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DEC 23 2019

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

APPELLATE CASE NO. 36863-7-III

MARK WHITMORE,
Respondent

v.

ZANE LARSEN, individually, AFFORDABLE ADVANCED
AUTORCARE, a Washington Limited Liability Company, d/b/a
EVERGREEN TIRE, and OCCUPANTS,
Appellants

APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR WHITMAN COUNTY
HONORABLE GARY J. LIBEY, JUDGE
Case No. 15-2-00140-8

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The defendant in this case are Zane Larsen and Affordable Advanced Autorcare, d/b/a Evergreen Tire. The reference to Mr. Larsen will include Affordable Advanced Autocare, since Mr. Larsen is the sole owner of that entity. RP 312, line 17-25.

Appellants brief makes references on pages 1, 7, 20 and 33 to the value of the strip of land as work \$7,500.00. This is nothing in the record nor the admitted exhibits that reflects this alleged value. Exhibit 115 was initially admitted, but later stricken. CP 396-400. Therefore, all references in Appellants brief to the value of the land involved must be stricken and not considered by this court, as it was not considered at the trial of this matter.

This action was commenced as an unlawful detainer matter. RCW 59.12-030, CP 2-5. The foundation of the case is based on the lease of Charles Chambers. EX 14. The focus of Appellants argument on appeal is that this should be treated as an action for ejectment. RCW 7.28.

N. W. McGee owned certain property north of “Campus Loop” (now and hereafter, Stadium Way) between the railroad right of way and property owned by Maybelle Keiser. RP 70-78. Maybelle Keiser sold to Myron and Blanche King property adjoining the N. W. McGee property, retaining a 16 foot access easement adjacent to the McGee property. EX 2. Blanche King, widow of Myron King then transferred her interest in the 16 foot easement, together with the property that Maybelle Keiser was about to seek to quiet title from N. W McGee. EX 4. The deed from Blanche King to Maybelle Keiser was recorded on the same date that the complaint to quiet title was filed. EX 4 and 118. The result being that

Maybelle Keiser owned 42 feet, more or less, from the railroad right of way east and north of Stadium Way. (26.06 feet from the quiet title and 16 feet from Blanche King).

Pullman was incorporated as a town in April 11, 1888. RP 104. In 1879 and 1888 the county commissioners of Whitman County, Washington Territory established both Branham Road and Kaylor Road, respectively. EX 102 and 103. It became necessary for Kaylor Road to be opened because the railroad destroyed a portion of Branham Road when it laid its tracks over a portion of Branham Road. EX 103. In 1913, the road to the east of the railroad, Kaylor Road and Branham Road, was to be replaced by a new road west of the railroad since the existing road was rocky, hilly and dangerous". EX 105. Also, about that time, the grain elevator now owned by Mr. Whitmore was constructed with a driveway from Stadium Way to the elevator, which was located at the end of the driveway from Stadium Way, past the location where Mr. Larsen's building now exists. RP 39-40. Examining the surveyors plotting depicting the original locations of Branham Road and Kaylor Road, show that these roads included the majority of the property occupied by Mr. Larsen and a portion of the property now owned by Mr. Whitmore. EX 101.

In 1949, the City of Pullman annexed the property now occupied by Mr. Larsen and the driveway owned by Mr. Whitmore. EX 126. In the annexation ordinance and city map, the only streets, roads or alleys shown are Stadium Way and Grand Avenue. EX 126 There is no depiction of either Branham Road nor Kaylor Road, nor the driveway from Stadium Way northerly.

The Order of Default in Maybelle Keiser's quiet title suit reflects that service of process was done by publication. EX 118. The complaint did not include the City of Pullman, nor Widmer and Widmer Roofing Specialist, since at the time neither was shown to have any record title to the property. The railroad would not have been a necessary party, since the description merely extended to the railroad right of way. In addition, at that time, all but approximately 10 feet of the Widmer & Widmer building was on property leased from the railroad. EX 19.

From November, 1962 to date, Mr. Whitmore and his predecessors in title have leased the property that includes approximately 10 feet in width, of Mr. Larsen's building, together with full use of the driveway over approximately 32 feet additional width, from Stadium Way to the Whitmore gate, to various tenants. EX 9-14. Initially, rent was \$100.00 per year. EX 6-11. From 1986 on, the rent became a monthly rent, starting at \$700.00 per month, with a cost of living adjustment, through and including the 2012 Chamber's lease, with rent and cost of living beginning at \$1,080.50 per month. EX 12-14.

At the time of trial, Mr. Whitmore testified that he had leased his grain elevator, located at the north end of the driveway from Stadium Way, for \$1,500.00 per month. There were also railroad leases in place at approximately \$1,900.00 per year. EX 113 The railroad lease provided little usable space for Mr. Larsen. EX 19

During 2014, Mr. Chambers began plans to retire at the end of 2014 and to sell his business and building. RP 176 He began negotiations with Mr. Larsen. Mr. Larsen took over the building, which was encumbered by Mr. Whitmore's lease, in November, 2014. RP 186-

187, 200-201.

The terms of the lease in effect in November, 2014 provided:

“PROVIDED, however, this lease shall continue in effect for an additional three (3) year term, thereafter upon the same terms and conditions until written notice to terminate or revise is given by either party to the other party on or before the 1st day of January 2015, or the first day of January before the end of any succeeding three (3) year term thereafter in which event the lease shall terminate on January 31 at the end of that three (3) year term.”

The lease also provided for the recovery of costs and attorney fees in the event of suit. EX 14.

Neither Mr. Chambers nor Mr. Larsen gave any timely notice of termination in writing. Mr. Chambers gave a written notice in February, 2015 of his intent to terminate. EX 15. It should be noted that neither Mr. Chambers nor Mr. Larsen have testified that they had made any permanent improvements to the building since Mr. Chambers initially leased the building in 1999. In fact only a 900 square foot addition was added in 1989 by a prior tenant. EX 122.

Mr. Whitmore not having received any rent from Mr. Larsen since January, 2015, served Mr. Larsen with a 3 day notice to pay rent or vacate in June, 2015. EX 1. Mr. Larsen refused to pay rent or vacate and an unlawful detainer action was commenced. CP 2-4.

Initially, Mr. Larsen argued that the only existing railroad tracks were not the tracks from which the 50 foot right of way of the railroad centerline should be measured and that the easterly right of way of the railroad extended into the property claimed by Mr. Whitmore. Several surveys were done by each parties surveyors. The surveyors did not agree and Mr. Whitmore motion for summary judgment was denied in

November, 2016. CP 48-176. Further surveys were done and cross motions for summary judgment were file and heard and denied in 2017. CP 192 - 284. The court order denying the motions for summary judgment on November 21, 2017 did not address the issues of Kaylor Road, which had not then be plead. CP 284. February 12, 2018 Mr. Larsen hired a new attorney. CP 312. It was after Mr. Larsen hired a new attorney that the issue of “Kaylor Road” and “Branham Road” roads on the property that was later annexed into the City of Pullman was raised. CP 332. The surveyors plotted the locations of both roads, as originally surveyed, which showed that the roads passed through Mr. Whitmore’s property and the leased railroad property where Mr. Larsen’s building now exists. EX101. Having learned of the new issues and being unable to reach an agreed solution, the parties agreed to mediation that occurred in September, 2018, without a resolution.

Mr. Chambers, apparently being unsure if Mr. Larsen was going to proceed with the purchase of the building, gave Mr. Whitmore a right of first refusal to buy the building and business commencing in April 15, 2015 through October, 2015. EX 114.

The evidence and record before the court clearing establishes the correctness of the trial courts decision and should be affirmed.

STATEMENT OF THE ISSUES:

1. Was the trial court correct in treating this matter as an unlawful detainer matter and not as an ejectment proceedings?
2. Was the trial court correct in finding that the parties had a landlord/tenant relationship based upon an existing lease at the time Mr. Larsen purchased the building?

3. Did the trial court correctly fashion a flexible remedy relating to the restitution of the premises to Mr. Whitmore?

4. Was the trial correct in refusing to recognize the existence of a public road that negated Mr. Whitmore's right to exclusively possess the property in question?

5. Did the trial court properly award damages under the lease in effect at the time Mr. Larsen purchased the building?

6. Was the trial court correct in doubling damages and awarding fees pursuant to the lease in effect at the time Mr. Larsen purchased the property.

ARGUMENT

I.

Was the trial court correct in treating this matter as an unlawful detainer matter and not as an ejectment proceedings?

The issue of whether a tenant who holdover on a lease that has an extension clause is bound by the terms of the lease. This was addressed in *March-McLennan Bldg., Inc. v Clapp*, 96 Wn. App. 636, 980 P.2d 311 (1999). The rule in Washington was adopted that a hold over tenant is bound by the terms of the lease that either on its face expired or continued. *Supra*. 644-645.

Mr. Chambers had a lease commencing February 1, 2012 and terminating January 31, 2015. The lease provided that it would continue on the same terms for additional 3 years terms unless notification in writing was given by either party to the other to terminate or modify the existing lease. EX 14. Mr. Chambers orally told Mr. Whitmore that he was going to retire at the end of 2014 and that he was negotiating a sale of

his business and the building with Mr. Larsen. RP 176. Mr. Chambers did not notify Mr. Whitmore in writing until February, 2015 of his intent not to renew. EX 15. In the interim, commencing in November, 2014, Mr. Larsen took over the building and began making payments on the building to

Mr. Chambers. RP 188-189; 195. Lease payments continued to Mr. Whitmore through January 2015. In addition, Mr. Larsen took over and continued to insure the property beginning in 2014 and continuing through the trial of this matter, consistent with the lease provisions, naming Mr. Whitmore or his LLC as an insured. EX 14 and 20. Clearly, Mr. Larsen having taken over the building in November, 2014 while the lease was in effect, assumed the lease and its provisions. Neither Mr. Larsen nor Mr. Chambers gave timely written notice of termination. Therefore the lease continued for an additional 3 year period until written notice is given.

As an alternative, in June, 2015, Mr. Whitmore served Mr. Larsen with a 3 day notice to pay rent or vacate for delinquent rent from February, 2015 through June, 2015. Mr. Larsen failed to pay rent or vacate the premises. In the event that it is determined that the original Chambers lease did not continue, then the service of the 3 day notice to pay or vacate created an implied lease. *Lake Union Realty Co. v. Woolfield*, 119 Wash. 331, 205 Pac.14 (1922), which held that the service of the 3 day notice to pay rent or vacate created an implied lease. Supra. 333.

Mr. Larsen further argues that the quiet title judgment obtained by Maybelle Keiser was defective by failure to name a tenant on the property and that Kaylor Road and Branman Road were city streets at the time of the action. This position is without merit for 3 reasons: (1) title to

property cannot be litigated in an unlawful detainer action; (2) Widmer & Widmer Roofing had no record title at the time, CP 172-176; and (3) neither Kaylor Road nor Branman Road existed at the time.

The long standing rule relating to unlawful detainer matters is that title to the property cannot be waged as a defense in such an action. *Decker v. Verloop*, 73 Wash. 10, 181 Pac. 190 (1913). This rule was recently approved in *River Stone Holdings v. Lopez* 199 Wn. App. 87, 395 P.3d 1071 (2017).

Apparently, Widmer and Widmer constructed their building on property they leased from the railroad. Approximately 10 feet of the property was on the land still titled in the name of H. W. McGee. Mrs. Keiser claimed the title and after acquiring the title to the property entered into a lease with Widmer and Widmer for the property. EX 9. From that point forward, i.e. from November, 1962, neither Widmer nor any future tenant to the property objected to the ownership of Mrs. Keiser or her successors in interest. At minimum, Mr. Whitmore and his predecessors have had open, notorious, continuous uninterrupted and adverse to all prior tenants. RCW 7.28.010 et.seq.

In 1913, the city of Pullman began the process of relocating the road east of the railroad tracks (Kaylor and Branman Roads) to the west side of the track. EX 130. Of significance, it must be noted that in each of the leases from Mrs. Keiser through Ms. Martin, (1962 to 1987) it was provided for a stip of land and:

“It is understood that the existing road adjacent to or upon the demised premise is a private road belonging to the Lessor. Lessee and Lessor shall have the common use of this road during the lease term. Lessee shall at all times during the lease maintain the road

for the length of these demised premises in a good state of repair, and neither party will obstruct the road so as to in any manner impede or interfere with the use of the road by Lessee or by the Lessor or her employees.”

EX 9-12.

The later leases provided:

“Lessor also hereby leases to Lessee all easements, parking and loading rights, right of ingress and egress, fixtures and appurtenance now or hereafter belonging or appertaining to said premises.”

and

“Lessee shall at lease [sic] annually grade and gravel the common driveway from the end of the asphalt to the existing gate at the north termination of the common driveway.”

EX 13 and 14.

The significance of these provisions is that there was no maintenance and repairs of the “driveway” formerly Kaylor Road and Branman Road after 1962 and arguably since approximately 1913.

It should be recalled, that Pullman did not annex the property north of Stadium Way, the Whitmore driveway property until June, 1959. EX 129 The roads were moved in approximately 1913. EX 130. Mr. Whitmore testified that the driveway to what is now his elevator had existed since approximately 1910. RP 39-40. With these fact in mind, the operation of RCW 35.02.180 and 36.87.090 show that at the time that the building now occupied by Mr. Larsen was not encumbered by either Kaylor Road or Branman Road.

RCW 36.87.090 provides:

“An county road, or part thereof, which remains unopened for public use for a period of five years after the order is made or, authority is granted for opening it, shall be thereby vacated, and the authority for building it barred by lapse of time:...”

It is apparent that from on or about 1913 until 1959, the driveway from Stadium Way to Mr. Whitmore's elevator was neither developed nor maintained as a county road. This non-use for over 5 years should be construed to have vacated the roads before the property was annexed into the city in 1959.

Also, RCW 35.02.180 provides:

“The ownership of all county roads located within the boundaries of a **newly incorporated** city or town shall revert to the city or town and become streets as of the official date of incorporation. (emphasis added)”

It was stipulated that Pullman was incorporated in 1888. RP 104. This being the case, by annexation in 1959, this not being a newly incorporated city or town, therefore the county roads, if they existed, did not become city streets.

Additionally, RCW 58.08.050, provides:

“Whenever any city or town has been surveyed and platted and a plat thereof showing the roads, streets and alleys has been filed in the office of the auditor of the county in which such city or town is located, such plat shall be deemed the official plat of such city, or town, and all roads, streets and alleys in such city or town as shown by such plat, be and the same are declared public highways: PROVIDING, That nothing herein shall apply to any part of a city or town that has been vacated according to law.”

The only evidence of the survey and platting is found in the ordinance annexing the property and this did not show Kaylor Road nor Branham Road, Only Grand Avenue and Stadium Way. EX 126.

Mr. Larsen argues that establishes that when Renton annexed Renton Highlands the franchise of *Evergreen* became subject to the

control of the city of Renton. The court held that when territory is annexed to a city, the authority of the city *ipso factor* extends over the new territory, and it become subject to the control and supervision of the municipality. Id.86 This begs the question of whether the county roads, if they existed, became city streets.

In contrast, *Spokane Valley v. Spokane County*, 145 Wn. App. 825 , 187 P.3d 340 (2008) held that the newly incorporated city of Spokane Valley, did not include an unimproved dedicated right of way since it was not opened to the public. Ib. 830-833. The case determined that the county road must be open as a matter of right to the public for vehicular traffic Here, the only use of the road has been as a driveway for the use of the owners of the property for their customers and suppliers. RP 208-210; 261-265.

Counsel suggests that when Mr. Chambers either sublet, by allowing Mr. Larsen to take possession of the building in November 2014 or by assignment, by allowing Mr. Larsen to continue possession of the building in February, 2015, that the lease terminated. This position is simply not well taken. The specific terms of the lease provided:

“Lessee shall not assign this lease or sublet an portion of the premises without prior written consent of the Lessor, which shall not be unreasonably withheld. Any such assignment or subletting without consent shall be void and Lessor, at his option, may terminate this lease.” EX 14

Clearly, Mr. Whitmore did not exercise his option to terminate the lease. He continued and continues to claim that Mr. Larsen is bound by the Chambers lease.

The cases cited by Mr. Larsen that would allow an extension of time to give notice of termination are not applicable to this situation. *General Telephone Co. v. C-3 Assocs.*, 32 Wn.App. 550, 648, P.2d 491 (1982) held that a notice was hand delivered when the lease provided for notice to be by registered mail. The notice was both received and acknowledged. *Wharf Restaurant v. Port of Seattle*, 24 Wn.App 601, 605 P.2d 334 (1979) involved a confusion of the time notice was to be given and the fact that a \$1,300,000.00 offer to purchase had been made to the tenant. Therefore, it would have been inequitable to forfeit the lease. In our case, clearly Mr. Larsen was aware of the lease, since he ceased making payments in February, 2015. Furthermore, there had been no substantial improvement or value to the property by either Mr. Chambers nor Mr. Larsen, the last improvement was a 900 square foot addition in 1989, 10 years before Mr. Chambers took possession. EX 122. The failure to allow additional time for Mr. Larsen or Mr. Chambers to terminate the lease would not result in a forfeiture of the lease, which is the evil that the cases rely upon to allow the additional time.

Mr. Larsen suggests that this matter should be treated as a case for ejectment, RCW 7.28.010 et.seq. as apposed to an unlawful detainer eviction, RCW 59.12.010 et.seq.

An action for unlawful detainer action is a special procedure to recover possession of property and related issues such as restitution of the premises and rents. *Duvall Highlands LLC v. Elwell*, 104 Wn. App. 763, 19 P.3d 1051 (2001). Were the matter filed to contest title and the right of ownership, an ejectment action would have been appropriate. However, this case mere addresses the issue of the continuation of a lease agreement

that was accepted by Mr. Larsen when he took possession of the building from Mr. Chambers in November, 2014, while the lease in effect. Ejection was not and would not have been the proper or correct way for Mr. Whitmore to proceed. Mr. Larsen took over the building with knowledge that the 10 feet of his building was on land previously leased to tenants since 1962. A simple reading of the legal description referred to 10 feet east of the railroad right of way along Stadium Way. EX 14. Mr. Larsen refused to accept that 10 feet of his building was on leased land and also questioned the location of the railroad centerline, used to measure the property both leased from the railroad, as well as, where Mr. Whitmore's property began. Mr. Larsen's own survey established the location of the centerline of the railroad and the 10 foot encroachment. EX 19. Mr. Larsen questioning title, but took possession of the building and has continued in possession for over 4 years..

Counsel suggests that had this matter been commenced as an ejectment action because other remedies and offsets are available. This would be true if this were an ejectment case, but it is not. The failure to pay rent by Mr. Larsen was the sole basis for the suit. The authorities cited are distinguished from our case. *Casstellon v. Rodriguez*, 4 Wn.App. 8, 418 P.3d 804 (2018) was commenced as an unlawful detainer action. However, the tenant move from the property and the action for possession no longer at issue. The plaintiff, after the defendant vacated the property returned to the court to obtain a judgment for rent. On appeal, it was held that the court lost subject matter jurisdiction when the property was vacated and therefore the judgment was vacated.

Bar K Land Co. v. Webb, 72 Wn.App. 380, 864 P.2d 435 (1993)

involved an early possession agreement for the purchase of a home. The buyer made substantial improvements to the property, but was unable to obtain financing. It was commenced as an unlawful detainer case. The court recognized that the landlord tenant act excluded actions related to occupancy under earnest money contracts, RCW 59.18.040(2), and that ejectment would be a proper remedy. The case does not address the issue of the special summons for an unlawful detainer and the ordinary 20 day summons for an action in ejectment. Since the case had not been converted, then the unlawful detainer action should have been dismissed.

Puget Sound Inv. Group v. Bridges, 92 Wn.App. 523, 963 P.2d 944 (1998) also does not apply. The plaintiff purchased the home at a federal tax foreclosure sale. The court held that the provisions allowing unlawful detainer did not apply to tax foreclosure sale, only to foreclosure of deeds of trust and real estate contracts, therefore the court did not have subject matter jurisdiction. *Honan v. Ristorante Italia*, 66 Wn. App. 262, 832 P.2d 89 (1992) also does not apply, that case was filed as an ordinary civil matter using a 20 day summons and unlawful detainer was not the remedy sought.

SSG Corporation v. Cunningham, 74 Wn. App., 708, 875 P.2d 16 (1994) dealt with substantial improvements to leased land, several homes and buildings, and whether the tenant expected to preserve the improvements as against the landlords interest. This case is not parallel, since the initial improvement to the land were on leased railroad property, with the 10 foot section on land later leased from Maybelle Keiser. It cannot be construed that the tenant ever expected to preserve the land for themselves. The lease provides:

“TRADE FIXTURES; REMOVAL:

Any and all improvements made to the premises during the lease term hereof or any previous leases shall belong to the Lessor, except trade fixtures of the Lessee. “Trade Fixtures” shall include the metal building located on the premises. Lessee may (if he is not in default in the payment of rent or otherwise hereunder) upon termination hereof remove all his trade fixtures, but shall repair any damage to the premises occasioned by such removal, excluding the cement slab for the building.” EX 14, page 5.

Here, Mr. Larsen is continuing to own the accessions that had been placed on the leased property. His improvements are not being sought, only the possession of the underlying land.

Mr. Larsen also claims that RCW 59.16. et.seq. applies, allowing certain defenses. RCW 59.16.010 defines Unlawful Detainer as follows:

“That any person who shall, without the permission of the owner and without having any color of title, thereto, enter upon the lands of another, and shall refuse to remove therefrom after three days’ notice, shall be deemed guilty of unlawful detainer and may be removed from such lands.”

However in this case, since Mr. Larsen at no time had a color of title, nor did he enter the property without Mr. Whitmore’s permission. Therefore the provisions do not apply.

Finally, it is claimed that *Proctor v. Hunnington*, 169 Wn.2d 491, 238 P.3d 1117 (2010) should control in this case. There the defendant unknowingly built his home on his neighbors property. Plaintiff owned approximately 30 acres and defendant built on approximately 1 acre. The suit was brought as an ejectment case. The court held that exercising its equity powers, it would force the plaintiff to sell the 1 acre, since the cost

to move the home grossly exceeded the value of the acre of land and the plaintiff would not be substantially damaged. While true in ejectment cases, this rule of law does not apply to unlawful detainer actions. The right to possession is all that can be determined.

It should be noted that Judge Fraizer made a reference to this as a “boundary dispute”. CP 298 This is not a boundary dispute in the ordinary sense. It must be remembered, initially, the question was where was the east boundary of the railroad right of way and the west boundary of Mr. Whitmore’s property existed. Both involved leased grounds upon which Mr. Larsen’s building was located. This is not a neighbor versus neighbor litigating where their property lines exist.

In ejectment cases, the party seeking ejectment must rely on his title, not the weakness of the party seeking to be ejected. *North American Non Metallics Ltd. v. Erickson*, 24 Wn.App. 892, 604 P.2d 999 , review denied 93 Wn.2d 1019 (1979) By the nature of the claim made by Mr. Larsen, he is attempting to eject Mr. Whitmore from the property. Mr. Larsen merely possesses the property acquired from Mr. Chambers, but the legal title is in Mr. Whitmore. In essence, Mr. Larsen is attempting to eject Mr. Whitmore. However, Mr. Larsen has only a possessors interest in the property acquired from Mr. Chambers, a lesser title than that claimed by Mr. Whitmore, as a result of the quiet title action in 1962.

Mr. Larsen further claims that this matter languished for 14 month and therefore it should not be considered for relief under lawful detainer act, which allows for an expedited return of possession of property to the owner. The record clearly reflect that there were 2 summary judgment motions seeking to resolve the locations of the railroad right of way

boundary. The motions, considering that there were two different surveyors involved and questions as to the location of the centerline of the railroad and the east line of the railroad right of way, delayed the proceeds being brought to trial. In addition a change in Mr. Larsen's attorneys. CP 55-127; 199-200; 209-250; 312-314. Only because of the issues raised by Mr. Larsen, what would usually have been an expedited matter, required a substantial amount of extra investigation and preparation.

II.

Was the trial court correct in finding that the parties had a landlord/tenant relationship based upon an existing lease at the time Mr. Larsen purchased the building?

Clearly, in November, 2014 when Mr. Larsen purchased the building and began making payments to Mr. Chambers, there was a lease in effect. He and/or Mr. Chambers failed to timely give written notice on or before January 1, 2015 of the intent not to renew and the lease then continued until written notice was given.

In *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 80 P.12d 311 (1999), the law was stated that the tenant became bound by the terms of the lease terms when the fixed term came to an end and the tenant held over. The rule announced in the case was:

“proof of a holding over after the expiration of a fixed term in a lease gives rise to the presumption, which in the absence of contrary evidence will be controlling, that the holdover tenant continues to be bound by the covenants which are binding upon him during the fixed term.”

Mr. Larsen not only took over the lease before it expired, but he also continued to live up to the requirements of the lease by continuing to

provide liability insurance. EX 20. His rent remained current through the original term of the lease from November 2014 through January 2015. He has continued to occupy and use the premises without the payment for his occupancy of the property.

While we cannot dispute the case law concerning the construction of contracts cited by Mr. Larsen, namely *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009) and *Nat'l Bank of Commerce of Seattle v. Dunn*, 194 Wash. 472, 78 P.2d 535 (1938). The application of these case to this case does not result in the same conclusion argued by Mr. Larsen. Here the written lease requiring a written notice to terminate clearly stated the unambiguous term of for termination requiring a written notice. EX 14. Various testimony of witness were given that Mr. Chambers was going to sell his business and that Mr. Larsen had taken over in November, 2014 while the lease was still in effect. Mr. Chambers also offered a right of first refusal to Mr. Whitmore in April, 2015, showing a continued interest in the building. EX 114. Negotiations between Mr. Larsen and Mr Whitmore suggested that a new lease was proposed and that "all prior leases had ended. RP 204. This of course would be necessary to avoid confusion over which lease prevailed. The lease was never accepted by Mr. Larsen, leaving in place the Chambers lease.

Once again Mr. Larsen misconstrues the holdings of *Gen. Tel. Co. Of NW, Inc. v. C-3 Associates, supra.* and *Wharf Res. Inc. v. Port of Seattle, supra.*. In those cases, the court held that it would have been inequitable to cause a forfeiture of a lease due to the underlying circumstances in each case. He argues that oral notification of a possible

intent to end the lease was equal to written notification and that there were substantial improvements to the property which should allow additional time to be given for the notification. Here, it was ambiguous whether Mr. Chambers was going to be able to sell his building coupled with his continued interest in the building by offering a right of first refusal; Mr. Larsen took over the building in November, 2014 and had continued to occupy it now for over 4 years without payment of any rent. Neither Mr. Chambers, nor Mr. Larsen have made any improvement to the building that would justify them being given additional time to give notice of termination. This is not a case where equity would intervene to avoid a forfeiture by giving additional time to give notice required by the lease. The renewal provision of the lease was presented and argued in the case and was not waived. Furthermore, the failure to allow additional time to give the notice does not result in a forfeiture of the leasehold property as in the cases cited.

Mr. Larsen further argues that in an unlawful detainer matter, the court can grant equitable relief, citing *Rec. Equip., Inc., v. World Wrapps*, 165 Wn. App. 553, 2216 P.3d 924 (2011). While this is true, in that case, the defendant had untimely exercised its option to extend its lease. When the previous lease was extended, in contemplation of defendant doing \$250,000.00 of improvements, and the dates for the renewals were mistakenly changed in the lease extension. Upon learning of the failure to give notice to extend the lease, the defendant immediately gave notification of its intention to exercise its option. Based upon these facts, the court allowed additional time to give notice, in the unlawful detainer case. The holding is significant, allowing equitable remedies to avoid a

forfeiture. However, the equitable remedies sought by Mr. Larsen far exceed any authority in an unlawful detainer matter. His alleged remedies are akin to remedies available in an ejectment proceeds, unrelated to the restoring possession in an unlawful detainer case.

III.

Did the trial court correctly fashion a flexible remedy relating to the restitution of the premises to Mr. Whitmore?

The writ proposed by Mr. Whitmore and issued by the clerk of the court was done in a flexible manner to avoid the hardship of removing 10 feet of Mr. Larsen's building. The lease itself only covers the east 10 feet of the property and access from the driveway. By placing a fence along the easterly side of the building, this would cause the loss of the use of the driveway on the east side of the building. However, Mr. Larsen testified that he had adequate access on the west side of his building. RP 294 -298, CP 170. The placement of the fence would create an inconvenience, but not require the removal of the building, which Mr. Whitmore was willing to work with to avoid the removal of 10 feet of Mr. Larsen's building..

The requested writ of restitution allowed a flexible means to enforce the writ by placing a fence along the east side of the building and not requiring the removal of the 10 feet of Mr. Larsen's building. CP 583-585 The purpose of an unlawful detainer action is to restore possession of property, not to allow the tenant to retain possession of the property. This flexible approach accomplishes that end.

IV.

Was the trial court correct in refusing to recognize the existence of a public road that negated Mr. Whitmore's right

to exclusively possess the property in question?

Once again, title is not to be litigated in an unlawful detainer matter. *Decker v. Verloop*, 73 Wash. 10, 131 Pac. 190 (1913). A similar issue was raised in *Hall & Paulson Furniture Co. V. Wilbur*, 4 Wash. 644, 30 Pac. 665 (1913). In that case the tenant leased land from the landlord over tide lands. The tenant claimed that his landlord did not own the land leased. It was held that the tenant is precluded from showing that his landlord had no title to the property, since the tenant had recognized his landlord ownership and paid rent. *Supra*. 648. In this case, Mr. Larsen, being aware of the lease between Mr. Whitmore and Mr. Chambers, continued to honor the lease after taking possession of the building in November, 2014. Rent was paid through January 2015, thereby acknowledging the lease agreement.

The failure, or refusal to acknowledge the existence of the public road, if any, as previously suggested, is not appropriate to raise in an unlawful detainer matter, since title is not litigated in such an action. *Decker v. Verloop*, 73 Wash. 10, 131 Pac. 190 (1913).

The true question is whether Kaylor Road and Branham Road continued to exist. RCW 58.08.050 requires that a plat of the city showing streets and roads to be filed. Since the property was annexed in 1949, the only evidence presented does not show that either of those roads were filed with the county auditor. Furthermore, the original town of Pullman was incorporated in 1888. The annexation was not a newly incorporated city and therefore, those roads did not become city streets. RCW 35.02.180.

Mr. Larsen cites *Housing Auth. of City of Pasco and Franklin*

County v. Pleasant, 126 Wn. App. 382, 109 P.3d 442 (2005). While the quote is correct, but it is taken out of context. Pleasant raised a defense at the show cause hearing, which was ignored by the trial court and a writ of restitution was granted. She vacated the property, but continue the appeal relating to the court improper issuance of the writ of restitution.

Possession, based upon the failure to entertain a valid defense, remained to be decided. This is not the situation claimed in this case.

Kiely v. Graves, 173 Wn.2d 926, 935 P.3d 226 (2012) dealt with a claim to adverse possession of a platted alley. The adverse possession claim was made before the alley was vacated. The holding of that case is not applicable, since in this case, the issue is whether Kaylor Road and Branham Road became city street, since the annexation was not the incorporation of a newly created city. RCW 35.02.180. In addition, the annexation of the property did not include a specific designation of Kaylor Road, Branham Road, or the driveway into Mr. Whitmore's property. RCW 58.08.050.

V.

Did the trial court properly award damages under the lease in effect at the time Mr. Larsen purchased the building?

Mr. Larsen became either bound by the terms of the Chambers lease or he became a holdover tenant on the property leased from Mr. Whitmore. The lease had not been terminated pursuant to the terms of the lease. Mr. Larsen recognized the lease by taking over the property in November 2014. *Marsh-McLennan Bldg., Inc. v Clapp*, 96 Wn .App. 636, 980 P.2d 311 (1999), clearly establishes that either as a holdover tenant, the tenant is bound by the terms and conditions of the expired lease.

Supra. 644-648.

Should this be considered an implied lease, based upon the giving of the 3 day notice in June, 2015, then the rent would be the fair market value of the rent. Testimony showed that similar property was leased for \$1,500.00 that also had improvements and the rent for the 10 feet and access of \$1,080.50. Of further significance is not only the 10 feet of the building was involved in the lease, but also approximately 32 feet of access from Stadium Way past the buildings. See Exhibits 13 and 14, that provide:

“Lessor also hereby leases to Lessee all easements, parking and loading rights, right of ingress and egress, fixtures and appurtenance now or thereafter belonging or appertaining to said premises.” EX 13

“MAINTENANCE, REPAIRS:

Lessee acknowledges that the premises are in satisfactory order and repair. Lessee shall at his own expense and at all times thereafter, maintain the premises in good and safe condition, including the parking lot and landscaping on the premises, and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted. Lessee shall be responsible for all repairs and maintenance required of the common driveway, excepting damages caused by Lessors use of the same....

Lessee shall at lease [sic] annually grade and gravel the common driveway from the end of the asphalt to the existing gate at the north termination of the common driveway.”

EX 14

Clearly, this lease included more than the mere 10 feet of Mr. Larsen’s building.

The approximately \$1,900.00 per year charged by the railroad was merely for ground rent over approximately 25 feet of land. The right of

way for the railroad being 50 feet; 10 feet was removed; 15 feet continued as an easement, leaving only 25 feet. As this pertains to Mr. Larsen, a majority of his building sits on the 25 feet. The court found that reasonable rent and fair market rent of \$1,080.50 until February 1, 2015, based upon the historical rent the rent of adjoining commercial space to be fair. Further, that fair rent, based on the cost of living, of \$1,122.50 thereafter was reasonable. The value of the rent was based not only on the 10 feet of the building, but also the access afforded by the driveway. Furthermore, the historical rents since 1989 was evidence of the fair rental value of the property.

VI.

Was the trial court correct in doubling rent and awarding fees pursuant to the lease in effect at the time Mr. Larsen purchased the property.

RCW 59.12.170, as it pertains to this matter provides:

“.... The jury, or the court, if the proceedings be tied without a jury, shall also assess the damages occasioned to the plaintiff by any...unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgement shall be rendered against the defendant guilty of the... unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due.” (Emphasis added)

In *Sprincin King Street Partners v. Sound Conditioning Club, Inc.* , 84 Wn.App. 56, 925 P.2d 217 (1996) it was held that it is not necessary to plead the request for double damages for them to be awarded. The defendant claimed that the failure of the summons to demand double damages precluded a double damage recovery. The court held:

“ Yet a summons confers jurisdiction upon the court when it gives notice according to the statutory requirements, with such particularity and certainty as not to deceive or mislead.”

....

Here, the statute requires the summons to include the parties, the nature of the action (in concise terms), the relief sought, the return day, and that the relief sought will be taken against the defendant for failure to appear. Thus, despite the omission of a claim for double damages (which Sprincin did include in its complaint), the summons substantially complied with the unlawful detainer summons statute.” *supra.* at 62

“... The court enters judgment “for twice them amount of damages thus assessed and of the rent, if any, found due.” Speaking grammatically, only one interpretation is possible: “of the rent” is a prepositional phrase which can only be attached to the noun “amount.” This literal reading requires the court to double both the “damages and the amount of past due rent.
supra. 63-64.

The trial court acquired subject matter jurisdiction by the use of the unlawful detainer summons form. RCW 59.12.080. RCW 59.12.170 mandates that once the rent for the unlawful detainer is found, it must be doubled.

Should the fee award be vacated? Again, the issue is whether the Chambers lease should be construed as applying to either the holdover tenancy of Mr. Larsen or the actual lease terms that remained in effect. *Marsh-McLennan Bldg., Inc. v. Clapp, supra.* answers this in the affirmative. Mr. Larsen was bound both by the terms of the lease he assumed in November, 2014 and that he failed to terminate or because as a holdover tenant, the terms of the lease that he held over on provided for the recovery of fees.

Miscellaneous argument.

At various portions of Mr. Larsen's argument, claim is made that Mr. Whitmore failed to amend his claim for unlawful detainer to address other arguments. In the summation for Mr. Whitmore's case it was specifically moved to amend the complaint to conform to the proof presented. RCW 59.12.150. These claims are without merit.

Attorney fees on appeal

Pursuant to RAP 18.1, Respondent request that they be awarded their costs and attorney fees in this matter. The American rule, as adopted in Washington, fees and expense are not recoverable absent specific statutory authority, contractual provisions or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 908 P.2d 884(1996). The Chambers lease provides for the recovery of costs and fees (EX 14 page 8). Respondents respectfully request the recovery of their attorney fees and costs in this matter.

CONCLUSION

Mr. Whitmore correctly commenced this action as an unlawful detainer case pursuant to RCW 59.12.030(3). Mr. Larsen was bound by the terms of the Chambers lease that he assumed by taking possession of the building in November, 2104 while the unexpired lease was in effect. The lease provided for an automatic extension unless either party gave written notice to the other of termination or revision of the lease terms, on or before January 1, 2015. No written notice was given. Mr. Chambers advised Mr. Whitmore that he intended to retire at the end of 2014, but this did not serve as notice to Mr. Whitmore of an intent to terminate the lease.

Various attempts to question Mr. Whitmore's title to the property were alleged by Mr. Larsen. However, these attempts are not appropriate in an unlawful detainer case. *Decker, supra.*

Counsel suggest that in an unlawful detainer case, the court can create an equitable resolution of the matter. It is contended, as shown above, that the writ of restitution, not requiring the removal of the 10 feet of encroaching building, but merely fencing and sealing off the east side of the building, was an equitable solution.

Clearly, Mr. Larsen was bound by the terms of the lease and the provisions for attorney fees, doubling of rent were appropriate. The trial courts decision should be affirmed.

Respectfully submitted this
23rd day of December 2019

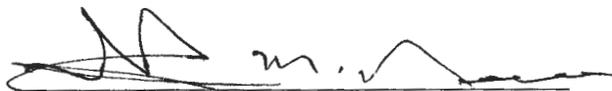
AITKEN, SCHAUBLE, PATRICK,
NEILL & SCHAUBLE



Howard M. Neill WSBA No. 05296
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on this 23rd day of December 2019, I caused a full, true and correct copy of this RESPONDENT'S BRIEF to be mailed to attorney for Appellants, Aaron Orheim, Talmadge/Fitzpatrick, 2775 Harbor Avenue SW, Third Floor, Suite C, Seattle, WA 98126, by first class United States Mail, with postage fully prepaid thereon.



Howard M. Neill