

No. 34747-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HEMPZEN ENTERPRISES, LTD,
a Washington corporation,

Appellant,

vs.

RONALD TRAVIS ROTH

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY
THE HONORABLE ALICIA NAKATA

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. RESTATEMENT OF ISSUES 2

III. RESTATEMENT OF THE CASE 2

 A. Ronald Roth and Hempzen Enterprises signed a two-year commercial lease that Hempzen breached by failing to keep the property free of liens. 3

 B. A commissioner found Hempzen in unlawful detainer based on its undisputed failure to remove the lien within the statutory cure period and the trial court declined to revise that ruling. 6

IV. ARGUMENT 9

 A. The trial court correctly found Hempzen in unlawful detainer based on its undisputed breach of the lease and failure to cure within the statutory period. 9

 1. Roth was entitled to possession of the property under RCW 59.12.030(4) because Hempzen did not remove the lien within the ten-day statutory cure period.10

 2. Hempzen never sought relief under RCW 59.12.190 and, regardless, was not entitled to relief under that statute.15

 3. Roth did not act in bad faith by seeking eviction based on Hempzen’s undisputed breach of the lease. 17

B.	RCW 59.12.100 applies only to a prejudgment writ of restitution. Hempzen cannot establish prejudice because it was allowed to post a bond to stay enforcement of the writ of restitution.	19
C.	Roth is entitled to his attorney's fees incurred on appeal under the parties' lease.	22
V.	CONCLUSION	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Angelo Prop. Co., LP v. Hafiz</i> , 167 Wn. App. 789, 274 P.3d 1075, <i>rev. denied</i> , 175 Wn.2d 1012 (2012)	10
<i>Badgett v. Sec. State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991)	18
<i>Burgess v. Crossan</i> , 189 Wn. App. 97, 358 P.3d 416 (2015).....	10
<i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 228 (2007)	12
<i>Crosswhite v. Washington State Dep’t of Soc. & Health Servs.</i> , ___ Wn. App. ___, 389 P.3d 731 (2017).....	15
<i>Daniels v. Ward</i> , 35 Wn. App. 697, 669 P.2d 495 (1983).....	10, 14, 19
<i>Donald B. Murphy Contractors, Inc. v. King Cty.</i> , 112 Wn. App. 192, 49 P.3d 912 (2002).....	17
<i>Draszt v. Naccarato</i> , 146 Wn. App. 536, 192 P.3d 921 (2008)	21
<i>Estate of Barnes</i> , 185 Wn.2d 1, 367 P.3d 580 (2016).....	3
<i>Gardner v. First Heritage Bank</i> , 175 Wn. App. 650, 303 P.3d 1065 (2013)	15
<i>Glover v. Fidelity & Deposit Co.</i> , 75 Wash. 606, 135 P. 486 (1913).....	21
<i>Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.</i> , 86 Wn. App. 732, 935 P.2d 628 (1997), <i>rev. denied</i> , 133 Wn.2d 1033 (1998)	18

<i>Hall v. Feigenbaum</i> , 178 Wn. App. 811, 319 P.3d 61, <i>rev. denied</i> , 180 Wn.2d 1018 (2014).....	22
<i>J. L. Cooper & Co. v. Anchor Sec. Co.</i> , 9 Wn.2d 45, 113 P.2d 845 (1941).....	17
<i>Keystone Land & Dev. Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004).....	18
<i>King Cty. v. Seawest Inv. Assocs., LLC</i> , 141 Wn. App. 304, 170 P.3d 53 (2007), <i>rev. denied</i> , 163 Wn.2d 1054 (2008)	16
<i>Marriage of Merritt</i> , No. 33577-1-III, 2017 WL 497038 (Wash. Ct. App. Feb. 7, 2017)	15
<i>Perez v. Garcia</i> , 148 Wn. App. 131, 198 P.3d 539 (2009)	13
<i>Port of Longview v. Int'l Raw Materials, Ltd.</i> , 96 Wn. App. 431, 979 P.2d 917 (1999).....	21
<i>State v. Bigsby</i> , 196 Wn. App. 803, 384 P.3d 668 (2016)	16
Statutes	
RCW 2.24.050.....	7, 13
RCW 59.12.030	1, 2, 7, 10-12
RCW 59.12.090	8, 20, 21
RCW 59.12.100	2, 8, 19-22
RCW 59.12.190.....	15-17
RCW 59.12.200	2, 8, 19-20, 22
RCW 60.04.031.....	4
RCW 60.04.141	4, 14, 18

RCW 60.04.171..... 4

Rules and Regulations

GR 14.115

RAP 2.5.....15

RAP 18.1 23

Other Authorities

Stoebuck & Weaver, 17 *Wash. Prac., Real Estate* §
6.80 (2d ed. 2004)10-11, 20-21

I. INTRODUCTION

Appellant Hempzen Enterprises Ltd. leased property from respondent Ronald Travis Roth, signing a commercial lease requiring it to keep the property free from any liens. After a contractor hired by Hempzen recorded a lien against the property, Roth gave Hempzen more than five months to remove the lien before filing a ten-day notice to cure or vacate under RCW 59.12.030(4). Hempzen did not comply with the notice; it did not remove the lien for another 75 days until only a week before the statutory deadline for foreclosure of the lien. A commissioner, and then the trial court, found Hempzen in unlawful detainer based on undisputed facts.

On appeal, Hempzen concedes it failed to remove the lien within ten days as required by statute, instead contending the statutory ten-day period denied Hempzen a “meaningful” opportunity to cure and that failure to cure should be excused because it alleges the lien was frivolous – despite eventually paying more than \$10,000 to remove it. Hempzen’s arguments fly in the face of the unlawful detainer statute. This Court should affirm the trial court and award Roth his attorney’s fees on appeal.

II. RESTATEMENT OF ISSUES

1. Did the trial court correctly find a tenant in unlawful detainer when the tenant had breached a lease provision requiring it to keep the property “free from any liens” and failed to comply with a statutory notice to cure by removing the lien within ten days as required by RCW 59.12.030(4)?

2. After a tenant is found in unlawful detainer, does the tenant stay the writ of restitution by posting a bond under RCW 59.12.200, which governs “stay of proceedings pending review,” or by posting a bond under RCW 59.12.100, which governs prejudgment writs of restitution?

III. RESTATEMENT OF THE CASE

Hempzen misrepresents the facts of this case, most notably its efforts to resolve its dispute with the contractor that filed the lien, Mr. Electric, and the amount of time Roth gave Hempzen to remove the lien. Hempzen makes those misrepresentations despite failing to assign error to any of the trial court’s findings, including its findings there was no “controversy that Hempzen Enterprises had breached the terms of its lease” and that removing the lien within ten days would not “create[] too much of a hardship.” (CP 140-41) Those unchallenged findings are now verities on appeal.

Estate of Barnes, 185 Wn.2d 1, 9, ¶ 7, 367 P.3d 580 (2016). This Court should rely on the restatement below, which sets forth the undisputed evidence supporting the trial court’s decision and is consistent with the trial court’s unchallenged findings:

A. Ronald Roth and Hempzen Enterprises signed a two-year commercial lease that Hempzen breached by failing to keep the property free of liens.

Hempzen Enterprises Ltd. leased from Ronald Travis Roth property in unincorporated Chelan County for use in Hempzen’s marijuana business under a two-year commercial lease signed on May 11, 2015. (CP 8-18) The lease required Hempzen to “keep the leased Premises and the property in which the leased Premises are situated, free from any liens arising out of any work performed, materials furnished or obligations incurred by Lessee.” (CP 10)

In June of 2015, Hempzen hired a contractor, Mr. Electric, to install a security system on the property. (CP 31-32, 42-43) By July Hempzen and Mr. Electric were embroiled in a dispute over whether Mr. Electric had properly installed the system and how much Hempzen owed Mr. Electric. (CP 32-38, 45-49) When Mr. Electric’s President offered to meet with Hempzen’s CEO, M. Scott Sotebeer, in October 2015 to “determine how the cost shortfalls will be handled,” Sotebeer replied “I will take no part in any such

discussion.” (CP 53-56) Roth had no involvement in the dispute between Hempzen and Mr. Electric. (CP 37)

Months later when Hempzen failed to resolve the dispute, Mr. Electric filed a lien against the property under RCW ch. 60.04 on December 7, 2015. (CP 19-20) Mr. Electric’s lien named Hempzen and Sotebeer as tenants, claiming they were indebted to Mr. Electric for \$13,504.20. (CP 19-20) Mr. Electric was required to serve notice of the lien on Roth under RCW 60.04.031, and if Mr. Electric foreclosed its lien, the foreclosing court would “have the power to order the sale of the property.” RCW 60.04.171.

By statute, Mr. Electric was required to foreclose this lien within eight months. RCW 60.04.141 (“No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time . . .”). Mr. Electric “made it very clear to [Roth] . . . [it] would foreclose its lien . . . if Hempzen did not satisfy the lien within the 8-month period.” (CP 106)

With the dispute still unresolved and the lien still of record more than five months after it was filed, on May 18, 2016, Roth served Hempzen with a “10 Day Notice to Comply with Rental

Agreement/Lease Contract.” (CP 21-22, 99-100) The notice stated that Hempzen had violated the lease by “fail[ing] to keep said property free from liens” and that it could cure its violation by “settl[ing] dispute with Mr. Electric” and “satisfy[ing] lien placed against Lessor, R. Travis Roth, and the real property at said location and have lien released.” (CP 21) The notice informed Hempzen that it was required to cure its violations or surrender the property “within ten (10) days after service of this Notice upon you” and that “in the event of your failure to do so within the said period, you will be guilty of unlawful detainer and subject to eviction as provided by law.” (CP 21) Hempzen did not remove the lien within ten days. (CP 99-100)

By June 30, 2016, 43 days after Roth served Hempzen with the ten-day notice to cure or vacate, Hempzen had still not removed the lien, prompting Roth to file an eviction summons, complaint for unlawful detainer, and a motion for an order to show cause why a writ of restitution should not issue. (CP 1-7, 23-25) Hempzen answered the unlawful detainer complaint the day before the July 22, 2016 show cause hearing, admitting that Mr. Electric filed a lien, but asserting the lien was frivolous. (CP 26-29) Hempzen also filed a declaration from its CEO Sotebeer asserting Hempzen had

“entered into a CR2A Settlement Agreement resolving its dispute” with Mr. Electric and that Mr. Electric had committed to remove its lien as part of the agreement. (CP 39) As proof of this agreement, Hempzen attached a “Mutual Release of Claims” that had only been executed by Hempzen, not Mr. Electric. (CP 76) Under the terms of this unexecuted settlement, Hempzen was to pay Mr. Electric \$10,250. (CP 76)

B. A commissioner found Hempzen in unlawful detainer based on its undisputed failure to remove the lien within the statutory cure period and the trial court declined to revise that ruling.

Chelan County Commissioner Earnest Radillo presided over the hearing on July 22, 2016. (CP 89) When asked about the CR2A agreement, Hempzen’s attorney stated Hempzen was still “waiting for opposing parties to execute the agreement,” but represented that Hempzen “had possession of the cashier’s check in the amount of the required funds.” (CP 89) The commissioner rejected Hempzen’s argument that it had timely cured the unlawful detainer and found Hempzen “guilty of unlawful detainer based upon proper notice of and ample time to cure default.” (CP 89) The commissioner entered findings of fact and conclusions of law supporting its decision, judgment in favor of Roth for \$1,381.72 in

attorney's fees and costs, and an order for issuance of a writ of restitution. (CP 83-88)

On August 1, 2016, Hempzen moved for revision of the commissioner's ruling, submitting new evidence to support its motion, including a now fully executed settlement agreement between itself and Mr. Electric, and a copy of a lien release Mr. Electric recorded that day. (CP 90-100) The cashier's check to Mr. Electric was dated July 26, 2016, four days after Hempzen's counsel had represented to the commissioner that it "had possession of the cashier's check," and a day after Sotebeer claimed Hempzen "hand delivered" the check to Mr. Electric. (CP 89, 112, 117)

At a hearing on August 31, 2016, Chelan County Superior Court Judge Alicia Nakata ("the trial court") struck Hempzen's supplemental pleadings as a violation of RCW 2.24.050, and denied Hempzen's motion for revision. (CP 140, 164-65) The trial court found there was no "controversy that Hempzen Enterprises had breached the terms of its lease" and noted that the unlawful detainer complaint was filed and served "well beyond the 10 day timeframe envisioned by" RCW 59.12.030(4). (CP 140-41) The trial court also found resolving the lien within ten days would not have "created too much of a hardship." (CP 141) The trial court

“further noted unlawful detainers were meant to produce relatively quick relief and the Court could not act outside of the statutory timeframe without an appropriate basis,” (CP 141) and issued a writ of restitution granting Roth possession of the property. (CP 144-45)

Hempzen then filed a motion asking that it be allowed to retain possession of the property by posting a bond under RCW 59.12.100, which allows a tenant to post a bond to stay enforcement of a pre-judgment writ of restitution issued under RCW 59.12.090. (CP 151-58; *see* § IV.B) The trial court “denied Defendant’s motion for bond based upon RCW 59.12.100 as there had been a judgment entered prior to issuance of the Writ of Restitution,” (CP 166-68) and entered a \$1,000 supplemental judgment for attorney’s fees in Roth’s favor. (CP 166-67)

On October 3, 2016, Hempzen filed a notice of appeal seeking review of the order denying revision, order denying a bond, and the fee judgments. (CP 176-78) On December 19, 2016, the trial court granted Roth’s motion requiring Hempzen to post a bond under RCW 59.12.200, which states “if the defendant appealing desires a stay of proceedings pending review, the defendant shall execute and file a bond.” (CP 183-84) Hempzen continues to possess the property, although it has not paid rent for March 2017,

and presumably will stay in possession until the lease expires at the end of April 2017.

The timeline below summarizes the relevant events:

- May 11, 2015 – Parties sign lease. (CP 8-18)
- December 7, 2015 – Mr. Electric files lien. (CP 19-20)
- May 18, 2016 – Roth serves Hempzen with ten-day notice. (CP 21-22)
- June 30, 2016 – Roth files unlawful detainer action. (CP 4-7)
- July 22, 2016 – Commissioner Radillo finds Hempzen in unlawful detainer. (CP 83-89)
- August 1, 2016 – Hempzen removes lien. (CP 99-100)
- August 31, 2016 – Trial court denies Hempzen’s motion for revision. (CP 140-41, 164-65)

IV. ARGUMENT

A. The trial court correctly found Hempzen in unlawful detainer based on its undisputed breach of the lease and failure to cure within the statutory period.

The unlawful detainer statute, RCW ch. 59.12, provides a straightforward remedy to landlords whose tenants are in breach of a lease – serve a notice giving the tenant ten days to cure or vacate. Here, Roth served this notice and Hempzen did not cure within ten days. Hempzen’s assertion it “complied with all lease terms” “[a]t all times” (App. Br. 2) cannot be squared with the trial court’s unchallenged findings, now verities on appeal, which are based on

undisputed facts establishing Hempzen was guilty of unlawful detainer.

- 1. Roth was entitled to possession of the property under RCW 59.12.030(4) because Hempzen did not remove the lien within the ten-day statutory cure period.**

“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.” *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. 789, 808, ¶ 33, 274 P.3d 1075, *rev. denied*, 175 Wn.2d 1012 (2012). “The main purpose of unlawful detainer under RCW[] Chapter 59.12 . . . is to give the landlord a speedy, efficient action to evict a tenant for breach.” *Stoebuck & Weaver*, 17 *Wash. Prac., Real Estate* § 6.80 at 439 (2d ed. 2004); *Burgess v. Crossan*, 189 Wn. App. 97, 102, ¶ 10, 358 P.3d 416 (2015) (“The unlawful detainer statutes provide an expedited method of resolving the right to possession of property.”).

Under RCW 59.12.030(4), remaining in possession after “failure to keep or perform any . . . condition or covenant of the lease” is a wrongful act of unlawful detainer. *Daniels v. Ward*, 35 Wn. App. 697, 702, 669 P.2d 495 (1983) (“RCW 59.12.030(4) states that a tenant is guilty of unlawful detainer when he fails to perform

any condition or covenant of the lease.”). As Hempzen concedes (App. Br. 11-12), upon receiving from the landlord a notice to cure a breach or vacate, a tenant has ten days to cure its breach before forfeiting its right of possession. RCW 59.12.030(4) (“*Within ten days* after the service of such notice the tenant . . . may perform such condition or covenant and thereby save the lease from such forfeiture”); Stoebuck & Weaver, 17 *Wash. Prac., Real Estate* § 6.80 at 440-41 (“the tenant has the [ten-day] notice period either to cure or to vacate”).

Hempzen undisputedly breached the lease provision requiring it to “keep the leased Premises . . . free from any liens arising out of any work performed, materials furnished or obligations incurred by Lessee.” (CP 10) On December 7, 2015, Mr. Electric filed a lien against the property arising from work it performed for Hempzen. (CP 19-20) When Roth served Hempzen with a ten-day notice to cure more than five-months later on May 18, 2016, Hempzen failed to remove the lien within ten days. (CP 21-22, 99-100)

As the trial court noted (CP 140), no authority supports Hempzen’s argument that it was entitled to some indefinite “equitable” period beyond the ten-day cure period in RCW

59.12.030(4). Hempzen ignores that RCW 59.12.030(4), by its terms, provides the only “meaningful opportunity to cure” (App. Br. 9) – a tenant must cure within ten days. Were a tenant instead entitled to retain possession by curing a breach at any point before the court issues a writ of restitution, as Hempzen argues, tenants would seek to drag out unlawful detainer proceedings, thereby interfering with the statutory purpose, “which is to provide a landlord with a speedy, efficient procedure by which to obtain possession of the premises after a breach by the tenant.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 375-76, ¶ 19, 173 P.3d 228 (2007).

Hempzen cannot avail itself of an equitable right to cure here, in any event. Hempzen had *still* not removed the lien by the July 22, 2016, show cause hearing, more than seven months after the lien had been filed, and 65 days after receiving the ten-day notice to cure. Nor had Hempzen “entered into a settlement of the lien claim [by] July 22, 2016,” as it now asserts. (App. Br. 12) As Hempzen’s CEO acknowledged, “the Settlement Agreement with Mr. Electric” had not been “fully consummated on or before July 22, 2016,” and it was only “complete[d]” a week later. (CP 93) Hempzen’s attorney confirmed at the hearing he “was waiting for

opposing parties to execute the agreement.” (CP 89) Hempzen did not cure the breaches identified in Roth’s ten-day notice until August 1, 2016, ten days after Hempzen had already been found in unlawful detainer. (CP 21, 99-100)¹

Hempzen also misrepresents its earlier “efforts” to resolve the lien, stating it “endeavored to resolve” the lien “as soon as” it was filed in December 2015. (App. Br. 12) Hempzen’s counsel apparently had not even obtained a copy of the filed lien as of March 2016 (erroneously looking for it in King, not Chelan county). (CP 115) Hempzen also did not answer Mr. Electric’s lawsuit filed on January 20, 2016, until June 7, 2016, and did so only after a motion for default had been filed, contrary to its assertion it “exerted all efforts to resolve” the lien. (CP 68; *see* King County Cause # 16-2-01471-2) Moreover, Hempzen’s argument that it could not have resolved the lien within ten days (App. Br. 12) ignores both the commissioner and trial court’s unchallenged

¹ Hempzen does not challenge the trial court’s refusal to consider evidence that was not before the commissioner under RCW 2.24.050 (“revision shall be upon the records of the case”); *Perez v. Garcia*, 148 Wn. App. 131, 138, ¶ 15, 198 P.3d 539 (2009) (“superior court judge’s review of a court commissioner’s ruling . . . is limited to the evidence and issues presented to the commissioner.”) (emphasis in original; quoted source omitted). Hempzen’s removal of the lien *after* the commissioner found it in unlawful detainer is, as the trial court recognized, a nullity. Even if the unlawful detainer statute allowed such belated cure (it does not), the trial court correctly refused to consider this new evidence.

finding that Hempzen had “ample time to cure default” and that removing it within ten days would not “create[] too much of a hardship.” (CP 89, 141)

Hempzen’s characterization of the lien as “baseless,” “entirely frivolous,” and “bogus” (App. Br. 1, 3, 7)² is immaterial where, as here, a tenant agrees to keep the property free from “any” liens. *See Daniels*, 35 Wn. App. 697. The *Daniels* court rejected the argument Hempzen makes here, that a similar lease prohibition “was intended to apply only to ‘valid’ liens.” 35 Wn. App. at 704. The court held that where “[t]he provision states ‘any’ lien must be discharged,” “the provision is designed to protect the landlord and a lien need not be valid to damage the landlord.” 35 Wn. App. at 704.

Hempzen did not remove the lien until August 1, 2016, more than a year after its dispute with Mr. Electric arose, more than seven months after the lien was filed, 75 days after receiving a ten-day notice to cure, ten days after it had already been found in unlawful detainer, and a week before the deadline for foreclosure of the lien under RCW 60.04.141. Hempzen’s assertions it was not in

² One would not expect Hempzen to pay over \$10,000 to resolve an “entirely frivolous” lien. (CP 112)

unlawful detainer and that the trial court failed to allow it to cure are meritless.

2. Hempzen never sought relief under RCW 59.12.190 and, regardless, was not entitled to relief under that statute.

Hempzen did not ask for relief of forfeiture under RCW 59.12.190, having never even cited the statute to the trial court. Hempzen's contention it "invoked" the statute below is a patent misrepresentation. (App. Br. 8) That Hempzen never actually asked the trial court to exercise its discretion confirms it was not entitled to equitable relief under RCW 59.12.190. *See Marriage of Merritt*, No. 33577-1-III, 2017 WL 497038, at *7 (Wash. Ct. App. Feb. 7, 2017) ("We would particularly encounter difficulty finding that the trial court abused its discretion when denying the equitable relief of laches when Ehm gave the court no opportunity to review the contention.") (unpublished).³ This Court should refuse to consider Hempzen's unpreserved argument. RAP 2.5(a); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 674, ¶ 37, 303 P.3d 1065 (2013).

³ Because this decision is unpublished, under GR 14.1, it has no precedential value, is not binding on any court, and is cited only for such persuasive value as this Court deems appropriate. *Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, ___ Wn. App. ___, 389 P.3d 731, 733 (2017).

Regardless, Hempzen cannot show any basis for relief under RCW 59.12.190, let alone establish that the trial court abused its discretion by failing to *sua sponte* grant relief under the statute. RCW 59.12.190 gives trial courts discretion to grant relief from forfeiture, stating “[t]he court *may* relieve a tenant against a forfeiture of a lease and restore him or her to his or her former estate . . . where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court.” (emphasis added); see *State v. Bigsby*, 196 Wn. App. 803, 810, ¶ 20, 384 P.3d 668 (2016) (“the word ‘may’ indicates discretion”) (quoted source omitted). Because a trial court’s authority under RCW 59.12.190 is, as Hempzen acknowledges (App. Br. 15), equitable in nature the trial court has “broad discretion” that is abused only when its “decision is manifestly unreasonable or based upon untenable grounds.” *King Cty. v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 314, ¶ 20, 170 P.3d 53 (2007), *rev. denied*, 163 Wn.2d 1054 (2008).

Though Hempzen *eventually* resolved the lien well after the statutory cure period had lapsed, it was not an abuse of the trial court’s broad equitable discretion to hold Hempzen to the terms of its lease. A party seeking equitable relief “must be frank and fair with

the court.” *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941). Hempzen misrepresented the status of its negotiations with Mr. Electric, telling the commissioner it “had possession of the cashier’s check” at the July 22, 2016, hearing (CP 89), when in fact the check was not obtained for another four days. (CP 112 (check dated July 26, 2016); *see also* CP 117 (Sotebeer declaration stating Hempzen “hand delivered” the check to Mr. Electric on July 25, 2016)) The trial court did not manifestly abuse its discretion in denying equitable relief, even had Hempzen properly availed itself of RCW 59.12.190.

3. Roth did not act in bad faith by seeking eviction based on Hempzen’s undisputed breach of the lease.

A party does not breach the covenant of good faith and fair dealing by insisting the other party live up to his agreement. Hempzen’s allegation that Roth “breach[ed] the implied covenant of good faith” by seeking a writ of restitution (App. Br. 1) ignores this black letter law and is wholly unsupported by the record.

The duty of good faith and fair dealing “arises only in connection with the performance of specific contract obligations. If no contractual duty exists, there is nothing that must be performed in good faith.” *Donald B. Murphy Contractors, Inc. v. King Cty.*,

112 Wn. App. 192, 197, 49 P.3d 912 (2002). In other words, “there is no ‘free-floating’ duty of good faith and fair dealing . . . The duty exists only in relation to performance of a specific contract term.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004) (quotation omitted). The duty of good faith “does not inject substantive terms into the parties’ contract” nor can it “apply to *contradict* contract terms” or “take away a right expressly conferred by the parties’ agreement.” *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997) (emphasis in original), *rev. denied*, 133 Wn.2d 1033 (1998). “As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *Badgett*, 116 Wn.2d at 570.

As a matter of law, Roth cannot have acted in bad faith by exercising his bargained for right to insist that Hempzen keep the property free of liens, especially given the impending deadline under RCW 60.04.141 for foreclosure of the lien. *Badgett*, 116

Wn.2d at 570; *Daniels*, 35 Wn. App. at 704.⁴ And Hempzen cites no evidence to support its allegation that “Roth used the bogus lien claim as a bad faith justification to squeeze Hempzen for additional financial concessions.” (App. Br. 7) That allegation ignores that Roth gave Hempzen more than five months to resolve the lien before serving it with a ten-day notice, and that he did not file this unlawful detainer action for another 43 days after serving the notice. (See App. Br. 12 (alleging Roth served the ten day notice “when [he] received notice of the . . . lien”))⁵ Finally, Roth did not act in bad faith by not accepting Hempzen’s bald – and false – assertion it had fully resolved its dispute with Mr. Electric at the July 22, 2016, hearing. (App. Br. 11-12)

B. RCW 59.12.100 applies only to a prejudgment writ of restitution. Hempzen cannot establish prejudice because it was allowed to post a bond to stay enforcement of the writ of restitution.

Hempzen remained in possession of the property after posting a bond under RCW 59.12.200, the statute that governs

⁴ As Roth explained on revision, Mr. Electric had “made it very clear . . . [it] would foreclose its lien . . . if Hempzen did not satisfy the lien within the 8-month period” and that “[l]iving with the fear of losing [the] property was very stressful.” (CP 106)

⁵ Hempzen also misrepresents that Roth served his ten-day notice “subsequently,” *i.e.*, after, Hempzen answered Mr. Electric’s lawsuit. (App. Br. 3-4) Roth served his ten-day notice on May 18, 2016 (CP 21-22); Hempzen filed its answer on June 7, 2016. (CP 68)

bonds staying post-judgment writs of restitution. Hempzen's argument – that it should have been allowed to post a bond under the pre-judgment writ of restitution statute, RCW 59.12.100 – is without merit and in any event fails to explain how Hempzen was prejudiced.

RCW 59.12.100 does not stay enforcement of a final judgment granting a writ of restitution. Under RCW 59.12.090, a landlord “at the time of commencing an action of . . . unlawful detainer, or at any time afterwards, may apply . . . for a writ of restitution restoring to the plaintiff the property.” To obtain a prejudgment writ of restitution, the landlord must post a bond. RCW 59.12.090 (“before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond”). If the landlord does so, then under RCW 59.12.100, the tenant may block the writ by posting a counter-bond. *See* Stoebuck & Weaver, 17 *Wash. Prac., Real Estate* § 6.80 at 442 (“If the tenant wishes to block restitution, the statute requires him to post a counter-bond.”).

A different statute governs stays of unlawful detainer judgments during an appeal. Under RCW 59.12.200, “if the defendant appealing desires a stay of proceedings pending review, the defendant shall execute and file a bond” *See also* Stoebuck

& Weaver, 17 Wash. Prac., Real Estate § 6.80 at 443 (“A tenant who appeals the judgment may stay the judgment and the writ of restitution pending appeal, upon the giving of a stay bond specially provided for in the statute.”).

Hempzen confuses these distinct bonds, which stay enforcement of different orders under the unlawful detainer statute. RCW 59.12.090 by its terms, applies to writs “issue[d] prior to judgment” and thus was not applicable when Hempzen sought to post a bond after it had already been found in unlawful detainer after a full and fair hearing. The case relied on by Hempzen confirms as much. In *Glover v. Fidelity & Deposit Co.*, 75 Wash. 606, 135 P. 486 (1913) (App. Br. 15), the court relied on the predecessor statute to RCW 59.12.100 because the bond at issue was issued prior to judgment. 75 Wash. at 607; see also *Port of Longview v. Int’l Raw Materials, Ltd.*, 96 Wn. App. 431, 446, 979 P.2d 917 (1999) (describing writ issued under RCW 59.12.100 as a “prejudgment writ of restitution”).

In any event, Hempzen was not prejudiced by the trial court’s refusal to allow it to post a bond under RCW 59.12.100. See *Draszt v. Naccarato*, 146 Wn. App. 536, 545, ¶ 29, 192 P.3d 921 (2008) (“Error without prejudice is not grounds for reversal”)

(quotation and alteration omitted). Hempzen complains the trial court did not “fix a bond that would have allowed Hempzen to remain in occupation of the premises.” (App. Br. 14) But the trial court did just that. It allowed Hempzen to post a bond under RCW 59.12.200 (CP 183-84), and Hempzen remains in possession of the property to this day, and will presumably maintain possession until the lease expires at the end of April 2017.

As Hempzen acknowledges, the hardship of eviction “is alleviated by the tenant’s ability to post *any* of the statutory bonds.” (App. Br. 16) (emphasis added) Hempzen in fact benefited from the trial court’s denial of its motion for a bond under RCW 59.12.100, as it was allowed to stay in possession of the property for more than three months without posting the required appellate bond. The trial court committed no error, let alone prejudicial error.

C. Roth is entitled to his attorney’s fees incurred on appeal under the parties’ lease.

The parties’ lease contains a prevailing party attorney fee provision applicable to any suits “for breach of any provision of this lease or to recover possession of the leased Premises.” (CP 11) “A contract providing for an award of attorney fees at trial also supports such an award on appeal.” *Hall v. Feigenbaum*, 178 Wn. App. 811, 827, ¶ 37, 319 P.3d 61, *rev. denied*, 180 Wn.2d 1018

(2014). Pursuant to RAP 18.1, this Court should award Roth his attorney's fees on appeal as the prevailing party.

V. CONCLUSION

This Court should affirm the trial court's writ of restitution and fee judgments, and award respondent Roth his attorney's fees on appeal.

Dated this 23rd day of March, 2017.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 23, 2017, I arranged for service of the foregoing Brief of Respondent to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 23rd day of March, 2017.



Patricia Miller

SMITH GOODFRIEND, PS

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