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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No: 366120

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

SPOKANE AIRCRAFT BOARD,

Petitioner,

v.

EXPERIMENTAL AIRCRAFT ASSOCIATION CHAPTER,

Appellant/Respondent.

**APPELLANT EXPERIMENTAL AIRCRAFT ASSOCIATION
CHAPTER'S REPLY BRIEF**

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TABLE OF CONTENTS

Table of Authoritiesi

I. RE-STATEMENT OF THE CASE IN REPLY.....1

II. SAB RELIES ON DISTINGUISHABLE CASES.....5

 A. FPA Crescent controls the outcome of this case.....5

 B. The Lease is Ambiguous.....6

III. CONCLUSION.....11

CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES

Cases

<i>Allied Stores Corp. v. North West Bank</i> , 2 Wn.App. 778, 784, 469 P.2d 993 (1970).....	8
<i>Allstate Ins. Co. v. Hammonds</i> , 72 Wn. App. 664, 670, 865 P.2d 560, 562 (1994).....	8
<i>Amend v. Bell</i> , 89 Wn.2d 124, 129, 570 P.2d 138, 95 A.L.R.3d 225 (1977).....	4
<i>FPA Crescent Associates, LLC v. Jamie’s LLC</i> , 190 Wn.App. 666, 360 P.3d 934 (Division Three 2015).....	2, 3, 6
<i>Green River Valley Found., Inc. v. Foster</i> , 78 Wn.2d 245, 249, 473 P.2d 844 (1970).....	7
<i>Keating v. Stadium Management Corp.</i> , 24 Mass.App.Ct. 246, 508 N.E.2d 121, 123 (1987).....	9
<i>Keck v. Collins</i> , 181 Wash. App. 67, 78–79, 325 P.3d 306, 311–12 (2014), <i>aff’d but criticized on other grounds</i> , 184 Wash. 2d 358, 357 P.3d 1080 (2015).....	10
<i>Ladum v. Utility Cartage, Inc.</i> , 68 Wash.2d 109, 411 P.2d 868 (1966).....	7
<i>Lanier Profl Servs., Inc. v. Ricci</i> , 192 F.3d 1, 4 (1st Cir. 1999).....	9
<i>McGary v. Westlake Inv’rs</i> , 99 Wn.2d 280, 285, 661 P.2d 971, 974 (1983).....	7
<i>McGary, supra</i> , 99 Wn.2d at 287, 661 P.2d 971.....	8
<i>Morgan</i> , 86 Wn.2d at 435, 545 P.2d 1193.....	7
<i>Riojas v. Grant County Pub. Util. Dist.</i> , 117 Wn.App. 694, 697, 72 P.3d 1093 (2003).....	4
<i>SAB cites W. Union Tel. Co. v. Hansen & Rowland Corp.</i> , 166 F.2d 258, 262 (9th Cir. 1948).....	5
<i>Spradlin Rock Prod., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cty.</i> , 164 Wn.App. 641, 661, 266 P.3d 229, 238 (2011).....	9
<i>State ex rel. Seaborn Shipyards Co. v. Superior Court</i> , 102 Wash. 215, 217, 172 P. 826, 826–27 (1918).....	3
<i>State Farm Gen. Ins. Co. v. Emerson</i> , 102 Wn.2d 477, 484, 687 P.2d 1139 (1984).....	7
<i>Vadheim v. Continental Ins. Co.</i> , 107 Wn.2d 836, 841, 734 P.2d 17 (1987).....	7

Statutes

RCW 59.12.030 2, 6

Other Authorities

Webster's New International Dictionary (2d ed.) 7

I. RE-STATEMENT OF THE CASE IN REPLY

In this case, the record and the briefing submitted to date show that Appellant Experimental Aircraft Association (“EAA”) had a five year written lease that allowed Respondent Spokane Airport Board (“SAB”) to relocate EAA if it lacked cause to terminate (terminating only for its own convenience) but decided to proceed with termination anyway. In September 2017, SAB made overtures to EAA about exercising its relocation powers under the Lease. It provided 180 days’ notice to EAA that it was terminating the old lease, and at the same time, it provided EAA assurances that its intentions were to “expand” (CR 581-582) EAA’s tenancy via relocation.

However, in August 2018, SAB’s tune changed. No longer discussing relocation (which by Lease was at SAB’s sole expense), SAB would not budge off of a much-less-favorable lease (one year; extension at Airport’s discretion). When EAA, whose leadership absolutely believed that SAB could not terminate the lease except for cause, balked at the less favorable lease, SAB brought this unlawful detainer

action, on the sole ground that the Lease had been terminated and that EAA was in unlawful detainer under RCW 59.12.030(1).

Under protest, EAA's membership vacated the premises immediately, before the end of August 2018, and the locks were changed. Some months later, SAB sought and won partial summary judgment on EAA's liability to SAB for whatever damages may have been caused, if any, by this so-called unlawful detainer.

SAB tries repeatedly but in vain to distinguish *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. 666, 360 P.3d 934 (Division Three 2015). In that decision, this Division of the Court of Appeals held that a landlord cannot take advantage of RCW 59.12.030(1) and the summary proceeding it provides for if the lease, as written and by its terms, has not expired.

For example, a landlord cannot terminate a two year tenancy early for nonpayment of rent and then claim unlawful detainer under RCW 59.12.030(1). Such a landlord can claim unlawful detainer, of course, but the proper

statute, RCW 59.12.030(3), provides for an opportunity for the tenant to cure and thereby reinstate the tenancy.

In addition, possession was no longer an issue by the time SAB sought summary judgment. This should have been an ejectment case, because the purposes of unlawful detainer, as recognized by this Division in *FPA Crescent*, could no longer be furthered by the summary procedures involved in unlawful detainer. The trial court lacked jurisdiction to decide liability for damages. *State ex rel. Seaborn Shipyards Co. v. Superior Court*, 102 Wash. 215, 217, 172 P. 826, 826–27 (1918) (trial court is “to all intents and purposes, sitting as a special tribunal, restricted to the determination of a special statutory proceeding ... [with] no jurisdiction to determine any other issue than that presentable under the special statute”).

EAA has shown this Court that there are multiple questions of fact to be decided on remand, treating this case as an action in ejectment, and not as a special statutory vehicle to decide possession summarily. One such question

is whether SAB acted in good faith when it “switched” to eviction from relocation very late in the day.

Another is whether the Lease should be interpreted as EAA has done, as providing for two types of termination, one for cause and one involving relocation. SAB interprets the Lease as giving it a freestanding right to terminate on six months’ notice. This is not consistent either with SAB’s actions (often the best test of what the parties really intended by a contract) or the written Lease.

SAB seeks to avoid these, and other, questions of fact simply by attacking the credibility of EAA’s witnesses. For example, at p. 10 of its response, Airport Board argues Mr. Hohner’s credibility. But a trial court cannot make credibility determinations on a motion for summary judgment, *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138, 95 A.L.R.3d 225 (1977), and this Court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party, not weighing and balancing evidence. *Riojas v. Grant County Pub. Util. Dist.*, 117 Wn.App. 694, 697, 72 P.3d 1093 (2003).

This Court should reverse. SAB relied on the wrong statute, and liability and damages cannot be ordered in a special statutory proceeding designed to promptly decide the right to possession of premises. In addition, multiple questions of fact abound here, notwithstanding SAB's attacks on Mr. Hohner's credibility.¹ SAB promised and made arrangements for relocation from Building 7 at Felts Field to Building 17, but when EAA balked at the less favorable lease and reduced space in Building 17, SAB decided this was a termination-eviction after all. This is not good faith.

II. SAB RELIES ON DISTINGUISHABLE CASES

A. FPA Crescent controls the outcome of this case

SAB argues that the tenancy was terminated by its unilateral act of changing a 2017 relocation into a 2018 termination. Questions regarding good faith aside, this argument has no bearing on our case. SAB cites *W. Union Tel. Co. v. Hansen & Rowland Corp.*, 166 F.2d 258, 262 (9th Cir. 1948) for the proposition that, “[w]hile recognizing the

¹ Jack Hohner is the long-time EAA local chapter president who became the Treasurer. He was intimately familiar with SAB's actions and EAA's responses.

distinction between the lease-term and the tenancy itself, the law of Washington holds that the expiration of the former results in the termination of the latter.”

This begs the question. As *FPA Crescent* recently held, a landlord cannot cherry-pick among lease provisions and unlawful detainer statutes. Yet that is exactly what SAB does here. Within the meaning of RCW 59.12.030(1), a tenant under a written lease for a specified term is not a “holdover,” bringing RCW 59.12.030(1) into play, until the agreed-upon term ends. This is the principal holding of *FPA Crescent*. SAB fails in its many attempts to distinguish this case and avoid this outcome.

B. The Lease is Ambiguous

Similarly, SAB claims that the termination provision is unambiguous. The ambiguity determination does not affect the outcome under this Division’s recent *FPA Crescent* decision, but it will likely affect disposition of the case on remand.

Generally, the question of whether a written instrument is ambiguous is a question of law for the court.

Ladum v. Utility Cartage, Inc., 68 Wash.2d 109, 411 P.2d 868 (1966). An ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole. *Green River Valley Found., Inc. v. Foster*, 78 Wn.2d 245, 249, 473 P.2d 844 (1970). The term “ambiguous” has been defined as “capable of being understood in either of two or more possible senses’.” *Ladum*, 68 Wn.2d at 116, 411 P.2d 868 quoting *Webster's New International Dictionary* (2d ed.). See also *McGary v. Westlake Inv'rs*, 99 Wn.2d 280, 285, 661 P.2d 971, 974 (1983).

The cases relied upon by SAB do not use the wrong standard, or a different one. They simply find the lack of ambiguity where reasonable minds could not differ. For example:

An ambiguity exists in a provision when, reading the contract as a whole, two reasonable and fair interpretations are possible. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 484, 687 P.2d 1139 (1984); *Morgan*, 86 Wn.2d at 435, 545 P.2d 1193. “A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.” *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 841, 734 P.2d 17 (1987). Where an ambiguity remains unresolved, we adopt the reasonable interpretation most favorable to the insured.

Vadheim, 107 Wn.2d at 841; *Morgan*, 86 Wn.2d at 435, 545 P.2d 1193. This rule applies even where the insurer may have intended another meaning. *Vadheim*, 107 Wn.2d at 841, 734 P.2d 17; *Morgan*, 86 Wn.2d at 435, 545 P.2d 1193.

Allstate Ins. Co. v. Hammonds, 72 Wn. App. 664, 670, 865 P.2d 560, 562 (1994). The court in this case found no ambiguity in resolving the question who was named as an “insured” under the policy.

Here, by contrast, taking the Lease as a whole, it is fair to believe that an early termination for cause is acceptable, but an early termination for SAB’s convenience invokes the relocation clause. This is, of course, exactly how SAB treated the Lease, and how EAA understood it.

Ambiguities in a lease agreement must be construed against the one who prepares the lease agreement. *McGary*, *supra*, 99 Wn.2d at 287, 661 P.2d 971. In the same vein, if a lease is ambiguous, the court will adopt the interpretation that is most favorable to the lessee. *Allied Stores Corp. v. North West Bank*, 2 Wn.App. 778, 784, 469 P.2d 993 (1970).

This Court may consider SAB’s conduct in deciding whether there is an ambiguity. As Division Two of this court

held, a “course of performance’ refers to ‘[a] sequence of previous performance by either party after an agreement has been entered into, when a contract involves repeated occasions for performance.’” *Spradlin Rock Prod., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cty.*, 164 Wn.App. 641, 661, 266 P.3d 229, 238 (2011); see also, e.g., *Lanier Profl Servs., Inc. v. Ricci*, 192 F.3d 1, 4 (1st Cir. 1999), in which the court stated:

Extrinsic evidence is admissible to assist the factfinder in resolving the ambiguity, including evidence of, in descending order of importance: (1) the parties' negotiations concerning the contract at issue; (2) their course of performance; and (3) trade usage in the relevant industry.³ See *Den Norske*, 75 F.3d at 52–53; see also *Keating v. Stadium Management Corp.*, 24 Mass.App.Ct. 246, 508 N.E.2d 121, 123 (1987).

192 F.3d at 4. For many months, SAB treated this Lease as if relocation was required, and not as if the tenancy was terminated. SAB appears to admit that it extended the termination period several times because of space availability

in Building 17, the relocation building. Answering Brief, at p. 6.²

This Court should reverse. The parties were not “negotiating a new lease,” and indeed SAB never once “negotiated” in the classic sense, but instead used strong-arm take-it-or-leave-it tactics. The record shows that the September 2017-August 2018 effort by SAB was that of relocation, at its own expense, to Building 17.

This is not a straightforward termination of lease. Nor was SAB’s action in suddenly turning to the courts in unlawful detainer a good faith action in effort to protect its lease rights. It was a bullying tactic and an about-face from its previous efforts, on which EAA relied, for relocation.

But, again, this Court does not need to resolve the ambiguity issue. This case presents a straightforward

² SAB does not specifically admit the reason for the extensions from June to July and July to August. It gives no reason at all. However, in context of the much-cited Hoehner Declaration and the emails discussed in EAA’s Opening Brief, a very reasonable inference is that SAB kept extending the time at which the tenance would be terminated because of space availability in Building 17. See CP 581. This is a summary judgment case, and EAA is entitled to all reasonable inferences. *Keck v. Collins*, 181 Wash. App. 67, 78–79, 325 P.3d 306, 311–12 (2014), *aff’d but criticized on other grounds*, 184 Wash. 2d 358, 357 P.3d 1080 (2015)

application of *FPA Crescent*, and should be resolved accordingly.

III. CONCLUSION

Based upon the foregoing, EAA respectfully requests this Court to reverse, and remand with instructions.

RESPECTFULLY SUBMITTED this 12/17 day of December, 2019.

A handwritten signature in cursive script that reads "Milton G. Rowland". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I certify that I am a citizen of the United States of America and a resident of the State of Washington, over the age of eighteen years, and competent to be a witness herein.

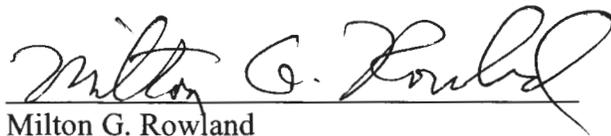
On the date designated below I caused to be served the foregoing document via e-mail, pursuant to the parties' e-service agreement, upon designated counsel:

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I am filing this document with the Division III Court of Appeals for the State of Washington at 1:20 p.m. on December 17, 2019.

Dated: 12/17/2019


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