts of this case were largely undisputed at the Trial Court level. The underlying claims of Summit are based on a basic and straightforward contract which defines the rights of the parties. CP at 7-12 and CP at 31-36. The terms of the agreement were not fulfilled and Summit declared the entire balance due and payable. CP at 4-5 and CP at 30.

The Appellants have not disputed the terms of the Contract or the amounts that Summit is due and owing. Instead, the only issue raised by the Appellants is the claim that Ashish Patel (“**Ashish**”) did not sign the Contract in his personal capacity and that Jenish Patel was not authorized to execute the Contract on behalf of the corporate Appellants. CP 48-55. Despite this claim, the Appellants provided absolutely no documentary evidence to support their claim. Instead, the Appellants filed two declarations, one from Ashish and one from Hemant Chhatrala (“**Hemant**”). CP 56-58 and CP 59-62. The Declaration of Ashish is less than one page when the caption is removed and the Declaration of Hemant is less than two pages. Id. No tax returns, corporate resolutions, annual reports, minutes of meetings, or other documentation was provided by the Appellants. Instead, the Declarations assert in conclusory fashion that the Contract was not executed by the Appellants. Id.

According to the Appellants, Hemant is the president of Appellant Shiva Management, Inc. (“**Shiva**”) and is the managing member of Chhatrala Investments, LLC, which in turn is the managing member of Appellant Chhatrala Edes, LLC (“**Edes**”). CP 59-60. As the purported manager/officer of Shiva and Edes, Hemant would presumably have access to the corporate documents of Shiva and Edes. Despite this, Hemant chose not to produce any of this documentation. Instead, Hemant filed a declaration that amounts to nothing more than a bald denial.

Despite the refusal of the Appellants to present any documentary evidence, such evidence is substantial and is part of the record. Prior to entering into agreements and as part of Summit’s due diligence, Summit routinely does research on its potential borrowers. CP at 89. In this case, Summit’s research included obtaining documentation to determine not only the financial status of the Appellants, but the structure of the

corporate Appellants and authority of Jenish and Ashish to sign on behalf of the corporate Appellants. Id. As part of this research and due diligence into the Appellants, Summit was provided the following:

1. Resolution from Edes authorizing Jenish and Ashish Patel to execute the Contract on behalf of the LLC. CP at 38-39;
2. Resolution from Shiva authorizing Jenish and Ashish Patel to execute the Contract on behalf of the corporation. CP at 41-42;
3. Resolution dated November 20, 2012 from Shiva transferring ownership of Hemant, Ashivin Patel, and Shailesh Patel to Sarjan Patel, Jenish Patel, and Ashish. CP 95-96;
4. Resolution dated October 29, 2013 from Shiva transferring the ownership of Sarjan Patel to Jenish and Ashish. CP at 98-99;

5. Resolution dated October 29, 2013 from Edes showing that Jenish and Ashish Patel were granted full ownership of Edes. CP at 101-102;
6. A promotional packet produced by the parent company (Chhatrala Group) of Shiva and Edes which indicates that (a) the Chhatrala Group consists in part of Shiva and the Chhatrala Investments, LLC (who is the managing member of Edes); and (b) Jenish is the Chief Investment Officer for the Chhatrala Group and is responsible for all investment and acquisition activities. CP at 116 & 119;
7. Certificate of Liability Insurance from Shiva and Edes listing Jenish as the contact for the companies. CP at 127-132;

8. A copy of a cancelled check dated October 30, 2013 (two days before the date of the Contract) drawn on the account of Edes and executed by Jenish. CP at 134;
9. Print out from the CA Secretary of State on November 3, 2013 (two days before Summit executed the Contract) showing that Jenish was the registered agent of both Edes and Shiva. CP at 91 & 93.

In the face of this substantial objective and documentary evidence, the Appellants provide nothing other than their conclusory, self-serving statements that the Contract was not executed by them. Such blanket and bald assertions which are inconsistent with the objective evidence in the record are insufficient to overcome to raise a genuine issue of material fact.

3.2 Procedure of Case

In their Amended Opening Brief, Appellants start their procedural recitation of the facts at the moment Summit filed its summary judgment motion. Appellants' Amended Opening Brief at 5. This ignores critical aspects of the case – the joint representation of Appellants and Jenish and the Appellants' Answer.

Summit filed its Complaint with the Trial Court on October 29, 2014. CP at 3-16. The Complaint raised claims against Appellants, Edes, Shiva, and Ashish, but also against Jenish Patel, who is not a party to this appeal. Id. A Notice of Appearance dated February 9, 2015 was filed on behalf of all named Defendants (including Jenish) by the Appellants' current counsel. CP 17-19. Approximately two and one-half months later on April 22, 2015 all named Defendants (again including Jenish) filed Defendants' Answer to Plaintiff's Complaint with Defenses and/or Affirmative Defenses (“**Answer**”). CP 20-24.

With the Answer, no mention was made regarding the now purported forgery of the signatures by Jenish or the lack of authority of Jenish to sign the Contract on behalf of the corporate Appellants. See Id. In fact, the Answer did not attempt to raise any actual defenses. Instead, the “defenses and/or affirmative defenses” raised in the Answer were limited to the usual laundry list of affirmative defenses – i.e. failure to state a claim, insufficient service of process, etc. Id.

More importantly, the Answer admits that the Contract was signed by the Appellants. Id. at 21. Below is an allegation from the Complaint and a corresponding answer to the allegation contained in the Answer:

Complaint ¶ 3.2: On or about November 1, 2013, Defendants, as borrowers, entered into an equipment finance agreement, with agreement number E14795, with Summit for the purchase of certain commercial equipment. The equipment finance agreement may be referred to as the “Agreement.” A copy of the Agreement is attached hereto as **Exhibit 1** and is fully incorporated by this reference. The equipment subject to the Agreement is described in the section of the Agreement entitled “Collateral Description” (“Equipment”).

Answer ¶ 3.2: Admit the agreement attached as Exhibit 1 was signed, however, it was signed on October 30, 2013. As to the terms, the agreement speaks for itself. Any allegations not admitted herein are denied.

CP at 4 & CP at 21. Not only do the Appellants admit in the Answer that the agreement was signed, the Appellants actually claimed to know the date that the agreement was signed. CP at 21.

Based on the state of the record and the Answer of all of the Appellants, Summit filed a motion for summary judgment on May 20, 2015. CP at 25-28. The summary judgment motion and the supporting declaration was fairly basic and, given the lack of any actual defense raised in the Answer and the admission that the Contract was signed, sought to set out the prima facie case regarding the default and amounts due. See CP at 25-28 & CP 29-42.

After service of the summary judgment motion and supporting declaration on counsel for all named Defendants, counsel for the Appellants filed an Amended Notice of Appearance dated June 19, 2015. CP at 45-47. With the Amended Notice of Appearance, counsel for the Appellants sought to withdraw as counsel for Jenish Patel. Id.

The Appellants (now for the first time acting without Jenish), on or about July 10, 2015, filed their Response and Opposition to Motion for Summary Judgment (“**SJ Response**”). CP 48-55. With the SJ Response, the Appellants also filed the short and unsupported Declarations of Hemant and Ashish. CP 56-58 & CP 59-62. Despite the Complaint being filed in October of 2014, the Appellants appearing through counsel in February of 2015, and the Appellants filing an Answer in April of 2015, it is with the July 10, 2015 SJ Response that the Appellants decided to first raise the issue regarding the alleged (a) lack of authority of Jenish to sign for Shiva and Edes; and (b) lack of signature by Ashish. Id.

Despite the direct contradictions between the Answer and the SJ Response, the Appellants failed to amend or in any way modify the Answer. Instead, the Answer remains of record and the admissions of the Appellants in the same are binding.

Based on the record, the Trial Court entered an Order on Plaintiff's Motion for Summary Judgment and Judgment First Amended on October 19, 2015. CP at 159-168. The Appellants filed a notice of appeal on October 29, 2015. CP at 157-168.

IV. ARGUMENT

The Appellants want this case to be about only the authority or lack thereof of Jenish Patel to execute the Contract on behalf of the corporate Appellants. Although this may be an issue, it is not the first issue that needs to be determined. A threshold issue is whether the Appellants are bound by their admission in the Answer that the Contract in question was executed. CP at 21.

Only once this threshold issue is overcome by the Appellants do we get to the question of authority. Even if we get to the question of authority, the issue is incorrectly framed by the Appellants. Appellants ask the Court to ignore the

substantial, objective, documentary evidence of Jenish's authority established by the record. See Appellants' Amended Opening Brief. This is not appropriate.

Instead, the Court should look to all of the objective evidence in the file to determine if a genuine issue of material fact is raised on the issue of authority. In other words, first the Court must determine if the self-serving, unsupported declarations of Hemant and Ashish which contradict the objective evidence in the case are sufficient to raise a genuine factual issue. If the Court determines the declarations are insufficient, the issue of authority is answered by the substantial documentary evidence in the record.

4.1 Standard of Review

A decision of the trial court to grant or deny a summary judgment motion is reviewed de novo. Kofmehl v. Baseline Lake, LLC, 177 Wash.2d 584, 594, 305 P.3d 230 (2013). Summary judgment is appropriate where there is no material

issue of fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

A self-serving affidavit alone that contradicts the evidence in the record is not sufficient to raise a genuine issue of material fact preventing summary judgment. See Marshall v. AC & S., Inc., 56 Wash.App. 181, 185, 182 P.2d 1107 (1989). “Questions of fact may be determined on summary judgment as matter of law where reasonable minds could reach but one conclusion.” McKinney v. City of Tukwila, 103 Wn.App. 391, 395, 13 P.3d 631 (2000). Summary judgment is appropriate when reasonable persons would agree that the moving party is entitled to judgment as a matter of law. CR 56(c); Bulman v. Safeway, Inc., 144 Wn.2d 335, 351, 27 P.3d 1172 (2001).

In this case, after reviewing the objective and documentary evidence, reasonable minds could only reach one conclusion – that Contract was properly executed and Summit was entitled to summary judgment as a matter of law. The self-

serving, unsupported, blanket statements in the declarations of the Appellants were directly contradictory to both (a) the admissions of the Appellants in their Answer; and (b) the objective documentary evidence in the record.

4.2 The Appellants are Bound by the Admissions in their Answer.

All of the Appellants to this action filed an Answer to the Complaint. CP at 20-24. In answer to an affirmative allegation in the Complaint, the Appellants admitted that the Contract in question was signed on October 13, 2013. CP at 21. At no point did the Appellants file an amendment or modification of their Answer and at no time did Appellants seek Court approval to amend their Answer.

Admission and affirmative allegations in an answer to a complaint are binding on parties. Hudson et. ux. v. Pacific Trust & Tractor Co., 151 Wash. 46, 50, 274 P. 789 (1929). Admissions in an answer have the force of evidence. Brooks v.

Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir. 1937). Where a party's answer admits certain allegations in a complaint, evidence offered by the party contradicting such admissions is inadmissible. Goldwater v. Burnside et. al., 22 Wash. 215, 218, 60 P. 409 (1900).

With the Answer, Appellants admitted that the Contract in question was signed. CP at 21. Specifically, the Appellants state in their Answer that they “[a]dmit the agreement attached as Exhibit 1 was signed, however, it was signed on October 30, 2013.” Id. This Answer directly contradicted by the Appellants’ subsequent position on this appeal and in their response to summary judgment at the Trial Court level. Additionally, with the Answer, the Appellants did not raise any defense regarding Jenish’s lack of authority or Jenish’s purported forgery on the Contract. See Id. at 20-24.

The admissions in the Answer are binding on the Appellants and have the force of evidence. The short self-serving declarations of Hemant and Ashish (which are the only “evidence” presented by Appellants) are contrary to the Appellants’ admissions in the Answer and are insufficient to raise a genuine issue of material fact.

On this basis alone, the ruling of the Trial Court was proper and should be affirmed.

4.3 The objective evidence shows that the Contract was signed by a person with the requisite authority.

Even if we ignore the dispositive admissions by Appellants in the Answer, the objective evidence that either (a) was provided to Summit contemporaneously with the execution of the Contract; or (b) was public record with the State of California, Secretary of State Corporation’s Division, shows that Jenish not only had authority to bind the corporate Appellants, but that Jenish was actually an owner of both Edes

and Shiva at the time of the Agreements.

This objective evidence, directly contradicts the bald, self-serving declarations of Hemant and Ashish. As such the declarations are insufficient to raise a genuine issue of material fact to prevent summary judgment. See Marshall v. AC & S., Inc., 56 Wash.App. 181, 185, 182 P.2d 1107 (1989).

a. Corporate documentation with the Secretary of State.

As is typical in commercial financing transactions, Summit routinely does research on the potential borrowers as part of its due diligence. CP at 89. Part of this research involves a representative of Summit researching the applicable State corporation's division regarding the current status of the potential corporate borrowers. Id. The results of any such research are performed in the general operation and practice of Summit's business and are recorded and/or saved into Summit file on or about the time of that the results are received. Id.

In this case, part of the research included a search of the California Secretary of State on November 3, 2013 regarding the current status of Shiva and Edes (Summit did not execute the Contract until November 5, 2013). Id. The results of the search produced a screen shot from the California Secretary of State dated November 5, 2013 showing that both Shiva and Edes were actual companies in the State of California. CP at 90-94. More importantly the screen shots show that as of November 5, 2013, Jenish Patal was the listed registered agent for both Shiva and Edes. CP at 90-93.

The fact alone, that Jenish was listed as the registered agent for the companies at the time of the Contract, may not alone resolve the issue of authority. However, when viewed in conjunction with the below objective facts (both in this section and the following section), all reasonable minds would conclude that Jenish had authority to execute the Contract on behalf of Shiva and Edes.

A review of the CA corporate filings of Shiva and Edes after their Contract with Summit went into default shows that the Appellants made an attempt to wipe Jenish from the corporate records – likely for the purpose of setting up their current attempted defense. After the Appellants defaulted on the terms of the Contract, Summit, through its counsel, sent a default/demand letter to the Defendants on September 17, 2014. CP at 66-68. Appellants admitted receiving this letter in their Answer. CP at 22.

After receiving the Declaration of Hemant and Ashish (and hearing of the Appellant's theory on authority for the first time), Summit, through its counsel, requested all of the corporate records with the CA Secretary of State for both Shiva and Edes. CP at 63-64. While the corporate filings for both companies were limited, the timing of the limited filings are telling. Specifically, the filings show that Shiva filed a Statement of Information on November 14, 2011 showing that

the officers and directors were Hemant Chhatrala, Ashvin Patel, and Shailesh Patel and that Jenish Patel was the agent for Shiva. CP at 69-70. No other filings were made by Shiva with the Secretary of State until October 1, 2014 (**14 days after the demand letter was sent**), at which time Shiva filed another Statement of Information which removed Jenish Patel as the agent. CP at 71-72

The actions of Edes are similar. On September 28, 2012, Edes filed an Application to Register a Foreign LLC listing Jenish Patel as the agent for Edes. CP at 73-75. No other filings were made by Edes until October 6, 2014 (**19 days after the demand letter was sent**), at which time Edes filed a Statement of Information which removed Jenish Patel as the agent. CP at 76-77.

The filings show that at the time that the Contract was signed, Jenish was the agent for both Shiva and Edes and the companies had objectively held Jenish out to the public and the State of California.

b. Documentation provided to Summit.

Again, as part of its due diligence and research into the Appellants, Summit obtained (prior to the execution of the Contract) certain documentation from Appellants to determine not only the financial status of the Appellants, but the structure of Edes and Shiva. CP at 2-3. As part of this due diligence, Summit was provided with certain resolutions of both Shiva and Edes. CP at 38-42 & 94-102

The resolutions include a November 20, 2012 resolution of Shiva that transferred ownership of Hemant Chhatrala, Ashivin Patel, and Shailesh Patel to Sarjan Patel, Jenish Patel, and Ashish Patel respectively. CP at 95-96. This is consistent with the November 14, 2011 Statement of Information filed by

Shiva with the CA Secretary of State listing Hemant Chhatrala, Ashivin Patel, and Shailesh Patel as the owners of Shiva. CP at 70. Summit was also provided a second resolution of Shiva dated October 29, 2013 (immediately prior to the execution of the agreement(s)). CP at 98-99. This second resolution shows that Sarjan Patel transferred all of his ownership interest in Shiva to Ashish and Jenish making Defendants Ashish and Jenish the sole owners of Shiva. Id. This is consistent with how the agreement(s) was executed and with the corporate resolutions provided Summit at the time of the agreement(s).

Summit was also provided a resolution of Edes dated October 29, 2013 showing that Jenish and Ashish were granted ownership of Edes. CP at 101-102. This resolution is again consistent with how the agreement(s) was executed and with the corporate resolutions provided Summit at the time of the agreement(s).

Summit was provided a Limited Liability Company Resolution of Edes and a Corporate resolution of Shiva showing that both companies had authorized that Jenish and Ashish execute the Contract on behalf of the companies. CP 38-42. These resolutions are also consistent with how the Contract was executed.

Also as part of Summit's due diligence, Summit was provided by Defendants a packet regarding an "investment opportunity" being pushed by the Chhatrala Group which is described in the packet as a "[g]roup of companies" including Shiva and a company named Chhatrala Investments, LLC. CP at 104-125 and specifically CP at 115. Hemant Chhatrala, in his declaration states that Chhatrala Investments, LLC is the managing member of Defendant Edes. CP at 60. In other words, the Chhatrala Group is a parent company that is made up of subsidiaries of smaller companies, which include both Shiva and Edes at some level.

The “investment opportunity” packet that was produced by the parent company of Defendants Shiva and Edes includes a section regarding the “Key Officers” of the group. CP at 119. The first “Key Officer” listed is Jenish Patel. Id. The packet describes Jenish as “the Chief Investment Officer” who joined the company in 2005. Id. The packet also states that Jenish is “responsible for all of the company’s investment and acquisition activities” and that Jenish “has consummated over \$65 million” in transactions. Id. Emphasis added. If all of the above evidence was not enough, the statements and admissions in the “investment opportunity” packet are dispositive.

Jenish Patel had authority to execute the agreement(s) on behalf of Edes and Shiva and there can be no genuine dispute on this fact. The contradictory, conclusory, self-serving, and unsupported statements of Hemant and Ashish to the contrary are of no consequence.

Although unnecessary considering the above, there are other documents which supported granting summary judgment in favor of Summit. As part of the documenting the agreement(s) Summit was provided with a Certificate of Liability Insurance from Shiva and Edes. CP at 127-132. The Certificate lists Jenish as the contact for the companies. Additionally, Summit was provided a copy of a check from the account of Edes in order to authorize telephonic payments. CP at 89 & 134. The check is drawn on the account of Edes and is executed by Jenish. CP at 134. The check cleared indicating that Jenish had signatory authority on the bank account of Edes.

There is other circumstantial evidence in the record that supports the Trial Court's summary judgment order. This circumstantial evidence includes, but is not limited to, (a) the similarities of the signatures of both Hemant and Ashish on their declarations compared to the signatures on the corporate documents and/or agreement(s); and (b) the fact that the address

used in the agreement(s) for Edes and Shiva by Jenish (and Ashish) is the same address used by Hemant with the most recent Statement of Intentions filed with the CA Secretary of State for both Edes and Shiva. CP at 12, 61, 57, 70, 72, 74-75, 77, 91, 94, 96, 99, & 102.

However, this circumstantial evidence is unnecessary as the objective documentary evidence can only lead a reasonable person to one conclusion – the Contract was executed by a party with requisite authority.

4.4 Objection Limited to Documents Attached to the Declaration of Craig Kupp.

Appellants make a very limited objection to three (3) documents that were attached to the Declaration of Craig Kupp. See Appellant's Amended Opening Brief at 19. Appellants allege that the Trial Court erred in considering certain corporate resolutions which are attached to the Declaration of Craig Kupp. Specifically, Appellants argue that the three (3)

corporate resolutions “are inadmissible because they were never properly authenticated” pursuant to ER 901. Id.

Before the lack of merit to the Appellants objection is discussed, it is important to recognize that the three (3) resolutions in question make up a very small portion of the objective, documentary evidence in the record. The admissibility of the majority of the documentary evidence in the record which establishes the authority of Jenish to execute the Contract is not objected to by the Appellants.

These unobjected to documents include all documents attached to the Declaration of Ken Mears (CP 29-42), the Supplemental Declaration of Joshua J. Busey (CP 63-77), and the majority of the documents attached to the Craig Kupp Declaration (CP 88-136). These unobjected to documents include, without limitation, the following:

1. Equipment Finance Agreement – CP 31-36;
2. Limited Liability Company Resolution – CP 37-39;

3. Corporate Resolution – CP 40-42;
4. Business Entity Detail from the CA Sec. of State – CP 90-91;
5. Business Entity Detail from the CA Sec. of State – CP 92-93;
6. Investment Opportunity packet of the Chhatrala Group – CP 103-125;
7. Cert. of Liability Insurance – CP 126-132;
8. Copy of check drawn on the account of Edes – CP 134;
9. Demand letter to Appellants dated 9/17/14 – CP 65-68;
10. State of CA Statement of Information – Shiva dated 11/14/11 – CP 69-70;
11. State of CA Statement of Information – Shiva dated 10/1/14 – CP 71-72;
12. State of CA App. To Register – Edes – CP 73-75;

and

13. State of CA Statement of Information – Eds – CP 76-77.

Even in the unlikely event that the Court finds that the three (3) “corporate resolutions” attached to the Craig Kupp Declaration are inadmissible, the above listed documents have not been objected to and are properly a part of this record. This substantial and objective record, even without consideration of the three (3) objected to corporate resolutions, is sufficient to support the Trial Court’s granting in favor of Summit.

Additionally, the objection to the three (3) resolutions attached to the Kupp Declaration is not well taken. The documents in question are business records that are kept in the ordinary course of Summit’s business. CP at 88-89. Mr. Kupp testified that (a) the documents were part of the books and records of Summit and it is the regular practice to record the records on or about the time of the occurrence; (b) Summit

routinely does research on potential borrowers as part of its due diligence process; and (c) the three (3) corporate resolutions at issue were obtained and recorded by Summit as part of this process. Id.

“A record . . . shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation.” RCW 5.45.020. Appellants’ objection appears to be primarily based on the theory that Mr. Kupp could not authenticate the resolutions as he was not the person who created the resolutions. See Amended Opening Brief of Appellants at 20. However, the Washington Supreme Court has found that “[i]t is not necessary to examine the person who actually created the record so long as it is produced by the one who actually has custody of the record as a regular part of his work.” Cantrill v. American Mail Line, 42 Wash.2d 590, 609, 257 P.2d 179 (1953). Further, “[s]tatements in a declaration based on a review of business

records satisfy the personal knowledge requirement of CR 56(e) if the declaration satisfies the business records statute, RCW 5.45.020.” Barkley v. GreenPoint Mortg. Funding, Inc., 190 Wash.App. 58, 67, 358 P.3d 1204 (2015). This is exactly what Mr. Kupp has done here with his declaration and the resolutions were properly authenticated and were admitted by the Trial Court.

It is also important to remember that in a trial judge is given wide discretion in admitting records and the decision of the Trial Court is given great weight. Cantrill, 42 Wash.2d at 608. As such, any such decision by the Trial Court will only be overturned if “there has been a manifest abuse of discretion” by the trial judge. Id. This is a high burden to overcome which Appellants have not come close to satisfying.

4.5 Summit is Entitled to Fees and Costs under RAP

18.1(a).

When a contract or agreement provides for payment of attorneys' fees, the prevailing party is entitled to a reasonable award of fees and costs incurred on appeal. Courchaine v. Commonwealth Land Title Ins. Co., 174 Wn.App. 27, 51, 296 P.3d 913 (2012). The Contract in question provides for fee/costs to the prevailing party. CP at 35. Summit therefore requests an award of fees/costs pursuant to RAP 18.1.

With their Amended Opening Brief, the Appellants make their own request for fees/costs if the case is remanded to the Trial Court. Amended Opening Brief of Appellants at 21. This request is misguided. "A party must prevail on the merits before being considered a prevailing party." Ryan v. State of WA, DSHS, 171 Wash.App. 454, 476, 287 P.3d 629 (2012). In this case, if the matter is remanded, the result is simply that no decision on the merits of the case has been decided. As such,

even if successful with this appeal, Appellants are not entitled to an award under RAP 18.1.

V. CONCLUSION

Based on the forgoing Summit requests that this Court affirm the summary judgment ruling of the Trial Court. Summit also requests that this Court award it fees and costs pursuant to RAP 18.1.

DATED this 21 day of July, 2016.



Joshua J. Busey, WSBA 34312
Bailey & Busey, PLLC
Attorneys for Summit

FILED

JUL 22 2016

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

SUMMIT LEASING, INC., a Washington corporation,

Plaintiff,

v.

CHHATRALA RDES, LLC, a limited liability company; SHIVA MANAGEMENT, INC., a corporation; ASHISH PATEL, an individual; the marital community of ASHISH PATEL & JANE DOES PATEL, husband and wife; JENISH PATEL, an individual; and the marital community of JENISH PATEL & DOE PATEL, husband and wife,

Defendants.

Court of Appeals No. 338703-III

Superior Court No. 14-2-03623-9

CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the state of Washington, I hereby state that the following is true and correct to the best of my knowledge and belief.

On July 22, 2016, I personally deposited in Attorney Messenger Service, a copy of Respondent's 1st Amended Response Brief for hand-delivery to the following:

CERTIFICATE OF SERVICE



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DATED: 7/22/14



Diane Pearson. Legal Assistant

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