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NO. 355276

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

J. H. PROPERTIES,

Appellant,

vs.

BILLY E. THOMPSON AND
ALL OTHER OCCUPANTS,

Respondent.

APPELLANT'S BRIEF

MINNICK • HAYNER, P.S.

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
	1. Right to Recover Attorney Fees.....	1
	2. Amount of Fee Award	1
	3. Northwest Justice Project is an Improper to this Appeal.....	1
II.	STATEMENT OF THE CASE	2
	A. The Underlying Litigation.....	2
	B. Procedural History	4
III.	ARGUMENT	5
	A. Standard of Review	5
	B. The Trial Court Erred In Awarding Attorney Fees and Costs without Legal Basis.....	6
	C. The Trial Court Erred in Awarding Attorney Fees and Costs in an Unreasonable Amount	12
	D. Northwest Justice Project is an Improper Party to this Appeal.....	14
IV.	CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001).....	5,6,12
<i>Tradewell Group, Inc. v. Mavis</i> , 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).....	6
<i>Morgan v. Kingen</i> , 166 Wn.2d 526, 539, 210 P.3d 995 (2009).....	6,12
<i>Rettkowski v. Dep't of Ecology</i> , 128 Wn2d 508, 519, 910 P.2d 462 (1996)	6,12
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wn.2d 141, 147, 859 P.2d 1210 (1993)	6,12
<i>Dayton v. Farmers Ins. Grp.</i> , 124 Wn.2d 277, 280, 876 P.2d 896 (1994)	6
<i>Housing Authority of the City of Everett v. Terry</i> , 114 Wn.2d 558 (1990).....	7,8
<i>Housing Authority of City of Seattle v. Silva</i> , 94 Wn. App. 731, 734, 972 P.2d 952 (1999)	8
<i>Council House, Inc. v. Hawk</i> , 136 Wn. App. 153, 147 P.3d 1305 (2006).....	13,14
<i>Stella Sales, Inc. v. Johnson</i> , 97 Wn. App. 11, 17-18 (1999).....	15
<i>Bingham v. Zolt</i> , 683 F.Supp. 965, 976 (S.D.N.Y. 1988).....	15

STATUTES

RCW 4.84.330..... 10
RCW 4.64.030..... 10,11
RCW 59.18.290..... 13
RAP 3.2..... 14
RCW 4.20.050..... 15

I.

ASSIGNMENT OF ERROR

1. Right to Recover Attorney Fees. The trial court ruled that Appellant had not waived notices to the tenant by accepting rent. The parties then proceeded to trial, after which time the trial court reversed its previous ruling. The trial court erred in awarding attorney fees because no basis exists for the award, and the award was unjust and unreasonable given the trial court's prior letter ruling.

2. Amount of Fee Award. The trial court awarded \$4,560 in attorney fees and \$907.25 in costs to Northwest Justice Project in an uncomplicated unlawful detainer action. The trial court erred in awarding fees and costs in an unreasonable amount.

3. Northwest Justice Project is an Improper Party to this Appeal. The trial court erred in granting judgment in favor of Northwest Justice Project as judgment creditor where Northwest Justice Project was not a party to the underlying action and where the judgment was not properly assigned to Northwest Justice Project.

II.

STATEMENT OF THE CASE

A. The Underlying Litigation.

Appellant J.H. Properties LLC rented a residential unit to tenant Billy Thompson. Property managers for the Appellant smelled the strong odor of marijuana emanating from Billy Thompson's unit on several occasions. Appellant also began receiving complaints of Respondent smoking marijuana in his unit as well as in the common areas of the apartment building in designated "no smoking" areas. Smoking was not allowed within 20 feet of the apartment entrance and Billy Thompson had signed a "Smoking Addendum" outlining the smoking rules when he rented his unit from Appellant. The "Smoking Addendum" stated that three violations of the no smoking policy was a grounds for eviction. CP 1-21.

Appellant served a 10-Day Notice to Comply and subsequently a 3-Day Notice to Quit for violations of the Smoking Addendum of the rental agreement. Both Notices contained language that acceptance of rent was not a waiver of the Notice. CP 13 and CP 15.

Counsel for Respondent filed an answer contesting the validity of the Notices due to acceptance of rent, among other alleged defenses. Judge John Lohrmann issued a letter ruling that Appellant did not waive the Notices by acceptance of rent due to the non-waiver language contained in the Notices. CP 79-80. The case then proceeded to an evidentiary hearing to determine whether Billy Thompson was smoking in his unit and in the common areas in violation of the covenants of his lease.

Evidence was presented at trial that another tenant witnessed Billy Thompson smoking marijuana in a no-smoking area, that on multiple occasions other tenants and the property managers had smelled the strong smell of marijuana emanating from Billy Thompson's unit, and Billy Thompson himself testified that he smoked marijuana daily, although he denied smoking marijuana inside his unit.

At the conclusion of the evidentiary hearing, Judge Lohrmann reversed his previous letter ruling, and ruled that Appellant had waived Notices served on Billy Thompson by accepting rent. By the time of the ruling, a little over a month remained on the term of Billy Thompson's lease. Appellant chose

not to appeal at that time. Billy Thompson passed away in the unit approximately two months after the trial.

Respondent Northwest Justice Project filed a motion for attorney fees and costs on the basis of an attorney fees provision in the lease that stated "Tenant(s) agrees to pay all costs, expenses, collection and attorney's fees, as allowed by law, either expeted or incurred by Owner/Manager due to any breach or default by the Tenant(s) of any terms of this contract." CP 104-105. Northwest Justice Project was neither a party to the lease agreement nor a party to the proceeding; however, the attorney for Northwest Justice Project listed Northwest Justice Project, not Respondent, as the Judgment Creditor. No probate has been opened for the Estate of Billy Thompson, and no personal representative has been appointed. J.H. Properties appealed on the basis of several legal arguments to be set forth hereinafter in Appellant's Brief.

B. Procedural History.

On May 11, 2017, Appellant filed a Summons and Complaint for Unlawful Detainer, a Motion and Order to Show Cause, and an accompanying Declaration in Support of Motion for Order to Show Cause setting a show cause hearing May 30, 2017. CP 1-21. Tenant Billy Thompson opposed the unlawful detainer action.

Respondent filed an objection in opposition to the action on the basis that Appellant accepted rental assistance on behalf of Billy Thompson and thereby waived notices previously served on Billy Thompson. CP 74-77. The Superior Court, in a letter ruling to counsel dated June 12, 2017, denied the Objection. CP 79-80.

A non-jury trial was held on June 15, 2017, after which Judge Lohrmann reversed his previous letter ruling and held that the Appellant had waived the previously served notices by accepting rent. CP 83-85.

The trial court granted Northwest Justice Project's Order for Award of Attorney Fees and Costs & Judgment on August 1, 2017. CP 116-119.

Billy Thompson died in August 2017. No probate proceeding has been opened for probate of his estate.

III.

ARGUMENT

A. Standard of Review.

This is an appeal from an Order for Attorney Fees and Costs and Judgment. CP 116-119. The Court applies a two-part standard when reviewing a trial court's decision to grant or deny a request for attorney fees. *Ethridge v. Hwang*, 105 Wn. App. 447, 459-60, 20

P.3d 958 (2001). The court reviews de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). It then reviews for an abuse of discretion the decision to award or to deny attorney fees and the reasonableness of the fees awarded. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). The party challenging the award must show that the court used its discretion in an untenable and manifestly unreasonable manner. *Ethridge*, 105 Wn.App. at 460 (citing *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993)).

B. The Trial Court Erred In Awarding Attorney Fees and Costs without Legal Basis.

The court reviews de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). To recover attorney fees, the recovery must specifically be authorized by contract, statute, or recognized grounds of equity providing for fee recovery. Otherwise each litigant is responsible for paying its own fees. *Dayton v. Farmers Ins. Grp.*

124 Wn.2d 277, 280, 876 P.2d 896 (1994). In the present case, no legal basis exists for the award of attorney fees to Northwest Justice Project.

For its argument, Northwest Justice Project relies in part on the case of *Housing Authority of the City of Everett v. Terry*, 114 Wn.2d 558 (1990). CP 94. In *Terry*, the Washington State Supreme Court set forth circumstances upon which a tenant in an unlawful detainer action may recover an award of attorney fees and costs. *Id.* The *Terry* case involved an unlawful detainer action brought by the Housing Authority of the City of Everett, Washington against its tenant, Ray Terry. *Id.* Ray Terry, a handicapped tenant, had allegedly breached his lease covenants by exhibiting unpleasant and intimidating behavior to fellow tenants brought on as a result of his disability. Mr. Terry was served with a Notice of Termination of Tenancy without a 10-day opportunity to comply with his lease provisions. *Id.* The Washington State Supreme Court ultimately ruled that the notice served on Mr. Terry was statutorily defective because it lacked an opportunity to cure. *Id.* at 571. The Supreme Court held that the trial court therefore lacked jurisdiction to entertain the case, and it reversed and remanded the case for dismissal. *Id.* The Supreme Court in *Terry* also held that because

the trial court lacked jurisdiction, it could not rule on the issue of attorney fees, and, as a result, *Terry* was not entitled to an attorney fee award. *Id.* at 571. It is well settled that failure to comply with notice requirements under the Residential Landlord-Tenant Act defeats the court's jurisdiction. *Housing Authority of City of Seattle v. Silva*, 94 Wn. App. 731, 734, 972 P.2d 952 (1999). Here, the trial court lacked jurisdiction to award fees.

Just as in *Terry*, in the present case the trial court ruled that the notices served on Billy Thompson were statutorily defective (due to waiver by accepting rent). CP 86-90. It follows that, just as in *Terry*, the basis for dismissal of the unlawful detainer action is the trial court's lack of jurisdiction to entertain the case. Thus, the trial court erred in entertaining Northwest Justice Project's motion for an award of attorney fees and costs, and the Order for an Award of Attorney Fees and Costs and Judgment was granted in error.

Even if the trial court had jurisdiction to entertain the case, the Order was still granted in error. Northwest Justice Project listed itself as "Judgment Creditor" on the Judgment from which Appellant appeals. Northwest Justice Project was neither a named party to the underlying action, nor was it a party to the lease agreement.

The basis for the trial court's award of attorney fees and costs was a lease provision that stated in pertinent part "Tenant(s) agrees to pay all costs, expenses, collection and attorney's fees, as allowed by law, either expeted or incurred by Owner/Manager due to any breach or default by the Tenant(s) of any terms of this contract." CP 7-9. The lease agreement and the specific lease provision in question were agreed to between Appellant and tenant Billy Thompson. Therefore, an attorney fees provision in the lease provided for an award of fees to the landlord when the landlord was forced to expend costs and fees to enforce lease provisions.

Testimonial evidence given at the time of the evidentiary hearing supported Appellant's claims that Billy Thompson was in default of the no-smoking provision of his lease. Had Appellant been the prevailing party during the underlying litigation, Appellant had a basis for an award of attorney fees and costs against Billy Thompson. In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to

reasonable attorneys' fees in addition to costs and necessary disbursements. RCW 4.84.330. Thus, Billy Thompson was also authorized for an award of attorney fees by both contract and statute.

Where a contract "specifically provides for" the recovery of attorneys' fees "incurred to enforce the provisions of such contract," fees are to be awarded to the "prevailing party," defined as "the party in whose favor final judgment is rendered." RCW 4.84.330. Northwest Justice Project was not a party to the lease agreement or a party to the underlying litigation (other than as counsel for Billy Thompson). Northwest Justice Project did not have a basis for an award of attorney fees and costs absent a contractual arrangement with Billy Thompson. Billy Thompson was the true prevailing party. Yet, Northwest Justice Project inserted itself as "Judgment Creditor" for purposes of the Order for Award of Attorney Fees and Costs and Judgment. CP 116-119. Appellant objected. CP 109-112.

Further, Northwest Justice Project did not follow the required form for entry of judgment as stated in RCW 4.64.030. As stated in RCW 4.64.030:

(1) The clerk shall enter all judgments in the execution docket, subject to the direction of the court and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action.

(2)(a) On the first page of each judgment which provides for the payment of money, including foreign judgments, judgments in rem, mandates of judgments, and judgments on garnishments, the following shall be succinctly summarized: ***The judgment creditor and the name of his or her attorney***, the judgment debtor, the amount of the judgment, the interest owed to the date of the judgment, and the total of the taxable costs and attorney fees, if known at the time of the entry of the judgment, and in the entry of a foreign judgment, the filing and expiration dates of the judgment under the laws of the original jurisdiction.

RCW 4.64.030 (emphasis added).

Instead, Northwest Justice Project inserted itself as judgment creditor and omitted the correct party to the action, Billy Thompson. No actual assignment of the award was made by Billy Thompson to Northwest Justice Project. Thus, Northwest Justice Project was not a proper judgment creditor and no legal basis existed for the award of fees and costs directly to Northwest Justice Project as granted in the Order for Award of Attorney Fees and Costs and Judgment. Therefore, the trial court abused its discretion by awarding fees absent any legal basis for recovery.

C. The Trial Court Erred In Awarding Attorney Fees and Costs in an Unreasonable Amount.

The appellate court reviews for an abuse of discretion the discretionary decision to award or to deny attorney fees and the reasonableness of the fees awarded. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). A trial court has abused its discretion when the trial court used its discretion in an untenable or manifestly unreasonable manner. *Ethridge*, 105 Wn.App. at 460 (citing *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993)). Here, the award of attorney fees was excessive.

In the present matter, the trial court issued a letter ruling on June 12, 2017 as to whether Appellant waived its notices served on the tenant by accepting rent. CP 79-80. The trial court held that there was no waiver based upon the non-waiver language contained in the notices. CP 79-80.

The parties then proceeded to litigate the unlawful detainer action in a half-day bench trial. CP 53. Once the bench trial was concluded and both parties rested, the trial court then reversed itself and ruled that Appellant had waived the notices by accepting rent. CP 86-90.

Had the trial court initially ruled that Appellant had waived notices, then no attorney fees and costs would have accrued as associated with trial and trial preparation. Only those fees and costs incurred up to and including the letter ruling of June 12, 2017 would have potentially been awarded to tenant Billy Thompson as the prevailing party.

From June 12, 2017 (the date of the letter ruling) through the end of the case, Tyler Graber, attorney at Northwest Justice Project, claimed attorney fees in the amount of \$3,120. CP 101. Mr. Graber also claimed \$907.25 in costs for a deposition held on June 15, 2017, after the letter ruling. CP 103. These attorney fees and costs would not have been incurred had the case been dismissed at the time of the letter ruling on June 12, 2017.

The statute allowing an attorney fee award to the prevailing party in a residential landlord-tenant unlawful detainer action is discretionary, not mandatory. RCW 59.18.290. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 147 P.3d 1305 (2006). Untenable reasons include errors of law. *Id.*

A prevailing tenant in an unlawful detainer action is authorized to receive an attorney fee award, even then the tenant had pro-bono legal counsel. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 147 P.3d 1305 (2006). Northwest Justice Project is a pro-bono public funded legal aid program representing Billy Thompson. However, Northwest Justice Project was not the prevailing party tenant. Also, such a large fee award is unreasonable and unjust, given the trial court's reversal and the fact that Billy Thompson was not required to pay for any attorney fees or costs.

Further, the trial court erred in awarding fees where the fee award was based upon errors of law. The court lacked legal basis to award the fee, as discussed *supra*, and thus grounds for the fee award were untenable.

D. Northwest Justice Project is an Improper Party to this Appeal.

RAP 3.2 authorizes the appellate court to substitute parties to a review when it ***appears*** that a party is deceased or the interest of a party in the subject matter of the review has been transferred. (emphasis added). This court has allowed substitution of Northwest Justice Project pursuant to RAP 3.2. However, this court has not ruled as to whether Billy Thompson's claim to an award of fees and

costs was in fact properly transferred to Northwest Justice Project and whether Northwest Justice Project is a proper party to this appeal. Appellant renews its arguments to this court and incorporates its previous arguments as set forth in its previously filed motions to this court.

When a party to a lawsuit dies, the cause of action survives, but the action must be continued by or against the deceased party's representatives or successors in interest. RCW 4.20.050. When a party to a lawsuit dies, the attorney for the deceased party may no longer represent his interests. *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 17-18 (1999), citing *Bingham v. Zolt*, 683 F.Supp. 965, 976 (S.D.N.Y. 1988). The death of the client terminates the attorney-client relationship, and the attorney may not act further unless authorized to do so by the deceased client's representative. *Id.*

Here, Billy Thompson has passed away, and no probate has been opened for Billy Thompson's estate. Northwest Justice Project's insertion of itself as judgment creditor without a valid assignment was improper. Further, Northwest Justice Project is not authorized to appear on behalf of the Estate of Billy Thompson. Thus, the trial court erred in granting the Order for Award of

Attorney Fees and Costs and Judgment where Northwest Justice Project is an improper party to this appeal.

IV.

CONCLUSION

The trial court erred in several regards when it granted the Order for an Award of Attorney Fees and Costs and Judgment. The trial court lacked jurisdiction to entertain the order. There was no legal basis for an award of fees to Respondent. Even if a legal basis existed for the fee award, the award itself was unreasonably large given the fees and costs that accrued after the trial court's reversal of its letter ruling of June 12, 2017. Further, it was error to grant such an order in favor of Northwest Justice Project as judgment creditor when Northwest Justice Project was not a party to the underlying action and had not properly been assigned the tenant's fee award. For all the reasons set forth above, Appellant respectfully requests this court to reverse and remand to vacate the previous Order.

DATED this 14 day of March, 2018.

MINNICK-HAYNER, P.S.

By: 
Mona J. Geidl, WSBA #42455
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of March, 2018, I caused to be served a true and correct copy of **APPELLANT'S BRIEF** by the method indicated below, and addressed to the following:

Tyler Graber
Northwest Justice Project
38 E. Main, Suite 207
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U.S. Mail, Postage Prepaid


Print Name: Judy Lomburg
Signed this 14 day of March, 2018
at Walla Walla, Walla Walla County, WA

MINNICK HAYNER

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